January 13, 2017

The Honorable Bob Goodlatte
2309 Rayburn HOB
Washington, DC 20515

The Honorable John Conyers, Jr.
2426 Rayburn HOB
Washington, D.C. 20515

Dear Congressman Goodlatte and Congressman Conyers:

With this letter, I respectfully submit my comments to the U.S. House Judiciary Committee's call for same on your proposed independent Copyright Office separate from the Library of Congress. As a victim of piracy by Russian and German websites (who spent weeks filing DMCA takedown notices and emailing state's attorneys general and the FBI), I agree that the Copyright Office should be modernized to keep pace with the digital age.

A) However, bureaucratic and policy solutions cannot fix our ineffectual statutory and common laws, which have rendered the Copyright Act all but ineffectual in federal court. More than the threat to our copyrights from foreign nations, by far the greatest threat to American creativity and innovation is from our own milquetoast, misguided, ineffectual statutory and common laws. This where the greatest challenge lies and major overhaul is absolutely critical.

Starting in 2014, I discovered multiple novels published by traditional New York publishing houses that infringed my ebook's 2011 copyright registered with the Register of Copyrights. As a self-published author, I retained and did not license my copyright, which gave me standing to sue. However, after contacting 460 lawyers in the last 2-1/2 years, I found only one with experience enforcing copyrights that had been infringed who was willing to represent individuals. Count 'em—one. But I contacted over 50 who only represent publishing houses and their multi-conglomerate parent companies.

The one mentioned above charged an obscene $750.00 per hour, and none of the retainer quotes I received from attorneys with no copyright experience beyond transactional (i.e., not an iota of infringement experience) were lower than $70,000.00.

Yet, of those who initially seemed willing to pursue my claim, the first question out of their mouths was, "Is it plagiarism?" And when I told them the infringement was mostly non-literal they made such statements as,"Copyright infringement is very hard to prove" and "Well, this type of claim could go either way." Every single lawyer who asked to review the evidence deemed my claims "meritorious," yet none, save one, were willing to take my claims.

Why? My research has turned up several reasons: (1) The rise of software and pharmaceutical copyright, patent, and trademark infringement claims in the last 30 years has produced a guaranteed, sizable revenue stream for intellectual property attorneys, (2) The publishing industry pumps out so many new books annually (200,000 according to Nielsen, or 160,000 more than in 2007) that it long ago relinquished vetting books for plagiarism (if it ever did; see #2 below) and, most critically, (3) Statutory and common law are so vague and imprecise that they have stripped lawyers of the tools to enforce non-literal claims and defend copyright law. The law as practiced has hamstrung its practitioners and rendered them impotent (see # 3 below).

(2) This type of claim is long overdue in the publishing industry. Over the years, I've read a number of novels that clearly infringed earlier ones (even published reviews mention the titles), yet the anticipated lawsuits never materialized. Why? Because publishing houses don't want to sue other publishers with whom they do business. As a result, the S.D.N.Y. court may have become lax in enforcing the law (and biased in favor of the revenue-generating, tax-paying N.Y. publishing industry?). But backing away from suits or quietly settling

them sends a dangerous message to would-be infringing authors that they can get away with violating civil law with impunity. But it is devastating and humiliating to a writer who has invested years of hard work and sacrifice to see her work stolen—and be powerless to do anything about it.

(3) In 1970, 47 years ago, the case of *Roth Greeting Cards v. United Card Company* introduced the phrase "total concept and feel," which seems to have set the standard because it appears repeatedly in the dwindling number of book infringement cases filed since. Such amorphous, elastic, meaningless terms have rendered lawyers powerless to enforce cases of non-literal infringement.

That courts latched onto such a unintelligible, unlawful phrase (and later ones) suggests they threw up their hands because "concept" is another word for idea, which is not protected by copyright, and no less an expert than law scholar David Nimmer calls "feel" "a wholly amorphous referent which invites abdication of analysis." The courts' reliance on such phrases have scared lawyers away from trying non-literal infringement claims.

In the last 30 years, infringers have become very sophisticated at "gaming the law"; that is, using it to their advantage by claiming that their work is "transformative," when in fact it plagiarizes or infringes. And the courts have let them get away with it, which is one reason such violations are rampant today—and why lawyers know they can't win. But poorly written laws with loopholes large enough for plagiarists to manipulate them to their ends but that fail to protect legitimate copyright holders are bad laws.

Even literal claims of word-for-word, line-by-line plagiarism (once a "slam-dunk" say attorneys) have become increasingly difficult for lawyers to enforce in court. According to The Atlantic (http://www.theatlantic.com/entertainment/archive/2016/06/plagiarism-in-the-age-of-self-publishing/485525/), stealing ebooks in the self-publishing era is rife. Romance writers Becky McGraw and Opal Carew have fought back against plagiarism, and Rachel Ann Nunes's case against Tiffanie Rushton is making its way through a Utah federal court. (http://rachelannnunes.blogspot.com, https://ecf.utd.uscourts.gov/cgi-bin/show_public_doc?214cv0627-51)

Of all the things to fear in the brave new world of digital ebook publishing (i.e., clickbait sites, counterfeiting, DRM circumvention, P2P file sharing, BitTorrent, the Piracy Bay, etc.) never in a million years would it have occurred to me to fear copyright infringement. The infringers may have been under the impression that they could infringe my copyright with impunity because it is "only" a self-published ebook; that is, "vanity press," undefended by a publishing house and, hence, available for theft. Their infringement has produced a profoundly "chilling effect" and, if unable to retain counsel, I can never publish my work again—to which I've devoted my entire life—without risking the same fate. It's not hyperbole to say that am in a fight for my life.

I spent seven years writing my novel while working full-time and caring for my family to the exclusion of everything else and without a publisher's advance (like they received) or support of any kind. It is truly a labor of love, and I cannot stand by silently while others steal from my creation.

My claim is less about recovering damages than about sending a message that self-published ebooks are protected by The Copyright Act too, and showing that the wages of hard work and sacrifice is not theft of what those years produced, but the backing of the law. Yet representation has proved literally impossible to obtain.

I have spent hours nearly every day for the last 2-1/2 years trying to defend my copyright. I only have five months left before the three-year statute of limitations expires. Day by day it inches closer and closer and with each passing hour I lose one more opportunity to enforce The Copyright Act and defend the Constitution.

If tightening statutory law that fails to protect copyright holders is something an independent Office of Copyrights can affect, I'm all for it.

B) I strongly support reintroducing the Copyright Alternative in Small-Claims Enforcement (CASE) Act (H.R. 5757) or combining it with H.R. 4241. The digital age has thrown open the doors for more and more entrepreneurial Americans to create, which has, regrettably, also opened the floodgates to copyright infringement, and we desperately need an affordable tribunal to enforce our rights. Between lawyers who are paralyzed by lousy laws and absent any other recourse, if we cannot enforce our rights, in effect we have no rights.

Recently, I had a very unsatisfactory exchange with the Register of Copyrights. I reported that a public college's library is violating 17 U.S.C. § 107 Fair Use by restricting the archived materials that students, professors, and patrons can read. The Registrar's Office adamantly refused to help.

Therefore, in the spirit of helpfulness, may I suggest an amendment to the CASE/ CODE Act? In the interests of impartiality, balance, fairness, transparency, and avoiding self-interest and career bureaucrats who just "mail in" their rulings, the small claims board should be comprised of no more than one representative from the Register's Office or newly formed Copyright Office and an annually rotating, odd-numbered group of disinterested persons with copyright experience, e.g., retired or no longer employed from each of the following: One:

- U.S. District Court judge
- One currently employed copyright (not trademark, patent) litigator in private practice
- University law school professor
- Literary agent
- Publishing house editor (including small press publishers, incl. of drama, poetry)
- Author
- Theater manager or owner
- Music composer, producer, or recording company executive
- Art gallery manager or owner
- Ebook retailer/distributor (e.g., Amazon.com, Apple.com iBookstore, Barnes & Noble Nook.com)
- Ebook aggregator (e.g., Smashwords.com, Lulu.com)
- One (minimum) current representative from: The Authors Guild, The Copyright Alliance, PEN American Center, Volunteer Lawyers for the Arts-NY, MA, CA, etc., Center for Democracy & Technology, The Copyright Society of the USA, American Constitution Society, Constitution Project, Center for Constitutional Rights, American Intellectual Property Association, The Center for Art Law, Americans for the Arts, Libel Defense Resource Center, New York State Bar Entertainment, Arts & Sports Law (EASL) Steering Committee, New York City Bar Copyright & Literary Property Commission, New York Lawyer's Association for Art Law Committee, American Composers Forum, The Recording Industry Association of America, American Federation of Arts (AFA), Association of Art Museums Directors (AAMD), Council of Fashion Designers of America, Dance USA, etc.

I strongly suggest the tribunal NOT include retired representatives of distributor Ingram Content Group, which has a monopoly on book distribution; The Electronic Frontier Foundation (EFF), which advocates less copyright protection; aggregator Book Baby, whose Terms unlawfully transferred authors' copyright to it without informing the authors; or Washington Area Lawyers for the Arts (WALA), which by refusing to adopt any policies, standards, or procedural guidelines, operates according to questionable practices.

Thank you.

Sincerely,
Hayley Kelsey

Cc: Rep. Hakeem Jeffries
Rep. Tom Marino