

Before the
COPYRIGHT OFFICE,
LIBRARY OF CONGRESS
Washington, DC

Notice of Proposed)
Rulemaking: Group) **COMMENTS OF THE**
Registration of Updates to a) **NATIONAL WRITERS UNION (NWU),**
News Website (FR Doc. 2023-) **NATIONAL PRESS PHOTOGRAPHERS**
28724; Copyright Office) **ASSOCIATION (NPPA), AND NATIONAL**
Docket Number 2023-8) **ASSOCIATION OF SCIENCE WRITERS (NASW)**
)
)

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The National Writers Union (NWU), National Press Photographers Association (NPPA), and National Association of Science Writers (NASW) submit these comments in response to the Notice of Proposed Rulemaking (NPRM) by the U.S. Copyright Office, “Group Registration of Updates to a News Website,” FR Doc. 2023-28724, Copyright Office Docket Number 2023-8, 89 *Federal Register* 311-318 (January 3, 2024). The proposed rule would create a new procedure for group registration of up to one month of updates to text on a website containing “news” content, with a single application form and a single fee and without submitting complete copies of each update.

1. About the commenters

The National Writers Union (“NWU”) is an independent national labor union that advocates for freelance and contract writers and media workers, including creators and self-publishers of Web content. The NWU works to advance the economic and labor conditions of writers and media workers in all genres, media, and formats. NWU membership includes, among others, journalists, fiction and nonfiction book authors, poets, novelists, playwrights, editors, academic writers, business and technical writers, website and email newsletter content providers, bloggers, social media producers, podcasters, videographers, illustrators, photographers, graphic artists, and other digital media workers. The NWU includes geographic chapters as well as at-large members nationwide and abroad.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution of copyrighted works. NPPA’s members include television and still photographers,

editors, students, and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, NPPA has vigorously promoted and defended the rights of photographers and journalists, including intellectual property rights and freedom of the press in all its forms, especially as it relates to visual journalism.

The National Association of Science Writers (“NASW”) is a community of more than 3,000 journalists, authors, editors, producers, students, public information officers, and others who write and produce materials intended to inform the public about science, health, engineering, and technology. One of our goals is to support the professional interests of science writers nationally and globally, as well as advocating for copyright protections for writers.

2. Summary of our comments on the proposed rule

The NWU, NPPA, and NASW welcome this rulemaking as an opportunity to address our longstanding concerns about current registration procedures as they apply to text published on the Web. As proposed, the new registration option would be entirely useless to individual creators. But with just two minor changes — removing the explicitly limiting qualifiers of “works made for hire” and “news” websites — it could be the most significant mitigation of the burden of copyright registration since the creation of the World Wide Web thirty-five years ago.

Current registration procedures impose a prohibitive burden in time and fees to prepare and submit applications for registration of copyright in most web content not also published in print or in other legacy formats such as “periodicals” published on a fixed recurring schedule.

Without a workable procedure by which we can, without undue burden in time or fees, register copyright in our web content, creators are left with no meaningful protection for our

work and no effective remedy for infringement of our rights.

With minor changes, as discussed below, the proposed rule could significantly mitigate the burden of registration formalities on web content creators, for the first time since the dawn of the World Wide Web as a publishing platform.

As also discussed below, the proposed rule fails to take into consideration the interests of web content creators and self-publishers, including those raised in many years of prior submissions by the NWU to the Copyright Office on the subject of registration formalities.

The proposed rule would be unnecessarily and arbitrarily limited with respect to both who can register web content and which content can be registered. This can easily be fixed.

Other simple changes would significantly reduce the burden for creators of registering copyright in web content, while also making the process easier for the Copyright Office.

We urge the Copyright Office to adopt the proposed rule, but only if it is amended to remove the unfair limitation to “works made for hire” and the unconstitutionally content-based and discriminatory limitation to websites whose content is deemed to constitute “news.”

We also encourage the Copyright Office to consider our other suggestions below for amendments to the proposed rule to reduce the burden on web content creators.

Finally, we remind the Copyright Office of its unfulfilled promise to establish a workable procedure for registration of copyright in new or previously unregistered websites, and of its obligation to comply with the Paperwork Reduction Act (PRA) by publishing for public comment estimates of the time required for members of the public to complete each of its copyright registration forms, and obtaining approval from the Office of Management (OMB) for

each of the forms it uses for copyright registration and other administrative functions.

3. Copyright registration formalities and web content

For decades, the NWU and other organizations of web content creators have advocated for reform of the copyright registration system.

Web content, particularly media that is published solely on the web and not additionally in print, has never been easy to register using the forms, procedures, and formats for deposit of copies that were originally developed for works published in legacy print formats such as printed books, magazines, and newspapers. Moreover, the current registration process is so onerous for the average freelance and/or self-published media worker that it's simply unrealistic to refer web content creators to the courts for redress of our copyright infringement grievances.

For most independent creatives, the majority of the work we publish online is likely to bring at most very small profit for each individual work. This means that timely registration of most individual web content elements is prohibitively time-consuming and costly relative to the likely benefit. The same is true of group registration unless the process is efficient and can be automated through existing content creation and management tools as much as possible. And without the ability to recover attorneys' fees — a "right" available only after such timely registration — only large corporations or multi-millionaires can afford to litigate.¹

The slight chance of at some future time recovering damages for copyright infringement simply doesn't, on purely economic cost-benefit terms, justify the very high cost in time and money to register copyrights in most web content — costs which creative professionals can

¹ The Copyright Office has, commendably, established a Copyright Claims Board for small copyright claims. But because any party can opt out and insist on proceeding in U.S. District Court, that small claims procedure is likely to be ineffective against the large, sophisticated, deep-pocketed infringers that pose the greatest threats.

rarely afford.² As a result, most web content is and always has been unregistered, even though this leaves it open season for infringement of web content creators' rights.

More than a decade ago, the NWU raised this issue explicitly with the Copyright Office:³

Federal civil litigation is prohibitively expensive for individuals or small publishers, even against infringers with shallower pockets than Google or Microsoft. This is especially true in the case of works first published online, because of the difficulty and expense of timely registration of copyright in frequently updated Web content and the consequent unavailability of attorneys' fees or statutory damages.

(The registration procedures of the Copyright Office have not kept pace with the digital age. For example, to register copyright in a Web site or blog, one must file a separate application and pay a separate fee to register the new content first published on each day. At \$35 per application, that means annual fees of \$12,775 to register copyright and preserve eligibility for statutory damage and recovery of attorneys' fees for a blog that is updated daily. Few blogs or self-published Web sites, even profitable ones, can add such an expense and remain profitable....)

[A]s was also made clear by the NWU and other witnesses in the ongoing Copyright Office inquiry into remedies for small copyright claims, statutory damages are vital to effective redress for infringement. That's especially true online, where establishing actual damages for partial diversion of the advertising revenue clickstream for a work is likely to require audits and expert analysis of multiple layers of online advertising and affiliate networks....

Copyright Office fees should be drastically reduced, and procedures clarified

² "Tens of millions of websites are published in the US each year. How many of them are registered with the Copyright Office? We would be shocked to find that more than a tiny fraction of one percent of Web content is registered... Only a handful of the most commercially successful websites generate sufficient revenues to be able to even consider copyright registration.... The burden of copyright registration forms and fees... is greatly exacerbated by the trends toward: (a) real-time publishing with shorter deadlines and more frequent or 'continuous' updates with dynamic publishing (what once might have been a weekly or monthly print publication is now likely to be a website with at least daily updates), and (b) more granular publication of shorter and shorter works (what was once a single textbook or travel guidebook is now a compendium of hundreds or thousands of discrete 'content elements' that can be aggregated and distributed individually or in multiple combinations). There's one word for these registration fees: unconscionable." Comments to the Copyright Office of the NWU, Society of Children's Book Writers and Illustrators (SCBWI), Dramatists Guild of America, and Textbook & Academic Authors Association (TAA), "Copyright Office Fees," September 21, 2018, available at <<https://nwu.org/wp-content/uploads/2018/09/comments-registration-fees-21SEP2018.pdf>>.

³ Comments of the NWU to the Copyright Office, "Orphan Works and Mass Digitization," February 4, 2013, available at <<https://nwu.org/wp-content/uploads/2021/10/NWU-orphan-works-4FEB2013.pdf>>.

and simplified, for registration of copyright in ... content elements of frequently updated and/or dynamically generated blogs, Web sites, etc.

Registration requirements should be abolished, and eligibility for statutory damages and recovery of attorneys' fees should be extended to unregistered works.

Additionally, the consistent position of the NWU for more than thirty years has been, and remains, that copyright registration is a formality prohibited by the Berne Convention. We continue to believe that the requirement to register as a precondition for filing a lawsuit for copyright infringement or obtaining an award of attorneys' fees or statutory damages should be repealed.⁴

But beyond this, even if copyright registration were not, *per se*, a prohibited formality — as we believe it is — current registration procedures are so burdensome and costly as to deny creators, in many cases, the “effective” redress for “any” infringement to which we are entitled by the WIPO Copyright Treaty.⁵ And the registration forms and procedures have been crafted predominantly to accommodate the common business practices and the ability to afford fees and time-consuming registration procedures of publishers, not creators. This has always disfavored and disproportionately denied effective redress to individual creators⁶ — a pattern we see

⁴ “Our members strongly support the elimination of sections 411(a) and 412 from the Copyright Act.” Testimony of NWU Executive Director Maria Pallante at a hearing on the Copyright Reform Act of 1993 before the Subcommittee on Patents, Copyrights, and Trademarks, Committee on the Judiciary, U.S. Senate, October 19, 1993, available at <<https://nwu.org/wp-content/uploads/2021/10/Senate-writers-testimony-19OCT1993.pdf>>. See also the report of the Library of Congress Advisory Committee on Copyright Registration and Deposit (ACCORD), September 1993, <<https://www.copyright.gov/1201/accord/accord.pdf>>. According to the letter of transmittal from ACCORD Co-Chairs Barbara Ringer and Robert Wedgeworth included in that report, “Speaking only for ourselves, as members of the advisory committee and not as co-chairs or on behalf of ACCORD or any of its members, we agree with the sponsors of the Copyright Reform Act that sections 411(a) and 412 should be repealed.” Maria Pallante was a member of ACCORD as Executive Director of the NWU.

⁵ “Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.” WIPO Copyright Treaty, Article 14(2), <<https://www.wipo.int/wipolex/en/text/295166>>.

⁶ “As you well know, section 412 prohibits an award of statutory damages or attorneys' fees in a successful infringement suit if the work has not been registered prior to the infringement or, in the case of published works,

playing out once again in this proposed rule.

What's particularly galling about this whole situation is that, while the World Wide Web is of course still evolving (as are print media), it's a mature publication medium. It's been around for more than a generation. But despite acknowledging the poor fit between web content on the one hand, and registration forms and procedures devised for printed media on the other, the Copyright Office has dragged its feet for decades in addressing this problem. And now there is still no general procedure for registering text published on the web — a status quo that will remain, even if this proposed rule for updates to a limited category of websites is finalized, and even if it is amended as we recommend.

Redressing this problem doesn't require reinventing the wheel: In 2017, the NWU formally petitioned the Copyright Office for rulemaking to create a group registration procedure for "multiple written works first distributed in electronic format on multiple dates."⁷

Although the Copyright Office eventually acted on this petition, it established a procedure that was too limited and burdensome, and which has — for that reason — been little used. While we requested that the proposed rule be amended to allow for registration of at least

within three months of publication. If registration fees are unreasonable, the bar will be set too high. Authors will not be able to afford registration, which effectively will mean that they will be denied real protection under the Copyright Act.... Without the possibility of attorneys' fees, it is extremely difficult to find and pay for legal counsel. Without the prospect of statutory damages, authors are left with the daunting task of documenting actual damages, a task so meaningless to most that it is tantamount to having no copyright protection at all.... The inequity of section 412 is not a new issue. In 1993, the U.S. Congress introduced bills that would have repealed sections 411 and 412.... Section 412, which could not be justified in 1993, certainly cannot be justified under a higher fee schedule. A higher fee schedule in 1998 will further raise the bar to registration precisely at a time when the growth of the Internet has heightened the impact of infringement." Testimony of NWU President Jonathan Tasini at a hearing before the U.S. Copyright Office on a proposed fee increase for copyright registration, October 1, 1998, available at <<https://nwu.org/wp-content/uploads/2021/10/Tasini-testimony-registration-1OCT1998.pdf>>.

⁷ Comments and petition for rulemaking of the NWU, American Society of Journalists and Authors (ASJA), Science Fiction and Fantasy Writers of America, Inc. (SFWA), and Horror Writers Association (HWA), January 30, 2017, "Group Registration of Contributions to Periodicals," January 30, 2017, available at <<https://nwu.org/wp-content/uploads/2017/02/NWU-registration-30JAN2017.pdf>>.

500 “works” per application, the Copyright Office arbitrarily limited the new GRTX registration procedure to 50. That same GRTX procedure requires that each “work” be extracted and saved as a separate file, named (or renamed) in a specified manner, and listed by name on the application. A social media feed, blog, or other website may contain thousands of works, hundreds of which may be added or revised to a greater or lesser extent each month. When these limitations and complications are considered, it should be clear why so few independent creative workers are turning to the GRTX rule to protect their copyrights.

But perhaps most important to the current context, the Copyright Office has made explicit that the GRTX procedure is not intended to be applicable to web content generally. And while the Copyright Office has acknowledged the need for a procedure for group registration of web content for more than a decade⁸, has claimed to be working on it, and has repeatedly promised to promulgate such a procedure,⁹ another five years have passed. The problems for creators persist, but the Copyright Office still has not announced any viable process for registering copyright in general web content.

And so we state again: the Copyright Office needs to modify the proposed rule to make it applicable to updates to web content in general — not just work-for-hire updates to “news”

⁸ Maria A. Pallante, Register of Copyrights, “Priorities and Special Projects of the United States Copyright Office, October 2011-October 2013”, October 25, 2011, <<https://www.copyright.gov/docs/priorities.pdf>>. “Registration Options for Websites... Registration of content that is disseminated online, e.g., on websites and blogs, presents certain challenges.... Should a group registration scheme be implemented that would permit a single registration to cover content disseminated over a period of many days or weeks? The Office intends to engage in consultations with stakeholders and seek public comment on possible solutions and decisions in 2012.”

⁹ “[T]he Office has open rulemakings related to certain group registration options, and is preparing additional notices concerning group registration options for... websites.” U.S. Copyright Office, Notification of Inquiry, “Registration Modernization,” 83 *Federal Register* 52336, October 17, 2018. “Because each work must be published ‘as part’ of a website or online platform, the website or platform itself would not be eligible for this [GRTX] option. The Office intends to address website registrations in a separate Federal Register notice. See 83 *FR* 52336, 52337 (Oct. 17, 2018). Similarly, the Office intends to address publication with respect to the internet, for purposes of registration, in a separate proceeding.” Notice of Proposed Rulemaking, “Group Registration of Short Online Literary Works,” 83 *Federal Register* 65614, note 28, December 21, 2018.

websites. And the Copyright Office still needs to create a workable procedure for group registration of the content of new websites and sites that have not previously been registered because registration has been impractical and/or too costly.

4. Essential changes to the proposed rule

The Copyright Office has previously acknowledged that the call for action to create a group registration procedure for web content has come from two distinct groups: newspaper publishers and authors including the NWU.¹⁰

However, in developing this proposed rule and the new registration option it proposes to create, the Copyright Office has consulted with, and considered the interests and typical business models of, only *one* of those two groups of stakeholders: newspaper publishers.¹¹ The NPRM

¹⁰ “Although the proposed rule does not extend to websites, the Office is aware of the need for establishing new and updated practices for examining and registering online works. See, e.g., Comments of Newspaper Association of America (urging the Office to create a group registration option for newspaper websites), available at <http://www.copyright.gov/rulemaking/online-only/comments/naa.pdf>; Comments of the National Writers Union, Western Writers of America, and American Society of Journalists and Authors (urging the Office to create a group registration option for multiple works published online on different dates), available at <https://www.regulations.gov/contentStreamer?documentId=COLC-2016-0005-0009&attachmentNumber=1&disposition=attachment&contentType=pdf>; see also 81 *FR* 86634, 86636–37 (Dec. 1, 2016); 81 *FR* 86643, 86646 (Dec. 1, 2016). The Office is considering these issues and will take them into account when developing its priorities for future upgrades to the electronic registration system.”

¹¹ The proposed rule would define a website as a collection of files served from a single domain name. But many websites – including major news sites – are served from content delivery networks (CDN) such as Cloudflare and Google AMP, with the content files within pages on those sites served from URLs and servers in those CDNs’ domains. An even larger fraction of websites, also including news websites, include content embedded in pages on their domains, but served from URLs in the domains of syndication services, advertising networks, and/or advertising brokerages. In addition, the proposed rule would be limited to sites consisting entirely of works deemed to have been “created” by a single publisher as works made for hire. But many news websites include works created by and licensed from contributors and intermediaries – articles by freelancers, letters to the editor, syndicated articles and graphics, stock and wire service photos, etc. – which weren’t created by the publishers of those news sites and may not have been created as works made for hire. Even “individual” or personal sites often include syndicated or otherwise licensed and/or embedded third-party content. There are also, of course, many multi-author sites, from group blogs and other sites published by small collectives to large news sites and sites consisting largely or entirely of content licensed from freelancers. In light of these limitations, it’s unclear how large a percentage of websites, even of those maintained by news publishers, would be eligible to have updates registered through the proposed procedures. All of these issues will need to be addressed in a future rulemaking for registration of copyright in web content generally, including content on multi-author websites and web content syndicated or served across multiple domain names.

does not mention the previous comments on this issue of the NWU and other authors, nor does it consider whether the proposed rule would be workable for us or would address our concerns.

The result is a proposed rule that would be entirely useless to individual creators of web content — *e.g.*, the vast majority of web content creators. Fortunately, while a separate registration process for new or previously unregistered websites would remain as urgently needed as it has been for decades, just a few small amendments to the proposed rule would make it much more useful to creators.

First, the restriction with respect to the author and claimant that “Each collective work in the group must be a work made for hire” should be removed from the proposed rule.

This restriction would serve only to favor publishers over human creators, and to deny any possible benefit from the proposed rule to the actual human creators of web content.¹²

The proposed rule would require that, “the author and claimant for each collective work must be the same person or organization.” As long as there is only one legal “author,” whether that entity acquired legal “authorship” through the legal fiction of “work made for hire” or through actual creation should have no bearing on the procedure for copyright registration.

The task of examining an application for registration for a collection of works for hire would be no easier than that of examining an application for the works of a human author. If anything, verifying claims with respect to works made for hire would be *more* burdensome for the Copyright Office. For a human creator, establishing a claim of human authorship requires only establishing who created the work. Establishing a claim of “authorship” of a work made for

¹² It might be possible for an author to set up a personal corporation, set themselves up as an employee of that corporation, and enter into a contract to have authorship of their work attributed to their personal corporation as “works made for for hire.” But who would actually do this? And why would the Copyright Office want to set up an incentive for authors to do this? We shouldn’t have to jump through hoops like this to enforce our rights.

hire requires establishing *both* who created the work and that the human creator of the work was a party to a valid work-for-hire contract or employment arrangement with the claimant, applicable to the work in question.

For example, the Group Registration for a Photographic Database option has no “work made for hire” requirement, and simply requires that the claimant owns the “exclusive rights in their respective works.”¹³ This registration includes the copyright in “the authorship involved in creating the database, as well as the photographs within the database that were authored by or transferred to the copyright claimant.”¹⁴ This language regarding Photographic Database registration provides a model to follow.

The NPRM does not even purport to offer any justification for restricting the proposed rule to works made for hire, and we believe that there is none. While another rule would still be needed for multi-author websites, there are a great many single-author websites, including self-published sites and sites published on third-party platforms. The authors of these sites deserve the same benefits as publishers that claim sole authorship of “works made for hire.”

Second, the limitation of the group registration procedure in the proposed rule to “news” websites, and the proposed definition of a “news website,” must be removed from the rule. The new registration procedure should be equally applicable to any website, regardless of its content.

Under the proposed rule, “News website means a website that is designed to be a primary source of written information on current events, either local, national, or international in scope, that contains a broad range of news on all subjects and activities and is not limited to any specific subject matter.”

¹³ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1112.4 (3d ed. 2021).

¹⁴ *Id.* at 1112.

This is, on its face, a purely content-based distinction. Content-based discrimination, including in fees and administrative procedures, is Constitutionally suspect and subject to strict scrutiny which the proposed rule does not attempt to meet, and cannot meet..

In *Arkansas Writers Project v. Ragland*, 481 U.S. 221 (1987), the Supreme Court addressed “whether a state sales tax scheme that taxes general interest magazines, but exempts newspapers and religious, professional, trade, and sports journals, violates the First Amendment's guarantee of freedom of the press.” The Court found such a content-based distinction inherently suspect, and in the case presented, Constitutionally impermissible:

Our cases clearly establish that a discriminatory tax on the press burdens rights protected by the First Amendment.... [D]iscrimination can be established even where, as here, there is no evidence of an improper censorial motive... This is because selective taxation of the press — either singling out the press as a whole or targeting individual members of the press — poses a particular danger of abuse by the State....

On the facts of this case, the fundamental question is not whether the tax singles out the press as a whole, but whether it targets a small group within the press.... Because the Arkansas sales tax scheme treats some magazines less favorably than others, it suffers from the second type of discrimination identified in *Minneapolis Star*.

Indeed, this case involves a more disturbing use of selective taxation than *Minneapolis Star*, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its content. “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dept. of Chicago v. Mosley*, 408 U.S., at 95 . See also *Carey v. Brown*, 447 U.S., at 462 -463. “Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.” *Regan v. Time, Inc.*, 468 U.S. 641, 648 -649 (1984)....

Arkansas faces a heavy burden in attempting to defend its content-based approach to taxation of magazines. In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.

The same standard of strict scrutiny applies, we believe, to content-based discrimination in copyright registration fees as was held by the Supreme Court to be applicable to the content-based discrimination in taxes that was at issue in *Arkansas Writers Project v. Ragland*.

The NPRM provides no justification for excluding websites that don't fit its vague definition of "news websites," much less a showing of a compelling interest that could not be served by less discriminatory alternatives, sufficient to satisfy strict First Amendment scrutiny.

Any distinction between the websites of the *New York Times* (news) and *The Onion* (entertainment and parody) relates to the content of the works on these sites, not its form or format. Whether the articles on a site constitute flash fiction or news is an *entirely* content-based distinction. The job of the Copyright Office in registering copyright claims is not to assess the credibility or the truth-value, if any, to be assigned to the content of a website or any other work. Nor may it charge different fees or impose different procedural burdens on the basis of such determinations. Whether web content is fact or fiction is, and must be, entirely irrelevant to eligibility, fees, or which procedures to follow and forms to use for copyright registration.

While we believe that the exclusion of any web content that doesn't meet the definition of a "news website" in the NPRM is unconstitutional, we find it especially indicative of the content-based, discriminatory character of the proposed rule that it would be limited, even among "news" websites, to those that "contain[] a broad range of news on all subjects and activities and [are] not limited to any specific subject matter." Updates to a news site with its coverage limited by geographic scope could be registered through the proposed procedure, but updates to a news site with its scope of coverage limited to a specific subject area could not be.

Online trade journals or topical or specialty news sites — many of which are written by a

single author, and which are vastly more numerous (and often more profitable for individual authors) than general news sites — would by definition be excluded.¹⁵ *The Athletic*, an online sports news outlet, would not have qualified or been able to register its articles as part of this website group registration option. But having been acquired by the *New York Times*,¹⁶ articles from *The Athletic* can be registered along with the other *New York Times* content. A blog about current events, or a blog of news about a town or neighborhood that may have no local print newspaper, *might* be eligible, but a blog about history or television or fictional robots or deep sea mysteries or agriculture or aviation would surely be out of luck. A comedy blog? A genre-spanning fiction portfolio? A beauty criticism newsletter? Not even on the table for discussion.

Whatever the intent of the proposed rule, the unsurprising result of consulting and considering the interests of only one subset of stakeholders in its drafting is that it would favor publishers of websites containing a specific type of content (“general news”) over publishers, including self-publishers, of websites containing any other category of content. Independent beauty critics deserve to have their copyrights protected as much as *The New York Times*.

The Copyright Office can easily avoid the problems inherent in discriminating between websites on the basis of content by treating all sites the same for purposes of registration, regardless of whether their content is news or fiction, narrow or broad in subject matter, or with purposes and content defined in scope by geography or by any other criteria.

¹⁵ A personal blog with a sufficiently broad range of topics *might* be more likely to fit this definition of a “news website” than a large specialty news site, but it’s hard to tell if this is what the Copyright Office intends. The definition is so vague as to lend itself to arbitrary or invidiously discriminatory interpretation and application.

¹⁶ Lauren Hirsch, Kevin Draper, and Katherine Rosman, “New York Times Co. to Buy *The Athletic* for \$550 Million in Cash,” *New York Times*, January 6, 2022, <<https://www.nytimes.com/2022/01/06/business/new-york-times-the-athletic.html>>.

5. Other changes to the proposed rule to lessen its burden

Unsurprisingly, given that only one category of stakeholders was consulted and only their interests were considered, the proposed rule makes some assumptions about how websites are structured and updated that are based on newspaper publishers' typical business practices, and that would result in unnecessary burdens on individual creators with different typical work flows.

There is no technical reason for these limitations. They serve solely to favor “news publishers” over human creators and over publishers of other types of websites, and they do so in multiple ways:

First, the proposed rule would be limited to updates published during a calendar month, even though attorneys' fees and statutory damages can be awarded as long as copyright is registered within three months¹⁷ of first publication. **We recommend that the proposed rule be amended to allow registration of updates published during any specified three-month period.**¹⁸

Compiling the necessary files, submitting the application, and paying the fee might be a modest burden for a commercial site operated by a large publisher with many staff. But requiring an application every month, rather than every three months, is a significant and unnecessary tripling of the burden for individual creators, including self-publishers of all types of single-author websites.

We do not believe that processing a registration for three months of updates will be significantly more difficult for the Copyright Office than processing an application for a month of updates, but is likely to make a difference in whether many creators can justify, on a cost-

¹⁷ 17 U.S.C. § 412(2).

¹⁸ See, e.g. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1112.4 (3d ed. 2021) (applying a three-month range to eligibility for the Group Registration for a Database).

benefit basis, taking the time to register updates to each of their websites.

It's important also to keep in mind, in this regard, that work published on each platform with a different domain name constitutes a separate "website" for purposes of this rule. So a web content creator active on several platforms will have to register each separately. An "influencer" active on half a dozen platforms could easily have to take a full day every month completing and submitting copyright registration applications for even just the text portion of the updates to each of their websites.

Second, the provision of the proposed rule requiring deposit of PDFs of images of the home page is disconnected from the reality that updates aren't necessarily visible on the "home page" of a website. Updates appear on the home pages of some — but far from all — newspaper publishers' websites. But for many websites, including self-published sites as well as many corporate and organizational sites, the home page is a mostly or entirely static page with general information about the site or how to subscribe, while updates appear primarily on a "blog" or "news" page or some other "inside" page(s) of the site.

On a reference site such as an online encyclopedia, a collection of FAQs, or an online travel guide, updates may be made continuously or at irregular intervals throughout the site, with no mention on the homepage of which interior pages of the site, index pages, menus, or other navigation or design elements (which form part of the "collective work" to be registered through the proposed new process) have recently been added or modified.

This is significant for, among others, professional bloggers and other authors whose work is published in a "blog" or "news" section of a website that isn't indexed on the home page.

So we question the assumption that the best guide to which pages of a site have been

updated during the time period covered by the application for registration of updates to a website is a collection of “PDF files that each contain a complete copy of the home page of the website” and that “show how the home page appeared at a specific point during each day of the calendar month when new updates were published on the website,” as in the proposed rule.

There is a standard way to identify which pages of a website have most recently been added or modified, and when those pages were most recently updated. There’s a page (or set of structured pages linked from a master page) on most websites created and maintained for the sole purpose of communicating exactly this information, in standardized and structured form.

This is typically *not*, however, the homepage of any website. It’s the sitemap page or set of sitemap pages, most commonly an XML page or set of pages structured in accordance with the XML sitemap protocol¹⁹ and placed by default at <[https://\[domain.name\]/sitemap.xml](https://[domain.name]/sitemap.xml)> or linked from a master sitemap index page at that URL.

The Copyright Office doesn’t appear to be conversant with this technical standard. The sitemap at <<https://copyright.gov/sitemap.xml>>²⁰ incorrectly suggests that the Copyright.gov home page hasn’t been modified since January 1, 2005, and doesn’t mention any other pages on the Copyright Office website. But because of its adoption by Google²¹, Microsoft Bing²², and other search engines, and the desire of most website publishers to have updates to their public websites found by those search engines, the “sitemap.xml” standard has been widely accepted and adopted by website publishers, web publishing platforms, and developers of content

¹⁹ Sitemaps.org, “Sitemaps XML format,” <<https://www.sitemaps.org/protocol.html>>.

²⁰ <<https://copyright.gov/sitemap.xml>>, visited February 18, 2024.

²¹ “Google supports the sitemap formats defined by the sitemaps protocol.” Google Search Central, “Build and submit a sitemap,” <<https://developers.google.com/search/docs/crawling-indexing/sitemaps/build-sitemap>>.

²² Microsoft Bing Webmaster Tools help & how-to, “Sitemaps,” <<https://www.bing.com/webmasters/help/Sitemaps-3b5cf6ed>>.

management systems (CMSs).

Wordpress²³, Ghost²⁴, Drupal²⁵, and many other CMSs and platforms include sitemaps either as core functionality or through mature and widely-used plugins or extension modules. The primary test of the burdensomeness for creators of a copyright registration procedure for new or revised web content should be how easily preparation and submission of an application for copyright registration can be automated as a “push-button” or scripted and scheduled operation within existing and future CMSs used to publish that web content.

As Google correctly notes, “If you're using a CMS such as WordPress, Wix, or Blogger, it's likely that your CMS has already made a sitemap available to search engines.”²⁶

A sitemap (or a set of sitemaps linked from a master sitemap) already has near-universal support as the way to indicate which pages of a site have most recently been added or modified, and when. A single sitemap or set of sitemaps can include the URLs and addition or most recent modification dates and times for all pages modified in the last month or the last three months.

Sitemaps are already created, or are available merely by enabling and configuring features already available, with minimal or no recurring burden, in all major CMSs.

Providing a sitemap or set of sitemaps with each application for group registration of updates to a website is the easiest way for publishers to provide a list of updates to the Copyright Office — the same way they already provide it to search engines — with the least burden.

²³ Pascal Birchler, “New XML Sitemaps Functionality in WordPress 5.5,” July 22, 2020 <<https://make.wordpress.org/core/2020/07/22/new-xml-sitemaps-functionality-in-wordpress-5-5/>>. “In WordPress 5.5, a new feature is being introduced that adds basic, extensible XML sitemaps functionality into WordPress core.”

²⁴ Ghost, “Changelog: XML Sitemaps,” December 16, 2014, <<https://ghost.org/changelog/xml-sitemaps/>>. “Today, we're introducing automatic XML sitemaps as core functionality within Ghost.”

²⁵ Drupal, “Download & Extend: XML Sitemap,” <<https://www.drupal.org/project/xmlsitemap>>.

²⁶ Google Search Central, “Let your CMS generate a sitemap for you,” <<https://developers.google.com/search/docs/crawling-indexing/sitemaps/build-sitemap#cmssitemap>>

A single sitemap or set of sitemaps would provide more information to the Copyright Office, in more useful form, than a collection of PDFs of daily images of a home page. Even if some updates are visible on a home page, many more may be visible only on other pages. But all updates in a given period can be identified by a single sitemap or set of sitemaps.

Unlike home pages with no standard structure, sitemaps are structured, standardized, machine-readable, and human-readable. They could be used immediately in manual Copyright Office work flow but would also lend themselves to efficiencies through automated parsing.

Conversely, capturing and saving daily snapshots of a homepage or any other page of a website would impose a non-trivial burden. It's not not a core or readily added feature of any CMS with which we are familiar. Compiling the page images proposed to be required by the Copyright Office would involve either a daily manual task, significant scripting ability and access to a server on which to run those scripts (least likely to be available to self-publishers or other small publishers), or paying one of the commercial services that provide this functionality for a fee.

All of this nuisance and expense could be avoided, and more useful information more easily provided to the Copyright Office in more useful form by web publishers, by amending the proposed rule to require submission of “a file or set of files linked from a master file listing in structured form the text files on the site added or modified during the time period covered by the application, including the URL and the date each file was added to the site or most recently modified,” instead of a set of daily PDFs of images of the home page.

6. The burden of copyright registration formalities

Aside from the gratuitous limitation of the proposed rule to “works made for hire” and to “news” websites, many of the problems in the proposed rule relate to the burdens in time and/or in costs of third-party services to enable completion of the proposed form and preparation and submission of deposit copies of the files and in the formats proposed to be required.

We suspect that a major reason why the Copyright Office has overlooked or underestimated many of these burdens is that the Copyright Office has not complied with its obligations pursuant to the Paperwork Reduction Act (PRA).

The PRA (44 USC §3501 *et seq.*), as enacted in 1980 and amended in 1995, requires that any “collection of information” from members of the public by a Federal agency, including any form which is completed by members of the public, be approved in advance by the Office of Management and Budget (OMB). That approval requires, *inter alia*, that the agency quantify its estimate of the time required to gather the requested information and fill out the form, publish that estimate and the basis for it in the *Federal Register*, accept and review public comments regarding that estimate, and apply to OMB for approval of the collection of information with a copy of the proposed form, an explanation of the justification for the collection of information, an estimate of its burden, and a summary of the comments received by the agency. OMB must provide a second round of notice and comment, and must then approve the form and assign an “OMB Control Number,” which must appear on the form, before it can be used by the agency.

The PRA provides the normal process through which the burden of complying with paperwork requirements is quantified and their justification is assessed. The purpose of the PRA is to ensure that these burdens are quantified, justified, and considered in rulemaking.

The PRA applies to “any executive department... or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” When the Copyright Office carries out rulemaking or administrative functions such as copyright registration, it acts as an agency subject to the PRA.²⁷ The PRA, as quoted, applies to any agency which is *either* an “executive department... or other establishment in the executive branch, *or* an “independent regulatory agency,” thus making clear that it is intended to apply to any “regulatory agency” even if it isn’t part of the executive branch.

But we can find no record of the Copyright Office ever having complied with any of the requirements of the PRA with respect to any of its forms or other collections of information.

The degree of burdensomeness of copyright registration forms, deposit requirements, and procedures is critical to evaluating proposed Copyright Office regulations and to assessing whether U.S. law and administrative procedures provide the effective redress for all acts of infringement the U.S. is required to provide as a party to the WIPO Copyright Treaty.

To facilitate this assessment, and to bring its activities into compliance with the law, **we urge the Copyright Office to promptly publish its estimates of the burden of completing each of its copyright registration forms for public comment, submit those forms for**

²⁷ We suspect that there is considerable alignment between those functions of the Copyright Office subject to the PRA and those subject to the Freedom Of Information Act (FOIA). FOIA similarly applies to all “agencies,” and the Copyright Office has conceded that FOIA applies to at least some activities of the Copyright Office. In response to our comments on this issue in an earlier rulemaking, the Copyright Office said that, “The Copyright Office is subject to the APA and FOIA only because there is a specific statutory provision in title 17 providing so, although it carves out certain actions from the scope of even those provisions. See 17 U.S.C. 701(e). There is no equivalent provision specifically rendering the Copyright Office subject to the Paperwork Reduction Act.” (“Final Rule: Group Registration of Contributions to Periodicals,” 82 *Federal Register* 29412, n. 11, June 29, 2017.) But this claim is incorrect: 17 U.S.C. 701(e) pertains to the APA and makes no mention of FOIA. Certain activities of the Copyright Office as an “agency” – unlike those of the rest of the Library of Congress, which is not an “agency” subject to FOIA – are subject to FOIA not because of any statute explicitly referencing the Copyright Office in relation to FOIA, but because the definition of “agency” in the FOIA statute itself includes those activities of the Copyright Office. The similar definition in the PRA of “any independent regulatory agency” also includes certain activities of the Copyright Office, including the collection of information from copyright registrants and the printed and online forms used for registering copyrights.

approval by OMB, and make it a practice to include PRA burden estimates in future rulemakings.

7. Web sites are more than just text, and the Copyright Office needs to address that.

While our historic focus, as the NWU, has been primarily on works in text format, it is nevertheless the case that websites are more than text, and web creators are more than writers. Increasingly, even a single-creator website or a single blog post, can include a mix of text, photographs, graphics, audio, and video. The historic separation of these modes of creative output by the Copyright Office, requiring separate applications for registration of each of the components of the same multi-media package, multiplies the burden of registration formalities.

We urge the Copyright Office, in planning its follow-up rulemaking to establish procedures for registration of the content of entire new or previously unregistered websites, to work with creators in all sectors to construct a process for registration of all elements of a site with a single application, for a single fee, through a procedure that draws as much as possible on the automation and efficiency made possible by building on web content management systems.

We thank the Copyright Office for the opportunity to provide these comments. We would welcome an opportunity to meet with the Copyright Office to discuss these suggestions and other ways to minimize the burden on web content creators of registration formalities. We look forward to finally being able to register copyright in updates to the text of some of our websites through a revised version of the proposed rule.

We also look forward to a future rulemaking, hopefully soon, to create a group registration procedure to allow us to register copyright in all elements of the content – text and non-text – of new or previously unregistered websites.

Respectfully submitted,

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