

Science Fiction and Fantasy Writers of America, Inc. (SFWA)

P.O. Box 3238

Enfield, CT 06083-3238

Email: LegalAffairs@sfgwa.org

Comments Concerning Reform of Copyright Law

TO: Hon. Bob Goodlatte, Chairman,
House Judiciary Committee
Hon. John Conyers, Ranking Member,
House Judiciary Committee

*via electronic submission to
copyright.comments@mail.house.gov*

SFWA, Inc. respectfully submits the following comments concerning the Committee's call for testimony on copyright reform in the Committee's press release of December 8, 2016.

Statement of Interest

SFWA is a nonprofit membership organization of over 1,800 commercially published writers of science fiction, fantasy, and related works. Its membership includes writers of both stand-alone works and short fiction published with other works. Of particular note, SFWA's membership includes a significant number of authors' estates, and has a long-standing record of advocating for the interests of authors' estates against those who would infringe on those estates' rights for their own profit.

SFWA is not a subsidiary of any other entity, and is entirely owned by its membership. SFWA has no subsidiaries or other ownership interest in any other organization that may be affected by this testimony. SFWA members run their own small businesses, whose product is the written word.

Introduction

SFWA is pleased to submit comments concerning the Judiciary Committee's first policy proposal for Copyright Review, much of

which we fully agree with. Writers and other creators are in a time of unprecedented change. The world is transitioning from analog to digital media, facilitated by the unprecedented reach of the Internet. These changes offer great opportunity for authors, but also present many challenges. We urge Congress to look at our copyright laws with an eye to preserving and expanding the protections offered to creators. We believe that as part of this expansion, it is essential — as the Judiciary Committee’s proposals suggest — that the US government create and maintain electronic databases that go far beyond the card catalogs of the past to provide definitive information about copyrighted works, including contact information for authors, their heirs, or their representatives. This testimony focuses on the creation of such a database, herein referred to as the “Author Information Database”, but we emphasize that this database can only be fully created and accurate after the Copyright Offices records are fully digitized and regularized, so that the copyright status of all works published since 1923 can be easily ascertained.

We believe that the existing Public Catalog (<http://cocatalog.loc.gov>) maintained by the Copyright Office is a good start toward creation of the full database and Author Information Directory that we believe is essential. The existing catalog, however, only contains works registered from 1978 on. It should be updated immediately with all post-1923 records that have already been digitized and digitizing the remainder of the records and their inclusion in the database should have the highest priority. Further, the existing Public Catalog and the database that supports it should be upgraded to ease linking to the database storing author information.

The Register of Copyrights and Copyright Office Structure

SFWA agrees with the Committee’s policy proposal that the Copyright Office should be separated from the Library of Congress as quickly as possible. How it is administered after that depends upon several factors. It should be in a position to independently determine its budget and, as much as possible, be able to determine its own priorities, subject to oversight by the Judiciary

Committee. We accept the Judiciary Committee's proposal for keeping it as part of the Legislative Branch, but other options might work just as well. What is most important is that the Copyright Office have autonomy and a budget commensurate with its increased responsibilities.

We believe that the Copyright Office should not be financed by registration, recordation, or other fees levied on rightsholders. Such fees are counterproductive in that they discourage rightsholders from registering their works. The goal of the Copyright Office should be to provide publicly accessible information regarding the copyright status of specific works by leveraging digital technologies and the Internet to reduce fees to the lowest possible levels such that they only reimburse the Office for the actual expenses involved.

We also believe that any change in structure to the Copyright Office should be sensitive to the needs and expertise of two related and coordinated executive-branch units: The Patent and Trademark Office (Department of Commerce) and the United States Trade Representative. As just one recent example, the coordination difficulties presented by the current structure became glaringly obvious during negotiation of the recently-abrogated Trans-Pacific Partnership (and in the final product of those negotiations); it was readily apparent that negotiators assumed that the default patent/trademark practice of corporate ownership also applied to copyright holders without an adequate warrant for believing so. SFWA's own membership itself refutes that assumption for at least a discernible subset of copyrighted works. This is just one example of many that counsel either establishing specific interagency coordination mechanisms or possibly moving the Copyright Office to the executive branch.

Copyright Office Advisory Committees

SFWA largely agree with the policy proposal's conclusions in this area as well, but we must emphasize the importance of including creators of all sorts on these advisory committees, especially those who are natural persons who run their own small businesses. More often than not, creators are the last category considered when putting these advisory committees together, if they are included at

all. Creators, in many instances, have very different priorities than do the publishers, transferee-owners, and other middleman groups that they work with. Increasingly SFWA members and other writers are self-publishing their own works, bypassing many of these other interests entirely, which gives SFWA's members an even greater stake in their copyrights and how they are administered, exploited, and protected. Representatives from creators' groups such as SFWA have studied these issues and stand ready to serve on these advisory committees.

Information Technology Upgrades

As stated above, we believe that the Copyright Office should create systems that build on advances in information technology to achieve the goals of the original registration system: To ensure every creative work is definitively identified and its copyright status clarified, with contact information for the author and/or other rightsholders to the work as part of the publicly-accessible record. In our opinion, achieving these goals is part and parcel of any successful legislative approach to the orphan works problem. We agree with the policy proposal, the Librarian of Congress, and the Copyright Office's IT modernization plan insofar as they call for completion of the digitization of the Office's records as the highest priority, but it shouldn't stop there. Immediately available next steps would include the rationalization of the ISBN, ISSN, ISNI, and DOI schemes. Ultimately we believe that the management of this intellectual property metadata rightfully belongs with the Copyright Office, and we recommend giving it the authority to administer these schemes or their successors.

As a longer-term goal, we suggest something like the model database of copyright ownership described in subsection A below. In subsection B below, we call attention to the problem of proper succession of copyright interests, which can confound the best efforts to track and find copyright holders, even if the database we contemplate is created, and suggest measures to be considered in revisions of copyright law.

A. Digital Database of Copyright Ownership

The December 8, 2016 proposal from the Chairman and Ranking Member, Reform of the U.S. Copyright Office state that that the Copyright Office “should maintain a searchable, digital database of historical and current copyright ownership information and encourage the inclusion of additional information such as licensing agents that would be available to the public. This database should allow copyright owners to include additional metadata, such as standardized identifiers, for a fee.”

SFWA agrees with the need for such a database. As discussed below, we do believe that any fee charged to individual creators registering their works should not impose an undue financial burden on them.

(1) Problems Created by Lack of a Database/Directory

Since works are given copyright protection the moment they are fixed, there is no reliable way to find authors to seek their permission to publish or reuse material. Because the penalties for infringement are high — as we believe they should be — there is a lot of material that cannot be reused because the authors are essentially un-locatable. That is, the cost to locate them, if they can even be located, is often too high to justify the use of the work. Factoring in the 95 years/Life+70 years duration of copyright, a large amount of work is likely to be un-reusable for over a hundred years and in extreme instances lost altogether.

There have been a number of examples submitted by editors to us demonstrating how this has prevented them from keeping important older work in print. Author Spider Robinson noted that much of science fiction’s pulp magazine heritage could be lost because by the time copyrights expire, the physical magazine issues may no longer exist. (Some have been archived on microfilm, but not all, and the microfilm copies are of dubious quality.) Examples of losing track of authors after less than a decade were given, demonstrating the likelihood that obscure older works are even more difficult to republish. This includes not just short stories, novels, poetry, and so on, but web pages, public newsgroup postings, podcasts, social media platforms, and other forms still

being developed.

(2) Author Information Database/Directory (AID)

Considering the structure of the database recommended by the Chairman and Ranking Member, we believe that our recommendations to the Copyright Office in 2013¹ are directly relevant.

We recommend that as part of the database, the Copyright Office should establish an Author Information Directory (AID) containing author contact information and information about authors' works. The Directory should draw upon existing records and allow authors to easily obtain a unique identification number, and should be searchable by anyone seeking to find a copyright holder. The same approach could be used for photographs and graphic works. To make finding authors easier, the Copyright Office (or an entity it designates) should create and maintain an official Author Information Directory containing author contact information and information about their works. For the initial creation of the Directory, the Copyright Office could draw upon the Library of Congress Name Authority File (NAF),² copyright records, and other relevant databases. The Directory should provide unique identifiers for authors (AID#) and for any of their pseudonyms. The system should also enable searching for joint authors and collaborating authors when knowing only one of the contributors.

When authors already have NAF records, they should be able to search the NAF and then link their contact information in the Directory to the NAF records. We encourage the Library of Congress to open up the process by which authors can contribute material to the NAF so that records can be corrected and so that it may more effectively accomplish its goals and work in conjunction with the Directory. The Copyright Office should also seed the Directory with

¹ See https://www.copyright.gov/orphan/comments/noi_10222012/ (Comment 81);

https://www.copyright.gov/orphan/comments/noi_11302012/ (Reply Comment 75).

² <http://id.loc.gov/authorities/names.html>

the information it has now, marking contact addresses with the date of the entry, thereby alerting database users that an address entry may no longer be valid.

Newly-registering authors without existing NAF records or AID numbers should be able to log in via a web page, supply their name, email, and relevant contact information, and be assigned their unique author identification number. They should also be able to complete an information form requesting the generation of an NAF record, based on their provided information.

Registering with the AID would not be mandatory, but should be strongly encouraged. While searching the directory would be part of a reasonable search for a work's author, the absence of an author from the directory would not be a conclusive way of establishing that the author could not be found.

Of course, there should also be provision in the system for enabling an author to designate a third party as the appropriate contact point. If nothing else, the problem of "celebrity stalking" must be allowed for in establishing any system that would potentially expose direct contact information to the public.

There should be no fees for registration with the AID in order to encourage the widest possible participation.

(3) Authors' Use of Directory/Database

To register a work, the author would log in to a web page, supply their author AID identification number, the title of the work, and any optional information that may be useful; the work would be registered and the author would receive a registration identification number for the work (a stable identifier, similar to a Digital Object Identifier).³ Authors should at this time receive information

³ See generally *The International DOI Foundation* (<http://www.doi.org>); see also Norman Paskin, "Digital Object Identifier (DIO®) System," (<http://www.doi.info/overview/DOI-ELIS-Paskin.pdf>, retrieved Jan. 29, 2013); Carol Ann Meyer, "A Primer on Digital Object Identifiers," *The Digital Digest* (Association of American University Presses)

stressing the importance of keeping their registration up-to-date. The registration identification number (Reg ID#) should not be based on ISBNs or other publisher-specific information, which is likely to be transitory and change over the life of the copyright.⁴ While the Reg ID# could be based on some other already-existing identifier such as unique WorldCat⁵ record numbers, an entirely new identification system would likely work best, especially since WorldCat records are inconsistent in handling diacriticals, hyphenated and other multipart surnames, and name changes. Whatever numbering system is used to identify works would have to identify both book-length works and shorter works published in periodicals, collections, or individually (especially, but not only, electronically).

The Author Identification Directory would need to include a mechanism to link AID#s and Reg ID#s in a way that can properly record collaborations. The Library of Congress's database, or the WorldCat database, both of which already have this function for linking authors and titles (or uniform titles), could be strong tools for updating the AID. Authors should be linked to all individual works of theirs they register and the database should be designed to produce well formatted results for individual authors, including all of their registered works and any ancillary material they provide.

Authors should also be able to enter a general description of the kind of work they create, to facilitate publishers searching for authors of unregistered works.

(<http://aaupdigitaldigest.wordpress.com/2011/11/10/a-primer-on-digital-object-identifiers-by-carol-anne-meyer/>, retrieved Jan. 29, 2013).

⁴ In some extreme circumstances, publishers have misused their control of the publisher-specific information in ISBNs and ISSNs (and no doubt will in the future) to prevent author reuse of the author's own work after proper termination of a publishing contract. The potential for this even in good faith was particularly apparent during the early days of e-book publication (*cf.*, *e.g.*, *Random House, Inc. v. Rosetta Books LLC*, 283 F.3d 490 (2d Cir. 2002), and the proceedings in the District Court), and has become increasingly so during publishing-industry consolidations and bankruptcies (*cf.*, *e.g.*, *In re Byron Preiss Visual Prods., Inc.*, No. 06-10299 (Bankr. S.D.N.Y.)).

⁵ <http://www.worldcat.org/>.

The registration process for both copyrights themselves and the AID should conclude with generation of a single-sheet educational flyer (or the equivalent) reminding registrants of the importance of maintaining a current, searchable contact and providing for succession of interests in a will or other estate-planning document. The flyer should be enclosed with or attached to the registration confirmation message.

Author contact information - Current contact information for authors should, if the author so chooses, include contact information for an author's designated agent instead of for the author. The only need for filing change-of-address records would be when a designated agent moves their office or the author changes designated agent. Authors otherwise would submit a change of address form to the AID. This system should default to a single designated agent for an author's works, but should allow an author to designate an agent for less than all works and/or have different designated agents for different works (especially, but not only, when an author's works have been adapted by multiple media companies).

Anonymous email box for copyright holders - The Copyright Office should set up, in conjunction with the AID, an email system allowing copyright holders to receive email through an anonymous email box should they want keep their personal email addresses or mailing addresses confidential. If the Copyright Office is unable to set up such a system, it should encourage writers' organizations to create similar systems linked to the AID.

Third-party rightsholders - For works made for hire and other works in which the author has transferred all rights, the title and text of works should be linked to both the author(s) of the work and the publisher/copyright holder. Such works should be designated as publisher-owned work, with contact information pointing to the proper rightsholder(s).

Pseudonyms - Authors with pseudonyms should be able to register each separately. Pseudonymous works could be linked to author names using the NAF database at the author's discretion. Authors

may opt to make the link between the two names public or private, based on their preferences and contractual obligations. Authors should, however, be encouraged to have the link be public or to allow the link to become public after a specified number of years.

Authors who change names or create new pseudonyms and wish their old and new names to be linked would be so linked, as they are in the NAF database.

Death or incapacity of an author - In the case of a deceased author or an author for whom a guardian is appointed by a court, a notice should be sent by the successor(s) to the AID indicating their or their representative's contact information. Upon presentation of the author's death certificate or the appropriate court order, any email addresses and password(s) will be transferred to those successor(s).

To elaborate on our suggestion above, the Copyright Office should also provide educational materials to copyright holders at the time of their initial registration of copyright and at the time of their registration with the AID that reminds copyright holders of the importance of maintaining current, searchable contact information. The material should also stress the importance of providing for the succession of their interests in their works to their literary heirs, either in their wills or in other documents. Further, the Copyright Office should draft a suggested clause for use in wills, and send a copy of that clause with each certificate of registration for copyrights claimed by a natural person. Language should be included directing executors and heirs to update the AID records.

The information sheet will encourage authors to explicitly and properly allow for copyrights in their wills,⁶ which in turn will make establishing ownership of a copyright by persons who wish to reuse materials considerably easier.

Verification of registration - There should be an option for

⁶ Cf., e.g., *Horadam v. Stewart* (In re Estate of Andre Norton), No. M2007-46-COA-R3-CV (Tenn. Ct. App. Oct. 6, 2008) (improper and inconsistent treatment of copyrights and assets in estate plan).

authors who want to submit notarized registration forms or enter digital signature information into the directory of authors. What kind of authorization was used (if any) would not be public knowledge, so that anyone trying to fraudulently alter the record would be more likely to be discovered and deterred. If digital signatures are allowed (such as PGP or X.509 certificates), there should be no requirement as to what kind; authors should be allowed to enter information for any kind of digital signature.

When registering or entering data, anyone claiming authorship or copyright of a work should be required to do so under penalty of perjury.

(4) Use of the Directory/Database by Potential Publishers or Re-users

The AID database should be publicly searchable as part of a diligent search for the author of a work by a party seeking permission to publish or otherwise reuse the work. The search engine used for this should be very flexible, allowing for Boolean keyword searches as well as searches by author, subject, and any ancillary material provided by the author or NAF.

Use of the AID by a potential publisher would provide evidence of a good faith effort to find the holder of a copyright, but must not exempt a potential publisher from an obligation to undertake a more complete search.

Potential publishers using the AID should be able to enter information they have learned about the author and what is known about the author into the Directory to facilitate searches by others. Any such information should be marked as coming from a third party and as an unconfirmed entry. Any such information should be entered under penalty of perjury.

B. The Copyright Office Should Work to Ensure Proper Succession of Copyright Interests

The Copyright Office should provide explicit guidance to copyright holders on how to ensure the succession of their copyright interests. As difficult as it can be to find the owner of a copyright when the original registrant still holds the copyright, finding the owner when that copyright has changed hands is much more complex. Sometimes these transactions are voluntary or by devise (such as a will), and are later recorded at the Copyright Office. All too often, they are not. The Copyright Office should establish regulations and public-outreach efforts in four particularly problematic areas.

(1) The Copyright Act specifies how renewal rights and termination rights descend,⁷ but it rightly does not specify descent of copyrights themselves. Instead, the Act allows for free transfer of copyrights, including by devise (or, presumably, intestate succession). The Copyright Office has largely been silent on the issue, which often leaves copyright owners uninformed, particularly for pseudonymous and anonymous works. The Copyright Office should act to help educate copyright holders on the issue. As part of that effort, the Copyright Office should include a mandatory one-page inclusion with **every** certificate of registration advising the recipient to make specific provision in his/her will and/or business succession plan for ownership of the copyright being registered. This will encourage authors to explicitly allow for copyrights in their wills, which in turn will make establishing ownership of a copyright by persons who wish to reuse materials considerably easier.

To make this as clear as possible, that inclusion should contain a suggested clause for including in wills.

(2) Publishing, both in print and otherwise, is an extremely hazardous business. The median life of a publisher is under five years, and even extremely large publishers and other corporate owners of copyrights suffer financial reverses that force bankruptcy.

⁷ 17 U.S.C. § 304(a)(1)(C); 17 U.S.C. §§ 203, 304(c).

The Bankruptcy Code is not very explicit in the succession of intellectual property itself, as opposed to intellectual property licenses (which are merely executory contracts).⁸

We urge simultaneous amendment of the Bankruptcy Code and/or Rules to require that all copyright transactions, assets, etc. be reported on either existing Schedule F (executory contracts) or a new Schedule F1 (contracts and rights related to licenses) for **all** debtors and be recorded in the Digital Database/Directory discussed above.

All too often, particularly with smaller businesses, copyrights are not explicitly scheduled as assets in bankruptcy and/or disposed of in the final decree. This is a significant cause of copyright orphans, particularly for works made for hire, non-textual works, and short textual works. Because copyright is a specific type of asset that is subject to special, and indeed Constitutional, attention exclusively under federal law,⁹ the Copyright Office should act to fill this gap. Until the Bankruptcy Code can be revised, the Copyright Office should fill this gap through an interpretive rulemaking under the Administrative Procedures Act.¹⁰ Rather than interfere in the bankruptcy process itself, such an interpretation should establish what happens to a copyright when the owner of that copyright has gone through bankruptcy, but the copyright has not been scheduled or explicitly disposed of by the final decree.¹¹ The objective here is to provide a clear default rule that can be easily interpreted just by comparison to the bankruptcy schedules and decree. If the debtor (or, for that matter, its creditors) desire an outcome different from the default condition, all they need to is explicitly provide for that outcome in the schedules and decree—

⁸ 11 U.S.C. § 365; cf. 11 U.S.C. § 541; *see also* the Byron Preiss matter (footnote 4 above)

⁹ 17 U.S.C. § 301 (federal preemption of copyright); 28 U.S.C. § 1338(a) (exclusive federal-court jurisdiction over copyright claims); U.S. Const., Art. I, § 8, cl. 8.

¹⁰ 5 U.S.C. § 501 et seq.

¹¹ 17 U.S.C. § 201(e) does not prevent this. By its own terms, § 201(e) applies only to “individual authors.” Further, this would not enact a transfer; it would only clarify to whom a transfer per force had been made when not otherwise specified.

just as an individual author could so provide in a will. We believe that this default condition, consistent with the concepts behind the Visual Artists' Rights Act,¹² should return works made for hire to their creators unless those works are explicitly disposed of in bankruptcy.

(3) Many smaller businesses — publishers, in this case — however, do not go through bankruptcy upon dissolution. They may be sole proprietorships; they may be partnerships; they may be corporations or other limited-liability business entities. Some of them simply close down in an organized manner, but many others lose their rights to continue as business entities through neglect or abandonment, such as failure to pay annual state fees. Filling this gap is even more important than filling the gap created by bankruptcies, because such dissolutions ordinarily do not create any public record of what happens to the assets of the defunct business. Fortunately, as the rationales would be virtually identical to those for bankruptcy, this instance could be covered in the same rulemaking procedure, and same rule, as for bankruptcy. The rationale for returning works for hire to their creators, though, is even stronger in the event of a non-bankruptcy business dissolution.

(4) Finally, many publishing enterprises change control. This ranges from a simple change of ownership (possibly including a change in name) to mergers and acquisitions. This presents similar difficulties to bankruptcy and dissolution, with the added twist that—unlike bankruptcy or dissolution—someone actually does own (or at least have a claim to) the copyrights in question. Again, the same rulemaking and rule could provide for a clear chain of ownership for copyrights, although in this instance the rationale for returning works made for hire to their creators is admittedly somewhat weaker.

Small Claims

SFWA wholeheartedly supports the creation of a Copyright Small Claims Court to adjudicate copyright violations. SFWA members, for

¹² 17 U.S.C. § 106A.

the most part, are small businesses that do not have the wherewithal to pursue litigation in Federal Court; any method to give them the tools to sue for the unauthorized use of their work would be a vast improvement over the current process. We do have two reservations about the implementation proposed in the two bills that have been put forward. In both bills, participation by the defendant is voluntary, with no compelling reason to agree to trial in the Small Claims Court except the threat of a Federal lawsuit. We are skeptical that the copyright violators in the situations we are most familiar with would agree to participate; we believe that, at the very least, some mechanism needs to be included that would encourage copyright violators to agree. Better yet would be to make participation compulsory, although we understand that there may be Constitutional reasons why this is impossible. We also worry that Small Claims Court as proposed would be swamped by false actors¹³ almost immediately; we would recommend that the actual creators of creative works be given priority, either by creating additional hurdles for transferees, or simply by limiting use of the court to those individual(s) who created the work(s) in question.

Conclusion

Science Fiction and Fantasy Writers of America fully supports the Judiciary Committee in this revisiting copyright and the Copyright Office in the digital age. We look forward to participating in future Judiciary Committee advisory committees, roundtables, or other stakeholder meetings.

Respectfully submitted for SFWA,
Michael Capobianco, Co-Chairman,
SFWA Legal Affairs Committee
Author, Past President, SFWA;

James W. Fiscus, Co-Chairman,
SFWA Legal Affairs Committee,
Author, Past Director, SFWA

¹³ See, e.g., *Lightspeed Media Corp. v. Smith*, 761 F.3d 699 (7th Cir. 2014); *AF Holdings, LLC, v. Does 1-1058*, 752 F.3d 990 (D.C. Cir. 2014).

Cat Rambo (ex officio)
Author, SFWA President;

Elizabeth Moon, Author,
Past Vice-President, SFWA;

Rosemary Claire Smith, JD, Author,

Advisors to the Committee:

Gordon Van Gelder, Author and Editor, Publisher,
The Magazine of Fantasy and Science Fiction

C.E. Petit, JD, Author and Editor,
Director of Licensing & Enforcement
Avicenna Development Corporation.