

"Preservation and Reuse of Copyrighted Works"

Written Testimony of Edward Hasbrouck
for the National Writers Union (UAW Local 1981, AFL-CIO)

Before the

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Committee on the Judiciary
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Chairman Goodlatte, Ranking Member Conyers, Chairman Coble, Ranking Member Nadler, and members of the Subcommittee, we appreciate the opportunity to submit testimony in reference to your hearing on "Preservation and Reuse of Copyrighted Works."

As the only national labor union of working writers in all genres, media, and formats -- fiction and nonfiction book authors, journalists, business and technical writers, website and e-mail content providers, bloggers, poets, playwrights, editors, academic writers, and others, at all levels of commercial success -- the National Writers Union (UAW Local 1981, AFL-CIO) welcomes the opportunity to provide this written testimony for the record of the Subcommittee's hearing regarding "Preservation and Reuse of Copyrighted Works."

The preservation and reuse by writers of our own previous works have long been central to our creative process and to our ability to earn a living from our personal repertoires of past work.

The most basic business lesson passed on from each generation of freelance writers to the next is of the importance of being able to reuse our own work in new markets and media to generate additional revenues that sometimes exceed those for the first use of the work; to build on our own past work to create our own new works; and to preserve both our work and our rights to it so we are able to engage in and earn a living from those new uses.

Phrases, lines, sentences, paragraphs, and pages of text used in blog posts and magazine articles are the building blocks for our subsequent books – and vice versa. Stories and articles are rewritten with new titles, tag lines, and "hooks" for new audiences and markets. All this is standard business practice.

As the entrepreneurial small business sector of the creative industries, individual writers – not larger, less agile, legacy publishers – have been the leaders in creating and pursuing new business models for distributing and earning a living from our work in the digital age. We aren't called "creators" for nothing, and our creativity extends to new ways to reuse our work, new ways to preserve it, and new ways to make it available, as well as to the creation of new written works on paper or on screen.

Those new models are increasingly disintermediated, decentralized, and digital, facilitated by the vastly increased ease of self-publishing and direct, peer-to-peer, writer-to-reader distribution.

Neither past print publishers, nor libraries that rely on publishers for information, typically know whether or how works included in "out of print" books or magazines have been reused, reissued, or made available by their creators in some new format or media, such as a new self-published or author-licensed print-on-demand edition (with a different ISBN), a self-published e-book, a PDF file of an individual story, article, or poem (first published in some book or journal) downloadable from the author's website, or a revised, updated, and perhaps reorganized and retitled version of some or all the same content now incorporated into one or more websites that generate advertising revenue.

If a work that is shown in a library catalog or bibliographic database as "out of print" in some past edition has been preserved and is now being reused and made available, that is most often because the author herself held onto a copy of the work, held onto or was able to reclaim her rights to reuse it, and has fact found a business model (more and more often some form of digital self-publication) which promised a reasonable return on the investment she has made in her time to make the work available, perhaps updated or improved or in a more usable format than the original.

For writers struggling to earn a living from writing, every marginal dollar, every potential revenue stream, and every piece of our work is essential. We can't afford to "abandon" any of our work.

It is publishers, not writers, who are much more likely to "abandon" works they have previously published. Typical author-publisher contracts have allocated 85-95% of revenues from sales of printed books to the publisher (under the "royalty" clause), but anywhere from 50% (under a subsidiary rights licensing clause, if it includes digital rights) to 100% (in the absence of any assignment of digital rights) of revenues for new digital editions to authors. This gives print publishers a compelling incentive to prioritize marketing of their "frontlist" of new books, while giving authors an equally great incentive to prioritize making their personal "backlists" of works available in new digital forms.

Observers unfamiliar with the book business might assume that the "long tail" of works included in old periodicals and in books shown as "out of print" in bibliographic databases makes a negligible contribution, if any, to authors' income. This is mistaken, to a rapidly growing degree. Many authors are finding that because of their larger share of revenues from new digital editions and the higher unit sales resulting from lower prices, they can earn more from new digital editions of their personal backlists than from the small royalty percentage a publisher pays them for frontlist books.

As a result, far more of the works included in "out-of-print" books and periodicals in library collections are available today in digital format because writers ourselves have made them available online or through licensed new digital editions than because libraries have digitized them or the original print publishers have actually held and legitimately exercised rights to have them digitized.

In this context, the role of Congress in preservation and reuse of copyrighted written works should be seen as the task of supporting writers – the people who are actually doing most of this preservation and reuse today – and enabling us to earn a living from this work.

The single greatest limitation on writers' ability to reuse and make available our past work is our inability to reclaim our rights to that work from past publishers who have disappeared due to corporate mergers and acquisitions or have gone out of business entirely. More and more of our own work is being placed beyond our own ability to make it available to would-be readers by publishers' insistence on contracts that assign rights beyond those publishers ever intend to exercise, and by the increasingly short typical lifespan and failure-prone nature of Internet and digital publishers.

One of the factors that must be considered in evaluating "fair use" under Section 107 of the Copyright Act is "the effect of the use upon the potential market for or value of the copyrighted work." The Berne Convention permits exceptions to copyright only if they do not "conflict with a normal exploitation of the work." Understanding of the new markets for copyrighted work in the digital age, and the "new normal" of business models, including those digital self-publishing and Web content, is thus an essential precondition to policy making on these issues. But little attention has been paid to this element of fair use analysis. Most discussion of writers' business models has relied on information from publishers (who are often unaware of how writers are exploiting our copyrights), or on other third-party speculation about us, for its conclusions about how we earn our livelihoods. We strongly encourage Congress and the Copyright Office to conduct more basic research about new markets and norms of exploitation in direct consultation with writers and other creators as the basis for any new policies.

An author who cannot be located may be profitably exploiting her rights in ways that are intended to ensure that she cannot be found. Writers on stigmatized or controversial subjects, whistleblowers, muckrakers, writers who fear retaliation for their writing, or writers who want to preserve their own or others' privacy – for example, a professional "mommy blogger" who wants to tell family stories without naming herself, or a writer on workplace issues who doesn't want to name her employer – may be earning their living from advertising on anonymous, untraceable websites. These writer/rights holder/self-publishers cannot be found by even the most diligent search, but what's important is that new digital business models have created markets that enable them to earn a living from their work.

As we have explained in detail in our comments to the Copyright Office, "orphan works" legislation would inevitably interfere with these normal forms of exploitation of rights by authors.¹

Rights held by a publisher that has gone out of business, on the other hand, are the typical case of genuinely "orphaned" rights that by definition cannot legally and commercially be exploited.

Section 203 of the Copyright Act has too many limitations and procedural obstacles to be useful to most writers, including a requirement for actual notice to the rights holder that can never be fulfilled if the rights holder has gone out of business without a successor-in-interest. As a result, Section 203 cannot be used by a creator to reclaim her rights, as a prerequisite to making the work available to new readers, in the case in which it is most needed: an "orphan publisher" that has gone out of business.

¹ NWU comments to the Copyright Office on "orphan works" (February 4, 2013), available at <<http://www.nwubook.org/NWU-orphan-works-4FEB2013.pdf>>, and NWU reply comments on "orphan works" (March 6, 2013), available at <<http://www.nwubook.org/NWU-orphan-reply-comments-6MAR2013.pdf>>.

It is hard to believe that Congress intended Section 203 to enable a creator to reclaim her rights from a recalcitrant and uncooperative publisher, but not from an out-of-business former publisher.

Reform of Section 203, as we have argued to the Copyright Office in our comments on "orphan works," could simultaneously solve the largest and easiest portion of the "orphan works" problem (the orphan or "zombie" publisher problem), while enabling creators to further pursue the new and publicly beneficial digital distribution business models in which we have already been the pioneers.

Reversion of rights to a work's creator(s) should be automatic after a number of years (no more than 20) without requiring notice, registration, or other formalities. Reversion of rights held by a corporation, partnership, or other entity other than a natural person should be automatic and immediate on the dissolution of the corporation, partnership, or entity, unless notice of a successor-in-interest is recorded with the Copyright Office before the entity is dissolved.

Many of writers' efforts to preserve, reuse, and make available our work in new formats, particularly in digital form, have gone on below the radar of librarians and bibliographers who remain focused on centralized, intermediated, legacy print publication business models and data sources.

Library catalogs, including that of the Library of Congress, and the work of the Copyright Office, reflect little of what writers have done to make our work available, including the massive (but decentralized) scale on which individual authors have already digitized portions of our work.

Authors' own efforts at digitization, self-publication, and distribution should not be omitted from discussions of models and possibilities for mass digitization. As we have already noted, if a digital edition of a work included in an "out-of-print" book or periodical in a typical library collection exists, it is most likely one created and distributed or licensed by the author herself.

Unfortunately, that available digital edition – perhaps one with new and updated content in a format that the author believes will be more useful to readers than the original edition – is unlikely to be listed in any library catalog or acquisitions database, and even less likely to be linked to records for the original edition in which the work was included. Librarians and bibliographers are continuing to rely on former print publishers as the exclusive and authoritative source of information about the status of availability of works included in books and periodicals previously published in print form, and are thus missing a vast assortment of available new editions.

Much of the digital content libraries and readers want already exists, but library catalogs and bibliographic databases don't enable librarians and readers to find those new editions. That's a cataloging problem, not a rightsholding problem. It's a problem that can and should be solved by librarians. It doesn't require legislation, but it does require librarians to talk to working writers and learn more about the forms in which writers have made, and are making, digital content available.

In failing to keep pace with the changes in writers' business models, libraries have fallen behind in their aspiration to serve as connectors between readers and the written work they seek.

If a writer is making available all or part of the content of a book or contribution to a journal on the writer's website, or as one or more self-published e-books, the writer probably wants libraries and library patrons to know about it. But neither the Library of Congress nor any other library or library consortium or cataloging system we know of allows an author to add information to an existing bibliographic listing to indicate (a) contact information for the author as rights holder in case a library or anyone else wants to seek a license for digitization or other use; (b) a URL or other information as to where all or part of the work is already available for acquisition by a library or consultation by a reader in digital form; (c) whether the author grants or is willing to grant a license for digitization, digital distribution, or other use on standard terms (such as some specified Creative Commons license) or for a specified standard fee (one-time fee, per-lending fee, monthly or annual license, etc.).

Congress should encourage the Library of Congress to take the lead in opening up its catalog to incorporate pointers to, and information about, decentralized mass digitization already being engaged in by individual writers. And Congress should encourage the Library of Congress and the Copyright Office to involve working writers directly in developing new policies and procedures, not to rely on assumptions about us and our business models made by even well-meaning outsiders.

We look forward to working with this Subcommittee and Committee, the Congress, the Administration, the Library of Congress, and the Copyright Office to continue our leading role as writers in preserving, reusing, and making available our work to readers in the widest possible range of formats and media, according to the widest possible range of existing, emerging, and not-yet-imagined business models. Thank you for considering our views.

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