

The National Writers Union (UAW Local 1981, AFL-CIO) submits these comments in response to the notice “Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement: Request of the Intellectual Property Enforcement Coordinator for Public Comments Regarding the Joint Strategic Plan,” FR Doc. 2010-3539 published at 75 *Federal Register* 8137-8139 (February 23, 2010) .

The National Writers Union (NWU) is a national labor union that advocates for freelance and contract writers. The NWU includes 15 local chapters as well as at-large members nationwide. The NWU works to advance the economic conditions of writers in all genres, media, and formats. NWU membership includes, among others, book authors, journalists, business and technical writers, website and e-mail newsletter content providers, bloggers, poets, playwrights, editors, and academic writers. The NWU is affiliated with the United Auto Workers, AFL-CIO.

Through this proceeding, the office of the Intellectual Property Enforcement Coordinator is seeking comments regarding the costs to the U.S. economy resulting from intellectual property violations and recommendations for improving the Government’s intellectual property enforcement efforts.

Much of the commentary regarding intellectual property infringement has focused on audio-visual recordings. The NWU welcomes this opportunity to address the distinct issues with respect to infringement of intellectual property in written works, particularly the threat posed to writers’ livelihoods by corporate infringement of writers’ copyrights in their written work.

Copyright infringement – especially infringement of writers’ rights to electronic reproduction and distribution, in whole or in part, of our written work – is a serious and growing problem for writers as creators and holders of copyrights in our written work.

The most frequent and damaging infringers of writers’ electronic rights are print publishers, who routinely publish or license "bootleg" electronic editions of works, when they don't own the rights to reproduce or distribute those works in electronic form. A large percentage of e-books from the largest

and most “mainstream” e-book sources are bootleg editions published without the authorization of the writer, and/or for which the writer is being paid a smaller percentage of the revenues than is specified in the contract with the original print publisher.

Through its Grievance and Contract Division and other communications, the NWU has received complaints from NWU members who have discovered, after the fact, that a “Kindle edition” or other e-book version of one of their books has been issued or licensed by the publisher of the print edition of the work, without the consent of the author and without the author having assigned electronic rights to the print publisher.

The NWU also receives complaints from members who discover that print publishers are paying them only a (smaller) percentage of e-book or other electronic rights licensing revenues provided for by the clause in the author-publisher contract for printed books, rather than the (larger) share of e-book revenues provided for by the separate electronic or subsidiary rights clauses in the contract. Standard publishing industry practices of providing only infrequent, long-delayed, and needlessly inscrutable royalty statements – even when publishers themselves have real-time sales and revenue analytics that could easily be made available to writers – exacerbate this problem by making it difficult, in some cases impossible, for writers even to know that they are being short-changed on their e-rights revenue share.

On the Internet, the largest infringement problem is that Web publishers frequently leave written works on their websites after time-limited licenses for Web usage have expired, and copy or sublicense Web pages or Web content to other sites without having obtained rights to do so from the authors. There is also widespread electronic “pirating” of content from writers’ Web sites or blogs by electronic publishers. Publishers of many Web sites plagiarize entire Web pages, or portions of them, without making any attempt to identify the copyright holder or obtain permission. In all such cases writers are not compensated for the sale of their work. How many millions of dollars writers do not receive each year because of such infringement is incalculable. The only recourse for writers if they are lucky enough to

discover such infringement is to demand, using the Digital Millennium Copyright Act, that their work be taken down immediately. It is exceedingly rare that they are ever compensated for unknowable amounts of revenue that should be paid for such pirating.

Publishers also systematically infringe writers' intellectual property rights by improperly classifying works written by freelance writers as "works for hire," when those works do not qualify as works for hire. This is a particularly egregious and damaging violation of writers' rights when a publisher simultaneously categorizes a writer as an independent contractor, not an employee, for purposes of wages and benefits, and as an employee for purposes of categorizing their writing to be work for hire.

Print publishers' infringements of writers' copyrights are devastating to writers' ability to obtain revenue for those rights. Because print publishers have much greater access to marketing and distribution channels, it is difficult for a writer's own authorized Web content or e-book to compete with a bootleg e-book with the same content offered by or "licensed" by a print publisher, even if the print publisher doesn't own the rights to electronic distribution of that content.

Electronic publishers and distributors, including the largest and most reputable e-book publishers and retailers, rarely make any effort to verify the rights ownership claims of print publishers who purport to license electronic rights to books or other printed works. And electronic publishers and distributors almost never go to the trouble of seeking out creators to verify their copyrights.

The largest infringers of writers' intellectual property rights to electronic reproduction of their work are the world's largest print and electronic publishing companies: print publishers who falsely claim and "license" rights, and electronic publishers and distributors who fail to vet those false claims by print publishers and publish and distribute bootleg e-books that infringe writers' rights.

Writers have no effective means to enforce their rights against these infringers. Writers have been successful in the few legal cases when they have been able to join together to bring class actions, or had the support of writers' organizations. Writers have prevailed in litigation against bogus electronic

rights' claims by major print periodical publishers (*Tasini v. New York Times*) and book publishers (*Random House v. RosettaBooks*). But even the largest organizations of writers are structurally and financially disadvantaged vis-à-vis the large print and electronic publishers and distributors who collude in e-book bootlegging.

Federal cases are prohibitively expensive for individual authors, especially against bootleggers with the deepest pockets in the world. Copyright infringement claims that are of great economic significance to struggling freelance writers are too small to interest most qualified intellectual property attorneys. Therefore most NWU members and other writers are unable to litigate their copyright infringement claims against electronic bootlegging of their work by print or electronic publishers.

Large publishers are among those copyright infringers whose infringing actions are most likely to be knowing, deliberate, and therefore criminal. But writers' complaints of criminal copyright infringement by publishers are typically ignored. As a result, print publishers correctly believe that, given the current pattern of prosecutorial discretion, they can violate writers' copyrights with impunity.

For all these reasons, intellectual property enforcement proposals, as they relate to textual works, should recognize that the main infringement problems are false claims to writers' rights by print publishers and electronic bootlegging. Effective enforcement requires enforcement mechanisms that are accessible and affordable to individual writers and that will be effective even against large corporate infringers. One part of such an enforcement strategy should be to give priority in use of criminal copyright enforcement resources to the pursuit of those infringers whose victims lack the resources to be able to pursue civil remedies on their own, such as writers whose rights are infringed by large, knowledgeable, and sophisticated publishers. Another element of such a strategy could be a Federal small claims court whose jurisdiction includes copyright infringement claims. Sanctions for intellectual property infringement should include sanctions for those who knowingly make false rights claims, for

those who fail to exercise due diligence in verifying rights claims by parties other than the original creator(s), and for those who fail to contact the original creator(s) to verify who holds the relevant rights.

The NWU looks forward to working with the office of the Intellectual Property Enforcement Coordinator to help craft such a strategy to protect the rights of our members and all writers.

Respectfully submitted,

_____/s/_____

Larry Goldbetter, President

Susan E. Davis, National Contract Advisor

and Co-Chair, Book Division

Edward Hasbrouck, Co-Chair, Book Division

National Writers Union

(UAW Local 1981, AFL-CIO)

256 West 38th Street, Suite 703

New York, NY 10018

212-254-0279

<<http://www.nwu.org>>