

The undersigned national organizations of writers and photographers submit these comments in response to the Notice of Inquiry (NOI) by the U.S. Copyright Office, “Online Publication,” FR Doc. 2019-26004, Copyright Office Docket Number 2019-72, 84 *Federal Register* 66338-6634 (December 4, 2019).¹

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 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.

American Photographic Artists, Inc. (APA) is a leading non-profit organization run by, and for, professional photographers since 1981. Recognized for its broad industry reach, APA works to champion the rights of photographers and image-makers worldwide.

Through this Notice of Inquiry, the Copyright Office is seeking comments concerning the definition of “publication” in the Copyright Act as it applies to works made available online, whether the Copyright Office should promulgate “guidance” on this issue, and whether “there is a need to amend section 409 so that applicants for copyright registrations are no longer required to identify whether a work has been published and/or the date and nation of first publication” or to enact other modifications to the registration provisions of the Copyright Act.

1. By notice promulgated on January 21, 2020 (85 *Federal Register* 3303-3304, FR Doc. 2020-00653), the comment period for responses to this notice of inquiry was extended through March 19, 2020.

As organizations some of which have previously raised this issue with the Copyright Office, we thank the Copyright Office for recognizing the importance of this issue, issuing this Notice of Inquiry, and including the question of whether changes to the Copyright Act are needed.

As the NWU said in comments to the Copyright Office in 2017, the Copyright Act:

... require[s] writers to guess, and to gamble our later ability to enforce our copyrights on successfully guessing, at the time of registration, whether a court would later determine our works to have been, as of that time, “published” or “unpublished” as those terms are defined in the Copyright Act. We doubt that even the foremost experts in copyright law would be willing to bet on such a gamble with respect to works distributed online, much less to risk the entire value of their life’s creative work on such a gamble.²

However, while we recognize the good intentions of the Copyright Office in desiring to “clarify” for creators whether our work would later be deemed by courts to have been registered or not, we believe that “guidance” from the Copyright Office would inevitably be mistaken by creators as authoritative, and relied on by creators, at their own peril to their rights. As a result, such guidance would tend to provide false confidence to creators and do more harm than good.

Accurate “guidance” by the Copyright Office to creators would consist of more explicit and prominent notice to creators that:

1. The Copyright Office has no authority to determine whether a work will later be determined by courts to have been “published” or “unpublished.” Copyright Office “guidance” on this issue cannot be relied on by creators.

2. National Writers Union (NWU), Textbook & Academic Authors Association (TAA), Science Fiction and Fantasy Writers Of America, Inc. (SFWA), and American Society Of Journalists and Authors (ASJA), “Comments and Renewed Petition for Rulemaking: Group Registration of Unpublished Works” (FR Doc. 2017–21722, Copyright Office Docket Number 2017-15), November 17, 2017, available at <https://nwu.org/wp-content/uploads/2017/11/NWU-registration-13NOV2017.pdf>.

2. Only courts can determine whether a work was, at the time it was registered, published or unpublished. Such a determination can be made only after the fact.
3. There is no procedure by which a creator can obtain, prior to or at the time of registration, a definitive or binding determination of whether a work is published or unpublished.
4. Creators must guess whether each work will later be deemed published or unpublished.
5. If a creator guesses wrong, they may irrevocably forfeit some or all of their rights.

Clear guidance to this effect from the Copyright Office would serve to clarify why Congress needs to act, and why the Copyright Office should recommend that Congress do so.

We continue to believe, as the NWU has argued consistently for more than 25 years to the Copyright Office and Congress, that what is called for, and what is ever more urgently needed in the digital age, is change by Congress to the registration provisions of the Copyright Act.³

The requirement to register copyrights as a precondition to remedies for copyright infringement (including eligibility for statutory damages and/or recovery of attorneys' fees) is, with respect to foreign works, a formality prohibited by the Berne Convention. To the extent that works first published in other countries that are parties to the Berne Convention enjoy greater (although still less than full) eligibility than works published in the U.S. for remedies for copyright infringement without registration, this creates an incentive for even U.S. authors to insure that their works are first published in any country other than the U.S. Such an incentive is clearly perverse, and contrary to the U.S. public interest.

3. See the discussion of this history and citations to earlier NWU testimony to Congress and submissions to the Copyright Office in "Comments of the NWU and ASJA: Removal of Personally Identifiable Information from Registration Records; Notice of Proposed Rulemaking" (FR Doc. 2016-22011, Copyright Office Docket Number 2016-7), October 17, 2016, available at <<https://nwu.org/wp-content/uploads/2016/10/NWU-ASJA-PII-registration-17OCT2016.pdf>>.

The best way to deal with the problems caused by the registration provisions of the Copyright Act, 17 U.S. Code § 411 and § 412, is to completely repeal those sections of the law. They impose formalities prohibited by the Berne Convention with respect to foreign creators and foreign publications, and they harm U.S. creators as well. We reiterate our longstanding call on the Copyright Office to recommend repeal of these sections to Congress, and on Congress to act.

If registration requirements are retained, the violations of the Berne Convention and of the rights and interests of U.S. creators can best be mitigated by legislation “to amend section 409 so that applicants for copyright registrations are no longer required to identify whether a work has been published and/or the date and nation of first publication,” as suggested in the Notice Of Inquiry. This suggestion for reform of the Copyright Act has our strongest endorsement, and we urge the Copyright Office to recommend it to Congress.

Neither whether a work would be determined to have been published or unpublished, nor where it would be determined to have been “first” published (particularly in the digital environment of online publication on “cloud” platforms consisting of Web servers in multiple and often unknown countries), is known or, in many cases, knowable to creators seeking to register their works distributed online, even with the most diligent effort. Requiring us to make guesses about these matters is unreasonable, and effectively denies us our rights.

Finally, if the Copyright Act and/or Copyright Office regulations continue to require creators to specify whether our works are “published” or “unpublished,” or make distinctions in rights and/or eligibility for remedies on that basis, we believe that the best interpretation of the current provisions of the Copyright Act is that all works made available on the World Wide Web are “published.” The Notice of Inquiry suggests that a distinction could or should be made on

the basis of whether copies of works distributed on the Web are intended or authorized for further distribution or re-copying by their recipients. But we believe that this latter view is misguided and is based on a lack of appreciation of the architecture of the Web.

Any Web server is, *by definition*, an on-demand digital copying and copy-distribution machine. Before a user can view a Web page, the Web browser on their device sends a “GET” request to the Web server, in response to which the server creates and sends a digital copy of the Web page or other Web content to the user’s device.⁴ That copy is then rendered by the browser on the user’s device for viewing or other use. This process constitutes making available and distribution of copies and satisfies the definition of publication, regardless of whether the user who receives and views the digital copy in their Web browser is authorized to make *additional* digital or paper copies. All Web content that is made publicly available on the Web (*i.e.*, that is made available for making and delivery over the Internet of copies, on demand, by a publicly accessible Web server) should be deemed, by definition, to be “published.” No inquiry onto whether further re-copying or re-distribution is authorized or intended should be necessary.

We again thank the Copyright Office for initiating this Notice of Inquiry and inviting comment on the need for revisions of the Copyright Act. We look forward to the Copyright Office’s recommendations to Congress, and to Congressional action to address these longstanding but increasing important concerns of both U.S. and non-U.S. authors.

4. The server may decide whether or not to fulfill a “GET” request (*i.e.* whether to respond to the request by making and sending a digital copy) on the basis of criteria such as whether the request is accompanied by a “cookie” indicating that the request comes from an authorized requester such as a logged-in subscriber, or the geographic territory or Internet domain name inferred from the IP address from which the request is received. But none of these or other conditionalities for fulfillment of GET requests alters the fact that any Web server is, by definition, an on-demand digital copying and copy distribution engine.

Respectfully submitted,

_____/s/_____

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