

By its “Third Request for Comments, Remedies for Small Copyright Claims,” FR Doc. 2013–04466, published at 78 *Federal Register* 13094-13097 (February 26, 2013), the Copyright Office has solicited further comments regarding, *inter alia*, the availability of awards of attorneys' fees and the international treaty implications of potential new remedies for “small” copyright infringement claims.

Having raised these issues in our response to the first Copyright Office request for comments on this issue¹ and in our testimony at the Copyright Office public hearings on this issue in November 2012², the National Writers Union (UAW Local 1981, AFL-CIO) welcomes the interest of the Copyright Office in these aspects of the issue and the opportunity to submit further comments.

In item 6 of its “Third Request for Comments,” the Copyright Office invites further submissions regarding the role of attorneys and the availability of awards of attorneys' fees in small copyright infringement cases.

The NWU believes that, if attorneys are permitted to participate in any procedures for adjudication of small copyright claims (including appeals or removal proceedings to Article 3 courts), awards of attorneys' fees should be available regardless of copyright registration or other formalities.

It's crucial to recognize, in this regard, that lack of, or deficiency in, satisfaction of copyright registration formalities in the U.S. is typically not the result of a lack of concern by writers for the protection of our rights, or of reasonable diligence in attempting to protect our rights.

For writers of works first published abroad – including NWU members in countries around the world – lack of registration of copyright in the U.S. is typically the result of justified reliance on the entitlement, pursuant to the Berne Convention, to protection of copyright without any formalities. The formalities required by the U.S. as a precondition for statutory damages and recovery of attorneys' fees are precisely the sorts of formalities the Berne Convention was intended to prohibit.

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- 1 Comments of the National Writers Union, “Remedies for Small Copyright Claims” (January 16, 2012), available at <http://www.copyright.gov/docs/smallclaims/comments/37_nwu_org.pdf> and <<http://nwubook.org/NWU-copyright-small-claims.pdf>>.
 - 2 Transcribed at <<http://www.copyright.gov/docs/smallclaims/transcripts/>>.

For all writers, failure to satisfy U.S. copyright registration formalities is often a consequence of the fact that, as the NWU has pointed out in our previous comments and testimony in this proceeding, and in other ongoing proceedings before the Copyright Office:³

1. Fees for registration of copyright in some types of works, such as content elements of granular, dynamic, and frequently updated Web content, are prohibitively expensive, and the submission of applications for registration of these types of works is prohibitively time consuming.
2. Uncertainties and ambiguities in the registration rules (such as those concerning the “publication” status of works made available on the World Wide Web, and the categorization of other digitally distributed works for copyright registration purposes) are such that no writer or other claimant can have any certainty that an attempted copyright registration will be upheld if challenged.
3. The lack of any means of effective redress for copyright infringement genuinely accessible and affordable to most individual writers makes the investment of time and money in the attempt to satisfy copyright registration formalities an economically unjustifiable investment of writers' time and money, and a diversion from revenue-generating creative work.

As a result of these factors, which are central to the reasons that the Copyright Office has embarked on this inquiry, most revenue-generating writing (including virtually all work available only online) is not registered with the Copyright Office as a result of rational business decisions by writers.

It would be grossly unfair to create a new channel for redress of small copyright infringement claims, but to make its benefits (such as awards of attorneys' fees and/or statutory damages) unavailable to those who did not attempt to register their copyrights precisely because they previously had no means of potential redress that would give them any rational reason to have spent time or money trying to do so.

3 Comments of the National Writers Union, “Orphan Works and Mass Digitization” (February 4, 2013), available at <http://www.copyright.gov/orphan/comments/noi_10222012/National-Writers-Union.pdf> and <<http://nwubook.org/NWU-orphan-works-4FEB2013.pdf>>.

In item 16 of its “Third Request for Comments,” the Copyright Office also invites further submissions regarding “the international implications of a small claims system, including how the voluntary or mandatory nature of such a system might affect the analysis.”

As the NWU noted in our initial written comments and during the public hearings, the U.S. has an obligation to provide authors of works first published in other parties to the Berne Convention with the same rights as are enjoyed by authors of works first published in the U.S., without any formalities. This applies not only to the “enjoyment” of these rights but also to the “exercise” of these rights, and the most important aspect of the exercise of these rights is the ability to enforce them against infringers.

In addition, Article 14 of the WIPO Copyright Treaty provides that, “Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.”

The specific reference to “remedies to prevent infringement” means that any copyright small claims system that does not provide for injunctive relief without formalities for authors of works first published abroad will not fulfill U.S. obligations pursuant to the WIPO Copyright Treaty.

Currently, most authors of works first published in other parties to these treaties, and who have not successfully complied with U.S. copyright registration formalities, cannot afford the tens of hundreds of thousands of dollars required to bring a copyright infringement case in Federal court, and are ineligible for any award of statutory damages or attorneys' fees. As a result, they lack the effective means of redress which the U.S. committed itself to enact by signing and ratifying the WIPO Copyright Treaty.

Legislation to create – for the first time – a genuinely effective means for enforcement of copyrights available to individual authors should therefore be seen as a U.S. treaty obligation.

A copyright small claims system which is voluntary on the part of defendants accused of copyright infringement would not provide the required assurance of an effective means of redress.

Accordingly, to bring the U.S. into compliance with the Berne Convention and the WIPO Copyright Treaty, and to fulfill U.S. commitments pursuant to those treaties, the U.S. should extend availability of injunctive relief to terminate infringing conduct and eligibility for awards of statutory damages and attorneys' fees to all works, without regard for copyright registration or other formalities, under both existing Article 3 court procedures and any new procedures for small copyright claims.

In order to avoid unfairly disadvantaging authors of works first published in the U.S., relative to authors of works first published abroad, and to avoid a disincentive for first publication in the U.S., the elimination of registration or any other formalities as a prerequisite to any remedies or redress for infringement should be extended to all works, regardless of the place of first publication.

Respectfully submitted,

_____/s/_____

Larry Goldbetter, President

Susan E. Davis, National Contract Advisor

and Co-Chair, Book Division

Edward Hasbrouck, Co-Chair, Book Division

National Writers Union

(UAW Local 1981, AFL-CIO)

256 West 38th Street, Suite 703

New York, NY 10018

212-254-0279

<<http://www.nwu.org>>