

The Library of Congress

ADVISORY COMMITTEE ON COPYRIGHT REGISTRATION AND DEPOSIT

ACCORD

REPORT OF THE CO-CHAIRS

ROBERT WEDGEWORTH

BARBARA RINGER



SEPTEMBER 1993

Library of Congress Cataloging-in-Publication Data

Library of Congress. Advisory Committee on Copyright Registration and Deposit.

ACCORD : report of the co-chairs / the Library of Congress, Advisory Committee on Copyright Registration and Deposit ; Robert Wedgeworth, Barbara Ringer [co-chairs].

p. cm.

"September 1993." .

----- Copy 3 Z663.8 .A63 1993

1. Library of Congress. Copyright Office. 2. United States. Copyright Royalty Tribunal. 3. Copyright--United States.

I. Wedgeworth, Robert. II. Ringer, Barbara Alice, 1925-
III. Title.

KF3002.A823 1993

346.7304'82--dc20

[347.306482]

93-45043
CIP

Contents

Membership	v
Letters of Transmittal	
The Honorable William J. Hughes/October 1, 1993	vii
The Honorable William J. Hughes/September 15, 1993	xii
The Honorable Carlos J. Moorheard/September 15, 1993	xiii
The Honorable Dennis DeConcini/September 15, 1993	xiv
The Honorable Orrin G. Hatch/September 15, 1993	xv
The Honorable Patrick J. Leahy/September 15, 1993	xvi
Dr. James H. Billington/September 15, 1993	xvii
ACCORD Report	1
Prefatory Note	3
Chapter 1 Introduction	5
Chapter 2 ACCORD's Methodology	9
Chapter 3 The Work of ACCORD—Issues, Arguments, Proposals	15
Chapter 4 Recommendations	27
Appendix	A/1
Agenda/June	A/3
Summary/June	A/5
Agenda/July	A/11
Summary/July	A/13
Agenda/August	A/19
Summary/August	A/21
Agenda/September	A/27
Summary/September	A/29
Index of Draft Working Papers	A/35
Letter to the Members of ACCORD	A/36
Draft Working Paper A	A/38
Draft Working Paper B	A/43
Draft Working Paper C	A/45
Draft Working Paper D	A/48
Index of Working Papers	A/51
Working Paper #1	A/54
Working Paper #2	A/62
Working Paper #2a	A/72
Working Paper #3	A/74
Working Paper #4a	A/85

Contents (CONTINUED)

Working Paper #4	A/92
Working Paper #5	A/94
Working Paper #5a	A/105
Working Paper #5	A/223
Working Paper #6	A/234
Working Paper #7	A/246
Working Paper #8	A/256
Working Paper #9	A/259
Working Paper #10	A/264
Working Paper #11	A/276
Working Paper #11a	A/320
Working Paper #12	A/342
Working Paper #13	A/346
Working Paper #14	A/349
Working Paper #15	A/359
Working Paper #16	A/365
Working Paper #16a	A/367
Working Paper #17	A/368
Working Paper #18	A/387
Working Paper #19	A/395
Working Paper #20	A/417

Membership

OF THE LIBRARY OF CONGRESS ADVISORY COMMITTEE ON COPYRIGHT REGISTRATION AND DEPOSIT (ACCORD)¹

Barbara Ringer, Co-chair
Former Register of Copyrights

Robert Wedgeworth, Co-chair
Interim University Librarian, University of
Illinois at Urbana-Champaign

Jon Baumgarten
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Professor Hasia Diner
University of Maryland

The Honorable Raya Dreben
Massachusetts Appeals Court

Alan Fern
Director, National Portrait Gallery

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Artistic Property Law,
Columbia University, School of Law

Morton David Goldberg
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Paul Goldstein
Lillick Professor of Law, Stanford University

Professor Peter A. Jaszi
Washington College of Law, The American
University

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Arthur J. Levine
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Robin Davis Miller
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Robert L. Oakley
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Law, Georgetown University Law Center

Charles D. Ossola
Lowe Price LeBlanc & Becker

Maria Pallante
Executive Director, National Writers Union

Professor Shira Perlmutter
The Catholic University of America, Columbus
School of Law

Stanley Rothenberg
Moses & Singer

Emery Simon
Executive Director, Alliance to Promote
Software Innovation (APSI)

Bernard R. Sorkin
Legal Department, Time-Warner Inc.

Staff of ACCORD

Sandra Barnes
Henry Cohen
Charlotte Douglass
Lewis Flacks (through June 1993)
Gayle Harris
Cynthia Joy
Pat Raap
Eric Schwartz, Staff Director
Henrietta Terry

Assistants to ACCORD

Howard Chang
Kathy Donegan
Marie Morris
Jeanette Pierce
Nanette L. Stasko
Mark Traphagen

¹Irwin Karp, Professor Toni Morrison, and Acting Dean Jean Preer were appointed to ACCORD, but resigned before our report was prepared.



THE LIBRARIAN OF CONGRESS

WASHINGTON, D.C. 20540-1000

October 1, 1993

Dear Mr. Hughes:

On May 4, 1993, I received a letter signed by you, Mr. Moorhead, Senator DeConcini, and Senator Hatch, in which you endorsed our effort to explore "ways to satisfy the Library's acquisition needs separately from the current method of incentives provided in Sections 411 and 412 of the Copyright Act," and our appointment of a committee consisting of outside individuals to study and advise on this question. You stated that, given "the time constraints, we believe the meetings should focus on the following question: 'If Sections 411 and 412 of the Copyright Act are repealed, how can the Library's acquisitions needs be met?'"

Following further discussions I appointed an Advisory Committee on Copyright Registration and Deposit (ACCORD) to advise me concerning the impact and implications of the Copyright Reform Act of 1993 (H.R. 897, S. 373). As you requested, the first phase of the committee's work was focused on possible methods of inducing copyright registration and deposit for the Library of Congress that would serve as alternatives to the incentives now offered by sections 411 and 412. On September 15, 1993, I forwarded to you the report of the co-chairs of the Committee on the first phase of ACCORD's work; now, I am pleased to submit to you my comments and recommendations based upon my review of that report and my consultations with colleagues here at the Library.

At the outset, I thank you for the opportunity the Copyright Reform Bill has given the Library and the Copyright Office to undertake a searching self-examination of existing procedures and practices, of the interrelationship between the Library and the Office and, most importantly, about the fundamental purposes and future roles of copyright in the electronic age.

This process of self-examination, which will continue far beyond Phase II of ACCORD's work, has highlighted anew the crucial importance of the Library and the copyright system to communications and information transfer in the next century. We must be able to adjust to the changes that come so rapidly in the information age, and we look forward to working with your committees in blazing a constructive path through the difficult challenges ahead.

A fundamental issue which must be addressed is the crucial centrality of the copyright system in sustaining the collections of the Library of Congress and its increasingly vital databases. Congress can take pride in having created the greatest library in the world, but it must realize that, to a very large extent, this greatness is based upon

the operation of the copyright system. In addition, the philosophy and provisions of American copyright law have undergone a fundamental transformation in recent years; with the evaporation of copyright formalities as conditions of statutory protection, the role of copyright registration has also changed. The Copyright Office's function of providing a great national database of information about copyrighted works has become all the more important. Now more than ever, we must maintain and strengthen the reliable, publicly-available record of copyrights. This is a formidable challenge, which we believe we will be able to meet with your assistance.

I believe that the proposals summarized in chapter 4 of the ACCORD report and the covering letter of the co-chairs, both dated September 15, 1993, comprise an excellent starting-point for leading the Library and its Copyright Office into the electronic age. With very few qualifications I endorse them and recommend that you give them full consideration in the legislative process. Some of the proposals in the report can be implemented administratively, through regulations or changes in practice; others will require statutory changes. I hope that we can work together in finding the right formula for this statutory/administrative mix, and I pledge my enthusiastic and open-minded support in accomplishing this goal.

Let me comment briefly on the specific recommendations:

- * **Mandatory Deposit.**

The ACCORD report recommends a substantial expansion in the statutory provisions governing mandatory deposit for the Library of Congress which would supplement and complement the existing registration and deposit system. It is now clear to me that we must move in the direction of the "legal deposit" systems upon which the national library collections of most other countries are based, but this obviously cannot be done with the stroke of a pen. Since we already have an effective registration/deposit system supporting the Library's collections, we must move cautiously into what is essentially a new era in collections management for us. Legislation and regulations are difficult to change and there is a risk of disruption of the steady stream of acquisitions if great care, including constant monitoring, is not exercised during a period of transition. Substantial reductions in deposits for a year or more would be an irreparable loss which could--far more easily than a layman might realize--irreversibly change the nature of the Library of Congress.

I share the views expressed by my colleagues that the expansion in mandatory deposit must be carefully planned, must be phased in through pilot projects, and must be sufficiently funded. I also agree with concerns that the proposed system could break down if depositors are encouraged to negotiate in every case. Negotiations may be appropriate in cases where new classes of works are added to the mandatory deposit system or in situations in which compliance is a severe hardship. But the statute and regulations must prevent potential depositors from delaying or avoiding a legal and reasonable demand. Negotiations should be the exception, not the rule, and there should be clear deadlines to

assure timely response to a legal demand. In implementing any changes to the mandatory deposit system, we will comply with reasonable due process requirements, without obligating the Library to the Administrative Procedure Act (to which legislative agencies are not subject).

In response to your instructions to suggest alternatives to Sections 411(a) and 412, I strongly recommend that Title 17 be amended to substitute a new chapter of the Copyright Code for Section 407, mandating a system of deposit under which material, both published and publicly disseminated, would automatically be added to the Library's collections without the need for prior demands in individual cases. I endorse the proposals regarding sanctions for non-compliance and legal representation. I am also enthusiastic about the proposal that brief records of these deposits be added to the databases of the Library. However, I believe that we should include licensing, permissions, and pricing information only in registration records, not in these simple deposit records, so as not to weaken this proposed incentive to register.

I am recommending to ACCORD that, during the second phase of its operations, it make in-depth studies of the legal deposit systems in effect in other countries and that it propose pilot projects for implementing an expanded mandatory deposit system, many of which could be adopted without legislation.

*** Registration Process.**

I am also convinced that, by adopting simplified procedures and maintaining a positive, service-oriented attitude toward the whole copyright process, the Copyright Office can induce substantial increases in registrations. I endorse the recommendations in the ACCORD report calling for simplified short-form applications, expansion of group registrations and optional forms of deposits, greater consultation with applicants about mutual problems, expansion of information in the copyright on-line databases (especially facts on ownership, permissions, and licensing), making clear that good faith errors in applications will not result in loss of copyright protection or invalidation of registration, and reinforcing the current policy of resolving doubts about registrability in applicants' favor.

Some of the changes that I am recommending should be accomplished through legislation, but most can be and will be brought about through administrative action under the present law. I have directed that the Copyright Office hold public proceedings in the near future on a proposed regulation dealing with group registration for newsletters and that similar proceedings be planned and scheduled with respect to other potential subjects for group registration, including photographs and software. I am also asking that work be resumed on drafting simplified application forms, though changes in their content would have to be mandated by amendment of Section 409. We are beginning a broad consultative process, built on the work of ACCORD, in which we plan to stress the shared interest of the copyright community in strengthening the registration system.

In sum, I believe that modest amendments in Title 17, coupled with dedicated administrative action, will not only encourage registrations but will also help to pave the way for the increased role of automated copyright records in the international information highway.

* Three-year review.

If statutory changes are made, it becomes vitally important to test the effect of legislation on copyright registration and deposit through carefully-structured and continuous analysis of actual experience under the changed law. For this reason I strongly endorse ACCORD's recommendation for a statutorily-mandated review and report to Congress if the law is changed. ACCORD recommends a five-year review. I would suggest that an initial review and report should take place after three years. I am asking ACCORD, during its second phase, to propose standards for such a review.

Because of the extraordinary importance of a continuity of acquisitions for the nation's greatest repository of knowledge and the significance of maintaining the integrity of the copyright data base in the electronic era, the Library may have to come to you sooner to request extraordinary action if we see immediate damage to the collections of the nation's greatest repository of knowledge.

* Recommendations of the ACCORD co-chairs.

Two additional proposals for inducements to registration and deposit, growing out of the ACCORD discussions, were put forward for my consideration in the co-chairs' covering letter. I endorse them both.

I. Reports on Litigation. -- The co-chairs recommend a requirement that litigants inform the Copyright Office in writing of the filing of infringement actions. Section 508 of the current law, whereby the courts are required to notify the Register of Copyrights about pending copyright litigation and the results of lawsuits, has not been successful. The ACCORD co-chairs' proposal would add valuable information to the national database and would also provide an inducement to register in some cases. I recommend that a fee be charged to cover the workload of recording these documents.

II. Enhanced Remedies. -- I also endorse the ACCORD co-chairs' second proposal: providing "enhanced remedies" for copyright infringement of registered works, such as recompensing some of the plaintiff's costs in litigation or increasing statutory damages for infringement. These proposals would be likely to furnish realistic incentives to register.

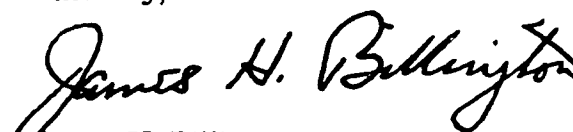
* Costs.

I wish to comment on the possible costs of some of the proposals I have endorsed. Expansion in the scope of mandatory deposit will have costs in processing time and storage space. Improving on-line access to mandatory deposit records and increasing the information available in copyright registration records will have automation and processing costs. In addition, expanded group registration may result in reduced fee receipts. It seems to me that these proposals should be moved ahead for adoption, but in today's fiscal climate

we must be sure that the costs of the improvements are covered through fees or appropriations. I look forward to working with the Congress to address these issues. The staff of the Copyright Office is already working to determine the budgetary impact of the options proposed in the ACCORD report.

I close by adding my thanks to all the members of ACCORD, and especially to the co-chairs, Barbara Ringer and Robert Wedgeworth, who worked long and hard to produce a report which will be of great value to the Library and the Copyright Office. I also wish to give thanks to the extraordinary Copyright Office staff who supported ACCORD in creating the report and to all the staff members who have given and continue to give so much thought to these issues. It is rare that a functioning administrative agency will work so hard and enthusiastically to examine itself, while continuing to provide its regular services. I know that I can count on the staff of the Copyright Office to continue their fine work throughout a forthcoming transition period.

Sincerely,



James H. Billington
The Librarian of Congress

The Honorable
William J. Hughes
Chairman, Subcommittee on Intellectual Property
and Judicial Administration
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515-6219

cc: The Honorable Charlie Rose
Chairman, Joint Committee on the Library

The Honorable Vic Fazio
Chairman, Subcommittee on Legislative
Committee on Appropriations



THE LIBRARIAN OF CONGRESS

WASHINGTON, D.C. 20540-1000

September 15, 1993

Dear Mr. Hughes:

In May I appointed an Advisory Committee on Copyright Registration and Deposit (ACCORD) to advise me concerning aspects of the proposed Copyright Reform Act of 1993 (H.R. 897 and S. 373). I am pleased to transmit to you the Phase I report, prepared by co-chairs Robert Wedgeworth and Barbara Ringer. The Phase II report, in accordance with your request, will be transmitted to you in March 1994.

As soon as I have reviewed this report and have had the opportunity to confer with senior management in the Library and the Copyright Office, I will provide you with my recommendations based on the findings in the Phase I report. I hope to do this in two weeks.

I appreciate your willingness to provide me with the time for reasoned reflection in order to consider the potential impact of the legislation on the Library and the Copyright Office and to provide you with my views.

Sincerely,

A handwritten signature in cursive script that reads "James H. Billington".

James H. Billington
The Librarian of Congress

Enclosures: Letter of transmittal from co-chairs
ACCORD Report

The Honorable
William J. Hughes
Chairman, Subcommittee on Intellectual Property
and Judicial Administration
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515-6219



THE LIBRARIAN OF CONGRESS
WASHINGTON, D.C. 20540-1000

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James H. Billington
The Librarian of Congress

Enclosures: Letter of transmittal from co-chairs
ACCORD Report

The Honorable
Carlos J. Moorhead
Ranking Minority, Subcommittee on Intellectual Property
and Judicial Administration
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515-6219



THE LIBRARIAN OF CONGRESS

WASHINGTON, D.C. 20540-1000

September 15, 1993

Dear Dennis:

In May I appointed an Advisory Committee on Copyright Registration and Deposit (ACCORD) to advise me concerning aspects of the proposed Copyright Reform Act of 1993 (H.R. 897 and S. 373). I am pleased to transmit to you the Phase I report, prepared by co-chairs Robert Wedgeworth and Barbara Ringer. The Phase II report, in accordance with your request, will be transmitted to you in March 1994.

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A handwritten signature in cursive script that reads "James H. Billington".

James H. Billington
The Librarian of Congress

Enclosures: Letter of transmittal from co-chairs
ACCORD Report

The Honorable
Dennis DeConcini
Chairman, Subcommittee on Patents, Copyrights
and Trademarks
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275



THE LIBRARIAN OF CONGRESS

WASHINGTON, D.C. 20540-1000

September 15, 1993

Dear Orrin:

In May I appointed an Advisory Committee on Copyright Registration and Deposit (ACCORD) to advise me concerning aspects of the proposed Copyright Reform Act of 1993 (H.R. 897 and S. 373). I am pleased to transmit to you the Phase I report, prepared by co-chairs Robert Wedgeworth and Barbara Ringer. The Phase II report, in accordance with your request, will be transmitted to you in March 1994.

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James H. Billington
The Librarian of Congress

Enclosures: Letter of transmittal from co-chairs
ACCORD Report

The Honorable
Orrin G. Hatch
Ranking Minority, Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275



THE LIBRARIAN OF CONGRESS
WASHINGTON, D.C. 20540-1000

September 15, 1993

Dear Pat:

In May I appointed an Advisory Committee on Copyright Registration and Deposit (ACCORD) to advise me concerning aspects of the proposed Copyright Reform Act of 1993 (H.R. 897 and S. 373). I am pleased to transmit to you the Phase I report, prepared by co-chairs Robert Wedgeworth and Barbara Ringer. The Phase II report, in accordance with your request, will be transmitted to you in March 1994.

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A handwritten signature in cursive script that reads "James H. Billington".

James H. Billington
The Librarian of Congress

Enclosures: Letter of transmittal from co-chairs
ACCORD Report

The Honorable
Patrick J. Leahy
United States Senate
Washington, D.C. 20510-6275



THE LIBRARY OF CONGRESS

WASHINGTON, D.C. 20540

September 15, 1993

Dear Dr. Billington:

We are honored to submit to you the Report of your Advisory Committee on Copyright Registration and Deposit (Phase I).

In March of this year the House Subcommittee responsible for copyright legislation held hearings on the Copyright Reform Act of 1993 (H.R. 897, S. 373), a bill which, among other things, would repeal sections 411(a) and 412 of the present law. At the hearings you expressed concerns about the potential impact of the bill on the copyright registration system and the collections of the Library of Congress, and you stated your belief that further, in-depth studies were needed on these questions.

In response to your concerns the committees of Congress asked that you undertake a two-part review of the immediate issues raised by the bill and their broader implications, and that you report your findings and recommendations to Congress by mid-September. To assist you in fulfilling this mandate you appointed an advisory committee, of which we are co-chairs, and which has become known by its acronym, ACCORD. Your initial charge to the committee was to study and report upon possible methods of inducing copyright registration and deposit for the Library of Congress that would serve as alternatives to the incentives now offered by sections 411(a) and 412.

The committee has given us, as co-chairs, the duty of reporting the outcome of Phase I of ACCORD's work and recommendations as accurately, fully, and objectively as possible, and this we have tried to do in the attached document. We must emphasize that the statements in the report are our own, not those of the committee as a whole or of any of its individual members. We believe that the recommendations in Chapter 4 of this report accurately reflect the views of ACCORD as a whole favoring two detailed proposals -- expanded mandatory deposit and improvements in registration -- which would serve as alternatives to the inducements in sections 411(a) and 412 of the present law. There was substantial support for, and no opposition to, adoption of the recommendations in Chapter 4, although the members agreed to disagree on the Reform Bill's repeal of sections 411(a) and 412. Obviously the strength of a member's support for the Chapter 4 recommendations must be affected by that individual's views on repeal of 411(a) and 412.

Since the bill would eliminate sections 411(a) and 412, most of the committee members felt that the only way to judge the impact of their loss would be first to understand their purposes and how they work. As chairs of ACCORD we have been criticized for failing to limit discussion of the two provisions to the background necessary for coming up with alternatives, but we do not believe that cutting off debate on sections 411(a) and 412 would have been necessary or desirable -- or possible in any event. We believe that it was important for the members to consider what 411(a) and 412 accomplish or fail to accomplish with respect to registration and deposit under the present law, in order to evaluate what alternatives can be found to accomplish the same or similar purposes.

It is true that the debates over section 412 went beyond the question of its possible impact on copyright registration and deposit, and expanded to cover litigation issues on which there are very strong feelings. Acknowledging that these are matters for Congress, not the committee or the Librarian, to consider, we must say that we do not regret that the debates took place. They were constructive and illuminating, and ultimately, we believe, resulted in a much better understanding on the part of everyone of the various positions and the reasons for them. Our report reflects the differences of opinion on sections 411(a) and 412, and all of the arguments made concerning them. We believe that, after reviewing the text, you will be satisfied that all views are fairly and objectively presented.

Speaking only for ourselves, as members of the advisory committee and not as co-chairs or on behalf of ACCORD or any of its members, we agree with the sponsors of the Copyright Reform Act that sections 411(a) and 412 should be repealed. At present there is no empirical proof that these sections induce registration. As noted below, we agree with the suggestions that the effect of the legislation -- both the repeal of 411(a) and 412 and the alternatives enacted to induce registration and deposit -- be surveyed continuously during the five years following enactment of the bill, and looked at closely at the end of that period. We also favor setting up, during Phase II of ACCORD's work, carefully crafted, objective surveys of all of the factors now inducing registration, together with possible surveys of the expected results of the recommendations in Chapter 4. We certainly agree that if facts can be found we should go where they lead us. But so far no facts exist, and we do not believe that retention of sections 411(a) and 412 can be justified simply on the basis of hypotheses or a priori suppositions.

As individual members of ACCORD we have carefully and thoroughly reviewed all of the information, arguments, and proposals put forward with respect to alternative inducements to registration and deposit. Again no hard evidence exists -- or can exist now -- as to the effect adoption of the recommendations in Chapter 4 would have on total registrations or the Library's collections; the only way to test this effect would be through carefully monitored experience. Nevertheless, we are convinced that, if fully supported by Congressional legislation and faithfully and energetically implemented by the Copyright Office and the Library, the overall levels of copyright registrations and deposits for the Library will not decrease.

Some of the doubts and misgivings concerning the proposals derive from the somewhat cynical conviction that changes of this sort cannot effectively be implemented for bureaucratic reasons. We completely disagree. We believe that both the Library of Congress and the Copyright Office are at the center of what is already becoming the greatest revolution in information storage and transfer in human history, and that the changes and improvements proposed in this report, among many others, are essential to the future of both of these great institutions. Removing current barriers and deterrents to registration, and transforming mandatory deposit into the kind of automatic legal deposit system successfully used by national libraries throughout the rest of the world, should by themselves be enough to strengthen deposit and registration. When the inducements of electronic databases and the permissions and licensing potentials of the new information age are added, it seems to us safe to predict the registrations will increase, perhaps dramatically. Even so, recognizing that people like us -- people who care deeply about preserving the Library's collections and the database of copyright records -- have misgivings about the effects of an uncertain future, we are putting forward some additional proposals as possible safety valves.

Remembering that ACCORD was established for the purposes of providing you with information and advice, and that it is for you and you alone to decide what proposals to put before Congress, we should like to mention again the two basic recommendations for inducing registration in Chapter 4, and to add three more proposals for you to consider. We put these forward in our personal capacities and without in any way speaking for the committee, but we believe on the basis of our review of the discussions that they have support from some of members and deserve your consideration.

First, mandatory deposit. As recommended in Chapter 4, there should be a substantial expansion in the statutory provisions governing mandatory deposit for the Library of Congress, and a corresponding program within the Library to implement the provisions. This should include a new international database of

very simple entries covering mandatory deposits, with added information about rights and permissions supplied voluntarily by the depositors.

Second, registration reforms. As recommended in Chapter 4, the present copyright registration requirements, practices, and policies should be simplified and ameliorated through legislation accompanied by administrative action. All of the reforms suggested would have an effect in inducing people who are not now registering to do so, but probably the most important are the short form application for registration and the expansion of information in the copyright online database.

Third, five-year review. As recommended at the end of Chapter 4, the legislation should mandate a continuing study of its effects on registration and deposit and a five-year analysis and report to Congress.

Fourth, reports of litigation. Section 508 of the current law, under which the courts are called upon to supply information about pending litigation and the results of copyright lawsuits, has been a failure. It was suggested during the ACCORD discussions that the obligation to keep the Copyright Office and the public informed of copyright litigation be placed on the litigants themselves, and that registration would be induced by adding this information to the Office's online database. We agree, and recommend that you consider proposing a revision of section 508 for this purpose.

Fifth, enhanced remedies. As outlined in Chapter 3, ACCORD devoted considerable time in plenary and subcommittee sessions to a proposal for "enhanced remedies": to induce registrations by creating new remedies for copyright infringements which are not available to anyone under the copyright statute today, and which, in the discretion of the court, could be granted if the work has been registered. A number of possible "enhanced remedies" were suggested; the ones we liked best were, first, recompensing some of the plaintiff's costs of litigation (costs of duplicating the court record, costs of accounting, expert witnesses, etc.), and, second, raising the maximum amount recoverable as statutory damages for unwillful infringement from \$20,000 to \$100,000. Several members of the committee favored this approach, and expressed their disappointment that it seemed to have dropped out of the discussions. We agree that the "enhanced remedies" proposal has merit, and we recommend that you add it to your list of recommendations.

Dr. James H. Billington

5

September 15, 1993

Finally, we cannot close this letter without paying tribute to the staff of the committee and the members themselves. In the many years that the two of us have spent in this field, we have never seen such dedicated and selfless work. It represents public service, professional and voluntary, at its very best.

Yours sincerely,


Barbara Ringer


Robert Wedgeworth





The Library of Congress

ADVISORY COMMITTEE ON COPYRIGHT REGISTRATION AND DEPOSIT

ACCORD

REPORT OF THE CO-CHAIRS

ROBERT WEDGEWORTH

BARBARA RINGER

SEPTEMBER 1993



Prefatory Note

The attached report is the work of the co-chairs of ACCORD, Robert Wedgeworth and Barbara Ringer as informed by the work of the full committee. It was not written by the committee. Our report was circulated in draft form to all the members of ACCORD for comments and suggestions and, we received some very helpful corrections of typos and syntax and stylistic improvements, many of which we have incorporated. In addition, where the suggestions corrected an error or an overstatement, supplied an omission, or helped to clarify a point, we have done some rewriting. In other cases, however, where a suggestion, if accepted, would have destroyed the balance and objectivity that was and continues to be our aim, it was omitted.

This report is that of the co-chairs, as we saw and heard the deliberations of ACCORD during its first phase. We and we alone take full responsibility for its contents.

The Advisory Committee on Copyright Registration and Deposit (ACCORD) was established in May 1993 by Dr. James H. Billington, Librarian of Congress, to advise him concerning aspects of the proposed Copyright Reform Act of 1993, (H.R. 897 and S. 373). That legislation, introduced in Congress in February 1993, proposes changes in the current copyright law that raise questions about copyright policy and the relationship between the needs of the Library, authors and copyright owners, users of copyrighted works, and the public.

In particular, the legislation proposes the elimination of two provisions in the copyright law (sections 411(a) and 412) which have an impact upon the current copyright registration system. It has been argued that their elimination would entail risks to the Library's collections, which depend on copyright registrations and deposits to a considerable extent.

Dr. Billington, in his letter of invitation to ACCORD members, asked for an analysis on five key points:

- 1) how the present system of registration, recordation and mandatory deposit affects authors and their assignees, the collections of the Library of Congress and exchange libraries, the judicial system, and the public;
- 2) how the system can assure that the Library continues to have access to the widest variety of published expressions of American culture and scholarship;
- 3) the appropriate mix of registration incentives to encourage registration deposit for the benefit of the Library's collections, with respect to both published and unpublished works, at the same or greater levels than assured by existing copyright law;
- 4) the nature of the public need for a comprehensive public record of copyright claims and their ownership;
- 5) an assessment of the tensions and an identification of the public interests in different levels of legal examination as a part of copyright registration.²

Dr. Billington, after consultation with the relevant congressional committees, agreed to provide recommendations to Congress, based on the ACCORD discussions during its first phase, by mid-September, 1993. It was agreed that the Librarian's recommendations should focus initially upon those issues addressed by the proposed legislation that could have a direct impact on copyright registration and the Library of Congress' collections: the proposed elimination of the statutory provisions found in sections 411(a) and 412 of the copyright law. Other issues raised by the legislation—the provisions with regard to recordation (sec. 101 of the bill), the presidential appointment of the Register of Copyrights (sec. 103), and the reorganization of the Copyright Royalty Tribunal (title II)³—are not dealt with in our report, although some members

² Letter of Dr. James H. Billington, Librarian of Congress to ACCORD members, May 5, 1993.

³ On August 3, 1993 legislation was introduced (H.R. 2840, S. 1346, Copyright Royalty Tribunal Reform Act of 1993) comprising an amended version of the Title II provisions in the Copyright Reform Act. The House Subcommittee on Intellectual Property and Judicial Administration marked up and favorably reported the bill from the subcommittee on August 5, 1993.

of ACCORD have expressed views on these provisions in other contexts.⁴

The other, broader, questions raised by Dr. Billington's letter, which are not directly related to the Copyright Reform bill, will be the subject of further study and will be presented to Congress in a report to be issued in March 1994 (so-called Phase II of ACCORD's work).

Copyright Reform Act of 1993

The Copyright Reform Act of 1993 was introduced in the House and Senate on February 16, 1993. The House Subcommittee on Intellectual Property and Judicial Administration held hearings on March 3 and 4, 1993.

The bill has four key provisions:

(1) Sec. 101 is intended to allow the perfecting of security interests by recording documents either in the appropriate state office or in the Copyright Office. The decisions in *National Peregrine, Inc. v. Capitol Federal Savings and Loan*, 116 Bankr. 194 (Bank. C.D. Cal. 1990) and *Official Unsecured Creditor's Committee v. Zenith Productions, Ltd. (In re AEG Acquisitions Corp.)*, 127 Bankr. 34 (Bank, C.D. Cal. 1991) held that state Uniform Commercial Code statutes for perfecting security interests in copyrights were preempted by sections 205 and 301 of the Copyright Act.

(2) Sec. 102 would repeal sections 411(a) and 412 of the copyright law.

Section 411(a) requires that registration must be made (or rejected) by the Copyright Office before an infringement action can be brought. An exception is made for all Berne Convention works other than those originating in the United States.

Section 412 provides that no award of statutory damages or of attorney's fees can

be made in an infringement action (with certain exceptions) unless, if the work is unpublished, it was registered before the infringement began or, if the work is published, registration was made within three months of first publication.

(3) Sec. 103 would provide for the Register of Copyrights to be appointed by the President rather than, as now, by the Librarian of Congress (who is appointed by the President).

(4) Title II of the bill would eliminate the Copyright Royalty Tribunal and move its functions into the Copyright Office, to be performed by ad hoc arbitration panels.

Phase I Report of ACCORD

The purpose of this report is to provide the Librarian of Congress with information and recommendations concerning those provisions in the bill that may have the most direct impact on the Library of Congress: the elimination of sections 411(a) and 412. Two policy considerations emerged from the decision to limit ACCORD's Phase I deliberations to these issues: first, the effect that eliminating sections 411(a) and 412 may have upon the Library of Congress's collections and future acquisitions policy; and, second, any copyright registration implications of repealing the two provisions, including the effect on the operations of the Copyright Office (a department of the Library of Congress), and any consequences for copyright owners and copyright law generally.

For some ACCORD members it was difficult to separate the rationale for copyright registration from the interests of the Library's collection development because of the historic link between the two and the copyright system's assistance in developing a national library unlike any other in the world. Others argued that the issues of Library acquisitions policy and those of copyright registration policy are distinct and should be considered separately. Whether copyright registration is, or should be, a fundamental method used for building the collections of the Library of Congress was discussed at length.

ACCORD reached a strong consensus on the principles that Library acquisitions policy should not drive copyright registration policy and, at the

⁴ During the deliberations of ACCORD there was agreement from many members that the relationship between recordation and registration could be strengthened to induce registrations and that the provisions in section 101 of the Copyright Reform Act should be considered in this context. See also Working Paper No. 8, which discusses the views of one member of ACCORD on the questions raised by the provisions in the draft bill relating to recordation and the perfecting of security interests.

same time that it was important for the voluntary copyright registration and deposit system to continue. There was general agreement that the present system can serve a significant dual purpose — to provide extensive and reliable public records of use to copyright owners and users, and to build the collections of the Library now and in the future.

Preserving the scope and integrity of the collections of the Library of Congress has necessarily been one of ACCORD's fundamental missions. Concern for the Library and its future were uppermost in the minds of the Librarian and the congressional committees, and they in turn made it clear that addressing this concern should be the priority of ACCORD. The Library of Congress serves as a national library for the benefit of Congress, authors, scholars, the library community, and the general public. It must be strengthened, if possible. It cannot be weakened by any proposed legislation.

The ACCORD deliberations on Library acquisitions focused on the implications of deleting sections 411(a) and 412. Some members predicted that copyright registrations would decline if the provisions were simply repealed. Others suggested that the elimination of these provisions would not significantly affect copyright deposits, especially in the classes of works most valuable to the Library. Given the time constraints on ACCORD during Phase I, no empirical method capable of testing either prediction could be developed, and no valid conclusions could be reached on the basis of *a priori* reasoning. ACCORD therefore adopted the only course open to it: to consider the various suggestions put forward to safeguard or strengthen the collections of the Library, and to offer proposals based on them.

The proposals contained in Chapter 4 are intended to enhance incentives for voluntary copyright registration and deposit, to improve the operation of the current system, and to insure that the deposit of material in the Library of Congress remains at current levels or increases. The proposals would encourage copyright registrations through modifications in current copyright law, including major changes in the current mandatory deposit requirements, and statutory and administrative recommendations to make registration and deposit simpler, less burdensome, and more attractive. A crucial component of this plan, which for Library acquisitions purposes complements voluntary copyright registration, is the mandatory deposit provi-

sion of section 407. ACCORD believes that a mandatory deposit system, if significantly strengthened, would create an effective mechanism for Library acquisitions of published or "publicly disseminated" materials. For unpublished materials alternative inducements would have to be found, such as the improvements proposed in Chapter 4 to the copyright registration system.

The second major policy consideration is the impact of the proposed repeal of sections 411(a) and 412 on copyright owners, the copyright registration system, and the Copyright Office.⁵ ACCORD held extensive discussions on these questions, but did not achieve consensus, especially on section 412.

Apart from the need to develop the collections of the Library, there are strong reasons to encourage copyright registration. As the communications revolution gathers momentum and the information superhighway is in its early stages, a comprehensive and reliable copyright database, available freely to the general public, is an enormous asset for a number of purposes. These matters were addressed during the ACCORD deliberations and by the individual authors of the working papers prepared for ACCORD discussions. There was consensus among ACCORD members that information obtained through registration—information bearing on authorship, dates of creation and publication, the ownership and duration of copyright, and the like—can be extremely valuable not only for business transactions such as transferring rights, and obtaining permissions or licenses, but also for resolving legal disputes, providing biographical information, and so forth.

The 1989 United States adherence to the Berne Convention was the latest step toward a system of copyright free from formalities, providing authors with rights without the need to register, affix notice, or, under a 1992 amendment, to file renewals. With millions of works now protected by copyright without the need for information in a notice on copies or phonorecords, and works proliferating in digital and other electronic formats, the post-Berne environment requires a system readily informing the public by identifying these works and their copy-

⁵ A documentary legislative history of the current copyright registration and deposit sections, including sections 411(a) and 412, has been completed through 1965 and was distributed to ACCORD members.

right status. The Copyright Office catalog contains over 25 million entries dating back to 1870. Information since 1978 is now available on the Internet. Authors and users of copyrighted works depend on

this database to use and license works, and to create new works, thus fulfilling the constitutional mandate of copyright to “promote the progress of Science and useful Arts”⁶

⁶ U.S. CONST. art. I, sec. 8, cl. 8.



ACCORD's Methodology

The Phase I deliberations of ACCORD focused on the implications of repealing sections 411(a) and 412: what the effect of outright repeal might be on Library acquisitions and other copyright policy, and whether alternatives to induce registration and deposit could be found. To provide the Librarian with information necessary to respond to Congress, and to assist Congress with its deliberations, a number of background legal and policy working papers were prepared by ACCORD members, staff, and others assisting ACCORD.⁷

Several hard decisions about methodology had to be made at the outset. Lack of time and resources during Phase I foreclosed us from significant but difficult types of studies. These include: cost-benefit analyses of various Library of Congress and Copyright Office operations; surveys of the motivations, experiences, and problems of present and potential applicants (examining questions such as why authors and other copyright owners register, and what changes they would make in their practices if sections 411(a) and 412 are repealed or changed, etc.); and statistical surveys about present and future Library of Congress acquisitions. During Phase II we hope that we may be able to undertake some of these inquiries.

In attempting to suggest alternative incentives to register, ACCORD adopted several hypotheses concerning benefits afforded by registration and ways to encourage additional voluntary registrations. As discussed in Part I of this report, the primary hypothesis is that a system of voluntary registration benefits authors and copyright owners and should be encouraged; that a reliable, publicly available national copyright database is important in facilitating business, legal and personal transactions; and that inducing registration, especially for unpublished works not subject to mandatory deposit and "special materials" not collected by other libraries, will strengthen the collections of the Library of Congress. A second hypothesis is that mandatory deposit, when substantially broadened and strengthened, can make a significant contribution to the Library's acquisition of published materials without any loss of effective copyright protection⁸ for authors and other copyright owners.

⁷ The Working Papers of ACCORD, numbers 1 through 20, together with an Index to these working papers, are contained in the Appendix to this report. Some of these papers express views on particular issues, and in those cases the opinions are those of the authors of the papers alone, and do not necessarily represent the views of ACCORD, its members, co-chairs, or staff.

⁸ One member stressed that proprietors of some works, particularly those disseminated in a form easily copied, have indicated concerns about mandatory deposit and the circumstances under which the Library makes these works available. These concerns range from Library security to the possibility of adverse effects on the market for a work if there would be widespread unauthorized use of deposit copies. The member noted that the negotiations recently concluded between the Library and private sector representatives on experimental agreements for deposit of works in CD-ROM format suggest that it may be possible to provide appropriate safeguards for such works, thereby allaying the owners' concerns and achieving the Library's goals.

Draft Work Programs

Initially, in an effort to organize the work of ACCORD, four major draft work programs were proposed.⁹ These broad outlines included work to be conducted in both phases of the ACCORD deliberations.

Draft Work Program A provided an outline of the copyright registration, deposit and recordation provisions generally. Beginning with the historical background of copyright registration, deposit and recordation in the United States, the Work Program proposed study of: the foreign experience with registration and deposit systems; the value of registration for all legal and business purposes; the relationship and fairness of the current system to authors, copyright owners, the Library, and users of copyrighted works; and a compilation of statistical information on registration and deposit.

Draft Work Program B focused on registration and deposit as prerequisites to recovery of statutory damages and attorney's fees. This Work Program outlined the study of section 412, concentrating on its history, operation, and fairness to authors, copyright owners and users.

Draft Work Program C focused on the mandatory deposit system of the Library, including a review of the history of section 407, and the regulatory and administrative provisions implementing it; its scope and operation; its cost-effectiveness; its problems and limitations; means of strengthening the current system to induce greater voluntary compliance; and a plan to prepare a detailed statistical survey of the current system.

Draft Work Program D proposed to produce possible alternative incentives for registration and deposit—described as “the bottom line” of the first phase of ACCORD's mandate. The Work Program suggested review of the current sections 411(a) and 412; the impact, if any, of their elimination on the Library; evaluation of the arguments for changing the present examination and registration practices; consideration of possible amendments to the existing inducements to registration and deposit; and consideration of possible new inducements.

⁹ See Appendix, draft work programs A through D.

¹⁰ Summary minutes of each of the meetings were prepared by the staff of ACCORD and are contained in the Appendix to this report.

Phase I: Deliberations of ACCORD

After its organization in late May 1993, it was agreed that to complete its Phase I deliberations, ACCORD would meet once a month, in two-day sessions, in June, July, August and September.¹⁰

June 10-11, 1993: Meeting of ACCORD

The first meeting of ACCORD began with preliminary remarks from Dr. James Billington, Librarian of Congress outlining the mission of ACCORD—to sustain the “record of America's culture” found in the Library of Congress, and to consider new incentives to copyright registration and deposit.

Co-chairs Ringer and Wedgeworth described the work of the Committee's two-phase effort. Phase I would address the immediate target: to examine sections 411 and 412 of the copyright law and alternative incentives to registration. The aim was to enable the Librarian to submit his preliminary report to Congress by mid-September, 1993. Phase II would address broader issues and would require a report around March, 1994.

ACCORD discussed its proposed work schedule, including organizational and procedural matters (agreeing that all of its meetings would be open to the public), and general administrative issues, such as its budget and staffing. The Committee also received a demonstration from Library staff on the special collections of the Library, including photographs, maps, music, and motion pictures.

The members of the committee were presented with an overview of the Copyright Reform Act of 1993, H.R. 897 and its companion bill, S. 373, together with a summary and analysis of the current provisions in the Copyright Act relevant to ACCORD's deliberations, primarily sections 407, 411(a) and 412. Discussions then began on mandatory deposit and the copyright registration issues. On mandatory deposit, the discussion focused on the system's present and potential benefits not only to the Library of Congress but also to other libraries that rely on the collections of the Library as a library of “last resort.”

The copyright registration discussions included a look at current registration practices, problems, and current incentives to registration, as well as an historical perspective on registration and deposit in the United States before and after the Su-

preme Court's decision in *Washingtonian Publishing Co. v. Pearson*.¹¹ There was also a summary of the legislative history of the general revision of the 1909 copyright statute, leading up to the 1976 Act and the legislation implementing U.S. adherence to the Berne Convention in 1989.

The Draft Work Programs (A through D) were discussed. A proposal to divide the panel into four working groups, each assigned one of the Draft Work Programs, was rejected in favor of working through each of the programs in the plenary sessions.

Various ACCORD members were commissioned to prepare draft working papers on key issues. Two groups were assigned to prepare papers on section 412 (registration and deposit as prerequisites to recovery of statutory damages and attorney's fees); one group was to write a paper on the merits of the current section 412 (Working Papers No. 4(a) and 4(b)) and the other was to prepare a paper on the reasons why section 412 should be repealed (Working Paper No. 3). Another member was charged with preparing a paper on section 411(a), registration as a prerequisite to the commencement of an infringement action (Working Paper No. 2). Finally, a third group was asked to prepare a paper on section 407, mandatory deposit for the Library of Congress (Working Paper No. 1). Several other materials were requested for the July meeting, to be prepared by members of ACCORD, its staff or other assistants.

July 12-13, 1993: Meeting of ACCORD

The July meeting focused on the presentation of documents prepared by ACCORD members and staff. Nine working papers in all were prepared for the July meeting, in addition to the minutes of the June meeting, and the first section of a documentary legislative history of the copyright registration and deposit provisions. All working papers were dated, numbered and labeled as draft documents of ACCORD (with the possibility that later revisions would be prepared). They were distributed to ACCORD members and appropriate congressional

staff, and were made available to the general public. Co-chair Ringer introduced her legislative history of copyright registration and deposit, briefly summarizing the historic background in England and the United States and reproducing the relevant parts of various studies and hearings, up to 1965, that led to the registration and deposit provisions in the 1976 Act. ACCORD then discussed the various theories for the development of our registration/deposit system in Anglo-American copyright law.

The copyright and deposit systems in various foreign countries (Working Paper No. 7), were then discussed. These included deposit laws, with penalties for noncompliance, separate from copyright laws. There was a preliminary consideration of mandatory deposit and Working Paper No. 1, and the committee agreed that there should be further discussion and study on this subject. A request was made for a working paper for the August meeting (Working Paper No. 11).

The cases for and against section 411(a), as laid out in Working Paper No. 2, were taken up next. The paper summarized the history of the current provision; the practical implications of the connection between the requirement to register and filing a lawsuit; and the impact of section 411(a) on the Library, the courts, and the interests of authors, copyright owners, and users.

ACCORD then debated the cases for and against section 412, on the basis of Working Papers No. 3 and 4(a) and 4(b). The committee reviewed current practices, and considered how the provisions or their elimination could affect the ability of authors and copyright owners and users to protect and enforce their rights. It also considered the relation of section 412 to inducing copyright registrations and deposits and maintaining the collections of the Library of Congress.

The next topic was alternative incentives for copyright registration and deposit, with Working Paper No. 9 as the focus. That paper was divided into three sections: first, an enumeration of current statutory inducements which could be strengthened; second, new inducements; and third, options for amending the existing sections 411(a) and 412. The discussion grouped the incentives into categories, such as: fee-based or litigation-based incentives; incentives based on analogies from other laws, such as patent and trademark law; incentives providing additional rights for registered works (extension of the term of copyright, for example); and incentives

¹¹ 306 U.S. 30 (1939). See also, Working Paper No. 17 for an analysis of the case, and comments and copyright registration practices after this seminal decision.

based on changes or expansions in current administrative practices, such as alternative deposits, use of identifying material, and group registrations.

Several additional working papers were prepared following these discussions, including: Working Papers No. 5, 5a and 5b (federal statutes providing attorney's fees and the awarding of attorney's fees under the current copyright statute); Working Paper No. 6 (awards of infringer's profits under section 504); Working Paper No. 10 (court uses of copyright registration information); Working Paper No. 13 (practices of the U.S. Customs Service and the role of copyright registration); Working Paper No. 14 (awards of statutory damages under section 504); Working Paper No. 15 (tax law applicable to deposits in the Library of Congress); and Working Paper No. 18 (statutory damages and attorney's fees awards under the current copyright law).

ACCORD members were also given a tour of the Copyright Office's registration collections located in Landover, Maryland, and a briefing on their operations.

*August 16-17, 1993: Meeting of ACCORD*¹²

The committee first took up the issue of mandatory deposit. Three working papers were presented on the subject of mandatory deposit. First, a group presented its paper on mandatory deposit and its benefit to the Library and the public (Working Paper No. 1). Next, a paper was presented on the legal, constitutional and public policy questions raised by a mandatory deposit system (Working Paper No. 12). Finally a paper was presented on the constitutional basis for mandatory deposit under present law and methods to improve the current system for the benefit of the Library's collections (Working Paper No. 11 and separate comments on this paper contained in Working Paper No. 11(a)).

The current practices of mandatory deposit were examined, and there was an analysis of the legal and administrative limitations of the current system and the domestic and foreign policy implications of a mandatory deposit system. Sugges-

tions were offered for improving and strengthening the legal and practical applications of the system. There was a general consensus that, if substantially improved, the current mandatory deposit system would help to strengthen the collections of the Library of Congress. Members expressed an interest in proposals to redraft the current provisions of section 407.

ACCORD continued the July discussion on alternative incentives to registration, also returning to a debate concerning the current provisions of section 412. Between the extremes of repealing and retaining the section there were some proposals aimed at keeping section 412 but ameliorating the impact, and others aimed at repealing the provision but inducing voluntary copyright registrations.

The deliberations returned to some of the incentives proposed in Working Paper No. 9, with additional suggestions. Among the items considered were fee-based and litigation based incentives, changes in current administrative practices governing registration, and copyright recordation practices and incentives. ACCORD also discussed the merits of strengthening the national public database of copyright information through registration and deposit.

Finally, the committee reviewed its remaining work schedule and prepared a proposal and schedule to complete its Phase I report for submission to the Librarian of Congress.

September 1-2, 1993: Meeting of ACCORD

The committee met to discuss the Phase I draft report of ACCORD. The draft recommendations of ACCORD were considered — focusing on the proposals to strengthen the current system of mandatory deposit, and to simplify and strengthen the copyright registration system. The final work schedule for completion of the report and presentation to Dr. Billington was agreed to. In addition, ACCORD discussed its planned work schedule for the Phase II deliberations.

Phase II: Future Work Program of ACCORD

In the next stage of its work ACCORD will address the broad policy questions raised by Dr. Billington in his early mandate: how the present system of registration, recordation and mandatory deposit affects authors and other copyright owners,

¹² After the July meeting of ACCORD a separate subcommittee was established to consider litigation-based incentives to registration, focusing on the awarding of "enhanced" remedies for registered works. See Working Papers No. 16 and 16(a).

the collections of the Library of Congress (and other libraries), the judicial system, and the public; and how that system may be improved. Some of the considerations include: access by the Library to the widest variety of materials while fully preserving

the copyright protection in those materials; the interests of authors, copyright owners, and users in future Library acquisitions; and improving the Library's comprehensive public record of copyright claims and ownership.





The Work of ACCORD —Issues, Arguments, Proposals

Chapter 3

In this Chapter we are seeking to identify the main issues that occupied ACCORD during its first phase, to outline the principal arguments that were made concerning them — during the meetings and in written comments — and to summarize the various proposals put forward by members and others for inducing deposit and registration. For this purpose we have broken the subject into three parts:

- First**, a review of sections 411(a) and 412, the issues they raise and the arguments made concerning them;
- Second**, a review of the present mandatory deposit and voluntary registration/deposit provisions, their value and problems, the arguments concerning them, and proposals for change; and
- Third**, a listing and brief summary of various fee-based, litigation-based, and other proposals for alternative inducements to registration and deposit.

A. Section 411(a): Present Inducements to Registration and Deposit: Registration as a Condition of Infringement Suit

1. History and Purpose of the Provision

The express requirement that registration be made for a work before the copyright owner may bring an infringement suit entered the U.S. copyright law in 1909. The requirement was retained in the 1976 revisions with the addition of one exception: if application for registration had been made and refused, suit could be brought as long as the Register was notified and given the opportunity to join on the issue of registrability. Two other exceptions were added later, notably a 1988 amendment exempting non-U.S. Berne Convention works from the requirement.

From the beginning there have been dual purposes behind section 411(a), though their relative importance has changed over the years with the easing and repeal of other copyright formalities in U.S. law and the broadening of the subject matter of copyright. First is the gatekeeper function of registration: screening of the application and deposit by the Copyright Office is intended to keep invalid copyright claims out of court and to provide a certified record and a solid basis for the ordering of proof. Second, section 411(a) is intended as an incentive to registration and deposit: although

there is no requirement for registration to be made until the eve of suit, it has been argued that some copyright owners are induced by section 411(a) to register in anticipation that, since they may need the certificate in a hurry if infringement occurs, they might as well file an application while the copies are handy and the facts are fresh in their minds.

2. *Arguments for Repeal of Section 411(a):*

- a) With the repeal of mandatory formalities and the expansion of copyrightable subject matter, the screening function has lost much of its validity.
- b) The inducement-to-register argument is undermined by statistics comparing the number of suits filed (less than 2,000 in 1991) as against the number of registrations in the same period (more than 600,000 in 1991). Few will be induced to register in anticipation of litigation, since registration can be made at any time up to filing suit.
- c) Review of judicial opinions in infringement cases suggests that courts largely make independent evaluations of issues of fact and copyright validity rather than relying on certificates of registration.
- d) The requirement can result in harm and injustice to copyright owners by effectively preventing or unduly delaying injunctive relief, by requiring expensive and unproductive paperwork where many copyrights are involved in a suit, and by offering defendants an opportunity for dilatory tactics.
- e) The "two-tier" scheme of section 411(a), under which non-U.S. Berne works need not be registered while other works (mainly of U.S. origin) must be, is demoralizing and unfair to U.S. copyright owners, and may put them at a competitive disadvantage.

3. *Arguments for retention of section 411(a):*

- a) The requirement provides a mechanism by which copyright claims involved in litigation are first exposed to specialized, ex-

pert scrutiny, aiding claimants and the courts by clarifying the information on certificates and screening out unfounded claims to copyright.

- b) Section 411(a) provides at least some incentive to registration, thus contributing to the national copyright database and to the collections of the Library of Congress.
- c) The statistics comparing infringement cases to total registrations are not all that revealing, since an indeterminate number of the registrations may have been induced by a desire to be prepared in case there is a threat of infringement, even if there is no specific contemplation of suit at the time of registration.
- d) There have been expressions from some members of the judiciary favoring retention of the requirement as helpful to the courts: the better the Copyright Office records, the better the decisions will be.
- e) Though only a small percentage of registrations end up in court, they are the most important cases. Together the records of registration and ownership (section 205) give the courts a needed starting-point.

B. Section 412: Present Inducements to Registration and Deposit: Registration as a Condition of Recovery of Statutory Damages and Attorney's Fees

1. History and purpose of the provision

Before 1909, under a very onerous scheme of formalities, registration was a mandatory precondition of copyright protection in the United States. The 1909 Act changed and liberalized the formalities system to some extent, but the provision on registration and deposit was obscurely worded, and was not definitively interpreted for thirty years. Between 1909 and 1939 there were many who believed that the statute's requirement that deposit (and registration) be made "promptly" after publication was mandatory rather than hortatory, though no one knew what "promptly" meant.

As interpreted by the Supreme Court in the 1939 *Washingtonian* case, registration and deposit for the Library of Congress were really optional during

the first 28-year copyright term: they were mandatory only if the copyright owner wanted to bring an infringement suit, if the Register of Copyrights made a formal demand (in which case failure to comply could result in forfeiture of copyright), or if renewal of copyright for a second 28-year term was sought. However, the decision did not result in any great changes in registration practice or the statistics of registrations. After 1939 there was uneasiness, inertia, and traditional lawyer's conservatism; people kept on registering and depositing, and there seemed to be a reluctance to accept the Supreme Court's decision at face value.

During the ten years between 1955 and 1965 the Copyright Office, under a congressional mandate, undertook the development and drafting of a bill for the general revision of the copyright act of 1909. There was early acceptance of the general principle that copyright registration was extremely valuable and should be retained. At the same time it was also generally agreed that, except where necessary to correct omissions or errors in the copyright notice, registration should be made voluntary but should be strongly induced by withholding certain remedies and evidentiary benefits for infringement of works not registered promptly.

For a time in the early 1960's the issue of what remedies to withhold where infringement preceded registration became extremely contentious. Finally, by the time the first of many general revision bills was introduced in Congress in 1965, there was general agreement as to what the inducements to registration should be, and the issue disappeared from public copyright debates leading to enactment of the 1976 general revision statute. In all of the revision bills after 1965, and indeed in all of the proposed revisions of the Act of 1976, the provision that became section 412 remained essentially unchanged: the remedies of statutory damages and attorney's fees were withheld from unpublished works infringed while unregistered; the same was true for published works unless the work had been registered during a three-month grace period following publication.

Throughout the general revision period the purpose mentioned as underlying section 412 was the inducement to register and deposit. The 1988 bill to implement U.S. adherence to the Berne Convention assumed that the requirements of section 412 are compatible with Berne's prohibition against establishing or maintaining formalities as conditions

of copyright protection. No changes in 412 were proposed, and the Senate report (which favored outright repeal of section 411(a) rather than the act's ultimate adoption of a two-tier system exempting non-U.S. Berne works) suggested that its solution would have no effect on registration and deposit because section 412 would still be there to induce them.

At any event, by sweeping away the remaining formalities of the U.S. copyright law — notably the requirement of notice as a condition of protection for published works—the 1988 Berne Implementation Act brought nearly everything in the world that can be considered an "original work of authorship" (and that had not already fallen into the public domain) automatically under U.S. copyright protection. This sweeping change, some argue, made registration itself more important, and gave section 412 a new or increased significance in inducing registration as a means of marking off areas of copyrighted works where statutory damages and attorney's fees may be obtained.

2. *Arguments for repeal of section 412:*

- a) The remedies of statutory damages and attorney's fees are essential to protect effectively the rights of individual authors and small individual and corporate copyright owners. Infringement has become much more common, and litigation has become much more complex and expensive in recent years. The inability of plaintiffs to recover at least some of the legal costs of bringing suit, and something more than whatever actual damages and profits they can prove, simply puts them out of court. This means that deliberate infringers can continue their activities with impunity, that other infringers are encouraged rather than deterred, and that settlements of litigation become more difficult and unfair.
- b) Unlike large corporate copyright owners the great majority of individual authors and small copyright owners know little or nothing of copyright requirements, including registration and section 412. When an unregistered work is infringed the author or owner frequently discovers

for the first time that, even if victorious, he or she must bear all costs of legal representation; and, for there to be any monetary recovery at all, the owner must offer proof of actual damages and the defendant's additional profits attributable to the infringement. This can be an extremely expensive and difficult if not impossible task, and in the end the amounts that can be proven are often minimal. The costs of pursuing the action may well exceed the amounts recovered in this situation, and be more than the individual can afford. Even if the author or owner wishes to pursue the infringement claim, there may be real difficulty in finding an attorney to take the case. Section 412 can be a trap for the unwary.

- c) Even if they know of the requirements of section 412, many authors and small copyright owners do not have the time, resources, or staff to register within the very short grace period provided. This is especially true of authors of numerous separate works, such as photographers, graphic artists, poets, journalists, and the like. For them the burdens of paperwork and multiple registration fees as a practical matter preclude registrations for large numbers of works, most of which will never be infringed; the author or other small copyright owner is thus effectively deprived of protection when infringement does occur.
- d) Plaintiffs must win their case before any possibility of statutory damages and attorney's fees arises, and the courts can generally be relied upon to prevent unfounded claims from succeeding. Nuisance suits can also be deterred in appropriate cases by granting attorney's fees to the winning defendant or imposing sanctions under Rule 11.
- e) There is no empirical evidence to show whether section 412 is an inducement to registration and deposit, but it should be noted that before section 412 was enacted in 1976 copious registrations were made without the threat of withholding statutory damages, attorney's fees, or any other

remedies. If inducements are needed in the absence of section 412, they should take the form of positive benefits rather than the negative penalties of the present law.

- f) Should section 412 remain in the statute, there is a danger of retaliation by other countries where U.S. works are currently being pirated. Another country could, for example, make registration a condition of criminal sanctions against infringement of U.S. works, and such sanctions are frequently the primary weapon in a given country against piracy.

3. Arguments for retention of section 412:

- a) The legislative history of section 412 shows that the principle underlying it — to induce registration and deposit for the Library of Congress by withholding certain remedies for infringement of unregistered works — has gained wide acceptance since the mid-1960's; it was enacted without controversy in 1976 and, again without controversy, was retained without change in 1988.
- b) Section 412 is fulfilling the purpose for which it was intended as a powerful working inducement to registration and deposit, which are in large part responsible for the Library's collections and copyright databases. It has proven its reasonableness and legitimacy as part of the American copyright system.
- c) Repeal of section 412 would pose risks to the collections of the Library of Congress and the Copyright Office's public record of registered works by making them dependent on unproven alternative incentives to registration and deposit.
- d) The acts of 1976 and 1988 have transformed the American copyright system into one virtually free of formalities, with the result that the number of works now protected by statutory copyright is virtually incalculable. However, without notice and registration, it is difficult if not impossible for publishers, historians, bi-

ographers, journalists, and other authors and users to determine basic copyright facts about a work. The function of section 412 in our copyright system has thus achieved a new dimension. By inducing registration it provides scholarly users and other authors and publishers with essential information not otherwise available; and, by withholding statutory damages and attorney's fees for unregistered works, it shields these users from some of the risks of litigation.

- e) Repeal of section 412 would lead to a flood of infringement claims induced by the greater availability of statutory damages and attorney's fees. In some cases the motives behind the actions would be to force monetary settlements involving works to which the creators never previously ascribed any value, and in others the motives would be to use the copyright law as a weapon to suppress information for one reason or another.
- f) If section 412 is repealed, fear of litigation could lead scholars and other authors to avoid using quotations or excerpts from copyrighted materials, undermining the fair use doctrine and having a chilling effect on the free exchange of information and opinions.

C. Existing Deposit and Registration Provisions: Mandatory Deposit

1. History and purpose of section 407

The 1976 general revision statute went part of the way in softening the formal requirements of the old law, especially with respect to notice and manufacture; as under the Supreme Court's *Washingtonian* decision, registration and deposit were made largely voluntary but were also strongly induced, especially by section 412. Despite this inducement there was genuine concern in 1976 about the potential effect of the statutory changes on the collections of the Library of Congress. Originally section 407 was intended to operate as a back-up to voluntary registration and deposit, to provide the Library with a way to compensate for any losses to its collections under the new law.

Unlike mandatory deposit under the 1909 statute, which was tied to registration and provided for loss of copyright as a sanction, section 407 was modelled on *depôt legal* systems in effect in the great majority of other countries, and on which their national library collections depend. The provision was intended to complement voluntary copyright registration by giving the Library a way to obtain material needed for the collections and otherwise unobtainable under a voluntary copyright registration system. A complementary provision under section 408 was intended to provide further inducements to copyright registration and deposit by allowing section 407 deposits to be used for voluntary registration under section 408.

Although section 407 expressly declared that its requirements are not a condition of copyright protection, the 1976 act preserved strong ties between mandatory deposit under section 407 and voluntary registration and deposit under section 408. Two of these links were particularly important: first, the obligation of mandatory deposit was made to rest upon U.S. copyright owners or rights holders, and, second, the requirement applied only to works published with copyright notice in the United States.

The constitutionality of section 407, as it existed between 1978 and 1988, was litigated in 1985 in *Ladd v. Law and Technology Press*. The Ninth Circuit Court of Appeals upheld the constitutionality of section 407 in the face of three challenges: that the deposit requirement was not "necessary and proper"; that it constituted a taking of private property for public use without just compensation; and, that it burdened material protected by the guarantees of freedom of speech and expression.

In the 1988 Berne Implementation Act, Congress repealed the requirement that, as a condition of copyright protection, published works carry a copyright notice, and added a consequential amendment of section 407: the requirement of mandatory deposit, formerly limited to those works published in the United States with notice of copyright, was broadened to cover a copyrighted "work published in the United States"—that is, a work published with or without a copyright notice.

There has been some uneasiness that the sweeping change in 1988 weakens the force of the *Ladd* decision upholding the constitutionality of section 407, because the decision gave some significance to the copyright owner's act in placing a copy-

right notice on works subject to mandatory deposit, and notice is no longer a condition of copyright. However, members of ACCORD do not appear to share this concern: the collections of the Library clearly "promote the progress of science and useful arts," and the *quid pro quo* for mandatory deposit is found in the Congressional grant of a system copyright protection and, potentially, in the establishment and maintenance of a national database of information about the material deposited. Some non-constitutional questions remain concerning the issue of inducing owners to abandon copyright protection as an alternative to complying with the mandatory deposit requirement, and the treatment of non-U.S. Berne Convention works under section 407. These problems should be given further study.

The proposals to improve and expand the effectiveness of mandatory deposit are outlined in Chapter 4 of this report, and for the most part they are self-explanatory. However, the following additional observations should be made:

First: The key to a successful mandatory system is that in general it be made to work automatically, without individual demands and negotiations. At the outset this will require the Library to establish and maintain databases, identify and contact potential depositors, and undertake an educational campaign.

Second: Mandatory deposit cannot and should not reach unpublished, undissemated works, and thus will not substitute for any inducements to register and deposit unpublished material now provided by section 412. If the Library's collections are not to be weakened, these recommendations for expanding and strengthening mandatory deposit must be coupled with recommendations for improving registration practices and procedures as outlined below.

Third: A second key to the success of a mandatory deposit system is the spirit in which it is implemented and enforced. It is important that potential depositors be made to understand their obligations as citizens and that they be approached non-coercively with understanding of their special problems and under a system of due process. However, if it becomes necessary to

enforce a formal demand, something better than the present system must be found. The possibility of allowing the Librarian to retain outside counsel and to obtain recompense for attorney's fees should be fully explored.¹³

Finally: Enormous changes are taking place in information storage and transfer; the Library of Congress collections, their users, and the Library's bibliographic and copyright records it maintains lie at the core of this revolution. Careful and imaginative planning and energetic implementation of the recommendations in this report will be essential to their success.

D. Existing Deposit and Registration Provisions: Simplification and Amelioration of Current Registration Policies and Practices

A second group of the recommendations to induce registration and deposit are summarized in detail in Chapter 4, below. They involve not so much a basic change in the operations of the registration system as the adoption of simplified procedures and a positive approach to carrying them out. ACCORD was in general agreement that legislation, regulations, or administrative action should—

- 1) Create a simple, short-form application to be used whenever possible. Many believe that this would induce individual authors who are now put off by the complicated forms to start registering their works.
- 2) Greatly expand the use of group registration and optional deposit to reduce the present burdens; induce the Copyright Office to consult more actively and frequently with present and potential registrants to hear their problems and to respond to them whenever possible.

¹³ A fourth observation, suggested by an ACCORD member, is consistent with views expressed by other members during the discussions: "The Library must continue to work together with private sector representatives in adopting appropriate safeguards in the Library for works in media more easily copied than traditional media. Proprietors of such works are concerned as to the greater possibility of widespread unauthorized use of such deposits. Agreements such as the recent experimental agreements with the Library for CD-ROM deposits may work to both allay the concerns of copyright owners and achieve the Library's goals."

- 3) Emphasize the importance of the copyright catalog and online database of copyright registrations, and work out a system whereby information about ownership, transfers, licenses, and the sources of permissions could be added to the data already available.
- 4) Make clear that good faith errors in applications will not invalidate copyright protection or constitute fraud on the Copyright Office, and that no misstatement in an application will invalidate the copyright itself.
- 5) Restore or make more widely applicable the "rule of doubt," under which uncertainties about copyrightability or registrability are resolved in the applicant's favor. Adopt an attitude of helpfulness toward applicants, leaving it to the courts to decide doubtful questions.

In this connection it is important to emphasize that nothing here is intended as a criticism of staff members of the Copyright Office or the Library of Congress, who have often been cited for their efficiency, cooperativeness, and willingness to go out of their way to share their time and expertise with applicants and members of the public. Most of the members of ACCORD are users of the Library and the Copyright Office, and their concerns are not with individual members of the staff, for whom they have the highest praise. Their concerns are with institutional and administrative policies which, they feel are inconsistent with the spirit and philosophy of the present copyright law of this country.

E. Additional Incentives to Registration and Deposit

The incentives to copyright registration and deposit on which ACCORD was able to put forward recommendations to the Librarian—those involving expanded mandatory deposit and substantial improvements in registration practices and policies—are laid out in Chapter 4 of this report. In addition, a very large number of ideas for other inducements were put forward during Phase I of the committee's work. Most were discussed in plenary sessions and in one subcommittee meeting; others were contained only in written submissions. Some ideas were passed over quickly, while others

—notably those involving litigation-based incentives or the granting of "enhanced remedies" for registered works—were given serious consideration. Some of the ideas were very imaginative, and none were either accepted or rejected outright. Many of them deserve further consideration, either as possible incentives to deposit and registration or on their own merits.

There is no space in this report to describe in detail all of the proposals and ideas that have been put forward for inducing registration and deposit, or to review the comments and criticisms directed at them. However, we have tried to divide them into categories and to list them briefly under the following headings:

- 1) Incentives based on giving greater substantive rights to registered works;
- 2) Monetary or fee-based incentives;
- 3) Incentives tied to mandatory deposit (in addition to those recommended in chapter 4);
- 4) Incentives tied to registration (in addition to those recommended in chapter 4);
- 5) Litigation-based incentives.

1) *Incentives Derived from Granting Greater Rights*

NOTE: The Berne Convention prohibits the establishment of formalities, including registration and deposit, as conditions of copyright protection. It was pointed out that some of these ideas might satisfy Berne but that others would raise problems. Aside from the suggestion in paragraph (f), which was not discussed, none of these proposals appeared to attract support from ACCORD members.

- a) *Extension of term.* Add a term of years, possibly five, to the duration of copyright in registered works.
- b) *Presumption of death.* For registered works, remove the presumption under section 302(e) as to the author's death, a presumption used in determining when copyrights expire in some cases.
- c) *Domaine public payant.* Establish an additional five-year (or other) public domain status for registered works during which income from protected uses would be

shared between the copyright owner and the government.

- d) *Prima facie presumption.* Give prima facie evidentiary effect to certificates of registration in judicial proceedings other than copyright, including probate and contract disputes.
- e) *Titles.* Give certain rights in the titles of copyrighted works that have been registered.
- f) *Software.* To encourage registration of computer software, provide for an explicit prohibition of reverse engineering of registered software if the deposit consists of the source code in its entirety, with appropriate assurances of secrecy for some limited period, such as ten years.

2) Monetary Incentives

NOTE: A number of problems were raised with respect to suggestions for inducing registrations or enhancing the Library's collections by reducing costs to the copyright owner or by paying out appropriated funds to purchase material or for other purposes. It was agreed that suggestions of this sort may be unrealistic in the present political and economic climate and, even if funding were secured in one Congress, it could be swept away in a later budget, seriously damaging the copyright system and the Library's collections. The administrative costs in identifying and purchasing material are usually much greater than the costs of the material itself; many works now acquired under the copyright law are not for sale, and as a realistic matter could never be identified for purchase. Also, experience has shown that the problems and costs of administering a registration schedule providing for differentials in the amounts of fees may outweigh the advantages in providing lower fees for certain types of registrations.

- a) *Fee-based incentives:*
 - i) Provide a lower fee for short-form registrations.
 - ii) In special cases, provide free registrations, lower fees, or rebate credits (e.g., where registration is made very promptly after publication; where the Library wants a very expensive work;

where registration is combined with deposit under the cataloging-in-publication program).

- b) *Deposit/Registration Databases.* In the online databases of mandatory deposits and voluntary registrations provided by the Copyright Office and the Library, include information about permissions, licensing, and pricing that would be furnished by the copyright owners themselves, and would be of substantial commercial benefit to them.
- c) *Tax incentives.* (These would require much working-out within the government and a large educational campaign, but should not be brushed off for these reasons.)
 - i) Provide a tax credit for the value of both mandatory and voluntary deposits.
 - ii) Under the new charitable gift deductions law included in the 1993 Budget Reconciliation Act, encourage copyright owners to take deductions for deposits.
- d) *Combined deposit and purchase.* Negotiate and make special arrangements with depositors in certain cases for the Library to purchase a number of copies or phonorecords over and above the number deposited, for the mutual benefit of the Library and the copyright owner.
- e) *Exchanges.* Work out a system whereby deposits or extra copies the Library does not want are offered for exchange to other libraries, especially those in foreign countries, in order to obtain their extra or unwanted material.

3) Mandatory Deposit (Incentives other than those recommended in Chapter 4):

- a) *Mini-412.* Include in new chapter 11 on mandatory deposit, as one of the penalties for failure to comply with a formal demand, the loss of statutory damages and attorney's fees in infringement suits for unregistered works. After discussion by ACCORD this idea failed to find acceptance.

