

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

Notice of Inquiry:
Online Publication
(FR Doc. 2019-26004;
Copyright Office Docket
Number 2019-7)

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)**REPLY COMMENTS OF THE
NATIONAL WRITERS UNION (NWU)**
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June 15, 2020

National Writers Union

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The National Writers Union (NWU) submits these reply 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 and the initial comments submitted in response to that Notice of Inquiry².

The NWU is an independent 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, academic writers, and multimedia workers.

As we noted in our initial comments, one of the questions raised by the NOI is how to apply the definition of “publication” in the Copyright Act to works made available online.

In our initial comments, we noted that, “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 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. 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.” [emphasis added]

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1. By notice promulgated on January 21, 2020 (85 *Federal Register* 3303-3304, FR Doc. 2020-00653), the deadline for reply comments in response to this notice of inquiry was extended through June 15, 2020.
 2. Initial comments of the National Writers Union (NWU) and American Photographic Artists, Inc. (APA), March 19, 2020, <<https://www.regulations.gov/document?D=COLC-2019-0003-0020>>; also available at <<https://nwu.org/wp-content/uploads/2020/03/NWU-APA-online-publication-19MAR2020.pdf>>.

In response to the NOI, some other commenters expressed exactly the mistaken argument with respect to “redistribution” of Web content that we criticized in our comments.

Among these commenters, the Authors Alliance³ argued for the inclusion of the qualifier, “without technological restrictions that prevent downloading or other reuse” in the criteria for determining whether a work made available online has been “published”:

The Copyright Office should adopt guidance that “Publication” occurs when a work is first offered, under the rights-owner’s authority, for viewing online without technological restrictions that prevent downloading or other reuse.... The question should not be whether a post on the Internet ... authorizes redistribution of a work, but whether it forbids it.

The implicit intent of the Authors Alliance proposal appears to be to create a legal presumption that making a work available on the World Wide Web implicitly “authorizes redistribution” of the work, unless (nonexistent and impossible) technical measures are used to prevent such redistribution. The Authors Alliance does not mention remuneration, but it appears that it intends that this presumptive implied license should be for unremunerated redistribution.

The creation of such a presumption of an implied license for redistribution of files downloaded from the Web by browsers is unsupported by the Copyright Act, outside the scope of this policy study by the Copyright Office, contrary to the interests of authors and of the public, and based on an erroneous claim with respect to the existence of such technical measures.

The Authors Alliance does not say why it believes authors would benefit from the creation of such a presumption of an implied license for redistribution of Web content. As authors, we believe it would harm us. Regardless of what definition of “publication” is used, publication and/or distribution of copies of a work over the Internet does not imply, and should

3. Comments of the Authors Alliance, March 19, 2020, <<https://www.regulations.gov/document?D=COLC-2019-0003-0014>>.

not be presumed to imply, permission for copying or “redistribution” of the work. Such an implied license would render the copyright in any such work effectively meaningless.

Even if the technical measures suggested by the Authors Alliance existed, which they don’t, authors typically have no control over the coding of Web pages on which our works appear. Contracts for licensing of Web distribution of written works are typically contracts of adhesion. Typically, these contracts give authors no say with respect to attributes such as “no-cache” headers or “robots.txt” files that, while they do not and cannot *prevent* redistribution, might be used to revoke an implied license for redistribution. A presumptive implied license would thus be, in practice for authors, a compulsory license.

The Copyright Office should be extremely cautious about reading into the Copyright Act any new presumptive, implied, and/or compulsory license. Such caution is especially warranted in this instance, where the implications for Web content, the Web content economy, and authors of Web content could be so sweeping. Should it be presumed that the publisher of any ordinary Web site intends to grant an implied (and apparently unremunerated) license to anyone who wants to create an unauthorized “mirror” server that distributes all of the files from the site, perhaps with the addition (or substitution for advertisements on the original site) of advertisements that generate revenue for the operator of the “mirror” site? This would appear to be the canonical example of a “pirate” site for Web content. This is not what the publisher of a typical Web site, or the authors of the works distributed through such a site, intends to authorize.

This proposal by the Authors Alliance is based on the claim that, “copyright owners have the technological capacity to restrict the further distribution of their online content.”

This claim is entirely unfounded, and should be rejected by the Copyright Office.

Web browsers work by first downloading files from Web servers, and then rendering those files for reading, viewing, or other local use. Anything viewed or read on the Web has *necessarily* already been downloaded to the device on which it is viewed or read. It is *per se* impossible to read or view Web content without it first being downloaded by the web browser.

Passwords or other controls can be used to restrict access to files available online only to authorized users. Encryption of files distributed over the Web can be used to restrict access to the decrypted contents of those files only to authorized users. But neither these nor any other technical measures can restrict the ability of a user, once they have downloaded a file for rendering, reading and/or viewing in a web browser or some other application, to *copy and/or redistribute copies of any file* obtained from the Web, even if that file is encrypted. File copying and transmission software is agnostic with respect to file content or encryption.

A ZIP file, PDF file, or EPUB file can be encrypted and protected with a password or other encryption key. But that has no effect whatsoever on bitwise copying or redistribution of the encrypted file once it is downloaded from a Web server or otherwise obtained.

There are not, and the nature of the Web and of digital files means that there cannot be, any technical measures that would allow reading or viewing of Web content without the files containing that content first being downloaded, or while restricting copying and redistribution of those files. The comments of the Authors Alliance in this respect are premised on a chimera.

We concur in the comments of the Science Fiction and Fantasy Writers of America, Inc.⁴, that many unpublished works are available privately through controlled-access websites, and that private rather than public Web availability should not be deemed to constitute “publication”.

4. Comments of the Science Fiction and Fantasy Writers of America, Inc., March 19, 2020, <<https://www.regulations.gov/document?D=COLC-2019-0003-0006>>.

Many unpublished works are available on the Web. But they are not *publicly* available. The distinction between whether or not availability on the Web constitutes “publication” should depend on whether the work is publicly available or whether access is controlled. The distinction between unpublished works and published works is made clear from these access controls:

- Many authors store drafts of unpublished works on personal file servers accessible over the Web, or on controlled-access cloud-based Web services such as Dropbox. These services can also be used for collaboration between co-authors, exchanges of drafts and comments with editors, and sharing of as-yet-unpublished works with reviewers.
- Some authors create new works (which may or may not ever be published) directly on Web-based controlled-access writing platforms such as Google Docs or Dropbox Paper.
- Password-protected Web-based services such as We Transfer are used to transmit drafts of unpublished works between authors, editors, graphic designers, and reviewers.
- Many authors create drafts of blog posts and other Web content directly in password-protected Web-based editing modules, accessible only to authorized users, within Wordpress and other blogging and content management systems. These same controlled-access Web-based user interfaces are used to edit blog posts and Web content. Drafts created and/or edited through these platforms may or may not later be published.

These files are all available (to authorized users) on the Web. But none of these files are intended to be public or should be considered to be published. Access to files of these types on any of these Web-based platforms is controlled, typically through user and/or file passwords.

Some web-based services can be used either for private storage and controlled distribution of unpublished works, or for uncontrolled distribution of published works, depending on the settings selected for a particular file. For example, Google Docs can be used for writing, editing, collaboration, or sharing of drafts of unpublished works, with password-controlled access limited to a specified list of readers. Google Docs can also be used as a publishing platform, by choosing to grant access to a file to any user who knows the URL. Unpublished works made available on social media platforms can be made accessible only to a defined, password-controlled list of “friends”. Those same social media platforms can also be used for uncontrolled distribution of published works. The distinction is in the controls on access to files, not on any attempt to impose technical controls on *further copying* or *redistribution*.

It should be irrelevant to the assessment of “published” or “unpublished” status whether or not additional (nonexistent and impossible) technical measures are used to try to restrict the ability of those who have viewed (*i.e.* downloaded and obtained a copy of) the work from such a Website to make or redistribute *additional* copies.

The restrictions on copying or redistribution of copies of works obtained via the World Wide Web are provided by the Copyright Act and the applicable copyright treaties, not by technical measures. Copyright treaties including the Berne Convention and the WIPO Copyright Treaty require the U.S. to provide authors with effective legal remedies for violations of our rights. Authors’ rights are protected by law and should be enforceable. Authors should not be reduced to trying to police our rights through vigilante technical measures or fortifications, as we too often are today and as the Authors Alliance implicitly suggests that we should be.

We again thank the Copyright Office for the opportunity to provide these reply comments. We remain available to work with Copyright Office and Congress on legislation to address the issues, some of them longstanding, that have led to this policy study.

Respectfully submitted,

_____/s/_____

National Writers Union

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