

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
VALANCOURT BOOKS, LLC,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 18-1922 (ABJ)
)	
SHIRA PERLMUTTER,)	
<i>in her official capacity as the</i>)	
<i>Register of Copyrights</i>)	
<i>of the U.S. Copyright Office, et al.,</i>)	
)	
Defendants.)	
_____)	

MEMORANDUM OPINION

Plaintiff Valancourt Books, LLC (“Valancourt”) is an independent press based in Richmond, Virginia, and it brought this action on August 16, 2018, against defendants Shira Perlmutter, in her official capacity as the Register of Copyrights of the United States Copyright Office (“Copyright Office”), and Merrick Garland, in his capacity as Attorney General of the United States.¹ Compl. [Dkt. # 1] ¶¶ 9–10. Plaintiff alleges that the requirement in the Copyright Act that copies of every new work eligible for copyright must be deposited with the Copyright Office, 17 U.S.C. § 407, is an unconstitutional taking of private property that violates the Fifth Amendment and a burden on freedom of speech that violates the First Amendment. *Id.* ¶¶ 1–4. Plaintiff seeks a declaration that the deposit requirement is unconstitutional and an injunction blocking enforcement of the Copyright Office’s mandatory book deposit requirement (“deposit requirement”). *Id.* ¶ 5.

¹ Defendants have been automatically substituted pursuant to Federal Rule of Civil Procedure 25(d).

On July 3, 2019, defendants moved for summary judgment on all counts. Defs.’ Mot. for Summ. J. [Dkt. # 17] (“Defs.’ Mot.”); Mem. in Support of Mot. for Summ. J. [Dkt. # 17-1] (“Defs.’ Mem.”). On August 2, 2019, plaintiff opposed the motion and cross-moved for summary judgment. Pl.’s Combined Cross Mot. for Summ. J. and Opp. to Defs.’ Mot. [Dkt. # 18] (“Pl.’s Cross Mot.”); Pl.’s Mem in Supp. [Dkt. # 18-1] (“Pl.’s Mem.”). Upon consideration of the entire record² and for the reasons stated below, the Court will grant defendants’ motion and deny plaintiff’s cross motion.

BACKGROUND

I. History of the Copyright Act and its requirements

The Copyright Clause of the Constitution provides that “Congress shall have Power . . . To promote the Progress of Science . . . by securing [to Authors] for limited Times . . . the exclusive Right to their . . . Writings.” U.S. Const., art. I, § 8, cl. 8. Congress first exercised this authority in 1790 when it established federal copyright protections for written work. *See* Copyright Act of 1790, 1 Stat. 124, 125.

Among the conditions imposed by Congress in connection with copyright protection, there is a requirement to provide the Library of Congress with copies of most newly published material. The deposit requirement has existed in some form from the first Congress to the present day,

² *See* Joint Stipulations of Fact [Dkt. # 17-3] (“Joint SOF”); Pl.’s Suppl. Statement of Undisputed Material Facts [Dkt. # 18-2] (“Pl.’s Suppl. SOF”); Decl. of James Jenkins [Dkt. # 18-3] (“First Jenkins Decl.”); Defs.’ Mem. in Opp. to Pl.’s Cross Mot. for Summ. J. [Dkt. # 20] (“Defs.’ Opp.”); Defs.’ Reply to Pl.’s Opp. to Mot. for Summ. J. [Dkt. # 21] (“Defs.’ Reply”); Defs.’ Revised Resp. to Pl.’s Suppl. Statement of Undisputed Material Facts [Dkt. # 22] (“Defs.’ Resp. to Suppl. SOF”); Pl.’s Reply to Defs.’ Opp. to Cross Mot. for Summ. J. [Dkt. # 23] (“Pl.’s Cross Reply”). The Court will use the Bates numbers for pin cites.

except for a period of six years in the mid-19th century.³ Copyright protection was initially conditional upon the deposit of a printed copy of a work, and in 1834, the Supreme Court upheld this requirement as constitutional. *See Wheaton v. Peters*, 33 U.S. 591, 662–64 (1834).

In 1865, Congress empowered the Librarian of Congress to demand copies of works that had not been deposited within one month of their publication, and failure to comply would result in forfeiture of the work’s copyright. Act of Mar. 3, 1865, ch. 126, § 3, 13 Stat. 540, 540. Two years later, Congress added a \$25 penalty for non-compliance. Act of Feb. 18, 1867, ch. 43, § 1, 14 Stat. 395, 395. By 1909, Congress amended the Copyright Act to require that two copies of a work be deposited with the Copyright Office, “after [a] copyright [was] secured by publication of the work with . . . notice.” Act of Mar. 4, 1909, § 12, 35 Stat. 1075, 1078. In the event the two copies were not deposited, the Register of Copyright could make a formal demand that the deposit be made within three months, or the copyright holder would risk both forfeiture of the copyright and the imposition of a \$100 fine. *Id.* § 13.

In 1976, section 407 of the Copyright Act was enacted; it eliminated the copyright forfeiture penalty for failure to meet the deposit requirement, but increased the fine to \$250 per work. Copyright Act of 1976, Pub. L. No. 94-553, § 407(a), (d)(1), 90 Stat. 2541, 2579, codified as amended at 17 U.S.C. § 407(a), (d)(1).

In 1988, Congress amended section 407 by the Berne Convention Implementation Act. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, §8, 102 Stat. 2853, amending 17 U.S.C. § 101 *et seq.* It explained that this modification was made in order to bring U.S. copyright law in line with that of other countries; in amending section 407, Congress did not

³ *See* Copyright Act 1790, ch. 15, §§ 3–4, 1 Stat. 124, 125; Act of Aug. 10, 1846, ch. 178, § 10, 9 Stat. 102, 106; Act of Mar. 3, 1865, ch. 126, § 2, 13 Stat. 540, 540; Act of Mar. 3, 1891, ch. 565, § 3, 26 Stat. 1106, 1107; Act of Mar. 4, 1909, ch. 320, § 9, 35 Stat. 1075, 1077.

change the deposit requirement, but it eliminated copyright notice as a condition of copyright. *See* Joint SOF ¶ 42, citing the Berne Convention for the Protection of Literary and Artistic Works.⁴ The language of section 407 has not been subsequently amended.

Today, the Copyright Act provides that “the owner of copyright . . . shall deposit [in the U.S. Copyright Office], within three months after the date of . . . publication . . . two complete copies of the best edition” of the published work. 17 U.S.C. § 407(a).⁵ If the owner of the copyright does not provide copies of the work to the Copyright Office, the Register of Copyrights may send a written demand, and if the copyright owner still has not complied after three months, a fine of \$250 plus the price of the work at retail may be levied. 17 U.S.C. § 407(d). If there is a “willful” or “repeated” failure to comply with the deposit requirement, an additional fine of up to \$2,500 may be imposed on the copyright owner. *Id.*

4 *See also* Ex. 1 to Defs.’ Mot., Committee on the Judiciary Report on the Berne Convention Implementation Act of 1988, [Dkt. # 17-2] (“Congressional Report”) at 45 (“Since noncompliance with the mandatory deposit requirement does not result in forfeiture of any copyright protection, [it] is compativle [sic] with Berne. However, elimination of the copyright notice as a condition of copyright requires an amendment to section 407 of the Copyright Act.”).

5 There are, in fact, two deposit requirements in the Copyright Act: section 407, which is tied to the act of publication and section 408, which is tied to the copyright registration process. Because this dispute challenges the constitutionality of section 407, the Court will not discuss the deposit requirement imposed by section 408.

The Register of Copyrights is authorized to promulgate exceptions to the deposit requirement in certain situations:

The Register of Copyrights may by regulation [sic] exempt any categories of material from the deposit requirements of this section, or require deposit of only one copy or phonorecord with respect to any categories. Such regulations shall provide either for complete exemption from the deposit requirements of this section, or for alternative forms of deposit aimed at providing a satisfactory archival record of a work without imposing practical or financial hardships on the depositor, where the individual author is the owner of copyright in a pictorial, graphic, or sculptural work and (i) less than five copies of the work have been published, or (ii) the work has been published in a limited edition consisting of numbered copies, the monetary value of which would make the mandatory deposit of two copies of the best edition of the work burdensome, unfair, or unreasonable.

17 U.S.C. § 407(c).

II. Factual and procedural background⁶

Plaintiff Valancourt is an independent press based in Richmond, Virginia, that publishes “rare, neglected, and out-of-print fiction” and operates on a print “on-demand” model out of the owners’ home. Joint SOF ¶¶ 4, 12, 23.⁷ On June 11, 2018, plaintiff received a demand letter from the Copyright Acquisition Division of the Copyright Office requesting a copy of all 341 books in its catalog. *Id.* ¶ 71–73; Ex. A. to Joint SOF [Dkt. # 17-3] (“First Email from Copyright Office”); Ex. B. to Joint SOF [Dkt. # 17-3] (“First Demand Letter”); Ex. C to Joint SOF [Dkt. # 17-3] (“First Sample Notice for Mandatory Deposit of Copies”). Plaintiff replied on June 12, 2018, asking the Copyright Office to withdraw its request and offering to sell the books “at [Valancourt’s] costs

⁶ The following facts are undisputed unless otherwise noted.

⁷ The parties agreed to file a stipulation of material facts in lieu of engaging in discovery. *See* Joint SOF. However, both parties have supplemented this joint statement. *See* Pl.’s Suppl. SOF; *see also* Defs.’ Resp. to Suppl. SOF.

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