

# COPYRIGHT PREREGISTRATION: EVIDENCE AND LESSONS FROM THE FIRST SEVEN YEARS, 2005–2012

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*In 2005 Congress created a new copyright formality: preregistration. Preregistration addresses a growing phenomenon in which copyrighted works are leaked to the Internet prior to official release. Preregistering a work allows copyright owners immediate access to courts and an expanded menu of remedies.*

*Based on an originally constructed dataset coupled with user interviews, we study how preregistration has been used from its 2005 inception to the end of 2012. Over 6,000 works have been preregistered in six eligible categories. Several lawsuits were filed in reliance on preregistrations. Most preregistrations are of motion pictures and literary works. Substantial commercial use of the system has been limited to the movie and TV industries. The music, publishing, and computer software industries virtually have not used it in the ordinary course of business. A few particular users have preregistered a great number of works. Different from the use anticipated by Congress, preregistrations were often obtained after infringement (or even a business dispute) had already started. Most preregistrations were made by individual, small-entity, or other one-time users.*

*The Article recommends that: (1) the duration of preregistrations should be limited; and (2) preregistration (and other copyright) fees should vary with entity size. It offers lessons for formalities and copyright reform: (1) Digital-age formalities may not give rise to the distributional concerns that characterized old formalities; (2) newly minted formalities may limit, rather than expand, access to expressive works; (3) the rates of subsequent registration of preregistered works vary across categories and can inform copyright lawmaking; and (4) the Copyright Office's views may be affected by its institutional interest.*

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## INTRODUCTION

Imagine that you are Academy Award winning director Ang Lee. It is 2003. You are just back from several weeks in the Utah desert filming your latest project, *Hulk*, and have Universal Studios backing you with tens of millions of dollars.<sup>1</sup> You have spent years on the project and have immersed yourself in the

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1. See Jeff Jenson & Scott Brown, *Mad Sexy*, ENTERTAINMENT WEEKLY (June 6, 2003), <http://www.ew.com/ew/article/0,,455356,00.html>.

world of special effects, hoping to create a new visual language.<sup>2</sup> Fans, however, have been skeptical, unsure that you can pull it off.<sup>3</sup> Then, two weeks before the film's debut, someone leaks a copy of the film onto the Internet. Piracy is nothing new to you, but this is. Usually, it's only after the theatrical release that the pirates begin their work. This time, millions of people are watching your movie before you have sold a single ticket. What's worse is that these millions are starting to talk about the film. "It's terrible," they say. "The special effects are lousy." "Don't bother to see it in the theaters," goes the online buzz.<sup>4</sup>

Soon you learn what happened. The leaked version is a work print, an *unfinished* version that lacks most of the special effects.<sup>5</sup> It does look terrible. The film these millions of people are criticizing isn't the film you intended for them to see. "What can we do?" you ask.

For Ang Lee and Universal, it turned out, not much. Though the leaked version was technically under copyright, Universal, the copyright owner, could not easily assert its rights. The first hurdle was that, in order to file a complaint in court and stop the infringement, Universal had to first register *Hulk* with the Copyright Office.<sup>6</sup> But Universal, following industry practice, was planning to register the movie only after it opened.<sup>7</sup> Registration takes the Office several

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2. *Id.*; see also David E. Williams, *Temper Temper*, AM. CINEMATOGRAPHER (July 2003), <http://www.theasc.com/magazine/july03/cover/index.html> (providing a more detailed account of the creation of the special effects for *Hulk* and Ang Lee's extensive involvement).

3. See Peter Hartlaub, *Ang Lee's Transformation / Director Happily Jumped into the Foreign World of Special Effects for 'The Hulk'*, SFGATE (May 18, 2003), <http://www.sfgate.com/movies/article/Ang-Lee-s-transformation-Director-happily-2616262.php>; Jenson & Brown, *supra* note 1.

4. For a press account of the *Hulk* incident, see Benjamin Weiser, *Hulk Vanquishes an Evildoer for Bootlegging His New Film*, N.Y. TIMES, June 26, 2003, at B3; P.J. Huffstrutter, *How Hulk Crushed the Online Pirate*, L.A. TIMES (June 26, 2003), <http://articles.latimes.com/2003/jun/26/business/fi-hulk26>.

5. Huffstrutter, *supra* note 4; Weiser, *supra* note 4.

6. 17 U.S.C. § 411(a) (2000), amended by Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 104(b), 119 Stat. 218, 222 and Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, § 101(a), 122 Stat. 4256, 4257.

7. See Piracy Education and Deterrence Act of 2003: Hearing on H.R. 2517 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 108th Cong. 65 (2003) [hereinafter Piracy Hearing] (statement of Maren Christensen, Senior Vice President, Intellectual Property Counsel, Vivendi Universal Entertainment) ("[R]equiring a registration is not practical today for criminal or civil infringement actions," and is a special burden in combating pre-release piracy because "[u]sually in these cases the copyright owners have not yet filed their copyright registration applications because the films have not been completed or published."). This logic also explains the industry practice, allowed for by law, to register a work after it has been published, or otherwise made available to the public. See 17 U.S.C. § 412(2) (2012) (treating copyright owners that have registered within three months of publication as if they registered simultaneously with publication for the purpose of statutory damages and attorney's fees).

months to process, and had Universal had to wait this long, it (and Lee) would continue to helplessly see the movie downloaded and wrongfully disparaged. The second hurdle was that registration, even if completed immediately after discovering the leaked version online, would not have availed Universal of statutory damages and attorney's fees, as these were available only for acts of infringement that occurred *after* registration.<sup>8</sup>

Though Universal moved quickly to register *Hulk*, it was too little, too late. The damage had already been done.<sup>9</sup> The earlier viewing and the negative publicity generated by the low quality of the pirated copy depressed ticket sales and cost Universal tens of millions of dollars.<sup>10</sup> The incident was a watershed moment for the film industry. As one studio lawyer explained, after *Hulk*, prerelease infringement "was front and center on everyone's mind. It could have happened to any of us . . . . It was quite traumatic."<sup>11</sup>

Following the *Hulk* incident, the consensus in the film industry was that copyright law, as it stood, was inadequate for the realities of movie making in the digital age.<sup>12</sup> While a copyright holder could register a work before release, registration requires the copyright holder to deposit one copy of the unpublished work with the Library of Congress.<sup>13</sup> But depositing a copy in the Library of Congress before a film is released is costly and cumbersome (especially if done repeatedly), and makes the unfinished work available to the public, precisely what Universal sought to avoid respecting *Hulk*.<sup>14</sup>

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8. 17 U.S.C. § 412 (2000), *amended by* Family Entertainment and Copyright Act of 2005, Pub. L. 109-9, § 104(c), 119 Stat. 218, 222 *and* Prioritizing resources and Organization for Intellectual Property Act of 2008, Pub. L. 110-403, § 101(b), 122 Stat. 4256.

9. After the registration was completed, the U.S. Attorney for the Southern District of New York stepped in and brought charges. *See* Weiser, *supra* note 4. The infringer pled guilty to criminal copyright infringement only a few days after *Hulk*'s opening weekend. *Id.*

10. Without the ability to even seek an injunction to stop the piracy, Universal and its lawyers felt helpless. As one lawyer familiar with the *Hulk* incident told us: "[Universal lost] tens of millions of dollars . . . as a result of . . . the [negative] buzz . . . . You can't unscramble the egg. What do you do for all the financial backers? Giving the guy a conviction doesn't put your money back. What are you going to do, sue the guy for the millions of dollars? He doesn't have it." Telephone Interview with Anonymous #2 (Jan. 30, 2013).

11. Telephone Interview with Anonymous #4 (Feb. 5, 2013).

12. Telephone Interview with Anonymous #2, *supra* note 10; Telephone Interview with Anonymous #3 (Feb. 1, 2013); Telephone Interview with Anonymous #4, *supra* note 11.

13. 17 U.S.C. § 408 (2000), *amended by* Family Entertainment and Copyright Act of 2005, Pub. L. 109-9, § 104(a), 119 Stat. 218, 221-22.

14. Depositing a redacted copy of the work, as the Copyright Office has occasionally allowed, presents significant risks that confidential material will leak out. Several industry lawyers with whom we spoke indicated that the Copyright Office has permitted this practice in the case of sensitive screenplays. At least with respect to computer programs that are covered by trade secrets, the Copyright Office has promulgated a rule

To solve these problems, the Motion Picture Association of America (“MPAA”) and the Recording Industry Association of America (“RIAA”) proposed eliminating registration as a prerequisite for suit in cases of prerelease infringement.<sup>15</sup> Doing so would have continued Congress’s practice of curtailing (or eliminating) various formalities that had long accompanied U.S. copyright law,<sup>16</sup> and would have followed the spirit, if not in the letter, of U.S. international obligations.<sup>17</sup> While the MPAA and RIAA proposal gained initial support in Congress, pushback came from an unexpected corner: the Copyright Office. Unwilling to tolerate any weakening of the registration formality, the Office proposed a new preregistration formality for unpublished works that would supplement, but not replace, the registration formality.<sup>18</sup> The Copyright Office won the political battle. The MPAA and RIAA proposal failed, and in 2005 Congress made the preregistration formality law.<sup>19</sup>

As is appropriate for the digital age’s first copyright formality, preregistration is obtained only online, in a process that should not take more than a few minutes.<sup>20</sup> No deposit of the work (whose creation may have just begun) is required.<sup>21</sup> Preregistration, like registration, satisfies the requirement that copyright owners of U.S. works register them before suing.<sup>22</sup> On top of the available remedies of injunctions and damages, preregistration also allows the copyright owner to receive statutory damages and attorney’s fees for acts of infringement that occur subsequent to the work’s preregistration.<sup>23</sup> For preregistration to have its full bite, preregistrants must follow up with a full registration (and the accompanying deposit) within three months of publication or one month from having knowledge of the infringement, whichever is earlier.<sup>24</sup> Failing to do so may

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governing the procedure for redaction. Deposit of Copies and Phonorecords for Copyright Registration, 37 C.F.R. § 202.20(c)(2)(vii)(A)(2) (2013). In the case of secure tests, the Copyright Office returns the copy back to the owner promptly after examination. *Id.* § 202.20(c)(2)(vi).

15. Telephone Interview with David Carson, former General Counsel, U. S. Copyright Office (Feb. 12, 2013).

16. *See infra* Part I.A.

17. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

18. Telephone Interview with David Carson, *supra* note 15.

19. *See infra* Part I.C (reviewing the incidents and the legislative history that led to the establishment of the preregistration system).

20. *See generally Preregister Your Work*, U. S. COPYRIGHT OFFICE, <http://copyright.gov/prereg/> (last updated Feb. 7, 2011).

21. *See* Preregistration of Copyrights, 37 C.F.R. § 202.16(c)(6) (2013).

22. 17 U.S.C. § 411 (2012); *see also* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 157–58, 166 (2010) (describing the difference between jurisdictional requirements and claim processing rules and holding that § 411 is a claim processing rule that is satisfied by registration and preregistration).

23. 17 U.S.C. § 412 (2012).

24. 17 U.S.C. § 408(f)(4) (2012).

grant a de facto license for any infringements commenced earlier than two months after the initial publication.<sup>25</sup>

In this Article, we study how the preregistration system was formed and then used in its first years. The analysis of the system's use is informed, first, by a quantitative analysis of preregistration records. We retrieved the preregistrations of all 6,086 works dated from the launch of the system in November of 2005 through December 31, 2012. Of these, 2,525 were later registered, and we retrieved all of these subsequent registrations as well. We report various preregistration and subsequent registration statistics broken down by year, category of work, and type of preregistrant, and discuss several notable patterns in the data. Our analysis is also informed by interviews with lawyers and preregistrants, which we quote from throughout the Article, conducted in order to get insiders' views of the system and to augment and help make sense of the quantitative data.<sup>26</sup>

From a seven-year perspective, the preregistration system is used in ways that are markedly different from those that seemed likely at its inception.<sup>27</sup> Most preregistrations are of motion pictures (41%) and literary works (36%). Preregistrations of sound recordings are far fewer (8%).<sup>28</sup> Despite active participation of trade associations from several industries in the lobbying and rulemaking processes, major industry use of preregistrations in the ordinary course of business (i.e., preemptively) has been largely limited to film studios.<sup>29</sup> Major music labels virtually do not preregister works as a matter of course.<sup>30</sup> Several major publishing houses and software companies have preregistered a few extremely valuable works preemptively.<sup>31</sup> Biographies and autobiographies stand out as the only genre that attracted a small, yet notable, number of preregistrations: This genre—and, as it happens, the same plaintiff—generated both the Supreme Court's famous prerelease infringement case of *Harper & Row Publishers, Inc. v. Nation Enterprises* and the only reported opinion we could find based on a preregistration, *HarperCollins LLC v. Gawker Media LLC*.<sup>32</sup> Content for television accounts for a surprisingly large number of preregistrations.<sup>33</sup> This may not be a

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25. See *infra* Part I.D.3 (discussing the duty to register and the consequences of failing to do so).

26. See *infra* Appendix A (explaining this Article's methodology).

27. See *infra* Part II (analyzing the use of the preregistration system qualitatively and quantitatively).

28. See *infra* Part II.A.

29. See *infra* Part II.B (reviewing preregistrations in the film industry); *infra* Part II.C.1 (reviewing motivations to preregister in the film industry).

30. See *infra* Part II.C.2.

31. See *infra* Part II.C.3 & note 202 (reviewing preregistrations in the publishing industry and the preregistration of *Harry Potter and the Deathly Hallows*); *infra* Part II.C.4 & note 241 (reviewing preregistrations in the computer software industry and the preregistration of *Grand Theft Auto V*).

32. See *infra* notes 208–217 and accompanying text (reviewing *Harper & Row Publishers v. Nation*, 471 U.S. 539 (1985) and *HarperCollins Publishers v. Gawker Media*, 721 F. Supp. 2d 303, 307 (S.D.N.Y. 2010)).

33. See *infra* Part II.C.4 (reviewing motivations to preregister in the television industry).

continuing phenomenon as most of this content (as much as 24% of all preregistrations) is due to the idiosyncrasies of three particular users.<sup>34</sup> In some cases, parties have preregistered works *after* prerelease infringement started.<sup>35</sup> Such preregistration does not make statutory damages and attorney's fees available, but it does guarantee quick access to courts (and enhanced remedies against additional infringements). In some cases, preregistrations are seemingly made in order to reinforce a party's position in a legal dispute that had already begun.<sup>36</sup> The majority of preregistrations were made by individual, small business, and other nonrepeat users that were largely absent from the legislative and rulemaking processes.<sup>37</sup>

Based on its findings, the Article makes two specific recommendations for preregistration reform. First, the duration of preregistrations should be limited.<sup>38</sup> Second, the Copyright Office should vary its preregistration (and possibly other) fees according to entity size.<sup>39</sup> The Article then offers lessons for formalities and copyright reform more generally. First, the use of formalities has been widely believed to raise distributional concerns. The preregistration formality, used predominantly by individual, small-business, and nonrepeat users, may have quite the opposite effect.<sup>40</sup> Second, many advocate greater use of copyright formalities because they hope to restore the access-enhancing effect that characterized copyright law's old system of formalities. The preregistration formality, however, restricts access to works and should give pause to anyone who believes that the aforementioned effect is inevitable.<sup>41</sup> Third, the preregistration system makes available data about the rate at which preregistered works are later registered. Such data can inform copyright law and policy on matters such as copyright duration.<sup>42</sup> Lastly, our study reveals that the Copyright Office, likely driven by institutional concerns, took an active role in initiating and pushing for the preregistration system. Future attempts at copyright law reform would be wise to consider the Copyright Office's institutional interest.<sup>43</sup>

The Article proceeds as follows. Part I discusses the law and legislative history pertaining to the preregistration formality. Part II contains quantitative analysis of the data on preregistrations and qualitative analysis of users' motivations to preregister based on interviews we conducted. Part III offers lessons for copyright law and formalities reform. The Conclusion follows.

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34. See *infra* Part II.C.5 (reviewing preregistration practices by Comedy Partners and Spanski/Euro Vu that seem to have stopped); *infra* note 134 and accompanying text (reviewing NBC's preregistration of its coverage of the Olympics).

35. See, e.g., *infra* notes 213–217 and accompanying text (reviewing the facts surrounding *HarperCollins*).

36. See *infra* Part II.C.5.

37. See *infra* Part II.C.6.

38. See *infra* Part III.E.

39. See *infra* Part III.C.

40. See *infra* Part III.A.

41. See *infra* Part III.B.

42. See *infra* Part III.C.

43. See *infra* Part III.D.

## I. THE FORMATION OF THE PREREGISTRATION SYSTEM

### A. Copyright Formalities

For the first two centuries following the nation's founding, copyright protection generally depended on strict adherence to a set of formalities, including registration.<sup>44</sup> Registration requires recording information about the work and its ownership and comes coupled with another formality: the deposit of copies of the work with the Library of Congress.<sup>45</sup> Registration thus helps inform the public about the ownership of works and facilitates access to them.

The registration formality has been liberalized for over a century now. Prior to the Copyright Act of 1909, registration prior to publication was a strict prerequisite for protection.<sup>46</sup> This changed under the 1909 Act, which made publication with notice the sole condition for protection.<sup>47</sup> Registration (and the accompanying deposit) was still demanded after publication,<sup>48</sup> but noncompliance would not void the copyright (unless in defiance of an express request made by the Register of Copyrights).<sup>49</sup> The Copyright Act of 1976 made registration permissive.<sup>50</sup>

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44. Under the 1909 Copyright Act, such formalities included publication, notice, renewal, deposit, and registration. Act of March 4, 1909, Pub. L. 60-349, 35 Stat. 1075 (amending and consolidating the Acts respecting copyright). An author who published her book without proper notice committed her work to the public domain. *See id.* § 9.

45. For the current version of the registration formality see 17 U.S.C. § 408 (2012).

46. Act of March 3, 1891, ch. 565 § 3, 26 Stat. 1106, 1107 (an Act to amend Title sixty, Chapter Three, of the Revised Statutes of the United States, relating to copyright) (“No person shall be entitled to a copyright unless he shall, on or before the day of publication in this or any foreign country, deliver at the office of the Librarian of Congress . . . a printed copy of the title of the [work] for which he desires a copyright, nor unless he shall also, not later than the day of publication thereof in this or any foreign country, deliver at the office of the Librarian of Congress . . . two copies of such [work].”).

47. *See* Act of March 4, § 9.

48. *See id.* § 12 (requiring that after its publication with notice, copies of the work should be deposited in the copyright office together with “a claim of copyright,” which can be read to mean application for registration); *see also* BENJAMIN KAPLAN, SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86TH CONG., STUDY NO. 17 ON THE REGISTRATION OF COPYRIGHT 17, 31 (1958) [hereinafter KAPLAN STUDY] (suggesting claim to mean application). Registration was still a prerequisite in certain instances. *See* Act of March 4, § 23 (renewing the copyright beyond the then-initial 28-year term of protection); *id.* § 11 (protecting certain unpublished works); *id.* § 12 (filing an infringement action).

49. *See* Act of Mar. 4, 1909, § 13 (failure to comply with the Register of Copyrights's actual demand to follow section 12's deposit and registration requirements subjects the claimant to fine and voiding of copyright). *See also* KAPLAN STUDY, *supra* note 48 at 17–19 (same).

50. 17 U.S.C. § 408(a) (2012). Refusal to deposit, in the face of an express request to deposit, can result in a fine. *Id.* § 407(d)–(e).

While liberalizing the registration formality, Congress still sought to induce voluntary and early compliance through several incentives. The 1909 Act made registration a general prerequisite for bringing an infringement action,<sup>51</sup> a requirement that currently applies only to U.S. works.<sup>52</sup> The 1976 Act made statutory damages and attorney's fees available as remedies only for works that had been registered prior to their infringement.<sup>53</sup> To further encourage prompt registration, the 1976 Act limited the prima facie evidentiary presumption that accompanies the certificate of registration to only those registrations that were made within five years of publication.<sup>54</sup> In addition, a certificate of registration can be recorded with U.S. Customs and Border Protection to prevent the importation of infringing copies.<sup>55</sup>

### ***B. Hulk and the Unique Problem of Prerelease Piracy***

This was the legal environment in which Ang Lee created *Hulk*. Piracy and the need to follow copyright formalities were generally thought to be matters to deal with after a work's release.<sup>56</sup> As one studio lawyer put it, by 2 a.m. after the "Thursday night midnight screening for your blockbuster . . . that film is out there. But it takes a while for it to hit all those larger [peer-to-peer] networks."<sup>57</sup> The opening weekend would generate "the excitement and publicity" that gets others to see the movie as well.<sup>58</sup> Even though piracy inevitably occurred after a film's release, the opening weekend buzz was more than enough to keep moviegoers coming and to turn a profit.<sup>59</sup>

Prerelease piracy is qualitatively different. Movies are a genre in which advance advertisement, anticipation, and excitement often accompany release, and

51. Act of Mar. 4, 1909, § 12 ("No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with.").

52. 17 U.S.C. § 411 (2012). The Berne Convention Implementation Act of 1988 limited the duty to register prior to suit only to the case of U.S. works. Pub. L. No. 100-568, § 9(b)(1), 102 Stat 2853, 2859 (1988); *see also* Berne Convention for the Protection of Artistic and Literary Works, Article 5(2).

53. Act of Oct. 19, 1976, Pub. L. 94-553 § 412, 90 Stat. 2541 (codified at scattered sections of 17 U.S.C. (2006)). Congress feared that making registration completely permissive would cause a reduction in registrations, and thus sought to encourage it. *See* H.R. REP. 94-1476 at 159, (1976) *reprinted in* U.S.C.C.A.N. 5659, 5774 ("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.").

54. 17 U.S.C. § 410(c) (2012) (conditioning the presumption on registration within five years of first publication). This evidentiary presumption was attached to the certificate in the 1909 Act, but it was not limited to registrations completed within a set term of years from publication. Act of Mar. 4, 1909, Pub. L. 60-349 § 55, 35 Stat. 1075.

55. *See* Subpart-D—Recordation of Copyrights, 19 C.F.R. §§ 133.31–133.37.

56. Telephone Interview with Anonymous #4, *supra* note 11.

57. *Id.*

58. *Id.*

59. *Id.*

where people compete to be among the first viewers, as theatres have limited capacity. The free online availability of a movie prerelease is therefore enticing to the public, especially at a time when fans and would-be willing consumers have no legitimate alternative. This can cause the opening weekend's excitement and box office revenue—which serve as market signals—to fizzle and harm the movie's overall value.<sup>60</sup>

Prerelease piracy can be particularly damaging because the quality of the pirated copy is often high.<sup>61</sup> As another studio executive said:

Our real focus [was] stopping the post release piracy [like] camcording off of screens. But [those] copies are terrible most of the time. If you're [watching] a camcorderd version of a film you've got to be pretty desperate . . . . On the other hand, if a [finished] print or nearly finished print gets out [before release], it's amazing how quickly they end up in some optical disk factory in China. That's one of the reasons prerelease [piracy] is so [damaging] because there is the potential for a really high quality master from which to start duplicating things [at a very early stage].<sup>62</sup>

This high-quality piracy is also bad for filmmakers in a different way. Because the prerelease copy purports to be the finished or nearly finished version of the film, it can generate negative, perhaps undeserved, criticism, as it did in the case of *Hulk*. As another studio representative explained:

When your movie gets released early it can poison the movie because it's not finished. The special effects may not be good. The sound may not be good. Sometimes you're changing the ending or redubbing lines. If your movie is out there in advance it can *poison* the commercial opportunities of your film not just for theatrical release, but DVD, TV, and down the line, because the movie gets tagged as a dog.<sup>63</sup>

Unfortunately for Universal, the laws in place at the time were inadequate to prevent or cope with the huge loss caused by the *Hulk* incident.<sup>64</sup>

The legal problem was twofold. First, in order to benefit from the deterrent of statutory damages and attorney's fees, a copyright holder generally had to register and deposit her work before infringement commenced.<sup>65</sup> Although

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60. For example, as one studio lawyer told us, when TV networks buy the rights for a movie, "they make those deals on opening weekend. If people have had two months to trash your film on the Internet you're not going to get top dollar for that. It can be devastating to the income flow over the life of your picture." *Id.*

61. Telephone Interview with Anonymous #3 (Feb. 1, 2013).

62. *Id.*

63. Telephone Interview with Anonymous #4, *supra* note 11.

64. Empirical evidence supports the view that prerelease piracy is especially harmful. See Liye Ma et al., *The Effect of Pre-Release Movie Piracy on Box-Office Revenue*, 35–36 (March 10, 2011) (unpublished manuscript) (on file with authors).

65. 17 U.S.C. § 412 (2000), *amended by* Family Entertainment and Copyright Act of 2005, Pub. L. 109-9 § 104(c), 119 Stat 218, 222. Statutory damages and attorney's

there was no legal barrier to registering incomplete or unpublished works, repeated registrations throughout the work process would be costlier and involve an administrative headache. More importantly, many content producers who are wary of prerelease piracy want to keep confidential the information and content that a full registration and the accompanying deposit would disclose to the public.<sup>66</sup> The example of *Hulk* shows the damage that could be done by exposing an unfinished film to the public, but scripts and other material can be sensitive as well. Depositing a screenplay in advance of release will leak out plot information that studios may want to keep secret as part of a film's publicity strategy.

The Copyright Office has permitted owners to hold back or redact parts of their work in some circumstances,<sup>67</sup> but this has not been a perfect solution. In the words of one industry attorney:

It's not that people don't trust the Copyright Office but once you release [a work] from your control, you release it from your control . . . [W]ere you to release the scripts of your upcoming television show that everyone's chafing at the bit to [see], you risk people finding out, even by word of mouth. When you give up the deposit copy there are rabid fans and malicious folks that will do anything to find out.<sup>68</sup>

Hence, the longstanding practice at the time of *Hulk* was to register a work only after it had been made available to the public.<sup>69</sup>

The second problem studios faced was that registration was necessary just to get into court.<sup>70</sup> In theory, a copyright owner could take a wait-and-see approach to avoid the aforementioned risks associated with early deposit. She could register only after prerelease piracy occurred. Doing so, she would give up statutory

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fees were also available for *postpublication* infringements if registration was completed within three months of publication. *Id.* § 412.

66. For example, during the rulemaking process regarding preregistration, the MPAA and trade organizations suggested that no information about preregistered works be made public, that some preregistration information be made optional, or that they be allowed to give indefinite answer, to protect information such as intended release date and the details of upcoming projects. MOTION PICTURE ASSOC. OF AMERICA, IN THE MATTER OF PREREGISTRATION OF CERTAIN UNPUBLISHED COPYRIGHT CLAIMS – NOTICE OF PROPOSED RULEMAKING: COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA TO DAVID CARSON 8–9 (2005) [hereinafter MPAA Comments]. All materials for the preregistration rulemaking are available at <http://www.copyright.gov/prereg/rulemaking.html>.

67. See *supra* text accompanying note 14.

68. Telephone Interview with Anonymous #2, *supra* note 10.

69. See *Piracy Hearing*, *supra* note 7 (statement of Maren Christensen, Senior Vice President, Intellectual Property Counsel, Vivendi Universal Entertainment); 17 U.S.C. § 412(2) (2012).

70. 17 U.S.C. § 411(a) (2000), amended by Family Entertainment and Copyright Act of 2005, Pub. L. 109–9 § 104(b), 119 Stat 218, 222, and Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, § 101(a), 122 Stat. 4256, 4257.

damages and attorney's fees and rely on injunctions (and actual damages) to stop the prerelease piracy once it occurred. This was Universal's strategy with *Hulk*.

In practice, however, this was not a very effective strategy because copyright registration is a lengthy process. The Copyright Office takes three to five months on average to process normal registration applications.<sup>71</sup> Although there is an expedited processing route available, it is only granted in specific situations (such as pending litigation), costs significantly more than a standard registration, and still takes five to seven business days to complete.<sup>72</sup>

In a world of Internet piracy, even a few days may be too long to wait. In the case of *Hulk*, the Copyright Office abandoned its normal procedures and processed the registration the same day Universal applied. Still, the registration was obtained only after the material had been online for some time. Moreover, the Office made clear that it could not make such exceptions on a regular basis.<sup>73</sup> Without the ability to get into court as soon as the piracy has been discovered, a leaked work can spread and become impossible to contain.

### *C. How the Preregistration System Came to Be*

Even before the *Hulk* pirate pled guilty, Congress was searching for a solution to the problem of prerelease piracy. On June 17, 2003, three days before *Hulk*'s theatrical opening, Maren Christensen, the attorney primarily responsible for Universal's response to the *Hulk* incident, testified before the House Subcommittee for Intellectual Property. She told Congress of the harm Universal suffered and the inability of the studio or the Justice Department to take swift action because of the registration formality. She praised the Copyright Office's quick handling of the *Hulk*'s registration, but pointed out that not all copyright holders can receive the same special treatment. So, she argued, Congress should consider eliminating the registration requirement for criminal prosecution and find some other way of easing the civil registration burden consistent with the deposit requirement.<sup>74</sup>

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71. *I've Submitted My Application, Fee, and Copy of My Work to the Copyright Office, Now What?*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/help/faq/faq-what.html#certificate> (last updated June 10, 2013).

72. U.S. COPYRIGHT OFFICE CIRCULAR 10: SPECIAL HANDLING (Feb. 2013), <http://www.copyright.gov/circs/circ10.pdf>. The current fee for special handling is \$760. *Fees*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/docs/fees.html> (last updated Apr. 1, 2013).

73. One attorney at the Copyright Office with whom we spoke said that the Copyright Office takes special care to process quickly the applications of those facing infringement. Practitioners outside the Copyright Office, however, indicated that this was not the case, and that even when special handling was available it was expensive and not guaranteed. At a minimum, there was some substantial risk that registration would be too slow.

74. *Piracy Hearing*, *supra* note 7, at 61–62 (statement of Maren Christensen, Senior Vice President, Intellectual Property Counsel, Vivendi University Entertainment). The film industry was not alone in advocating a substantial easing of the registration burden. In the same hearing in which Ms. Christensen testified, Congress also heard

Although Christensen's testimony offered few concrete proposals,<sup>75</sup> the MPAA and the RIAA knew precisely what they wanted in a solution: the complete elimination of registration as a requirement for bringing suit, at least for prerelease cases. Shortly after Christensen's testimony, the Senate Judiciary Committee's staff convened a meeting with representatives of the MPAA, the RIAA, and the Copyright Office to learn more about the MPAA and RIAA proposal. David Carson was General Counsel of the Copyright Office at the time and represented it at the meeting. He recalls:

We were called over to the Senate Judiciary Committee for a meeting. The folks who were clearly driving it were the motion picture industry and the recording industry. [T]hey were [pressing that] with respect to prerelease infringement, the requirement for registration as a prerequisite for suit be abandoned.<sup>76</sup>

The MPAA and RIAA's motivation to do away with the registration formality in the context of prerelease infringement was rivaled by the Copyright Office's resolve to keep it in place. The Office's fear was that making an exception in this particular context might lead to the eventual demise of the registration formality:

Our view was, and the Office's view remains, that registration should be a prerequisite to suit. [I]f you create . . . exceptions[,] it's a slippery slope that will ultimately lead to the complete relaxation of the registration requirement. That was something that institutionally, and as a matter of principle, we thought was a bad idea.<sup>77</sup>

At the meeting, the delegation was under orders to oppose, categorically, any weakening of the registration requirement; however, it became clear that the

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testimony from David Trust of the Professional Photographers of America. He argued that for small businesses the registration requirement was particularly burdensome and effectively denied them copyright protection. Trust advocated leveling the playing field between big and small businesses by eliminating the registration requirement altogether. *Id.* at 11 (statement of David Trust, President, CEO, Professional Photographers of America).

75. Following this hearing, Congress continued at an unusually brisk pace and began considering several bills to combat prerelease piracy. In the House, the first of these, the Piracy Education and Deterrence Act of 2003, was introduced only two days after Maren Christensen's testimony. The bill proposed, among other things, authorizing customs agents to seize pirated copies of copyrighted material at the border, whether or not the material had been registered. It seems, however, that Congress was moving towards an even greater easing of copyright formalities. The Act's 2004 version, introduced only a few months later, went even further: proposing to eliminate registration as a requirement for criminal prosecution altogether. *Compare* Piracy Deterrence and Education Act of 2003, H.R. 2517, 108th Cong. § 6 (2003), *with* Piracy Deterrence and Education Act of 2004, H.R. 4077, 108th Cong. § 106 (2004). *See also* Robin Jeweler, *Copyright Law: Digital Rights Management Legislation in the 107th and 108th Congresses*, CONG. RESEARCH SERV. (Jan. 5, 2005) (comparing the two bills). The bills also would have criminalized prerelease piracy. *Id.* at 10–11.

76. Telephone Interview with David Carson, *supra* note 16.

77. *Id.*

MPAA and RIAA had done a good job of convincing the Judiciary Committee staff.

The Judiciary [Committee] staff . . . was buying what the motion picture industry and recording industry were selling. We were not going to walk out of that room without having the Senate staff . . . recommend legislation that would get rid of the registration requirement in cases of prerelease infringement.<sup>78</sup>

Feeling desperate, Carson decided to offer preregistration as an alternative. Preregistration was not something that the Register of Copyrights, or anyone at the Copyright Office, wanted, but from the Copyright Office's point of view it solved the MPAA and RIAA's problem without weakening the registration system. "I knew [the Register] wouldn't be happy," Carson remembers, "but if we didn't [offer preregistration,] we were likely to get something even worse."<sup>79</sup>

The industry wasn't too excited about the system either. It solved their problem, but was still another formality to comply with.<sup>80</sup> Nonetheless, the Senate staffers thought preregistration was a fair compromise, and several months after the meeting, Senator John Cornyn formally proposed the preregistration system as part of Senate Bill 1932, the Artists' Rights and Theft Prevention Act of 2004 ("ART Act").<sup>81</sup> At the opening of the 109th Congress, the resurrected ART Act was joined together with an unrelated bill to form the Family Entertainment and Copyright Act of 2005 ("FECA").<sup>82</sup> Congress quickly passed the bill, and in April 2005, President Bush signed it, creating the preregistration system.<sup>83</sup>

#### ***D. The Preregistration System***

##### *1. Copyright Office Rulemaking*

Under the ART Act's preregistration system, authors can "preregister[]" "unpublished" works "being prepared for commercial distribution" that are of a type with a "history of prepublication infringement."<sup>84</sup> The government may bring

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78. *Id.*

79. *Id.*

80. *Id.*

81. Preregistration was only a small part of ART's antipiracy program.

82. The ART Act was joined with the Family Home Movie Act as part of a political compromise. *See*, WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:113 (West 2013). The Family Home Movie Act's primary purpose was to protect the manufacturers of equipment that screened out offensive material from movies and television programming from copyright liability. *See* Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9 § 202, 119 Stat. 218 (2005). Initially, the film industry opposed the act when it was a stand-alone bill but dropped its opposition and let it become part of the Family Entertainment and Copyright Act ("FECA") to ensure that the ART act would pass. PATRY ON COPYRIGHT § 1:113

83. 17 U.S.C. § 408(f) (2012).

84. *Id.*

criminal charges against infringers of preregistered works,<sup>85</sup> and as with regular registration, a preregistrant can receive statutory damages and attorney's fees for infringement occurring after preregistration, so long as she files an application for full registration within three months of publication, or within one month of learning of the infringement, whichever is earlier.<sup>86</sup>

Although Congress limited eligibility for preregistration to works "being prepared for commercial distribution" that are of a type with a "history of prepublication infringement,"<sup>87</sup> it left the definition of these terms and the precise nature of the preregistration process to be worked out by the Copyright Office through rulemaking.<sup>88</sup>

Two things about this rulemaking process are significant. First, the number of industries that sought preregistration protection is remarkable. The MPAA and the RIAA were the driving forces behind the ART Act, and in its proposed rules, the Copyright Office assumed that only motion pictures, sound recordings, and nondramatic musical works performed on sound recordings had a sufficient "history of infringement" to be eligible for preregistration.<sup>89</sup> Nonetheless, numerous other trade associations and individuals also sought to preregister their works. The Advertising Photographers of America; the American Society of Composers, Authors and Publishers; BMI Records; the Association of American Publishers; the Entertainment Software Association; and the Software and Information Industry Association, as well as other trade groups and a few individuals, all responded with comments to the Register's proposed rules.<sup>90</sup> Initially, the Copyright Office was reluctant to include works other than films and music unless these works had "a substantial history of pre-release infringement

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85. Since FECA was passed, Congress amended the Copyright Act to enable criminal prosecutions even in the absence of preregistration or registration. Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, § 101, 122 Stat. 4256, 4257 (codified at 17 U.S.C. 411(a) (2012)) (barring only civil actions without registration).

86. 17 U.S.C. § 411 (2012) (requiring preregistration or registration); *id* § 412 (allowing remedies); *id* § 408(f)(3) (imposing the full registration requirement).

87. 17 U.S.C. § 408(f)(2) (2012).

88. The act gave the Register of Copyrights 180 days to complete the rulemaking process, and, obeying the statute, the Copyright Office issued a Notice of Proposed Rulemaking on July 22, 2005. The notice proposed rules and solicited comments from the public. Preregistration of Certain Unpublished Copyright Claims, 70 Fed. Reg. 42286-01, 42288 (Jul. 22, 2005) (to be codified at 37 C.F.R. pt. 202).

89. In its proposed rules, the Copyright Office noted it did "not have discretion to permit preregistration for classes of works that had only a few instances of infringement in pre-release form," and limited preregistration to motion pictures, sound recordings and nondramatic musical works performed on sound recordings because infringement of these works was the primary problem FECA was intended to solve. Preregistration of Certain Unpublished Copyright Claims, 70 Fed. Reg. at 42288 (Jul. 22, 2005) (codified at 37 C.F.R. § 202.16) (recognizing that "Congress was responding to concerns of motion picture studios and record companies").

90. For all comments, see *Preregistration Rulemaking*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/prereg/rulemaking.html> (last updated Nov. 25, 2005).

which is likely to continue.”<sup>91</sup> In the end, however, the Register opened the preregistration system to every trade group who made a request, even if it could produce only anecdotal evidence of prerelease infringement.<sup>92</sup>

The second important feature of the rulemaking process was that virtually all of the comments emphasized the speed of the preregistration process. Everyone wanted preregistration to be as fast and easy as possible to enable copyright owners to get into court quickly and enforce their rights.<sup>93</sup> Although only the MPAA mentioned it specifically, the *Hulk* incident, recounted in the Office’s proposed rules, was on everyone’s mind. As the RIAA’s Comment put it, “[t]he preregistration procedure will be successful to the extent that it allows a copyright owner who learns in the morning about a prerelease act of piracy to file a preregistration application by mid-day, receive an acknowledgement in the afternoon, and be present it in court before the workday closes . . . .”<sup>94</sup>

## 2. The Final Preregistration Rules

At the end of the rulemaking process, six categories of works were declared eligible for preregistration: motion pictures, sound recordings, musical compositions, literary works being prepared for publication in book form, computer programs, and advertising photographs.<sup>95</sup> A preregistration may state that the work belongs to more than one of the eligible categories.<sup>96</sup>

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91. Preregistration of Certain Unpublished Copyright Claims, 70 Fed. Reg. at 42288 (Jul. 22, 2005) (codified at 37 C.F.R. § 202.16).

92. Both the Entertainment Software Association (“ESA”) and the Software & Information Industry Association (“SIIA”) suggested that software should be added as a class of works. ENTERTAINMENT SOFTWARE ASSOC, RULEMAKING ON THE PREREGISTRATION OF CERTAIN UNPUBLISHED COPYRIGHT CLAIMS, COMMENTS OF THE ENTERTAINMENT SOFTWARE ASSOCIATION 1 (2005) [hereinafter ESA COMMENTS]; SOFTWARE & INFO. INDUS. ASSOC., COMMENTS RE: PREREGISTRATION OF CERTAIN UNPUBLISHED COPYRIGHT CLAIMS: (1) NOTICE OF PROPOSED RULEMAKING AND (2) SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING 1–2 (2005) [hereinafter SIIA COMMENTS]. SIIA’s comments stated that, “software products have been infringed prior to publication,” but that its members “were reticent or prohibited (on advise [sic] of counsel) from providing details about these infringements.” *Id.* at 2. The ESA documented several incidents, going back to 1993, when *Doom II* was “pirated several weeks before its intended release date” that “had the effect of further delaying the authorized release of the game.” ESA COMMENTS at 2.

93. See, e.g., ESA COMMENTS, *supra* note 92, at 10 (the purpose of preregistration is to “allow the copyright owner to file an infringement suit and obtain relief in pre-release infringement cases”); MPAA COMMENTS, *supra* note 66, at 910; SIIA COMMENTS, *supra* note 92, at 4.

94. RECORDING INDUSTRY ASSOC. OF AM., PREREGISTRATION OF CERTAIN UNPUBLISHED COPYRIGHT CLAIMS: COMMENTS OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA IN RESPONSE TO COPYRIGHT OFFICE NOTICE OF INQUIRY 5 (2005).

95. Preregistration of Copyrights, 37 C.F.R. § 202.16(b)(1) (2013).

96. E.g., *The Floss Diet, Self-Administered Physical Restraint*, Preregistration No. 2700 (filed on Sept. 9, 2009); see *infra* note 113.

A prerequisite for preregistration is that the creation (or “fixation”) of the preregistered work has already begun.<sup>97</sup> Preregistration is obtained exclusively online and requires only a minimum of information: the type of work; title; author; copyright owner; the dates the work was begun, will be completed, and will be commercially released; and a description of the work.<sup>98</sup> All dates can be approximate. The preregistration should reasonably identify the work, subject to what is reasonably known at the time of application and the applicant’s legitimate interest in protecting confidential information.<sup>99</sup> Unlike registration, and as is appropriate for the context of preregistration, no deposit is required.<sup>100</sup> No legal training is necessary to understand the form, and anyone familiar with the work would be more than able to complete it. The whole process can be completed in minutes, and it quickly yields a proof of preregistration via email.<sup>101</sup>

Upon completion, preregistrations are available to the public in the Copyright Office’s searchable online registration database.<sup>102</sup> Preregistration is relatively pricey: It costs \$115 compared to a mere \$35 for a full registration.<sup>103</sup> Interested parties may petition the Register of Copyright to make additional categories of works preregistration eligible.<sup>104</sup>

### 3. *The Duty to Register*

Preregistrants are required to register (and deposit a copy of) their work within three months of publication.<sup>105</sup> Failing to register within this time frame (or within one month of learning of the infringement, whichever is earlier)<sup>106</sup> results in granting a de facto license to infringements commenced earlier than two months after the first publication.<sup>107</sup> Absent publication or knowledge of infringement, there is no requirement to register preregistered works within a certain time.

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97. For example, in the case of motion pictures, preregistration is permitted after the start of principle photography. In the case of literary works, or musical compositions, preregistration is permitted when something is written. Preregistration of Copyrights, 37 C.F.R. § 202.16(b)(2)(ii).

98. *See id.*

99. *See id.* § 202.16(c)(6).

100. *Id.*

101. *Id.* § 202.16(c)(10).

102. *Id.*

103. *Fees*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/docs/fees.html> (last updated Apr. 1, 2013).

104. 37 C.F.R. § 202.16(c)(14).

105. 17 U.S.C. § 408(f)(3) (2012).

106. *Id.* § 408(f)(4).

107. Section 408(f)(4) states:

an action . . . for infringement of a work preregistered under this subsection, in a case in which the infringement commenced no later than 2 months after the first publication of the work, shall be dismissed if [full registration and deposit are not made] within the earlier of—

(A) 3 months after the first publication of the work; or

The statutory language implies that a preregistrant who failed to register timely may be worse off than it would have been had it not preregistered. In the latter case, she could still register (or preregister) after infringement occurred and obtain an injunction and actual damages. A preregistrant who failed to register timely cannot bring any action respecting infringements commenced earlier than two months after publication. In light of the statutory language and the legislative history, this harsh consequence seems intended to ensure that preregistered works are registered when they can be.<sup>108</sup>

## II. USE OF PREREGISTRATIONS, 2005–2012

### A. Preregistrations in General

Quantitative data on preregistration comes almost exclusively from the records of the Copyright Office. To date there is little quantitative data based on litigation: We could find only one reported case and a few complaints based on a preregistered work.<sup>109</sup>

The first preregistration was issued on November 15, 2005 for a photograph used in an advertisement for pillows.<sup>110</sup> By the end of 2012, the last year reviewed in this study, 6,086 works had been successfully preregistered with the Copyright Office.<sup>111</sup> These included, 2,473 Motion Pictures<sup>112</sup> (40.63% of

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(B) 1 month after the copyright owner has learned of the infringement.

*Id.* See also *infra* note 160 and accompanying text.

108. H.R. REP. NO. 109-33(I), at 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 220, 223.

109. See *HarperCollins Publishers LLC v. Gawker Media LLC*, 721 F. Supp. 2d 303, 307 (S.D.N.Y. 2010) (issuing a temporary restraining order to a website to take down leaked material from an upcoming release). See *infra* Part II.C.3.. For a complaint filed based on a preregistered work, see, e.g., First Amended Complaint and Demand for Jury Trial at 3, *Zomba Recording LLC v. Lavandeira*, No. 2:07-CV-06591 (C.D. Cal. Dec. 4, 2007) (bringing a copyright infringement action for leaking tracks from an upcoming Britney Spears album where all the tracks had been preregistered after infringement).

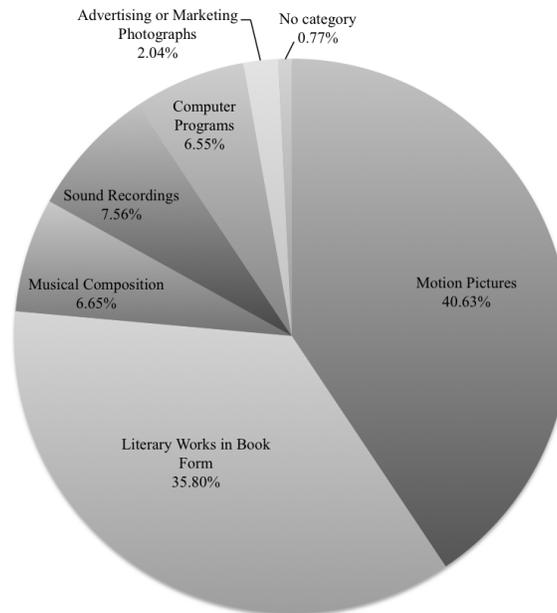
110. *Kimberly B. Pillows*, Preregistration No. 1 (filed on Nov. 15, 2005). Like Copyright registrations, preregistrations are assigned twelve digit identifying numbers. For preregistrations, the number begins with “PRE” and is followed by nine numerals. E.g., PRE000000001. These numbers are for the most part issued in order. In this article all preregistration will be cited as “Preregistration No. X,” where X is all characters to the right of the last leading zero after PRE. For example, PRE000003454 will be written as Preregistration No. 3454. For a more detailed discussion of preregistration numbering, see *infra* Appendix A.

111. See *infra* Appendix A (detailing the Article’s data collection and coding methodology).

112. Many works are preregistered under several categories. For example, Preregistration No. 915, apparently a video game, is preregistered under all six preregistration-eligible categories. *Pier Solar and the Great Architects*, Preregistration No. 915 (filed on Dec. 23, 2007). In our statistical analysis, such works are counted and reported fractionally in each category noted. To wit, *Pier Solar and the Great Architects*

preregistrations), 2,179 Literary Works in Book Form (35.80%), 405 Musical Compositions (6.65%), 460 Sound Recordings (7.56%), 399 Computer Programs (6.55%), 124 Advertising or Marketing Photographs (2.04%), and 47 works that did not specify a type of work (0.77%).<sup>113</sup>

Figure 1—Overall Preregistrations by Category



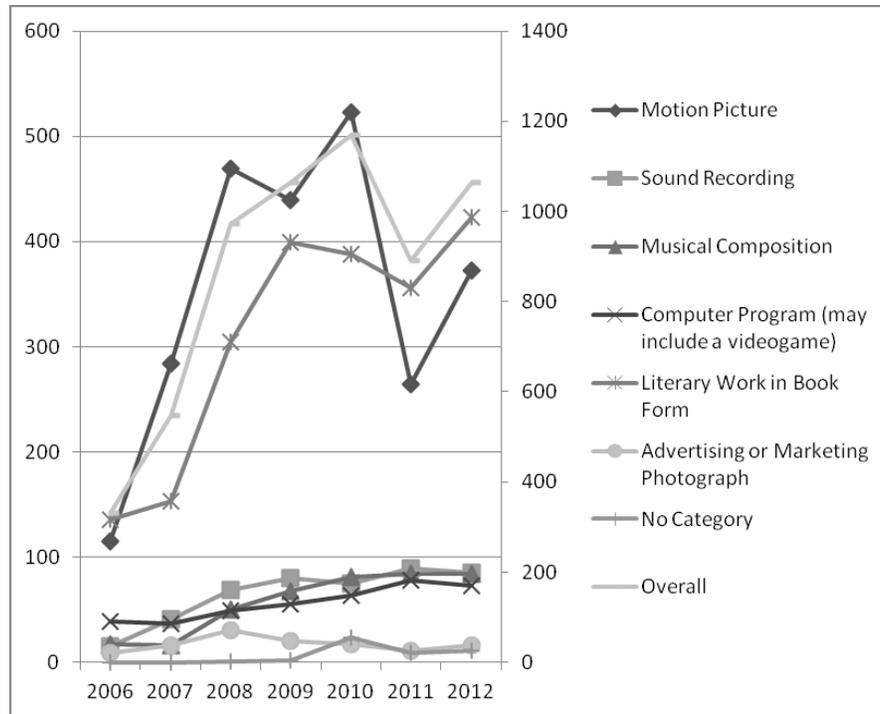
As shown in Figure 2, the annual number of preregistrations increased from 331 in 2006, the first full year of preregistrations, to a high of 1,169 in 2010. It dropped to 891 in 2011 and then rose to 1,064 in 2012.<sup>114</sup>

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contributed 1/6 to the total count of preregistered works in each of the categories. The alternative of heaving all category counts increase by 1 each, instead of 1/6, would misrepresent the total number of works preregistered and the categories' relative size.

113. *E.g., The Floss Diet, Self-Administered Physical Restraint*, Preregistration No. 2700 (filed on Sept. 9, 2009). Many of the preregistrations that do not list a category are consecutive and unrelated, for example, Preregistration Nos. 3975–82; 5051–59. This suggests that the absence of a category might be the result of some error. It is not clear if the Copyright Office would accept a preregistration application that failed to specify a category. *See generally Preregistration Information*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/prereg/help.html> (last updated Feb. 7, 2011) (instructing preregistrants to select at least one category for type of work).

114. Preregistrations by year: 47 in 2005 (one and a half months); 331 in 2006; 547 in 2007; 973 in 2008; 1,064 in 2009; 1,169 in 2010; 891 in 2011; and 1,064 in 2012.

Figure 2—Annual Preregistrations 2006–2012, Overall and by Category<sup>115</sup>

The law mandates that preregistered works be registered upon publication.<sup>116</sup> One might take preregistration as a signal of value: The select group of authors who have taken the extra time, effort, and cost to preregister most likely did so based on private information and expectation that their works prove commercially successful. Preregistration, after all, is limited for works intended for commercial distribution.<sup>117</sup> The data show, however, that less than half of preregistered works are later registered.<sup>118</sup> Only 2,525 of the 6,086 preregistrations covered in this survey, or 41%, were subsequently registered.<sup>119</sup>

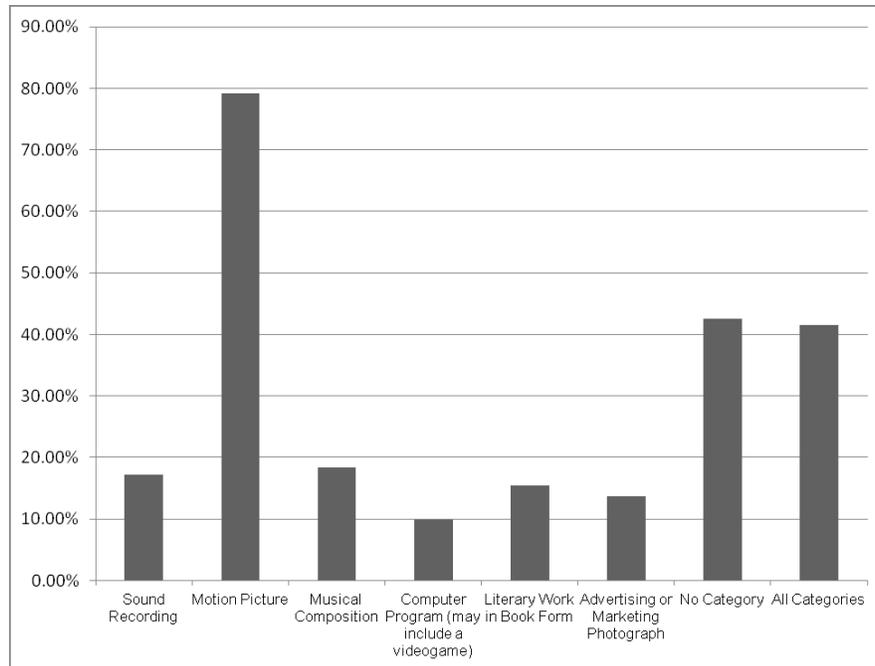
115. The left vertical axis provides the scale for the individual categories while the right one provides the scale for the overall number of preregistrations.

116. See *supra* Part I.D.3.

117. 17 U.S.C. § 408(f) (2012) (“Preregistration of works being prepared for commercial distribution.”).

118. Some preregistrations are subsequently registered multiple times. As a result there were 2,590 registrations that referenced preregistrations but only 2,525 preregistrations that were subsequently registered. See *infra* Appendix A.

119. There is some reason to think that we underestimate follow-up registration rates. Our study checked for follow-up registrations by searching the copyright database for registrations that cross-referenced an earlier preregistration. However, some registrations of preregistered works do not reference the original preregistration. For example, 7 of the 70 top grossing movies for 2006–2012 had registrations that did not properly reference their

Figure 3—Registration Rates of Preregistered Works by Category<sup>120</sup>

Preregistration demonstrates awareness of copyright law and likely a hope for profit. Therefore the absence of a subsequent registration is likely explained by a lack of market success.<sup>121</sup> There is little reason to register

preregistration. *See infra* Appendix B. While clerical errors may bias our overall registration rate statistic down, two unique preregistrants make it significantly higher than what it would be in their absence. Of the 2,525 preregistered works for which we have found follow-up registrations, Comedy Partners and Spanski's massive preregistration pattern accounts for 1,250. *See infra* Part II.C.5. The overall registration rate for other works is much lower, a mere 27%. Even assuming a significant number of clerical errors, it is clear that most preregistered works are not subsequently registered. The aforementioned follow-up registration rates might be biased downwards for another reason: We only looked at registrations that were made on or before June 6, 2013. It is possible that some works in our dataset have been, or will be, registered eventually, but after June 6, 2013. Nonetheless, within the data we observed, the majority of those who do register do so within 28 days of preregistration, and 75% are registered within 97 days. This may suggest that most of the preregistrations that have remained unregistered for months and years (a majority of preregistrations) have been abandoned (at least in terms of commercial distribution) and that the number of overlooked follow-up registrations is small.

120. The high rate of motion picture registrations, 79%, is due in part to the Comedy Partners, Spanski, and Olympics preregistration patterns. The number of their preregistrations is large compared with the overall number of motion picture registrations, and they all register at a rate approaching 100%.

121. This would be the case, for instance, if the work was abandoned and never completed, was completed but never exploited commercially, or if its market following was

commercially unsuccessful works, and authors of such works may decide not to throw good money after bad by further pursuing copyright protection. This reasoning is corroborated by the fact that the majority of preregistrations are made by individuals and entities that have not preregistered a work before and are unlikely to do so again.<sup>122</sup> This is particularly true in every category other than motion pictures, where the rates of follow-up registration are low and where large commercial entities are least active.<sup>123</sup> Thus, a likely reason for the lack of subsequent registration is that preregistrations concern hopeful projects that did not pan out.

### ***B. Major Industry Use of Preregistrations***

One might expect that members of the movie, sound recording, musical works, publishing, software, and advertising photographers trade associations that pushed for the preregistration system would be its major and active users.<sup>124</sup> This is only partially true. In every category of preregistration other than motion pictures, the majority of preregistrants appear to be individual artists and small entities.

Moreover, major content producers preregister a mere fraction of their total output. For example, only four of the top ten selling books on Amazon.com for the years 2006–2012 were preregistered.<sup>125</sup> Of the six major publishing houses that operated during this period,<sup>126</sup> three have never preregistered a work, and the

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dismal such that the low cost of registration was not worthwhile. However, in the absence of actual knowledge of infringement, registration is required only upon the work's publication. It is thus possible that some preregistered yet unregistered works were commercially successful by way of, e.g., public performance.

122. See *infra* Part II.C.6 (discussing preregistrations by nonrepeat players).

123. The rate of preregistered motion pictures that are ultimately registered is 79%. Even if Comedy Partners and Spanski's preregistrations were removed from the data, the rate would be 63%. The corresponding rate is significantly lower for musical compositions (18%), sound recordings (17%), literary works (15%), advertising photographs (14%), and computer programs (10%).

124. See *supra* Part I.C (recounting efforts by the MPAA and the RIAA to push for a legislative solution to the problem of prerelease infringement); *supra* Part I.D.1 (reviewing the parties that participated in the Copyright Office's rulemaking).

125. These were J.K. Rowling's *Harry Potter and the Deathly Hallows*, Stephenie Meyer's *Breaking Dawn*, and Walter Issacson's *Steve Jobs*. See, e.g., *Amazon Best Sellers of 2012*, AMAZON.COM, [http://www.amazon.com/gp/bestsellers/2012/books/ref=zg\\_bsar\\_cal\\_ye](http://www.amazon.com/gp/bestsellers/2012/books/ref=zg_bsar_cal_ye) (last visited July 25, 2013) (containing links to other years).

126. Six publishers dominated the U.S. market, and were commonly referred to as the "Big Six": Hachette, HarperCollins, Macmillan, Penguin, Random House, and Simon & Schuster. Jeremy Greenfield, *Big Publishers, High Prices Dominate E-Book Best Sellers*, FORBES (Aug. 20, 2012), <http://www.forbes.com/sites/jeremygreenfield/2012/08/20/big-publishers-high-prices-dominate-e-book-best-sellers/>. Penguin and Random House merged in 2013, after the period analyzed in this Article. Julie Bosman, *Penguin and Random House Merge, Saying Change Will Come Slowly*, N.Y. TIMES, July 2, 2013, at B3. Neither has used the preregistration system. See *infra* note 127.

other three have only preregistered fourteen books.<sup>127</sup> Similarly, in the software industry, none of the top ten software companies have preregistered any of their works,<sup>128</sup> and the top 25 video game developers have only preregistered 5 games.<sup>129</sup>

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127. Hachette preregistered six works, some under the subsidiaries Little, Brown and Company, and Grand Central Publishing, as follows: Ted Kennedy's biography, *True Compass*, Preregistration No. 2635 (filed on Aug. 20, 2009); *Twilight: The Graphic Novel, Vol. 1*, Preregistration No. 3171 (filed on Feb. 12, 2010); Hank Paulson's *On the Brink*, Preregistration No. 3055 (filed on Jan. 27, 2010); Laurie Sandell's *Truth and Consequences*, Preregistration No. 4814 (filed on Sept. 19, 2011); Michael Pantaloni's *Instant Influence*, Preregistration No. 3781 (filed on Aug. 26, 2010); and J. K. Rowling's *Casual Vacancy*, Preregistration No. 5695 (filed on Jul. 26, 2010). HarperCollins preregistered only a single work, *America by Heart*, by Sarah Palin. Preregistration No. 4046 (filed on Nov. 19, 2010). Simon & Schuster has preregistered seven books, the largest number by any publisher, as follows: Bob Woodward's *The Price of Politics*, Preregistration No. 5673 (filed on July 17, 2012); Walter Isaacson's *Steve Jobs*, Preregistration No. 4881 (filed on Oct. 19, 2011); Congresswoman Gabrielle Giffords's autobiography, *Gabby*, Preregistration No. 4880 (filed on Oct. 19, 2011); Karl Rove's autobiography, *Courage and Consequence*, Preregistration No. 2987 (filed on Jan. 8, 2010); Laura Bush's autobiography, *Spoken from the Heart*, Preregistration No. 3232 (filed on Mar. 3, 2010); an account of the Jaycee Dugard's kidnapping, *A Stolen Life*, Preregistration No. 4614 (filed on Jun. 16, 2011); and Dick Cheney's autobiography, *In My Time*, Preregistration No. 4634 (filed on Jun. 23, 2011). Simon & Schuster also preregistered the audiobooks for *Gabby*, Preregistration No. 4916 (filed on Nov. 4, 2011) and *The Price of Politics*, Preregistration No. 5672 (filed on July 17, 2012). The other three major publishers, Penguin, MacMillan, and Random House, have not preregistered any books.

It is possible that some major commercial works are preregistered solely in the name of the author and do not include the name of the publisher in the preregistration. In reviewing the preregistration records we found four instances of this: J.K. Rowling's *Harry Potter and the Deathly Hallows*, published by Scholastic, Preregistration No. 549 (filed on May 16, 2007); Stephenie Meyer's *Breaking Dawn*, published by Hachette, Preregistration No. 1479 (filed on June 30, 2008); Bob Woodward's *The War Within*, published by Simon & Schuster, Preregistration No. 1559 (filed on Aug. 21, 2008); and Vladimir Nabokov's posthumously published novel, *The Original of Laura*, preregistered by his son, Dmitri Nabokov, and published by Knopf (an imprint of Random House), Preregistration No. 1242 (filed on May 7, 2008).

It is likely that, with the exception of the Nabokov book, the publisher, even though not mentioned, still instigated the preregistration. See *infra* Part II.C.3. And it is noteworthy that these three preregistrations were all done in the first years of the system. Major publishers may now be more thorough with the detail they include in their preregistrations. See *infra* note 196 (discussing the special circumstances of the Nabokov preregistration).

128. See, e.g., Michel van Kooten, *Global Software Top 100 - Edition 2011*, SOFTWARE TOP 100 (Aug. 23, 2011), <http://www.softwaretop100.org/global-software-top-100-edition-2011> (listing the top software companies ranked by revenue in 2011).

129. See, e.g., *Top 25 Gaming Companies 2010*, Software Top 100 (2010), <http://www.softwaretop100.org/top-gaming-companies-2010> (last visited Nov. 14, 2013) (listing the top video game publishers by revenue in 2010). Take-Two Interactive, ranked eighth in revenue among video game publishers in 2010, preregistered *Grand Theft Auto IV*, Preregistration No. 1212 (filed on Apr. 25, 2008); *Grand Theft Auto V*, Preregistration No. 6048 (filed on Nov. 12, 2012); and *Max Payne 3*, Preregistration No. 5276 (filed on Mar. 6,

The sound recording industry has similarly made little use of the preregistration system. None of the Billboard Top 10 Singles for the years 2006–2012 were preregistered,<sup>130</sup> and, in fact, the major record labels have only preregistered four albums.<sup>131</sup> The few major independent artists who have preregistered works on their own seem to have followed the same erratic pattern of preregistration as the major labels, preregistering only occasionally.<sup>132</sup>

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2012). Square Enix, ranked ninth in revenue among video game publishers in 2011, preregistered *Deus Ex: Human Revolution*, Preregistration No. 4616 (filed on June 16, 2011). Finally, second-ranked Activision's *Enemy Territory: Quake Wars* was preregistered by the game's developer "id Software." Preregistration No. 294 (filed on Sept. 22, 2006). Cyanide Studios, a smaller, French publisher, preregistered three of its games: *Of Orcs and Men*, *Aarklash*, and *Dogs of War*. Preregistration Nos. 5472 (filed on May 22, 2012); 6067 (filed on Nov. 29, 2012); and 6068 (filed on Nov. 29, 2012), respectively.

130. See *Charts - Year End*, BILLBOARDBIZ, <http://www.billboard.com/biz/charts/year-end> (last visited July 16, 2013); see also *infra* note 131 (discussing Katy Perry's album *Teenage Dream*—while many songs from that album made the top 10, only the reissue of the album was preregistered).

131. Zomba Music Group, a subsidiary of RCA preregistered Britney Spears's 2007 album, *Blackout*. Preregistration Nos. 674–88 (filed on Sept. 5, 2007), 751 (filed on Sept. 5, 2007), 755–57 (filed on Sept. 10, 2007), 797 (filed on Oct. 3, 2007). Zomba individually registered each of the tracks she recorded for the album, including the tracks that ultimately did not appear in the album.

Metallica preregistered and subsequently registered its 2008 album *Death Magnetic* through an entity called Creeping Death Music. Preregistration No. 1598 (filed on Sept. 5, 2008). Warner Brothers is listed on the preregistration and appears related to the band. *Metallica*, <http://www.warnerbrosrecords.com/artists/metallica> (last visited Dec. 29, 2012).

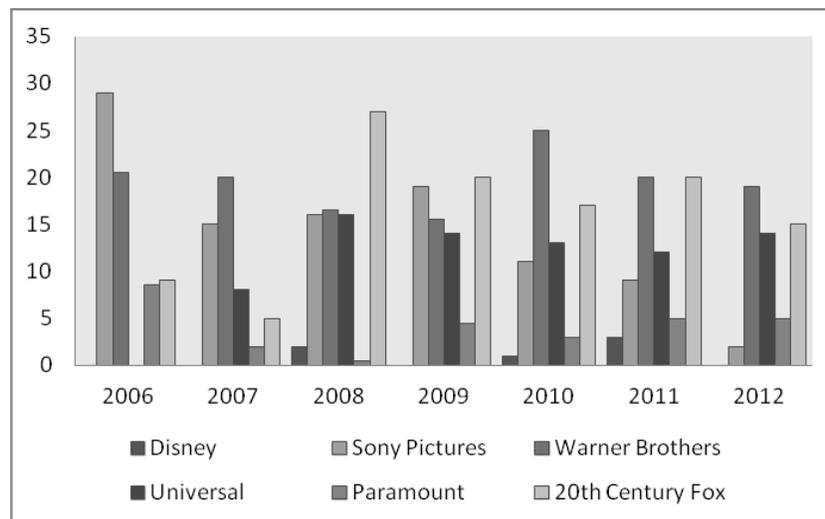
Capital Records, a subsidiary of EMI, preregistered Katy Perry's *Teenage Dream: The Complete Confection*. Preregistration No. 5237 (filed on Feb. 22, 2012). This album was a rerelease that contained only three original tracks that were not on the original album—the remaining additions to the earlier album appear to be derivative works. James Montgomery, *Katy Perry Reissue Is Teenage Dream 'With A Face-Lift'*, MTV NEWS (Mar. 26, 2012), <http://www.mtv.com/news/articles/1681774/katy-perry-teenage-dream-complete-confection.jhtml>.

Capital Latin, another EMI division, preregistered Belinda's *Catarsis*. Preregistration No. 5821 (filed on Aug. 8, 2012).

132. Jay-Z preregistered some unreleased tracks from his 2009 album, *Blueprint 3*. See *infra* Part II.C.2 for more discussion. Duran Duran, while signed to Epic Records, a subsidiary of Sony Records, began work on a new album in 2005. The band eventually left Epic, and subsequently preregistered the album on its own. *Reportage*, Preregistration No. 5021 (filed on Dec. 21, 2011). Tori Amos preregistered her albums *Midwinter Graces*, Preregistration No. 2744 (filed on Oct. 5, 2009), and *Night of Hunters*, Preregistration No. 4684 (filed on July 19, 2011). However, she did not preregister other albums that she released after preregistration became available. The band Flogging Molly preregistered their most recent album, *Speed of Darkness*, Preregistration No. 4391 (filed on Mar. 16, 2011). They had not preregistered their earlier albums, released after preregistration became available. Singer Eddie Money preregistered *Reflections Vol. 1*, Preregistration No. 7 (filed on Nov. 29, 2005). The album was later released under a different name, *Wanna Go Back*, in 2007. See Eddie Money, WARRIOR RECORDS, <http://www.warriorrecords.com/eddiemoney/> (last visited June 13, 2013).

The film and television industries have preregistered more of their output than others. But again, it does not appear that the industry as a whole preregisters its work as a matter of course. More than half (1,488) of the 2,473 preregistrations in the motion picture category seem attributable to two litigated cases of mass copyright infringement<sup>133</sup> and to NBC's practice of preregistering all of its Olympics coverage.<sup>134</sup> Small entities, other television networks, and individuals preregistered another 520 works in the motion picture category. Only 465 motion picture preregistrations, or 19%, list one of the six major film studios or their partners as a copyright claimant.<sup>135</sup> To give a rough sense, this represents around 40% of the movies the major studios distributed over the survey period.<sup>136</sup>

Figure 4—Annual Preregistrations by Major Film Studios, 2006–2012



133. See discussion *infra* Part II.C.5.

134. NBC used preregistration extensively for its coverage of the Olympics and made a total of 147 preregistrations spanning the network's programming for the 2008, 2010, and 2012 Games. See, e.g., *2008 Olympic Games NBC Network Coverage August 12, 2008*, Preregistration No. 1509 (filed on Aug. 7, 2008). All but one of NBC's preregistered Olympic coverage days were subsequently registered.

135. The big six studios, the members of the MPAA, are Universal (NBC Universal), Paramount (Viacom), Warner Brothers (Time Warner), Columbia Pictures (Sony Pictures), Fox, and Disney. See generally MOTION PICTURE ASSOCIATION OF AMERICA, THEATRICAL MARKET STATISTICS 2012, at 21 (2012). There are, of course, other studios that are "major" in the sense of being popularly known, but that are independent of the "Big Six" in both production and distribution. These include Lucasfilm, which only recently became part of Disney, and Steven Spielberg's Dreamworks Pictures. While both of these studios have used the preregistration system, they are not considered here as "major studios."

136. From January 2006 to December 2012 the major studios distributed 1,138 movies. See MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 135, at 20. Because preregistration became available in November 2005, there have been more than 1,138 movies distributed during the period preregistration has been available.

Interestingly, only 70%, or 49 out of 70, of the top ten grossing movies for the years 2006–2012 were preregistered.<sup>137</sup> Only Warner Brothers and Universal preregistered all of their top-grossing movies. Disney has never preregistered a film<sup>138</sup> (although one Disney subsidiary has),<sup>139</sup> and Fox, Sony Pictures, and Paramount only preregistered some of their top films. Given the size of the budgets for these films and the great potential harm from prerelease piracy, one would think that the benefit from preregistration outweighs the \$115 preregistration fee (even assuming low probabilities of prerelease infringement). Yet many movies distributed by major studios are not preregistered. Given the tumult *Hulk* caused in the film industry, and the private resources spent in the lawmaking process, these data are surprising.<sup>140</sup>

With a few exceptions, television studios have used the preregistration system infrequently in their ordinary course of creative business. NBC has preregistered all its coverage of the Olympics since 2008,<sup>141</sup> as well as a few episodes of its soap opera *Passions*.<sup>142</sup> The other major networks—ABC, CBS, and Fox—have not preregistered anything. Cable networks made occasional use of the system, but only for a small fraction of their overall production.<sup>143</sup> Only Comedy

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137. See *infra* Appendix B; see also BOX OFFICE MOJO, <http://www.boxofficemojo.com> (last visited Nov. 6, 2013).

138. In place of preregistration, Disney appears to employ a variety of strategies to protect its intellectual property from prerelease infringement. For its animated films, including those released by its subsidiary Pixar, Disney registers the model sheets of all major characters in the film prior to release. *E.g.*, *Chick Hicks—green race car no. 86*, Registration No. VAu000707181 (from *Cars*); *Wall-A*, Registration No. VAu000739167 (robot from *Wall-E*); *Ratatouille—Auguste Gusteau*, Registration No. VAu000718428; *Tangled Model Sheets—Set 1*, Registration No. VAu001028070. Sometimes Disney will register a film’s screenplay before release. *E.g.*, *POC: W-End*, Registration No. PAu003025192 (*Pirates of the Caribbean: At World’s End*); *Ratatouille*, PAu003121083.

139. MVL Film Finance, LLC, a subsidiary of the Walt Disney Corporation, has preregistered six films and one television show. Two of the films and the television show were preregistered before Disney bought MVL Film’s parent company, Marvel Entertainment, in 2009. *Iron Man*, Preregistration No. 1020 (filed on Feb. 19, 2008); *The Incredible Hulk*, Preregistration No. 1022 (filed on Feb. 19, 2008); *Iron Man: Armored Adventures Episode 1 “Iron, Forged in Fire” Part One*, Preregistration No. 1890 (filed on Dec. 22, 2008). See Ethan Smith, *Disney Completes Marvel Acquisition for \$4.3 Billion*, MARKET WATCH (filed on Jan. 1, 2010), <http://www.marketwatch.com/story/disney-completes-marvel-acquisition-for-43-billion-2010-01-01>. Nevertheless, Marvel has continued to preregister its films after being acquired by Disney. *Iron Man 2*, Preregistration No. 3332 (filed on Apr. 2, 2010); *Thor*, Preregistration No. 4206 (filed on Jan. 20, 2011); *Captain America: The First Avenger*, Preregistration No. 4311 (filed on Feb. 18, 2011); *Marvel’s The Avengers*, Preregistration No. 5019 (filed on Dec. 22, 2011).

140. See *infra* Part II.C.1 for possible explanations.

141. See *supra* note 134.

142. Preregistration Nos. 156–57 (filed on May 23, 2006).

143. Cartoon Network preregistered 13 episodes of assorted programs. Various Episodes of *Squidbillies*, Preregistration Nos. 282–85 (filed on Sept. 13, 2006); *The Venture Bros.—Episode #24: Viva los Muertos*, Preregistration No. 296 (filed on Sept. 25, 2006); Episodes of *Robot Chicken*, Preregistration Nos. 302–03 (filed on Sept. 20, 2006); Episodes

Partners, a division of Viacom, made some consistent use of the system. As explained below, it preregistered every episode of *The Daily Show* and *The Colbert Report* for a while, apparently in the context of pending litigation, and has since stopped.<sup>144</sup>

Admittedly, the data regarding preregistration use by the major content producers is imperfect. Preregistrations are often made under a subsidiary.<sup>145</sup> It is difficult to identify every smaller and less well-known subsidiary of a parent company to include in our analysis, and we may have overlooked some.<sup>146</sup> Moreover, in some cases, individuals have preregistered work that was later distributed by a publishing house, as J.K. Rowling did with one of her *Harry Potter* books.<sup>147</sup>

Nonetheless, we have reason to believe that our description of the trends in the data is generally accurate. First, we verified the identity of any entity that preregistered more than three works to determine if it was a subsidiary or partner of a major content producer. Second, as we discuss below,<sup>148</sup> our conversations with the executives at major studios suggest that they do not preregister every movie they distribute. Our numbers are consistent with their description of their practices. We observed in the data, and confirmed with the RIAA, that no major record label preregisters content as a matter of business practice. Rather, they preregister after detecting infringement when registration is for some reason

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of the *Venture Bros.*, Preregistration Nos. 316–17 (filed on Oct. 4, 2006); Episodes of *Aqua Teen Hunger Force*, Preregistration Nos. 325–26 (filed on Oct. 17, 2006); *Aqua Teen Hunger Force: The Movie*, Preregistration No. 335 (filed on Oct. 25, 2006); *Robot Chicken: Star Wars Episode II*, Preregistration No. 1406 (filed on June 30, 2008). AMC began preregistering most, but not all, episodes of *The Walking Dead* in 2012—the show’s third season—and has continued the practice. Preregistration Nos. 6019 (filed on Nov. 4, 2012); 6032–34 (filed on Nov. 15–16, 2012); 6156–59 (filed on Jan. 31, 2013); 6161 (filed on Jan. 31, 2013); 6164 (filed on Jan. 31, 2013).

144. See *infra* Part II.C.5.

145. Sony Pictures, for example, rarely preregisters under its own name. We found 11 preregistrations that list “Sony Pictures” in the claimant field. Some of these are listings for subsidiaries as well, such as Sony Pictures Animation. See, e.g., *Open Season*, Preregistration No. 254 (filed on Aug. 25, 2006). It often preregisters under a subsidiary, such as Columbia Pictures.

146. With regard to book publishers, this difficulty was easily solved as imprints within a major publishing house share the same address as the publisher, and users may search for this address. See, e.g., *On the Brink: Inside the Race to Stop the Collapse of the Global Financial System*, Preregistration No. 3055 (filed on Jan. 27, 2010) (address for Grand Central Publishing the same as Hachette’s U.S. office). In one instance, a preregistration did not mention the name of the publisher, but included the publisher’s address. *Casual Vacancy*, Preregistration No. 5695 (filed on July 26, 2012) (by J. K. Rowling).

147. *Harry Potter and the Deathly Hallows*, Preregistration No. 549 (filed on May 16, 2007). See also *supra* note 127 (listing instances of authors preregistering work released by major publishers); see also *infra* Part II.C.3 (arguing that the publisher likely suggested the preregistration).

148. See *infra* Part II.C.1.

inadequate and they need to go to court.<sup>149</sup> A final way to see that the overall rate of preregistration by major content producers is low is that it is low even for their most profitable works. As we discussed earlier in this section, the top-selling records, movies, books, and video games—which we could search individually by name—all exhibited remarkably low levels of preregistration.

### *C. Motivations for Observed Preregistration Patterns*

The preregistration data contain several notable patterns. For example, some parties have preregistered a great number of works. In some cases, a particular subcategory of works draws a notable number of preregistrations. In others, a few particular preregistrations stand out as the only instances of use by major industry players. To get a better sense of the data, we conducted a series of interviews with users and lawyers for users of the system. Not suggested as a representative sample, they nevertheless shed valuable light on the reasons that may make one preregister a particular work. We first discuss preregistration patterns in the various industries whose works are eligible for preregistration. Then, we discuss two parties who preregistered heavily for a while, but then stopped. We suspect that these may have been motivated by pending legal disputes. Lastly, we discuss preregistrations by individuals and small entities, which account for the majority of the use of the system.

#### *1. Film Studios*

The film industry is both the industry most likely to benefit from preregistration and the system's most consistent commercial user. Motion pictures are expensive to produce, and during post production the studio often lacks control over the work and thus risks leaks.<sup>150</sup> Preregistration allows a studio to get into court quickly and seek an injunction to stop the leak and deters leakers with the threat of statutory damages and attorney's fees.<sup>151</sup> However, while one might expect the industry to preregister nearly every film, that is not the case.<sup>152</sup>

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149. Telephone Interview with Steve Marks, Chief, Digital Business & General Counsel, RIAA & Jennifer Pariser, Senior Vice President of Litigation and Anti-Piracy, RIAA (August 7, 2013) [hereinafter RIAA interview].

150. Telephone Interview with Anonymous #3, *supra* note 12. This is exactly what happened with *Hulk*—the leaked copy had been lent to an advertising agency and an employee there lent it to a friend, who uploaded it on the internet. Weiser, *supra* note 4.

151. Of course, as one studio lawyer noted, not all potential leakers are thinking about preregistration and statutory damages, but these generally add to deterrence. Telephone Interview with Anonymous #3, *supra* note 12. A different attorney looked at the counterfactual and worried what would happen if pirates knew that the penalties were less for posting unreleased, unregistered films. Telephone Interview with Anonymous #4, *supra* note 11. Furthermore, as a lawyer in another industry told us, the threat of statutory damages adds force to cease and desist letters (which can be sent to intermediaries). Telephone Interview with Anonymous #10 (June 26, 2013).

152. *See supra* Part II.B.

According to executives at several of the major film studios, they preregister every work they *produce*, but not every work they *distribute*.<sup>153</sup> This makes sense: A studio that merely distributes another's film does not generally have the right to preregister it. The structure of the film industry is such that major studios produce a comparatively small number of the films that bear their name. A large number of the films that the major studios distribute are actually acquired from smaller filmmakers who are in the business of making films for the purpose of selling them to the major studios for distribution.<sup>154</sup> Still, many small producers and one of the major studios, Disney, do not regularly preregister their work.<sup>155</sup>

There are several related sets of factors likely driving smaller studios not to preregister. First, there is less of a threat of a leak for a smaller picture. Many of these films do not become well known until after they are released, so there is little demand for pirated copies before release. This lack of publicity also allows smaller studios to get protection by registering a copy of the screenplay for their film rather than preregistering. Whereas a major studio making a highly publicized and anticipated blockbuster may be hesitant to deposit its screenplay in the Copyright Office, a smaller studio making a less well-known picture may not have such fears. At least one mid-size studio explicitly told us that registering the script was their alternative to preregistration.<sup>156</sup>

An additional factor at smaller studios is the size and experience of their staff. As one industry lawyer said, smaller studios "don't have a dedicated copyright department . . . . They have someone who has 15 other responsibilities and doesn't file copyrights everyday like [the major studios] do. So, things fall through the cracks."<sup>157</sup> Indeed, even for films produced by major studios, preregistration can fall through the cracks.<sup>158</sup>

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153. Telephone Interview with Anonymous #4, *supra* note 11; Telephone Interview with Anonymous #3, *supra* note 12.

154. According to attorneys in the industry, every licensing deal is slightly different and the relationship between the major studio and its smaller partner varies from film to film. Thus, unfortunately, there is no efficient way to determine when a major studio makes a film and when it merely distributes one. It is hard to determine exactly how often studios preregister the films they produce (as opposed to distribute). Telephone Interview with Anonymous #4, *supra* note 11.

155. Disney and most of its subsidiaries do not appear to preregister, though one recently acquired subsidiary, MVL Film Finance, LLC, does. *See also supra* note 138 (discussing the strategies Disney uses to stop prerelease copyright infringement); *supra* note 139 (discussing preregistrations by MVL Film Finance, LLC).

156. Telephone Interview with Anonymous #1 (Jan. 30, 2013). Because copying the entire film would certainly be an illicit derivative work of the screenplay, this can provide almost all of the protection that a preregistration would. If someone pirated a still shot, or a sequence without any dialogue, however, script preregistration might not provide coverage.

157. Telephone Interview with Anonymous #4, *supra* note 11.

158. For example, the movie *The Smurfs*, Registration No. PA0001743057, produced by Columbia Pictures, was not preregistered. *The Smurfs 2* has been, however. Preregistration No. 6176 (filed on Feb. 8, 2013).

In the case of small studios, these practical problems associated with smaller and less experienced staff are compounded by the requirement to follow up with a full registration in a timely manner. Without staff dedicated to copyright registration, smaller studios are less confident that they will actually file a timely follow up registration.<sup>159</sup> The penalties for failing to do so can be quite harsh, including the de facto granting of a license to any prerelease infringer.<sup>160</sup> Consequently, some smaller studios,<sup>161</sup> and even one major television studio, with a dedicated copyright department,<sup>162</sup> have told us that they do not preregister, in order to avoid being worse off in the event that they fail to follow up with full registration.<sup>163</sup>

Overall, the film industry has made substantial use of preregistration, and augmented it by improving control over films during postproduction.<sup>164</sup> Though prerelease infringement still exists, our interviewees expressed their satisfaction with preregistration.<sup>165</sup> As one industry lawyer told us, preregistration is “a relatively inexpensive process and it’s there when you need it.”<sup>166</sup> Another lawyer was more sanguine about the system: “Preregistration worked.”<sup>167</sup>

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159. As one copyright attorney indicated, providing a deposit copy before the § 408 deadline can actually present some significant logistical challenges, particularly for smaller, less well-heeled studios. “[Registration] is also cost and labor intensive, depending on what you’re producing. If you’re producing [a] lot of material you have to have [full time] people doing it . . . . [I]n the case of a film, the Copyright Office requires the registrant to deposit] a 35mm [archival quality] studio print [that] costs somewhere around \$2,000. It is worth it to the majors to make registrations, but it may not be worth it, or even possible, for independent filmmakers . . . to give [a print] to the [C]opyright [O]ffice.” Telephone Interview with Anonymous #2, *supra* note 10.

160. *See supra* note 107 and accompanying text.

161. Telephone Interview with Anonymous #1, *supra* note 156.

162. Telephone Interview with Anonymous #6 (Feb. 1, 2013).

163. Some copyright attorneys explicitly advise their smaller clients against preregistration because of § 408. As one lawyer told us: “Why get yourself into potential problems where you [may be unable to] file a suit? Once you step off the curb into the preregistration street, there are vulnerabilities. You always have preregistration available if you need it, and maybe, for some high profile thing, you do it, but you don’t want it to be part of your regular practice because once you [do], you have to make sure you have a timely registration and deposit.” Telephone Interview with Anonymous #2, *supra* note 10.

164. *See supra* note 165 (discussing the millions studios spend to prevent leaks during post production); Telephone Interview with Anonymous #3, *supra* note 12.

165. *See* Ma et al., *supra* note 64 (detailing and quantifying prerelease infringement in the movie industry in the years 2006–08). *See also* Brian Stelter, *Piracy Puts Film Online One Month Before Open*, N.Y. TIMES, Apr. 2, 2009, at B3 (discussing a prerelease leak of the film *Wolverine* and noting how the industry had largely eliminated the problem of prerelease piracy since *Hulk*); Xan Brooks, *Harry Potter Studio to Investigate Deathly Hallows Leak*, THE GUARDIAN (Nov. 18, 2010 08:54 EST), <http://www.guardian.co.uk/film/2010/nov/18/harry-potter-deathly-hallows-leak> (recounting another prerelease leaking incident and also stating that the problem has been largely controlled).

166. Telephone Interview with Anonymous #3, *supra* note 12.

167. Telephone Interview with Anonymous #4, *supra* note 11.

## 2. Record Labels

By some accounts, every single record is leaked before its official release date,<sup>168</sup> even in instances when a label takes extraordinary measures to prevent leaks.<sup>169</sup> Nevertheless, the music industry uses the preregistration system in a very limited way: Generally, it only preregisters the biggest releases and even then, only after discovering a prerelease leak.<sup>170</sup> The industry was one of the chief drivers of the ART Act, and the RIAA, along with the MPAA, convened the meeting at which the Copyright Office first proposed preregistration as a solution to prerelease piracy.<sup>171</sup> One reason so little music is preregistered lies at that meeting. As the former General Counsel of the Copyright Office recalls, what the music industry really wanted was to not have to register in prerelease infringement cases; what they got was preregistration.<sup>172</sup>

The main reason the music industry has not used preregistration extensively, however, is that it has not found the system to meet its needs very well. In most cases, registration provides all the protection the music industry needs.<sup>173</sup> While preregistration may provide extra protection in some instances, it is not economical for the music labels to preregister every label or track, as thousands of these are released every year.<sup>174</sup>

Labels deal with prerelease infringement in ways that reduce its impact. When they discover a prerelease leak, they try to move the release date up, an option the film industry generally lacks.<sup>175</sup> In most instances, record companies are able to remove leaked content by sending a takedown notice to the host of the infringing content.<sup>176</sup> Litigation is relatively costly and not worth it for the average album.<sup>177</sup> Even if a label gets to court immediately, the damage has already been done.<sup>178</sup>

When the music industry preregisters, it does so after a prerelease leak was detected and even then only in exceptional circumstances.<sup>179</sup> For example, Zomba Music Group, a subsidiary of RCA, preregistered each track produced for

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168. Claire Suddath, *Album Leaks: A Nightmare or Opportunity*, TIME (July 8, 2010), <http://www.time.com/time/arts/article/0,8599,2002094,00.html>.

169. Sasha Frere-Jones, *Random Access Denied*, THE NEW YORKER (June 10, 2013), <http://www.newyorker.com/online/blogs/sashafrerejones/2013/06/daft-punk-random-access-memories-leaked-reviews.html?intcid=obnetwork>.

170. RIAA Interview, *supra* note 149.

171. *See supra* Part I.C.

172. Telephone Interview with David Carson, *supra* note 16.

173. RIAA interview, *supra* note 149.

174. *Id.*

175. *Id.*

176. *Id.*; *see also* 17 U.S.C. § 512(c) (2012) (granting service providers immunity for copyright infringement if they remove content “upon notification of claimed infringement”).

177. RIAA Interview, *supra* note 149.

178. *Id.*

179. *Id.*

Britney Spears's 2007 album *Blackout*, including the tracks that ultimately did not appear on the album,<sup>180</sup> after the blogger Perez Hilton leaked four of the tracks prior to the album's release and refused the label's demand to take them down.<sup>181</sup> Zomba sued, seeking both an injunction and statutory damages for the copyright violations.<sup>182</sup> The case settled, presumably after Perez removed the pirated content.<sup>183</sup>

The Spears case not only illustrates the typical situation in which a record label uses preregistration—the prerelease leak of a major artist<sup>184</sup>—but may also suggest that some in the industry might not fully understand the nature of the formality. Although Spears's label sought statutory damages, these are only available for pre-release infringements that take place after preregistration.<sup>185</sup> If some in the industry believe that statutory damages and attorney's fees are available for unpublished works that are preregistered after infringement, then this might explain some of the industry's infrequent use of the system.

It is worthwhile noting that while Spears's album was subsequently registered, the unreleased tracks from the album were not.<sup>186</sup> These tracks exist in a curious state: preregistered, but seemingly no longer set for commercial release.<sup>187</sup>

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180. Preregistration Nos. 674–88 (filed on Sept. 5, 2007), 751 (filed on Sept. 5, 2007), 755–57 (filed on Sept. 10, 2007), 797 (filed on Oct. 3, 2007).

181. See First Amended Complaint, *Zomba Recording LLC v. Lavandeira*, No. 2:07-CV-06591 (C.D. Cal. Dec. 6, 2007). The complaint claims the infringement took place on Aug. 23, 2007. *Id.* The earliest preregistration from the album, Preregistration No. 674, took place on Sept 5, 2007.

182. *Id.* Zomba also sought attorney's fees as part of a related wrongful conversion claim. *Id.*

183. First Amended Complaint, *Zomba Recording LLC v. Mario Aramando Lavandeira et al*, Docket No. 2:07-CV-06591 (C.D. Cal. July 8, 2008).

184. Another example of record company preregistering a leaked major release is Katy Perry's *Teenage Dream: The Complete Confection*. James Dinh, *Katy Perry's 'Part Of Me' Leaks Online*, MTV.COM (Dec. 30, 2010), <http://www.mtv.com/news/articles/1655103/katy-perrys-part-me-leaks-online.jhtml>; see also *supra* note 131 for more information about the album.

185. 17 U.S.C. § 412 (2012) (exempting “work[s] that [have] been preregistered . . . before the commencement of the infringement” from the general rule that registration prior to infringement is a prerequisite for statutory damages or attorney's fees). Part of the confusion may be due to the rule for infringements that take place after publication. As long as an album is registered within three months of publication, it is as if it was registered the day of publication and statutory damages and attorney's fees are available for any infringements taking place after publication. *Id.* Of course, just because a certain type of relief is sought in a complaint, does not mean that the party believed it would be granted that relief. However, from our discussion with representatives from the RIAA, we have reason to believe that there is some confusion about the availability of statutory damages and attorney's fees for works infringed prior to publication that were not preregistered until after infringement. RIAA Interview, *supra* note 149.

186. See *Blackout*, Registration No. SR0000609604 (listing the album tracks).

187. Spears would release a special Target edition of the album that included one of the unreleased tracks. See DISCOGS, <http://www.discogs.com/Britney-Spears-Blackout/release/1138712> (last visited July 27, 2013) (listing the additional track *Outta this*

The same seems true with respect to three preregistered but unreleased tracks from Jay-Z's album *Blueprint 3*.<sup>188</sup> Such works are eligible for the enhanced protection that preregistration entails, but may never be released or registered (and deposited).<sup>189</sup> Such use of the preregistration system was probably unintended and unforeseen by Congress.<sup>190</sup>

While record companies and the RIAA do not speak so lightly of leaks,<sup>191</sup> in practice they seem to have accepted that some level of leakage is inevitable. An attorney we spoke with said that the consensus was that the industry had to find a market-based solution to the problem of music piracy.<sup>192</sup> The RIAA seemed to believe that the best way to stop piracy is to move people over to legitimate services.<sup>193</sup> In practice, this means greater availability of digital music and streaming services, a solution that appears to be working better over time.<sup>194</sup> Preregistration would seem to have little role in this market-based solution.

### 3. Book Publishers

The relatively small number of book preregistrations by major publishers is probably due to the fact that books are less prone to prerelease infringement than motion pictures. First, books generally generate less prerelease excitement as compared to the anticipation that routinely accompanies the opening of a film. Second, books are not as easily duplicated and distributed online. For many readers—at least for now—reading a book digitally is an inferior substitute for the printed version. Consequently, the online pirates' incentive to obtain books prematurely is comparatively weak.<sup>195</sup> As one industry lawyer told us, given all the

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*World*, Preregistration No. 687). This additional track does not appear to have been registered after publication in violation of 17 U.S.C. § 408(f)(4). See *supra* Part I.D.3.

188. *Blueprint 3 Non-Album Tracks*, Preregistration No. 3276 (filed on Mar. 16, 2010). Jay-Z did not preregister the songs actually included in the album even though they were leaked prior to the album's release date. Cyrus Langhorne, *Jay-Z's Blueprint 3 Leaks Online Early*, SOHH.COM (filed on Aug. 31, 2009), [http://www.sohh.com/2009/08/jay-zs\\_blueprint\\_3\\_leaks.html](http://www.sohh.com/2009/08/jay-zs_blueprint_3_leaks.html).

189. The statute states that preregistration is for works being prepared for commercial release. 17 U.S.C. § 408(f) (2012). Undoubtedly, these tracks were being prepared for commercial release, but are not any longer. Should copyright infringement actually occur, the tracks would then have to be registered. 17 U.S.C. § 408(f)(4) (2012).

190. See *infra* Part III.E (suggesting a legislative fix).

191. See, e.g., Record Industry Association of America, *Who Music Theft Hurts*, [http://riaa.com/physicalpiracy.php?content\\_selector=piracy\\_details\\_online](http://riaa.com/physicalpiracy.php?content_selector=piracy_details_online) (last visited July 30, 2013).

192. Telephone Interview with Anonymous #7 (July 17, 2013).

193. RIAA Interview, *supra* note 149.

194. Victor Luckerson, *Revenue Up, Piracy Down: Has the Music Industry Finally Turned a Corner?*, TIME (Feb. 28, 2013), <http://business.time.com/2013/02/28/revenue-up-piracy-down-has-the-music-industry-finally-turned-a-corner/>.

195. Telephone Interview with Anonymous #7, *supra* note 192 (noting also that this may change as e-books become a larger part of the book market); see also *infra* note 200 and accompanying text (describing the poor quality of the leak of *Harry Potter and the Deathly Hallows*).

turmoil in the publishing industry, copyright infringement, either before or after release, is not a major concern.<sup>196</sup>

Two notable exceptions to this rule among works of fiction were the later novels in J. K. Rowling's *Harry Potter*<sup>197</sup> and Stephenie Meyer's *Twilight* series,<sup>198</sup> both of which were eagerly anticipated. Unsurprisingly, the final novels in both of these series were preregistered.<sup>199</sup> Despite unprecedented security, the last Harry Potter novel was leaked online before its release as a series of blurry photographs of the book.<sup>200</sup> While the publisher, Scholastic, was not able to completely plug the leak, it took several legal measures that reduced the availability of the leaked versions, including sending takedown notices to websites demanding that the leaked version be removed.<sup>201</sup> The additional remedies that

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196. Telephone Interview with Anonymous #7, *supra* note 192. There is, however, one form of copyright infringement that the major publishers do regularly encounter: unauthorized foreign editions and translations. *Id.* This may explain why the estate of Vladimir Nabokov apparently took the step—unusual for an established author—of preregistering an unpublished novel of the late author *before* shipping it to publishers. The estate had often seen pirated copies of Nabokov's works being released in Russia after the collapse of the Soviet Union. See Brian Boyd, *Remembering Dmitri Nabokov, the Novelist's Son and Literary Executor*, THE DAILY BEAST (May 10, 2012), <http://www.thedailybeast.com/articles/2012/05/10/remembering-dmitri-nabokov-the-novelist-s-son-and-literary-executor.html>. The preregistration, Preregistration No. 1242, is dated May 7, 2008. Nabokov's son, Dmitri, announced that he was selling the book in late April of that year. Kate Connolly, *Nabokov's Last Work Will Not Be Burned*, THE GUARDIAN (Apr. 22, 2008), <http://www.guardian.co.uk/books/booksblog/2008/apr/22/nabokovoriginaloflaura>. In an interview with Dmitri published on May 4, 2008, he said that at that point only five or six people had seen the manuscript, which was on notecards. Steve Coates, *His Father's Siren, Still Singing*, Week in Review, N.Y. TIMES, May 4, 2008, at 5. As some scholars had seen the work well before Dmitri decided to publish, it seems likely that at the time of the interview, the work had not been submitted to publishers. See *id.* It was at least July before a publisher bought the rights to the novel. Leon Neyfakh, *Department of Old but Unreported News: Knopf to Publish Nabokov's Unfinished Novel The Original of Laura*, N.Y. OBSERVER (Nov. 19, 2008), <http://observer.com/2008/11/departments-of-old-but-unreported-news-knopf-to-publish-nabokovs-unfinished-novel-the-original-of-laurai/>.

197. Motoko Rich, *New Potter Book May Have Made Its Way to Web*, N. Y. TIMES (July 18, 2007), <http://www.nytimes.com/2007/07/18/us/18potter.html>.

198. Dan Glaister & Sarah Falconer, *Mormon Who Put New Life into Vampires*, THE GUARDIAN (July 19, 2008), <http://www.guardian.co.uk/books/2008/jul/20/news.booksforchildrenandteenagers>.

199. *Harry Potter and the Deathly Hallows*, Preregistration No. 549 (filed on May 16, 2007); *Breaking Dawn*, Preregistration No. 1479 (filed on July 30, 2008).

200. David Mehegan, *Despite Tight Security, Harry Potter Book Leaked on Internet*, THE BOSTON GLOBE (July 17, 2007), [http://www.boston.com/ae/books/articles/2007/07/17/despite\\_tight\\_security\\_harry\\_potter\\_book\\_leaked\\_on\\_internet/?page=full](http://www.boston.com/ae/books/articles/2007/07/17/despite_tight_security_harry_potter_book_leaked_on_internet/?page=full).

201. *Id.*

preregistration made available likely added force to Scholastic's demands.<sup>202</sup> Nevertheless, major publishers rarely preregister novels.<sup>203</sup>

One curious aspect of the *Twilight* and *Harry Potter* preregistrations is that they do not list the books' publishers.<sup>204</sup> Nevertheless, given the prominence of the books, Hachette's prior use of the system,<sup>205</sup> and the efforts that Scholastic took to prevent any prerelease piracy,<sup>206</sup> it seems likely that the publishers ensured that the books were preregistered. In fact, part of the reason there are so few preregistrations of major books is that only two major publishers, Simon & Schuster and Hachette, preregister books before infringement, which may suggest that publishers, not famous authors, push for preregistration.<sup>207</sup>

The only category of books that have been preregistered by commercial publishers in any quantity is celebrity biographies and memoirs.<sup>208</sup> Any student of copyright law would be immediately reminded of the prerelease infringement involved in the Supreme Court's case of *Harper & Row v. Nation*.<sup>209</sup> In that case, *The Nation* magazine obtained a purloined copy of President Gerald Ford's memoir, *A Time to Heal*, three weeks before the book's official release and published excerpts from it. Harper & Row, the book's publisher, sued, and eventually the case came before the Supreme Court.<sup>210</sup> While the case centered on

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202. The book was preregistered on May 16, 2007, well before any reports that the book was leaked online. *Harry Potter and the Deathly Hallows*, Preregistration No. 549 (filed on May 16, 2007); see Mehegan, *supra* note 200. Therefore, both statutory damages and attorney's fees would be available in a suit for copyright infringement. 17 U.S.C. § 412 (2012).

203. See *supra* note 127 (providing a complete list of preregistrations published by major publishers). The only other novels that were released by major publishers and preregistered were another Rowling novel, a graphic novel based on the *Twilight* series, and a posthumously published novel by Vladimir Nabokov. Yet, all of those that preregistered their books before infringement were published by either Simon & Schuster or Hachette. Among Barnett's clients who did not preregister is George W. Bush, whose autobiography *Decision Points* was published by Crown, a subsidiary of Random House.

204. *Harry Potter and the Deathly Hallows*, Preregistration No. 549 (filed on May 16, 2007); *Breaking Dawn*, Preregistration No. 1479 (filed on July 30, 2008).

205. See *supra* note 127 (describing Hachette's use of the preregistration system).

206. See *supra* notes 201–202.

207. See *supra* note 127 (providing a list of book preregistrations). HarperCollins preregistration of Sarah Palin's *America by Heart* was done in order to bring litigation and is discussed below. Scholastic is not considered to be one of the major publishers. See *supra* note 126. That publishers may provide the impetus for preregistration may also be inferred from the fact that many preregistrants of major books share the same agent. See David Montgomery, *Washington Lawyer Bob Barnett is the Force Behind Many Political Book Deals*, WASH. POST (March 7, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/06/AR2010030602563.html> (listing Karl Rove, Hank Paulson, Dick Cheney, Edward Kennedy, and others as Barnett clients).

208. See *supra* note 127.

209. 471 U.S. 539 (1985).

210. More specifically, Harper & Row, the book's publisher, had licensed to *TIME* the right to publish excerpts from the book before its official release. After *The Nation* published excerpts from the book, *TIME* cancelled its article and refused to pay the

whether *The Nation's* publication was a fair use, the fact pattern involved is precisely what the preregistration system was meant to address. *The Nation* stole the excerpts because they were a hot news item, and it wanted to be the first to release them. Harper & Row wanted to protect the excerpts for precisely the same reason: The right to publish them first was extremely valuable. Ultimately, Harper & Row won the fair use battle at the Supreme Court, but lost the war. Although they prevailed on their infringement claim, on remand all they were able to get was actual damages because the book was not registered at the time of *The Nation's* infringement.<sup>211</sup> Had preregistration been available to Harper & Row, they might have been able to quickly obtain an injunction or at least receive statutory damages and attorney's fees after the fact.

It seems that the publishing industry learned a lesson from *Harper & Row* and makes limited—but strategic—use of the preregistration system. Although the publishing industry has only preregistered 14 books, 10 were biographies or autobiographies of notable figures: for example Ted Kennedy's autobiography, *True Compass*, and Walter Isaacson's *Steve Jobs*.<sup>212</sup>

Recently, in fact, HarperCollins (Harper & Row's successor) was able to take partial advantage of preregistration and quickly remove a prerelease leak from the web. In 2010, HarperCollins successfully sued and obtained a temporary restraining order against an online tabloid, *Gawker*, and forced it to remove from its website leaked excerpts from a book by Sarah Palin that HarperCollins was set to release.<sup>213</sup>

As *Harper & Row* and the *HarperCollins* cases suggest, the anticipated release of prominent biographies is often accompanied with the type of excitement and potential for profit that makes the danger of prerelease piracy real and is indeed the primary context in which we see preregistrations by commercial publishers. *HarperCollins* also illustrates another interesting aspect of preregistration: It may be obtained after infringement to provide quick access to

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remainder due to Harper & Row. Harper & Row sued *The Nation* for the loss of the *TIME* contract. *Id.* at 539.

211. Harper & Row Publishers, Inc. v. Nation Enters., 557 F. Supp. 1067, 1073 n.14 (S.D.N.Y. 1983), *aff'd*, 779 F.2d 35 (2d Cir.1985).

212. The others are Gabrielle Giffords's autobiography, *Gabby*; Sarah Palin's autobiography *America By Heart*; Karl Rove's autobiography, *Courage and Consequence*; Laura Bush's autobiography, *Spoken from the Heart*; Dick Cheney's autobiography, *In My Time*; Henry Paulson's *On the Brink: Inside the Race to Stop the Collapse of the Global Financial System*; Laurie Sandell's *Truth and Consequences: Life Inside the Madoff Family*; and the authorized account of the Jaycee Dugard kidnapping, *A Stolen Life*. See *supra* note 127.

213. HarperCollins Publishers LLC v. Gawker Media LLC, 721 F. Supp. 2d 303 (S.D.N.Y. 2010). *Gawker* published images of 21 full pages from the book in a posting titled "Sarah Palin's New Book: Leaked Excerpts." *Id.* For media coverage, see Sarah Weinman, *Gawker Is on Shaky Legal Ground Over Sarah Palin Book Excerpts*, DAILY FINANCE, (Nov. 22, 2010), <http://www.dailyfinance.com/2010/11/22/gawker-sarah-palin-book-excerpts-fair-use-copyright-judge-lawsuit/>.

the courts.<sup>214</sup> Because the Palin book was not preregistered prior to infringement,<sup>215</sup> statutory damages and attorney's fees were not available as remedies in an infringement action.<sup>216</sup> And so, like Harper & Row before it, HarperCollins won the lawsuit, but received no statutory damages.<sup>217</sup> Thus, preregistration, even if not done preemptively, may be relied upon by copyright owners as a guarantee of quick access to court after prerelease infringement has been detected, and as a way to deter further expansion of the leak after the preregistration's date.<sup>218</sup>

#### 4. Television, Computer Programs, and Advertising Photographs

These industries have rarely preregistered their works, likely because they do not perceive prerelease infringement as a major threat. Television, for example, is the industry most similar to the film industry and shares with it the same preregistration category. Unlike movies, however, television shows are often shot shortly before they air, and their release and marketing rarely involve a challenging chain of custody. This leaves little room for prerelease infringement to occur. Not surprisingly, television studios have never experienced a substantial prerelease piracy problem.<sup>219</sup>

Similar dynamics likely explain why the other major content producers do not ordinarily preregister. For example, there is little reason to steal an unfinished computer program that is still being debugged. Programs are only valuable if they are fully functional, and fully functional versions of software generally come with built-in protective measures such as a unique per-copy code.<sup>220</sup> Indeed, the Copyright Office was surprised to get rulemaking comments from various industries outside the film and music industries.<sup>221</sup> As one attorney involved in the

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214. 17 U.S.C. § 411 (2012).

215. Whereas 21 pages from Palin's book were posted on *Gawker* on Nov. 17, 2010, see *HarperCollins*, 721 F. Supp. 2d at 305, the book was preregistered on Nov. 19, 2010. See *supra* note 127 (referencing the preregistration).

216. 17 U.S.C. § 412 (2012). Nevertheless, HarperCollins demanded them in their complaint. Complaint, *HarperCollins Publishers LLC v. Gawker Media LLC* 721 F. Supp. 2d 303 (S.D.N.Y. 2010) (No. 10-CIV-8782). The parties stipulated to dismiss the case after the temporary restraining order was granted without costs or attorney's fees to any party. Stipulation of Dismissal, *HarperCollins Publishers LLC v. Gawker Media LLC* 721 F. Supp. 2d 303, 2010 WL 4752037 (S.D.N.Y. 2010) (No. 10-CIV-8782).

217. Stipulation of Dismissal, *HarperCollins Publishers LLC v. Gawker Media LLC*, 721 F. Supp. 2d 303 (S.D.N.Y. 2010) (No. 10-CIV-8782).

218. See *supra* note 127. HarperCollins has only ever preregistered the Palin book.

219. Telephone Interview with Anonymous #6, *supra* note 162. Another reason the TV industry cites for not preregistering is the cost. It is easy and cheap enough to preregister a single film, but according to one major cable TV network, to preregister and then register each episode of every show they produce would require a several-fold increase in their copyright registration budget and personnel. *Id.*

220. Telephone Interview with Anonymous #10, *supra* note 151. This is also true of beta versions that software makers send out for testing. *Id.*

221. Telephone Interview with David Carson, *supra* note 16.

preregistration rulemaking put it, industries such as advertising photography, video games, television, and computer software, just did not “strike me as . . . industries [with] a prerelease problem.”<sup>222</sup> With the exception of video games, these industries have not faced, at least thus far, a substantial threat of prerelease piracy,<sup>223</sup> so it is not terribly surprising that they never made much use of the system.

The lack of use<sup>224</sup> of the preregistration system among photographers is even less surprising as the vast majority of photographers do not even register their photographs. A lawyer who specializes in advising photographers estimated to us that less than 4% of photographers register their works with the Copyright Office.<sup>225</sup> Even among the few who do, the need for preregistration seems to be rare as photography sessions usually take no more than a few days, photographers usually do not share copies of their photographs while on the job, and they can easily register their images immediately after taking them, thus avoiding the costs and risks of preregistration.<sup>226</sup>

The lack of use by the video game industry<sup>227</sup> is surprising because the industry regularly suffers from prerelease piracy.<sup>228</sup> One industry lawyer told us that typically a video game is leaked online one week before its official release date.<sup>229</sup> Games, like movies, are created by numerous individuals working for several years, all of whom are potential leakers.<sup>230</sup> In the case of games produced for Sony’s Playstation or Microsoft’s Xbox, a company must surrender the code during postproduction, as Sony and Microsoft own the production facilities for the games.<sup>231</sup> Typically Sony and Microsoft will test the games over six to nine

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222. *Id.*

223. *But see supra* notes 90 & 92 (detailing the claims of prerelease infringement made by these industries during the rulemaking process).

224. Two notable exceptions for the photograph category are Walmart, which preregistered but did not subsequently register an advertising pamphlet in 2010, *November 28, 2010 Circular*, Preregistration No. 4031 (filed on Nov. 10, 2010), and AEG Live, which preregistered photographs taken during a Michael Jackson concert. *Photographs Taken at Rehearsals for ‘This Is It’ Concert Tour*, Preregistration No. 2492 (filed on July 2, 2009). The photo was later registered by Michael Jackson Co. for use in a documentary film.

225. Telephone Interview with Edward Greenberg (June 21, 2013).

226. *Id.*; *see also supra* Part I.D.3 (discussing the risks of failing to preregister).

227. *See supra* Part II.A (discussing the rarity of video game preregistration by large game companies).

228. For the industry’s own description of its prerelease piracy problem prior to the enactment of preregistration, see ESA COMMENTS, *supra* note 92.

229. Telephone Interview with Anonymous #10, *supra* note 151.

230. One industry analyst estimated that it took 250 people over five years to create *Grand Theft Auto V*. Brendan Sinclair, *GTA V Dev Costs Over \$137 Million, Says Analyst*, GAMES INDUSTRY INT’L. (Feb. 1, 2013), <http://www.gamesindustry.biz/articles/2013-02-01-gta-v-dev-costs-over-USD137-million-says-analyst>.

231. Telephone Interview with Anonymous #10, *supra* note 151. Game makers are also forbidden from building security, such as limited licenses, into these console games. *Id.*

months before the disks are produced.<sup>232</sup> The risk here is obvious, and there has been a confirmed instance of a Sony employee leaking game code during this process.<sup>233</sup> Once the game is completed it must then be sent to thousands of stores nationwide before its release date, and here again there is a real risk of the game being leaked before release.<sup>234</sup> Many games are also expensive to produce, with the most expensive rivaling blockbuster movies in cost.<sup>235</sup>

Despite these numerous similarities to the film industry in development process and cost, we could only find five preregistrations by the top video game producers.<sup>236</sup> Two of these were done in response to prerelease leaks, with one being used to bring a lawsuit.<sup>237</sup> The companies affected have not preregistered any other games.

The only large game company that regularly preregisters its games before infringement is Take-Two Interactive, producer of the wildly popular *Grand Theft Auto* series.<sup>238</sup> Their preregistration strategy has evolved since their first preregistration, which was for *Grand Theft Auto IV*. Whereas *Grand Theft Auto IV* was preregistered a mere four days before release,<sup>239</sup> their next two preregistrations, *Max Payne 3*<sup>240</sup> and *Grand Theft Auto V*,<sup>241</sup> were done months

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232. *Id.*

233. *Manhunt 2 Leak Came From PlayStation Europe Employee*, GAMEPOLITICS.COM (Oct. 22, 2007), <http://gamepolitics.com/2007/10/22/manhunt-2-leak-came-from-playstation-europe-employee#.Ufbk9mTF18Y>.

234. Telephone Interview with Anonymous #10, *supra* note 151.

235. *Grand Theft Auto V* reportedly cost over \$137 million to produce and another \$69 to \$109.3 million to market. Sinclair, *supra* note 230.

236. *See supra* note 129.

237. *id* Software, Inc. preregistered *Enemy Territory: Quake Wars*, a game developed with Activision, after Activision's computer system was hacked, and the game code stolen. *Enemy Territory: Quake Wars*, Preregistration No. 294 (filed on Sept. 22, 2006); Christian Nutt, *Report: Dutch Police Arrest Activision, Valve Hacker*, GAMASUTRA (June 30, 2008), [http://www.gamasutra.com/view/news/110167/Report\\_Dutch\\_Police\\_Arrest\\_Activision\\_Valve\\_Hacker.php](http://www.gamasutra.com/view/news/110167/Report_Dutch_Police_Arrest_Activision_Valve_Hacker.php). Square Enix preregistered *Deus Ex: Human Revolution* and used the preregistration to bring a case against several John Does. *Deus Ex: Human Revolution*, Preregistration No. 4616, Complaint, Square Enix Ltd. v. Does 1–15, No. 2:11-CV-01045 (W.D. Wash. Jun 22, 2011). The lawsuit does not appear to have developed into anything.

238. *See generally* TAKE-TWO INTERACTIVE, <http://www.take2games.com/>. *See also* Sinclair, *supra* note 230 (discussing the cost of developing *Grand Theft Auto V* as well as its estimated sales). Take-Two Interactive has made three preregistrations: *Grand Theft Auto IV*, Preregistration No. 1212 (filed on Apr. 25, 2008); *Grand Theft Auto V*, Preregistration No. 6048 (filed on Nov. 12, 2012); and *Max Payne 3*, Preregistration no. 5276 (filed on Mar. 16, 2012). A smaller French publisher, Cyanide Studios, has also made three preregistrations, all apparently before any infringement. *See supra* note 129.

239. The game was preregistered on April 25, 2008, and then released on April 29, 2008. *Grand Theft Auto IV*, Preregistration No. 1212 (filed on Apr. 25, 2008); *General Information*, GTA4.NET, <http://www.gta4.net/overview/> (last visited Oct. 11, 2013).

240. *Max Payne 3* was preregistered on March 16, 2012 and released May 15, 2012. *Max Payne 3*, Preregistration No. 5276 (filed on Mar. 16, 2012); Rockstar Games, *Max Payne 3 Coming to Xbox 360, PlayStation 3 and PC this May*, ROCKSTAR NEWSWIRE

before release. These earlier preregistrations provide protection and deterrence during the postproduction process when the company has no control over its code, as well as when the game is released to retailers.

There does not appear to be a satisfactory reason why the rest of the industry does not use preregistration more frequently. Some suggested to us that general counsels may simply be ignorant of preregistration. However, the main lobbying group for the industry, the Entertainment Software Association (ESA), had lobbied during the rulemaking process to include video games as works eligible for preregistration.<sup>242</sup> If the trade group knows about it, why don't its members? Furthermore, those companies that preregistered in response to an infringement are surely aware of the system, but have chosen not to preregister any more works.

### 5. Mass Copyright Preregistration

One unexpected application of the preregistration system has been its use in mass copyright litigation involving hundreds or thousands of works distributed on the Internet. In an effort to thwart would-be infringers, Comedy Partners, the subsidiary of Viacom and MTV Networks that operates Comedy Central, is far and away the single most frequent user of the preregistration system.<sup>243</sup> Comedy Partners produces both *The Daily Show* and *The Colbert Report*, daily news satire shows, and from late March of 2007 until May 2011, it preregistered every single episode of these programs the day before it aired.<sup>244</sup> Over four years, Comedy Partners had preregistered 1,183 works, nearly 20% of all the works in the database.<sup>245</sup>

Comedy Partners's preregistration pattern began at about the same time that its parent company,<sup>246</sup> Viacom, sued YouTube over copyright infringement of

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(Jan. 17 2012), <http://www.rockstargames.com/newswire/article/20071/max-payne-3-coming-to-xbox-360-playstation-3-and-pc-this-may.html>.

241. *Grand Theft Auto V* was preregistered on Nov. 12, 2012, and was released on Sept. 17, 2013, a delay of four months from the original release date. *Grand Theft Auto V*, Preregistration No. 6048 (filed on Nov. 11, 2012); Rockstar Games, *Grand Theft Auto V Is Coming 9.17.2013*, ROCKSTAR NEWSWIRE (Jan. 31 2013), <http://www.rockstargames.com/newswire/article/48591/grand-theft-auto-v-is-coming-9172013.html>.

242. ESA COMMENTS, *supra* note 92.

243. See Comedy Partners Company Profile, YAHOO! FINANCE, <http://biz.yahoo.com/ic/109/109916.html> (last visited Dec. 29, 2012).

244. Preregistration No. 454 and 455, submitted on March 27, 2007, preregistered episode 12042 of *The Daily Show* and episode 3042 of *The Colbert Report*, respectively, for publication on March 28, 2007. *The Daily Show with Jon Stewart – Eps. # 12042 – Dennis Miller*, Preregistration No. 454 (filed on Mar. 27, 2007); *The Colbert Report – Eps. # 3042 – Madeline Albright & James Fallows*, Preregistration No. 455 (filed on Mar. 27, 2007).

245. Because Comedy Partners subsequently registered 95% of these works, it accounts for an even higher percentage of subsequent registrations of preregistered works, 44%. No other user comes close to the volume of preregistrations or the consistency with which works are subsequently registered.

246. Compare *The Daily Show with Jon Stewart - Eps. # 12042 - Dennis Miller*, Preregistration No. 454 (filed on Mar. 27, 2007) (Comedy Partner's first preregistration

*The Colbert Report*, *The Daily Show*, and other Viacom programs. Viacom ended its massive preregistration practice shortly after the district court granted summary judgment in the case.<sup>247</sup> Thus, it is likely that this extensive use of the preregistration system was motivated by, and would not have occurred but-for, this litigation.

At least one other major user of the preregistration system appears to have adopted such a strategy. In 2012, Spanski Enterprises, a company that broadcasts Polish language TV and radio in North America, began a similar preregistration pattern as part of its litigation against the Polish state-owned television company TVP. Spanski alleged in its complaint that TVP continued distributing some of its programs into North America via its website after assigning exclusive rights for the shows to Spanski.<sup>248</sup> In 2012 Spanski (and its subsidiary Euro Vu) was the most frequent single preregistrant of the year, with a combined 158 preregistrations.

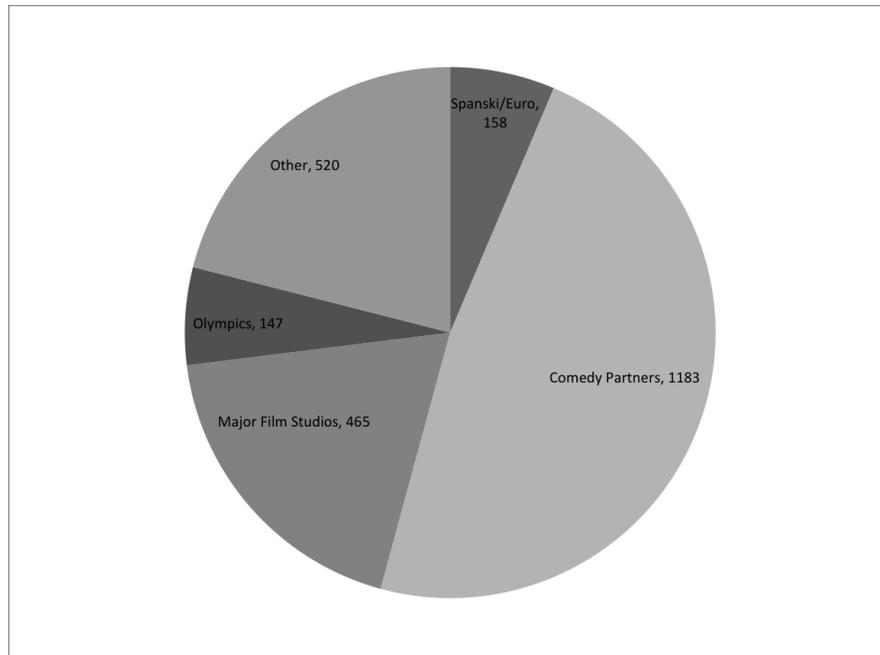
As Figure 5 shows, the Viacom and Spanski preregistrations together comprise the majority of all preregistrations in the motion picture category:

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dated March 27, 2007), *with* Complaint, *Viacom Int'l, Inc. v. YouTube, Inc.*, 540 F. Supp. 2d 461 (S.D.N.Y. Mar. 13, 2008) (No. 1:07-CV-02103).

247. *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (granting summary judgment to YouTube). It is not clear why it took Viacom nearly a year to cease preregistering, or why it did not continue preregistering given that it recently won on appeal to the Second Circuit. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d. Cir. 2012).

248. Complaint, *Spanski Enters. v. Telewizja Polska, S.A.*, (D.D.C. Jun 11, 2012) (No. 1:12-CV-00957).

Figure 5—Motion Picture Preregistrations by Major Subcategory<sup>249</sup>

Though the pattern of preregistration by Viacom and Spanski appears unusual, it may make sense in the context of commercial litigation. It is possible that the plaintiffs in both cases have sought to raise the stakes through the use of preregistration and the threat of statutory damages. If so, this is surely not what preregistration was designed to accomplish, yet it remains to be seen whether these cases mark a trend.<sup>250</sup>

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249. For a discussion of NBC's preregistration of its Olympics broadcasts see *supra* note 134 and accompanying text.

250. An unusual characteristic of the Spanski litigation is that it was a case of a licensee suing the producer of the copyrighted material for copyright infringement. According to the complaint, because TVP was the producer of the programing, it was able to infringe the Spanski's rights before Spanski even had a copy of the programs. Thus, Spanski was not able to register and deposit the work prior to infringement, and, indeed, Spanski took some of its deposit copies from TVP's allegedly infringing websites. Nonetheless, because Spanski has been able to preregister without deposit before infringement, it may be eligible for statutory damages if the case is litigated to a judgment. Granting statutory damages to a licensee as against a content producer was certainly not what preregistration was designed to accomplish, but the *Spanski* case shows how the system may be put to unforeseen uses.

*6. Individuals and Small Entities*

Individuals and small entities are responsible for the majority of preregistrations. Yet these preregistrations seem to be of a lower average commercial value as suggested by their relatively low rate of subsequent registration. One possibility for the low rate of use, corroborated by interviews we had with such preregistrants,<sup>251</sup> is that many of them did not truly understand the benefits of preregistration and how it is different from registration. The fact that individual preregistration is largely a one-off event may suggest that it might be the result of a misconception about the nature and benefits of preregistration (though, as we have seen in the cases of book publishing and computer games, even major commercial parties that suffered prerelease infringement did not start to preregister all their works). Some individuals told us that they preregistered their works before pitching them to commercial entities, believing either that it would send a better signal or that it would protect them against their work being stolen from them in the process.

Preregistration is a quicker and easier alternative to registration because it is done online, requires no deposit, and produces an immediate record of preregistration. Nonetheless, an individual who fears infringement, but who wants to pitch her work to a major publisher, music label, or studio, would likely be better off simply registering her work. For individual artists, preregistration costs more,<sup>252</sup> comes with unnecessary legal risks,<sup>253</sup> and provides inferior protection to registration.<sup>254</sup>

The Copyright Office website itself is very clear about who should, or rather, whom the Copyright Office thinks should, preregister. On the entry page that every user must go through before preregistering, the Copyright Office proclaims, in bold type, that “preregistration is not registration . . . . Its purpose is to allow an infringement action to be brought before the authorized commercial

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251. *E.g.*, Telephone Interview with Anonymous #11 (June 13, 2013).

252. Excluding the costs of deposit and the personnel involved, which are discussed below, registration is far cheaper than preregistration. Registration is a mere \$35 rather than \$115. Indeed, an author could register two drafts of his work-in-progress, and the final version, and still save \$10 over preregistration, plus another \$35, since a preregistrant will have to register anyway.

253. *See supra* Part I.D.3.

254. Marketing and giving out copies of an unpublished work may count as “publication” under § 408, forcing the author to make the full registration that they sought to avoid. Indeed, if the author triggers § 408 and does not realize it, she may even lose protection entirely. *See supra* Part I.D.3 discussing the legal risks associated with § 408.

distribution of a work and full registration.”<sup>255</sup> It even says that “for the vast majority of works, preregistration is not useful.”<sup>256</sup>

Apparently, many creators do not think that their works are among this vast majority. Many individual preregistrants with whom we spoke, including authors, musicians, and website designers, believed that they had been the victims of copyright infringement in the past.<sup>257</sup> Wanting more protection, many of them found out about preregistration from the Internet and decided that the \$115 was worth it.

In some respects, the individual users of the system are acting rationally. When it comes to music piracy, both major and independent labels are affected.<sup>258</sup> Independent labels constitute over 30% of the market share of music sales as measured by label ownership.<sup>259</sup> While many independent preregistrants may not yet be established as successful artists, some certainly are.<sup>260</sup> And as distribution has become easier online, many albums that previously would never have found a label are now self-published and so are truly being prepared for commercial release.<sup>261</sup>

A similar change has been occurring in the publishing industry. Self-publishing is now common, with authors having the option of releasing just electronic books or both electronic books and print versions.<sup>262</sup> Self-published books now appear regularly among the bestselling e-books.<sup>263</sup> Some self-published preregistrants have had success in print as well.<sup>264</sup>

255. *Preregistration*, U.S. COPYRIGHT OFFICE, <http://copyright.gov/prereg/> (last updated Feb. 7, 2011); see also *Preregistration Information*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/prereg/help.html> (last updated Feb. 7, 2011) (providing details about different aspects of the preregistration form).

256. *Preregistration*, U.S. COPYRIGHT OFFICE, <http://copyright.gov/prereg/> (last updated Feb. 7, 2011).

257. E-mail from Anonymous #8 to K. Ross Powell (June 26, 2013) (on file with authors); E-mail from Anonymous #9 to K. Ross Powell (May 31, 2013) (on file with authors); Telephone Interview with Anonymous #5 (June 6, 2013).

258. See Suddath, *supra* note 168.

259. Ed Christman, *Universal Music Still Market Top Dog In 2012*, BILLBOARD BIZ (Jan. 3, 2013), <http://www.billboard.com/biz/articles/news/1510504/universal-music-still-market-top-dog-in-2012>. Independent labels constitute a smaller percentage, 12.1%, if one looks at distribution rather than label ownership. *Id.*

260. For example, Flogging Molly, which preregistered their latest album, has had records debut in the top ten. See *Flogging Molly—Chart History*, BILLBOARD BIZ, <http://www.billboard.com/artist/302242/flogging-molly/chart> (last visited Oct. 14, 2013).

261. See, e.g., CREATE SPACE, <https://www.createspace.com/> (last visited Oct. 14, 2013).

262. See Jane Friedman, *Infographic: 5 Key Book Publishing Paths*, JANE FRIEDMAN (May 20, 2013), <http://janefriedman.com/2013/05/20/infographic-5-key-book-publishing-paths/> (graphically organizing the vast array of publishing options available to starting writers).

263. Gabe Habash, *The Bestselling Books of 2013, January–March*, PUBLISHERS WEEKLY (Apr. 5, 2013), <http://www.publishersweekly.com/pw/by-topic/industry-news/>

The rise of electronic books may make online infringement a more likely danger.<sup>265</sup> Self-published authors may even face risks of prerelease infringement that more established authors do not. Many fear that publishers or movie studios will steal from the work that they have submitted to them.<sup>266</sup> Whether this fear is reasonable or not, it is one that registration rather than preregistration could easily solve.

Many self-published authors now also send their draft manuscripts to so-called beta-readers—generally aspiring writers themselves—for editing and comment.<sup>267</sup> The manuscripts sent to beta-readers are unfinished and so authors may be reluctant to go through the full registration process and the deposit that it entails.<sup>268</sup> This may lead them to preregister.

One famous writer was a victim of a prerelease leak, and her reaction likely demonstrates imperfect familiarity with the preregistration formality even among relatively sophisticated users. Stephenie Meyer had been working on a retelling of her *Twilight* books from the perspective of another character when the unfinished manuscript leaked onto the Internet.<sup>269</sup> It turned out that the leak had come from a member of a writer's group with whom she had shared the manuscript for comment.<sup>270</sup> In response, Meyer stopped work on the book and posted the manuscript online.<sup>271</sup> She also preregistered the book.<sup>272</sup>

Because the manuscript had not only been leaked but also distributed by her, Meyer had no reason not to register and deposit her unfinished work. The leak

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bookselling/article/56697-going-their-own-way.html (finding that self-published romances accounted for seven of the twenty bestselling e-books from January to March 2013).

264. E.g., *How Do You Grab A Naked Lady?*, Preregistration No. 3312 (filed on Mar. 27, 2010); see also *How Do You Grab a Naked Lady?: A Memoir*, AMAZON, [http://www.amazon.com/How-You-Grab-Naked-Lady/dp/145820619X/ref=sr\\_1\\_1?s=books&ie=UTF8&qid=1375240889&sr=1-1&keywords=how+to+grab+a+naked+lady](http://www.amazon.com/How-You-Grab-Naked-Lady/dp/145820619X/ref=sr_1_1?s=books&ie=UTF8&qid=1375240889&sr=1-1&keywords=how+to+grab+a+naked+lady) (last visited July 30, 2013) (containing numerous published reviews, customer reviews, and a nontrivial sales rating).

265. Telephone Interview with Anonymous #7, *supra* note 192.

266. Id.

267. See *Beta Readers*, FANFICTION.NET, <http://www.fanfiction.net/betareaders/> (last visited July 30, 2013) (listing thousands of registered beta readers).

268. Authors may also fear that registering a draft does not protect the later completed version. One lawyer told us about a client of his that had registered 17 versions of the same book. Telephone Interview with Anonymous #7, *supra* note 192. A later draft would be a derivative work of the earlier draft and protected by the earlier registration.

269. Stephenie Meyer, *Midnight Sun: Edward's Version of Twilight*, THE OFFICIAL WEBSITE OF STEPHENIE MEYER (Aug. 28, 2008), <http://www.stepheniemeyer.com/midnightsun.html>.

270. Kat Rosenfield, *Stephenie Meyer Explains What Actually Happened with 'Midnight Sun'*, MTV.COM (Mar. 12, 2013), <http://hollywoodcrush.mtv.com/2013/03/12/stephenie-meyer-midnight-sun/>.

271. Meyer, *supra* note 269.

272. *Midnight Sun*, Preregistration No. 1564 (filed on Aug. 25, 2008). The preregistration is dated August 25, 2008, three days before her blog post describing the leak and posting the manuscript. Meyer, *supra* note 269.

had come from a friend of hers, and she did not seem to be preregistering in preparation of litigation.<sup>273</sup> While preregistrations are often obtained to add force to cease and desist letters,<sup>274</sup> this does not seem to be the case for Meyer, who posted her manuscript online. Meyer, however, is yet to register the work, and so, as infringement already occurred, she is in violation of § 408(f)(4), which requires registration within a month of knowing of the infringement.<sup>275</sup>

Given the inability of even a major commercial author to perfectly use the preregistration system, its less than perfect use by commercially unestablished authors should at the very least be understandable. The risk of copyright infringement that they are responding to is real enough, but they may be worse off if they fail to follow up with a registration.<sup>276</sup> In just about every case, a registration would seem to provide all the protection that these individual authors desire. The big advantage of preregistration for the major studios, game companies, record labels, and publishers is that, by delaying the deposit requirement, they are able to keep their work from segments of the public that try to pirate it or at least get an early glimpse of a forthcoming work. Unknown authors simply do not face these risks.

### III. LESSONS FOR COPYRIGHT LAW AND POLICY

For many years, copyright law had a strict system of formalities. Under the Copyright Act of 1976, as amended, these formalities have been gradually weakened and in some cases eliminated.<sup>277</sup> While some support the modern trend and advocate weakening formalities further,<sup>278</sup> others advocate a return to a formality-based copyright law.<sup>279</sup> Our study of copyright's first digital age

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273. See Meyer, *supra* note 269.

274. One lawyer told us that such threats were the chief benefit of preregistration to her company. Telephone Interview with Anonymous #10, *supra* note 151.

275. 17 U.S.C. § 408(f)(4) (2012).

276. See *supra* Part I.D.3.

277. 17 U.S.C. §§ 408–12 (2012).

278. See, e.g., Irwin Karp, *A Future Without Formalities*, 13 CARDOZO ARTS & ENT. L.J. 521, 521–28 (1995); Arthur Levine, *The End of Formalities: No More Second-Class Copyright Owners*, 13 CARDOZO ARTS & ENT. L.J. 553, 553–57 (1995); Shira Perlmutter, *Freeing Copyright From Formalities*, 13 CARDOZO ARTS & ENT. L.J. 565, 565–88 (1995).

279. See, e.g., LAWRENCE LESSIG, *FREE CULTURE* 211–14 (2004); LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 251–52 (2001); LAWRENCE LESSIG, *REMIX* 260–65 (2008); David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 178–82 (2009); James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167, 225 (2005); Stef van Gompel, *Formalities in the Digital Era: An Obstacle or Opportunity?*, in *GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE, FROM 1709 TO CYBERSPACE* 395 (Bently et al. eds., 2010); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 489 (2003); Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 562–63 (2007); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 545–68 (2004). See also *Copyright Formalities*, BERKELEY LAW, <http://www.law.berkeley.edu/>

formality offers several lessons to both sides in this debate, and suggests that some conventional wisdom respecting copyright formalities may no longer hold true in the digital age.

#### *A. Formalities May Promote Distributive Justice*

Distributive concerns were traditionally believed to weigh against the use of copyright formalities.<sup>280</sup> On this account, corporate and commercial authors, such as movie studios, record labels, and publishing houses, are sophisticated parties and repeat market players who use legal advice as a matter of course. Unsophisticated individual authors, in contrast, may not have the knowledge or the means to comply with the technicalities of copyright formalities. A copyright system with formalities tends to promote the interests of commercial copyright owners and harm those of individual artists.

Indeed, Congress noted distributive concerns when it eliminated the renewal formality and weakened the notice formality in the Copyright Act of 1976.<sup>281</sup> Such distributive concerns with formalities are also often reflected in policy debates<sup>282</sup> and scholarship.<sup>283</sup> Distributive concerns are also part of the current debate over renewed use of copyright formalities.<sup>284</sup>

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formalities.htm (last visited Nov. 5, 2013) (containing the schedule and records of a 2013 conference at Berkeley Law School dedicated to copyright formalities).

280. See, e.g., Molly Schaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1541 n.26 (2005) (“[T]he formalities of U.S. copyright law had long been criticized as hypertechnical traps for unsophisticated authors.”).

281. See H.R. REP. NO. 94-1476, at 134 (1976) (suggesting that the renewal registration formality has often been “the cause of inadvertent and unjust loss of copyright); *id.* at 143 (noting, with respect to the notice formality, that “[r]anged against these values of a notice requirement are its burdens and unfairness to copyright owners. One of the strongest arguments for revision of the present statute has been the need to avoid the arbitrary and unjust forfeitures now resulting from unintentional or relatively unimportant omissions or errors in the copyright notice. It has been contended that the disadvantages of the notice requirement outweigh its values and that it should therefore be eliminated or substantially liberalized.”).

282. See, e.g., Shira Perlmutter, *Freeing Copyright from Formalities*, 13 CARDOZO ARTS & ENT. L.J. 565, 586 (1995) (raising an argument from “fairness. It is not good policy for any legal regime to penalize the unwary, the less well-off, and the less sophisticated. The reality is that many individual authors fall into one or more of these categories when it comes to the technical requirements of copyright law. They have little legal expertise, either personally or readily available. We should not make the choice to condition rights on such expertise.”).

283. See, e.g., Mark McKenna, *Fixing Copyright in Three Impossible Steps: Review of How to Fix Copyright by William Patry*, 39 J.C. & U.L. 715 (2013) (“[S]ome of the old formality rules were quite Byzantine, so some unsophisticated authors who did want to claim rights may well have been penalized by those rules.”).

284. See Julia D. Mahoney, *Lawrence Lessig’s Dystopian Vision*, 90 VA. L. REV. 2305, 2329–30 (2004) (reviewing LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004)) (arguing that “[w]hat Lessig neglects to mention is that all formalities impose

Patterns of actual use of the preregistration formality suggest that when it comes to digital age formalities, the presupposed distributive disparate impact may no longer exist. Quite the contrary: The data suggest that occasional users, such as individuals and small entities make the vast majority of preregistrations (especially outside of the motion picture category).<sup>285</sup> There were 6,086 preregistrations during the study's period, made by 3,884 unique claimants.<sup>286</sup> Of these, 3,739, or 96%, made only one preregistration; 74, or 2%, made two preregistrations; and only 71, or 2%, made 3 or more preregistrations. The vast majority of the system's users are therefore individuals, small entities, and other nonrepeat players. Alternatively, looking at the number of preregistrations, a considerable majority thereof—over 60%—were made by one-time users.<sup>287</sup>

Of course, as discussed above, many of these preregistrants would have been better off simply registering rather than preregistering their works.<sup>288</sup> However, this suggests that rather than eliminating formalities, Congress could instead better adapt them to the digital age. Most of the individual users of the system we interviewed expressed satisfaction with the simplicity of the preregistration system.<sup>289</sup> Even if they were somewhat unclear about the benefits

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burdens, and that those burdens are experienced most keenly by the inexperienced and uneducated. . . . Lessig should at least acknowledge that corporate copyright holders are likely to have a much easier time negotiating the system than the lone individual creator, and that a turn to more formalities could bestow an advantage on none other than the 'Big Media' interests Lessig abhors." See also James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167, 225 (2005) (proposing to resurrect the notice formality, but noting that "[t]he main downside of resurrecting the notice formality is that unwary authors will lose their copyrights if they fail to affix a notice").

285. See *supra* Part II.B (discussing the lack of use of the preregistration system by major copyright holders, especially in the music, publishing, and video game industries).

286. Our calculations may somewhat overstate the number (and percentage) of unique preregistrants and, equivalently, the number of preregistrations by such parties. The data does not allow us to rule out the possibility that an author or an entity may have chosen to preregister different works under different names. Simple typos or other variations of name may create disparities as well. That said, we took several measures to reduce this bias. We used an alphabetical list of all claimants, and whenever a claimant made more than one preregistration, we examined the nearby entries on the list to see if the claimant had been duplicated in similar entries. For example, Comedy Partners, the largest preregistrant, was listed under 13 somewhat different names. Since all these began with "Comedy," it was easy for us to spot the variants and attribute all of them to one preregistrant. This technique also worked well with the film industry where slight variations between entries were also easy to detect. Nevertheless, we cannot rule out the existence of some residual bias.

287. The percentage in the text was calculated as 3,739 (preregistrations by entities that preregistered only once) divided by 6,086 (total number of preregistrations), which is 61.4%.

288. See *supra* Part II.C.6.

289. Telephone Interview with Anonymous #11, *supra* note 251; E-mail from Anonymous #9 to K. Ross Powell (May 31, 2013).

of preregistration, they appreciated the acknowledgement of their copyright that the formality gave them.<sup>290</sup>

These data suggest that digital age formalities may not share in the drawbacks of their predecessors. With easy access to online search and greater familiarity with the law, reduced fees, and streamlined online compliance with formalities, it may very well be the case that a formality system will be used by individual or occasional authors more frequently than by industry, commercial, and repeat players.

### ***B. Formalities May Limit Access to Expressive Works***

Much of the scholarship advocating greater use of formalities is driven by the venerable interest of enhancing the public domain.<sup>291</sup> A strict system of formalities, on that view, helps deposit material into the public domain. An author's failure to comply with a formality—which in the case of notice is as innocuous as adding the copyright symbol, ©, together with the author's name and the date to the work—suggests that no copyright incentive was needed to induce its creation. If so, it makes no sense for society to bear the limitations that copyright protection puts on the work's copying and distribution.

The preregistration formality demonstrates that new formalities may not necessarily have the same beneficial effect on access to expressive works that the old ones had. As an optional formality, preregistration does not help to bring works into the public domain. Rather, preregistration limits access to works by increasing the sanction associated with unauthorized use. Before preregistration was available, many noncommercial parties could use unpublished material knowing that the worst that could happen is that a court would ask them to stop.<sup>292</sup> Once such material is preregistered, users risk having to pay statutory damages—which can be as high as \$150,000 per work—and attorney's fees.<sup>293</sup> Preregistration thus creates a substantial chilling effect on the use of expressive works.

Moreover, while preregistration is formally limited to works “being prepared for commercial distribution,”<sup>294</sup> many preregistered works are seemingly

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290. Several people spoke about “getting a copyright,” unaware that fixation is sufficient. *E.g.*, Telephone Interview with Anonymous #11, *supra* note 251; E-mail from Anonymous #8 to K. Ross Powell (Jun 26, 2013).

291. See Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311, 314 (2010) (noting recent suggestions aiming “to return to the author or right holder the burden of asserting claims to copyright, and thereby to enlarge the public domain with works whose authors do not ‘care’ sufficiently about to mark off their ownership.”).

292. Assuming that the use entailed no actual harm and no profits, the only remaining substantial remedy would be an injunction. See 17 U.S.C. § 502 (2012) (courts may grant injunctions for copyright infringement); *id.* § 504(b) (a plaintiff in an infringement action can recover the actual damages it suffered and the infringer's profits).

293. See *Id.* § 504(c) (statutory damages); *id.* § 505 (attorney's fees). See also *id.* § 412 (conditioning the award of statutory damages and attorney's fees on registration or preregistration prior to the commencement of the infringement).

294. *Id.* § 408(f).

never published.<sup>295</sup> Coupled with the fact that the fair use defense applies narrowly to unpublished works,<sup>296</sup> such chilling effect is particularly troubling. Further, although the preregistration system serves a limited notice purpose by creating a public database of preregistered works, the lack of a deposit requirement, and the minimal disclosure requirements that it involves, make it inferior to the registration system as a means of building the Library of Congress and notifying the public of copyright claims. Perhaps most worrisome is the fact that some artists appear to be using the system to gain the added protection preregistration offers but possibly without the intent to publish or deposit their works.<sup>297</sup>

Formalities thus should not be assumed to come loaded with any inherent precommitments or to necessarily entail any type of consequences. Rather, they can be shaped and used to achieve any goal Congress wishes them to. The old formalities were put in place by the founding fathers, many of whom viewed copyrights as monopolies,<sup>298</sup> which they abhorred.<sup>299</sup> The copyright system and the formalities Congress created tended to ensure that protection would not be excessive.

But times have changed: Copyrights are now widely perceived as intellectual “property” rather than monopolies, copyright-reliant industries have significant influence on the legislative process, and the national interest in the balance of foreign trade has pushed the U.S. to expand copyright protection.<sup>300</sup> The access-limiting contours of the preregistration formality seem largely in line with

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295. As we have shown earlier, many preregistered works are not subsequently registered, and registration is mandatory upon the work’s publication for the preregistration to remain effective. Because preregistration shows knowledge of the law’s formal requirements and a financial motivation, the lack of subsequent registration most likely indicates that the work was not later published.

296. See *Harper & Row, Publishers, Inc. v. Nation Enters.* 471 U.S. 539, 564 (1985) (“[T]he scope of fair use is narrower with respect to unpublished works.”).

297. See *supra* notes 186–90 and accompanying text; *infra* Part III.E.

298. See, e.g., James Madison, *Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments*, in JAMES MADISON’S DETACHED MEMORANDA, 3 WM. & MARY Q. 3D SER. 534, 551 (Elizabeth Fleet, ed. 1946) (discussing “all cases of monopoly, not excepting those specified in favor of authors & inventors”); see also Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771, 1804–05 (2006) (quoting correspondence between James Madison and Thomas Jefferson in which the two regard intellectual property rights as monopolies).

299. See Oliar, *supra* note 298, at 1800–01 (discussing the “anti-monopolistic sentiment of the Framers”).

300. See William W. Fisher, *Geistiges Eigentum—ein ausufernder Rechtsbereich: Die Geschichte des Ideenschutzes in den Vereinigten Staaten [The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States]* in EIGENTUM IM INTERNATIONALEN VERGLEICH [PROPERTY IN INTERNATIONAL PERSPECTIVE] 265 (Hannes Siegrist & David Sugarman eds., 1999), translated version available at <http://cyber.law.harvard.edu/people/ffisher/iphistory.pdf> (reviewing the economic, ideological, political, and terminological changes with respect to intellectual property in the U.S. since the founding).

these historical trends. If these trends continue, future formalities might similarly limit access to expressive works.

***C. Preregistration Data Shed Light on Works' Depreciation Rates and Desirable Copyright Duration and Fees***

For the first two centuries after the founding, our copyright system had a renewal structure. Copyrights were first granted for an initial term of years. At the end of the initial term, copyrights could be renewed for an additional term. If renewal was not sought, works passed into the public domain at the end of the initial term. The Copyright Act of 1976 changed that structure. Copyrights now have one unitary term.

In an empirical study of copyright renewals, Judge Richard Posner and Professor William Landes show that one significant benefit of the renewal requirement was that it revealed information about the effective commercial life of copyrighted works, which is relevant to setting optimal copyright durations.<sup>301</sup> Because of the structure of the renewal formality, Landes and Posner could calculate renewal rates for different types of works, namely, the ratio between the total number of works copyrighted in a particular year and the number of those in which renewal was subsequently sought.<sup>302</sup> From these renewal rates Landes and Posner calculated the depreciation rate of copyrights, namely the rate at which their values decline over time.<sup>303</sup> When an author renews her copyright, it is because she expects the value of the remaining copyright term to exceed the cost of renewal. Landes and Posner found that renewal rates rose between 1910 and 1991 from about 0.03% to 22%.<sup>304</sup> Depreciation rates were at a high of about 12.2% in 1914, and at a low of 5.4% in 1990.<sup>305</sup> From the depreciation rates, Landes and Posner were able to calculate the average expected life of copyrighted works, which they found differs across categories of works. They found that the average commercial life of works over time ranges between 8 and 18 years, much shorter than the current common statutory term of 95 years for works made for hire.<sup>306</sup> This is very useful data for policy makers trying to design a copyright system. As Landes and Posner suggest, these data may be used to calculate optimal copyright duration or different durations for different types of works.<sup>307</sup>

An unforeseen benefit of the preregistration system is that it gives us a new glimpse at the commercial life of works and their depreciation rates. Works are preregistered, at the earliest, at the beginning of the creative process. If the

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301. William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 234-49 (2003).

302. *Id.* at 237.

303. *See id.* at 239.

304. *Id.* at 237.

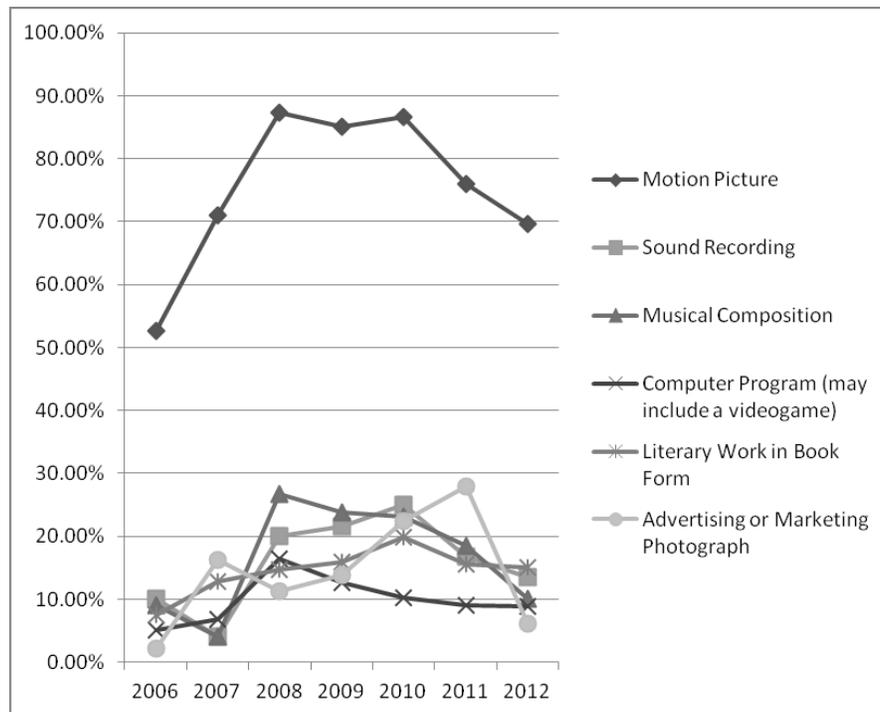
305. *Id.* at 238. Unfortunately, their renewal registration data became much less informative after 1992, the year in which Congress made renewals occur automatically, for the pre-1976 works still subject to the old renewal regime. *See id.* at 239.

306. *Id.* at 240.

307. *Id.* at 210.

process is successful, they are registered in full at its end. It is informative that nearly 60% of preregistered works are never later registered.<sup>308</sup> Motion pictures dominate other categories with respect to their registration rate: Whereas 79% of preregistered movies are later registered,<sup>309</sup> less than 20% are registered in any of the other categories.<sup>310</sup> Figure 3 above has shown the overall registration rates of preregistered works. Figure 6 further breaks them down by year.<sup>311</sup>

Figure 6—Registration Rates of Preregistered Works by Category and Year, 2006–2012<sup>312</sup>



308. Our data have some limits. *See supra* note 119.

309. The rate for motion pictures is slightly elevated by the Comedy Partners and Spanski preregistration. *See supra* Part II.C.5. Absent these preregistrations, the registration rate for motion pictures is 63%.

310. *See supra* note 123 (reporting follow-on registration rates by category).

311. If Comedy Partners and Spanski preregistrations are removed from the data, the rates for motion pictures beginning in 2006 would be 53%, 57%, 69%, 62%, 72%, 61%, and 59%.

312. These data are subject to some change especially for the most recent years as there is no limit on how long a copyright holder can wait until registering. *See supra* note 119 (discussing the typical time between preregistration and registration). We excluded those works that do not list a category. *See supra* note 113. These works tend to be registered at the same rates as the rate for all categories combined. *See supra* Figure 3.

The fact that relatively few works are ultimately registered suggests that most works, even those whose authors spend extra effort to protect, have little commercial value.<sup>313</sup> The data also indicate that motion pictures, the works that require the largest upfront investment, are the most likely to retain their value over time, and that other works depreciate fairly quickly.<sup>314</sup> Whereas Landes and Posner found that in the later years of their study, some 80% of all copyrights were not renewed past the 28th year, our data suggest that nearly 60% of preregistered works (or projects) are likely abandoned after three years.<sup>315</sup> These statistics, if representative of the group of copyrighted works,<sup>316</sup> could suggest that average depreciation rates, which have been gradually declining between 1910 and 1990, are now on the rise. In the digital age, in other words, the effective commercial life of works may be shorter than what it once used to be. If so, our data do not support a potential case for further extensions of the copyright term.

Our findings could also be used to reform copyright filing fees and better understand their effect. Landes and Posner's "most interesting result" in their regression analysis was that registrations are highly sensitive to increase in fees.<sup>317</sup> They thus suspect that many works have negligible expected value. Our data and interviews further suggest that the fee elasticity of preregistration likely changes with the type of preregistrant. Among the major movie studios, the registration rate of preregistered works approaches 100%, and our impression from interviews is that the preregistration fee is a nonissue for them. If we combine Landes and Posner's finding that higher filing fees are associated with a statistically significant negative effect on (pre)registrations, with our finding that large commercial entities are insensitive to modest increases in fees, it would seem that the effect is

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313. It is possible that preregistered works were later published (or commercially released), but not registered. While we have data on registrations, we lack data on subsequent publication (or commercial release). We believe, however, that conditional on a work's preregistration, the lack of registration likely means a lack of publication. *See also supra* notes 121–23 and accompanying text.

314. This conclusion should be qualified by the fact that commercial creators are highly represented among motion picture preregistrants, whereas preregistrations in other categories are dominated by one-shot users, whose subsequent registration rates are low.

315. In our dataset, about 41% of all preregistered works were subsequently registered. Further, for the group of preregistered works that were later registered, over 99% were registered within three years of preregistration. With registration of preregistered works, however, as different from the renewal of copyrights, one cannot be completely sure that a work that was not registered within a certain time was truly abandoned.

316. Preregistered works may not be representative of all copyrights. Authors who preregister might be the most confident in their work's future value. For this reason, follow-on registration rates may overestimate the commercial life of the average work. Counting the other way, preregistrants might be individuals who are initially overoptimistic about their chances of completion or commercial success, or may overestimate the degree to which preregistration would help them. If so, registration rates may underestimate average commercial lives of works. It is hard to know the overall pull of these competing considerations.

317. LANDES & POSNER, *supra* note 301, at 245–46.

driven substantially by small entities and individual authors who are particularly sensitive to increases in fees.

Accepting that users differ in their sensitivity to filing fees, there is good reason for the Copyright Office to charge different users different prices. From a utilitarian perspective, taking as given the Office's need to raise money and its desire to enhance public records regarding the ownership of works, increasing the fees for large corporations and reducing them for individuals and small entities would be superior to the Office's current uniform schedule of fees.<sup>318</sup> To wit, keeping the amount of money raised constant, a small increase in fees on large entities would not cause them to register any less, while the offsetting reduction in fees on individuals and small entities would result in an increase in the amount of works they register. Such reform in the Copyright Office's fee structure—for preregistrations and more generally—is also supported by considerations of fairness. Individuals and small entities tend to be less sophisticated than large commercial enterprises, as is shown by their markedly smaller propensity to subsequently register their preregistered works. On average, they profit less from the preregistrations and consume fewer of the Office's resources.<sup>319</sup> In this respect, the Copyright Office could follow the Patent and Trademark Office's example of varying its fees based on the size of the preregistrant.<sup>320</sup>

Although the preregistration data has some limitations compared with the data provided by the renewal system, the Copyright Office and policy makers would be wise to look at the preregistration data as they are almost the only currently available evidence our copyright system generates about the rates at which copyrighted works' value depreciates over time.

#### ***D. Formalities May Be Affected by the Interests of the Copyright Office***

The Copyright Office plays an important role in the day-to-day administration of the copyright system and in shaping Congress's copyright legislative choices.<sup>321</sup> Two major accounts were thus far suggested for the way the Copyright Office works. The first is the Copyright Office's own account. According to the Office, it is an expert and impartial agency acting in the public

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318. See *Fees*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/docs/fees.html> (last updated Apr. 1, 2013) (listing the current fees).

319. An individual who only preregisters would pay the Office \$115 for uploading information on a webpage. A large corporation may often pay an additional, yet lower fee (e.g., \$65) for the subsequent registration, which often consumes Office's personnel time (e.g., processing a paper application).

320. The Patent and Trademark Office has a separate fee schedule for "small entities." See *Fee Schedule*, U.S. PATENT & TRADEMARK OFFICE, <http://www.uspto.gov/web/offices/ac/qs/ope/fee031913.htm> (last updated on Oct. 4, 2013).

321. For an account of the Copyright Office's role in drafting legislation see *supra* Part I.C; Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 860–62 (1987). Many copyright code provisions delegate responsibility to the Copyright Office to enact rules and regulations for the administration of the system. See, e.g., 17 U.S.C. § 408 (2012) (empowering the Copyright Office to create procedures for preregistration and registration).

interest.<sup>322</sup> The second stems from Jessica Litman's work on the legislative history of the Copyright Act of 1976.<sup>323</sup> According to Professor Litman, the Act does not generally reflect independent policy judgments made by Congress and the Copyright Office.<sup>324</sup> Instead, it is largely the result of compromise among competing interest groups.<sup>325</sup> Congress and the Copyright Office's contributions were limited to facilitating compromise, even when its social desirability was doubtful.<sup>326</sup> While the two accounts, which need not be mutually exclusive differ, they nevertheless agree that the Office acts to promote the public good, which it either knows as an expert or which it equates with compromise.

Our study suggests a third account for the Copyright Office's operation: serving its own institutional interest.<sup>327</sup> As we discussed in Part I, the Copyright

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322. See Maria A. Pallante, *A Message from the Register of Copyrights*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/about.html> (last updated Nov. 4, 2013) (suggesting that "[t]he Office is proud to be part of a long tradition of providing expert and impartial leadership and advice on copyright law and policy to Congress, federal agencies, the courts, and the general public").

323. See generally Litman, *supra* note 321.

324. *Id.* at 860–61.

325. *Id.*

326. See *id.* (“[T]he statute's legislative history . . . reveals that most of the statutory language was not drafted by members of Congress or their staffs at all. Instead, the language evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines.”); *id.* at 862 (“[The] legislative history reflects an anomalous legislative process designed to force special interest groups to negotiate with one another. . . . The legislative materials disclose a process of continuing negotiations among various industry representatives, designed and supervised by Congress and the Copyright Office and aimed at forging a modern copyright statute from a negotiated consensus. . . . The record demonstrates that members of Congress chose to enact compromises whose wisdom they doubted because of their belief that, in this area of law, the solution of compromise was the best solution.”).

327. Our view is based primarily on the sources discussed *supra* in Part I. However, it also fits with the existing literature on agency behavior. Agencies, like all institutions, are prone to an outsized belief in the importance of the work they do and often act to protect their own power. See, e.g., Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 596 (2011) (“Economic analysis of public institutions provides two perspectives that dispute the reliability of government employees to serve in the public interest. Public choice economics starts with an assumption that bureaucrats are self-interested, which leads to a prediction that government employees will make decisions that advance their own careers and interests. These interests include prospects for employment outside the government, promotion within the government, the accretion of power, and other self-interested goals, such as avoiding hard work (i.e., to shirk rather than work).”); Steven J. Eagle, *Economic Salvation in a Restive Age: The Demand for Secular Salvation Has Not Abated*, 56 CASE W. RES. L. REV. 569, 574 (2006) (“Public choice theory posits that legislators, executive branch officials, and agency administrators are in business for themselves; that is, they are motivated by the same types of incentives that motivate their counterparts in the private sector.”). None of this is to say that those who work at the Copyright Office or other government agencies are self-interested Machiavellians. Agencies

Office opposed vehemently the RIAA and MPAA's joint proposal to eliminate registration as a requirement for suit in prerelease infringement cases. Such opposition does not seem to fit Litman's account, where legislative proposals to which all interested parties agree become law.<sup>328</sup>

It also seems unlikely that the Office's opposition stemmed solely from its pursuit of the public good. The Office had heard about and sympathized with the industry's need to deal with the threat of prerelease infringement.<sup>329</sup> The Office understood that Congress was favorable to the MPAA/RIAA's position to do away with the registration requirement as a prerequisite for suit in cases of prerelease infringement. The Office further knew that Congress had deemed it in the public interest to join the Berne Convention, a step that entailed the weakening and elimination of copyright formalities.<sup>330</sup> Any further weakening of formalities would merely continue a long-running trend,<sup>331</sup> and would follow the spirit, if not the letter, of U.S. international obligations. However, the Office's delegates to the meeting with the Senate Judiciary Committee's staff were ordered to oppose any proposal that would further weaken the registration formality, however minimally.<sup>332</sup> These instructions explicitly forbade proposing the preregistration system as a possible compromise (an instruction which the Office's representatives eventually did not follow).<sup>333</sup> Given Congress's and the industry's positions, and the Office's general support of compromise, one would be hard pressed to explain the Office's adamant position as stemming solely from its conception of the public good.

It is therefore not unreasonable to conclude that the Office's position was affected at least in part by institutional concerns. We understand that the Office feared that any further chipping away at the registration requirement would lead to a slippery slope towards the formality's elimination. The Office may truly believe that this would be bad policy, but such elimination would also certainly undermine the justification for the Office's existence. The Office is, after all, primarily one of public record.<sup>334</sup> Registration and the accompanying deposit are the primary

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and their employees often act for the public good, but they, like all people, also act in their own self-interest.

328. See Litman, *supra* note 321, at 861 ("In some cases, affected parties agreed upon language, which was then adopted by Congress . . ."). Note, however, that Litman's research concerns the Copyright Office's actions surrounding the legislative history of the 1976 Act, where the elimination or substantial weakening of the formalities system was not an immediate threat.

329. Telephone Interview with David Carson, *supra* note 15.

330. See Berne Convention for the Protection of Literary and Artistic Works art. 5, Sept. 9, 1886, revised at Stockholm, July 14, 1967, 331 U.N.T.S. 217, amended in Paris, July 24, 1971, 828 U.N.T.S. 221. Implemented by the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, Sec. 2, 102 Stat. 2853.

331. See *supra* Part I.A.

332. Telephone Interview with David Carson, *supra* note 15.

333. *Id.*

334. See Circular 1a, *A Brief Introduction and History*, U.S. COPYRIGHT OFFICE, (suggesting that "[t]he Copyright Office is an office of record, a place where claims to

records the Office keeps.<sup>335</sup> In their absence, there would be little need for a Copyright Office.<sup>336</sup> Indeed, many countries without copyright formalities do not have a copyright office.

Such institutional motivation is consistent with the Office's actions surrounding the preregistration formality. It can explain why the Office ceased acting as an arbiter among competing industry interests, and why it opposed a united, cross-industry front in order to preserve the system of copyright formalities.<sup>337</sup> Moreover, the Copyright Office succeeded in buttressing the formalities regime: Not only did the Office fend off a substantial threat to copyright formalities, but it convinced Congress to enact the digital age's first formality.<sup>338</sup>

The Office's operation surrounding the preregistration formality offers two lessons. The first is that the Copyright Office is an interested party in copyright reform in general (as it may also need to participate in implementing the law) and with respect to formalities reform in particular. Second, parties interested in affecting copyright and formality reform would be wise to take the Office's interests into consideration.

#### ***E. A Reform Proposal: Limiting the Duration of a Preregistered Status***

While preregistrations bolster private parties' claim of ownership through the threat of enhanced remedies, they provide the public with only limited notice of the metes and bounds of the rights claimed. This is so since preregistered works are not deposited (or published). This raises the potential for abuse: A party might preregister using a very generic description (perhaps even without having created anything at all) and later rely on the preregistration in an infringement action.<sup>339</sup> Fortunately, the system seems to have been formed with these concerns in mind. One cannot preregister a work in the abstract: She must have already started to create the work and fixed a portion of it in a tangible medium.<sup>340</sup> Further, she must certify that she has a reasonable expectation that the work will be commercially

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copyright are registered and where documents relating to copyright may be recorded when the requirements of the copyright law are met").

335. See Circular 1, *Copyright Basics*, U.S. COPYRIGHT OFFICE, 7 (explaining that "copyright registration is a legal formality intended to make a public record of the basic facts of a particular copyright").

336. See Pamela Samuelson, *Will the Copyright Office be Obsolete in the Twenty-First Century?*, 13 CARDOZO ARTS & ENT. L.J. 55, 55 (noting that "if the U.S. Congress repeals the registration and deposit provisions of the current copyright statute, there may be little or nothing for the copyright office to do. In this event, Congress might decide to abolish the Office entirely."). It may not be superfluous to note that many countries that do not have formalities as a part of their copyright law also do not have a copyright office.

337. See *supra* Part I.C.

338. *Id.*

339. Telephone Interview with David Carson, *supra* note 15 (suggesting that the Copyright Office was concerned with such potential for abuse and sought to minimize it in the final rules).

340. Preregistration of Copyrights, 37 C.F.R. § 202.16(b)(2)(ii) (2013).

distributed.<sup>341</sup> The preregistrant must describe the work in detail sufficient to convince a court in an infringement action that the preregistration actually describes the work that is alleged to be infringed.<sup>342</sup> A full registration (and deposit) is required shortly after acquiring knowledge of infringement.<sup>343</sup> Together, these requirements signal a legislative intent to maintain guarantees of notice and access while protecting unpublished (and often unfinished) works.

In its current form, however, the preregistration formality does not cap the duration of time in which an unpublished work can remain preregistered (absent knowledge of an infringement). While a precondition for preregistration is that the work is being prepared for commercial distribution and that the preregistrant has a reasonable expectation that the work will be commercially distributed,<sup>344</sup> no provision was made for cases in which such fact and intent ceased to exist at a later time. That a work is no longer prepared for commercial distribution may be inferred, for example, from the passage of time. Sometimes, surrounding evidence may suggest that intent to commercially distribute likely ceased, or even that intent not to distribute likely formed.<sup>345</sup> Allowing such works to maintain their status as preregistered seems to counter the legislative intent and the aforementioned policies of guaranteeing proper notice of and access to works.

This omission can be easily fixed. One potential way would be to require, as a condition for the preregistration's effectiveness, that the work (or its latest version) be registered (and so deposited) at the latest within a certain term of years. Such term should not be too short as not to unduly burden preregistrants who are still working on their projects, but not too long as not to unduly harm the public interest in notice and access. A second way, which can complement the first, would be to require preregistrations to be renewed periodically.

There is reason to believe that such a fix would work well. Its two aforementioned components have been employed successfully in trademark law's analogous context of intent to use applications, which require a "bona fide intention to use the mark in commerce."<sup>346</sup> Similarly, copyright preregistration is

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341. *Id.* § 202.16(b)(2)(i); *id.* § 202.16(b)(3)(ii); *id.* at § 202.16(c)(8).

342. *Id.* § 202.16(b)(6).

343. 17 U.S.C. § 408(f)(4) (2012).

344. *See* 37 C.F.R. § 202.16(b)(2)(i) (the preregistrant must have a reasonable expectation of commercial distribution); *id.* § 202.16(b)(3)(ii) (the work must be prepared for commercial distribution); *id.* § 202.16(c)(8) (the preregistration applicant must certify that the work is being prepared for commercial distribution and that she has a reasonable expectation that the work will be commercially distributed); *see also* Preregistration of Certain Unpublished Copyright Claims, 70 Fed. Reg. 42286, 42288 (Jul. 22, 2005) (noting that in enacting the preregistration system Congress wishes to address "the phenomenon of infringement on the Internet of works that are truly en route to commercial distribution").

345. *See supra* notes 186–189 (detailing an instance in which preregistered tracks were not eventually included in the album for which they were seemingly intended and an instance in which unreleased tracks were preregistered after the release of the album for which they were seemingly intended).

346. *See* 15 U.S.C. § 1051(b) (2012).

“an indication of an intent to register a work,”<sup>347</sup> which requires a “reasonable expectation of commercial distribution.” Although the two bodies of law differ, each has its own rationale for limiting the duration of preliminary claims to exclusive rights in inchoate intangibles,<sup>348</sup> such that the trademark context could prove informative.

### CONCLUSION

The story of the U.S. preregistration system is a complex one. At its heart stands the movie industry, which views prerelease infringement as a real threat and therefore has a substantial practice of preregistering the movies it produces. The music, book publishing, and software industries have preregistered preemptively only a few, highly anticipated and valuable works. Often, they have preregistered after infringement occurred as a means to get to court quickly and contain the infringement. Such limited use by sophisticated parties may suggest that for most works, preemptive preregistration is not cost effective.<sup>349</sup> The Copyright Office administers the system, which it initiated in order to fend off a potential weakening of the registration formality. Finally, individuals and small entities are a large and unintended user of the system, but many of them seem to be ill informed about its benefits.

The study recommended the desirability of limiting the duration of preregistrations and of varying preregistrations fees according to entity size. More generally, the study suggested that formalities may not necessarily entail an adverse distributive effect, nor a necessary beneficial effect on access to expressive works. Preregistration data provide valuable information concerning works’ effective commercial life that can help policymaking on copyright duration. The Copyright Office was suggested to have had an agency role in the creation of the preregistration system. It is hoped that these lessons shall prove helpful in future rounds of copyright and formalities reforms.

### APPENDIX A: METHODOLOGY

#### *A. Quantitative Data and Coding*

The Copyright Office maintains an online database that is searchable by the public and contains the records of all registrations and preregistrations since

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347. See *Preregistration*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/help/faq/faq-prereg.html> (last updated Jul. 24, 2012).

348. See Dotan Oliar & James Stern, *Intellectual Priority* (working paper) (on file with authors).

349. To justify preregistration economically, one must believe that the expected benefit of preregistration is greater than the associated fee of \$115 and time involved. Such expected benefit can be thought of as the reduction in probability of prerelease infringement times the expected harm from such infringement. If, for example, one believed that the enhanced remedies associated with preregistration would not have any deterrent effect above and beyond the other civil and criminal remedies (including the ability to preregister after infringement), she would not preregister preemptively.

January 1, 1978.<sup>350</sup> With the aid of a computer program, we retrieved from it on June 6, 2013 the records of all preregistrations dated from 2005 to the end of 2012, and of all registrations that referenced the number of any of those preregistrations.

The Copyright Office uses preregistration numbers of the format PRE#####, where each # stands for a digit.<sup>351</sup> Generally, the numbers are allocated to applications consecutively.<sup>352</sup> The effective date of preregistrations is the one on which an acceptable application and fee were submitted to the Copyright Office, regardless of the time it took the Office to process the application.<sup>353</sup> While later-dated preregistrations tend to have greater preregistration numbers, the fit is not perfect: A preregistration may have a later date yet a smaller number than another.<sup>354</sup> Ten preregistration numbers belong to preregistrations that have been cancelled,<sup>355</sup> and about twenty-two numbers are missing from the database (or may have not been used by the Copyright Office for some reason).<sup>356</sup> Occasional formatting errors exist within preregistration records.<sup>357</sup>

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350. The database may be found and searched at <http://www.copyright.gov/records>.

351. In this Article, registration numbers are cited to as “Preregistration No. X,” where X stands for all the digits in the preregistration number excepting leading zeros.

352. See Preregistration of Certain Unpublished Copyright Claims; Notice of Proposed Rulemaking, 70 Fed. Reg. 42286, 42290 (Jul. 22, 2005) (noting that “[a]ll preregistrations will be numbered with the prefix ‘PRE’ and will be numbered consecutively.”). See also *supra* note 110 (noting that Preregistration No. 1 is dated Nov. 15, 2005, the system’s first day of use).

353. According to Copyright regulations “[t]he effective date of a preregistration is the day on which an application and fee for preregistration of a work, which the Copyright Office later notifies the claimant has been preregistered or which a court of competent jurisdiction has concluded was acceptable for preregistration, have been received in the Copyright Office.” 37 C.F.R. § 202.16(c)(9).

354. Compare *Inside Ethics*, Preregistration No. 5018 (filed on Dec. 23, 2011), with *Marvel’s The Avengers*, Preregistration No. 5019 (filed on Dec. 22, 2011). Some differences of this sort are more extreme. For example, Preregistration No. 6377 is dated February 18, 2012. The preceding Preregistration No. 6376 is dated April 25, 2013.

355. Ten preregistrations are listed as cancelled. *E.g.*, *It’s Over. Love Circle*, Preregistration No. 2179 (cancelled) (uncollectible fee and no reply); *SANJAH, GIVING THANKS TO THE ALMIGHTY*, Preregistration No. 216 (cancelled) (publication date same as the date preregistration was submitted); *Matt Srum*, Preregistration No. 1264 (cancelled) (refund request as per remitter’s request).

356. *E.g.*, Preregistration No. 175 does not appear in the database. The possibility exists that these missing numbers stand for preregistration applications that were processed but for some reason are not reported on the database. To estimate the number of preregistrations that we might be missing for this reason, we note that Preregistration No. 6100 is the lowest numbered preregistration among those dated in 2013. We can reasonably assume that smaller preregistration numbers went to works dated 2012 or earlier (this is consistent with our data, and such assumption may only increase our estimate of preregistrations that we might be missing). This is of course a subset of preregistered works dated 2012 or earlier: Some such works have preregistration numbers greater than 6,100. Respecting this subset, however, our dataset contains 6,077 preregistrations whose number

The data contain patterns of cross-referencing that go beyond one unique registration number to one unique preregistration number. Sometimes, one preregistration led to several subsequent registrations for multiple versions of the final work<sup>358</sup> or for various components of it.<sup>359</sup> Other times registrations appear to be duplicative.<sup>360</sup> Finally, some preregistrations appear mistakenly as subsequently registered twice because one of the registrations references that preregistration erroneously.<sup>361</sup>

When copyright owners register works, they should note whether these were previously preregistered and if so the preregistration number. We noticed instances where registrants failed to note that their work was previously preregistered<sup>362</sup> or noted an incorrect preregistration number.<sup>363</sup> Our computer program picked up only properly referenced prior preregistrations,<sup>364</sup> so the subsequent registration rates we report may understate the real ones.<sup>365</sup>

Generally, we did not attempt to correct individual data points that we came across anecdotally and suspected may have been erroneously entered. We

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is less or equal to 6,099 (note that our dataset contains 9 additional preregistrations dated 2012 or earlier with preregistration numbers higher than 6,100, complementing our dataset of 6,086 works). If so, 22 (or 6,099–6,077) preregistrations (0.36% of entries) might be missing from that subset. The percentage of missing preregistration numbers remains about the same if calculated for the first 2,000 (0.35%) and 4,000 (0.35%) preregistration numbers.

357. If one were to limit the search terms on the Copyright Office's database for preregistrations from 2005–2012 and searched for all preregistration numbers starting with "pre," one would obtain 6,084 results. Two additional records were picked up by our program, Preregistration No. 169 (filed on Jun. 8, 2006) and Preregistration No. 2570 (filed on Jul. 28, 2009) that have some error in their date that prevents them from being retrieved in the aforementioned way.

358. For example, Preregistration No. 1212 (filed on Apr. 25, 2008) for *Grand Theft Auto IV* was subsequently registered separately for its PC, Playstation, and Xbox formats.

359. For example, *The Assassination*, Preregistration No. 1990 (Jan. 29, 2009), a "rock album," had four subsequent registrations of individual songs.

360. For example, *The Colbert Report? Eps. # 3074? Jessica Valenti*, Preregistration No. 572 (filed on June 5, 2007) was registered as PA0001631486 and PA0001638356.

361. For example, Preregistration No. 641, the film *Not Easily Broken*, was registered by the correct party, PA0001614903, and improperly as the preregistration for *Hancock*, PA0001599934.

362. The registration for *Mission Impossible III*, PA0001314043, does not reference its preregistration, Preregistration No. 135 (filed on Apr. 19, 2006).

363. For example, the registration for the film *Hancock*, PA0001599934, list its preregistration as PRE000000641 when it should be PRE000000640. PRE000000641 had been cross-referenced by a registrantion made by the correct party as well.

364. For example, the registration for *Madagascar: Escape to Africa*, PA0001610978, which listed its preregistration as PRE-000-000-988, did not show up. Nor did the preregistration for *The Colbert Report* episode registered as PA0001728900 appear in our data as it was listed as PRE0000044345, which contains too many characters.

365. See also *supra* note 119; *infra* note 366.

did, however, engage in two procedures to enhance the data's integrity and lessen the aforementioned bias. First, we searched for all registration numbers that contain the distinct word "pre." This allowed us to add seven registrations that incorrectly cross-reference a prior preregistration. We added these to our dataset manually.<sup>366</sup> Second, we looked at all instances when at least two registrations referenced the same preregistration. Each of these subsequent registrations was double checked against the preregistration. We spotted five registrations that cross-referenced a prior preregistration with a different title. We could easily find the correct preregistration by its title, and corrected the cross-reference.<sup>367</sup> In our final dataset, after these two corrections, we have 2,590 subsequent registrations that are based on 2,525 preregistrations.

The statistics we report in the paper come from this final dataset. Presenting the data involved some discretion. Many preregistered works list multiple categories<sup>368</sup> and some list none.<sup>369</sup> Those that list multiple categories were counted fractionally in each category listed.<sup>370</sup> For the purposes of reporting data about various time intervals between preregistration and registration, if a work was registered more than once, the date of the earliest registration was used.<sup>371</sup>

To determine whether major industry players were using the system, we searched not only by their name but also by their corporate address. We did that as sometimes a preregistration would list the company's address but not include its

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366. For example, TX0006953291 references preregistration "PRE 2502," which should be PRE000002502. There could be many additional ways to incorrectly reference a prior preregistration, and we did not attempt to search for and examine them all. There is, however, one pattern in the database worth noting: Many registrations reference a preregistration number that does not exist. These numbers may have more or less than nine digits or, when they have nine, are outside the range 1-6999. In an email responding to our question about such numbers, the Copyright Office replied that they are provided by registrants and are not verified by the Office. *See* E-mail from the Copyright Office to K. Ross Powell (Jul. 8, 2013) (on file with authors). According to patterns that we noted in such nonexistent preregistration numbers that are referenced, it seems that some registrants may have referred to a prior registration, rather than their work's earlier preregistration. For example, in an attempt to look for the next most likely error in referencing a preregistration number, on Oct. 31, 2013, we searched all registration records for registration numbers containing (pre0? not pre00?), namely any mention of preregistration numbers that begin with one leading zero, but not two. This search returned ten registrations that referenced preregistration numbers of the aforementioned type. We examined all ten, and to the best of our search ability, the registered works were not preregistered, and the referenced preregistration numbers do not exist. *See, e.g., No Limitation*, Registration No. SR0000653398 (Feb. 2, 2009) (referencing PRE097055143).

367. For example the *Hancock* registration, PA0001599934, was corrected in the dataset to reference the correct preregistration, Preregistration No. 640. *See supra* note 363.

368. *E.g., Pier Solar and the Great Architects*, Preregistration No. 915 (filed on Dec. 23, 2007) (preregistering the work under all six categories).

369. *See supra* note 113 and accompanying text.

370. *See supra* note 112.

371. *See supra* note 119.

name;<sup>372</sup> other times it made it easier to discover that certain companies are related, as often such companies share the same address.<sup>373</sup>

To generate the number of films preregistered by major film studios, we searched for the names of the studios and their subsidiaries in the copyright claimant field.<sup>374</sup> The subsidiaries included in this search are WV Films (Warner Brothers), Alcon films (an independent studio, distributed by Warner Brothers), New Line (Warner Brothers), Dark Castle (Warner Brothers), Regency Entertainment (Fox), MVL Entertainment films (Disney), Revolutions Studios films (an independent studio, distributed by Sony), Screen Gems films (Sony), and Columbia Pictures (Sony). Legendary Pictures was also a frequent preregistrant, but each of their preregistrations included their partner Warner Brothers as a claimant as well.<sup>375</sup> Although the studios have additional subsidiaries that we may have missed, none appears to have preregistered more than one work.<sup>376</sup>

A handful of motion picture preregistrations list both a major studio and one of its (aforementioned) subsidiaries as copyright claimants. In reporting the total number of movies produced by a major studio, these were counted only once (rather than once for the studio and once for its subsidiary). In several instances both Paramount and Warner Brothers were listed as preregistrants.<sup>377</sup> Each of these entries was counted as one half for each studio.

### ***B. Qualitative Data***

To better understand authors' motivations to preregister, we augmented our quantitative analysis with nineteen phone and two email interviews. Our interviewees included government lawyers at the Copyright Office and in private practice; in-house counsel and executives at major and small content-producing corporations; representatives from the RIAA and the MPAA; and individual artists who have preregistered works. Though not suggested as representative, our list of interviewees contains diversity in the subject matter preregistered and the size and nature of the author or creating enterprise. Many of the quotes were provided anonymously as many of our interviewees spoke with us on condition of anonymity.

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372. *E.g.*, *The Casual Vacancy*, Preregistration No. 5695 (filed on July 26, 2012).

373. *See, e.g.*, *On the Brink: Inside the Race to Stop the Collapse of the Global Financial System*, Preregistration No. 3055 (filed on Jan. 27, 2010) (address for Grand Central Publishing the same as Hachette's U.S. office).

374. *See supra* note 135 and accompanying text (explaining our use of the term major film studios and reporting data on their use of preregistration).

375. *E.g.*, *Watchmen*, Preregistration No. 2076 (filed on Mar. 2, 2009).

376. We ran Internet searches on the names of all parties who have preregistered two or more motion pictures in an attempt to determine whether they are subsidiaries of one of the major film studios.

377. *E.g.*, *Zodiac*, Preregistration No. 375 (filed on Dec. 29, 2006).

**APPENDIX B: TOP WORLDWIDE GROSSING FILM REGISTRATIONS  
AND PREREGISTRATIONS<sup>378</sup>**

Year	Rank	Title	Studio	Preregistration No.	Registration
2006	1	<i>Pirates of the Caribbean: Dead Man's Chest</i>	Disney	None	PA0001322906
	2	<i>The Da Vinci Code</i>	Columbia	PRE000000004	PA0001317631
	3	<i>Ice Age: The Meltdown</i>	Fox/ Blue Sky	PRE000000033*	PA0001306625
	4	<i>Casino Royale</i>	MGM/ Columbia	PRE000000255	PA0001340640
	5	<i>Night at the Museum</i>	Fox	PRE000000191	PA0001341310
	6	<i>Cars</i>	Disney/ Pixar	None	PA0001322908
	7	<i>X-Men: The Last Stand</i>	Fox/Marvel	None	PA0001317637
	8	<i>Mission: Impossible III</i>	Paramount	PRE000000135*	PA0001314043
	9	<i>Superman Returns</i>	Warner Bros.	PRE000000160	PA0001331425
	10	<i>Happy Feet</i>	Warner Bros.	PRE000000340*	PA0001347067
2007	1	<i>Pirates of the Caribbean: At World's End</i>	Disney	None	PA0001334112
	2	<i>Harry Potter and the Order of the Phoenix</i>	Warner Bros.	PRE000000605	PA0001355547
	3	<i>Spider-Man 3</i>	Columbia	PRE000000271	PA0001332103
	4	<i>Shrek the Third</i>	Paramount/ DreamWorks	PRE000000472	PA0001375529
	5	<i>Transformers</i>	DreamWorks/ Paramount	PRE000000418*	PA0001334012
	6	<i>Ratatouille</i>	Disney/ Pixar	None	PA0001354935
	7	<i>I Am Legend</i>	Warner Bros.	PRE000000885	PA0001590883
	8	<i>The Simpsons Movie</i>	Fox	None	PA0001382125
	9	<i>National</i>	Disney	None	PA0001597790

378. The list of films was taken from <http://boxofficemojo.com/yearly/?view2=worldwide&view=releasedate&p=.htm>.

		<i>Treasure: Book of Secrets</i>			
	10	<i>300</i>	Warner Bros.	PRE000000435	PA0001372258
2008	1	<i>The Dark Knight</i>	Warner Bros.	PRE000001409	PA0001606857
	2	<i>Indiana Jones and the Kingdom of the Crystal Skull</i>	Paramount/ Lucasfilm	PRE000001228	PA0001597330
	3	<i>Kung Fu Panda</i>	Paramount/ DreamWorks	PRE000000488	PA0001598023
	4	<i>Hancock</i>	Columbia	PRE000000640*	PA0001599934
	5	<i>Mamma Mia!</i>	Universal	PRE000001396	PA0001602737
	6	<i>Madagascar: Escape 2 Africa</i>	Paramount/ DreamWorks	PRE000000988*	PA0001610978
	7	<i>Quantum of Solace</i>	MGM/ Columbia	PRE000001019	PA0001609313
	8	<i>Iron Man</i>	Paramount/ Marvel Studios	PRE000001020	PA0001596370
	9	<i>WALL-E</i>	Disney/Pixar	None	PA0001606305
	10	<i>The Chronicles of Narnia: Prince Caspian</i>	Disney/Wald en	PRE000002706	PA0001710563
2009	1	<i>Avatar</i>	Fox	PRE000001349	PA0001653536
	2	<i>Harry Potter and the Half-Blood Prince</i>	Warner Bros.	PRE000002477	PA0001647906
	3	<i>Ice Age: Dawn of the Dinosaurs</i>	Fox/Blue Sky	PRE000001362	PA0001632003
	4	<i>Transformers: Revenge of the Fallen</i>	DreamWorks/ Paramount	PRE000002215	PA0001632652
	5	<i>2012</i>	Columbia	PRE000001917	PA0001649916
	6	<i>Up</i>	Disney/Pixar	None	PA0001635067
	7	<i>The Twilight Saga: New Moon</i>	Summit Entertainment	None	PA0001653512
	8	<i>Sherlock Holmes</i>	Warner Bros.	PRE000004993	PA0001771915
	9	<i>Angels &amp; Demons</i>	Columbia	PRE000001354	PA0001627570
	10	<i>The Hangover</i>	Warner Bros.	PRE000002378	PA0001643119

2010	1	<i>Toy Story 3</i>	Disney/Pixar	None	PA0001688323
	2	<i>Alice in Wonderland</i>	Disney	None	PA0001675924
	3	<i>Harry Potter and the Deathly Hallows—Part I</i>	Warner Bros.	PRE000004015	PA0001721904
	4	<i>Inception</i>	Warner Bros.	PRE000003657	PA0001715030
	5	<i>Shrek Forever After</i>	DreamWorks	PRE000001914	PA0001685317
	6	<i>The Twilight Saga: Eclipse</i>	Summit/Entertainment	None	PA0001689175
	7	<i>Iron Man 2</i>	Paramount/Marvel Studios	PRE000003332	PA0001673574
	8	<i>Tangled</i>	Disney	None	PA0001713581
	9	<i>Despicable Me</i>	Universal	PRE000003604	PA0001685728
	10	<i>How to Train Your Dragon</i>	DreamWorks	PRE000001626	PA0001754422
2011	1	<i>Harry Potter and the Deathly Hallows—Part 2</i>	Warner Bros.	PRE000004656	PA0001742099
	2	<i>Transformers: Dark of the Moon</i>	Paramount	PRE000004598	PA0001739345
	3	<i>Pirates of the Caribbean: On Stranger Tides</i>	Disney	None	PA0001737564
	4	<i>The Twilight Saga: Breaking Dawn—Part I</i>	Summit Entertainment	PRE000004659	PA0001758397
	5	<i>Mission Impossible: Ghost Protocol</i>	Paramount	None	PA0001762564
	6	<i>Kung Fu Panda 2</i>	DreamWorks	PRE000003042	PA0001741616
	7	<i>Fast Five</i>	Universal	PRE000004478	PA0001739490
	8	<i>The Hangover Part II</i>	Warner Bros.	PRE000004549	PA0001736738
	9	<i>The Smurfs</i>	Columbia/SPA	None	PA0001743057
	10	<i>Cars 2</i>	Disney/Pixar	None	PA0001742101

2012	1	<i>The Avengers</i>	Marvel Studios / Disney	PRE000005019	PA0001782553
	2	<i>Skyfall</i>	MGM / Columbia	None	PA0001810222
	3	<i>The Dark Knight Rises</i>	Warner Bros. / Legendary Pictures	PRE000005671	PA0001798515
	4	<i>The Hobbit</i>	Warner Bros. / MGM / New Line	PRE000005992	PA0001825381
	5	<i>Ice Age: Continental Drift</i>	Fox / Blue Sky	None	PA0001793948
	6	<i>The Twilight Saga: Breaking Dawn—Part 2</i>	Lionsgate / Summit Entertainment	PRE000004661	PA0001812965
	7	<i>The Amazing Spider-Man</i>	Columbia / Marvel Entertainment	PRE000004284	PA0001793261
	8	<i>Madagascar 3: Europe's Most Wanted</i>	Paramount / DreamWorks	PRE000003903*	PA0001793305
	9	<i>The Hunger Games</i>	Lionsgate	None	PA0001785093
	10	<i>Men in Black 3</i>	Columbia	PRE000004565	PA0001787577

\* The registration either does not mention the preregistration or lists it incorrectly.