

Public Hearing on Proposed Fee Increase for Copyright Registration

U.S. Copyright Office, October 1, 1998

**Statement of Jonathan Tasini
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The National Writers Union (NWU) would first like to thank the Copyright Office staff for its fairness and professionalism in conducting not only this public hearing but the entire process relating to the proposed fee increase as it has unfolded thus far. While we regret that fee increases appear to be necessary, we accept that the Office requires additional revenue in order to operate efficiently. We appreciate the time you took to meet with us over the summer, and we note your sensitivity, as evident in the Notice of Proposed Fee Increase, to the economic hardship, which many individual authors face today. However, we do not support the proposed fee increase as currently structured. As a leading advocate of authors' rights and the only union for journalists, book authors and other literary writers, the NWU is of course concerned about keeping registration within reach of its members, many of whom make their living solely from writing and cannot always, even under the current fee schedule, afford to register works on a timely basis. The NWU has been in existence for 15 years and has 4800 members in 17 locals throughout the country.

While we understand that the Copyright Office needs to find ways to survive financially, we do not believe that increasing fees across the board is an equitable solution. Authors face both financial and legal obstacles under the current copyright system, and we believe these obstacles must be carefully considered before a new fee schedule can be implemented.

ECONOMIC REALITY OF AUTHORS

To put the issue of raising fees in perspective, as well as the question of who should bear the burden of an increase, it is first worth looking at authors' economic realities. Except for a small percentage of cases, the average author's income is neither comfortable nor consistent. In the last few years despite the success of the Internet in opening new markets seasoned writers have regularly left the freelance roster because contractual conditions continue to deteriorate. Clearly, authors today are not enjoying the full benefit of the Copyright Act. Yet the Union believes, and many would agree, that these small creators are the intended beneficiaries of Article 1, Sec. 8 of the U.S. Constitution. Moreover, their voices are crucial to a free press, a strong first amendment and a healthy democracy.

Increased registration fees would be one more obstacle to securing to authors the benefits of copyright law. We take the position that for a book author, who may write one book every year or two and nothing else, a one-time fee in the range of \$20 is reasonable. But many of

our members write for periodicals such as newspapers, magazines, journals, and quarterlies. These authors, who include freelance journalists, reporters, poets, columnists and cartoonists, may write anywhere from 10-25 pieces per year, or more in the case of those who freelance for newspapers on a daily or weekly basis. Many book authors write freelance articles in addition to working on their books, simply to survive. Moreover, most every author working on a project for publication has one or more unpublished, unfinished works (perhaps a novel) in the drawer. For the majority of such authors, those dedicated to their craft and determined to stay with the profession, it is important for the Copyright Office to recognize that, as a rule, money is short and every dollar counts. By contrast, the revenues of large media companies have dramatically increased.

Unfortunately, these companies frequently strip writers and other creators of their basic contractual rights and deny them any share of downstream revenues, particularly in the electronic world. This is particularly evident in the proliferation of all-rights contracts, contracts which seize all rights with little or no additional compensation to the author.

IMPORTANCE OF UNBURDENED LEGAL PROTECTION

As bleak as the finances of authors are, they would be irrelevant to the Office's assessment of increased fees if not for two reasons. First, under our law, copyright protection is free and automatic to authors of original works. This is important, as it means the registration process cannot be characterized as a typical commercial service for which authors, as consumers, should be willing to pay the going rate. Copyright owners do not register to get a copyright, the way perhaps, trademark applicants pay to obtain federal protection. Under the copyright system, the right to federal protection already exists at the time of creation and copyright owners, technically speaking, do not have to register. The Copyright Office, however, wants copyrights registered for reasons that range from creating a public record to ensuring the collections of the great Library of Congress. Yet it requires copyright owners to pay the processing costs. At the very least, registration fees should reflect that some copyright owners are in a better position than others to foot the bill.

Second, there can be no discussion of increased registration fees without acknowledging the legal stranglehold that is imposed by section 412 of the U.S. Copyright Act. As you well know, section 412 prohibits an award of statutory damages or attorneys' fees in a successful infringement suit if the work has not been registered prior to the infringement or, in the case of published works, within three months of publication. If registration fees are unreasonable, the bar will be set too high. Authors will not be able to afford registration, which effectively will mean that they will be denied real protection under the Copyright Act. We predict that fewer authors will register under the proposed fee increase. They will not, therefore, be entitled to recover attorneys' fees and statutory damages should their works be infringed. Without the possibility of attorneys' fees, it is extremely difficult to find and pay for legal counsel. Without the prospect of statutory damages, authors are left with the daunting task of documenting actual damages, a task so meaningless to most that it is tantamount to having no copyright protection at all.

The inequity of section 412 is not a new issue. In 1993, the U.S. Congress introduced bills that would have repealed sections 411 and 412. The Library of Congress, concerned that a repeal would directly lead to fewer deposits of copyrighted works, instituted a task force, ACCORD, to study the matter. The report of ACCORD's co-chairs was comprehensive and illuminating. It concluded that there is no empirical proof that these sections induce registration and that they could not be justified simply on the basis of hypotheses... See Report of the Co-Chairs, p. xvii (1993).

All of ACCORD's members agreed that the Library and the Copyright Office ought to focus attention on creating new incentives for registration, including improved mandatory deposit, registration reforms, continuing studies of 412, and enhanced remedies. *Id.* pp. xvii-xix. In light of these findings, the NWU worked with the Copyright Office to create and test a new, short registration form that is currently used by some authors.

Much work remains to be done in the area of creating incentives. Section 412, which could not be justified in 1993, certainly cannot be justified under a higher fee schedule. A higher fee schedule in 1998 will further raise the bar to registration precisely at a time when the growth of the Internet has heightened the impact of infringement. On behalf of all authors, we request the Copyright Office refrain from raising fees until it has revisited and updated the negative impact of 412 on authors and included these issues in its analysis of any fee increase.

THE PROPOSED FEE SCHEDULES

For all of the reasons cited above, the NWU opposes proposed Schedule 1. The proposal more than doubles the present fee and would hit prolific authors particularly hard. As for Schedule 2, the NWU thanks the Copyright Office for its efforts in proposing an alternative schedule that includes somewhat-reduced fees for individual authors as well as improved group registration. We recognize that such alternative measures would result in a financial loss for the Office. Nonetheless, we have evaluated the alternatives in light of the continued existence of section 412 and believe that both alternatives fall short of alleviating the concerns of our members. It is conceivable that we would conclude otherwise in the absence of section 412.

A reduced fee of thirty-five dollars still represents a substantial increase and will, in our estimation, result in fewer individual authors registering their works and fewer copyright deposits. In addition, we note that more and more authors are turning to unions and trade associations to handle registration for them as a service, since these entities are working to build on-line licensing opportunities for their members and have the expertise and desire to handle all facets of the process. Under the proposed schedule, it appears that only works submitted by individual authors are eligible for the reduced rate. We suggest a break be created for not-for-profits that wish to send bulk registrations to the Office, either by traditional means or through the developing electronic channels of CORDS. As for group registration, as we understand it, the effective date would extend only from registration, not creation. Therefore, a group registration filed at the end of a certain period may not be sufficient to provide the real benefits of registration (statutory damages and the possibility of attorneys' fees) for all works. This is particularly true if one's first work has entered the stream of commerce, either through readings, or mailings to agents or editors, months before the last

work is completed and the collection is registered. This also means that a periodical writer who files a GR/CP form once a year would have many works that would be ineligible for statutory damages or attorneys' fees. The writer would have to file a GR/CP form every 3 months to ensure that all works are fully protected. Thus, with section 412, a periodical writer who seeks full copyright protection under the law would have to register a minimum of 4 times per year.

The NWU also encourages the Office to create a small business exemption.

First, many individual authors set themselves up as small businesses for tax protection and related reasons. Second, the NWU believes that the proposed fee increase will hurt small, independent presses, who in our opinion must be protected so as to ensure public access to diverse works not usually published by mainstream presses. We believe corporate America should and can pay more than individual authors and that it is not unreasonable to institute higher fees for them. Those in a better position to bear the burden of necessary fee increases should naturally do so. It is perfectly reasonable for a small press that publishes an article worth \$350 to pay less for registration than the producers of a major blockbuster movie worth hundreds of millions of dollars. To summarize, we recognize the budgetary needs of the Copyright Office. However, the Copyright Office is not, in the end, a commercial entity where bottom line figures should solely dictate the policy for our country. Indeed, the Office has never operated this way. The Office is a special institution of the highest cultural importance whose greater purpose is the promotion and preservation of the Copyright Act. That Act rests on a Constitutional ideal whose core values include the goal of encouraging, not hindering, the economic well-being of authors.

Thank you for the opportunity to present our concerns.