

The National Writers Union (UAW Local 1981, AFL-CIO) welcomes the opportunity to submit these comments in response to the Notice of Inquiry, "Remedies for Small Copyright Claims," FR Doc. 2011-27824, published at 76 *Federal Register* 66758-66761 (October 27, 2011).

Through this proceeding, the Copyright Office is seeking comments regarding "how copyright owners have handled small copyright claims and the obstacles they have encountered, as well as potential alternatives to the current legal system that could better accommodate such claims."

The NWU welcomes and encourages the Copyright Office, the office of the Intellectual Property Enforcement Coordinator, and Congress to follow through on this vital copyright reform initiative. Copyrights are useless to writers if, as is the case today, they are effectively unenforceable.

The National Writers Union (NWU) is a national labor union that advocates for freelance and contract writers. The NWU includes local chapters as well as at-large members nationwide. The NWU works to advance the economic conditions of writers in all genres, media, and formats. NWU membership includes, among others, book authors, journalists, business and technical writers, website and e-mail newsletter content providers, bloggers, poets, playwrights, editors, and academic writers. The NWU is a national amalgamated union (Local 1981) of the United Auto Workers, AFL-CIO.

As discussed below, the NWU has learned from the extensive experience of our organization and our diverse membership (1) that in most real-world circumstances the current U.S. legal system offers writers no effective means to protect our rights and livelihoods against copyright infringement, (2) that both substantive and procedural changes to the U.S. copyright regime could and should be made, in order to begin to provide some possibility of redress for writers whose copyrights have been infringed, and (3) that proposals for changes to the current U.S. copyright enforcement regime and/or its procedures should be evaluated, first and foremost, as to how effective they would be in affording recourse in the most common, real-world infringement scenarios, with respect to both the nature of typical infringements and the typical characteristics and resources available to rightsholders and infringers, respectively.

1. The experience of the NWU and our members with copyright infringement

The NWU receives information about infringements of our members' copyrights through our geographic and at-large chapters, through our national advocacy and policy campaigns for writers' rights, and through the work of our Grievance and Contract Division (GCD). The GCD provides advice and informal advocacy and mediation, through the services of trained NWU member volunteers, to individual members and to groups of members with similar grievances against the same infringer. The GCD works on both grievances related to publishers (including grievances against publisher-infringers who have licensed some rights to a work but exploit other rights) and grievances against unrelated infringers. The GCD also receives inquiries and information requests from both NWU members and non-members.

The NWU has been involved in litigation of individual copyright infringement test cases such as New York Times Co. v. Tasini, 533 U.S. 483 (2001), decided by the Supreme Court in favor of the plaintiff writers whose work had been infringed. We have also been involved in copyright class-action litigation including the ongoing In Re: Literary Works in Electronic Databases Copyright Litigation (M.D.L. No. 1379, U.S. District Court for the Southern District of N.Y.), currently on remand following decisions by the Supreme Court and the Court of Appeals for the 2nd Circuit.

2. Patterns of infringement of writers' copyrights

The National Writers Union has discussed the extent and severity of the threat to writers' livelihoods posed by copyright infringement and the character of typical infringers and infringements in previous comments to the Intellectual Property Enforcement Coordinator ("Comments of the National Writers Union, Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement: Request of the Intellectual Property Enforcement Coordinator for Public Comments Regarding the Joint Strategic Plan (FR Doc. 2010-3539)," March 23, 2010, available at <http://www.nwubook.org/NWU-ip-enforcement.pdf>). A copy of those comments is attached and incorporated in this submission.

The record of infringement-related grievances communicated to the NWU Grievance and Contract Division reveals a diversity of types of infringements and infringers. The NWU has received reports of infringing paper, print-on-demand, and electronic copies of written work, as well as of potentially infringing theatrical, television, and movie productions. The works infringed include newspaper and magazine articles, fiction and nonfiction books, poetry, textbooks, and Web content.

Clear patterns and trends are discernible in infringement of our member writers' copyrights. At one time the preponderance of infringement-related grievances made known to the NWU pertained to infringing paper copies printed and/or distributed by entities previously unknown to the writer-rightsholder and with no apparent relationship to any licensee of the work. But a growing proportion of copyright infringement grievances received by the NWU pertains to infringing electronic (e.g., ebook or Web) copies published, distributed, and/or purportedly "licensed" by publisher-infringers who had licensed some rights to a work at some point in time, but who were infringing the writer's copyrights by making, distributing, and/or purporting to sublicense infringing copies after the expiration of their license, in a medium or manner to which they did not hold a license, and/or otherwise outside the scope of their limited license to reproduce the work.

Since 1994, the NWU has received more than twice as many grievances related to infringing electronic copies of our members work as of hardcopy infringement (i.e., paper copies).

In the vast majority of grievances by NWU members related to infringing *paper* copies of our work, there is no obvious relationship between the infringer and any licensee of the work. In more than two-thirds of the cases of infringing *electronic* copies, however, the infringing copies are being distributed by, or with the appearance of having been purportedly published or "licensed" by, a publisher-infringer who held, or had once held, some sort of limited license to reproduce the work in some form.

While the shift from hardcopy bootlegging to electronic infringement has been widely recognized, the central and growing role of publisher-infringers in the overall infringement problem has been less widely noted but, we believe, is equally critical to effective copyright enforcement reform.

3. Obstacles to enforcement of writers' copyrights and to redress for infringements

The experience of the NWU and its members is that existing U.S. legal mechanisms rarely provide any meaningful possibility of redress for writer-rightsholder victims of copyright infringement, especially when they are confronted by publisher-infringers. In our experience attempting to advocate for writers whose copyrights have been infringed, litigation is not a serious threat or one that most infringers, especially large and sophisticated publisher-infringers, take seriously. Publishers correctly believe that, given the difficulty and cost of civil litigation and the unlikelihood of criminal prosecution, they can violate writers' copyrights with *de facto* legal impunity in the U.S. Here are some of the reasons why:

(a) Attorney's fees

The cost of legal representation (necessitated by the difficulty and reduced chances of a successful outcome for a *pro se* plaintiff in Federal court) is by far the most significant barrier to the availability of effective legal redress for writer-rightsholder victims of copyright infringement.

Most writers cannot afford to advance the legal fees – typically at least tens of thousands of dollars in even the simplest case, and more often several hundred thousand dollars or more – to litigate a copyright infringement claim. Given the costs of litigation, and the potential for a large, sophisticated infringer to deliberately drive up the costs and delay judgment through their litigation tactics, personally funded civil litigation is rarely a rational choice for a writer who is the victim of copyright infringement. And because the actual damages in an individual copyright infringement case are typically difficult to establish, and even statutory damages are often much less than a competent copyright attorney's fees to litigate such a case, competent attorneys willing to take such a case on contingency are rare.

In the rare cases in which the NWU and/or other groups of writers have been able to find lawyers willing to litigate copyright infringement class-action cases against especially large infringers, writers have been able to do so only because of the large value of the aggregated infringements against the class. Even in these cases, where attorney's fees are spread over many members of a class, those fees have typically consumed a substantial portion of any eventual settlement or award. And no matter how clear-cut the underlying law, any financial recovery by writer victims of infringement has typically been years delayed and, when finally received, so small that it is not adequate compensation for the infringement.

(b) Disparity of resources between writers and typical infringers

Even if a writer-rightsholder is willing and able to litigate *pro se*, the typical copyright infringer – especially the typical publisher-infringer – is much larger and has much deeper pockets. As a result, an infringer can easily use tactics such as extensive discovery and/or depositions to deplete the infringement victim's resources to the point where s/he is unable to continue to litigate. Even when these tactics "only" cost the *pro se* victim-plaintiff in time, and not other out-of-pocket expenses, the writer who is the victim of copyright infringement – and who is receiving no revenue, or reduced revenue, from the work being infringed – is dependent on his or her time to create new works to generate revenue while the case is pending. An infringer who occupies the victim's time with litigation effectively deprives the writer of his or her livelihood. And of course, where the writer-victim is represented by pay-as-you-go legal counsel, it's easy for an infringer with deep pockets to prolong the litigation until they exhaust the victim's budget for legal fees.

(c) Copyright registration

For works first published in the U.S., registration of copyright is a prerequisite to the commencement of civil litigation against an infringer, and registration prior to the infringement or within three months after the first publication of the work is a prerequisite to the award of statutory damages or attorney's fees.

In a substantial percentage of copyright infringement grievances brought to the NWU by our members, copyright was not registered in time for eligibility for statutory damages and attorney's fees.

It remains unclear how writers of certain increasingly common types of work, such as dynamically generated blogs and other Web content, are supposed to register their copyrights. Must copyright be registered in each discrete component of a Website, each page of which is dynamically assembled and potentially customized each time it is viewed? Is the entity in which copyright must be registered the Web page? The content element on the page? Or the back-end database of content components from which the viewed Web pages are dynamically constructed by the Web server software? What is the proper way to register copyright in a Twitter feed or a frequently updated Facebook page? Such uncertainties – and the possibility that an attempted registration will turn out to have been made in the wrong manner and thus not to be valid for purposes of entitlement to attorney's fees and statutory damages – make it more difficult for writers of these types of works to justify the investment of time in trying to register their copyrights when their works are created and before they are infringed.

Publishing, and especially online publishing, is increasingly "granular," with published work being divided into smaller and smaller content modules. Particularly for freelance writers who produce a large number of discrete and separately published works, timely registration of copyright in each of their works is time-consuming. There are tens of thousands of "apps" that can be used to post copyrighted content to blogs, Facebook, Twitter and other social networks and Websites, but we have not been able to find any content management or posting app that integrates registration of copyright in each new or updated content element, or even that enters each new or updated content element into a database that can be used to register copyright in the collection of such elements published during a given time period.

Writers face a difficult choice between spending time registering copyright in the works they've already written (on the slight possibility that they may at some future time be able to recoup the value of that time in awards or settlements of claims for copyright infringement), or spending that time writing

new works that may well have a greater chance of providing a greater return for the investment of time. Forcing writers to make such a choice of whether to register their copyright each time they post or update an article or comment in their blog, publish a Tweet, or update their Facebook page serves no useful social purpose and frustrates the possibility of redress through civil litigation for writers who make what may be a rational choice not to waste time registering copyrights each time they publish such a new or revised "work," if they could spend the same time producing new revenue-generating work.

Finally, in the case of books, denial of statutory damages on the grounds of failure to register copyright is particularly unfair when the infringer is the original publisher of the work and was responsible, under the terms of the contract and license for first publication, for registering the copyright, but failed to do so.

(d) Difficulty of establishing actual damages

In many cases of infringement of writers' copyrights, the actual damage is not solely or primarily the revenue (if any) directly received by the infringer through sale or licensing of infringing copies, but the damage done to the writer's revenues through competition with legitimate copies. Availability of infringing copies severely impairs the ability of the writer-rightsholder to generate revenue either through self-publication or through licensing of re-publication or "secondary" usage. This sort of damage is especially likely when a publisher-infringer has access to better distribution and publicity channels for their infringing copies (often including the largest and best-known ebook distribution services) than does the author (whose only means of distributing legitimate self-published copies or marketing licensing of "secondary" rights may be the author's own Website). Establishing the exact value of this sort of damage – which has been reported to the NWU by our members – is difficult at best, and effectively litigating such a damage claim may require the services of expensive experts. Exactly how much does it reduce the potential advertising revenue generated by a particular content component of a writer's Website if that particular copyrighted content is being made available on the Website of a print publication whose time-

limited license for Web publication of that article, in conjunction with its appearance in a print periodical, has expired, but whose ranking by search engines makes it appear above the author's own Website in search results?

Even where the amount of damages is more directly related to an infringer's revenues for sale or licensing of infringing copies, information as to those revenues is typically in the exclusive control of the infringer, and may require costly discovery, depositions, and/or auditing of the infringer's books.

(e) Nonenforcement of criminal statutes against copyright infringement

The most effective remedy for and deterrent to copyright infringement, the least costly to the rightsholder-victim of the infringement, and the only remedy likely to offset the disparity of resources between the typical infringer and the typical writer-rightsholder-victim, would be the enforcement of existing Federal statutes which make copyright infringement, in certain circumstances, a criminal offense.

Unfortunately, there has been essentially no attempt to enforce the Federal statutes criminalizing copyright infringement, particularly as they relate to infringement of written work. We know of no cases of criminal investigation or prosecution of publisher-infringers of writers' copyrights, no matter how large, sophisticated, and knowledgeable as to the illegality of their conduct.

For example, one NWU grievance officer contacted the FBI to report a pattern of willful infringement by a particular mainstream publisher of the work of tens of writers (and perhaps orders of magnitude more), and to ask about the FBI pursuing a criminal investigation. The local FBI office that was contacted told the NWU grievance officer that the FBI would only consider criminal investigations in infringement cases if the victim had already brought a civil case against the infringer.

We have been unable to find any public statement of FBI or Department of Justice policy regarding prioritization or the exercise of prosecutorial discretion in cases of copyright infringement. So we don't know if this policy has since changed, or varies from district to district.

4. Recommendations for reform of the U.S. copyright enforcement regime

(a) Less expensive procedures

Reduced costs to the victim of infringement, including reduced up-front, out-of-pocket costs, are the *sine qua non* of any new or revised tribunal or procedures that will offer writers a meaningful possibility of redress for infringement of their copyrights.

Limiting costs requires not just reducing fixed costs such as filing fees, and not just eliminating the need to hire an attorney (as discussed further below), but also limiting the ability of a deep-pocketed defendant to drive up costs through delay, removal to another more expensive tribunal or set of procedures, or demands for costly discovery. No "fast-track" or simplified set of procedures or alternate tribunal that depends on the consent of both parties to its jurisdiction will accomplish this purpose. The party with deeper pockets – typically the infringer, not the writer-rightsholder-victim – will always be able to bring their greater resources into play merely by opting out of such a small-claims court or expedited process.

Time is money for working writers, and reducing costs also requires limiting the time that parties (especially *pro se* parties) must invest in adjudication of a claim.

(b) No prejudice against pro se parties or non-lawyer advocates

Because the largest part of the cost of litigation to the victim of copyright infringement is typically attorney's fees, the ability to proceed without an attorney – and to do so without significant prejudice to the likelihood of success – is essential to reducing the cost of justice for writers who are victims of copyright infringement. It's critical not just for a victim of copyright infringement to be *permitted* to bring a claim without an attorney, but that the tribunal and its procedures for such claims be established in such a manner as to establish that proceeding without an attorney will be the norm. Whether or not state small claims courts are given jurisdiction over such claims, their procedures and their support to *pro se* parties may provide appropriate models for small copyright claims.

Any party should be permitted to be represented in such a proceeding by a non-attorney of his/her choice. Procedures of the U.S. Tax Court, in which non-attorneys may be admitted to practice, show that within a narrow and specialized field of Federal law, non-attorneys may be as capable advocates as attorneys. The experience of the NWU's Grievance and Contract Division, whose volunteer members have obtained about \$1.5 million in compensation for NWU members – most of whom could not afford an attorney and had no realistic prospect of recovery through litigation – provides further evidence of the potential effectiveness of advocacy by non-attorneys.

Disputes between freelance writer-rightsholders and publisher-infringer have much in common with grievances by employees against employers, in which workers often choose to be represented by grievance officers or other members of their labor union. Given a choice, we believe that many copyright infringement victims would choose to be represented by advocates from their labor union (such as the NWU) or other professional organizations, rather than by more expensive attorneys.

(c) Availability of statutory damages, injunctive relief, and effective collection of awards

Because of the difficulty and expense of establishing actual damages, and because damage from infringement often occurs through diversion of reader-buyers from legitimate to infringing copies that can best be cured through court-ordered cessation of distribution of those infringing copies, statutory damages and injunctive relief are essential elements of any scheme that will provide effective redress to writers who are victims of copyright infringement.

Not mentioned in the notice of inquiry, but essential to effective redress, is an effective mechanism for collection of judgments from infringers who may be located in cyberspace rather than at any readily identifiable geographic location, whose bank accounts may be located outside the U.S. and difficult to identify, and who may have few, if any, tangible assets despite substantial revenue streams.

Because most infringement of written work today occurs through making of infringing copies on demand (through print-on-demand or on-demand creation of electronic copies in response to download

requests or orders), rather than through bulk production of a stockpiled inventory of bootleg copies, seizure of infringing copies is rarely necessary as a remedy for writer-rightsholders.

(d) No prerequisite of registration or reduction of statutory damages for nonregistration

The NWU believes that the requirement for registration of copyright is entirely unnecessary and should be abolished. Under the Berne Convention, to which the U.S. is a party, works first published in other countries must be, and are, afforded the same protections as works first published in the U.S., without any requirements for "formalities" such as registration. In dealing with works first published in other countries, U.S. federal courts can and already do routinely handle claims involving unregistered works. We are aware of no allegations that U.S. courts have any difficulty whatsoever in adjudicating such claims as a result of the fact that copyright in the works at issue has not been registered.

Moreover, the requirement of registration of copyright exclusively for works first published in the U.S. creates a perverse disincentive for first publication in the U.S., particularly for online publication or distribution. In those cases, the location of the server is irrelevant to the accessibility of the Website to the purveyor or purchaser of a license to an electronic copy of a work (and may even, in the case of a "cloud" hosting service, be unknown or unknowable to the Web publisher). The registration requirement encourages even U.S.-based writers, bloggers, and Web publishers to ensure that their work is first made available from a server located in any country other than the U.S. We can conceive of no rational reason for the U.S. government to deliberately impose such an inequitable burden on U.S. publishers and Web-hosting providers, while giving preferential treatment to their competitors in the rest of the world.

If the registration requirement is not eliminated entirely, it should be narrowed to require registration only as a prerequisite to civil litigation, and eliminated as a criterion of eligibility for recovery of, or a factor in determining the amount of, statutory damages or attorney's fees. And the procedures for registration of works published in frequently changing, dynamically generated, and/or customized formats, such as the content of blogs and Websites, should be clarified and simplified.

(e) Ability to deal with commingled contract and other state-law issues without undue escalation of costs

Adjudication of many copyright infringement claims, including virtually all cases of infringement by publisher-infringers, is likely to require resolution of contract issues, which are governed by state law. In the face of an accusation of infringement, it's natural that a publisher-infringer who holds or once held any sort of license to reproduce the work in any manner will try to claim that the allegedly infringing conduct falls within that license. Such claims, including both some sincere if erroneous ones as well as many specious ones, must be anticipated.

It's common, in fact, for naïve observers to presume that claims of infringement by publishers aren't claims of "infringement" at all, but are "merely" contract disputes. But such an assumption would be mistaken. If I sell you my car, but you take my boat as well, you are guilty of theft of the boat even if your actions might also be construed as a breach of the contract for the sale of the car.

For this reason, a copyright small claims court or other streamlined procedure limited to cases in which the only issues raised are those *exclusively* of copyright infringement will be ineffective. Similarly, a process under which raising state-law claims, even far-fetched ones, will allow a dispute to be removed from the copyright small claims court or the fast-track procedures, and transferred to a (much more expensive) standard federal or state court proceeding, will provide an easy way for a deep-pocketed infringer to escalate the costs beyond the means of a typical writer-rightsholder.

The preferred resolution of the commingling issue is for the tribunal or procedure for small copyright claims to be empowered to rule on related breach-of-contract, contract interpretation, and other state-law claims, using applicable state law. A less-preferred alternative would be to permit such claims to be severed and adjudicated separately, without prejudice to the adjudication of the copyright infringement claim by the small claims court or under the simplified small copyright claims procedures.

(f) Prosecution of criminal copyright infringers

Criminal prosecution of copyright infringers, including both publisher-infringers and ebook distributors who knowingly traffic in infringing copies by failing to exercise due diligence in verifying whether ebook publishers actually hold the rights to license electronic copies of those works, has been almost entirely neglected as a means of providing redress to victims of copyright infringement.

The development of new redress mechanisms for victims of copyright infringement should be coupled with ending the neglect of existing enforcement mechanisms including criminal prosecutions of copyright infringers, especially large and sophisticated infringers.

We urge the Copyright Office and the Congress, as part of their ongoing inquiry into the handling of copyright infringement claims, to engage with the Department of Justice and the office of the Intellectual Property Enforcement Coordinator regarding their policies for receipt, investigation, prioritization, and the exercise of prosecutorial discretion in copyright infringement cases.

U.S. Attorneys should be reminded of their responsibility for investigation and prosecution of criminal copyright infringers, and consideration should be given to the establishment of easier-to-find mechanisms for reporting of complaints by victims of copyright infringement. Priority in criminal prosecutions should be given to cases where the rightsholder-victim lacks the resources to pursue civil remedies (as is the case for most writers-rightsholder victims) and against large, sophisticated infringers (such as large publisher-infringers) whose infringing conduct is most likely to be engaged in with full knowledge of its illegality, which is one of the elements of criminal infringement.

Consideration should be given to establishing a system under which copyright infringement complaints made under existing or any new civil litigation procedures are automatically reviewed by U.S. Attorneys to determine whether criminal prosecution of the alleged infringer is appropriate.

The NWU looks forward to working with the Copyright Office, the Office of the Intellectual Property Enforcement Coordinator, and members of Congress to implement these recommendations and modify the copyright enforcement regime to provide writers with the means we now lack for effective enforcement of our rights.

Respectfully submitted,

_____/s/_____

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The National Writers Union (UAW Local 1981, AFL-CIO) submits these comments in response to the notice “Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement: Request of the Intellectual Property Enforcement Coordinator for Public Comments Regarding the Joint Strategic Plan,” FR Doc. 2010-3539 published at 75 *Federal Register* 8137-8139 (February 23, 2010) .

The National Writers Union (NWU) is a national labor union that advocates for freelance and contract writers. The NWU includes 15 local chapters as well as at-large members nationwide. The NWU works to advance the economic conditions of writers in all genres, media, and formats. NWU membership includes, among others, book authors, journalists, business and technical writers, website and e-mail newsletter content providers, bloggers, poets, playwrights, editors, and academic writers. The NWU is affiliated with the United Auto Workers, AFL-CIO.

Through this proceeding, the office of the Intellectual Property Enforcement Coordinator is seeking comments regarding the costs to the U.S. economy resulting from intellectual property violations and recommendations for improving the Government’s intellectual property enforcement efforts.

Much of the commentary regarding intellectual property infringement has focused on audio-visual recordings. The NWU welcomes this opportunity to address the distinct issues with respect to infringement of intellectual property in written works, particularly the threat posed to writers’ livelihoods by corporate infringement of writers’ copyrights in their written work.

Copyright infringement – especially infringement of writers’ rights to electronic reproduction and distribution, in whole or in part, of our written work – is a serious and growing problem for writers as creators and holders of copyrights in our written work.

The most frequent and damaging infringers of writers’ electronic rights are print publishers, who routinely publish or license "bootleg" electronic editions of works, when they don't own the rights to reproduce or distribute those works in electronic form. A large percentage of e-books from the largest

and most “mainstream” e-book sources are bootleg editions published without the authorization of the writer, and/or for which the writer is being paid a smaller percentage of the revenues than is specified in the contract with the original print publisher.

Through its Grievance and Contract Division and other communications, the NWU has received complaints from NWU members who have discovered, after the fact, that a “Kindle edition” or other e-book version of one of their books has been issued or licensed by the publisher of the print edition of the work, without the consent of the author and without the author having assigned electronic rights to the print publisher.

The NWU also receives complaints from members who discover that print publishers are paying them only a (smaller) percentage of e-book or other electronic rights licensing revenues provided for by the clause in the author-publisher contract for printed books, rather than the (larger) share of e-book revenues provided for by the separate electronic or subsidiary rights clauses in the contract. Standard publishing industry practices of providing only infrequent, long-delayed, and needlessly inscrutable royalty statements – even when publishers themselves have real-time sales and revenue analytics that could easily be made available to writers – exacerbate this problem by making it difficult, in some cases impossible, for writers even to know that they are being short-changed on their e-rights revenue share.

On the Internet, the largest infringement problem is that Web publishers frequently leave written works on their websites after time-limited licenses for Web usage have expired, and copy or sublicense Web pages or Web content to other sites without having obtained rights to do so from the authors. There is also widespread electronic “pirating” of content from writers’ Web sites or blogs by electronic publishers. Publishers of many Web sites plagiarize entire Web pages, or portions of them, without making any attempt to identify the copyright holder or obtain permission. In all such cases writers are not compensated for the sale of their work. How many millions of dollars writers do not receive each year because of such infringement is incalculable. The only recourse for writers if they are lucky enough to

discover such infringement is to demand, using the Digital Millennium Copyright Act, that their work be taken down immediately. It is exceedingly rare that they are ever compensated for unknowable amounts of revenue that should be paid for such pirating.

Publishers also systematically infringe writers' intellectual property rights by improperly classifying works written by freelance writers as "works for hire," when those works do not qualify as works for hire. This is a particularly egregious and damaging violation of writers' rights when a publisher simultaneously categorizes a writer as an independent contractor, not an employee, for purposes of wages and benefits, and as an employee for purposes of categorizing their writing to be work for hire.

Print publishers' infringements of writers' copyrights are devastating to writers' ability to obtain revenue for those rights. Because print publishers have much greater access to marketing and distribution channels, it is difficult for a writer's own authorized Web content or e-book to compete with a bootleg e-book with the same content offered by or "licensed" by a print publisher, even if the print publisher doesn't own the rights to electronic distribution of that content.

Electronic publishers and distributors, including the largest and most reputable e-book publishers and retailers, rarely make any effort to verify the rights ownership claims of print publishers who purport to license electronic rights to books or other printed works. And electronic publishers and distributors almost never go to the trouble of seeking out creators to verify their copyrights.

The largest infringers of writers' intellectual property rights to electronic reproduction of their work are the world's largest print and electronic publishing companies: print publishers who falsely claim and "license" rights, and electronic publishers and distributors who fail to vet those false claims by print publishers and publish and distribute bootleg e-books that infringe writers' rights.

Writers have no effective means to enforce their rights against these infringers. Writers have been successful in the few legal cases when they have been able to join together to bring class actions, or had the support of writers' organizations. Writers have prevailed in litigation against bogus electronic

rights' claims by major print periodical publishers (*Tasini v. New York Times*) and book publishers (*Random House v. RosettaBooks*). But even the largest organizations of writers are structurally and financially disadvantaged vis-à-vis the large print and electronic publishers and distributors who collude in e-book bootlegging.

Federal cases are prohibitively expensive for individual authors, especially against bootleggers with the deepest pockets in the world. Copyright infringement claims that are of great economic significance to struggling freelance writers are too small to interest most qualified intellectual property attorneys. Therefore most NWU members and other writers are unable to litigate their copyright infringement claims against electronic bootlegging of their work by print or electronic publishers.

Large publishers are among those copyright infringers whose infringing actions are most likely to be knowing, deliberate, and therefore criminal. But writers' complaints of criminal copyright infringement by publishers are typically ignored. As a result, print publishers correctly believe that, given the current pattern of prosecutorial discretion, they can violate writers' copyrights with impunity.

For all these reasons, intellectual property enforcement proposals, as they relate to textual works, should recognize that the main infringement problems are false claims to writers' rights by print publishers and electronic bootlegging. Effective enforcement requires enforcement mechanisms that are accessible and affordable to individual writers and that will be effective even against large corporate infringers. One part of such an enforcement strategy should be to give priority in use of criminal copyright enforcement resources to the pursuit of those infringers whose victims lack the resources to be able to pursue civil remedies on their own, such as writers whose rights are infringed by large, knowledgeable, and sophisticated publishers. Another element of such a strategy could be a Federal small claims court whose jurisdiction includes copyright infringement claims. Sanctions for intellectual property infringement should include sanctions for those who knowingly make false rights claims, for

those who fail to exercise due diligence in verifying rights claims by parties other than the original creator(s), and for those who fail to contact the original creator(s) to verify who holds the relevant rights.

The NWU looks forward to working with the office of the Intellectual Property Enforcement Coordinator to help craft such a strategy to protect the rights of our members and all writers.

Respectfully submitted,

_____/s/_____

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