set of rules. Over the years, advances in telecommunications and newer forms of transmission and distribution have challenged the copyright law.[47] Certainly, copyright law cannot accommodate all forms of transmission in the same way or by the same procedures. Nonetheless, with respect to some of the greatest innovations of all time—the printing press, motion pictures, radio, and television—copyright, both in the U.S. and abroad, has adapted itself sufficiently well without the formalities to make it the best alternative as an incentive for creation by independent authors.

[47] Television and cable were among the earlier technologies that copyright law accomodated.

BAMBOOZLEMENT: THE REPEAL OF COPYRIGHT REGISTRATION INCENTIVES

JOHN B. KOEGEL*

I. INTRODUCTION

On February 16, 1993, Representative William J. Hughes (D-N.J.) introduced a bill[1] that, among other things, would repeal sections 411(a) and 412 of the Copyright Act of 1976.[2]

Section 411(a) requires a copyright holder simply to file for registration of his work with the Copyright Office as a condition precedent to commencing an infringement action in federal court.[3] This requirement, in a more stringent form, has been a component of the federal copyright system since 1909.[4] Moreover, since the initial Copyright Act required recordation in order to grant copyright protection, this prerequisite to the commencement of an action for infringement has essentially been part of the copyright law since 1790.[5] Notwithstanding the sweeping revisions of copyright law ultimately enacted in 1976, and the range of amendments enacted in 1988 to make the Copyright Act compati-

* B.A., Ohio Wesleyan University; J.D., Fordham University School of Law. The author is a sole practitioner who specializes in representing visual artists.

[1] *Representative Hughes named his proposal the "Copyright Reform Act of 1993,"* H.R. 897, 103d Cong., 1st Sess. [hereinafter *Hughes Repeal Bill*]. The related Senate bill, S. 373, was introduced by Sen. Dennis DeConcini (D-Ariz.). *See* 139 CONG. REC. S1616 (daily ed. Feb. 16, 1993). House Bill 897 was favorably reported out of the Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee on Nov. 17, 1993. *See* H.R. REP. No. 388, 103d Cong., 1st Sess. 8 (1993).

[2] 17 U.S.C. §§ 411(a), 412 (1988 & Supp. V 1994).

[3] 17 U.S.C. § 411(a).

[4] Copyright Act of Mar. 4, 1909, ch. 320, § 12, 35 Stat. 1075, 1078 ("No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with.").

Although this statement is technically accurate, case law decided under the 1909 Act has not always adhered to this requirement. *See* Washington Pub. Co. v. Pearson, 306 U.S. 30 (1939) (infringement actions may be brought for acts committed before and after registration); *see also* Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 161 F.2d 406 (2d Cir. 1946), *cert. denied*, 331 U.S. 820 (1947) (excusing twenty-seven year delay between deposit and registration, and holding that for purposes of bringing suit for infringement under 1909 Act, deposit and registration could be made at any time during first term of copyright).

[5] Act of May 31, 1790, ch. 15, § 3, 1 Stat. 124, 125 ("[N]o person shall be entitled to the benefit of this Act . . . unless he shall first deposit . . . a printed copy of the title of such map, chart, book or books. . . . "); Act of July 8, 1870, ch. 230, § 90, 16 Stat. 198, 213 (1870) ("[N]o person shall be entitled to a copyright unless he shall . . . deposit in the mail a printed copy of the title of the book or other article. . . . ").

ble with the Berne Convention,[6] this procedural requirement survives as an integral aspect of U.S. copyright law.

Section 412 states that two of the extraordinary monetary remedies potentially available in copyright infringement actions will not be imposed if the copyright holder had not previously made her copyright ownership a matter of public record by registering the work prior to the occurrence of the claimed infringement.[7] This provision was included in the Copyright Act as part of the general copyright law revision passed in 1976. It was placed in the statute because the mandatory registration system, which was instituted under the 1909 Copyright Act,[8] was being converted to a voluntary registration system. Congress found that a provision such as section 412 was necessary as an inducement to voluntary registration.[9] There was also the belief and intention that the extraordinary remedies of attorney's fees and statutory damages should be available for unpublished works only when the owner has, by registration, made a public record of his copyright claim.[10]

In his introductory statement, Representative Hughes summarized the copyright law aspects of his bill by saying simply: "In the case of the Copyright Office, we have an agency that would be benefitted by some relatively minor changes."[11] As Chairman of the Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee, Congressman Hughes quickly scheduled and held hearings on his bill on March 3 and 4,

6 Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified in scattered sections of 17 U.S.C. (1988)).

7 17 U.S.C. § 412.

8 Act of Mar. 4, 1909, *supra* note 4, § 12.

9 *See* H.R. REP. No. 1476, 94th Cong., 2d Sess. 158 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5774 ("The need for section 412 arises from . . . basic changes the bill will make in the present law . . . . Copyright registration for published works, which is useful and important to users and the public at large, would no longer be compulsory, and should therefore be induced in some practical way."); *see also* MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 191 (1989), stating that:

> [f]rom a practical standpoint, § 412 provides a powerful incentive for early registration because in some instances statutory damages may be the only viable remedy for the copyright owner. . . . [Although] statutory damages can be chosen as an alternative to actual damages and profits, when the plaintiff cannot, for practical reasons, prove actual damages and profits, statutory damages may become the only other viable measure of damages available.

10 *See* H.R. REP. No. 1476, *supra* note 9, at 158. "The great body of unpublished works now protected at common law would automatically be brought under copyright and given statutory protection. The remedies for infringement presently available at common law should continue to apply to these works under the statute, but they should not be given special statutory remedies unless the owner has, by registration, made a public record of his copyright claim." *Id.*

11 139 CONG. REC. E337 (daily ed. Feb. 16, 1993) (remarks of Rep. William J. Hughes (D-N.J.), introducing his "Copyright Reform Act of 1993").

1993,[12] a mere fifteen days after its introduction on the House floor. On November 20, 1993, the House passed an amended version of the Hughes Repeal Bill, which included an outright repeal of sections 411(a) and 412.[13]

II. BENEFITS OF THE CURRENT LAW

In our legal system, attorney's fees generally are not awarded regardless of who prevails. Additionally, most tort claims and property damage actions require the claimant to prove that he has been injured. Moreover, damages are ordinarily awarded strictly to compensate the injured party for that amount of losses which he can demonstrate. Under copyright law, however, three extraordinary remedies are available to the copyright holder who prevails in an infringement action. One, a plaintiff can be awarded not only his actual damages but, on top of that, all profits realized by the defendant that can be attributed to the infringing use of copyrighted material.[14] Two, a plaintiff can elect alternatively to receive an award of statutory damages of up to $100,000 for each infringement, even if there is no showing of economic injury.[15] Three, in addition to either actual or statutory damages, a prevailing plaintiff may recover some or all of her attorney's fees.[16]

As noted, under current copyright law any plaintiff, regardless of whether he registered his copyright, may be awarded some or even all of the profits realized by the infringer.[17] However, in order to be eligible to seek the other two extraordinary remedies—statutory damages and attorney's fees—an author must simply register his work at any point before the infringement of which he subsequently complains.[18]

Registration is a very simple act. The required form is easily obtained, and requests simple answers to a few simple questions. The registration form can be mailed to the Copyright Office along with a fee of twenty dollars and examples of the work being registered, pursuant to very flexible deposit requirements.[19] For an ad-

12 *Copyright Reform Act of 1993: Hearings on H.R. 897 Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. (1993) [hereinafter *Hearings*].

13 *See* 139 CONG. REC. H10,308 (daily ed. Nov. 20, 1993).

14 17 U.S.C. § 504 (1988).

15 17 U.S.C. § 504(c)(2).

16 17 U.S.C. § 505 (1988).

17 17 U.S.C. § 504(a) & (b).

18 17 U.S.C. § 412.

19 17 U.S.C. § 708 (1988 & Supp. V 1994) (requiring basic registration fee of $20.00); 17 U.S.C. § 407 (1988) (requiring deposit of two copies of the "best edition"). For applicable Copyright Office regulations, see 37 C.F.R. § 201.4-201.6 (1994).

ditional fee, the copyright owner can receive from the Copyright Office a determination and, if the work is indeed copyrightable a certificate of registration, in five business days.[20] To the extent that certain types of authors, such as photographers or computer software companies, have encountered some extra work in the past in preparing deposits, the Copyright Office has made efforts to change its regulations to accommodate their special circumstances.[21]

There is no dispositive evidence one way or the other on what induces copyright holders to register. However, the Copyright Office has reported that in the four-year period following the elimination of section 411 for foreign authors, registrations from this group have dropped between thirty and forty percent.[22] Common sense strongly suggests a causal connection. As it now stands, a copyright owner receives three, and only three, advantages from registration. Each is beneficial only if the owner elects to engage in litigation. Of these three, sections 411(a) and 412 are unques-

[20] For individuals who require issuance of a certificate of registration, a process called "special handling" has been implemented by the Copyright Office in order to expedite registration procedures. Special handling is granted for situations in which a contract or publishing deadline must be met, a claim involving either pending or prospective litigation, or circumstances which involve a customs matter. The fee for special handling is currently $200.00. *See* COPYRIGHT OFFICE, ML-341, POLICY STATEMENT FIXING FEES FOR THE SPECIAL HANDLING OF IMPORT STATEMENTS AND DOCUMENTS (1985).

[21] *Hearings, supra note* 12, at 229 (prepared statement of Ralph Oman, Register of Copyrights, discussing "special procedure" approved in 1992 to facilitate registration of collections of unpublished photographs).

Computer software companies have encountered obstacles in the past when preparing deposits for software due to the typical format that a computer program copyright registration deposit encompasses. Such deposits generally consist of the first and last twenty-five pages of source code, with trade secrets and other confidential material omitted. Unlike the Copyright Office, which requires deposit in order to examine a claim for registrability, the Library of Congress seeks to procure, for purposes of archival integrity, deposits consisting of the highest quality available examples of a work. Thus, the typical format of a computer program copyright deposit is absent particular features of a work (i.e., the machine-readable version of a software program) and therefore fails to meet a number of Library of Congress requirements.

Section 408(b) of the Copyright Act states that a work deposited to the Copyright Office may fulfill the Library of Congress requirement of § 407. *See* 17 U.S.C. § 408(b) (1988). Because of the above-described inconsistencies, this section posed difficulties for computer software companies who were seeking copyrights for particular computer programs. Furthermore, these problems were not exclusive to computer programs but sometimes affected other authors such as photographers. *See* H.R. REP. No. 388, *supra* note 1, at 10-11, 13. The Copyright Office has adjusted some of its regulations in order to accommodate such circumstances. For example, deposit requirements can be modified in special cases so as to meet the needs of the parties. In these situations, one deposit copy might be required rather than two or, when a particular work is unwieldy or extremely valuable, identifying material may be deposited rather than the work itself. *See* 37 C.F.R. § 202.19 (1994).

[22] *Hearings, supra* note 12, at 215. This development resulted from United States adherence to the Berne International Copyright Convention. The Berne Implementation Act, *supra* note 6, amended Title 17 to exempt works of Berne origin from the requirement of registration as a prerequisite to suit. *See* 17 U.S.C. § 411(a).

tionably the more powerful. In seminars and primers, authors are repeatedly advised to register in order to be in a position to obtain these two enhanced benefits.[23] The third and only other inducement to registration is found in section 410(c).[24] If registration is made within five years of publication, the validity of copyright rights as well as any other information in the certificate are accorded prima facie weight by the court. Not only is this a far, far weaker incentive than the two discussed above, it is one nearly impossible to explain to the non-lawyer. Hence, its value as an incentive to authors is minimal at best.

Thus, the Copyright Act offers special litigation advantages in return for a minor and inexpensive administrative act. It is completely reasonable as well as good policy to require some minimal public benefit in the form of deposit with the Library of Congress, in return for granting this extraordinary power. Thus the general public and the government have been enormously benefitted by the breadth and depth of this great public library. There are, however, other public benefits to maintaining a national copyright registration system, particularly a voluntary one, and sections 411(a) and 412 are an integral part of that system.

In its present form, section 411(a) requires an author merely to *file* for registration before commencing a lawsuit in federal court alleging infringement. Even if the author's application is rejected by the Copyright Office, the author may proceed with the suit. This requirement of attempting to protect one's copyright has been a part of U.S. copyright law from the beginning. The first federal copyright act, in 1790, required recordation of a claim to copyright and deposit of a copy as a prerequisite to having copyright protection in the first place.[25] Copyright ownership was simplified in 1909, but registration was still mandatory and *acceptance* of registration by the Copyright Office was required before a lawsuit for infringement could proceed.[26] In 1976, however, the Copyright Act was overhauled and the system of registration made voluntary. Either by design or by operation, section 411(a) is said

[23] Most available literature in copyright law directed at a lay audience illustrates this point. For a recent example written for lawyers who specialize in corporate practice, see Baila H. Celedonia, *"Hey, that's my name!" Trademarks, Copyrights, Patents—What you Need to Know*, BUS. LAW TODAY 53 (Sept./Oct. 1994). "Registration of the copyright in a work with the U.S. Copyright Office, which can be done at any time after the work is created, is not required, although registration is a prerequisite to suing an infringer and recovering statutory damages or attorney's fees for infringement." *Id.* at 55; *see also* AMERICAN SOC'Y OF MAGAZINE PHOTOGRAPHERS, PROFESSIONAL BUSINESS PRACTICES IN PHOTOGRAPHY 77 (1986).

[24] 17 U.S.C. § 410(c) (1988).

[25] Act of May 31, 1790, *supra* note 5, § 3.

[26] Act of Mar. 4, 1909, *supra* note 4, § 12.

to produce three benefits: it provides an incentive (1) to register and (2) to deposit works that are passed along to the Library of Congress, and (3) it establishes prima facie evidence of the validity of the copyright.

Section 412 limits the availability of awards of statutory damages and attorney's fees to those copyright holders who register their work prior to the particular infringement that is the subject of the lawsuit. When these special remedies were introduced into the copyright law in 1909, they were components of the formality-based system that was conceived by Congress to serve the public interest. In 1976, when registration became voluntary, measures were sought to secure timely and widespread registration for the benefit of both the registration system and the Library of Congress.[27] Accordingly, Congress determined that copyright holders should receive the unusual remedies of statutory damages and attorney's fees only if their works were registered before they were infringed. The Senate Report accompanying the 1976 Act states that this provision was needed for two reasons: (1) to induce copyright registration for published works; and (2) to confer special remedies for the great body of unpublished works that would become automatically protected only if the owner by registration made a public record of his copyright claim.[28] Thus, sections 412 and 411 operate together to induce registration and deposit of registered works with the Library of Congress.

The overhaul of the copyright statute culminating in 1976 was an eleven-year process; revised legislation was first introduced in 1965.[29] This was preceded by years of studies and reports dating back to 1955.[30] Throughout this twenty-one year process, the crea-

[27] *Hearings, supra* note 12, at 215 (prepared statement of Ralph Oman, Register of Copyrights, describing incentives currently built-in to the registration system as the "most efficient and practical").

Registration provides owners with protection against the unauthorized use of their work, because under § 401(c) registration establishes priority of authorship as well as prima facie evidence of both the validity of the copyright and the facts stated in the certificate. Furthermore, a registration system facilitates an efficient, flexible, and potentially prosperous market for copyrighted works: transfers, assignments, and licenses are promoted because prospective transferees have more trust and reliance in the validity of a registered copyright. In addition, the Copyright Office registry assists potential copyright purchasers in determining what the legal status of a work is, and provides information pertaining to market availability. *See generally* Arthur J. Levine and Jeffrey L. Squires, *Notice, Deposit and Registration: The Importance of Being Formal*, 24 UCLA L. REV. 1232 (1977); *see also* LEAFFER, *supra* note 9, at 185.

[28] H.R. REP. No. 1476, 94th Cong., 2d Sess. 158 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5774.

[29] H.R. 4347, 89th Cong., 1st Sess. (1965); S. 1006, 89th Cong., 1st Sess. (1965). These related bills were introduced on Feb. 4, 1965. *See* H.R. REP. No. 1476, 94th Cong., 2d Sess. 47-48 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5660-61.

[30] *See* H.R. REP. No. 1476, *supra* note 29, at 5660. The movement for a general revision of the copyright law, after a string of failures between 1924 and 1940, was revived when the U.S. became a party to the Universal Copyright Convention in 1955. *Id.*

tion of section 412 was unopposed; similarly, there was no push to change the longstanding rule codified in section 411(a). In 1987 and 1988, during extensive and wide-ranging debate over adapting the copyright law to adhere to the formality-free principles of the Berne Convention, Congress found section 412 to be compatible with the Berne Convention, and it remained part of the law.[31] And while the Senate favorably considered the elimination of section 411(a), it elected not to repeal the provision, relying heavily on the recognized and longstanding importance of section 412 for encouraging voluntary deposits with the Library of Congress.[32]

Nevertheless, under the guise of being only "minor change," Congressman Hughes proposed to whisk away sections 411(a) and 412, labeling them as mere "formalities."[33] Curiously, or perhaps suspiciously, he and other proponents of the Hughes Repeal Bill acknowledged at the same time the need for incentives to reward or encourage the fulfillment of registration and deposit.[34]

In 1994, the United States Supreme Court handed down two unanimous copyright decisions, *Campbell v. Acuff-Rose Music*,[35] involving the limits of fair use in parody situations, and *Fogerty v. Fantasy*,[36] involving the standards for awarding attorney's fees. The

[31] *See* S. REP. No. 352, 100th Cong., 2d Sess. 14-15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3706, 3719-20.

[32] *See* S. REP. No. 352, *supra* note 31, at 16-25, *reprinted in* 1988 U.S.C.C.A.N. 3706, 3721-30. Sen. Patrick Leahy (D-Vt.), in suggesting that § 411(a) should be repealed in adherence to the Berne Convention, proposed an increase in the maximum available amount of statutory damages to compensate in part for the loss of incentive to register which such repeal would bring. *See* 133 CONG. REC. S7370 (daily ed. May 29, 1987).

[33] Opinions differ widely as to whether §§ 411(a) or 412 are "formalities" at all. Considering this issue, the House Report on the Berne Convention Implementation Act of 1988 states that "the word 'formality' must be understood in the sense of a condition necessary for a right to exist. A formality would be an administrative obligation set forth by a national law which, if not fulfilled, would lead to a loss of copyright." H.R. REP. No. 609, 100th Cong., 2d Sess. 40 (1988). Following this definition, §§ 411(a) and 412 are not formalities.

It should also be recognized that the Berne Convention, the Holy Grail of the proponents of the Hughes Repeal Bill, does not outlaw all formalities. It merely states that "the enjoyment and the exercise of [copyright] shall not be subject to any formality," as article 5(2) provides, in countries of the Union *other than* the country of origin (under article 5(1)). *See* S. REP. No. 352, *supra* note 31, at 11, *reprinted in* 1988 U.S.C.C.A.N. 3706, 3716; *see also* H.R. REP. No. 609, at 40. Thus, under the Berne Convention, copyright protection for works of foreign origin may not be premised on any formal requirements. The Convention does not, however, prohibit conditions to certain types of remedies or licenses or exemptions, since these ancillary provisions do not prevent the enjoyment or exercise of copyright. Even if called "formalities," procedural requirements such as those embodied in §§ 411(a) or 412 are entirely permissible under and consonant with the tenets of the Berne Convention.

[34] H.R. REP. No. 388, *supra* note 1, at 13.

[35] 114 S. Ct. 1164 (1994).

[36] 114 S. Ct. 1023 (1994).

opinions, authored by Justice Souter and Chief Justice Rehnquist respectively, both reemphasize the notion that the single and primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public.[37]

Recalling the seminal opinion of Judge Story in *Emerson v. Davies*,[38] Justice Souter observed that the fundamental purpose of copyright is to promote the creation and publication of edifying matters.[39] Authors should receive a "fair return," but the ultimate aim is artistic creativity in general.[40] Copyright law, in other words, is not limited simply to discouraging infringement.

In *Fogerty* the Court reviewed a "dual standard" that had been followed in a number of circuits, and which purportedly served to promote the copyright holder's incentive to sue on colorable claims, thereby giving enhanced protection to copyright owners.[41] This "dual standard" was premised on an argument frequently advanced by proponents of Congressman Hughes' bill: by awarding attorney's fees to prevailing plaintiffs as a matter of course, litigation of meritorious infringement claims will be encouraged. Chief Justice Rehnquist, speaking for the entire Court, flatly rejected this approach, finding this notion to be a one-sided view of the purposes of the Copyright Act:

> While it is true that *one* of the goals of the Copyright Act is to discourage infringement, it is by no means the *only* goal of that Act. . . . [T]he policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement.[42]

The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public, as the *Fogerty* Court stated:

> The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity *for the general public good.*[43]

The primary objective of copyright is not to reward the labor of

[37] *Fogerty*, 114 S. Ct. at 1030; *Acuff-Rose*, 114 S. Ct. at 1169.
[38] 8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4,436).
[39] *Acuff-Rose*, 114 S. Ct. at 1171 n.10.
[40] *Id.* at 1169-70.
[41] *Fogerty*, 114 S. Ct. at 1026-27 n.6.
[42] *Id.* at 1029 (emphasis in original).
[43] *Id.* (quoting Twentieth Century Music Corp. v. Aiken, 464 U.S. 417, 429 (1984) (footnotes omitted)) (emphasis added).

> authors, but '[t]o promote the Progress of Science and useful Arts.' To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.[44]

Hence, the successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as the successful prosecution of an infringement claim by the holder of a copyright. While the purpose of an award of attorney's fees to a plaintiff is to deter copyright infringement, this view of the purpose of the Copyright Act is too narrow because it fails to consider adequately the important role played by copyright defendants.[45]

III. Negative Consequences of Congressman Hughes' Bill

While the central purpose of the copyright law is to benefit the general public, it is extremely hard to locate any potential public benefit in the Hughes Repeal Bill. Quite to the contrary, one can easily foresee a number of negative consequences to the public. These negative consequences can be grouped into four categories. First and perhaps foremost, the bill would have a chilling effect and impose added costs on new authors, thereby potentially depriving the public of some new works. In so doing, the bill in effect runs against the central purpose of the copyright law. Second, the bill would "gut" the copyright registration system.[46] Third, by removing the existing incentive for voluntary deposit, the bill would "immeasurably diminish[ ]" the collections of the Library of Congress.[47] And fourth, the bill would increase the burden on the federal courts by generating more litigation—including private infringement actions and enforcement of mandatory deposit by U.S. Attorney's Offices—and from the loss of expert opinions of the Copyright Office on the copyrightability of various works of authorship. These four negative consequences of the Hughes Repeal Bill are addressed in turn below.

A. *Effect on Authors*

A professed objective of the Hughes Repeal Bill is to facilitate litigation by certain copyright holders who currently must carefully

[44] *Fogerty*, 114 S. Ct. at 1030 (quoting Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991) (citations omitted)).
[45] *See id.* at 1029.
[46] *Hearings, supra* note 12, at 223 (prepared statement of Ralph Oman, Register of Copyrights).
[47] *Id.* at 179 (statement of James H. Billington, Librarian of Congress).

consider whether to engage in litigation.[48] According to Congressman Hughes and other proponents of the bill, the benefitted class will be largely those authors of unpublished, unregistered works.[49] Implicit in this proposed amendment to the copyright law is an increased risk of litigation to any person who cites or uses preexisting material as a source. This risk in turn necessarily restricts new expression and adds to the cost of new creativity. Since nearly every creative act is automatically vested with copyright protection, and there is no notice requirement, it can be extremely difficult for a subsequent party to obtain permission, even if doing so were considered desirable.

Registration provides a possible vehicle for determining the identity and address of the copyright owner. But until registration is made a greater rather than lesser part of the system, as the Hughes Repeal Bill would cause, there is the ever-increasing likelihood that the copyright owner will remain unknown. Frequently, a source may be a work containing material licensed from the underlying copyright holder. In such instances, a member of the public may be able to determine the identity of the licensee only. The party may therefore have no incentive to pass along a use request to the original copyright holder or licensor. Or, it may happen that the secondary licensee grants permission mistakenly, and the copyright owner subsequently comes along and sues.[50] In order to locate a copyright holder through a copyright search, one must know in advance either the name of the author (or other copyright claimant) or the exact title of the work. Without this information, one cannot determine copyright status, even for registered works. For example, if a new author wished to use a visual image lacking notice, it would be impossible to determine if it was a registered work, and thus it would be quite difficult—if not impossible—to find the copyright owner. And even if one of the two elements of information is known, searches are both time-consuming and expensive.

Therefore, the copyright system should be reformed to provide faster and easier ways of obtaining information. Such improvements would only be meaningful if authors registered their works. The Hughes Repeal Bill, however, would move the copyright system further away from registration to the detriment of a stronger system and new authors who would have to either shun all preexisting materials—unless published before this century—or risk excessive future claims from purported licensors.

Print and broadcast news organizations, which generally work under frequent and pressing deadlines, often publish images or text which have not been cleared in advance. A great deal of this material is unregistered, created by authors who have little interest in controlling future uses. If the news article or story is found objectionable by the copyright holder, an infringement suit may be brought for tactical reasons, possibly resulting in awards of statutory damages and attorney's fees. The author of the article, facing a judgment of infringement, is unprotected by the First Amendment safeguards built into the libel laws. And, unfortunately, the fair use defense[51] is a far less developed protection for authors than the First Amendment.

B. *Effect on the Registration System*

A system of copyright registration has been a fundamental part of copyright law since the inception of that protection in 1790.[52] Registration provides authors as well as the general public with a permanent, official record of the wide variety of creative "writings"[53] that the Constitution—and the copyright law—seeks to promote.

Registration furnishes authors with proof of the existence of their expressions and the date of creation. In so doing, registration greatly facilitates the enforcement of copyright claims against infringers and, at the same time, offers information to potential users. For example, since assignments of copyright ownership and other transfers are registered, a member of the public can readily trace ownership to its current holder.

More than 600,000 copyright claims were registered in calendar year 1992.[54] This has brought the total number of copyright claims registered with the Copyright Office to over twenty-four million.[55] Since the registration form is extremely simple and straightforward, and it is reviewed before acceptance by the Copyright Office, the information contained in filings are generally consid-

48 H.R. REP. No. 388, *supra* note 1, at 12 (characterizing the bill as providing "equal access to justice" for individuals and small businesses).

49 *Id.* The House Committee, finding that § 412 has become a potent litigation device used against copyright holders, noted with approval the assessment of the Association of American Publishers that § 412 has "become more of a shield for infringers than a benefit to anyone." *Id.*

50 *See, e.g.*, Rubin v. Brooks/Cole Pub. Co., 836 F. Supp. 909 (D. Mass. 1993).

51 17 U.S.C. § 107 (1988 & Supp. V 1994).

52 Act of May 31, 1790, *supra* note 5, § 3; Act of July 8, 1870, *supra* note 5, § 90; Act of Mar. 4, 1909, *supra* note 4, § 10.

53 U.S. CONST. art. I, § 8, cl. 8.

54 *Hearings, supra* note 12, at 225.

55 *Id.* at 225.

ered to be of reasonably high quality. All of this is accomplished not only voluntarily, but with a nominal application fee of twenty dollars. The cumulative registration fees resulted in revenue to the government during fiscal year 1992 of $14.5 million,[56] which equalled approximately sixty percent of the Copyright Office's registration budget for the same year.[57] The Hughes Repeal Bill, by removing sections 411(a) and 412 from the copyright statute, strips away any meaningful incentive to voluntarily register. The foreseeable result is clear: the registration system will wither rapidly and eventually become obsolete.

To blunt this obvious concern, Congressman Hughes proposed a group of "alternative incentives" to registration.[58] Analysis of these so-called incentives is necessary in order to evaluate fully the merits of the proposed change in the Copyright Act. At the outset, one must keep clearly in mind that an incentive is an inducement to act based on the expectation of some reward or benefit. Simply making a task easier to perform is not the creation of an incentive, particularly if performance produces no real benefit. Currently, sections 411(a) and 412 provide special litigation opportunities as a reward or benefit. Accordingly, these two provisions are incentives to register. Supposedly as a replacement for the repeal of these incentives, the Hughes Repeal Bill would effect six changes in Copyright Office procedures.[59]

The first would be a requirement that the Copyright Office prepare a new short-form application.[60] Presumably, this new form would be shorter than the form currently used. Today's form requires only six to ten items of information, much of which is entered simply by checking a box. Such a reduction of information would be harmful to the public record that makes the copyright system informative to the general public. In addition, a mere simplification of the process does not by itself create any motivation to engage in the process.

Another "incentive" would be a mandated and statutory liber-

56 *Id.* at 212.

57 *Id.* at 206.

58 H.R. REP. No. 388, *supra* note 1, at 13-14.

59 H.R. 897, 103d Cong., 1st Sess. §§ 3-6 (1993). As related by the House Subcommittee, these alternative incentives are accomplished by instituting (1) a new short form application; (2) a more liberal examination standard; (3) alternative forms of deposit for copyright registration; (4) a formal appeals process for refusals to register a claim to copyright; (5) provisions clarifying when pre-existing works have to be disclosed on the copyright application form in order to limit sharply the fraud on the Copyright Office defense; and (6) expansion of the group registration provisions. *See* H.R. REP. No. 388, *supra* note 1, at 14.

60 *See* H.R. 897, *supra* note 1, § 4(a); H.R. REP. No. 388, *supra* note 1, at 14-16.

alization of Copyright Office standards in reviewing registration applications.[61] While the record compiled by the House Subcommittee includes a number of questions about the methodology employed by Copyright Office examiners, the record entirely fails to demonstrate that the application of current standards is in any sense problematic. More to the point, liberalization of standards provides an incentive to register only for those few authors who choose not to register, in the (often misguided) belief that their work is not copyrightable. This change, therefore, does not represent an incentive for registration of the vast number of copyrightable works that the copyright law was primarily established to cover.

Another incentive proposed in the bill would be the requirement that the Copyright Office develop a new process for satisfying the deposit requirement.[62] Although there is no evidence that the Copyright Office has not been innovative and responsive in this area, this change does not affect most authors. For those authors who might be benefitted by additional or easier deposit alternatives, changing the deposit rules once again acts not as an incentive, but rather a mere simplification of the process.

The Hughes Repeal Bill also proposes a formal appeals process to review any rejection of a registration application by the Copyright Office.[63] At the moment, the process for seeking reconsideration of copyrightability is relatively simple.[64] The bill would replace these regulations with a new "formal procedure" that supposedly would represent an improvement.[65] Such a change would not be an incentive for authors to participate in the registration process. And to the extent that the proposed reform affects any authors, it benefits only those who wish to register items that experienced Copyright Office examiners have found to be noncopyrightable.

Moving to even more esoteric realms, the Hughes Repeal Bill would curtail the ability of defendants in infringement actions to

61 *See* H.R. 897, *supra* note 1; § 5(a); H.R. REP. No. 388, *supra* note 1, at 16-18.

62 *See* H.R. 897, *supra* note 1, § 3; H.R. REP. No. 388, *supra* note 1, at 19.

63 *See* H.R. 897, *supra* note 1, § 5(a); H.R. REP. No. 388, *supra* note 1, at 18-19.

64 Under the present system, a registration applicant whose claim has been denied may request that the Copyright Office reconsider the decision. The rehearing is before the head of the section that initially rejected the claim, and further appeal may be taken to the Chief of the Examining Division. H.R. REP. No. 388, *supra* note 1, at 18 ("Currently, Compendium II of Copyright Office Practices § 606.04 permits an applicant whose claim has been refused to request that the Office reconsider its action.").

65 H.R. REP. No. 388, *supra* note 1, at 19. Section 5(a) of H.R. 897 would require the Copyright Office to publish in the Federal Register a new appellate process, in which final appeals are brought before the Register of Copyrights. *Id.*

raise a defense of fraud on the Copyright Office.[66] According to Congressman Hughes, this "incentive" would principally benefit those who register compilations and derivative works.[67] The logic here is that since the obligation for accuracy has been alleviated, potential applicants who might be inclined to make false statements on their registration forms would have a new incentive to register. If such a group of potential registrants exists, it is a small one and more importantly, not an especially appealing one.

Finally, the Hughes Repeal Bill proposes an expansion of Copyright Office procedures for group registration.[68] Once again, this procedural change has little bearing on the underlying motivation to register. But more revealingly, it is directed at a procedure that not only is flexible and accommodating in its current form, but also one the Copyright Office has, without legislative mandate, taken steps toward expanding further.[69]

Careful analysis indicates, therefore, that the six "alternative incentives" included in the bill in fact are not incentives at all. To the extent that changes in the registration process would be made, the beneficiaries would not be the average author or registrant. The changes to the application review standards and the appeals process would benefit only those who present borderline works. The curtailment of the fraud defense would assist only those who submit inaccurate information. And simplification of the registration form (whether for single or group applicants) and increasing the alternatives for meeting the deposit requirement would make the process easier for only a small minority of applicants.

C. *Effect on the Library of Congress*

Despite the abbreviated period between introduction of the Hughes Repeal Bill and public hearings, both the Librarian of Congress and the Register of Copyrights testified as to the effect of repeal of sections 411(a) and 412 on the collections of the Library

66 *See* H.R. 897, *supra* note 1, § 5(c); H.R. REP. No. 388, *supra* note 1, at 15-16. Section 5(c) of the bill amends § 410(c) to provide that good faith errors (or omissions) on a registration application shall not affect the validity of a copyright, in order to ensure that no copyright be invalidated by a court solely on the basis of fraud on the Copyright Office. *See* H.R. REP. No. 388, *supra* note 1, at 16.

67 H.R. REP. No. 388, *supra* note 1, at 15.

68 *See* H.R. 897, *supra* note 1, § 3 (expanding § 408(c)(2) to include all collective works published within a five-year period); H.R. REP. No. 388, *supra* note 1, at 19.

69 One of the organizations that has supported the Hughes Repeal Bill on the ground that registration is an enormous burden once advised its members, "A question arises as to how a photographer can have the time, energy, and money to register everything he or she shoots. The Copyright Office has developed procedures to accommodate certain bulk filings of photographic works." *See* AMERICAN SOC'Y OF MAGAZINE PHOTOGRAPHERS, PROFESSIONAL BUSINESS PRACTICES IN PHOTOGRAPHY 78 (1988).

of Congress. The testimony of Librarian of Congress James H. Billington included the following statements:

- The copyright registration system, created by Congress, has brought free deposit copies of these materials to the Library for us to preserve and for future generations to study and learn from. Since 1870, the system has worked efficiently for the Library and for the nation. Without it, we could never have built up the world's most comprehensive collections in all formats, used by scholars every day and available to all comers.[70]
- The proposed bill, whatever its intent, effectively eviscerates the copyright registration system and eliminates the statutory incentives that bring the Library free deposit copies.[71]
- This legislation endangers the ability of the Library to collect copyrighted materials as thoroughly, as quickly, or as comprehensively across all information formats as it does today. The result will be a less usable, less comprehensive, and more costly record of the nation's cultural and intellectual heritage.[72]
- In short, this legislation, from the Library's point of view, gravely threatens a system which over 120 years has admirably served the Library, the Congress, the creative community, and the public interest.[73]

Included in Register of Copyrights Ralph Oman's testimony were the following statements:

- H.R. 897 would have a devastating effect on the Library of Congress's collections. The depth and universality of our great national Library owe more than is generally understood to the existing copyright registration system with its strong statutory incentives for registration.[74]
- Besides reducing the amount of material the Library would receive from copyright, the Reform Act would have the additional effect of reducing the quality of material deposited for registration purposes.[75]
- Relying upon mandatory deposit and enforcement to supply copies now acquired by registration would be both costly and

70 *Hearings*, *supra* note 12, at 182 (prepared statement of James H. Billington, Librarian of Congress).

71 *Id.*

72 *Id.* at 183.

73 *Id.* at 193.

74 *Id.* at 210 (prepared statement of Ralph Oman, Register of Copyrights).

75 *Id.* at 211.

imperfect.[76]

- The incentives to encourage copyright registration must be finely calibrated if we want a strong public registration system. The recent changes in registration incentives have already resulted in a significant decline in registration and in the works available for the collections of the Library; drastic changes, such as the ones proposed, will be even more devastating.[77]
- A system of copyright registration has been a central feature of our copyright law since its origin in 1790, and the deposit of material to identify the work being registered has always been required. Since 1846 (except for an interval of a few years) copies of published works under copyright have also been required to be deposited in the Library of Congress for its collections.[78]
- Deposit has always been a key element of the United States copyright system, although the method of encouraging or enforcing deposit has differed. The present copyright act encourages deposit by registration incentives. Registration and deposit have always been linked. Removal of incentives to register as proposed in this bill would vitiate the registration system and also dry up the source of deposit material for the Library of Congress.[79]

This testimony from these two officials simply confirms a point with which most would agree: our nation has a remarkable and invaluable treasure in its Library of Congress. This institution has become great largely through a copyright registration system that brings copies of creative works of all kinds to the Library at no cost. Any curtailment of registration, however, would naturally produce a decrease in deposits with the Library. Once this flow is broken, it is unlikely that the materials lost during the period of curtailment would be entirely replaced. Moreover, reviving the stream of deposits may be extremely difficult.

Substituting a mandatory deposit regime for the current voluntary approach also defies common sense. Generally speaking, a system of voluntary compliance through inducements is the best way to maintain continuous adherence to the process of deposit with the Library of Congress. Conversely, a "mandatory" approach based on enforcement by U.S. Attorneys ought to strike one as cumbersome, costly and ultimately ineffectual. Moreover, and by

76 *Id.* at 212.
77 *Id.* at 217.
78 *Id.* at 223.
79 *Id.* at 224.

no means incidentally, a mandatory system would apply only to "published" works. This will leave a vast amount of unpublished works totally outside the deposit system. And since there is so much unpublished material of great value to a national library, a mandatory approach is reckless and unnecessarily damaging.

According to the Copyright Office, 650,000 works were received during 1992 through registration.[80] For purposes of this analysis, the Copyright Office calculated the total estimated value for these deposited materials to be $12 million.[81] In the same year, 97,800 of these voluntarily deposited works were passed through to the Library of Congress.[82] By contrast, in the same year the Library gathered only 5832 titles pursuant to "mandatory deposit."[83]

There is nothing in the Hughes Repeal Bill that replaces the current incentive to deposit *unpublished* works. The "improvements" regarding mandatory deposit are strictly limited to published works. Moreover, nothing in the bill addresses the administrative costs of implementing the mandatory deposit alternative promoted in the bill. The Copyright Office has estimated that the cost to the Library alone (excluding the cost of enforcement) would be $1.1 million for each group of 10,000 titles secured through deposit demands.[84]

These changes are proposed without any evidence in the public record on the question of what motivates registration. Remarkably, proponents of the bill cite the absence of evidence as an argument in favor of removing an incentive-based system that has existed since 1909 and that produced 650,000 voluntary registrations in 1992.[85] The burden should be on the proponents to show that these longstanding incentives in fact do not work.

In an effort to give the bill an appearance of responsibility to the collections of the Library of Congress, Representative Hughes included another set of reforms which may be termed "protective measures." There appear to be nine of these changes in the bill. Together they are supposed to ensure that deposits to the Library are not reduced following the repeal of sections 411(a) and 412 as incentives to voluntary registration. Like the bill's "alternative incentives" for registration, these "protective measures" for deposit are almost entirely illusory.

80 *Id.* at 211, 219.
81 *Id.* at 211.
82 *Id.* at 212.
83 *Id.*
84 *Id.* at 214 n.3.
85 *Id.* at 211, 219.

One protective measure would insert into the Copyright Act a new sentence stating that the obligation to deposit arises without any need for prior notification or demand.[86] But this unconditional obligation is already found in section 407(a).[87] Therefore, this measure would be nothing more than a restatement of current copyright law.

The next measure would take responsibility for enforcement of mandatory deposit away from the Register of Copyrights and vest it with the Librarian of Congress.[88] This measure is principally cosmetic, as well as being quite circular; under the current system, the Librarian has the undeniable ability to communicate deposit requests through the Copyright Office.[89] Adding to the "shell game" feeling of this measure, the House Report even notes that the Librarian would have the authority to delegate this enforcement function back to the Register.[90]

The next protective measure comes into play only if a civil action is brought by the government for a court order compelling an author to deposit with the Library. Currently, the Copyright Act provides for the imposition of fines if deposit is enforced through the federal courts.[91] The Hughes Repeal Bill would give the court discretion to assess attorney's fees in addition to such fines, presumably to compensate the U.S. Attorney's Office for time and resources spent.[92] This potential sanction would operate as an incentive only if it were realistically feared by copyright holders. Accordingly, a certain level or frequency of enforcement would have to occur for that fear or expectation to be established. This is highly unlikely given the serious demands on the time and resources of U.S. Attorneys.

This particular measure, more than any other, raises the general question of whether a mandatory/punitive system is preferable to a voluntary one. The Hughes Repeal Bill unquestionably moves in the direction of the former; the bill gives authors the choice of handing over a copy of the work, or being fined. As such, the bill moves in the opposite direction from the Copyright Act of 1976,

86 *See* H.R. 897, *supra* note 1, § 2; H.R. REP. No. 388, *supra* note 1, at 20.

87 17 U.S.C. § 407(a) ("Neither the deposit requirements of this subsection nor the acquisition provisions of subsection (e) are conditions of copyright protection.").

88 *See* H.R. 897, *supra* note 1, § 2; H.R. REP. No. 388, *supra* note 1, at 20.

89 17 U.S.C. § 704(b) (1988) (providing that in the case of unpublished works, the Library of Congress is entitled to select works deposited with the Copyright Office for the Library collections).

90 H.R. REP. No. 388, *supra* note 1, at 21 n.42 (section-by-section analysis).

91 17 U.S.C. § 407(d).

92 *See* H.R. 897, *supra* note 1, § 2; H.R. REP. No. 388, *supra* note 1, at 20.

which converted copyright registration from a mandatory to a voluntary consideration.

The next measure would add a new sentence expressly permitting a deposit with the Library to satisfy the requirement of deposit for copyright registration purposes.[93] Once again, this is simply a cosmetic change. The measure merely repeats a provision already found in section 408(b),[94] stating that Library deposits under section 407 will satisfy the registration deposit requirements of section 408.[95]

In addition to the foregoing phantom measures, the Hughes Repeal Bill proposes five changes to section 407, which governs mandatory deposit with the Library of Congress.[96] According to the House Report, each of these changes supposedly would "further ensure that Library of Congress deposits are not indirectly reduced by repeal of Sections 411(a) and 412. . . ."[97]

The first change would be a requirement that the Librarian of Congress publish in the Federal Register an annual list of categories of works that the Library wants to receive over the next year. How this would ensure deposits to the Library is not explained. Another change in section 407 would make the obligation to deposit arise upon publication rather than three months after publication, as that section now provides.[98] It is hard to see how this change in timing—by a mere three months—is meaningful. Understandably, the House Subcommittee offers no explanation as to how this amendment would strengthen compliance with mandatory deposit.

The next change tackles a widely unknown problem. The Hughes Repeal Bill allows the Librarian of Congress to effect a deposit demand intended to cover a group of works without individually listing each demanded work.[99] This provision of the bill must mean that for years the Librarian has been uncertain about the procedure for demanding deposits. But educating the Librarian

93 *See* H.R. 897, *supra* note 1, § 2; H.R. REP. No. 388, *supra* note 1, at 20. This amendment in the bill would add a sentence to § 407(b), stating that deposits made to the Library of Congress under § 407 may be used to satisfy the § 408 requirement of deposit with the Copyright Office.

94 17 U.S.C. § 408(b).

95 *Id.*

96 Though § 407 requires deposit of "two complete copies of the best edition," deposit is not a condition of copyright protection. *See* 17 U.S.C. § 407(a).

97 H.R. REP. No. 388, *supra* note 1, at 20.

98 *See* H.R. 897, *supra* note 1, § 2; H.R. REP. No. 388, *supra* note 1, at 21 (section-by-section analysis).

99 *See* H.R. 897, *supra* note 1, § 2; H.R. REP. No. 388, *supra* note 1, at 21 (section-by-section analysis). Section 2 is intended in part to "clarify[ ] that a demand for compliance can be for a body of works as well as for an individual work. . . . " *Id.*

on the flexibility regarding his authority to demand deposits would not appear to have any bearing on motivating authors to deposit.

The fourth change to section 407 would require the Librarian to specify a due date in any deposit demand. The section currently requires a response to a deposit demand "within three months after the demand is received. . . ."[100] The Hughes Repeal Bill retains this time period but adds that any demand should additionally specify a "date for compliance."[101] The addition of this language would only confuse the operation of section 407, since it would allow the Librarian to pick a date of compliance different from the three-month period that continues to stand.

The fifth and final change, like the others, is purely cosmetic. A clause added to section 407(d) would clarify that the fines imposed by the federal courts in actions commenced by local U.S. Attorneys are civil in nature.[102] This new language changes nothing in the existing law. To the extent that it supposedly resolves potential confusion, this "resolution" produces less of an incentive to deposit than an incentive based on the mistaken belief that a violation (failure to deposit) might be a criminal act.

Almost in passing, the House Report contains a statement that "[l]ibrary acquisitions policy must not determine copyright policy."[103] Prior to hearing testimony in opposition to the bill from the Librarian of Congress, Congressman Hughes offered his opinion that "[i]t may be that the time has come to consider separating the legitimate interests of the Library in acquisitions from copyright policy."[104] Separating the Library of Congress and the Copyright Office may or may not be a productive step. It would be a significant change, however, and one that should be squarely addressed. Such a split should not be achieved by piecemeal efforts to strip away the connections between the two institutions, and it should not endanger both institutions in the process.

D. *Effect on the Federal Courts*

Remarkably, the House Report not only admits but actually trumpets the fact that the Hughes Repeal Bill is designed to give greater numbers of copyright holders—supposedly individuals and small businesses—more of an opportunity to litigate infringement

100 17 U.S.C. § 407(d).
101 H.R. 897, *supra* note 1, § 2.
102 *Id.*; *see* H.R. REP. No. 388, *supra* note 1, at 21 (section-by-section analysis).
103 H.R. REP. No. 388, *supra* note 1, at 13.
104 *Hearings*, *supra* note 12, at 176 (remarks of Rep. William J. Hughes, Subcommittee Chairman).

claims.[105] This increased litigation, a stated purpose of the bill,[106] will undoubtedly add to the workload of the heavily burdened federal court system.

Greater reliance on a mandatory deposit system will require active enforcement in the form of civil actions prosecuted by government employees in the federal courts. The strain and cost to the government could not possibly be met by the fines and attorney's fees that might be imposed in such civil enforcement actions.

The Hughes Repeal Bill would not only engender increased litigation, it would also remove the "expert opinion function" of the Copyright Office that has been a helpful by-product of section 411. A pretrial determination by the Copyright Office as to the copyrightability of a work does help the courts. These administrative rulings serve as a foundation or point of departure for nearly every copyright decision. Issues of copyrightability have become more complex, and the Copyright Office has the expertise and experience to provide courts an initial judgment on this threshold issue. In addition, judges generally lack the expertise in evaluating copyrightability that comes with frequent exposure to copyright issues; therefore an initial determination by a non-partisan expert is helpful.[107] Fourteen thousand claims were rejected for non-copyrightability in 1992, indicating that copyright protection is by no means automatic. Further, registration can operate to date the creation of a work, which helps to show whether the plaintiff's work preceded that of the defendant.[108]

It seems clear that the group which would benefit most from repeal of section 411(a) are those who seek to obtain copyright protection for borderline works. Without section 411(a) one would even be well-advised to not register, and risk a dismissal for noncopyrightability from a court with less expertise than the Copyright Office. The safer course would be to convince a less experienced court that the "gray-area" item is in fact protected. The current system promotes timely registration prepared by the author which is reviewed and frequently turned down by experienced examiners. The proposed system promotes the litigation of care-

105 *See supra* note 48 and accompanying text.
106 *Id.*
107 *Hearings*, *supra* note 12, at 221-22. In his prepared statement, Register of Copyrights Ralph Oman explained that without the "front end screening" of copyright claims presently undertaken by the Copyright Office, "our already over burdened federal judiciary would be required to make ad hoc decisions without the benefit of review by copyright specialists. . . ." *Id.*
108 *See, e.g.*, Tempo Music, Inc. v. Famous Music Corp., 838 F. Supp. 162 (S.D.N.Y. 1993) (information contained in registration certificate was clearly important and helpful to the court).

fully crafted infringement claims filed long after the date of creation, and which then must be resolved by a district judge who often has only a fleeting familiarity with copyright law. If one plans to be in the business of suing people to protect one's economic interests, that person should be able to take the single step that the copyright law requires, in exchange for the litigation privileges the statute offers.

Like most legislative initiatives promoted by special interest groups, the Hughes Repeal Bill has its share of shibboleths. For example, the House Report refers to the current system generally as a trap for the unwary and lauds the bill as granting "equal access to justice."[109] The report argues as well that these various changes are needed to rid the law of its "formality-based approach."[110] But, like most sound-bite arguments, scrutiny reveals a vacuum of support or justification. One need only question who exactly are the "unwary" and why are they so helpless or hapless. One need only recognize that all authors have the same rights and the same ability to enforce these rights. Copyright protection is automatic upon creation, and it no longer can be lost through inadvertent omissions. Thus, no author who has registered his copyright claim is precluded from commencing a suit for infringement. The only difference involved is whether two extraordinary litigation advantages should remain contingent upon a single, simple procedure that produces several public benefits in exchange. And last, one need only recognize that the litigation advantages offered by section 412 and the procedure required by section 411(a) are not "formalities" which prevent or impair the enjoyment or exercise of the copyright holder's bundle of rights.

The bestowing of extraordinary remedies upon every expression protected by copyright, grounded ostensibly on the need to remove a trap for unwary copyright owners who do not know how to register, actually creates a very real trap for reasonably unwary users. Passage of the Hughes Repeal Bill would expose many innocent parties to claims simply because they *used* a copyrighted work. This use might involve quite productive efforts by way of incorporating some aspect of a prior work, but not efforts resulting in the distribution of a substantially similar expression or a reasonably anticipated derivative application. With no notice requirement and no public notice through registration, a copyright owner and a

109 H.R. REP. No. 388, *supra* note 1, at 12.
110 *Id.* at 9.

contingency-fee attorney could easily engage in what some have referred to as copyright terrorism.

IV. CONCLUSION

Therefore, the overall detriment to the general public from passage of the Hughes Repeal Bill would be great. The chilling effects from a greater risk of claims from unpublished authors, as well as the added costs from a reduced ability to locate copyright owners, would simply inhibit the creation of new works. The removal of the incentive to register would significantly weaken, if not obviate entirely, the registration system. The elimination of the voluntary registration system would in turn deprive the Library of Congress of voluntary deposits. And finally, the encouragement of suits by private parties and mandate of deposit enforcement actions by local prosecutors would unquestionably increase the burdens on and costs incurred by the Justice Department and the federal courts.

Perhaps the most perplexing aspect of all of this is that on the other side of the equation there is no inducement for the creation and publication of new work. True, the Hughes Repeal Bill would give greater rights to certain segments of the creative community. But there is no showing that enhancing the litigation power of heedless copyright owners would benefit creativity, especially where those rights can and will be used against others who undertake the creation of new work.

The authority for a statutory system of copyright protection in the United States is the Constitution. Monopoly rights—and their ensuing profits—are permitted so that the public will benefit from the widest possible production and dissemination of literary, musical and visual creativity. Changes in the copyright law should therefore satisfy this purpose. The Hughes Repeal Bill has little to do with public benefit and altogether too much to do with the special interest groups that it principally champions.