

1. About the commenters and our interest in this proceeding

National organizations of writers in a variety of genres, media, and formats – the National Writers Union, American Society of Journalists and Authors, Science Fiction and Fantasy Writers of America, Inc., and Horror Writers Association – submit these comments and this Petition for Rulemaking in response to the Notice of Proposed Rulemaking (NPRM) by the U.S. Copyright Office, “Group Registration of Contributions to Periodicals,” FR Doc. 2016-28700, Copyright Office Docket Number 2016-8, 81 *Federal Register* 86634-86643 (December 1, 2016). By notice at FR Doc. 2016-30017, 81 *Federal Register* 90753 (December 15, 2016), the Copyright Office extended the deadline for responsive comments until January 30, 2017.

The National Writers Union (NWU) is a national labor union that advocates for freelance and contract writers. The NWU includes local chapters as well as at-large members nationwide and abroad. The NWU works to advance the economic conditions of writers in all genres, media, and formats. NWU membership includes, among others, fiction and nonfiction book authors, journalists, business and technical writers, Web site and e-mail newsletter content providers, bloggers, poets, novelists, playwrights, editors, and academic writers. The NWU is a national amalgamated union (Local 1981) of the United Auto Workers, AFL-CIO, and is one of the U.S. affiliates of the International Authors Forum (IAF), the International Federation of Journalists (IFJ), and the International Federation of Reproduction Rights Organizations (IFRRO).

Founded in 1948 as the "Society of Magazine Writers," today's American Society of Journalists and Authors (ASJA) is the nation's professional organization of independent nonfiction writers: "freelancers." Membership standards are rigorous. To qualify, a writer must

have written two books, six full-length articles in a publication with audited national circulation, or an equivalent combination. Members earn their livings from magazine articles, online content, trade books, research papers and many other forms of non-fiction writing.

The Science Fiction and Fantasy Writers of America, Inc. (SFWA) is a membership organization of over 1,800 commercially published writers of science fiction, fantasy, and related works. Its membership includes writers of both stand-alone works and short fiction published in periodicals, anthologies, and other collations. Of particular note, SFWA's membership includes a significant number of authors' estates, and SFWA has a long-standing record of advocating for the interests of authors' estates against those who would infringe on those estates' rights for their own profit. SFWA is not a subsidiary of any other entity, and is entirely owned by its membership. SFWA has no subsidiaries or other ownership interest in any other organization that may be affected by this rulemaking.

The Horror Writers Association (HWA) is a nonprofit organization of writers and publishing professionals around the world, dedicated to promoting dark literature and the interests of those who write it.

2. Introduction and overview

Through this and two other concurrent proceedings, the Copyright Office is proposing to modify its regulations for group registration of multiple works with a single application.

We welcome the Copyright Office's renewed interest in group registration and its stated intent to simplify and reduce the burdens of the registration and deposit requirements.

Unfortunately, the proposed rules would increase the burden on those writers whose work qualifies for group registration by eliminating the option to submit applications and accompanying deposit copies in hardcopy form. Meanwhile, the proposed rules would not address the more urgent need of writers of granular or frequently updated works distributed electronically, including virtually all Web and social media content, for whom registration of contributions one day at a time is prohibitively costly and time-consuming, rendering registration effectively unavailable and denying these writers any effective redress for infringement. Nor would they address the burden imposed on writers of short-form works that must each be registered individually because they were not first published as contributions to periodicals.

Accordingly, we urge the Copyright Office to retain the current option for submission of applications for registration and accompanying deposit copies of contributions to periodicals in hardcopy form, or to eliminate the deposit requirement for group registration of these works.

And we petition the Copyright Office for rulemaking to establish similar mechanisms for group registration of (a) multiple works first distributed electronically on multiple dates, regardless of whether they constitute contributions to periodicals or a database and regardless of whether they might be deemed to have been, at the time of registration, published or unpublished, and (b) multiple works that would otherwise be eligible for group registration except that they were not first published as contributions to periodicals.

For the record, we reiterate our longstanding belief that requirements for registration, timely registration, and/or deposit of copies as a prerequisite to remedies for infringement, including civil litigation or award of attorney's fees or statutory damages, constitute formalities

prohibited by the Berne Convention. These requirements also deny the "effective remedy" for infringement which the U.S. is obligated to provide, pursuant to the WIPO Copyright Treaty.¹

We encourage the Copyright Office to consider and make recommendations to Congress for the necessary changes to the Copyright Act, including the repeal of 17 U.S. Code § 411 and § 412, to bring the U.S. into compliance with its obligations under these treaties.

In the meantime, however, and even if the Copyright Office declines to make such recommendations to Congress or Congress declines to act, these treaties are binding on the Copyright Office as on all other agencies and branches of the U.S. government. Accordingly, we remind the Copyright Office of its obligation, pursuant to U.S. treaty obligations, to consider whether current or proposed regulations create such burdensome requirements as to rise to the level of "formalities" or deny any "effective remedy" for infringement. And in doing so, we note that the Berne Convention prohibits *all* formalities, with no "de minimis" exception.

On that basis, and for the reasons discussed in more detail below, we oppose the proposed elimination of the current option to submit applications for group registration, and any required copies of works to be registered, in either hardcopy or electronic form.

3. The proposed requirement to created new PDF files of scanned images of pages of hardcopy periodicals in which works were published is unduly burdensome.

As the NPRM correctly notes, only a small minority of works currently distributed electronically satisfy the current statutory and regulatory definition of "periodicals."

¹ See comments of the NWU and ASJA, "Removal of Personally Identifiable Information from Registration Records; Notice of Proposed Rulemaking, Copyright Office Docket No. 2016-7", October 17, 2016, available at <<https://nwu.org/wp-content/uploads/2016/10/NWU-ASJA-PII-registration-17OCT2016.pdf>>.

The NPRM refers to "electronically printed" or "ePrint" publications as potentially satisfying the current definition of "periodicals." But the only context in which we have seen the term "ePrint" is as the proprietary name used by a single computer printer brand for a specific (and little-used) software and hardware technology bundle for remote printing. It's not clear whether this is the meaning intended by the use of "ePrint" in the NPRM, or if not, what meaning is intended. Neither "electronically printed" nor "ePrint" are terms commonly used by writers or publishers, and neither has a commonly agreed to or industry-standard meaning. Neither term is sufficiently clear and unambiguous for use in this rulemaking.

The NPRM refers to the submission of contributions "in the precise form in which they were first published." But the effect of the proposed rule, which would require all applications and deposit copies to be submitted electronically, would be just the reverse. The proposed rule would *forbid* the submission of contributions to printed periodicals in the precise (hardcopy) form in which they were first published.

Most writers today create their works and submit them for publication electronically. Even handwritten manuscripts or drafts are typically typed electronically for submission to periodicals. Writers typically create and submit their works to periodicals in word processor, text, or HTML file formats, not as the PDF files or page images required by the proposed rules.

Instead of submission of copies in either the electronic form in which works are created or the hardcopy form in which they are published, the proposed rule would require writers to create and submit a new version of each work in a third, completely different, form: a PDF file containing a digital image of the page of the periodical on or in which each work appears.

Converting published editions of contributions to hardcopy periodicals to this new format for deposit and registration would require both hardware and software that many writers neither own nor know how to use: PDF creation software and a flatbed scanner with a platen large enough to scan entire pages of a magazine or newspaper. Each can cost several hundred dollars, with scanner costs typically many times higher for larger than letter sized pages. Outside of major metropolitan areas, finding a service bureau with a scanner for hire large enough to create images of entire newspaper pages can require substantial travel and expense.

According to the NPRM, "A substantial majority of the U.S. population has access to the internet, and therefore, the Office expects that most authors will be able to use the electronic system." The relevant metric, however, is the prevalence of large-format scanner and PDF creation software ownership and knowledge of use, or easy and cheap access, which are low.

It's unclear how much time the Copyright Office thinks it would take to create the new PDF page-scan version of each contribution, since none of the current copyright registration forms has an Office of Management and Budget (OMB) control number or an estimated time required for completion. It appears that none of the copyright registration forms has been submitted for approval in accordance with the Paperwork Reduction Act (PRA)², although when the Copyright Office is performing administrative and regulatory functions such as copyright registration, it clearly acts as an "executive agency" within the meaning of the PRA.³

The estimate of the time required to complete the registration application provided to OMB and posted for comment when approval is requested should include the time required to

² 44 U.S.Code § 3507.

³ Decisions construing the Copyright Office as an "executive agency" when it is carrying out copyright registration and similar administrative and regulatory functions include *Intercollegiate Broadcasting System Inc. v. Copyright Royalty Board and Library of Congress*, 684 F.3d 1332 (D.C. Circuit 2012, cert. denied May 28, 2013); and *Eltra Corp. v. Ringer*, 579 F.2d 294 (4th Circuit 1978).

obtain and learn how to use the necessary hardware and software and perform the scanning and PDF creation, or travel time to the nearest provider of scanning services and waiting while the scanning is done (or a second trip to the service provider to pick up the completed scanning job).

The suggestion in the NPRM that, "Alternatively, the author could hire an attorney to submit the application on her behalf, either by paying for the attorney's services or by obtaining *pro bono* representation" is difficult to accept as having been made sincerely. No significant percentage of working writers would find an attorney able and willing, *pro bono*, to scan all of their contributions to periodicals and submit them to the Copyright Office for registration. Nor could any significant percentage of those writers afford to pay an attorney to provide that service.

Even if registration is not determined to be *per se* a formality prohibited by the Berne Convention – as we think it is – the requirement imposed by the proposed rule for the creation of an entirely new edition in a new format, neither the format of creation nor the format of publication, solely in order to satisfy the registration deposit requirement, is clearly a prohibited formality. This is especially true when the creation of this new format requires expensive software and hardware that is not necessary to the ordinary work of a published writer.

Registration and deposit requirements are burdensome for all writers who want to protect their copyrights. Some would find these requirements less burdensome if done electronically. Others would find them less burdensome in hardcopy format. Closing off either option would render these requirements more burdensome for one or the other class.

The easiest way to avoid creating a new burden of format conversion or new formality for writers, while achieving the goal for the Copyright Office of all-electronic intake of applications for registration, would be to eliminate the deposit requirement for registration.

If the Copyright Office decides, contrary to our recommendation, that the deposit requirement for this category of registration can be retained without violating U.S. treaty obligations, and should on policy grounds be retained, we ask that the option of hardcopy submission of the application for registration and the deposit copies also be retained.

4. Petition for rulemaking to create new categories of group registration

The NPRM correctly notes that "a Web site would not be considered a periodical under the Proposed Rule. Web sites are typically updated on a continual basis rather than an established schedule. The updates are not made in successive issues that can be recognized as discrete, self-contained collective works, and they do not contain numerical or chronological designations that distinguish one update from the next.... [A]n applicant could not register a group of articles that were published solely on a Web site" under either the current or the proposed rules.

As we have noted in other recent submissions to the Copyright Office, registering a Web site with frequent updates is prohibitively costly and time-consuming.⁴ Only large Web publishers can afford the time and fees to submit a separate application for each day's updates or additions of new content. Individual writers, including freelancers who contribute writing to other Web sites and self-publishers of Web sites, blogs, and other Internet publications, cannot.

We do not know how many applications for registration of Web or social media content the Copyright Office receives. We suspect, however, that the number of such applications is tiny, especially as a percentage of the vast number of Web sites, blogs, and accounts on social media

4 Comments of the NWU, WWA, and ASJA, "Mandatory Deposit of Electronic Books and Sound Recordings Available Only Online; Notice of Inquiry, Copyright Office Docket No. 2016-3," August 18, 2016, available at <<https://nwu.org/wp-content/uploads/2016/08/NWU-WWA-ASJA-ebook-deposit-18AUG2016.pdf>>.

platforms that are updated daily. Most written work distributed through these channels is not registered. That is not because writers do not value or want protection for this work. It is not registered because registration one day at a time costs too much and takes too much time.

Registration of copyright in contributions to a Web site, blog, or social media platform updated daily requires completion of a separate application for each day, for a minimum fee of \$35 per application or \$12,775 per year.⁵ Even if it were possible to complete each day's application form and prepare the necessary deposit copies (which in many cases of dynamic and personalized content delivery is impossible, as discussed further below) in 10 minutes, a writer wanting to register copyright in a single Web site, blog, or social media feed would spend more than 60 hours each year on copyright registrations – one and a half weeks of full-time work.

If this isn't the sort of burdensome "formality" that the Berne Convention was intended to prohibit, or a bar to "effective redress" for infringement, we don't know what is.

We cannot overstate the significance of this prohibitively burdensome registration requirement. Today, more copyrighted written work is distributed in electronic format on the World Wide Web than in any other format or through any other distribution channel, mainly on Web sites and through social media apps and platforms. Because registering copyright in these works is prohibitively costly and time-consuming but is a prerequisite for litigation or recovery

⁵ It might be possible to register a *claim* to copyright in a group of works distributed online as “unpublished,” or to submit a *claim* to the contents of the back-end content database for a blog as an unpublished database. But these claims could, and probably would, be challenged in any infringement lawsuit. The Copyright Office expresses no official opinion as to whether any work is “published” or “unpublished,” and even if it did, that opinion would not be binding on the courts if the claim were contested. Whether most works distributed online would be adjudicated to be “published” or “unpublished” is uncertain. As a result, it is impossible to obtain any certainty of protection against infringement. Writers’ rights should not depend on successfully guessing how courts will rule on ambiguities like this. See our previous comments to the Copyright Office, Note 4, *supra*.

of attorneys' fees or statutory damages, writers whose work is distributed through these channels and in these formats are denied any meaningful remedy for infringement of their rights.

This is a flagrant, fundamental, and ongoing violation of writers' rights and of U.S. obligations pursuant to the Berne Convention and the WIPO Copyright Treaty.

Writers of online content are not the only writers for whom the requirement for individual registration of each short-form work, with a separate form and fee, is prohibitively burdensome and denies them access to any effective remedy for infringement.

Many short-form works are published and distributed in formats that do not qualify for group registration of contributions to "periodicals." These include short stories, "flash" fiction, poems, essays, and articles published in anthologies, collections, chapbooks, pamphlets, tracts, irregular series, short-form e-books, research reports, offprints, and other formats.

For many short-form works, the revenue per work is less than the registration fee.

Congress could address this problem through repeal of 17 U.S. Code § 411 and § 412. But treaty obligations should guide the Copyright Office as well as Congress. And the Copyright Office has the rulemaking authority, pursuant to existing statutes, to substantially mitigate the burden on writers and reduce the scope and degree of U.S. derogation from its treaty obligations.

As the NPRM correctly notes, the statutory requirement for the Register of Copyright to create procedures for certain specified categories of works and publication formats is, "Without prejudice to the Register's general authority to create group registration options under section 408(c)(1) of the Copyright Act at the Register's discretion."

We hereby petition the Register of Copyright to exercise her discretion, pursuant to Section 408(c)(1) of the Copyright Act, to initiate a rulemaking to create group registration

procedures for (a) multiple written works first distributed in electronic format on multiple dates, regardless of whether they constitute contributions to "periodicals" or a "database" or might be determined to have been, as of the date of application for registration, "published" or "unpublished," and (b) multiple written works by the same creator first published on multiple dates, regardless of whether they were published as contributions to periodicals.

According to the NPRM:

The [Copyright] Office is aware of the need for establishing new and updated practices for examining and registering complex or emerging areas of authorship. The Register's strategic plan calls for the Office to "[a]ssess special issues relating to registration and deposit protocols for emerging forms of digital dissemination of works across the spectrum of creative industries," and to "[i]dentify and make appropriate changes to Office policy and procedures in response to ... emerging business standards." (Strategic Plan 2016–2020 at 11.) The rule proposed in this notice represents an interim improvement to the current electronic registration system, and is intended to provide a sound foundation for creating other registration options within the next five years.

For writers whose work is distributed online and cannot feasibly be registered, and who consequently lack any effective redress for infringement, five more years is too long to wait.

This is not a new problem, and there is no basis for such prolonged additional delay.

The World Wide Web, browser-based, client-server access to on-demand digital content delivery, and the standards and protocols that support them have existed in essentially their current form for more than twenty years. Contrary to the statement in the NPRM, this mode of distribution of copyrighted text is neither particularly "complex" in structure nor "emerging."

The most common format for Internet distribution of copyrighted text is the Web page. By nature, Web content is necessarily more structured (typically according to HTML standards) than text in analog formats (books, magazines, ephemera, handwritten manuscripts, etc.). The

identifiers assigned to works distributed on the Web (Uniform Resource Locators or URLs), the indexing system that enables any device connected to the Internet to locate the host from which a copy of a specific resource can be requested (the Domain Name System or DNS), and the protocols for requesting and responding to requests for copies (HTTP and TCP/IP) are far simpler and more universally implemented than any comparable schemes for hardcopy works.

All of this should make it much simpler to provide group registration of works distributed in these formats and through these channels than for works in analog formats.

Many of the complications of the current and proposed registration rules and procedures relate to the manner and format for deposit of copies of the works to be registered. But the Register has already exercised her discretion to exempt "Electronic works published in the United States and available only online" from the general deposit requirement.⁶ And the Register has similar authority to exempt these works from any deposit requirement for registration.⁷

With respect to works that have been published, but that do not qualify for group registration as contributions to periodicals, the same procedures could be adopted as are currently in effect for group registration of contributions to periodicals. We have been unable to discover what historical factors led Congress to mandate the creation of a group registration option limited to contributions to periodicals. But whatever those factors may have been, we can see no reason why the Register of Copyright should not now exercise her statutory discretion to create a similar

6 37 C.F.R. §202.19 (c)(5). The Copyright Office has proposed rules that would require the deposit of some such works, but only on a case-by-case basis on demand of the Register of Copyright. The NWU et al. have opposed the proposed rules, and no final rule has been issued. See Comments of the NWU et al. at note 4, *supra*.

7 "The Register of Copyrights is authorized to specify by regulation the administrative classes into which works are to be placed for purposes of deposit and registration, and the nature of the copies ...to be deposited in the various classes specified. The regulations may require or permit, for particular classes, the deposit of identifying material instead of copies... or a single registration for a group of related works." 17 U.S. Code § 408 (c)(1)

group registration procedure for short-form works that are similar in every respect except that their format of first publication does not fit the definition of contributions to “periodicals”.

This may seem too trivial a difference to warrant rulemaking by the Copyright Office. But for a writer trying to earn meaningful income from short-form writing, the difference between a single group registration application and fee every three months, and an individual application and fee for each work, is profound. Consider the difference it would make to a sole proprietor in a retail sales business if, instead of quarterly estimated tax payments and returns, they were required to file an individual tax return form and payment for each sale! That is, in effect, what is required today of short-form writers of works published in non-periodical formats.

In proposing rules in response to this petition for rulemaking, we recommend that the Copyright Office include the following in its consideration, along with any other issues, for each of the two proposed new categories of group registrations:

- (a)** Is the burden in time and/or money of the registration procedures such that registration constitutes a formality prohibited by the Berne Convention?
- (b)** Does the cost, time, or other difficulty of registration preclude, in some or all cases, the "effective redress" required by the WIPO Copyright Treaty?
- (c)** Will the proposed procedures accommodate the registration – without undue burden – of granular, dynamic, and personalized content, particularly if each visitor to a URL or licensee of a work in electronic format receives a unique dynamically assembled or personalized "edition" that constitutes a distinct "work" for copyright purposes?

- (d)** Will the proposed procedures accommodate the registration of works whose status as "published" or "unpublished" cannot be determined with certainty?
- (e)** How easily can the proposed rules, including the deposit requirements if deposit is required, be accommodated by existing content creation, management, and distribution tools? How easy will it be, for example, to implement plugins to Wordpress or to iOS or Android social media client apps to record all data – including any required version data for dynamic and/or personalized content and for deposit, if deposit is required – in the format required for registration?
- (f)** Should deposit be required for registration and, if so, for what purpose, especially in light of the exemption of works distributed online from current deposit requirements?
- (g)** If deposit of copies is required for registration, will this deposit requirement constitute, for some works, a prohibited formality or a bar to effective redress?

With respect to deposit, we believe that "Electronic works ... available only online" have properly and for good cause been exempted from the general deposit requirement, and should similarly be exempted from any requirement to deposit copies in order to register copyright.

We question the claim that it is necessary or desirable to require deposit of copies of works published in hardcopy formats in order to facilitate identification or requests for permission to make additional copies of those works. But whatever the merits of those arguments, they do not apply to works distributed on the Web.

If you want to obtain a work identified by a specific URL, you can send a request for a copy of the resource at that URL in the form of a standardized HTTP "get" request. This file

request and response protocol is supported on all Web browsers, on all operating systems, and on billions of Internet-connected devices worldwide.

The request is automatically routed to the proper server by the Domain Name System, without you having to know where the server is located, or anything about how the DNS works.

Notably, you do not need to identify the author or creator or know who holds any rights to the work. The URL suffices, and a response to your request – and a copy of the file, if your request for a copy is granted – can be returned anonymously. If your request for a copy is granted, you receive that copy immediately and without further action. There's no need for a two-step process to first obtain permission and then obtain or create the permitted copy.

The server can be programmed to decide automatically whether or not to grant your request on the basis of your IP address or attributes associated with it (whether your request comes from an IP block associated with a specific country or geographic region, for example, or with the domain of the holder of a site license to the content you have requested) or on the basis of the presence, absence, or contents of a browser "cookie" sent with the request.

If the resource has moved or changed or the rightsholder does not wish to distribute more copies or doesn't want to grant your specific request for a copy, the server can be programmed to return either a reply denying your request, or a standardized HTTP "redirect" message referring you automatically either to a different version, a different work, or a different server altogether.

The copy you receive can generate revenue for the publisher (who may or may not be a self-publisher, without the recipient of the copy needing to know) through the inclusion of dynamically embedded advertisements, and the revenue can be optimized based on personalization of the ads in your copy based on your IP address, browser cookies, etc. That

monetization can preserve the anonymity of the creator and publisher, as can payments for licenses or digital copies through Paypal to an account linked to an anonymous email address.

All of this happens in anywhere from a fraction of a second to at most a few seconds.

It's difficult to imagine that some new system for identifying written works, routing requests for copies to writers or other holders of digital copying rights, and returning responses to requesters (and, if the requests are granted, copies of the requested works) based on Copyright Office registration and deposit records would be as fast, cheap, efficient, and reliable.

The Internet isn't broken, at least not in this respect. The Copyright Office doesn't need to re-invent the World Wide Web, the DNS, or the HTTP and TCP/IP protocols, and shouldn't try. Neither registration nor deposit of copies with the Copyright Office is likely to improve, in any material respect, the ease of requesting and obtaining copies of written works available online.

The undersigned organizations of writers – National Writers Union, American Society of Journalists and Authors, Science Fiction and Fantasy Writers of America, Inc., and Horror Writers Association – look forward to participating in a rulemaking to make it feasible, for the first time in more than twenty years of Internet content distribution, Web publishing, blogging, and social media, to obtain meaningful protection against copyright infringement for works in these formats that are now well-established but still prohibitively expensive and time consuming to register and thus effectively denied copyright protection.

Respectfully submitted,

/s/

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