

The Library of Congress

ADVISORY COMMITTEE ON COPYRIGHT REGISTRATION AND DEPOSIT

ACCORD

REPORT OF THE CO-CHAIRS

ROBERT WEDGEWORTH

BARBARA RINGER



SEPTEMBER 1993

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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
Proskauer Rose Goetz & Mendelsohn

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

I. Fred Koenigsberg
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Arthur J. Levine
Finnegan Henderson Farabow Garrett &
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Robin Davis Miller
Executive Director, The Authors Guild, Inc.

Robert L. Oakley
Director of the Law Library and Professor of
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.

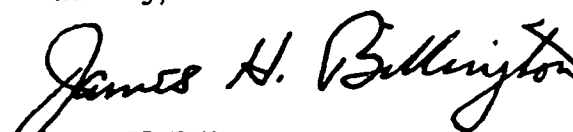
* Costs.

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

September 15, 1993

Dear Mr. Moorhead:

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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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
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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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
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.

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.

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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
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.

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
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.

