From: [redacted]
To: FN-OMB-IntellectualProperty
Subject: Letter on copyright protection
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Victoria A. Espinel
United States Intellectual Property
Enforcement Coordinator
Executive Office of the President
Washington, DC

via email.

Dear Ms. Espinel:

I am responding to your recent request, published in the Federal Register of February 18, 2010, for suggestions on how intellectual property can be better protected. Most of my expertise is in the area of electronic database infringements of copyrighted material.

I have been the plaintiff, and won settlements, against two of my former publishers for distributing, without my permission or any payment for those rights, magazine articles of mine from their print magazines. Furthermore, they claimed ownership of those works, for which they had only acquired first serial rights. Since I acted as my own private investigator and paralegal in these and other cases, I became intimately familiar with copyright laws and treaties. I also testified before Judge Daniels at the Fairness Hearing for the Electronic Database Copyright Infringement case in New York in 2005, at my own expense. I was the only non-lawyer to make an appearance.

I have a number of points to address, based on those experiences. So, please, bear with me.

My first point is that the current Copyright Act is heavily weighted against the ordinary citizen such as myself. The law itself is very simple, what they call Black Letter law, but the implementation and provisions contained therein favor large corporations and other entities by creating an uneven playing field that discourages all but the most determined plaintiffs.

The copyright registration system should be discarded. It's intended purpose is provide public notice of ownership of a copyright. The copyright itself is inherent in the act of creation and publication or not is irrelevant to its status. In pursuing my cases I discovered that many creators, authors, and publishing companies fail to obtain this registration. Moreover, those wishing to infringe seldom consult the records of the Copyright Office to determine if a work's copyright is registered or if the author/creator of same might have other registrations that might include this work (I am the owner of several group registrations). Publishers and database companies simply take what they want. The most egregious examples of this is the Google Books program which asked no one's permission before scanning works still under copyright, and requires authors to "opt out" if they wish to protect their rights. They certainly have the resources to consult Copyright Office records, but decline to do so.

The registration system which is, I believe, not a requirement in other nations, is probably a violation of the Geneva convention on copyrights which prohibits "formalities" as a precondition for copyright. By requiring U.S. citizens to obtain copyright registration and allowing home-country rules for those in

other jurisdictions, it places the former at a disadvantage.

Moreover, the fees required and the complicated nature of the registration forms creates another disincentive for U.S. citizens to register their copyrights. Even large corporations with in-house legal staff often fail to do so, simply to reduce their costs. The registration fees are the least of it. The forms are sufficiently complicated that lawyers are often employed to fill them out and file them.

Registration is a prerequisite for bringing a copyright action, and such a suit can only be brought in a Federal District Court. The minimum amount for a cause of action is $75,000.

This is far more than most infringement actions would bring in damages unless the statutory provisions of the copyright act are part of the suit. They seldom are, because registration for Section 506 actions must be obtained within 90 days of first publication of the work. Section 1202 actions, which were the heart of my case against Cygnus Business Media, have no such limitation.

Federal Court filing fees and fees for serving a lawsuit can also be a barrier. The fees alone can easily exceed to the amount of actual damages. Most lawyers will not take these cases on a contingency basis because the amounts at issue simply cannot pay them for their time. (More of that below.) Even if one has a lawyer working on a contingency agreement, one must still find the money for these fees. In my case against Cygnus it was about $17,000. My "pro se" testimony at that Fairness Hearing required another $4,000 in legal fees. I needed the help of two attorneys to put my thoughts into the proper form to be submitted to the court.

Copyright Registration provides no protection against copyright infringement for most citizens. Infringers ignore the law and copyright registrations and letters of protest, and even letters from a plaintiff's attorneys, with impunity, secure in the knowledge that the law makes it too hard to bring a legal action of any kind. It is beyond the means and skill of most creators.

Little wonder then that more than 99 percent of the copyrights at issue in the Electronic Database Settlement had not been registered. This is the reason the case was dismissed by the Appeals Court. No registration means no jurisdiction. What was left was thousands of individual contract disputes not eligible for a class action. Such disputes are too small for the Federal Court in most instances. There is a gaping hole in the constitutional protection afforded by a copyright because of the way the law is written.

If a plaintiff were not required to file only in a Federal Court, the matter would be different. If Federal preemption were discarded and a creator could bring an action in any competent jurisdiction, this would not result in a rush to the courthouse by aggrieved creators, but rather quicker offers of settlement by the infringers. The real consequence and deterrent for copyright infringement would become, not potential damages, but the cost of defending such suits in courts of local jurisdiction. In "Hamit v Cygnus Business Media", not only was Cygnus served, but so were ten of their database customers, including Thomson-Gale and Lexis-Nexis. My sole practitioner lawyer found himself facing 17 other lawyers on the other side and the case was settled by a Magistrate Judge in a single day in my favor. It took four years to bring it to that point. The amount of the settlement was sealed by the court, but they were a fraction of the legal fees that came back on Cygnus since they had warranted that they had the proper licenses for the 99 articles for which we proved 340 infringements.

If you want to stop large multi-national corporations from stealing the work of tens of thousands of American writers, make it very expensive for them when they get caught doing so. Make them do their due diligence on contracts and licensing agreements rather than just relying upon publishers' warranties. That, in turn, will make the publishers require written contracts that clearly spell out which rights are bought when an article is assigned. If the publishers and their customers face lawsuits in small claims or other courts far removed from their home offices, they will not only want the written contract, but will pay fair fees for the work to include all other rights.

In addition to discarding copyright registration and Federal preemption, the entire matter of fair payment can be settled by introducing compulsory per-use licensing and sale of published work. Rates for First Serial Rights to a work are part of the initial negotiation, but the derivative uses for electronic databases can only be fixed by the terms of a written contract. Most magazine publishers decline to use these because the legal expenses associated with their execution often exceed the fee for

the work. A compulsory licensing system would set a standard rate for such additional uses beyond any dispute. There is a model in the Public Lending Right.

In any event, creators should be further compensated by adopting the Public Lending Right scheme originated in the United Kingdom and now used in many other nations. These are micro-payments and currently capped for any one work, but such a system, for all creative works, would solve many problems and prevent future legal disputes over infringement. It would also provide fair compensation for the use of works by library patrons. Such compensation is not currently part of our copyright system.

Another way to improve the copyright protections in the current law would be to force the Department of Justice to enforce, evenly, the criminal portions of the law. This is only done against small, relatively defenseless infringers, usually with great public fanfare. It is never done against a major corporation or university or other large entity with political power or friends in high places.

My own experiences with this are relevant. In the case against Cygnus Business Media, I sought help from the Federal Bureau of Investigation and the U.S. Attorney in Los Angeles. There are provisions in the criminal parts of the law for restitution and the potential violations went beyond the Copyright Act, in my opinion, to include the RICO statutes and a portion of the Business and Professions code of the State of California, which could also be prosecuted in a Federal Court.

I was told by one FBI Agent that there were no criminal statutes, which was simply ignorance on his part, and by another than "not all laws get enforced". I was finally able to arrange a meeting with another in the Los Angeles office. I took with me a binder of information that demonstrated the complex pattern of electronic database infringements generated by ONE article in the Cygnus Business Media case. This agent, who claimed to have been formerly a Certified Public Accountant, was impatient and apparently unable to grasp that one article could be infringed tens of thousands of times simply by being put into electronic distribution and that a very large business had been built on the unlicensed work of tens of thousands of authors. An example I cited in my statement to Judge Daniels at the Fairness Hearing mentioned above was a press release from Gale Group bragging that they served 60,000 libraries in 60 nations. Some of those nations, such as Iran, were on the Commodity Export Control List. The fees for these uses were paid to the publishers of the magazines where the articles first appeared, and most authors were not aware that their work was being sold in this manner. The publishers did not have these rights.

I was then and remain very disappointed that my government would not enforce criminal statutes designed to protect a civil right of mine that is part of the U.S. Constitution.

I had six such cases altogether. After the settlement in the Cygnus case and one other, my lawyer and I decided to drop the rest simply because they were not large enough. They would cost us both more to pursue than the maximum possible judgement because they all involved a lesser number of articles and infringements of same. The refusal of the U.S. Attorney to prosecute Cygnus told us that the criminal part of the law would also not provide us any relief.

With Cygnus, I felt I had made my point and need not go further just to prove what the law was. Afterwards, I wrote an article for the "Columbia Journalism Review" advocating as small claims court for copyright infringement cases where authors such as myself could find justice. The title was, ironically, "Stop Thief!".

Again this was done on a oral contract between the editor Mike Hoyt, and myself. No additional rights were included. However since the CJR's owner, Columbia University, has a deal with the electronic database companies, the article soon started appearing in electronic form and I have had to ask to have it taken down more than once. I have a copyright registration for this work. It availed me not. And the matter does not rise to the level of a lawsuit any lawyer will take.

I should not have to police these uses of my work. There should be a mechanism that satisfies the public's desire for access to a wide range of material, and my desire to make a living from my work. Again, compulsory licensing, already established for musical works, seems like the easiest solution.

I will close with one further observation on an unrelated matter. My friend Jerry Pournelle told me that

when he was President of the Science Fiction Writers of America there was a constant problem with imported editions of the works of members, often in unauthorized anthology form, which had been printed abroad and were distributed to and sold in warehouse stores and other retail outlets. It seemed to be impossible to stop these retail chains from selling these editions which competed directly with these authors' licensed works. I propose that when such editions are found and complained of, in print or electronically, that the Customs Service be authorized to seize them and destroy them regardless of who owns the physical property. This is done in other nations.

Please feel free to contact me if you have any questions on any of the above. I will try to make myself available for testimony if that is needed.

Sincerely,

Francis Hamit