

THE COPYRIGHT REFORM ACT OF 1993

HEARING

BEFORE THE

SUBCOMMITTEE ON
PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

S. 373

A BILL TO AMEND TITLE 17, UNITED STATES CODE, TO MODIFY CERTAIN RECORDATION AND REGISTRATION REQUIREMENTS, TO ESTABLISH COPYRIGHT ARBITRATION ROYALTY PANELS TO REPLACE THE COPYRIGHT ROYALTY TRIBUNAL, AND FOR OTHER PURPOSES

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and statutory damages are extraordinary remedies, and not inherent aspects of copyright protection. But is that conclusion free from doubt?

Ms. RINGER. Senator Hatch, I believe that it is a violation of the Berne Convention. I may be alone in this. But it might not have been in 1976 or 1978 when it came into effect, because at that point, perhaps the importance of statutory damages and attorneys' fees and in some cases the absolute essential nature of that, for people to actually defend their rights, was not that clear. But with the enormous increases in costs of litigation and so forth, I think that it is a violation.

Senator HATCH. Could you also explain in the context of mandatory deposit how a provision allowing abandonment of copyright could be interpreted as an unpermitted Berne formality? Does the Librarian's proposal for enhanced mandatory deposit avoid this potential problem?

Ms. RINGER. You're asking a tough question. But speaking personally, again, I think it probably does violate Berne. If the choice is between not making a mandatory deposit and abandoning copyright, if that's the choice that's offered, it seems to me that that is a formality which would be forbidden by Berne.

Senator HATCH. Thank you. I really want to thank all four of you for the work that you've done, for the ACCORD work, the statements that have been made. I think they're very helpful to the committee. So we appreciate it.

Senator DECONCINI. Thank you, Doctor, very much. We appreciate your testimony, all of you, and your being with us today.

Mr. BILLINGTON. Thank you very much, Mr. Chairman.

Senator DECONCINI. Our next panel will be Scott Turow, Maria Pallante, and Erica Jong. If they would please come forward, please. Your full statements will appear in the record. We would ask that you summarize them for us.

Ms. Jong, we'll start with you if you're prepared. Thank you for being with us today and taking the time to express your views regarding this very important subject. Will you please proceed?

STATEMENT OF ERICA JONG

Ms. JONG. Thank you, Mr. Chairman.

Mr. Chairman, my name is Erica Jong. I am a poet, a novelist, a biographer, an essayist, and I have also written screenplays, plays and musical comedy libretti. I very much appreciate the opportunity to testify here today.

Since the publication of my first book in 1971, I have been active on behalf of authors' rights in many organizations: The Poetry Society of America, Poets and Writers, where I served on the board for a decade, The Author's Guild, where I served on the board for two terms, a total of 6 years, culminating in my service as president from 1990 to 1992.

I remain a member of the Author's Guild Council and a past president. I also belong to the Dramatists Guild of America, PEN, The Writers' Guild of America East and West, and the National Writers' Union, where I have accepted the offer to serve on the advisory board.

But I emphasize that I am not here in any official capacity, but simply as an author who has had many different experiences with my work in many different countries. My works are published around the world in languages as diverse as Chinese, Japanese, Hebrew, Macedonian, Serbo-Croat, Polish, French, Italian, Russian, Swedish, Norwegian, Finnish. My last novel perhaps sold more copies in Italy than it did in the United States, which is not a rarity.

I have a special interest in copyright and free expression and in anticensorship activities. I am also a passionate amateur book collector, and a great supporter of libraries. I was thrilled to meet the library people here today. As a scholar and a teacher of 18th century English literature, I have taught at the City University of New York, the University of Maryland, the Salzburg Seminar, the Breadloaf Writers' Conference, also as a former Ph.D. candidate at Columbia, I have often been dependent on the resources of great libraries.

I come before you to support creators' rights, which are endangered in many countries, including our own. Our Constitution specifically empowers you to protect copyright by securing for limited times to authors the exclusive right to their respective writings. section 1, clause 8. This body, both in 1909 and in 1976, passed legislation to ensure that creators and their heirs could benefit from their created work. In 1989, you led us a giant step forward by adhering, by ratifying U.S. adherence to the Berne Convention.

Often creative work circulates in many diverse forms before it reaches readiness for publication. As a poet, I often mail or fax poems to friends, to editors, to colleagues. As a playwright and screenwriter, I share ideas as yet unconsummated with my colleagues and with my possible future collaborators. As the writer of work for children, I have read aloud to children, my own and those of others and friends.

I have read portions of stories that may not be published for many years. If I, a successful writer with a wealth of legal talent at my disposal, cannot copyright each and every product of my brain, how can the beginning poet, screenwriter, photographer, novelist or nonfiction writer be protected?

To register every copyright is an impossibility for the fertile and prolific creator. Most do not even know about the requirements of registration as a precondition for meaningful enforcement. Others cannot afford the burden of registering every one of their poems, essays, stories, photographs, sketches. Sometimes one's work is taken from one deliberately or not, and one does need a remedy.

Most of my creative colleagues are not rich, and they cannot afford lawyers. That is why the availability of attorneys' fees and statutory damages is crucial. They are by nature playful dreamers who don't always keep lists and inventories of each idea or its expression. They do not employ, nor can they afford to employ, staffs of administrative assistants to keep a paper trail of every work.

But when someone reproduces that work without permission, they sometimes need recourse that is not beyond their economic means. Often their work is appropriated and they don't even discover it until years later, much too late to fall within the requirement of section 412.

Special registration and fees available only to the affluent discriminate against American creators. Most of the world does not impose such a burden. We, too, believe in the freedom of intellectual property. But without meaning to, we have restricted it by requiring registration.

As American creators, we wish, of course, to have the richest possible national library. But we see no reason to link the deposit of works in the Library of Congress with copyright enforcement. Our copyright law provides authors with an incentive to create by granting us exclusive rights to license our words. Our ability to enforce these rights, essential to making a living for us, should not be tied to the great and worthy good of creating and maintaining a great national library.

When American books are pirated in other countries, our American creators are outraged. We should piracy, and demand that all countries in the world obey the law of copyright. We believe that creators should benefit from their own work; it is the only currency we have. We believe that their children should also benefit; it is often the only legacy we have to give them. If in this new information age our work is utilized by others without permission, we need resources that are unencumbered.

In the years since the Copyright Law of 1976 was passed, some organizations have regrettably taken advantage of intellectual property registration requirements in the law to benefit by creators' work. Knowing that creators could not usually afford to sue, and could not get damages and attorneys' fees without timely prior registration, these organizations used copyrighted work with impunity.

We are attempting to remedy this problem by repealing section 412 of the 1976 Copyright Law. We really believe that the legislators who proposed this repeal embodied in Senate bill 373 are truly acting in the spirit of our copyright laws and of our Constitution. It is in the spirit of those laws and the Constitution that I endorse Senate bill 373.

It is because I am a successful author that my work, both published and unpublished, has been pirated, infringed, and used without permission. Often I have been unaware of the infringement until long after it has occurred. If Senate bill 373 becomes law, I and other creators will have better access to redress. If prior registration remains necessary, it would be more difficult for us to protect our work.

When I travel to foreign countries and argue that we should all support the Berne Convention, I want to know that we in America are doing our best to create and sustain a climate hospitable to creators' rights in our own great country. In many other countries, the United States' registration requirements are regarded with skepticism, and making them more onerous will only separate us from our many global partners. We should seek to have a standard of intellectual property law that is truly international and that truly protects individual creators who are increasingly disempowered by giant multinational conglomerates. We would move closer to this goal by repealing sections 411(a) and 412.

Our authors, screenwriters, lyricists, composers, photographers, illustrators, graphic artists, fine artists, create immense wealth for

the United States. They also create our images of freedom all over the planet. It is these images of freedom that have helped to bring the Iron Curtain down.

The dreamers who give birth to our intellectual and artistic wealth also deserve a fair share of it. They deserve control over it. They have already given away far too much to those whose only contribution is to distribute it, and who pillage the proceeds of creative wealth to buy more and more media companies that privately control the fruits of creativity and free expression.

We as creators are only asking for what Charles Dickens fought for in the 19th century and what the Founders truly intended for us to have: the right to our own words and to receive proper credit for the pleasure and for the inspiration they give to those who are moved by them.

Copyright is not only a law, it is an idea enshrined in our Constitution. America has become a great country in part because of its access to information, to art, to music, to inspiration itself. After all, we who call ourselves creators are merely the singers of God's song. We ask only the chance of raising our voices without having to worry about our pockets being picked.

Please repeal sections 411(a) and 412.

Senator DECONCINI. Ms. Jong, thank you very much for your testimony. It was very helpful.

Ms. Pallante, if you would summarize your statement, please?

**STATEMENT OF MARIA PALLANTE, EXECUTIVE DIRECTOR,
NATIONAL WRITERS UNION, NEW YORK, NY**

Ms. PALLANTE. Thank you, Mr. Chairman. I have prepared a written statement and with your permission would like to submit that for the record.

Senator DECONCINI. It will appear in the record.

Ms. PALLANTE. I am a member of ACCORD and a former staff attorney for the Author's Guild. However, I am here in my capacity as the executive director of the National Writers Union, a nationwide organization of 4,000 journalists, poets, novelists, biographers, historians, children's book authors, technical and commercial writers, genre writers, textbook authors, essayists, and academic scholars.

Our members strongly support the elimination of sections 411(a) and 412 from the Copyright Act. The National Writers Union previously urged that this be done in a statement to the House Subcommittee last spring. We believe that thousands of other writers, composers, photographers, artists and creators of copyrighted works in every medium of expression do not even know of the requirements of section 412. Others simply cannot afford to register each and every poem, article, short story which they create in a given year.

The remedies of attorneys' fees and statutory damages are essential to the meaningful enforcement of an author's copyright. Without these remedies, few authors can afford the legal fees associated with an infringement claim, and few are eligible for economic relief. The Supreme Court has held that these remedies are intended to allow an author modest recompense that otherwise would not be possible.

A few historians and biographers, we believe erroneously, believe that section 412 is somehow necessary to protect application of the Fair Use Doctrine. Section 412, however, neither protects nor prevents legitimate fair use. First, authors and their publishers have to honestly apply the Fair Use Doctrine when a borrowed work has been registered.

There is no less reason for them to be as scrupulous when an author has not yet registered her copyright claim. Any argument that the Fair Use Doctrine is at risk is an implicit acknowledgement that some authors and publishers feel more free to exceed fair use when borrowing from unregistered works, because the denial of attorneys' fees and statutory damages insulates them from liability as a practical matter.

Clearly, copyright protection extends to all works, whether published or unpublished, commercially valuable or commercially valueless. The Supreme Court has agreed that authors may have legitimate reasons for keeping unpublished works private. Unpublished works are often works-in-progress, works not ready for others to read or utilize.

Often authors show unpublished works only to a small number of people, perhaps to their agent, perhaps to an editor or two. Most published authors whom I know have many unpublished works lying around or floating around the industry. Invariably, these works are unregistered. The fact that authors do not register their works does not mean that their works are not valuable to them, nor does it mean that others should be free to use them without fear of a lawsuit.

Moreover, repeal of 412 will not trigger a flood of new infringement claims, in our opinion. Plaintiff-authors and their attorneys will still be faced with the prohibitive fact that if their case is lost, they cannot recover statutory damages or attorneys' fees. More importantly, courts have the power to compel a plaintiff-author to pay attorneys' fees to the defendant if in the end the claim is found to be without merit.

We would also like to point out that in addition to being necessary to the rights of authors, the remedies of attorneys' fees and statutory damages are common under American law. Both remedies were available under the 1909 Copyright Act, even if registration was made after the infringement. When in 1976 section 412 made these remedies dependent upon prior registration, it was at the expense of the creative community in this country.

For authors of limited income, the availability of attorneys' fees is essential to their being able to retain counsel. Without this prospect, few attorneys will agree to represent an infringement claim, no matter how egregious, and will require a retainer sum up front. Most New York attorneys require a retainer agreement of at least \$5,000, a sum that is more than many authors, many of our members, earn from royalties in a given year.

Statutory damages are essential to authors because it is extremely difficult to prove actual loss in cases of infringement. The value of unpublished works is not easily obtainable, because such works by their definition have not yet been sold commercially. Works with limited circulation, a category that are easy targets for infringement, cannot be valued fairly unless their authors have

proven sales histories. Statutory damages often supply the only hope for recovery, thereby allowing authors an effective way to protect their intellectual property.

Publishers have argued that elimination of section 412 will reduce deposits with the Library of Congress. This is a spurious argument, in our opinion. In 1986, they enthusiastically urged the repeal of section 412 in a letter written by their counsel to the Register of Copyrights. His letter was written to support the demand of the Author's Guild that section 412 be eliminated. Section 412, we believe, was no more or no less of an inducement than it is today.

We thank Chairman DeConcini and Senator Hatch for giving us this opportunity to present our views.

Senator DECONCINI. Thank you very much, Ms. Pallante.

Mr. Turow, please proceed. Your full statement, if you have one, will appear in the record.

**STATEMENT OF SCOTT TUROW, MEMBER, AUTHOR'S GUILD,
NEW YORK, NY, ACCOMPANIED BY ROBIN DAVIS-MILLER, EX-
ECUTIVE DIRECTOR, AUTHOR'S GUILD**

Mr. TUROW. Thank you, Mr. Chairman, Senator Hatch. I am, of course, pleased and honored to be here with the opportunity to address the subcommittee.

I am appearing today in behalf of the Author's Guild. With me today is Robin Davis-Miller, who is the executive director of the Author's Guild.

As you have noted, Mr. Chairman, I have made a formal statement. With your permission, if that appears in the record, I would like to proceed by way of summary with just some oral comments.

Senator DECONCINI. Please proceed.

Mr. TUROW. Our special concern here today is with the repeal of section 412. And I must say that our opposition to this legislation is certainly somewhat counterintuitive for the Author's Guild. We seldom oppose anything that on its surface would appear to enhance the value of copyright, which as I'm sure the members of the subcommittee understand, and you, Mr. Chairman, copyright is the life blood of America's authors.

And it's also obvious that there is some respectful disagreement within the literary community, based on the statements you have heard from my colleagues to my left. They are sane and principled objections that are being raised.

Unfortunately, in our view, they are simply not supported by actual experience, and not supported by the experience of the literary community. It is clear to me as a trial lawyer, as a sort of side light that I continue to maintain, that this legislation is going to have a negative net effect for America's authors and for their rights of free expression.

With all due respect to Ms. Pallante, to me it seems beyond serious dispute that this legislation is going to encourage increased infringement litigation. Indeed, that's the purpose of it, to open the courts to people who currently don't have access to the courts, at least in theory.

Now, as a trial lawyer who does spend most of my time in Federal court, I would certainly hope, and I expect, that the sub-

committee would not take a positive view of this legislation unless it's convinced that most of those new claims that are going to be brought are first of all meritorious, and second of all, as a matter of policy, at least as important as the business that presently is before the Federal courts, and in places like Chicago, where I spend most of my time practicing, can lead to delays of up to a year, for example, in getting a ruling on a simple motion to dismiss or 1½ years in getting a ruling from our court of appeals.

But unfortunately, I don't think that that is the case. I don't think the case is that most of these new claims will prove to be meritorious or significant from a policy perspective. As I indicated, initially the Author's Guild was inclined to support this legislation for the reasons indicated. It seems to expand the value of copyright. That's a good thing from an author's perspective.

But the next step taken was to contact our own membership, as well as representatives of other writers' organizations, and to say "Gee, this sounds like a good idea, but does anybody have a good example of a writer who has lost a meritorious claim under the present scheme?" Now, none have been cited to us as yet, and that fact has had a large impact on the formulation of our views about this legislation. I am not for a minute claiming that there are no examples at all out there. There undoubtedly must be. I know that as a matter of simple deduction.

But I do want to suggest, Mr. Chairman and members of the subcommittee, that the problem, at least from an author's perspective, of rights being lost under the present legislative scheme is far less widespread than some of the statements you're going to be hearing today may be suggesting to you.

Now, if this legislation will not help many deserving authors based on our review of what we would have to call anecdotal evidence, are there authors who are going to be hurt? We think the answer is clearly yes, overwhelmingly yes. And here our principal concern is in the area of fair use. That is of course an area that is of particular concern to scholars, biographers, historians, journalists, and anybody who wants to judiciously quote from somebody else's work in the course of creating their own new work.

Now, undoubtedly, Mr. Chairman, you and the members of the subcommittee recall the vexed history of the last legislative action taken with regard to fair use. Fair use remains, in spite of the revisions of section 107 of the Copyright Act, a boundary line issue. It is not clear what deference, for example, is due to unpublished versus published work. This is an area that is still subject to litigation and a great deal of questions, and we at the Author's Guild receive questions frequently from our members on this issue.

Now, speaking personally, I was opposed and testified in front of the House against any change in section 107. I thought it was unnecessary. But my opposition was predicated on a kind of pragmatic, lawyerly view, if you will, of what was likely to happen. And I thought at that time that the hazard to authors making fair use of quotations was really limited to injunctive actions, since there is little actual damage that attends most fair uses, and that the result of that was going to be an occasional injunctive action which meant to me that somebody had to be ready to first spend the significant attorneys' fees involved and therefore it had to be an issue

of vital concern on which the alleged copyright owner was pretty sure that he or she was correct.

The problem with this legislation is, it dramatically alters that balance of risks. And the temptations of statutory damages and attorneys' fees will make fair use disputes far more frequent, and we fear, and I think we fear in good faith, that fair use litigation will become a sort of subterfuge for unhappy subjects of reportage, of biography, of history, who can't mount a good defamation claim, and will therefore use infringement claims they are now allowed to use with regard to unpublished works as a weapon in litigation.

We fear greatly the spillover effect that this is going to have. The advice that I give my clients all the time, that most of the lawyers in this room give their clients all the time, is take no chances. And when that advice is heeded in this context, it means that publishers will become increasingly wary of any work that could even conceivably give rise to one of these lawsuits.

Senator DECONCINI. Excuse me for interrupting. You say when you advise them, take no chances, you mean go and register. Is that what you mean?

Mr. TUROW. Certainly go register. And certainly don't, if you're going to publish something, take no chances with it. Who wants to undergo the extraordinary cost and unpleasantness of litigation in today's society.

We have to recognize here what the impact of prospective litigation is on the kinds of judgments that people in the marketplace make. Everybody wants to avoid litigation. And that really is the problem here. Authors will also take steps to keep themselves out of the courtroom. They are going to sanitize their works of anything that could even give rise to a fair use claim.

And unfortunately, the burden of this is not going to fall, frankly, on best-selling authors where the benefits are quite conceivably worth the risks. It's going to fall on the works at the margins, works that don't appear to have a great profit potential, where a publisher is going to say "You know, I would have published that 3 years ago, but once this repeal passed, it's too risky to publish that, and take the chance that I'm going to get sued for statutory damages and attorneys' fees." And that are the costs that are of great concern to us, and that cause us to oppose this legislation.

I note that Ms. Ringer mentioned that she thought these concerns were legitimate ones, and she, as Mr. Billington says in his formal statement, she recognizes them as legitimate concerns, but says that they are not properly addressed through section 412. I only hope, Mr. Chairman, that you and the subcommittee will not proceed, if you share those views, without some contemporaneous remedy for these concerns to make sure that it will not become open season on authors and publishers, particularly those who publish works that contain quotations from other sources.

Thank you very much.

[The prepared statement of Mr. Turow follows:]

PREPARED STATEMENT OF SCOTT TUROW

SUMMARY

- In an attempt to gather anecdotal evidence from its members and the members of other writers organizations, The Author's Guild has not yet found an example

of a writer being unable to bring a meritorious infringement claim under the present scheme.

- On the other hand, the repeal of sections 411(a) and 412 seems likely to foster increased litigation whose net effect will be to burden authors' rights of free expression. By eliminating registration as a pre-condition for an infringement claimant to receive statutory damages and attorney's fees, the proposed legislation is far more likely to promote vexatious suits—crank claims of original authorship or disputes about fair use. These suits, taken together, will have the effect of restricting free expression—by making publishers increasingly wary of works that could even conceivably give rise to infringement claims; by raising the costs of publication, making less likely the publication of works outside the mainstream, whose profit potential appears uncertain; and by providing new weapons that can be freely used by the unhappy subjects of biographies and reportage to hamper what they regard as unfavorable publications.

Mr. Chairman and Members of the Subcommittee: My name is Scott Turow. I am a novelist and also a practicing attorney. I am appearing before you in behalf of The Author's Guild, Inc.—on whose governing Council I sit—and the Guild's more than 6500 members in order to voice our strong objections to the repeal of present sections 411(a) and 412 of Copyright Act, which is proposed in the Copyright Reform Act of 1993. I am deeply grateful to the Chairman and the Members of the Subcommittee for the opportunity to present our views to you today.

To summarize our objections, The Author's Guild believes that in eliminating registration as a pre-condition for an infringement claimant to receive statutory damages and attorney's fees, the proposed legislation will undoubtedly foster increased litigation. Having tried to survey the experience of many authors, we further believe that as it concerns literary works, this change, rather than rescuing a significant number of meritorious claims lost under the present scheme, is far more likely to promote vexatious suits which will, taken together, have the effect of restricting free expression—by making publishers increasingly wary of works that could even conceivably give rise to infringement claims; by raising the costs of publication, making less likely the publication of works, outside the mainstream, whose profit potential accordingly appears uncertain; and by providing new weapons that can be freely used by the unhappy subjects of biographies and reportage to hamper what they regard as unfavorable publications.

With that said, let me add a bit more describing in whose behalf I am speaking. The Author's Guild's is a national professional society of published authors and has acted as spokesperson for the national community of authors for the past eighty years. Our membership is made up of over 6500 published writers—authors of fiction, history, biography, textbooks, periodical articles, short stories and other literary works—and includes winners of the Nobel Prize in Literature, the Pulitzer Prize and countless other literary awards.

While I am here speaking solely for the Author's Guild, you should know that we have consulted with and gathered opinions from numerous other writers groups in formulating the views we are advancing. Mr. Mark Fuerst, President of the American Society of Journalists and Authors, has specifically authorized us to convey to the Subcommittee his endorsement of the position we express today.

As an organization of authors, The Author's Guild has an overwhelming interest in the preservation of a system of the strongest possible copyright protection. Copyright is the lifeblood of our membership and we, therefore, we do not lightly oppose any legislation which, at least on its surface, would seem to enhance the value of a copyright.

Furthermore, even though ours is an organization of published authors, we do not perceive our interests as differing from those of unpublished authors. For one thing, virtually all of us started out as unpublished authors, and few us have forgotten the lessons of that experience. Moreover, most of us remain unpublished authors to some extent, whether in the instance of the occasional individual piece that cannot find a home, or simply a work-in-progress. Indeed, one of the Guild's principal concerns with the proposed repeal is that we believe they will make crossing the line from unpublished to published author harder and more hazardous.

As for myself, I am compelled to admit that although I am a lawyer, I do not regard myself as an expert on intellectual property questions. I am a litigator by training. In fact, it is my experiences in more than fifteen years of courtroom practice that so strongly inform my own opposition to repeal of sections 411(a) and 412.

It seems beyond dispute that this legislation will increase litigation of infringement claims. Indeed, it is one of the principal arguments of proponents of repeal of sections 411(a) and 412 that this bill will eliminate a current barrier to access

to the courtroom. Furthermore, even those with glancing knowledge of economics, like myself, can recognize the implications of this legislation: by increasing the potential rewards to some claimants through statutory damages, and by lowering the barriers to entry for an entire class of potential litigants through the possibility of attorney's fees, it is inevitable that more litigation will result. For intellectual property lawyers this is unquestionably good news. For authors, however, that is far less certain.

Because of the natural desire of any authors group to prevent the unwanted appropriation of unpublished work, and our strong interest in protecting the value of a copyright, the initial inclination of many of the Guild's leaders was to favor this legislation. The prospect of an unpublished writer whose work is wantonly pirated, while he or she is left without remedies due to an inability to prove actual damages, could be expected to excite the sympathies of an authors organization. However, in order to make an informed decision, the Guild began an elaborate process of consultation with its own members and representatives of other writers groups. Our efforts to find an example of a meritorious claim by a writer that was lost or seriously frustrated under the present system was unsuccessful. Undoubtedly, there must be such cases; but our diligent efforts to study the issue empirically suggests that instances where the lack of statutory damages have prevented writers from bringing infringement claims are far less widespread than imagined and that the currently available remedies appear to be accomplishing their intended effect. On reflection, this should not be surprising. Any person with an infringement claim may seek to register and then sue for actual damages and/or an injunction, plus other remedies provided by the Copyright Act. Moreover, it seems to have been entirely overlooked in the present debate that willful copyright infringement for profit is a crime under section 506(a), rendering the infringer subject to imprisonment for up to a year pursuant to 18 U.S.C. Section 2319. This is a deterrent to intentional infringement that far exceeds in *in terrorem* effect any civil remedy.

While the repeal of sections 411(a) and 412 cannot be expected, based on what we have discovered, to benefit many deserving authors, it seems to offer the clear prospect of great harm to other writers and their rights of free expression. The clearest impact will be on the publication of certain classes of works—biographical, historical and journalistic—which are particularly vulnerable to infringement claims because of the present uncertainties surrounding the fair use doctrine. One of the services The Author's Guild provides to its members is to attempt to answer legal questions and I must tell this Subcommittee that we receive questions about fair use with great frequency.

Undoubtedly, members of the Subcommittee are familiar with the long debate that confronted the most recent Congress over the issue of fair use, as codified in section 107 of the Copyright Act. One of the most troubling effects of the proposed repeal is that it seriously undermines the work of the prior Congress—and this Committee—in arriving at the compromise language which was eventually adopted in 1992. I personally was opposed to the efforts of some to entirely obliterate the distinction under Section 107 between published and unpublished work, and I gave testimony to that effect in the House of Representatives. But certainly I—and many others—arrived at our views in a context in which sections 411(a) and 412 were a longstanding part of the legislative landscape. Even as someone who did not believe that any revision of section 107 was necessary, I find myself deeply troubled by the implications of the proposed repeal. With the added prospect of statutory damages and attorney's fees, many more plaintiffs questioning the fairness of a use can be expected to sue. What could formerly be analyzed in the direst of worst case scenarios as a no-damage infringement will now have to be imagined as a claim potentially yielding statutory damages for willful infringement and attorney's fees. This new balance of risks means that an increasing number of works will not be published.

The proponents response—that this is well and good, since only actual infringement will be punished—strikes me as irresponsible, for the real-world effect is that far more than infringing uses are threatened. Given the unsettled questions surrounding fair use, publishers can be expected to be increasingly wary in publishing any work where fair use claims can arise. Authors, due either to their publishers encouragement or their own fears of having to pay the high legal fees that attend defense of even a frivolous claim, can be expected to expurgate their works more freely. This Subcommittee may want to consider what certain types of works—documentaries, biographies, or historical dramas—would sound like if subjected to that kind of cleansing.

The authors who will be most effected by these concerns are not those whose works, when published, are expected to show a significant profit, for in those cases the benefits may be worth the risks. It is the authors whose works are out of the

mainstream and which appear less sure of attracting a broad audience who will become less likely to be published, either because a publisher will not brook the risk of publishing it as it stands, or because a sanitized version is so lacking in vitality that it loses its attractiveness. It is new writers, formerly unpublished writers, and writers of books of idiosyncratic interest who will suffer most severely.

Also, by increasing the remedies and recoveries available to infringement plaintiffs, the legislation seriously enhances the risk that infringement actions will be used for an ulterior purpose. Persons who are the unwilling subjects of works will have an increased armory of potential remedies, the threat of which they can use to hamper publication of works they do not like by claiming that unpublished material of their authorship has been quoted in a way that does not constitute fair use.

If this legislation passes, crank lawsuits in which persons, out of some form of delusion or emotional need, claim authorship of all or part of works—especially well-known ones—can also be expected to grow more frequent. They are already not uncommon. Because publishers have successfully maintained a practice of requiring writers to indemnify them, the costs of these lawsuits often threaten to fall wholly on writers, although it is frequently the case that these suits are costly to publishers as well. Because of the uniquely solitary nature of the creation of a literary work, these claims can prove more vexing than might be imagined, since extrinsic evidence of original authorship is sometimes minimal. There are no subjects who pose for novelists and can in turn verify the published writer's original authorship.

Because of high legal costs in defending these actions, they are seldom litigated to conclusion; more often, they are settled as nuisance claims. But the settlement value of these claims will necessarily increase if the plaintiffs' range of recoveries expands to potentially include attorney's fees.¹

Moreover to the extent the greater litigation costs from all these new infringement claims fall on publishers, they will find themselves spending money on lawyers that authors should sensibly prefer to see them spending on publishing books. Once again, it is the works—and authors—at the margins that will suffer. With less to venture, publishers will become even more reluctant to bring out books with uncertain profit prospects—works by unknown or unpublished authors, or idiosyncratic works unlikely to attract a wide audience. This kind of winnowing of our cultural diversity is surely not necessary or desirable in today's America.

Proponents of this legislation respond to the possibility of an increase in vexatious litigation by claiming that there was not a surfeit of such claims prior to 1978, when sections 411(a) and 412 first became effective. This assumes that infringement claims based on unpublished, unregistered work were entitled to statutory damages and attorney's fees as part of a common law copyright claim, a position which some proponents of the repeals have advanced and which, to my eye, appears unfounded. The arguable existence of a few isolated decisions which granted common law infringement plaintiffs "estimated" actual damages or even "punitive damages" does not amount to general availability of statutory damages, nor does it equate with an express Congressional direction to ignore the traditional ban on attorney's fees for a prevailing party. In point of fact, the House Report accompanying the 1976 enactment of section 412 specifically noted:

The remedies for infringement presently available at common law should continue to apply to these [unpublished] works under the statute, but they should not be given special statutory remedies unless the owner has, by registration, made a public record of his copyright claim.

H.Rep. No. 94-1476. It is clear that in passing the 1976 legislation, the Congress found that it was creating remedies co-extensive to those available at common law and that authors of unpublished works were *not* then generally entitled to "special statutory remedies," i.e. statutory damages and attorneys fees. There is no reason that such expansion should take place now for a plaintiff class that was not historically entitled to those remedies, especially in a society where litigation generally—and intellectual property litigation specifically—has exploded and in an environment in which other American plaintiffs can not usually obtain such relief.

¹ Those who claim that the effect of an infringement plaintiff's prospective award of attorney's fees is offset by either Rule 11 sanctions (Fed.R.Civ.Pro. 11) or a defendant's prospect of recovering his attorney's fees under certain common law exceptions simply do not make sense. Instances where courts deviate from the American Rule and allow a successful litigant to recover attorney's fees are rare; indeed, under the Supreme Court's decision in *Chambers v. NASCO*, U.S. —, 111 S. Ct. 2123 (1991), such awards are seemingly limited to instances where a party has engaged in fraud in the course of litigation. Rule 11 sanctions, while more common, are of little use against many contingency plaintiffs who are largely without resources. Furthermore, in my experience, Rule 11 sanctions are seldom awarded in cases like these where it becomes clear that the plaintiff is suffering some psychological impairment.

For all these reasons, The Author's Guild has come to view the repeal of sections 411(a) and 412 as a serious risk to free expression. While we have been unable to uncover any hard evidence showing that more meritorious claims will be brought by authors, we see a significant potential that the increased costs of infringement litigation will make publishers less willing to publish works out of the mainstream, both because increased litigation costs will absorb capital that could be ventured on such works and because fair use questions will deter publication of works depending on secondary sources, especially when those works do not show sufficient profit potential to make them worth these new risks.

Again, I thank you, Mr. Chairman and Members of the Subcommittee, for the opportunity to share these views with you.

Senator DECONCINI. Thank you, Mr. Turow.

Let me ask you, you are a member of the Author's Guild, and do you represent them? Are you an officer, or are you their lawyer?

Mr. TUROW. I am not here as their lawyer.

Senator DECONCINI. You're not?

Mr. TUROW. I am here as a member of the Author's Guild Council, Senator, and I—

Senator DECONCINI. That's the same Author's Guild of Ms. Jong?

Mr. TUROW. Right. Ms. Jong represents what is a minority view at the Author's Guild.

Senator DECONCINI. How did you determine that view? Was there a survey taken?

Mr. TUROW. There were extensive meetings held in July at the Author's Guild. There were roundtable discussions that were held, a legal intern was assigned to survey the membership.

Senator DECONCINI. How many members are there, roughly?

Mr. TUROW. Of the Author's Guild, there are 6,500 members.

Senator DECONCINI. Were they all contacted and given a chance to respond?

Mr. TUROW. No; by no means. It was simply a random sample.

Senator DECONCINI. OK; were you contacted?

Ms. JONG. No, I was not.

Senator DECONCINI. You were not contacted. You weren't part of the roundtable or discussion?

Ms. JONG. No, I was not.

Senator DECONCINI. Did you know it was going on?

Ms. JONG. No, I did not.

Senator DECONCINI. Mr. Turow, you indicated in your statement that authors of unpublished works should not be entitled to statutory damages and attorneys' fees, because they haven't historically been entitled to these remedies.

Mr. TUROW. That certainly appears to be the sentiment of the Congress in the 1976 legislation, Mr. Chairman.

Senator DECONCINI. Yes, I think I agree that was the intent. Now, in 1991, and I know as a lawyer this is most unfair to go back, but we did read your statements, because your position seems to have changed, and everybody is entitled to that, and I value your long legacy in both careers within which you have distinguished yourself.

You said, among other things, let me just read one, and then I would like you to respond.

I regard my unpublished manuscript as part of a long, difficult and painful formative period in my creative life, simply because I have decided against publishing this work. I resent the notion of any person appropriating any part of the expressions contained there.

Now in light of a pretty passionate statement which really supports Ms. Jong's position here, do you really believe that your work should be entitled to less protection because it's unpublished? It seems to me if I were you, with your tremendous reputation, I would want to be covered. Now, maybe you're so sensitive to it that nothing you put your hands on doesn't get registered.

But I would think you would want that protection in case you do it on a vacation or you're on a sailboat and you write something down and leave it in a hotel room or something and somebody picks it up. Wouldn't you want that protection?

Mr. TUROW. Mr. Chairman, I certainly believe, and I made that statement in the context of efforts to equate published and unpublished works for fair use purposes. And I continue to believe, I believe today that unpublished work is due a greater degree of solicitude in making a fair use determination.

And it's precisely because of that that I am concerned about what the impact will be on biographers, journalists, and scholars. If you say, as the courts seem to have said, and we still haven't seen the history of 107 as it plays out in the courts, but if you say that unpublished work is due a greater degree of protection from fair use, just inherently because it's more private, if you subscribe to that view, then you have to be concerned about what is going to happen when those unpublished copyright owners come to court.

They are certainly now equipped with the usual panoply of remedies, of general remedies that most other American plaintiffs have. They can sue for an injunction, they can sue for actual damages, they can seek the other remedies regarding condemnation of the materials. So it's not as if unpublished authors of any kind of work are without remedies. Not to mention the fact, Senator, that nobody seems to be talking about in these debates that—

Senator DECONCINI. Let me interrupt you. But they cannot get—now correct me, please—they cannot get the damages or attorneys' fees if it's unregistered, is that correct?

Mr. TUROW. They cannot get statutory damages and attorneys' fees.

Senator DECONCINI. Then why shouldn't—what I really have a hard time with is coming to grips with why shouldn't they be able to get the statutory damages, if—

Mr. TUROW. I think that in my mind—

Senator DECONCINI. Because it's not registered. I just can't quite make the connection, and maybe you can help me.

Mr. TUROW. Well, in my mind it really comes down to a number of different issues. One is the cost benefit analysis that I make, and as I said, since I think greater solicitude should be given to unpublished work, I think that fair users are entitled not to be subject to the kinds of extraordinary expense and risk that this legislation would impose on them.

The other thing is that we don't have, at least as far as I can tell, with literary works, a broad history of those kinds of works being pirated. Ms. Jong talks about pirating of her work. I'm sure it's taken place. But usually what is far more common is to have published work pirated because it's far more widespread in its dissemination.

Senator DECONCINI. Let me interrupt you, because you have made statements in this same 1991 hearing, and it's true, you were there on another issue, and I just quote one:

It's now routine in New York publishing houses because of the ferocious appetite of Hollywood for many studios to have somebody who bootlegs manuscripts out of publishing houses long before they are published. Both of my novels were in the hands of people in Hollywood long before I had ever given anyone permission to be circulating them there.

Now, Mr. Turow, if someone had taken your manuscript and put their name on it to use it as a screenplay, and you hadn't registered it, you couldn't collect statutory damages or attorneys' fees because of section 412. Do you agree with that?

Mr. TUROW. That is correct, Mr. Chairman. And the question is, Does that happen?

Senator DECONCINI. Yes, well. You indicate that that does happen, but now you're saying it doesn't.

Mr. TUROW. No, it certainly happens that manuscripts are bootlegged all over Hollywood. That happens routinely.

Senator DECONCINI. You mean they don't pick them up and they—

Mr. TUROW. But somebody doesn't put their name on it and say "This is Scott Turow's work, I'm going to publish it as Scott Turow's." Were that the case for me or any of the other members of the Author's Guild, if we found a lot of evidence of that happening, we would be here championing this legislation.

Senator DECONCINI. What does bootlegging mean? Does that mean that they plagiarize it?

Mr. TUROW. No, it means it is xeroxed without the authority of any—usually what happens—

Senator DECONCINI. But leaving your name on it?

Mr. TUROW. Oh, yes. Yes. It goes out to Hollywood, this is the latest Jong novel, this is the latest Turow novel, do you want to try to buy the screen rights.

Senator DECONCINI. Your position is that unpublished works should be given more regard under the fair use, but that they should be entitled to the fewer remedies. Is that kind of summing up where you come from?

Mr. TUROW. In the end, that is where I come out.

Senator DECONCINI. OK; thank you. I know I don't want to take too much time here, but this is fascinating to me, because I want to do the right thing here, and I'm very concerned with having the distinguished panel before us here with very clear opposite positions here.

Ms. Pallante, let me ask you, opponents of this legislation argue that the repeal of 412 will just open the floodgates. What makes you think that won't happen? Because it doesn't happen now, even though they can't get statutory damages?

Ms. PALLANTE. Thank you, Chairman.

What happens now is that meritorious claims are blocked from court. Authors are essentially blocked from access to court—

Senator DECONCINI. Because of the costs?

Ms. PALLANTE. Because they cannot afford attorneys without the prospect of attorneys' fees, and because they cannot prove their infringement damages.

Senator DECONCINI. Now, do you know, do you have members and people that you know that that has happened to?

Ms. PALLANTE. Yes, we do. In fact, we have grievance officers throughout the country that write letters to potential infringers or other parties when one of our members has a grievance, whether it's a royalty claim that's not being paid or whether it's an infringement case.

And what will happen is that the National Writers Union will send a letter to a potential infringer, whether it's a corporate user or an individual user, and assuming that that work is unpublished and therefore probably unregistered, we will be ignored. Because the other side essentially knows that practically, our member will never be able to go to court.

Senator DECONCINI. Yes. And they just don't.

Now, Mr. Turow indicates that the author could, who infringes, could face some criminal prosecution, even fines. Have you ever had any experience that there have ever been any cases filed by the Justice Department?

Ms. PALLANTE. No; my experience has been that the Justice Department has not focused on copyright at all.

Senator DECONCINI. Thank you.

Mr. TUROW. Mr. Chairman, I am a former Assistant U.S. Attorney. And I can tell you that I prosecuted copyright violation cases. Certainly from this former Assistant U.S. Attorney, were I a U.S. Attorney and somebody brought to me a flagrant case of copyright infringement, I would have been very interested.

Senator DECONCINI. Yes. The evidence, or the information I have from Justice is they think that private remedies are sufficient, and so they don't bring a lot of these cases, although I don't know how many they have brought. I'm going to ask them.

Ms. JONG, let me just pursue one question here. I understand that you indicated in your testimony that some organizations have taken advantage of the registration requirement in order to benefit from the works of authors that could not afford to sue. Do you have any examples, or could you supply us any examples?

Ms. JONG. Yes. It's very simple to quote from an author's work more than would be fair use, knowing that the author really can't afford to pursue a claim against it. That's a daily occurrence.

Senator DECONCINI. It is? Yes. And is it possible to give us an example or two, maybe that you could supply us?

Ms. JONG. It's happened with my own work.

Senator DECONCINI. It has? Well, that would be—yes.

Ms. JONG. It's happened in my own work where, for example, my most famous novel is a book called "Fear of Flying" which sold about 15 million copies around the world. And knowing that I cannot be in every country in every language, and knowing that I cannot know what happens in every town newspaper, every college newspaper, people have taken enormous hunks out of the book and reprinted them either in—

Senator DECONCINI. But you're protected under the Berne Convention?

Ms. JONG. Yes, there I am.

Senator DECONCINI. Except here?

Ms. JONG. Except in the United States. The last time this occurred was a couple of years ago when somebody took a big chunk out of my book and reproduced it in a college newspaper as a piece of work belonging to a columnist, a student columnist. Nor did I sue, by the way, because I would not have wanted to stop this student writer who was enthusiastic and a fan, and was doing it more out of enthusiasm than ill will.

Mr. TUROW. But, Mr. Chairman, that——

Ms. JONG. But this happens daily. It is not——

Senator DECONCINI. So you have had your writing pirated on a number of occasions?

Ms. JONG. Absolutely.

Senator DECONCINI. Within this country.

Ms. JONG. From my novels, from my poems, from dramatic works.

Senator DECONCINI. Now, when this student author, just to pursue this a minute, did this, do you think she had any idea that she was violating the Copyright Act?

Ms. JONG. I don't know. Maybe she didn't know.

Mr. TUROW. If I could, Mr. Chairman.

Senator DECONCINI. Yes.

Mr. TUROW. The quotation from "Fear of Flying" is one that would give rise to statutory damages and attorneys' fees. That's a registered work. The issue is whether unregistered work, unpublished work, the work in my basement——

Senator DECONCINI. I understand.

Mr. TUROW. Should get that protection.

Senator DECONCINI. Yes, the published works are not always registered. I just have a difficult problem here, like I said, and I won't pursue it any further, for someone with your distinguished writing career not to want that protection.

I'm kind of surprised, but it's very interesting to me that you don't think it's necessary, where Ms. Jong says "My gosh, yes, we need to do this." And particularly when you're thinking of the small writer, the unknown writer that is not sophisticated as you are, or Ms. Jong is, or most of your 6,500 members, you know, why shouldn't the Copyright Act protect them in a process, even if you're right and there aren't that many violations?

Mr. TUROW. Again, Mr. Chairman, if I was thinking solely of myself, there's no doubt that this legislation would be beneficial to me. But as a member of the Author's Guild, as a member of its council and as a citizen, I don't think that the balance struck is likely to be a good one for the literary community.

Senator DECONCINI. I'm sorry to have taken so long.

Mr. TUROW. Thank you very much.

Senator DECONCINI. I will yield to Senator Grassley for an opening statement.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Well, it's really not an opening statement. I just wanted to explain to you that I wasn't going to be able to be here, because down the hall we're having hearings on health care reform. I wanted to say that I am sympathetic to the goals of the

bill that you and Mr. Hatch have and to thank you for convening the hearing. I think that we ought to seek ways to make it easier for the producers of intellectual property to protect themselves against infringement, and we certainly must insure that our copyright processes don't put American producers at a competitive disadvantage.

I'm also sympathetic with concerns about creating an undue litigation burden. I know the Chairman and ranking member, who are co-sponsors with me of legislation to reduce litigation in the Federal courts, share this concern. So I look forward to hearing from the proponents of this bill some reassurance that litigation this bill could encourage would be limited, and I look forward to further consideration of the proposals by the subcommittee.

Senator DECONCINI. Thank you.

Senator Hatch?

Senator HATCH. Thank you, Mr. Chairman.

I admire all three of you and appreciate your taking time to testify before us today, because this is important. And as with all copyright issues, there are lots of arguments on both sides, important arguments at that.

I realize, Ms. Jong, that you appear today in your personal capacity as an author, but you were recent past president of the Author's Guild. Could you speculate as to why the organization you so recently headed differs with you on the question of repealing sections 411(a) and 412 of the Copyright Act? You don't have to if you don't want to.

Ms. JONG. I can speculate on it. Unfortunately in the last few years, when there are infringement suits, publishers have tried to recover the monies from authors. So many authors who write history and biography have been very upset, very frightened, and their upset is well-founded, by a case that was about J.D. Salinger, about an Ian Hamilton biography of Salinger, which I'm sure you're familiar with.

I really share their concerns that they will not be able to write, and I understand the issue of fair use, which I feel great empathy about. But I will say that I think it has no place in this deliberations. The Salinger case seems to me *sua generis*. It doesn't seem to be a case that is similar to others.

I can tell you that last year I published a memoir biography of Henry Miller, who was a great friend of mine, the author of "Tropic of Cancer." And in the last 10 years of his life, he and I were great friends. I had 30 letters, unpublished letters, that Henry Miller wrote to me. I knew when I wrote my memoir, I would have to go to Val and Tony Miller, Henry Miller's children, and ask for permission to use these unpublished letters, which in fact formed a great part of the book.

Not only did the children give me permission, but they gave me permission gratis to use the letters. I was fully prepared to pay a fair amount of my advance to use the letters, and they said "We think you're doing something wonderful for Dad's career, we think you're reinterpreting his work, and we would like you to use Dad's letters." That's on the other end of the spectrum. On one end is Salinger and on the other end is Miller. In the middle there are

all kinds of different heirs and authors who are particularly friendly to biographers or not.

But I think that it really doesn't have a lot of do with the copyright law that we are trying to make stronger. There are other ways to address that issue and unlink it from this problem.

Senator HATCH. That's interesting. How would you feel as an individual author if you were to learn that you could not obtain the full copyright remedies of a foreign nation's law because you or your foreign publisher had failed to comply with the registration or deposit requirements unique to that particular nation?

Ms. JONG. I would be very upset. Also, because my books are published in many, many countries in the world, often I'm invited to be a guest at the writer's union in Sweden or in Russia or in Riga or Austria. My works appear in many places in the world. And many authors and presidents of writers organizations in other parts of the world are dismayed by the ways in which we are not congruent with Berne.

And they would like us to be congruent with Berne, so that when we go out and say "You're pirating American creators' works," we would have a strong moral ground on which to stand. Because having been congruent with Berne ourselves, we could then demand that they be congruent with Berne on the issue of piracy. I think it's a moral ground that we should take.

Senator HATCH. Thank you.

Ms. Pallante, your statement points out that among those who oppose repeal of section 412 today are certain authors and publishers that have in the past supported its retention. Could you tell us to what you attribute the change in their position?

Ms. PALLANTE. Yes; I think initially the publishers and the Author's Guild realized that section 412 was not an inducement to registration, but a shield to blatant infringement. I think perhaps the Author's Guild is taking a very narrow approach because most of their members, all of their members are published. Not all creators are published, and not all creators publish with large presses who have staffs who register and deposit for them. So they are really a minority in terms of all creative groups.

I think one of the inconsistencies here is that the Author's Guild has implicitly acknowledged that section 412 does not reach a lot of unpublished works, meaning a lot of unpublished works are not registered. Those are the works that the Library is trying to attract. So Mr. Turow's position is really at odds with Dr. Billington's position. The Library wants those unpublished materials. They can't get people to register them. Obviously section 412 is not working if section 412 is also a shield for fair use.

It has been my experience that our members want to register when they know how to do it, where to go, how to fill the form out. I think with new technology, our members will be more and more inclined to register if it is made easy for them, affordable, if their permission information can be placed on line. I think there are lots of other things that we came up with in ACCORD that will move people, perhaps to a much better job than 412 has ever done, to reach those unpublished and small creators.

Senator HATCH. To what extent do you think some members of your organization may oppose the repeal of section 412? Would that be a significant minority or just very few?

Ms. PALLANTE. We have only heard from one member who questioned the fair use argument. We had a very good discussion and have heard nothing since. That was one of our members who was a mutual member of the Author's Guild as well.

But we sent out an alert when the House subcommittee held hearings, and we heard nothing from our members but support. It has been in all of our newsletters, we have heard nothing but support.

Senator HATCH. Do you know how many members of your organization are, like Erica Jong, also members of the Author's Guild?

Ms. PALLANTE. We have never done that research. It is not uncommon for writers to join everything they can. [Laughter.]

Ms. JONG. They need all the help they can get.

Senator HATCH. Mr. Turow, I understand that you're pinch hitting at the last minute, and we want to thank you for volunteering your time.

In your perspective as a writer, a litigator, an owner of copyrights, it's very valuable to us on this committee. I would like to ask you some questions just to see what the responses are, because we are, Senator DeConcini and I, we both want to do what's right here. Neither of us has any other motivation. And we see the arguments on both sides, and up until now have come down basically on the bill's side.

So you in particular are very important here, because we want to explore this with you and find out what you need to say. Now, you indicate that you know of no writer who has been deterred from bringing a meritorious infringement action because of the existence of section 412.

But I think it's easy to imagine situations that must exist. Take for example the law as it exists with respect to correspondence. When you send letters, I take it that like the rest of us, you do not register them with the Copyright Office. However, you could someday be in the situation encountered by J.D. Salinger, that Ms. Jong raised, a few years ago, where large extracts from his correspondence were about to appear in print without any permission on his part at all.

Now, if an author is financially able to retain counsel, isn't it likely that the potential to recover attorneys' fees may in fact mean the difference between an ability to protect the copyright and an inability to so act?

Mr. TUROW. Yes; I think the answer to that question is yes.

Senator HATCH. OK. With regard to unpublished works, you wrote in a 1991 letter to my staff the following. You said "I would not want anyone to publish a word of my law school diary." Now, aren't you troubled by the statutory incentives that attempt to force you to register that diary with a Government office in Washington, and which incentives also create penalties for your failure to do so?

Mr. TUROW. Again, Senator, I stand by the positions that I took in 1991. And I would hope that a court reviewing some appropria-

tion from my law school diaries would attach significance to the fact that those are unpublished works.

The question in my mind is whether the balance of benefits to me as somebody who has this significant repository of works that nobody in New York thought were worth publishing for many years is counterbalanced by what this legislation is going to do in making infringement claims that have not historically been brought and have not historically been subject to statutory damages and attorneys' fees, now making those claims viable.

And again, if we were confronted with evidence that the kinds of situations that you're reasonably hypothesizing were widespread, our position on the legislation would not be what it is. Although I am a member of the National Writers Union, I oppose this legislation, because it seems to me that it's going to cost authors much more in the end, in terms of the practical effects on their rights to free expression, than the theoretical benefits that I recognize.

Senator HATCH. Well, I appreciate that. And I call upon all authors and others throughout the country to let us know whether this is a problem or not. If it isn't, maybe your points are very well taken. I want to know. And this is a good challenge to everybody here today, and perhaps people throughout the country, let's find out just how significant this is.

Now, it's common, is it not, for an author's contract with a publisher to include a clause specifying that the author remains ultimately liable for infringement claims that may successfully be brought against a work that is the subject of the contract?

Mr. TUROW. That's very common.

Senator HATCH. Very common. If this is the case, it would seem to me to undercut your point that repeal of 412 is likely to make the publishers of works outside the mainstream less likely to take a chance on publication. If the risk remains with the author, why would it inhibit the publisher?

Mr. TUROW. Well, generally what happens, Senator, we now get into the mechanics of the way these contracts work, generally the author becomes a named insured under the publisher's policy. And the author is subject to liability, usually for the deductible, under the policy. It's often the case that the publisher, in an act of comity, doesn't ask the author to step to the plate when it's not a situation involving willful infringement.

But even in those rare cases where the publisher were to ask the author to do that, we have to confront first of all the chilling effect of that threat, and secondly, the way this will make itself manifest in terms of publishers is increased costs for the kinds of insurance that publishers routinely obtain.

Senator HATCH. That's interesting. You make a strong point regarding the possibility of crank lawsuits. I think that's a pretty strong point.

But it seems to me that this should be less of a problem, as you have admitted, for successful writers than for others. If a frivolous plaintiff actually wants to claim that he or she first authored "Presumed Innocent," then wouldn't the actual damages attributable to such an infringement be sufficient to justify the filing of the lawsuit, however, weak the copyright claim?

Mr. TUROW. No question. But right now, that plaintiff would not, if somebody claims they found "Presumed Innocent" in their basement, they would not have the threat of attorneys' fees as a possible recovery. And it's that that I see as altering the balance. Chances are that plaintiff would sue in the second circuit, where as I understand the law, the second circuit believes that defendants aren't entitled to attorneys' fees in infringement claims. And the balance as between my publishers and myself and that plaintiff would be altered by that legislation in determining what the settlement view of this lawsuit is.

Senator HATCH. That's interesting. You're entitled, are you not, under current law, to request recovery of your attorneys' fees should you successfully defend an infringement action?

Mr. TUROW. Not as I understand the law in the second circuit, which is where most publishers are and where therefore a wise plaintiff choosing a forum would choose to sue.

Senator HATCH. I see. But an unregistered plaintiff is not covered, right?

Mr. TUROW. An unregistered plaintiff would have no right to obtain attorneys' fees under 412.

Senator HATCH. Well, you've pointed out a very important thing, because the circuits are split on this issue. And I think the Supreme Court will address it this term. Am I right on that? I'm right on that, OK.

Mr. TUROW. I think it would be helpful to know the answer, and I think it would have an impact on this legislation.

Senator HATCH. Sure. It may very well, but at least some circuits, as you have mentioned, allow the defendants to recover.

Mr. TUROW. Yes.

Senator HATCH. OK. Now, your testimony, it's very important to me, we've been friends for a long time, and I have a great deal of respect and care for you. By the way, he has given me, Ms. Jong, an autographed copy of one of his books. [Laughter.]

Ms. JONG. Any unpublished poems? [Laughter.]

Senator HATCH. Do you have some of those you would autograph? [Laughter.]

Mr. TUROW. There is a basement full of them—

[Laughter.]

Senator HATCH. Well, I would like to have some poetry from both of you, if you don't mind, it would be great.

But Mr. Turow, your testimony seems to discount the disincentives to frivolous litigation that exists around our legal system, such as rule 11 sanctions. Now, how is the situation of the author-defendant any different than the situation of defendants who can be made to answer for civil rights, equal pay, equal employment and disability act lawsuits, each of which entitle the successful plaintiff to the recovery of attorneys' fees? Doesn't your objection really go to the whole question of whether we should ever allow plaintiffs to recover attorneys' fees?

Mr. TUROW. Well, again, my concern, as I point out, all of these concerns are pragmatic, Senator. I'm concerned about how this is going to work out, in effect, and I don't necessarily question the legislation, civil rights legislation, for example, that gives successful plaintiffs the right to attorneys' fees.

The question is in my mind, to put it in sort of a pristine policy perspective, are the problems of unpublished, unregistered authors of equal stature, for example, with civil rights plaintiffs, so that they ought to be allowed in addition to the right to sue for an injunction, in addition to the right to receive whatever actual damages flow from the infringement, in addition to their right to go to the U.S. Attorneys office and ask them to prosecute, should they in addition be a title 2 statutory damages and attorneys' fees?

Again, that group historically has not been. And I don't think historical oppression is any justification for anything. What I take as being the lesson of history is that there may not have ever been a perceived need to reward that group with those kinds of damages because the problem is not a widespread problem. And I recognize that everybody looks at it in theory and says "Gee, it seems like this could be a problem." And the point that I'm really urging on the subcommittee today is, please be sure that you think that the benefits really do outweigh the costs. Because there are going to be costs here, I'm convinced of it.

Senator HATCH. Well, I've got that point, and I think it's a very, very important one, and we'll certainly look at it, and ask for advice from many people, including yourself. But I assume, actually this discussion today would make a wonderful central core of a great novel, it seems to me. I assume your novels are successful—I don't assume, I know they are successful—in many countries of this world, as Ms. Jong's are, other than just here in the United States.

Wouldn't you find it burdensome to find that you were prohibited from realizing the full benefits of a particular country's copyright law because you or your publisher failed to follow a particular local rule, such as depositing the right number of copies with the correct supporting material in the local national library or other government depository or office? And infringement of your work abroad could occur weeks or months before it was even planned for publication in a particular country, and yet a rule like our own section 412 would drastically limit your recovery.

Mr. TUROW. I understand the point you're making, Senator, and there is of course no way for me to disagree with it. I would be unhappy if any of those things were to occur.

Senator HATCH. I'm just afraid that our continued insistence on using the copyright law to build up the collections of the national library only invites retaliation from other nations whose authors cannot be expected to know the intricacies of our own copyright laws or copyright registration system, and who, like many U.S. authors, find out that they are unable to stop large-scale piracy of their works. Do you have any thoughts on the international aspects of these questions that I have just raised?

Mr. TUROW. Although I am fortunate to enjoy international success with my works, I really don't consider myself well enough acquainted with those issues to really address them. The only point I would add, at the risk of repeating myself, is that whatever conclusions the committee comes to, and I recognize that there are Berne Convention aspects of this legislation which I really, again, don't feel competent to address. I would hope, though, that the legitimate fair use concerns of American authors can somehow be ad-

dressed, if not in this legislation then something that accompanies it.

Senator HATCH. Well, I want to thank you for your testimony. I want to thank each of you. This has been an extremely interesting and very intelligent panel.

Senator DECONCINI. I do too, sir.

Senator HATCH. And I'm not just trying to praise you, it is something that has really interested Senator DeConcini and myself for a long time. And again, we would like to have any additional information that you care to send to us, because these are tough issues, we want to do what's right. We certainly want it to work well.

And all three of you have certainly won even increased respect from—I'm sure I can speak for Senator DeConcini as well—from both of us as we sit here and listen to you today. We appreciate it, we appreciate the effort and time you have put into this work.

Mr. TUROW. Thank you, Mr. Chairman, Senator Hatch.

Senator HATCH. And don't forget my unpublished poems. [Laughter.]

Ms. JONG. I will have them for you.

I would like to just make one comment, which is that a published author is also an unpublished author at any given time. That at this very moment, I may have dozens of manuscripts circulating at different places. So I am a published author, I am a successful author, but I am also at any given moment unpublished. That's something to bear in mind, I think.

Senator DECONCINI. I echo the compliments from Senator Hatch, and gratitude for your testimony, all of you. Thank you, Mr. Turow, Ms. Pallante, and Ms. Jong. Your testimony is very helpful to us. I wish you were all agreed on it, it would make it real easy for us.

Mr. TUROW. Well, thank you, Mr. Chairman, Senator, and thank you also to the members of the staff, and thank you all for the great courtesy and your attention.

Senator HATCH. Well, thank you, we appreciate it very much.

Ms. PALLANTE. Thank you, Senator Hatch, Chairman DeConcini.

Ms. JONG. Thank you very much.

Senator DECONCINI. Our next panel is Robert Oakley, law librarian, American Association of Law Libraries; Sandy Thatcher, director of Penn State University Press; and Irwin Karp, Committee for Literary Property Studies.

We'll start with you, Mr. Oakley. If you would summarize your statement, Mr. Oakley, for us, because of time constraints, we would appreciate it. Your full statement will appear in the record.

STATEMENT OF ROBERT L. OAKLEY, LAW LIBRARIAN, AMERICAN ASSOCIATION OF LAW LIBRARIES

Mr. OAKLEY. Thank you, Mr. Chairman, members of the committee.

I'm here this morning on behalf of the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Special Libraries Association, and the National Humanities Alliance. Collectively, these associations represent thousands of scholars, librarians, and their institutions throughout the Nation.