
Before the Copyright Office

Library of Congress

In the Matter of)
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Group Registration of Unpublished) Docket No. 2017-15
Works)
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Comments of Mary Rasenberger, the Authors Guild, Inc.; Michael Capobianco and James W. Fiscus, Science Fiction and Fantasy Writers of America, Inc.; Maria Ungaro, GWA: The Association for Garden Communicators; Stephen Mooser, Society of Children’s Book Writers and Illustrators; Charles F. Carnes, Songwriters Guild of America, Inc.

November 17, 2017

The Authors Guild, Science Fiction and Fantasy Writers of America, GWA: The Association for Garden Communicators, the Society of Children’s Book Writers and Illustrators, and the Songwriters Guild of America submit these comments in response to the Notice of Proposed Rulemaking (“NPRM”) by the U.S. Copyright Office, “Group Registration of Unpublished Works,” Copyright Office Docket Number 2017-15.

Statements of Interest

The Authors Guild and its predecessor organization, the Authors League of America, have been leading advocates for authors in the areas of copyright, contractual fairness, and free speech since its founding in 1912. The Guild’s approximately 9,000 members represent literary and genre fiction, trade, academic, children’s book authors, freelance journalists, poets, and self-published authors.

Science Fiction and Fantasy Writers of America, Inc., (SFWA) is the national organization for professional authors of science fiction, fantasy, and related genres. Founded in 1965, SFWA is a California 501(c)(3) member organization. SFWA has nearly 2,000 members, the majority of whom are professional freelance authors of novels and/or short fiction. SFWA members publish works of prose, dramatic scripts for film and television, and games related to science fiction and fantasy. Of particular note, SFWA's membership includes writers publishing with traditional book and magazine publishers and writers who self-publish their works in print and electronic form. 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 submission. SFWA members run their own small businesses, whose product is the written word.

GWA: The Association for Garden Communicators provides leadership and opportunities for education, recognition, career development and a forum for diverse interactions for professionals in the field of gardening communications.

Founded in 1971, the Society of Children's Book Writers and Illustrators (SCBWI) is a non-profit, 501 (c)3 organization. With over 22,000 members worldwide, it is the only professional organization specifically for those individuals writing and illustrating for children and young adults in the fields of children's literature, magazines, film, television and multimedia.

Founded in 1931, Songwriters Guild of America (SGA) is the nation's longest established music creator organization run solely by and for songwriters, composers, and their heirs. SGA provides administrative, legislative advocacy and other crucial services to its members throughout the United States and maintains close relationships with similar music creator groups throughout the world.

Summary

We understand that this NPRM proposes replacing the administrative accommodation in 37 CFR §202.3(b)(4)(i)(B), which permits registration of a collection of unpublished works, with a new

group registration for unpublished works (“GRUW”). We support the creation of a group registration for a limited number of unpublished works, but believe the proposed limit of only five works per registration is unworkable. It will greatly reduce the incentives to register and thus the number of unpublished works that are registered, which includes not only privately held works, but a substantial percentage of works created and disseminated online today. Such a result is contrary to the interests of authors, users, and the general public and would do a disservice to the Congress’ intent.

Another key problem with the proposal is the uncertainty of how to apply the concept of “publication” (as defined in the Copyright Act) to works made available online. We recommend as a first step addressing that problem by creating a simple definition pursuant to a rulemaking, or, better, replacing the “published/unpublished” distinction with the concept of “made available” or “disseminated” to the public. Doing so would greatly reduce the number of works in this category and the Copyright Office’s need to communicate with applicants on the issue, as well as prevent incorrect registrations. We believe it would also decrease abuse of the “unpublished collections” accommodation. If the Copyright Office nevertheless determines to adopt a regulation for a new “GRUW” group with such a low number of permitted works, it should not repeal the “unpublished collections” accommodation, for the reasons described below.

Number of Works

As advocates for modernization of the Copyright Office, we welcome the Copyright Office’s review of existing group registration practices with the goal of making registration both more efficient and more robust. We also appreciate the need to limit the number of works registered under a single registration. The resources required to examine an application with thousands of different works places an undue and unfair burden on the Copyright Office and cannot be supported with the fee for a single registration. In the long run, it means that other registrants will be required to foot the bill. There is almost universal agreement that the Copyright Office needs an infusion of capital for much-needed upgrades to its technology; we understand that members of Congress have suggested paying for those upgrades, at least in part, with increased fees. As we stated in our Comments in response to the Copyright Office’s Notice of Inquiry

regarding Information Technology Upgrades,¹ we oppose an increase in fees for individual creators, as it will impose too great a burden on them and create disincentives to registration. We surmise and fear that continuing to allow innumerable works under one registration for all types of works eventually is bound to force the Copyright Office to increase fees.

We also support the Copyright Office's efforts to improve the integrity of registration records by ensuring that each work can be properly examined and correctly identified in the registration certificate. This will facilitate licensing of works while reducing the potential for works to become orphaned, since the copyright and owner information will be more readily locatable in the registration records. We agree that there is a necessary limit to how many works can be examined and identified with a single application fee, but we believe that limit will vary by class and nature of the work.² Most importantly, the limit must accommodate the reasonable needs of applicants and further Congress' purpose in providing the Copyright Office with the authority to create groups: namely, to incentivize registration. As noted in the NPRM, "Congress recognized that requiring applicants to submit separate applications for certain types of works may be so burdensome and expensive that copyright owners may forgo registration altogether."³

In our view, the five works per registration limit proposed under the GRUW is far too low to serve either the legislative purpose of group registration or the Copyright Office's stated intent to create more robust records. It will have a reverse effect in that fewer works will be registered. A five-work limit will serve as a disincentive to register unpublished works. For example, the limit would make registration cost-prohibitive for authors of shorter, unpublished text-based works, such as articles, blogs, short stories, Facebook posts, and emails. It would serve a particular disincentive today when writers' incomes are in steep decline.⁴ A 2015 Authors Guild survey

¹ See *Information Technology Upgrades for a Twenty-First Century Copyright* (Mar. 31, 2016), available at https://www.authorsguild.org/wp-content/uploads/2014/10/2016-2-NOI_CO_IT-Upgrades.Authors-Guild.pdf

² For instance, it is much easier to eyeball several hundred photographs to ensure they include copyrightable content than to do so for software or musical works. Similarly, it is easier to scan a hundred blogs than a hundred books.

³ 82 Fed. Reg. 47,416 (Oct. 12, 2017).

⁴ See *The Wages of Writing*, (Sept. 15, 2015) available at <https://www.authorsguild.org/industry-advocacy/the-wages-of-writing/>

showed that the mean annual income for full-time authors has fallen to \$17,500. Because most authors are struggling financially, a rule that so drastically limits the number of works they may register with one fee will undoubtedly result in authors not registering those works.

Let's consider more specifically the types of works that may now be registered as "unpublished collections" and that would be subject to GRUW instead under the proposed new rule. First, an author might write several (as many as 10 or more) blogs or online articles a week. Many of these blogs may be deemed "unpublished" because the "publisher" of the website or blog has not expressly or implicitly permitted copying. Most writers produce a number of pieces that are not accepted for "publication," in which case the author may hold onto them for future use, or post them privately, so that they remain unpublished. Collections of emails would also be subject to GRUW instead of the unpublished collection accommodation, and they are precisely the types of works, we believe, for which the accommodation was created. Emails are the modern-day equivalent of letters, and like letters of yore, they often contain a great deal of wonderful authorial expression, especially when written by professional writers. And just as the private letters of authors in the past have proved important sources of material for research, so will writers' personal emails. They need to be preserved and a record of them created through registrations; and they need to be protectable. Last, poets often rely on the accommodation for unpublished collections to register their unpublished poems, and they too will be deprived of the benefits of timely registration. Very few, if any, authors can afford to or will register only five poems, blogs, posts, or emails at a time. The proposed GRUW limit of five works simply does not that nowadays comprise a not insubstantial portion of authorial output.

The legislative history of the 1976 Copyright Act shows that Congress considered group registration to be "a needed and important liberalization of the law" that removed the cost barriers of separate registration and gave creators vital incentive to register their works.⁵ We urge the Copyright Office to take the liberal spirit behind the group registration scheme into consideration in its rule-making. The proposed limit of five works per registration for unpublished works runs counter to the express legislative intent underlying group registration procedures as it would reimpose precisely the monetary burden on authors and creators that

⁵ H.R. Rep. 94-1476 at 154 (1976).

Congress intended to remove through the group registration scheme and act as a disincentive to registration. It will also likely cause registrations to decrease, which will greatly diminish the public record with respect to unpublished works. For these reasons, we believe that the proposed 5-work limit will be a disservice to authors, users, and the public alike.

Weighing the Copyright Office's interests in improving its registration processes and the integrity of its records with the needs of authors, as well as the liberal spirit behind the group registration scheme, we propose raising the number of works eligible for registration in a single claim to at least several hundred in the case of text-based works, perhaps more depending on the nature of the work. A better limit, though, would be a time period, such as all works created in a calendar quarter. This would work for blogs as well as emails and would strike a practical balance between the unrestricted administrative accommodation and the GRUW, without dissuading authors and creators from registering their unpublished works. For non-text based works, other limits might be more appropriate; and while we do not address non-text works in these Comments, we recommend that the Copyright Office consider creating different limits for different types of works as the labor required to examine them varies tremendously, as do the needs of their creators.

Definition of "Unpublished"

A second important issue that the new GRUW highlights is the dire need for a user-friendly definition of "published," or, alternatively, for the use of a different concept more suitable to the internet age. The term "published" remains a source of great confusion for applicants, yet applicants are responsible for making the determination as to whether their works are unpublished at the time of registration. As such, it is essential that applicants be given adequate guidance to make that determination. An important tenet that should drive all registration practices is that the process must be simple enough for any individual author to complete an application without having to hire a lawyer or registration expert. Moreover, having a definition that the ordinary individual applicant could easily understand will improve the accuracy of registrations. We suspect many works are improperly classified as published or unpublished; and, consequently, are being registered with that incorrect information or are taking additional time and resources of the Copyright Office to identify the inaccurate classification and

communicate with the applicant to make a correction. Having a clear definition would also mitigate the risk of prejudice to registrants' rights as a result of incorrectly identifying whether a work is published or not. Indeed, it would further the Copyright Office's stated goals in the NPRM of allowing "broader participation in the registration system," increasing "the efficiency of the registration process," and creating "a more robust record of the claim."⁶

The *Compendium of U.S. Copyright Office Practices, Third Edition* provides explanations of the meaning of "publication" and associated terms, but these explanations are scattered throughout the Compendium, and the principal discussion in §1900 is several pages long. To understand and apply the analysis properly to works disseminated online requires a knowledge of copyright law that few applicants have. This is why the Copyright Office needs a simple statement of what "publication" means in the online context—and it has the authority and ability to create one.⁷ The Copyright Office cannot unilaterally amend the definition of "publication," as it is embodied in §101 of the Copyright Act; it could, however, provide its administrative expertise to create a simple definition that would assist applicants.⁸ We recommend that the Copyright Office conduct a full administrative rulemaking on the issue, so that all interested parties can weigh in and to ensure that all issues are properly vetted. Pursuant to such a rulemaking, we believe that it is eminently possible to create a simple, useful definition of "published" that works for the Copyright Office's purposes, without adversely affecting the rights of copyright owners or users.

Alternatively, the Copyright Office might consider disposing of the use of the published/unpublished distinction and instead using a concept such as "disseminated to the public" or "made available to the public." Such a concept would, we believe, serve the same registration purposes as the published/unpublished distinction—indeed, in some ways, it would better serve them. If a work is made publicly available online, why should it matter whether copies are distributed or not? Publication is a concept that was created when public distribution meant distributing copies; this is no longer the case for many works, as certain types of works are increasingly being posted or performed online and not technically distributed "in copies."

⁶ 82 Fed. Reg. 47,420 (Oct. 12, 2017).

⁷ *U.S. Copyright Office, Compendium of U.S. Copyright Office Practices* §1900 (3d ed. 2017).

⁸ We would support amending the law to bring the concept of publication into the digital era and urge the Copyright Office to bring the need for an amendment to Congress' attention.

In sum, we urge the Copyright Office, prior to implementing a new GRUW group registration, to create a simple, easily understood definition of “published” applicable to online works, or, alternatively, to replace the published/unpublished distinction with a concept such as “publicly disseminated” that is better suited to the internet age. Doing so would enable applicants to make reliable determinations concerning the status of their works, facilitate faithful judicial interpretations, and make the GRUW group far more useful. It would also limit the number of works that would fall under the GRUW and result in better registration records. The “unpublished collection” accommodation has grown unwieldy in part due to the uncertainty of whether works made publicly available only online are “published,” as a result of which many publicly disseminated works, we suspect, are registered under the accommodation, even though a full analysis would show that they are in fact “published.”

Creation of New Groups for “Publicly Disseminated” or “Published” Works

For works that have been made available to the public or “publicly disseminated” online, we recommend that new groups be created for various classes of works. Writers, especially freelance writers, urgently need a group registration for short pieces, especially those disseminated online. This includes blogs, public Facebook posts (which writers are increasingly using to communicate their expression), other short articles, and even copyrightable tweets. We understand that the Copyright Office has narrowly interpreted the provisions of 37 C.F.R. §202.4 (for a group of contributions to periodicals) and will not register groups of works made available on many websites or blogs under this group, because it does not consider them “publications.” While there may be technical arguments for making such a determination, it undermines the very purpose of that group registration, which was mandated by Congress. Many, if not most, text-based publications have moved online, and the Copyright Office’s unwillingness to recognize that these are exactly the type of works that Congress intended to allow authors to register as a group—and for the same reasons—does great harm and disservice to the writing community and the ability to register freelance works.

In that vein, we would like to put on record that we support the Petition for Rulemaking filed by the National Writers Union, American Society of Journalists and Authors, Science Fiction and

Fantasy Writers of America, and Horror Writers Association on June on January 30, 2017 that urges the Copyright Office to create additional group registration options for specified categories of works.⁹

Anonymous or Pseudonymous Works

Likewise, with respect to the requirement that the works contained in a GRUW claim be uniformly anonymous or pseudonymous, it would greatly benefit applicants, their attorneys, and judges if the revised rule clearly elucidated this requirement and referred to pertinent parts of 37 CFR §§201, 204, which restrict requests for removal of personally identifiable information from a registration record.

Other Requirements for the GRUW

For the record we note that we support the Copyright Office's proposal to limit the group to the same administrative class, to require the title of each work, to require that the author and claimant be the same for each work, and that the authorship statement be the same for each.

Thank you for your attention to this matter. We are available for consultation at the Copyright Office's convenience.

Sincerely,

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⁹ See *Comments and Petition for Rulemaking: Group Registration* (Jan. 30, 2017), available at <https://nwu.org/wp-content/uploads/2017/02/NWU-registration-30JAN2017.pdf>

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