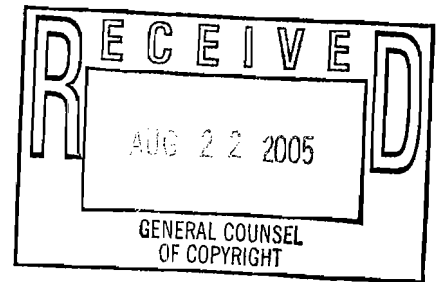


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**RE: Notice of Proposed Rulemaking on Preregistration
Of Certain Unpublished Copyright Claims**

Pursuant to the Notice of Proposed Rulemaking (“NPRM”) published by the Copyright Office in the Federal Register of July 22, 2005 (p. 42286-42292), the Association of American Publishers (“AAP”) submits these Comments on behalf of its members regarding the Copyright Office’s proposed rules to implement Section 104 of the Artists’ Rights and Theft Prevention Act of 2005 (“ART Act”) regarding preregistration of unpublished works that are being prepared for commercial distribution.

As the principal national trade association of the U.S. book publishing industry, AAP represents some 300 member companies and organizations that include most of the major commercial book and journal publishers in the United States, as well as many small and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books and journals in every field of human interest. In addition to publishing print materials, many AAP members are active in the emerging market for e-books, while also producing computer programs, databases, Web sites and a variety of multimedia works for use in online and other digital formats

Introduction

In general, the U.S. book publishing community is troubled whenever Congress or the Copyright Office establishes rules for copyright protection and enforcement that benefit some, but not all classes of copyrighted works, without a clear and persuasive justification for such discriminatory treatment that is based on either the form of

protection or enforcement at issue, or the particularized nature, use or susceptibility to infringement of the beneficiary class(es). Although some elements of copyright law may be sensibly applied only to certain classes of works, rules that establish procedures to make copyrighted works eligible for the optimal application of civil and criminal remedies for infringement generally should not give preferential treatment to certain classes of works while excluding others, since such differential treatment creates disrespect for the rights of copyright owners in the excluded classes at home and encourages our trading partners to discriminate against them abroad.

Unfortunately, in enacting the statutory language of the ART Act, Congress viewed the issue of criminal infringement of “a work being prepared for commercial distribution” only in terms of concerns regarding computer programs, musical works, audiovisual works, and sound recordings. As a result, the punitive and deterrent criminal infringement provisions in Section 103 of the Act apply only to those classes of copyrighted works, and do not apply to other classes of copyrighted works, including the broader class of “literary works” or its subset of “books, periodicals and manuscripts.”

Fortunately, however, in those provisions of the ART Act which address eligibility to obtain civil remedies for infringement of a work being prepared for commercial distribution, Congress granted the Register of Copyrights an important measure of discretion in determining which classes of works shall be eligible for the preregistration procedure that will constitute the gateway for a copyright owner to obtain the full panoply of civil remedies in such cases.

The AAP urges the Register of Copyrights, in a reasonable and proper exercise of that discretion, to include “literary works that are being prepared for commercial distribution” or, alternatively, “books, periodicals and manuscripts that are being prepared for commercial distribution” as a class of works that is eligible for the preregistration procedure to be established by the Register in regulations promulgated as directed by Congress in Section 104(a) of the ART Act. The AAP submits these comments to support a determination by the Register that either of the proposed class(es) has had “a history of infringement prior to authorized commercial distribution” within the meaning that the Copyright Office has proposed to give to this statutory standard in the pending NPRM.

Proposed Class of Works

In urging the Register of Copyrights to determine that “literary works that are being prepared for commercial distribution” is a class of works that is eligible for preregistration of copyrights under the proposed regulation, the AAP realizes that “literary works” – as defined in Section 101 of the Copyright Act – constitutes a very broad and diverse class of works that includes works such as “books, periodicals and manuscripts” (which are not included in the ART Act definition of “work being prepared for commercial distribution” for criminal infringement purposes) as well as computer programs (which are included in that definition). Indeed, even if the AAP were to limit this proposed class to its subsets of “books, periodicals and manuscripts” – which are not

defined terms under the Copyright Act – the class would remain broad and diverse for the purposes of this rulemaking.

Obviously, not all “books, periodicals and manuscripts that are being prepared for commercial distribution” can claim the “history of infringement prior to authorized commercial distribution” that is necessary to qualify for preregistration under Section 104 of the ART Act, as interpreted by the Copyright Office in its NPRM. But the same may be said with respect to the vast majority of the works that would fall within the “motion picture,” “sound recording” and “nondramatic musical composition” classes of works that have already been proposed by the Register as eligible for preregistration under the proposed regulations in the NPRM.

Perhaps recognition of this fact provides the premise underlying the suggestions in the NPRM that eligible classes of works might be limited to those “for which there is an anticipated demand” or to those which are “by authors or performers who have had some track record of success, or at least who have previously had their works released for commercial distribution.” The latter standard, however, would appear to be unworkable in terms of devising a standard of measurement; moreover, it would appear to be too narrow, based on experience as demonstrated by some of the examples provided below. While “anticipated demand” might seem to be a more reasonable consideration, at least based on experience, it too suffers from difficulties in objective standards of assessment.

In any event, insofar as the NPRM indicates that the meaning of the phrase “class of works” in this rulemaking should be informed by “Congressional guidance” regarding the meaning of that phrase in the context of the rulemaking mandate in Section 1201 of the Digital Millennium Copyright Act (“DMCA”), AAP would urge a more narrow alternative to the proposed “literary works” class. If the Register seeks to limit eligibility for preregistration to “a narrow and focused subset of the broad categories of works of authorship... identified in section 102 of the Copyright Act,” then AAP would urge the Register to determine that “books, periodicals and manuscripts that are being prepared for commercial distribution” is a class of works eligible for preregistration of copyrights under the proposed regulation.

The Register need not fear that adoption of either proposed “class of works” will inundate the Copyright Office with preregistration applications. It is quite likely that the copyright owners of most works in either alternative proposed class – sensible of the “history of infringement” predicate and unwilling to take on the added cost and administrative burden of preregistration without a reasonable possibility of a prerelease leak – will not participate in preregistration for many or, perhaps, even most of their works. However, the history of infringement in connection with certain works within these alternative classes, together with the more general concern about unjustified discriminatory treatment in providing protection and enforcement advantages to only some classes of works, strongly argues for adoption of one of the proposed alternative classes.

History of Infringement Prior to Commercial Distribution

Whether the class of works is broadly styled as “literary works” or more narrowly limited to its subset of “books, periodicals and manuscripts,” the alternative classes proposed by AAP for adoption by the Register have a history of infringement prior to commercial distribution that matches those of the classes of works already proposed to be eligible for preregistration and is replete with circumstances meeting all of the other requirements proposed for eligibility in the NPRM.

More specifically, with respect to each of the following examples of books or manuscripts that were infringed prior to commercial distribution, the conditions proposed in the NPRM were met insofar as the work at issue was:

- **unpublished** within the meaning of the definition of “publication” in the Copyright Act, because it had not been distributed to the public by sale, lease, rental or lending, and, where offered for distribution to a group of persons for further distribution (e.g., bookstores or first serial rights licensees), was subject to embargoes or secrecy agreements pending authorized commercial release;
- **in the process of being prepared for commercial distribution**, in the sense that preparation of the work had commenced at least through fixation of some portion of the work in a tangible medium, a contract for distribution was in place with an established distributor, and there was anticipated demand for the work; and,
- **within a class of works determined by the Register to have had a history of infringement prior to authorized commercial distribution**, in the sense that book publishers can document “more than a few instances” in the same manner as the industries that produce works within the classes of works already proposed by the Register for preregistration eligibility.

Works Infringed by Unauthorized Distribution Prior to Commercial Release

- *“A Time to Heal: The Autobiography of Gerald R. Ford”* (1979) – Former President Ford had contracted with publishers Harper & Row and Reader’s Digest to publish his memoirs, giving them the right to publish them in book form and the exclusive right to license “first serial rights” (i.e., prepublication excerpts). The publishers negotiated a prepublication license agreement with Time magazine, providing that Time would pay them \$25,000 – half in advance and the rest at publication – in exchange for the exclusive right to publish in the magazine a 7500-word excerpt from Ford’s account of the Nixon pardon, timed to appear about 1 week before shipment of the book to bookstores. The publishers instituted procedures to maintain confidentiality of the manuscript, and Time retained a right to renegotiate the second-half of its payment to the publishers if the material appeared in print before publication of the excerpt in the magazine. A few weeks before scheduled publication of the excerpt in Time magazine, the Nation magazine obtained an unauthorized copy of the manuscript from an unidentified

source, and quickly published a 2250-word “hot news” story consisting of quotes, paraphrases and facts drawn exclusively from the manuscript. Subsequently, Time magazine canceled its piece and refused to tender the second-half of its agreed contractual payment to the publishers. Six years later, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), the U.S. Supreme Court ruled that, even stripped to the 300-400 words (13%) of its story that the defendant Nation conceded was copyrighted expression from Ford’s manuscript, publication of the story infringed the plaintiff publishers’ copyright and was not excused as fair use under the law. The Court held that the defendant had “effectively arrogated to itself the right of first publication,” which the Court characterized as “an important marketable subsidiary right” of copyright.

- **“Perfect Murder, Perfect Town” – by Lawrence Schiller (Harper Collins 1998)** – Excerpts from this book, an exhaustive 621-page analysis of the Boulder, Colorado law enforcement investigation into the murder of JonBenet Ramsey, were leaked in news reports by Denver-area broadcast television stations and newspapers. See “*Bombshell in Ramsey Book*” and subsequent stories., <http://longmontfyi.com/ramsey/storyDetail99.asp?ID=25>.
- **“Living History” – by Hillary Rodham Clinton (Simon & Schuster 2003)** – Despite the precaution of signed embargo agreements between the publisher and bookstores, a copy of the much-awaited 562-page memoir by the former First Lady and current U.S. Senator was leaked to the Associated Press a week before its official release to the public, endangering a “first serial rights” deal that the publisher had negotiated with Time magazine. Foreign rights had already been sold to publish the book in sixteen countries. Mrs. Clinton was reportedly paid a \$2.85 million advance toward an \$8 million overall book deal, and the publisher ordered a million-copy first printing. See, e.g., “*Brouhaha Over Hillary Leaks*,” <http://cbsnews.com/stories/2003/06/06/politics/printables557607.html>; see also “*Strategy creates demand for Clinton Book*,” http://www.usatoday.com/life/books/news/2003-06-08-hillary-demand_x.htm.
- **“Harry Potter and the Order of the Phoenix” – by J.K. Rowling (Scholastic 2003)** – Four days before the official U.S. release of the fifth volume in the increasingly popular children’s series of Harry Potter books, the New York Daily News published plot details, including that there were new characters in the book and that one important character would not survive the story. It also reproduced two pages from the 870-page book, consisting of nearly one thousand words of *verbatim* text. In response, the U.S. publisher, Scholastic, filed suit against the newspaper, alleging \$100 million in damages for copyright infringement. In the meantime, efforts to safeguard the authorized publication date in the UK failed when thousands of copies of the book were stolen from a warehouse where they awaited distribution to bookstores. See, e.g., “*Rowling Sues Over Potter Leak*,” <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/entertainment/arts/3002520.stm>; see also “*Embargo Nazis*,” <http://slate.msn.com/toolbar.aspx?action=print&id=2084882>.

- **“My Life” – by Bill Clinton (Alfred A. Knopf Publishing Group 2004) –** Despite strict embargoes imposed by the publisher, both the Associated Press and The New York Times obtained copies of former President Clinton’s much-anticipated memoir, for which he reportedly received a \$10 million advance, days in advance of its authorized publication. Each news organization published lengthy articles discussing Clinton’s take on the Monica Lewinsky affair, his impeachment trial, the Whitewater inquiry, and Kenneth Starr’s grand jury investigation. See *“Copyrighting Clinton,”* <http://www.rcfp.org/news/mag/28-3/bct-clintonc.html>.
- **“Harry Potter and the Half-Blood Prince” – by J.K. Rowling (Scholastic 2005) –** Despite what perhaps may have been the most extraordinary prepublication security measures ever taken, unauthorized copies of the most recent and penultimate volume in the popular series of Harry Potter books, reportedly the fastest-selling book of all time, still managed to leak out to readers in the UK, Canada and the United States. The book’s entire 607-page contents were also quickly scanned into digital form and available online less than 12 hours after the work officially became available at bookstores. Raincoast Books of Vancouver, the Canadian publisher of the Potter series, obtained an injunction from the Supreme Court of British Columbia, preventing anyone from “displaying, reading, offering for sale, selling or exhibiting in public” the book after learning that its embargo had been broken by a Canadian bookstore. The injunction was similar to a court order obtained in England and Wales by the book’s UK publisher, Bloomsbury, after two men allegedly stole a copy of the book from a warehouse and attempted to sell details of the story to the *Sun* newspaper. It was successfully used to halt the attempted sale of a copy of the book on the eBay auction site. See, e.g., *“Pirates of the Potter-ian,”* <http://www.wired.com/news/print/0,1294,68269,00.html>; *“Raincoast obtains injunction against early distribution of HBP,”* <http://www.the-leaky-cauldron.org/Mtarchives/007258.php>; *“Reading Ban on leaked Harry Potter,”* <http://www.timesonline.co.uk/printFriendly/0,,1-2-1691805-2,00.html>.

For details of publisher prepublication security efforts, in connection with these and other recent books, see generally *“Books Under Lock and Key,”* <http://www.fortwayne.com/mld/newssentinel/living/12077985.htm?template=contentModules/printstory.jsp>; *“Test for Security Efforts: Next Harry Potter Book,”* <http://www.nytimes.com/2005/07/05/books/05pott.html?pagewanted=print>; *“Stop That Book,”* <http://slate.msn.com/toolbar.aspx?action=print&id=2084160>.

Conclusion

The Register of Copyrights should exercise the discretion granted by Congress, for purposes of this rulemaking, to determine that “literary works that are being prepared for commercial distribution” or, at a minimum, “books, periodicals and manuscripts that are being prepared for commercial distribution,” constitute a class of works that is eligible

for preregistration under Section 104 of the ART Act. Whichever way the class of works is styled, it would have a demonstrated history of infringement prior to commercial distribution that matches those of the classes of works already proposed to be eligible for preregistration and meets all of the other requirements proposed for eligibility in the NPRM.

Respectfully Submitted,



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