

**Before the  
COPYRIGHT OFFICE,  
LIBRARY OF CONGRESS  
Washington, DC**

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Removal of Personally  
Identifiable Information from  
Registration Records; Notice  
of Proposed Rulemaking  
(FR Doc. 2016–22011;  
Copyright Office Docket  
Number 2016-7)

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**COMMENTS OF THE  
NATIONAL WRITERS UNION (NWU)  
AND THE AMERICAN SOCIETY OF  
JOURNALISTS AND AUTHORS (ASJA)**

National Writers Union  
(UAW Local 1981, AFL-CIO)  
<<http://www.nwu.org>>

American Society of Journalists and Authors  
<<http://www.asja.org>>

October 17, 2016

**1. About the commenting organizations and our interest in this rulemaking**

The National Writers Union (NWU) submits these comments in response to the Notice of Proposed Rulemaking (NPRM) by the U.S. Copyright Office, “Removal of Personally Identifiable Information from Registration Record,” FR Doc. 2016-22011, Copyright Office Docket Number 2016-7, 81 *Federal Register* 63440-64445 (September 15, 2016).

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

Founded in 1948 as the "Society of Magazine Writers," today's American Society of Journalists and Authors (ASJA) is the nation's professional organization of independent nonfiction writers: "freelancers." Membership standards are rigorous. To qualify, a writer must have written two books, six full-length articles in a publication with audited national circulation, or an equivalent combination. Members earn their livings from magazine articles, online content, trade books, research papers and many other forms of non-fiction writing.

## 2. Introduction and overview

In this rulemaking, the Copyright Office has proposed to revise its Privacy Act regulations and its regulations for registration of copyright related to the maintenance, public availability on the Internet, correction, amendment, and removal of personal information.

We welcome these changes, and we commend the Copyright Office for recognizing some of the reasons why some writers do not want their personal information made public.

However, the need for this rulemaking is symptomatic of a larger problem that calls for additional regulatory and legislative action: writers are being forced to choose between revealing their identities and personal information, or risking the loss of some of their rights.

Writers should not be forced to make such a choice.

Nothing in the Copyright Act or copyright treaty law requires or authorizes the Copyright Office to compel writers to choose between protecting our privacy and protecting our copyrights.

Rather than the partial privacy patch provided by the proposed rules, we urge Congress and the Copyright Office to address the causes of this dilemma. We ask Congress to repeal the registration requirements for enforcement of copyright and remedies for infringement (17 U.S. Code §411 and § 412). And in light of the privacy issues highlighted by this NPRM, we encourage the Copyright Office to reconsider and withdraw its proposal<sup>1</sup> for legislation to categorize rights to any work as “orphaned” and fair game for unauthorized and uncompensated copying if the author has not chosen to make public sufficient information to allow herself to be contacted by would-be licensees, or deliberately or inadvertently does not respond to licensing requests, regardless of how actively she is exploiting the rights to her work.

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1 "Orphan Works and Mass Digitization: a report of the register of copyrights, " June 2015, <<http://www.copyright.gov/orphan/reports/orphan-works2015.pdf>>

### 3. The dilemma for writers of privacy versus copyright protection

Privacy and copyright are fundamental rights. Writers should not have to choose between them, and neither of these rights should be conditioned on waiver or forfeiture of the other.

Writers would not have to choose between privacy and copyright protection, but for the registration requirements in 17 U.S. Code §411 and §412 and for legislation enacted in other jurisdictions (including the United Kingdom<sup>2</sup> and the European Union<sup>3</sup>) and proposed in the U.S. that would classify rights to a work as “orphaned” if the writer cannot be “found” by the public.

The NWU has argued for more than 20 years that 17 U.S. Code §411 and §412 constitute formalities prohibited by the Berne Convention, deny the effective remedies required by the WIPO Copyright Treaty, and serve no legitimate purpose.<sup>4</sup> The NWU and ASJA take this opportunity to again ask that these provisions of the Copyright Act be repealed. Repeal of these provisions would eliminate one of the major causes of the dilemma faced by writers who want to preserve both their privacy and their copyrights.

Not all writers want to be found or contacted by the public, to make themselves available to be contacted at all times, or to concern themselves with responding promptly to say “no” to

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2 See the comments of the NWU to the U.K. Intellectual Property Office (IPO) consultation on implementing an "orphan works" licensing scheme, February 28, 2014, available at <<https://www.nwubook.org/NWU-UK-orphans-28FEB2014.pdf>>.

3 See the NWU comments to the European Commission in response to a Public Consultation on the Review of the European Union Copyright Rules, March 5, 2014, available at <<https://www.nwubook.org/NWU-EU-copyright-5MAR2014.pdf>>. See also the NWU complaint to the U.S. Intellectual Property Enforcement Coordinator that these laws violate the Berne Convention, August 10, 2012, <<https://www.nwubook.org/NWU-IPEC-2012.pdf>>.

4 "Our Copyright Reform Agenda: National Writers Union Priorities for Copyright Reform", as most recently approved by the NWU Delegate Assembly, August 2013, <<https://nwu.org/issues-we-care-about/copyright-defense/our-copyright-reform-agenda/>>. See also testimony of a panel of writers' representatives including NWU Executive Director Maria Pallante at a U.S. Senate hearing on the Copyright Reform Act of 1993, October 19, 1993, available at <<https://nwubook.org/Senate-writers-testimony-19OCT1993.pdf>>, and testimony of NWU President Jonathan Tasini at a public hearing before the U.S. Copyright Office, October 1, 1998, available at <<https://nwubook.org/Tasini-testimony-registration-1OCT1998.pdf>>.

every licensing request, if they are satisfied with the choices they have already made as to whether or how to license their rights and/or to exploit those rights themselves.

Many writers, of course, welcome engagement with their readers and make themselves available, in ways of their choosing, to their fans. But some popular writers would get no new writing or other work done if they made their contact information public or tried to read or respond to every communication from members of the public. Even less prominent writers sometimes find it essential to cut themselves off from public communication, and in some cases even from contact with friends and family, in order to concentrate on a writing project. The need for formal or informal writers' retreats, which may last for months in the case of a major project, is well recognized and long established as a part of how writers do our work.

Not every writer can afford to pay an agent or assistant to handle her communications with the public, to manage this workload, and/or to serve as an anonymizing proxy.

Any requirement to make contact information publicly available or to respond to requests for licensing, as a condition of copyright protection – including as a condition of redress for infringement or as a condition of not having rights deemed "orphaned" – would be a "formality" prohibited by the Berne Convention, and a denial of the effective remedies for infringement required by the WIPO Copyright Treaty. Neither the Copyright Office nor Congress has the authority to require any such formalities without violating U.S. treaty obligations.

Whether the writer or other rightsholder(s) can be found or contacted has, as should be obvious, absolutely no bearing on whether the work is available and/or is being exploited.

Classifying rights as "orphaned" if the rightsholder(s) cannot be "found" would require each writer to employ a publisher or agent as an anonymizing proxy to avoid loss of rights.

"Orphan works" legislation such as has been proposed by the Copyright Office would result in the classification as "orphaned" of rights to most anonymously self-published work (regardless of its commercial success and the revenues it is generating for the writer) and much other work self-published by writers who, while they are not anonymous, do not choose to make their contact information publicly available (again regardless of the commercial success of the work or the resulting interference with normal commercial self-publication and its revenues).

Our objections to "orphan works" proposals on the basis of, *inter alia*, their implications for privacy and anonymity (especially in light of the growing ease and importance of anonymous commercial digital self-publication),<sup>5</sup> were ignored in the final report and recommendations of the Copyright Office. Now that the Copyright Office is, as evidenced by this rulemaking, beginning to consider the implications for writers' privacy of copyright laws and regulations, we encourage the Copyright Office to reconsider and rescind its recommendation for fundamentally privacy-invasive "orphan works" legislation.

#### **4. The Privacy Act and copyright registration data**

The Privacy Act of 1974, 5 U.S. Code §552a (e), requires that "Each agency that maintains a system of records shall — (1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;... (7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless

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5 NWU comments to the Copyright Office on "orphan works" (February 4, 2013), available at <<http://www.nwubook.org/NWU-orphan-works-4FEB2013.pdf>>, and NWU reply comments on "orphan works" (March 6, 2013), available at <<http://www.nwubook.org/NWU-orphan-reply-comments-6MAR2013.pdf>>.

expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity."

We take it as beyond argument that records of the creation and publication of copyrighted written works, such as are contained in copyright registrations, are records "describing how any individual exercises rights guaranteed by the First Amendment."

Personal information included in these records is thus limited by these provisions of the Privacy Act to that data which is both "*necessary* to accomplish a purpose of the agency *required* to be accomplished by statute or by executive order," and "*expressly* authorized by statute or by the individual" (emphasis added).

The Notice of Proposed Rulemaking fails to assess whether the current or proposed rules satisfy this high burden of necessity (not mere utility), statutory requirement (not mere authorization as an option), and express (not merely implied) authorization. They do not.

According to the NPRM, "The public record of copyright registrations serves several important functions. Chief among these is that the record provides ... information that a potential user of a copyrighted work can use to locate the work's owner... [A]llowing the wholesale removal of a claimant address would impede the public's ability to contact a copyright owner to obtain permission to use the work."

We have previously urged that Congress consider the establishment of a voluntary author information directory, operated by the Copyright Office and populated with data crowd-sourced from writers ourselves, which could be linked as a relational database with copyright

registrations.<sup>6</sup> This would offer a much simpler and more effective means for providing and updating author contact information, for those authors who choose to supply it.

If writers want to record their contact information, a voluntary Authors Registry already exists.<sup>7</sup> It is a non-profit clearinghouse which was founded in 1995 by a consortium of U.S. writers' organizations including the ASJA, and later joined by the NWU and many others, to provide a means of identifying, receiving, and distributing payments to individual authors. Foreign publishers and reproduction rights organizations already use it to distribute certain royalties. Many American publishers and literary agents routinely send author information to the Authors Registry, and individual writers may have their identifying data recorded by it for \$10.

While our two organizations would greatly prefer that Congress empower the Copyright Office to track relevant identifying information about authors who are offering their works for licensing, encouraging use of the existing Authors Registry is one possible stopgap.

It may be that Congress should also consider authorizing the Copyright Office to operate a collective licensing scheme, particularly for public lending rights for written work.

But there is currently no statutory mandate or express authorization for the Copyright Office to collect or maintain records for the purpose of contacting writers for licensing. The Copyright Office has no statutory mandate to operate a licensing scheme for written works.

The Copyright Act, 17 U.S. Code §409, explicitly specifies the fields of personal data required to be included in applications for copyright registration: "(1) the name and address of the copyright claimant; (2) in the case of a work other than an anonymous or pseudonymous

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6 "Authors must be involved in any system of standard identifiers and rights databases," Submission of the American Society of Journalists and Authors (ASJA), National Writers Union (NWU), and Science Fiction and Fantasy Writers of America (SFWA) to the U.S. Patent and Trademark Office public meeting, "Facilitating the Development of the Online Licensing Environment for Copyrighted Works," April 1, 2015, available at <<http://accrispin.blogspot.com/2015/04/finding-authors-importance-of.html>>

7 See The Authors Registry, <<http://www.authorsregistry.org>>



work, the name and nationality or domicile of the author or authors, and, if one or more of the authors is dead, the dates of their deaths; (3) if the work is anonymous or pseudonymous, the nationality or domicile of the author or authors,... (10) any other information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright."

Note that clause (10) refers to the identification of the work, not the identification of the writer. Contacting the writer to seek a license or permission for copying or other use is a distinct purpose which is certainly not explicit, and does not even implicitly bear on the "the preparation or identification of the work or the existence, ownership, or duration of the copyright."

Collection or maintenance of records for this purpose is thus barred by the Privacy Act.

The database of copyright registrations is not a database of works available for licensing. If writers want to offer rights to their works for licensing, they can advertise their availability in many ways, including through voluntary participation in collective licensing schemes.

But writers can, and increasingly often do, exploit some or all of their rights to some or all of their works themselves, especially in digital formats, including through various channels of commercial and other self-publication and peer-to-peer distribution. Other works may not be on offer for additional licensing because the writer (or other rightsholder) is already satisfied with the choices she has made as to how to license and/or exploit those rights.

The creator of a written work is not required to offer that work for licensing, or to make herself available for permission requests, as a condition of registration. On the contrary, a writer may register copyright precisely because she is already exploiting the work in the manner of her

choosing – making it available on her (possible anonymous) website, or as a paid download, for example – and wants to assure herself of protection against any additional unauthorized copying.

## 5. Conclusion

Writers' privacy matters. New technologies have created new opportunities for writers to distribute, exploit, and generate revenue from their works anonymously or without divulging their personal information, and without the need for a publisher or agent as an anonymizing or privacy-preserving proxy. Those privacy gains should not be undermined by Copyright Office regulations or U.S. law, or by copyright registration procedures.

Respectfully submitted,

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/s/

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