Before the Copyright Office
Library of Congress

In the Matter of	)	
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	)	
Group Registration of Short Online	)	
Literary Works	)	Docket No. 2018-12
	)	

Comments of the Authors Guild, Inc.

The Authors Guild submits these comments on behalf of its approximately 10,000 members in response to the Copyright Office's Notice of Proposed Rulemaking ("NPRM") on "Group Registration of Short Online Literary Works" (GRTX), which was published in the Federal Register on December 21, 2018 as Copyright Office Docket No. 2018-12.

The Authors Guild and its predecessor organization, the Authors League of America, have been leading advocates for authors in the areas of copyright, contractual fairness, and free speech since its founding in 1912. Among our members are historians, biographers, poets, novelists and freelance journalists of every political persuasion. Authors Guild members create the works that fill our bookstores and libraries: literary landmarks, bestsellers and countless valuable and culturally significant works that never reach the bestseller lists. We have counted among our ranks winners of every major literary award, including the Nobel Prize and National Book Award. We have a long history of contributing to the ongoing interpretation and clarification of U.S. copyright law, and it is our pleasure to continue to serve that role now by submitting these comments to the Copyright Office.

We want to thank the Copyright Office for issuing this NPRM in response to our May 8, 2018 meeting with the Copyright Office and representatives of the National Writers Union ("NWU"), the Science Fiction and Fantasy Writers Association ("SFWA"), and the American Society of Journalists and Authors ("ASJA"), and our joint request that a new group registration option be created for short literary works.[1] In drafting Section 408(c)1 of the 1976 Copyright Act, Congress intended to give the Copyright Office the ability to create group regulations as "a needed liberalization of the law….At present the requirement for separate registrations where related works or parts of a work are published separately has created administrative problems *and has resulted in unnecessary burdens and expenses on authors and other copyright owners.*"[2] We applaud the fact that the proposed new regulation is drafted in this vein to eliminate unnecessary burdens and expenses by broadening the scope of group registrations. While we believe that the proposed new regulation is a significant improvement on the current law, we request that certain revisions be made.

Need for GRTX

The current group registration process contained in 17 U.S.C. §408(c)2, the only group registration created by Congress and included in the Copyright Act, applies to short works by the same author but is limited to works "published as contributions to periodicals." Because the Copyright Office has defined "periodical" narrowly, as "a collective work that is published on an established schedule in successive issues that are intended to be continued indefinitely, such as a newspaper, magazine, newsletter and other similar works", this group classification does not apply to most articles and other short text works by freelance writers today, namely, blogs and other online works, which are rarely published "on an established schedule in successive issues." As the Copyright Office acknowledges in the NPRM,

> works that are first published on a website cannot be registered under [the group registration option for contributions to periodicals] because websites are typically updated on a continual basis, the updates are not distributed as discrete, self-contained issues, and they do not contain numerical or chronological designations that distinguish one update from the next. As such, websites are not considered 'periodicals' for purposes of registration.[3]

[1] 83 Fed. Reg. 245, p. 65613.
[2] H.R. Rep. 94-1476, at 154 (1976) (emphasis added).
[3] 83 Fed. Reg. 245, p. 65612.

Permitting group registration of short works distributed online (for example, via websites or other online platforms) is a much-needed regulatory change that will help bring the U.S. copyright law into the 21st century. These kinds of short works are not currently being registered and the proposed regulation will help bring those works and authors into the copyright fold by encouraging more authors to apply for registration. This new regulation will improve the public record, enable freelance writers to obtain statutory damages and attorney fees for online articles if they file in a timely manner, and therefore improve their ability to enforce their rights, and it also should also provide an additional source of income to the Copyright Office.

Short Literary Works – Number and Length of Works

We agree with the Copyright Office's limitation of the group to "literary works" and the definition of that term. We do not agree, however, with the 50-work maximum per registration. As discussed at our May 8 meeting and in subsequent correspondence, the Authors Guild recommends a limit of 100 works to accommodate authors who write blog posts on a daily basis, who could generate 90 plus works in a three-month period.

In addition, we suggest increasing the proposed 17,500-word maximum to 40,000 words. Freelance journalists sometimes write pieces up to 20,000 or 25,000 words in length, and writers of short fiction may write even longer "short" works. The 17,500-word limit is arbitrary, and we see no reason to bar those slightly longer works from the group registration. It should take no longer to review, say, a 30,000-word piece than a 17,500-word story for copyrightability. While most journalism pieces will be covered by a 25,000 limit, a 40,000 limit would be preferable, as it would include longer pieces, such as longer essays, short stories and novellas, which similarly are generally not published as free-standing works.

Conversely, we believe that the 100-word bottom threshold should be 50 words instead, since many short blog posts and poems (which are expressly mentioned in the legislative history as the type of work meant to be protected through group registration[4]) contain fewer than 100 words. There is even a website named "50-Word Stories: Brand New Bite-Sized Fiction Every Weekday!" While we understand that the process of reviewing "extremely short work[s]" to determine their suitability for group registration may place an additional burden on copyright

[4] *Id.*

registration specialists, we do not believe that 50 to 100-word pieces are so short that they require that kind of close examination; and excluding them would unfairly prejudice writers of poetry and other works slightly shorter than 100 words.

As noted in greater detail below, we strenuously object to the proposal to reject outright an entire group registration application because one of the works is shorter or longer than the Copyright Office's thresholds. It makes far more sense to correspond with the applicant to advise them of the issue and request that the applicant agree to remove the ineligible work from the group.

Issues Related to the Publication Status of the Works

It is not clear why the group must be limited to works that are "published as part of a website or online platform." First, the author may have no control or knowledge of whether a work that is disseminated online is considered "published" under the statutory definition. The very question of what constitutes "publication" is highly problematic when applied to the online environment and it confuses creators who are unable to determine if their works are indeed "published" under copyright law.

Section 1008.3(B) (Reproduction and Distribution Distinguished from Performance and Display) of Compendium III states:

> The statutory definition makes clear that publication requires (i) the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending, or (ii) an offer to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display. 17 U.S.C. § 101. As a general rule, the U.S. Copyright Office considers a work "published" when it is made available online if the copyright owner authorizes the end user to retain copies or phonorecords of that work. For example, the fact that a work is expressly authorized for reproduction or download by members of the public or is expressly authorized for distribution by the public creates a reasonable inference that copies or phonorecords have been distributed and that publication has occurred.

While the author may be the copyright owner, in a freelance situation (or any situation in which the author is not the owner of the website), the author is rarely the one who "authorizes the end user to retain copies or phonorecords of the works" on the site. Often that is controlled by the site's terms of service, which apply to the website as a whole and not to the author's specific work. Second, it is rare that a work is expressly authorized for reproduction or download by

members of the public; often it is simply implied. If the requirement is that it need be an *express* authorization *by the copyright owner* then many online works will not fall into this group. Third, the author is not often privy to the information as to whether her works are offered in this manner.

Accordingly, the Authors Guild strongly recommends that both published and unpublished works be eligible for this group registration. Creating such a dividing line between published and unpublished literary works fills no apparent need and only exacerbates the potential for confusion and applicant frustration. We suggest that instead of referring to "publication" or "published", the regulation and application use the term "publicly disseminated". If the Copyright Office feels that it needs to have the "publication status" listed for each work as "published" or "unpublished," then it should include on the application itself a clear one to two sentence definition of what "publication" is in the online context – one that the typical creator could understand and apply. We applaud the Copyright Office's recognition of the need to provide more certainty about the Copyright Act's definition of "publication" for the digital age in its January 18, 2019 letters to the House[5] and Senate[6], but there's no need to delay implementation of the proposed regulation for Group GRTX until a Notice of Inquiry is issued and comments have been processed. In the meantime, the Copyright Office has the authority to define "publication" for purposes of registration in a manner that fits both its and the copyright community's needs.

The Authors Guild also recommends deleting the requirement that a work must be "first published on the internet," as it also is unnecessary and will increase applicant confusion. In addition to the problem of knowing if a work has been "published" online (as set out above), the author often has no control over the format in which the publisher chooses to distribute the work and may not be aware of the format in which the publisher "first" published the work. It is unlikely that publishers would even agree to provide that information.

The Copyright Office's suggestion of allowing works to be included in the group registration if they were "simultaneously published both on the internet and in a physical form" would not

[5] https://www.copyright.gov/policy/visualworks/house-letter.pdf
[6] https://www.copyright.gov/policy/visualworks/senate-letter.pdf

solve the problem. Again, the author cannot control this and generally will not be certain whether the work has in fact been "simultaneously published." If the Copyright Office believes it must retain this requirement, we suggest that the term "simultaneous" be defined to mean "within 30 days" to provide some leeway since works are rarely published online and in physical form truly simultaneously.

Limit to Online Works

Although the dramatic need for the new group regulations emanates primarily from the move to more online journalism where few websites publish in a manner that fits the Copyright Office's definition of "periodical," we do not believe there is a need to limit the proposed GRTX to online works. There are also short works that are published in print but not within the Copyright Office's definition of a "contribution to a periodical," such as contributions to print anthologies. Authors do not write solely for online or print media; they should be able to include all short works they have published in the past 90 days in a single group, even if they were published first or only in print form.

Separate Uploads for Each Work

As a practical matter, we think it unduly laborious and unnecessary to require an applicant to upload a large number of works separately. Authors should be given the option of including all works in a single document as long as they clearly label each one, start each new work on a new page and match the titles of each in order to the required list of works, which would effectively create a table of contents of the works. Another alternative might be allowing a single upload through file compression.

Clarity of Instructions and Ability to Amend to Comply with Rules

Because few authors are copyright experts or have access to affordable legal assistance to guide them through the registration process, the Copyright Office should take care to implement the new GRTX group with clear, straightforward instructions that effectively guide applicants through the registration process. Authors should not have to hire lawyers or other copyright registration experts to help them file these applications; if they need to do so it will radically reduce the number of authors who avail themselves of the group and hence the number of registrations—since it will add back the costs that the group registration process intends to save.

All rules should be clearly highlighted online. The applicant should not have to search the regulations or the Compendium III but should have a link from the application directly to the key rules. For example, if the term "GRTX" must be appended to the group title, the application instructions should make clear exactly how that should be done. Similarly, if the application's case number must be included in the file name of the list of titles, the case number should be made easily discernable and identified as such.

The NPRM provides in several areas that copyright registration specialists will have the discretion to reject an application if certain rules are not strictly complied with. The Authors Guild strongly objects to this. Failure to understand or follow directions should not lead to a rejection; but rather, the applicants should have an opportunity to amend the application to comport with the rules. We recognize that will require correspondence and potentially some additional staff time and cost, but form responses addressing typical errors and advising how to fix them could easily be created to minimize the work required, and could be provided as easily as rejection notices. When an application is rejected for failure to comply with rules, in our experience, the applicant most often simply misunderstood the rules and so the rejection letter does little to clarify the confusion. Requiring the applicant to refile the application or file an appeal adds an additional expense that the applicant may not be able to afford. As such, many of those applications never will be refiled and the works will not be registered, defeating the purpose of the new GRTX group registration.

We support the Copyright Office's efforts to amend its registration process to reflect the real world in which most authors operate and distribute their work. We also want to put on record that we support the comments of the Copyright Alliance, as well as those of the National Writers Union and the Science Fiction and Fantasy Writers of America.

Respectfully submitted,

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Executive Director