



**National Writers Union
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**National Writers Union Statement re:
"Remedies for Small Copyright Claims"**

**Testimony of Susan E. Davis (Co-Chair, NWU Book Division)
before the U.S. Copyright Office, Library of Congress**

New York, November 16, 2012

Panel VII: "Moving Forward"

On behalf of the National Writers Union (UAW Local 1981, AFL-CIO), I, as co-chair of the NWU Book Division since 2005 and as NWU National Contract Advisor since 2007, can provide empirical data about the experiences of our members that substantiate why writers need a copyright small claims court.

At present there is no affordable, effective, legal recourse for writers who have had their copyrights infringed. Regardless of how blatant the infringement, none but the most successful of writers has the financial resources to sue for the statutory and economic damages that current U.S. copyright law provides. Even the cost of filing for arbitration is prohibitive for most writers. That is why the National Writers Union, which includes writers in all genres and media at all levels of commercial success, supports the Copyright Office's efforts to protect writers' primary source of income and reputation. We believe it is imperative that every aspect of a copyright small claims system – including registration criteria, filing costs, length of time from filing to hearing a case, and both actual and statutory damages -- reflect and respect writers' substantive, procedural, economic, and moral rights.

The National Writers Union has extensive, practical experience with the ways that writers' copyrights are infringed and the ways that current legal procedures fail to protect writers' rights. Since its founding in 1981, the union has been active in litigation on behalf of infringed writers (including the 2001 Supreme Court decision *Tasini v. The New York Times*, brought on behalf of the then-President of the NWU as lead plaintiff); in advocacy with Congress and the Copyright Office; and in nonlegal representation and assistance to NWU members through the NWU Grievance & Contract Division.

Since 1991, the NWU Grievance & Contract Division has obtained nearly \$1.5 million in remuneration for aggrieved NWU members. Almost all of these grievances involved relatively small claims for writers who had few legal resources, which meant they could not look to existing federal court procedures to provide effective redress. As we have several times in the past, we are currently pursuing group grievances on behalf of two groups of members. These writers are owed tens of thousands of dollars by publishers who have infringed their copyrights by publishing work without complying with payment and other conditions of their contracts.

We conducted a survey earlier this year of our members' experiences with distribution of their work in e-book form. Results from this survey reveal that:

1. Seven percent of respondents did not know who authorized publication of their e-book.
2. Nine percent were never informed by the publisher of the existence of an e-book but found out on their own.
3. Eight percent have never been paid royalties for their e-books or e-book royalties were not clearly delineated on their royalty statement.
4. Fourteen percent cannot tell from their royalty statements if they are being paid correctly for their e-books.
5. Nine percent believe they are not being paid what they are owed for their e-books.
6. Less than half (48.5 percent) of respondents believe they are truly being paid what they are owed in e-book royalties by their publishers.

To summarize:

1. Some publishers are infringing writers' copyrights by issuing e-books without writers' knowledge or permission, even when electronic rights have been explicitly withheld. There is no cost-effective method for writers to address this infringement in the current court system.
2. Some publishers' royalty statements do not delineate e-book royalties, so writers do not have a true picture of their earnings. While most contracts allow audits of publishers' books, that is a costly and time-consuming procedure.

We must conclude that writers need a legal means to make publishers accountable, with respect to copyright infringement. The most common type of infringement claim by a writer is against a publisher/infringer and involves copyright based on contract issues. To be clear, the contract must be used in defense of the copyright claim. To be useful to writers in the real world, a copyright small claims court must be able to deal with this in a single proceeding in a single court.

Two specific cases provide excellent examples of why writers need a copyright small claims court. The first involves infringement by a writer's publisher. The writer filed her statement with the Copyright Office on Jan. 27, 2012: it's item #54, Miryam Ehrlich Williamson. Her publisher issued an e-book without her knowledge or permission in direct violation of her contract; she had reserved the right to publish an e-book for herself. When she discovered the e-book's existence -- and the publisher's infringement -- about a year after the e-book was published, she notified the publisher of the error. The publisher then offered her a 25 percent royalty for the e-book, but she requested 50 percent, since the contract for a subsequent book for which she had granted electronic rights stipulated a 50 percent royalty. Shortly thereafter she received a royalty statement, the first that reported sales of e-books. Amazingly two years after the print book went out of print, the returns on the print book were big enough to wipe out most of the e-book royalties. The writer requested a statement with the two formats separated, but the publisher refused. The writer is in the process of negotiating a settlement with the aid of a pro bono lawyer provided by the Volunteer Lawyers for the Arts.

The second case involves piracy by a third party. The member discovered his short stories had been pirated, relabeled with the pirate's name, and sold repeatedly in a variety of books as well as given away free via the internet. But our member was not alone. In the course of researching the pirate, our member found that the work of more than 20 other writers and artists had been similarly infringed. Given that

the pirate refused to pay damages for the infringements and the member could not afford to mount a federal class-action case, though that was called for, he enlisted the aid of the Attorney General of the state of Indiana where the pirate resided and filed a suit of consumer fraud. This case has not yet been resolved, and the member has not been able to sue for damages.

All these examples show conclusively that writers' real-world experience of copyright infringement and of attempting to obtain redress for violations of our copyrights, which often involve contract violations, must be addressed. At present, existing copyright law provides no substantive, effective protection for the vast majority of writers. The time for a copyright small claims court that will serve writers' interests is long overdue.

(The NWU's previous written submission in response to the Copyright Office notice of inquiry, addressing issues including remedies, is at <http://www.nwubook.org/NWU-copyright-small-claims.pdf>.)