

# U.S. COPYRIGHT OFFICE: ITS FUNCTIONS AND RESOURCES

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## HEARING BEFORE THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTEENTH CONGRESS FIRST SESSION

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FEBRUARY 26, 2015  
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**Serial No. 114-4**  
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Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://judiciary.house.gov>

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U.S. GOVERNMENT PUBLISHING OFFICE

93-529 PDF

WASHINGTON : 2015

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# CONTENTS

FEBRUARY 26, 2015

	Page
OPENING STATEMENTS	
The Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary .....	1
The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary .....	2
WITNESSES	
Keith Kupferschmid, General Counsel, Software & Information Industry Association	
Oral Testimony .....	5
Prepared Statement .....	7
Lisa A. Dunner, Partner, Dunner Law PLLC, on behalf of the American Bar Association	
Oral Testimony .....	23
Prepared Statement .....	25
Nancy J. Mertz, Schoeman Updike Kaufman & Stern LLP, on behalf of the American Intellectual Property Law Association	
Oral Testimony .....	36
Prepared Statement .....	38
Robert Brauneis, Professor, George Washington University Law School	
Oral Testimony .....	52
Prepared Statement .....	54
LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING	
Material submitted by the Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Member, Committee on the Judiciary .....	75
Material submitted by the Honorable Doug Collins, a Representative in Congress from the State of Georgia, and Member, Committee on the Judiciary ..	100
Material submitted by the Honorable Judy Chu, a Representative in Congress from the State of California, and Member, Committee on the Judiciary .....	104
APPENDIX	
MATERIAL SUBMITTED FOR THE HEARING RECORD	
Material submitted by Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office .....	110
Prepared Statement of the Association of American Publishers (AAP) .....	120
Prepared Statement of Mary Rasenberger on behalf of the Authors Guild .....	128
Prepared Statement of the Motion Picture Association of America .....	134
Letter from Cary Sherman, Chairman and CEO, the Recording Industry Association of America (RIAA) .....	138



## **U.S. COPYRIGHT OFFICE: ITS FUNCTIONS AND RESOURCES**

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**THURSDAY, FEBRUARY 26, 2015**

HOUSE OF REPRESENTATIVES  
COMMITTEE ON THE JUDICIARY  
*Washington, DC.*

The Committee met, pursuant to call, at 1:30 p.m., in room 2141, Rayburn Office Building, the Honorable Bob Goodlatte (Chairman of the Committee) presiding.

Present: Representatives Goodlatte, Chabot, Issa, King, Gohmert, Jordan, Marino, Collins, DeSantis, Walters, Buck, Ratcliffe, Trott, Bishop, Conyers, Nadler, Lofgren, Johnson, Chu, Deutch, DelBene, Jeffries, Cicilline, and Peters.

Staff present: (Majority) Shelley Husband, Chief of Staff & General Counsel; Branden Ritchie, Deputy Chief of Staff & Chief Counsel; Allison Halataei, Parliamentarian & General Counsel; Joe Keeley, Counsel; Kelsey Williams, Clerk; (Minority) Perry Apfelbaum, Staff Director & Chief Counsel; Danielle Brown, Parliamentarian; and Jason Everett, Counsel.

Mr. GOODLATTE. Good afternoon. The Judiciary Committee will come to order, and without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone to this afternoon's hearing on the "U.S. Copyright Office: Its Functions and Resources." And I will begin by recognizing myself for an opening statement.

Two hundred twenty-five years ago, the Nation's first Copyright Act was signed into law, but the U.S. Copyright Office itself is a more recent creation, if you can describe 118 years as recent. Although small in size, the Office is not small in importance. The copyright economy that the Office oversees is an expanding component of the U.S. economy.

The endless creativity of our citizens generates new works every year. As two of our copyright review hearings in 2013 demonstrated, the copyright world is intertwined with the technology world in a symbiotic relationship that benefits both sectors. Although most of the works referenced in the more than half a million copyright claims received each year by the Copyright Office may never become widely known, some are seen, heard, and read by millions of Americans, if not billions of people around the world.

America's creativity is the envy of the world, and the Copyright Office is at the center of it. However, many have highlighted the fact that one cannot have a Copyright Office whose technologies

and processes are of the analog era when the economy has become a digital one. Although the Copyright Office has managed to direct its resources to maximize their efficiency, it is clear that what was expected of the Office in the 20th century is not what is expected of it in the 21st century.

Today, most Americans carry one or more smart devices in their pocketbooks, backpacks, and purses. They store their favorite books, songs, movies, games, and more on their device, and they use the internet to find more. Yet trying to find much information about the works themselves from the Copyright Office records is not a useful effort for most. Burdened by a lack of funds and dependent upon the vastly different technology needs of the Library of Congress, the Copyright Office has been unable to respond to the needs of the copyright community, harming copyright owners and users alike.

I have worked with three outstanding registrars of the copyright over the years: Barbara Ringer, Mary Beth Peters, and Maria Pallante. All have been strong advocates for a robust Copyright Office that can serve the needs of the copyright community while providing wise counsel to this and other Committees. In response to the quality of their efforts, Congress vested more power with the Copyright Office through rulemaking authority over the past several decades.

Some now believe that part of the problem with copyright law today is that it is unable to adapt quickly enough to new technologies and business models. One possible solution would be to give the Office more authority to promulgate regulations that can more quickly interpret fundamental copyright principles set by Congress rather than wait for Congress to act. I look forward to hearing more about that possibility.

I am also interested in learning about the potential constitutional concerns that might result by adding more regulatory powers to the Copyright Office or creating new programs, such as a small copyright claims remedies system, as some have suggested.

The witnesses this afternoon are well positioned to explain the impact of poor funding and marginal IT systems upon the copyright system and those who interact with the Copyright Office on a daily basis. I look forward to hearing from them on these topics as well.

Thank you all again for being here this afternoon, and it is now my pleasure to recognize the Ranking Member of the Committee, the gentleman from Michigan, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Chairman Goodlatte. Members of the Committee, the United States Copyright Office plays a critical role in promoting and protecting our Nation's copyright system. The Office examines and registers copyright claims, records copyright documents, and administers statutory licenses. It provides expert copyright advice to Congress as well as various Federal agencies concerning trade agreements, treaty negotiations, and court proceedings. And the Office recommends much needed improvements to the copyright system based on its research and analysis.

Unfortunately, the existing Copyright Office itself is ill equipped to handle certain challenges presented by technological developments and the growing demands of the copyright system. While the

Copyright Office is well aware of its limitations, it cannot fully overcome them without congressional action.

Today's hearing provides us an opportunity to examine how the Copyright Office should function and how we can best prepare for the coming decades to benefit the overall copyright system. To that end, Congress should first consider whether the Copyright Office requires wholesale structural and operational changes to better meet the needs of the present and future copyright system.

Although a strong copyright system necessitates an efficient and effective United States Copyright Office, there are serious concerns that the Office, in fact, lacks sufficient autonomy and infrastructure to meet the needs of the copyright community. Therefore, I would ask the witnesses, whom I join in welcoming to this hearing, to discuss how best to address these structural and operational constraints.

Another factor integral to the success of the copyright system is for the Copyright Office to become more user friendly. For example, the Office's recordation system continues to be a cumbersome and costly process that requires manual examination and data entry. In addition, the functionality of the Office's databases and the usability of the Office's website must be improved. Further, the security of deposited digital works must be strengthened, and the copyright community needs a system which provides a more usable and searchable public record of copyrighted material.

The Copyright Office is aware of the need to modernize so that it can adapt to ever-evolving technology and the needs of the copyright community. We must help it do so, which leads me to my final observation. A strong copyright system requires that we fully fund the Copyright Office. As I have previously stated, the Copyright Office performs several critical roles in our copyright system. Yet since 2010, Congress has reduced the Copyright Office's budget over 7 percent, while continuing to ask it to do more. Decreased funding reduces any operating cushion the Copyright Office could otherwise use for long-term planning, such as overhauling its entire information technology system.

It has also undermined the Office's ability to hire staff to fulfill its many statutory duties. For instance, its registration program currently has 48 vacancies out of 180 staff slots, and the Office has been prevented from representing the interests of the United States in international meetings and multinational treaty negotiations as a result of budget constraints.

In Fiscal Year 2014, the Copyright Office had an overall budget of about \$50 million. When considering that total copyright industries contribute nearly \$2 trillion or more than 11 percent in value to the United States gross domestic product, Congress, we should realize the importance of the Copyright Office and increase its budget. Fully funding the Copyright Office will make our copyright system become even more effective and efficient, and enhance our country's competitiveness.

I thank the Chairman for holding today's hearings, and I look forward to hearing from the witnesses. Thank you.

Mr. GOODLATTE. Thank you, Mr. Conyers, and without objection all other Members' opening statements will be made a part of the record.

We welcome our distinguished panel today, and if you would all rise, I will begin by swearing in the witnesses.

Do you and each of you swear that the testimony that you are about to give shall be the truth, the whole truth, and nothing but the truth, so help you God?

[A chorus of ayes.]

Mr. GOODLATTE. Thank you very much. Let the record reflect that all the witnesses responded in the affirmative.

I will now begin by introducing our witnesses. Our first witness is Keith Kupferschmid, the general counsel and senior vice president for intellectual property for the Software and Information Industry Association. Mr. Kupferschmid specializes in intellectual property policy, legal, and enforcement matters. He received his bachelors of science in mechanical engineering from the University of Rochester. Additionally, he holds a J.D. from American University Washington College of Law.

Our second witness is Lisa Dunner, chair of the American Bar Association's Section of Intellectual Property. Ms. Dunner is the founding editor-in-chief of the ABA's Intellectual Property Law Section's IP magazine, *Landslide*, and has written about numerous trademark and copyright issues. Ms. Dunner attended Rollins College for her bachelors of arts degree, and she continued on to receive her J.D. from the John Marshall Law School.

Our third witness is Nancy Mertz, who is testifying on behalf of the American Intellectual Property Law Association. Ms. Mertz is a partner with Schoeman Updike Kaufman & Stern, where she focuses on intellectual property matters. Since 2009, she has been named annually to the list of New York's super lawyers for intellectual property litigation. Ms. Mertz attended the University of Rochester for her bachelors of arts degree. She then went on to receive her juris doctorate from American University Washington College of Law.

Professor Bob Brauneis, a professor of law at the George Washington University School of Law, and the Kaminstein Scholar-in-Residence at the Copyright Office. At GW, Professor Brauneis is the co-director of the intellectual property program. He has written numerous scholarly articles on intellectual property and constitutional law. Professor Brauneis received his B.A. from the University of California. He additionally holds a J.D. from Harvard University.

I would like to thank all of our witnesses for their appearance. Your written statements will be entered into the record in their entirety, and I ask that you each summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light on the table in front of you. When the light switches from green to yellow, you have 1 minute to conclude your testimony. When the light turns red, that concludes your testimony.

Mr. Kupferschmid, we will begin with you. You will want to turn on that microphone.

**TESTIMONY OF KEITH KUPFERSCHMID, GENERAL COUNSEL,  
SOFTWARE & INFORMATION INDUSTRY ASSOCIATION**

Mr. KUPFERSCHMID. Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee, thank you for the oppor-



tunity to testify before you today to discuss the functions and resources of the U.S. Copyright Office.

I am Keith Kupferschmid, general counsel and senior vice president for intellectual property for the Software and Information Industry Association. Today I hope to assist the Committee in better understanding the important role the Copyright Office plays in the creation and distribution of innovative new products and services, the concern we have relating to the Office's operations, IT infrastructure, staffing, and budget, and the immediate need to take steps to modernize the Office.

As the Office responsible for administering all matters relating to copyright, few other offices are more important to the growth of creativity and commercial activity in our Nation than the United States Copyright Office. Despite the critical nature of the services provided by the Office, many of these services have failed to keep pace with technology and the marketplace.

Our major concerns are the Library of Congress' demand for deposit copies in certain formats causes friction with the Copyright Office and copyright applicants. Some SIIA members do not register their works with the Copyright Office because it is too expensive and too cumbersome, and because they are concerned about the security of their deposits. For example, many newspapers are no longer registering their works with the Copyright Office because the Library requires that newspaper deposits be in microfilm format.

Also, the functionality of the Copyright Office registry is drastically out of date relative to today's technologies. For instance, a search of the registry for *The Godfather* does not display either the Oscar winning movie or the bestselling book within the first 25 search results.

The present recordation process is also shockingly antiquated, cumbersome, and costly. It requires manual examination and data entry from paper documents, much in the same way as when the recordation was first launched in the 1870's. It takes the Office 12 to 18 months to enter the data. This is much too long in today's copyright marketplace.

So what can be done to address these problems? First, the Office needs a more advanced IT infrastructure that is specifically to the Office and can better support the needs of its users. The Copyright Office is obligated to use the Library's IT systems, which are meant to service the Library and its associated function. But the Copyright Office has a very different mission. It provides services that affect the legal rights and economic interests of those who rely on the Copyright Act.

Second, the Copyright Office funding needs to be increased. From 2010 to 2013, funding was reduced by over 20 percent, causing staffing shortages and technology lapses. The Copyright Office is unable to increase user fees enough to offset the shortfall because it must limit its fees to the costs incurred for providing its services. Third, the Copyright Office needs more staff. The number of Copyright Office staff has dropped over the past 5 years from close to 500 FTEs to less than 400. This dramatic reduction in staff has placed an impossible burden on the Office to accomplish its responsibilities in a timely and effective manner.

The Copyright Office customers want the Office to do the things it already does, but do them better and faster, and also to do many new innovative things to make the copyright law more functional, more efficient, and more user friendly. The prospects of the Copyright Office being able to meet these demands are slim under the present structure and funding levels.

Accordingly, SIIA recommends the following steps be taken to address these problems. Congress should authorize a study to determine the best long-term solution for the Office. Alternatives include retaining the Copyright Office within the Library while increasing its autonomy, making the Copyright Office a freestanding independent agency within the executive branch, and relocating the Copyright Office into the PTO. This study should also examine whether the head of the Office should be a presidential appointee.

Congress should also increase the Copyright Office's funding to enable the Office to make immediate critical improvements. Considering how important the Copyright Office and the copyright industries are to the U.S. economy, increasing the Office's appropriations for modernization purposes is definitely justified.

Lastly, Congress should pass legislation immediately that vests the Copyright Office with the same type of operational autonomy that Congress has granted to the Congressional Research Service. Unlike the Copyright Office, the Library has no authority to supervise or direct the activities of CRS. To the contrary, the Library is statutorily required to encourage, assist, and promote CRS. By giving the Copyright Office more autonomy, many of the operational problems previously identified could be resolved.

I look forward to working with the Committee and other stakeholders as this and other copyright issues are considered by the Committee, and happy to answer any questions. Thank you.

[The prepared statement of Mr. Kupferschmid follows:]



**Statement of**  
**Keith Kupferschmid**  
**General Counsel and Senior Vice President, Intellectual Property**  
**Software & Information Industry Association**  
**before the**  
**House Judiciary Committee**  
**on**  
**“The U.S. Copyright Office: Its Functions and Resources”**  
**February 26, 2015**

Chairman Goodlatte, Ranking Member Conyers and members of the Judiciary Committee, thank you for the opportunity to testify before you today to discuss the functions and resources of the U.S. Copyright Office.

I am Keith Kupferschmid, General Counsel and Senior Vice President of Intellectual Property for the Software & Information Industry Association (SIIA). SIIA is the principal trade association for the software and digital information industries. The more than 700 software companies, data and analytics firms, information service companies, and digital publishers that make up our membership serve nearly every segment of society, including business, education, government, healthcare and consumers.<sup>1</sup> As leaders in the global market for software and information products and services, they are drivers of innovation and economic strength—software alone contributes \$425 billion to the U.S. economy and directly employs 2.5 million workers and supports millions of other jobs.<sup>2</sup>

SIIA's software and information members rely significantly on the copyright law to protect their investment in the creation and dissemination of their innovative new software and information products and services. They also rely on the copyright law as potential licensees interested in licensing the works of others and as information aggregators interested in copyright registration and recordation data. The copyright law is therefore critical to their success and prosperity as well as the short and long-term success of the U.S. economy. By testifying here today I hope to assist the Committee in better understanding the important role the U.S. Copyright Office plays in the creation and distribution of innovative new software and information products and services, the concerns we have relating to the Office's operations, IT infrastructure, security, staffing and budget, and the immediate need to take steps to modernize the Office.

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<sup>1</sup> A list of SIIA's member companies may be found at: <http://www.siaa.net/membership/memberlist.asp>.

<sup>2</sup> Software & Information Industry Association, *The U.S. Software Industry: An Engine for Economic Growth and Employment*, Prepared for SIIA by Robert J. Shapiro, 2014 at <http://www.siaa.net/Admin/FileManagement.aspx/LinkClick.aspx?fileticket=fFChUo5PyEM%3d&portalid=0>.

The Copyright Office is responsible for all administrative, policy and litigation matters relating to the U.S. copyright law. It plays the essential role of registering copyrighted works and recording transfers of ownership of these works. It also plays a crucial public policy role by advising Congress on all domestic and international copyright and related rights matters and providing information and assistance to Federal departments and agencies, as well as the Judiciary on all copyright issues.

As the Office responsible for administering all matters relating to copyright, few other government offices are more important to the growth of creativity and commercial activity in our nation than the U.S. Copyright Office. The ability of our nation's independent creators and small and large businesses to promptly register and record their copyright interests with the Office, and of the public to obtain copyright information that enables them to license copyrighted works creates new industries and spurs the economy, which in turn assists our global competitiveness and technological leadership.

Despite the critical nature of the services provided by the Office, many of these services have failed to keep pace with technology and the marketplace. While the Office should be held accountable for its shortcomings to some extent, in truth many of these deficiencies have been caused by many years of budgetary neglect and structural deficits that would make it difficult for any agency to merely keep pace, to say nothing about modernization.

Many of the challenges confronted by the Office can be traced back to the fact that the Copyright Office resides in the legislative branch, within and under the "direction and supervision" of the Library of Congress. As a department of the Library, the Office is obligated to use the Library's information technology systems, which are antiquated, incompatible and impractical in regard to the Office's underlying objectives and mission.

The Office is also significantly underfunded and understaffed. Within the past several years especially, it is proving exceedingly difficult for the Copyright Office to provide timely and effective services to its constituents. Consequently, we think the time is ripe for Congress to

examine the present structure of the Copyright Office and consider alternatives to the Copyright Office being within and under the supervision of the Library of Congress.

More specifically, we recommend that:

1. Congress should authorize a study to determine whether the Copyright Office, its users and the public are best served in the long-term by either retaining the Copyright Office within the Library while increasing its autonomy, or moving the Copyright Office from the Library and making it a free-standing independent agency within the executive branch or relocating it into the Patent and Trademark Office (PTO). This study should also examine whether the Register (or whomever heads the Office) should be a Presidential appointee.
2. Congress should increase the Copyright Office funding to enable the Office to make immediate critical improvements to its operations, staffing and IT.
3. Congress should pass legislation immediately that gives the Copyright Office the same type of autonomy that Congress has granted to the Congressional Research Service (CRS), which also resides in the Library.

### **Copyright Office Functions**

The primary duties of the Register, as enumerated throughout the Copyright Act, include:

- *Registration*, which includes examining and registering copyright claims;
- *Recordation*, which includes recording assignments, licenses, termination notices, security interests, and other copyright documents;
- *Administering Statutory Licenses and Rulemaking*, which includes statutory licenses affecting online music services, cable operators, satellite carriers, and broadcasters

and often requires the Office to manage and disperse private monies and to review final determinations of rates and terms for statutory licenses that are set by the Copyright Royalty Judges;

- *Advice on Policy Matters*, which includes advising Congress on national and international issues relating to copyright through studies and other means, providing information and legal assistance to Federal agencies, and participating in negotiations and international meetings;
- *Education and Information Services*, which includes maintaining public databases, materials to educate its customers and the public about copyright, and related information and education services.

There are a host of critical concerns we have relating to the Copyright Office's ability to efficiently and effectively perform these duties, the most significant of which include:

*A. Decreased Staffing Has Caused a Backlog of Copyright Applications*

In fiscal year 2012, the Copyright Office processed more than 560,000 claims for registration. Despite this herculean effort, the number of copyright registration applications pending with the Office increased over the course of the year. At the start of fiscal year 2012, there were 183,676 registration applications pending with the Office and at end of the fiscal year 194,689 applications were pending. The Register has acknowledged that this growing backlog of applications is a direct result of decreases in staffing levels.

Until and unless the Office's staffing problems are effectively addressed this backlog will continue to grow. Applicants may become more disenchanted with the Office and many may begin to question (if they haven't already done so) why they spend their time and resources to register their works. This may result in the submission of fewer applications, which in turn will translate to fewer deposit copies for the Copyright Office and thus fewer works for the Library of Congress' collections.

*B. The Library of Congress' Demands for Deposit Copies in Certain Formats Causes Friction with the Copyright Office and Copyright Applicants*

The deposit copy required by the Copyright Office serves numerous purposes. It is used by the Office in the examination process to determine whether the work meets the conditions of copyrightability and to certify the copyright record for parties, for example, as in the case of infringement litigation. These deposit copies are also used by the Library of Congress to stock its collections. Because the deposit copy is used by the Library for one purpose and by the Copyright Office for a completely different – and often competing – purpose, the Library and the Office are often at odds with one another over the type and use of the deposit copy.

The Library of Congress regularly reviews the deposits submitted for copyright registration and then selects the deposits that it wants to include in its collection. The Copyright Office has no choice but to turn over its copy to the Library because under the statute the Library controls the Office. However, if the Library makes a selection and takes the Office's only copy, then the Office will be unable to satisfy its obligation to certify the copyright record in the case of copyright litigation.

To date, the deposits the Library has selected have been primarily physical formats. Often, the Copyright Office and registrants would prefer to submit a digital deposit copy, but because the Library desires that the deposit be in a physical format, the Copyright Office requires the registrant to submit a physical copy. This is a major obstacle to the Copyright Office's efforts to make the registration process more efficient and less expensive for copyright owners.

Some SIIA members do not register their works with the Copyright Office because they have found the process to be too expensive and cumbersome and because they are concerned about the security of their deposits. For example, many newspapers are no longer registering their works with the Copyright Office because the Library requires that newspaper deposits be in microfilm format. As publishers and institutions move away from microfilm, the Library's continued and unreasonable demand for microfilm copies places an undue financial and administrative burden



on newspaper copyright owners. The end result is that everyone loses – the Library gets nothing for its collection, the public may be missing valuable historical knowledge, and the resulting financial hardship precludes newspaper publishers from registering their newspapers, thus making it more difficult for them to take action against the online infringers.

*C. The Functionality of the Copyright Office Registry is Outdated*

The Office’s registration system and its companion recordation system constitute the world’s largest database of copyrighted works and copyright ownership information. However, the functionality of the registry is drastically out of date relative to search and database technologies available today.

A good example of the functionality problems can be demonstrated by a simple search of the database records on the Copyright Office website. A search of the Office records for “The Godfather” does not display either the Oscar-winning movie or the best-selling book by Mario Puzo within the first 25 search results. In comparison, the first 25 search results for “The Godfather” on Google and Bing display virtually nothing but references to the movie and book.

The present recordation process is also shockingly antiquated, cumbersome, and costly. It requires manual examination and manual data entry from paper documents much the same way as when the recordation system was first launched in the 1870’s. The recordation process is extremely time consuming, resource-intensive and costly to the Office because all information, except for information included in the recordation cover sheet (which often is never filed), is hand-entered (*i.e.*, keyed in) by Copyright Office staff regardless of whether the recordation materials submitted are in digital or print form. The process takes twelve to eighteen months for the Office to enter the data – largely because of insufficient staffing and because documents must be submitted on paper. This is much too long. The copyright marketplace moves quickly and licensees, lawyers, and others need this information immediately – not a year and a half later.

The efficiency and reliability of the recordation system must improve. It is essential that the Office reengineer the recordation process to make historic records available, and to build a

comprehensive, publicly accessible database of copyright ownership transactions that is easily searchable and user friendly. It must become easier and less costly for ownership and other documents to be recorded with the Office and the Office must improve the efficiency and speed of the recordation process, as well as making it easier to search and retrieve documents from the Office's recordation database.

It is also crucial that the information that the Office collects as part of its registration and recordation systems be more easily accessible, current and searchable by the public through the Copyright Office website. New digital technologies have dramatically quickened the pace of commercial transactions involving copyrighted works. Parties to these transactions require access to copyright information at a commensurate speed. Anything less, may slow the pace of commercial innovation and the copyright marketplace. It is, therefore, critical that the Copyright Office make the most current registration and recordation information available on its site.

The Office has been making progress toward these goals, but this progress has been slow. It will continue to be slow so long as the Copyright Office continues to be encumbered by the budget, staffing and IT limitations imposed by the Library of Congress.

*D. The Copyright Office Needs Increased Regulatory Authority*

The vast majority of copyright law is directly administered by Congress by statute, and more recently by the courts. Although the Register has authority to conduct rulemakings, that authority is extremely limited.

This approach has caused considerable problems. The Copyright Office conducts various studies and issues many policy recommendations. However, there is often no follow-on action taken as a result of these efforts because the Office lacks substantive rulemaking authority to take the next logical step. If the Office were to be granted more regulatory and adjudicatory authority, the Office could more easily take these next steps, resulting in a more flexible, contemporary and user-friendly copyright law.

Limiting the Office's ability to administer the copyright law by regulation has forced Congress to codify too much detail into the Copyright Act making it both lengthy and unwieldy at times. Copyright issues are inherently fast-moving issues that require quick consideration and response to changes in economic conditions and new technologies. The Copyright Office has a knowledgeable and experienced staff that is well versed in all aspects of the copyright law as well as marketplaces and technologies affecting and affected by the law. The Office is well suited to act expeditiously and effectively to address complex copyright issues as they arise. Therefore, one step that Congress should consider in any attempt to update the copyright laws is whether to give the Copyright Office more regulatory and adjudicatory authority to administer the law moving forward.

### **Copyright Office Resources**

#### *A. The Copyright Office Needs an IT Infrastructure that is Devoted to the Office*

The Copyright Office does not have its own Information Technology (IT) infrastructure; it uses the network, servers, telecommunications, security and all other IT operations controlled and managed by the Library of Congress. This is a significant problem that needs to change going forward. The Library IT system is meant to service a library and its associated functions, not an organization like the Copyright Office, which has a very different mission from the Library and which is expected to provide services that affect the legal rights and economic interests of creators, owners, users and others who rely on the Copyright Act for their economic and creative well-being.

The Office needs a more advanced IT infrastructure – one that is specifically dedicated to the Office and can better support the needs of its users. Its customers need a more user-friendly registration and recordation system that is quickly adaptable to changes in the copyright marketplace and easily searchable across numerous data fields.

As copyright registration deposits are quickly moving toward solely digital copies, SIIA members are increasingly concerned about the security of the Office's database of copyright

deposits. For example, many SITA publishers produce copyrighted test banks and solution manuals that are not published or otherwise publicly distributed. For obvious reasons, these materials are closely held by these publishers and not made available to others lightly. These publishers are required to deposit digital copies (where there are no print copies) with the Office as part of the copyright registration process. They are justifiably concerned about the security measures the Office takes to protect against accidental leakage of these works or cyberattacks into the Office's database. Public disclosure of these test materials would not only destroy the value of the tests themselves, but also in many cases would also destroy the value and the integrity of the certification and other programs built around these tests.

Improvements to the Office's IT system should also take into account the need for users to access information from the Copyright Office database for various purposes, including to seek out potential licenses as well as text and/or data mining of the Office's database for research purposes. Such improvements would require enhancing access and searchability of the database. These improvements could also have an immediate effect on various policy issues. For example, improved access and searchability of the Office's database could help address the orphan works problem, which the IP Subcommittee has considered in the past.

*B. The Copyright Office is Underfunded*

Although the Copyright Office resides within the Library of Congress, it receives a separate appropriation. The budget for the Copyright Office is exceedingly small, given the amount and complexity of its responsibilities. In fiscal year 2013, the Office had an overall budget of only \$44.2 million. By comparison the budget of its sister organization, the U.S. Patent & Trademark Office (PTO), was \$2.8 *billion*. About two-thirds of the Copyright Office's budget (approximately \$28.7 million) came from user fees for registration, recordation, and other public services. The other third (about \$15.5 million) came from appropriated dollars. The Copyright Office is also supported in part by Library services provided without charge, such as security, financial services and automation support. Nor does it pay rent to the Library.

Since 2010, the dollars appropriated to the Office have been reduced by 20.7% and its total budget authority has been reduced by 8.5%. This decrease in funding has caused staffing shortages and technology maintenance lapses. Under its present structure there seems to be no immediate solution to these budget problems. The Copyright Office is unable to increase user fees enough to offset the shortfall because the Office is statutorily required to limit its fees to the costs incurred by the Office for the registration of claims, the recordation of documents, and other services. The Office also may not use the money it collects from user fees for capital improvements or other investments. That seems to be a moot point in any event as fee collections in recent years have regularly fallen below the Office's spending authority. As a result, the Copyright Office has no money for infrastructure improvements, like an overhaul of its IT systems.

Insufficient funding has often prevented the Office from accomplishing its statutory responsibilities. For instance, due to budget constraints, the Office has been unable to attend several meetings at the World Intellectual Property Organization (WIPO) and participate in bilateral and multilateral treaty negotiations. As the copyright landscape becomes more dominated by trade and treaty discussions taking place in various international fora, the absence of the U.S. Copyright Office from those discussions is cause for grave concerns.

Insufficient funding has also prevented the Office from keeping pace with technology, business practices and user demands. These struggles are not the result of a one or two year belt-tightening, but rather twenty or more years of systemic monetary neglect. The Office is in desperate need of a complete overhaul. That cannot happen without Congress first committing to provide the Office with the necessary funding to modernize the Office.

The Office also needs more flexibility in its legal spending authority. The Office should have the ability to build a reserve account from the fees collected so it has the necessary funds to draw from to make capital and other improvements in different budget cycles, including during periods when incoming fee receipts are down.

C. *The Copyright Office is Understaffed*

The Library has gradually reduced Copyright Office staff over the past several years. Due to budgetary constraints and other reasons, the number of Copyright Office staff has dropped precipitously over the past five years when the Office's number of full-time staff was 483. For the first time in many years the number of Copyright Office staff has dropped below 400. This dramatic reduction in staff has placed an impossible burden on the Office to accomplish its registration, recordation, policy and litigation responsibilities in a timely and effective manner.

The Copyright Office must be able to hire sufficient staff to carry out its daily responsibilities and to prepare for future challenges. The Office needs additional lawyers to adequately meet the litigation and (domestic and international) policy demands faced by the Office now and in the future. Considering the numerous copyright policy review hearings held the past two years by the House Judiciary Committee and the copyright debates taking place throughout Europe and the rest of the world, there is more interest and analysis of the world's copyright laws than at any other time in our history. Copyright issues are emerging in more and more fora and more new, complex and diverse copyright issues are emerging every day. It is essential that the Office have the legal staff necessary to effectively address these policy challenges.

The Office also needs additional staff to adequately address its registration and recordation responsibilities. Having a sufficient and experienced staff is essential to ensuring the accuracy and efficiency of the registration program. The registration program has been decimated by budget cuts and retirements, which has resulted in 48 vacancies out of a staff of 180 experts. These staff reductions have resulted in longer copyright registration pendency periods.

The recordation division of the Office also faces enormous staffing challenges. Shockingly, there are only nine employees to handle the annual filing of 12,000 recordation documents. This has resulted in a processing time of 17 months – an unacceptable turnaround time by any measure. The recordation processing delays have an immediate real-world effect. It drastically hinders the ability of rights holders, potential licensees, businesses, litigants and numerous other

users of the copyright system to quickly and easily locate and identify copyright owners for licensing, litigation or other purposes, which in turn can adversely affect the U.S. economy.

Perhaps the most glaring staffing problem is the Office's lack of adequate IT experts. The Copyright Office is obligated to use the Library of Congress' technical infrastructure, including its network, servers, telecommunications and security operations. As a result, the Office has only 23 full-time employees to provide support for the entire Office and its existing registration and recordation systems.

### **Next Steps**

New technological advances and innovative business models are continuously being developed and exploited that make creating, distributing, performing, obtaining, accessing and infringing copyrighted works easier than ever before. This creates more new types of authors, publishers, businesses, licensees, customers and infringers that use the copyright law and the services of the Copyright Office.

The Copyright Office is tasked with the tremendous challenge of keeping pace – or at the very least not falling too far behind – this fast-moving copyright juggernaut. The rapid changes in copyright will require dramatic changes to the structure and operations of the Copyright Office. It will require a number of paradigm shifts that will affect many of the Office's registration, recordation and other services; its use of technology and its funding.

The Copyright Office's customers are demanding more innovative services. They want the Copyright Office to do the things it already does but do them better and faster, and also to do many new innovative things to make the copyright law more functional, more efficient and more user-friendly. Because of staffing reductions and budgetary restrictions that have been in place for many years, the prospects of the Copyright Office being able to meet these demand are slim under the present regime. To have any reasonable hope of making the necessary improvements, immediate and wholesale changes in the structure and operations of the Copyright Office are necessary.

After reviewing each of the operational deficiencies, it is clear that many of the Copyright Office's struggles to administer the copyright law seem to lead down one path, and that path stops at the doorstep of the Library of Congress. Many of the staffing and budgetary limitations and restrictions, technical IT constraints and inadequacies, and registration deposit problems stem from requirements or restraints placed on the Copyright Office by the Library of Congress. Consequently, it is highly unlikely that the many operational problems can be resolved or that many of the suggestions for modernizing the Office can be achieved in the near future so long as the Copyright Office continues to operate under the supervision and direction of the Library of Congress.

SIIA therefore recommends that the following steps be taken to immediately to address the operational and resource problems at the Office:

*Authorize a Study to Determine the Best Long-Term Solution for the Office:* Congress should authorize a study to determine whether the Copyright Office its users and the public are best served by either: (i) retaining the Copyright Office within the Library of Congress while reducing the authority the Library has over the Office; (ii) moving the Copyright Office from the Library and making it a free-standing independent agency within the executive branch; (iii) moving the Copyright Office to the PTO, thereby creating a new executive-branch U.S. Intellectual Property Office that resides within the Department of Commerce; or (iv) integrating the Copyright Office and the PTO, thereby creating a new executive-branch U.S. Intellectual Property Office, and making that agency a free-standing independent agency that resides outside of the Department of Commerce. This study should also examine whether the Register (or whomever heads the Office) should be a Presidential appointee. The study shall be completed and submitted to Congress no later than nine months after the date Congress approved the study.

*Increase the Copyright Office's Funding:* Congress should increase the Copyright Office's funding to enable the Office to make immediate critical improvements to operations, staffing and IT. If the Copyright Office is going to be able to fully modernize it is going to need an infusion of staff and new technologies. Those needs come with a big price tag. Although the costs of implementing new functionalities and improvements in the Office will be significant expenditure



at the outset, these costs will likely be offset in the long run by the long-term cost savings created by these new functionalities and improvements and by revenue that the Office might generate from use of its new services and increased information availability. When one considers how important the copyright industries are to the U.S economy, increasing the Office's appropriations for modernization purposes is certainly justified.

*Increase the Copyright Office's Autonomy:* Congress should pass legislation immediately that gives the Copyright Office the same type of autonomy that Congress has granted to another department within the Library – the Congressional Research Service (CRS). Unlike the Copyright Office, the Library has no authority to supervise or direct the activities of CRS. To the contrary, the Library is statutorily required to “encourage, assist, and promote” the CRS’s activities “in every possible way.”<sup>3</sup> This type of autonomy is what allows CRS to provide Congress with analysis that is authoritative, confidential, objective and nonpartisan, while also maintaining its independence from the Librarian of Congress. By giving the Copyright Office more autonomy and the Library less control over the Office many of the operational issues previously identified could be resolved. For instance, concerns about the Copyright Office’s continued reliance on the Library’s IT systems and the Library’s ability to control the types of deposit copies the Office can accept from copyright owners could be remedied under this new structure.

We provide a detailed analysis of the different options for structural change and various additional improvements the Office can make, as well as many of the operational and resource issues discussed in this testimony, in our recently published report titled “The Most Important and Immediate Copyright Reform for Congress: Modernizing the U.S. Copyright Office” (attached as Appendix A).

If there is one inescapable conclusion here it’s that there needs to be wholesale changes in the structure and operations of the U.S. Copyright Office and those changes needed to take place yesterday. Therefore, it is SIIA’s view that it is essential that Congress focus its efforts on fixing the Copyright Office before it takes on any other possible legislative copyright reforms.

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<sup>3</sup> 2 U.S.C. § 166(b)

Although the funds needed to effectuate such change are likely massive, in the long term the expenditure will be well worth it. The services provided by the Copyright Office are critical to the U.S. economy. The money spent today investing in an efficient and user-friendly Copyright Office will result in substantial benefits in the future for the U.S. economy, and of course, the U.S. Copyright Office itself.

We look forward to working with the Committee and other stakeholders as this and other copyright issues are considered by the Committee. I will be happy to answer any questions.

Mr. GOODLATTE. Thank you.  
Ms. Dunner, welcome.

**TESTIMONY OF LISA A. DUNNER, PARTNER, DUNNER LAW  
PLLC, ON BEHALF OF THE AMERICAN BAR ASSOCIATION**

Ms. DUNNER. Chairman Goodlatte, Ranking Member Conyers, Members of the Committee, thank you for your invitation to the American Bar Association's Section of Intellectual Property Law to participate in this hearing.

The Copyright Office of today is a far cry from what it was in 1897 when it became a separate department of the Library of Congress to process registrations and acquire deposit copies for the Library's use. The Office remains part of the Library, but its responsibilities have multiplied to include recording transfers and terminations; providing copyright information to the public; administering certain statutory licenses; providing support to Congress through consultation and studies on issues, such as copyright, small claims, and music licensing; providing legal assistance to executive agencies and the courts; participating in negotiations on trade agreements and international treaties; and conducting rule-making proceedings.

The Copyright Office provides essential services to our copyright industries, a vital segment of the U.S. economy. A recent report found that the core copyright industries contributed \$1.1 trillion to the U.S. gross domestic product in 2013, and accounted for \$156 billion in foreign sales and exports. They employ nearly 5.5 million U.S. workers, more than 4 percent of the entire U.S. workforce. The 2009 through 2013 annual growth rate of these industries was 70 percent more than the growth rate of the U.S. economy as a whole.

The ever-increasing functions of the Copyright Office reflect the expansion of the copyright industries and their increasing sophistication, as well as the broader scope of copyright law itself. Over time, international issues have occupied more of the Office's attention, and the U.S. has joined many bilateral and multilateral copyright and trade treaties. The internet has expanded markets for U.S. works throughout the world. Unfortunately, the resources available to the Office have not let it keep pace with the fast-moving copyright role of the 21st century.

The ABA Section of Intellectual Property views the resources needs of the Office from three perspectives: autonomy, technology, and funding. The Copyright Office should have greater autonomy because efficient Copyright Office operations and sound copyright policy are paramount. The Librarian's broad authority over Copyright Office functions is problematic on multiple levels. Not only is copyright expertise not part of the Librarian's job requirements, but there is an inherent conflict-of-interest in having the Library sign off on and control regulations formulated by the Office. Especially since the Library, and like other libraries, often takes a position on policy matters that are the subject of the Office's studies and rulemaking proceedings.

Greater autonomy would allow the Office to more effectively support copyright owners and users of the 21st century, and it would expand the substantive role of the Office by granting it appro-

priately crafted rulemaking authority. Importantly, it would allow both the Copyright Office and the Library of Congress to focus their energies on what they each do best.

The Copyright Office needs a sophisticated, efficient IT system responsive to its needs and those of its users. Currently, it must work through the Library's IT system, which is developed and managed with the Library's different priorities in mind. Minor changes to online forms can take months. The system lacks adequate security.

Moreover, the Library's IT department is not always responsive to the Office's needs. During the 2012 government shutdown, the IT department took the Office's website offline. It took the Registrar of Copyrights days to get it restored. This is unacceptable for a Copyright Office that serves a vital segment of the U.S. economy.

In these times of budget austerity, many government agencies are called upon to provide substantially increase services with less than substantial resources. With the Copyright Office it is even worse. Since 2010, its budget has dropped by \$3.51 million, or 7.2 percent. The Office now operates with 360 full-time employees, well below its authorized ceiling of 439.

As a step toward securing adequate funding, the Office needs authority to make its own budget request. Currently, the Office presents its budget needs to the Librarian. The Office's budget needs should be evaluated on their own, rather than being evaluated in competition with all the other divisions in the Library.

As I hope my comments will reveal, enhanced autonomy, technology, and funding for the Copyright Office are interdependent and inextricably linked. Increased autonomy would enable the Office to make it more effective case for adequate funding, which in turn could provide much needed improvements in technology.

On behalf of the 20,000-plus members of the American Bar Association's Section of Intellectual Property Law, let me in closing express gratitude to the Committee for its sustained commitment to bringing the Copyright Office into the 21st century. Thank you.

[The prepared statement of Ms. Dunner follows:]



**STATEMENT**

of

**LISA A. DUNNER**

Chair of the

**SECTION OF INTELLECTUAL PROPERTY LAW**

**AMERICAN BAR ASSOCIATION**

before the

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES HOUSE OF REPRESENTATIVES**

for the hearing

on

**"THE U.S. COPYRIGHT OFFICE: ITS FUNCTIONS AND RESOURCES"**

February 26, 2015

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Thank you for the invitation for the Section of Intellectual Property Law of the American Bar Association to participate in this hearing of the House Judiciary Committee on "The U.S. Copyright Office: Its Functions and Resources." The views I express have not been approved by the ABA House of Delegates or Board of Governors, and should not be considered to be views of the Association.

The speed of technical innovation, the needs of the public (as both users and creators of material subject to copyright), the increasing importance of international markets, and the potentially high stakes of infringement in our interconnected world require a Copyright Office that can effectively and efficiently supply information and provide services to its users. The Office's existing systems simply are not up to the task. The Copyright Office, led by Register of Copyrights Maria Pallante, is aware of the challenges.<sup>1</sup> But the Office's ability to develop new solutions to operational and policy challenges is constrained by budget and infrastructure limitations. Resolving those difficulties is necessary to create a truly 21st century Copyright Office.

The Copyright Office of today is a far cry from what it was in 1897, when it became a separate department in the Library of Congress to process registrations and acquire deposit copies for the Library's use. Just as the copyright law and the scope of domestic and international policy issues have expanded in the past 100-plus years, so too has the United States Copyright Office. The Office remains part of the Library of Congress, but its responsibilities have multiplied. Among other things, it examines and registers claims to copyright in works of all kinds; records assignments, transfers, terminations and other information relevant to ownership of those works; maintains a record of designated agents of online service providers under the Digital Millennium Copyright Act; and provides copyright information to the general public through its website, databases and public information service. In addition, the Office administers the mandatory deposit provisions of U.S. law, as well as certain statutory licenses in the Copyright Act. It provides support to Congress through consultation and studies on issues such as Copyright Small Claims<sup>2</sup> and Federal Copyright Protection for Pre-1972 Sound Recordings.<sup>3</sup> Its most recent study, on Music Licensing, was issued on February 5, 2015.<sup>4</sup> The Office participates in negotiations concerning trade agreements and international treaties, and provides legal assistance

<sup>1</sup> See, e.g., Maria A. Pallante, *The Next Generation Copyright Office: What It Means and Why It Matters*, 61 J. COPYRIGHT SOC'Y 213 (2014) [hereinafter, "The Next Generation Copyright Office"].

<sup>2</sup> U.S. Copyright Office, *Copyright Small Claims: A Report of the Register of Copyrights* (Sept. 2013), available at <http://copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

<sup>3</sup> U.S. Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings: A Report of the Register of Copyrights* (Sept. 2013), available at <http://copyright.gov/docs/sound/pre-72-report.pdf>.

<sup>4</sup> U.S. Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights* (Feb. 5, 2015), available at <http://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.



to other executive agencies and the courts; for example, it works with the Justice Department on briefs filed with the courts on copyright issues. It conducts rulemaking proceedings related to the statutory duties of the Register and in connection with 17 U.S.C. § 1201 concerning technological protection for copyrighted works.

The growth of the Copyright Office reflects the expansion of copyright industries and their increasing sophistication, as well as the broader scope of the copyright law itself. New works and new uses of works have become subject to copyright law over the years, and new exceptions and statutory licenses have been added to ensure the availability of copyrighted works in appropriate circumstances. Over time, international issues have occupied more of the Office's attention. The Office became a separate department within the Library of Congress in 1897, only six years after enactment of the first law permitting non-U.S. works to qualify for U.S. copyright protection.<sup>5</sup> Since then, the United States has joined the Universal Copyright Convention, the Berne Convention, and many bilateral and multilateral copyright and trade treaties. The development of the Internet has expanded markets for U.S. copyright works throughout the world – whether authorized or not. Unfortunately the resources available to the Copyright Office have not allowed it to keep pace with the needs of its users, which is of critical importance in the fast-moving copyright world of the 21st century.

(a) The Compelling Need for a 21st Century Copyright Office

The Copyright Office serves the needs of many different constituencies. Perhaps the most obvious are the copyright industries, which are a vital segment of the U.S. economy. A recent report found that the “core” copyright industries contributed 1.1 trillion dollars to the U.S. GDP in 2013 and accounted for \$156 billion in foreign sales and exports.<sup>6</sup> They employ nearly 5.5 million U.S. workers, more than 4 per cent of the entire U.S. workforce.<sup>7</sup> The 2009–13 annual growth rate of these industries of 3.9 per cent was 70 per cent more than the growth rate of the U.S. economy as a whole.<sup>8</sup> As is apparent to even the most casual industry observer or consumer, the business models in these industries are changing with unprecedented speed, as different sectors experiment with different means of disseminating copyrighted works in the digital environment.

<sup>5</sup> Int'l Copyright Act of 1891, 26 Stat. 1106.

<sup>6</sup> Stephen E. Siwek, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2014 REPORT 2 (2014), available at <http://www.cipa.com/>. The “core” copyright industries were characterized as those industries “whose primary purpose is to create, produce, distribute or exhibit copyrighted materials” including software and videogames, books, newspapers, periodicals and journals, motion pictures, recorded music and radio and TV broadcasting. *Id.* at 1 n.1.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.*



Individual copyright owners, who may face particular challenges in registering their works, are an important group of constituents. The Copyright Office also serves users, including individuals, vital institutions such as libraries, archives, and educational institutions, and large corporations whose principal business is to disseminate or provide means of dissemination of copyrighted materials.

Of course, characterizing the Copyright Office's constituents simply as "owners" or "users" understates the complexity of the copyright world. Many copyright owners are also users, and many users build on copyrighted works to become copyright owners themselves. They share an important characteristic, however: they participate in a dynamic and fast-moving environment and are accustomed to immediate access to the information that they seek. Despite its best efforts, the Copyright Office has been unable to keep pace with the communities it serves.

(b) What is Needed To Achieve a 21st Century Copyright Office?

The Copyright Office must modernize to stay relevant in the 21st century and beyond. Below, we first identify essential improvements to the services the Office provides. Second, we describe ways that Congress could assist the Office in achieving its goals, including removing budget and infrastructure obstacles, and providing the Office with greater autonomy and rulemaking authority.

(i) Necessary Improvements to Copyright Office Operations.

(1) Registration.

The Copyright Office must be able to quickly and efficiently ingest applications for copyright registration in electronic form, and process those applications as speedily as possible. Thanks to the electronic registration system that was developed with off-the-shelf software and fully implemented in 2008, some 80% of registration applications are filed at least in part online.<sup>9</sup> The average time for the Office to turn around applications filed online is 3.3 months, as compared with 8.2 months for applications submitted in paper form.<sup>10</sup>

Despite this progress, there is no question that the existing registration system could be improved. For example, the user interface could be more informative and user friendly, and the

<sup>9</sup> The Next Generation Copyright Office, *supra* note 1 at 217–18.

<sup>10</sup> Oversight of U.S. Copyright Office: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of H. Comm. on the Judiciary, U.S. House of Representatives, 113<sup>th</sup> Cong. 9 (2014) (statement of Maria A. Pallante, U.S. Register of Copyrights) [hereinafter, "Statement of Maria A. Pallante"].





system software updated to provide greater flexibility and interoperability with other systems to simplify the registration process.<sup>11</sup>

One of the main obstacles to moving to an almost entirely online registration system is the requirement for the copyright deposit that accompanies the registration application. In most cases, an electronic version of a work is adequate for the Office to examine the work for registration purposes. However, copyright law provides that registration deposits for published works must satisfy certain statutory requirements for deposit with the Library.<sup>12</sup> The deposit for registration of a published work, as a general rule, must be in the “best edition” prescribed by the Library, i.e., the version the Library wants for its collections. The “best edition” is usually a physical copy of the work; thus, even if the registration is made in electronic form, the deposit must be in hard copy. (This is what is meant above when we refer to applications being submitted “at least in part online.” Of that 80%, approximately half fall into this category.<sup>13</sup>) To streamline the registration process, it may be advisable to separate the requirement of deposit for registration (which would likely be in electronic form) from the deposit for the Library (which could be in hard copy form). Waiting for receipt of the Library’s copies would not hold up the progress of the registration application. In addition, receiving registration deposit copies electronically would enable the Copyright Office to retain copyright deposit copies indefinitely. Currently, the Office has too little storage space to keep copyright deposits, and consequently few are kept longer than five years.<sup>14</sup>

## (2) *Recordation.*

Recordation of transfers, assignments, security interests, and other documents theoretically provides a means by which someone searching to find the copyright owner of a work could trace the chain of title. Making this information accessible to the public promptly in a user-friendly integrated database is an essential role of a 21st century Copyright Office. The current system of recordation, however, is the relic of an earlier time and provides relatively little help in establishing chain of title and/or encumbrances on title. It is still largely paper-based, and recordation information is not linked to registration records. It takes about 17 months to process a recordation, in large part because the department is significantly understaffed, with only nine

<sup>11</sup> Some copyright owners could benefit from batch processing of works being registered electronically. It would also be helpful if the Copyright Office could allow electronic filing of designation of agent forms that service providers file under 17 U.S.C. § 512, allowing such notices to be filed more quickly and efficiently.

<sup>12</sup> 17 U.S.C. § 408(b). Deposit for the Library must be made even if the work is not registered. *Id.* § 407.

<sup>13</sup> The Next Generation Copyright Office, *supra* note 1 at 217–18.

<sup>14</sup> This is especially problematic when there is a dispute concerning the registered work. Electronic deposit copies would also permit easier access to these important records. Right now, only the copyright owner or a litigant can have access to the deposit copy. While we recognize that there are security concerns with respect to some works, consideration should be given to making these records more accessible in appropriate circumstances.



recording specialists to process approximately 12,000 documents each year.<sup>15</sup> A prospective purchaser or lender is charged with notice of a transaction recorded within 30 days of its execution, although it may take 17 or more months before that transaction can be discovered in the Copyright Office records by a diligent purchaser or lender.<sup>16</sup> This long lead time can hinder loans for which copyrights are collateral, and film and financing deals, which are generally dependent on demonstrating an up-to-date clean title. Thus, the state of the recording function in the Office frustrates transactions in copyright assets.

The recording function of the Copyright Office must be reengineered, top to bottom. It should be possible for the Office to ingest materials for recording in electronic form, process them promptly, and if the copyright is registered, link the recording record with the registration so that a search for the registration or the recording would provide a full record with all of the relevant information returned together.

A recently published study by the Copyright Office, *Transforming Copyright Recording in The Copyright Office*,<sup>17</sup> is a critical first step, but reengineering recording will be an expensive and complicated task.

### (3) *Enhanced Security.*

As the Copyright Office increasingly accepts and maintains copyrighted works in digital form, it is imperative that the Office employ appropriate security measures to prevent unauthorized access to these works. Security is especially critical for works such as secure tests, answer books, source code, and for unpublished works generally. Because copyright registration is not mandatory, copyright owners may simply bypass registration if they believe their works are not secure in the Copyright Office, which would threaten the integrity and utility of the national copyright registry.

### (4) *Upgrade Copyright Office Databases.*

Many changes could be made to assist users in discovering important information about copyrighted works. First, it is essential to digitize pre-1978 records and make them available to the public in a searchable, user-friendly manner. The copyright registration database currently

<sup>15</sup> Statement of Maria A. Pallante, *supra* note 10 at 9.

<sup>16</sup> “As between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice under subsection (c), within one month after its execution in the United States or within two months after its execution outside the United States, or at any time before recording in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such manner, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer.” 17 U.S.C. § 205(d).

<sup>17</sup> The report of that Study, written by the Copyright Office’s Kaminstein Scholar-in-Residence, Robert Brauneis, and published in December 2014, is available at <http://copyright.gov/docs/recording/recording-report.pdf>.



contains records from January 1, 1978 (the effective date of the 1976 Act) to the present. The Copyright Office is in the process of digitizing some of these records, but what is lacking is an easily searchable online database of them. To ascertain registration and recordation information about these works, one must still go to Washington D.C. and search the old card catalogues in the Copyright Office.

While it might seem as though these records are too old to be useful, they contain valuable information about works copyrighted prior to 1978, many of which are still protected by copyright. In fact, it is all the more important to have these records accessible to all, precisely because they are older, and copyright status, ownership and other key copyright information is not readily available. Just as important, many of those works are no longer protected by copyright, particularly those whose copyrights were not renewed when renewal was mandatory. A complete database would be an important tool in identifying these public domain works for the benefit of those who wish to make use of them.

Second, the Copyright Office records should include unique identifiers which have become standard in many creative industries, such as International Standard Recording Code (ISRC), to assist users in seeking information about copyrighted works maintained in other databases. Ideally, the Copyright Office system would link to other trusted databases that contain such information.

Third, the Copyright Office database was developed largely as a text-based tool. There is no practical way to search the database for visual artworks or musical works, unless one knows the title under which it was registered (which, particularly in the case of photographs, is often not the title by which it later became known in the marketplace). It would also be useful if, going forward, the Copyright Office could license or develop software to enable image or music searches, at least on a going-forward basis. We are aware that these tools could require a significant ongoing dedication of resources, as these types of software are constantly being improved. It may be that linking to existing, trusted databases established in the various creative fields could provide this type of functionality.

The measures discussed above would not only encourage registration and recordation, but also respond to the increasing need to know whether a copyrighted work has been registered and who owns it, important considerations to individuals or entities seeking to further develop or use an existing work. Users of works that are potentially protected by copyright rightfully complain that it can be difficult to clear rights because owner information is not available. Rights clearance is an integral part of the copyright ecosystem; new creators often incorporate older works and rights owners are dependent on that licensing income to be able to invest in new works. The Copyright Office has an essential role in providing a robust means to acquire copyright information in the digital age.

These measures would go a long way to reduce the “orphan works” problem. One of the Copyright Office’s goals in recommending a legislative approach to orphan works was to



encourage the development of rights databases and so reduce the number of orphan works.<sup>18</sup> The Copyright Office's own database has an important role in making information accessible to the public.

(ii) Essential Requirements for Achieving Operational Goals.

There is no lack of vision or energy in the Copyright Office's management. Since she became Register of Copyrights in 2011, Maria Pallante, together with her staff, has focused significant time and resources to assess the state of Copyright Office operations, plan for the future, and make what inroads they could in addressing the problems.<sup>19</sup> But issues of infrastructure, budget and autonomy must be addressed before the Office can effectively tackle these issues.

(1) Technology.

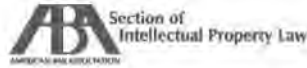
The Copyright Office needs a sophisticated, well-functioning IT system that can accommodate its needs. Currently, the Copyright Office must work through the Library's IT system and its existing software, developed and managed with the Library's different priorities in mind. The Copyright Office often has to compete with other Library departments for IT services. It is difficult for the Office to make even minor changes to the online form to address changes in practices or regulations; those changes are often put on a waiting list of months, if not years. This is not acceptable for an Office that serves a vital segment of the U.S. economy. Moreover, the IT department is not always sensitive to the needs of the Office and its users. During the 2012 government shutdown, the Library's website was taken offline, although the Register of Copyrights requested that the Copyright Office site remain online, like many government agency sites. She encountered considerable resistance from the Library's IT staff and it took days to get the Copyright Office's site restored. The Copyright Office and its users deserve a better level of service. The Copyright Office requires a nimble, responsive IT system focused solely on its needs, which often differ from those of the Library.

With a more robust IT system to manage applications, recordings, and other digital records, the Copyright Office will be better positioned to participate in various initiatives currently under consideration, such as federal protection for pre-1972 sound recordings,<sup>20</sup> or the institution of a

<sup>18</sup> See U.S. Copyright Office, *Report on Orphan Works: A Report of the Register of Copyrights* (Jan. 2006), available at <http://copyright.gov/orphan/orphan-report-full.pdf>. The Office is currently working on another study on Orphan Works in light of intervening events. See <http://copyright.gov/orphan/>.

<sup>19</sup> See, e.g., Maria A. Pallante, *Priorities and Special Projects of the U.S. Copyright Office: October 2011–October 2013* (2011), available at <http://www.copyright.gov/docs/priorities.pdf>; the Office's Technological Upgrades Project (discussed in Statement of Maria A. Pallante, *supra* note 10 at 3); U.S. Copyright Office, *Transforming Copyright Recordation in the Copyright Office* (Dec. 2014), available at <http://copyright.gov/docs/recordation-report.pdf>.

<sup>20</sup> U.S. Copyright Office, *Federal Protection for Pre-1972 Sound Recordings: A Report of the Register of Copyrights* (Dec. 2011), available at <http://copyright.gov/docs/sound/pre-72-report.pdf>.



new regime for small copyright claims.<sup>21</sup> The recommendations resulting from both studies, if followed, would likely place additional responsibilities on the Copyright Office.

(2) *Budget.*

Simply put, the Copyright Office needs significantly more money to do its job, not the small increment proposed in the federal budget for this year. It requires a budget that realistically reflects the scope of its responsibilities and the sheer volume of its work. Since 2010 its budget has dropped by \$3.51 million or 7.2%. As a result of budget cuts and retirement packages offered to Library employees, the Office is operating with approximately 360 full time employees, well below its authorized ceiling of 439.<sup>22</sup> It is significantly in need of experienced copyright lawyers and technical professionals, as well as registration and recordation specialists and others. (We take no position on whether specific types of employees should be hired, as this is a matter best suited for the expert judgment of the Register and her staff.) For example, although it is important that the Register or her staff participate in meetings that involve international treaties or trade agreements, the Office's budget for travel is so inadequate that there are times when Copyright Office personnel are unable to attend such meetings, or the U.S. P.T.O. has to pay their way. Similarly, the Office's databases are compared unfavorably with those of other public and private sector databases because the Office is so inadequately funded.

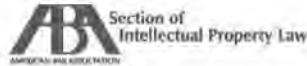
The Copyright Office needs a way to fund long term improvement projects. In fiscal year 2014, the Copyright Office budget was \$45 million, of which approximately two-thirds came from fees and one-third from appropriations.<sup>23</sup> The law does not empower the Office to raise fees to fund capital improvements; it can charge only the costs it incurs in performing a service in the ordinary course of business. The Register has suggested that the Office's fee-setting authority be made more flexible so that the Office can experiment with different fee structures that permit the Office to budget for its long-term future, and better serve the needs of the copyright community.<sup>24</sup> Even if the Office is given greater flexibility to innovate with respect to fees, however, it simply cannot raise enough to make ends meet and engage in capital improvement projects. There comes a point at which higher fees can discourage registration and recordation, and undermine the important goal of a providing a comprehensive, accurate database of copyright information.

<sup>21</sup> U.S. Copyright Office, *Copyright Small Claims: A Report of the Register of Copyrights* (Sept. 2013), available at <http://copyright.gov/docs/sound/pre-72-report.pdf>.

<sup>22</sup> Statement of Maria A. Pallante, *supra* note 10 at 8.

<sup>23</sup> The Next Generation Copyright Office, *supra* note 1 at 231.

<sup>24</sup> *Id.* at 233.



### (3) *Budget Process*

The Office lacks authority to set its own budget. The Copyright Office budget is a separate line item on the budget presented by the Library to Congress. The number does not necessarily reflect the Office's needs as submitted to the Library, however, because the Library must balance the Office's needs against those of its many other departments and ultimately decide what to request for the Copyright Office after considering the needs of all of its service units. The Office needs to be able to make its own budget request.

Moreover, long term improvement projects require a multi-year commitment, and such commitments are very difficult to make in the Office's current budget environment. Often any money it has at the end of a fiscal year is offset against its budget allocation for the following year, so it is difficult to secure funding for long-term projects. To effectively manage substantial improvement projects, the Office needs the ability to build up a reserve account, and be afforded a multi-year budget cycle.

### (4) *Greater Autonomy and Rulemaking Authority*

Effective and efficient Copyright Office operations and sound copyright policy considerations both suggest that the Copyright Office should have greater autonomy, and it should have control of its own budget and infrastructure. Such a change would allow the Copyright Office to develop an IT system focused on the particular needs of the Copyright Office and its users, one that can rapidly respond in a fast-paced business environment that mirrors that of the copyright community that the Office supports. The Office should be allowed to accumulate a reserve account to help its budgeting process, and provided with a multi-year budget cycle. We believe these changes would allow the Office to move forward with the operational upgrades vital to a 21st century Copyright Office.

Currently the Librarian of Congress must approve any regulations the Copyright Office formulates, even though copyright expertise is not a job requirement for the Librarian. Enhanced autonomy from the Library would bring with it an opportunity to expand the substantive role of the Copyright Office by granting it appropriately crafted rulemaking authority. The law presently gives the Copyright Office the primary responsibility for considering requests for exemptions under the anti-circumvention provisions of the Digital Millennium Copyright Act,<sup>25</sup> but some have suggested expanding the Office's regulatory role in certain circumstances, such as giving it the ability to adjudicate copyright infringement claims of relatively small economic value,<sup>26</sup> to render advisory opinions on fair use cases,<sup>27</sup> or to form

<sup>25</sup> See 17 U.S.C. § 1201(a)(1)(C). Although the Librarian of Congress ultimately issues the regulations due to certain Constitutional considerations, he has traditionally followed the Register's recommendations. *But see* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control, 75 Fed. Reg. 43825, 43838-39 (July 27, 2010).

<sup>26</sup> U.S. Copyright Office, *Copyright Small Claims: A Report of the Register of Copyrights* 97 (Sept. 2013), available at <http://copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.



standards and practices that animate certain broad principles of the copyright law, such as the Shawn Bentley Orphan Works Act of 2008 would have done, by empowering the Copyright Office to establish “recommended practices” for finding copyright owners.<sup>28</sup>

There is another important policy reason to provide the Office with greater autonomy. Libraries, including the Library of Congress, regularly take positions on various policy matters that are the subject of Copyright Office studies and rulemaking proceedings. At the same time, the Copyright Office’s conclusions and recommendations are subject to review by the Library. In short, the Library’s control of the Copyright Office presents a conflict of interest, regardless of whether or not the Library formally weighs in with comments. Providing the Office with greater autonomy will remove the conflict or appearance of conflict on the part of the Library.

Serious consideration should be given to the manner in which the Copyright Office’s independent authority might best be achieved.

In sum, the Copyright Office requires greater autonomy to effectively support copyright owners and users in the 21st century. Both the Copyright Office and the Library of Congress serve invaluable roles, and we believe that such a change would be mutually beneficial. Both entities could focus their energies on what they do best, and apply their budgets and develop their infrastructures in a way that best serves their users and the nation.

<sup>27</sup> Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007) (calling for the creation of a Fair Use Board within the U.S. Copyright Office).

<sup>28</sup> Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong., 2d Sess. (2008).

Mr. GOODLATTE. Thank you, Ms. Dunner.  
Ms. Mertz, welcome.

**TESTIMONY OF NANCY J. MERTZEL, SCHOEMAN UPDIKE  
KAUFMAN & STERN LLP, ON BEHALF OF THE AMERICAN IN-  
TELLECTUAL PROPERTY LAW ASSOCIATION**

Ms. MERTZEL. Chairman Goodlatte, Ranking Member Conyers, and distinguished Members of the Judiciary Committee, I am Nancy Mertz, a partner at Schoeman Updike Kaufman & Stern in New York City. Thank you for allowing me to testify today on behalf of the American Intellectual Property Law Association, and for your continued interest in the Copyright Office.

AIPLA is a bar association of approximately 15,000 members, including individuals who represent both copyright owners and users. Many of our members interact with the Copyright Office on a regular basis. I serve on AIPLA's board of directors and recently chaired its Copyright Law Committee. I am a member of the Copyright Society of the USA, and previously served as a trustee of that organization. I have spent more than 2 decades practicing in this area of the law.

Creative expression is a key driver of our Nation's social and economic wellbeing, and the Copyright Office plays a critical role in our Nation's copyright system. We recognize and appreciate the strong leadership of Registrar Pallante and her excellent staff. However, in our view, inadequate resources and lack of autonomy have left the Office understaffed and its technology outdated, preventing the Office from operating as well as it should. Today I will briefly describe some of the difficulties faced by those who used the Office's services on a regular basis.

A copyright registration or a refusal is a prerequisite to a suit for infringement of a United States work. Timely registration also creates a public record, entitles the owner to prima facie evidence of validity, and the potential to recover statutory damages and attorneys' fees in cases of infringement.

However, the electronic system for registering copyrights online is severely lacking. For example, it needs a more intuitive interface and the ability to print, view, and forward draft applications to third parties for signature. Otherwise some practitioners will continue to use paper applications. The deposit system also needs substantial improvement. Instead of a manual deposit of physical materials, applications should be evaluated based upon submission of electronic materials. We need to continue building the Library's important collection and simultaneously improve the registration process.

Because of staffing constraints, it also takes too long to retrieve deposit material from the Office. In copyright disputes, it is usually important to compare the accused material to the deposit material. However, it can take the Office 8 to 12 weeks to provide deposit material, which is simply too long for a party to wait if they are facing litigation.

Recording documents that affect copyright, such as assignments and licenses, is also too cumbersome. We have to file documents with original signatures, we do not usually get a receipt, and the



information takes far too long to appear online. Professor Brauneis' report describes these issues in much more detail.

To continue to thrive, our copyright system needs a better database. The Office has in its possession a wealth of information concerning the registration status and ownership of creative works. However, its online catalog only dates back to 1978. To search older works which may still be under copyright, it is often necessary to hire a trained searcher to review card catalogues, printed materials, and even microfiche. The online catalogue of post-1978 works is also difficult to search, and some perceive its results as inaccurate, over inclusive, or under inclusive.

The absence of a trusted database creates uncertainty, increases the cost of copyright-related transactions, and hinders sound business decisions. Creating a robust database may also help mitigate the issue of orphan works and masked digitization as it will be less burdensome and expensive to identify copyright owners.

AIPLA believes that the Copyright Office needs increased resources and greater autonomy over its budget and IT systems. Others have made suggestions about necessary changes, including where the Office should be located within our Federal system. AIPLA takes no position on that issue today, and recommends further study. In today's digital world, copyright will continue to grow in importance as an economic and cultural force. A well-functioning copyright office is not only desirable, it is essential.

Thank you for continued interest in these issues. We stand ready to assist you, and the Office, and others in any way we can.

[The prepared statement of Ms. Mertz follows:]



Testimony of

Nancy J. Mertz

On behalf of the

American Intellectual Property Law Association

before the

U. S. House of Representatives Committee on the Judiciary

hearing on

“The U.S. Copyright Office: Its Functions and Resources”

February 26, 2015

## **I. Introduction**

Chairman Goodlatte, Ranking Member Conyers, and distinguished members of the Judiciary Committee, I appreciate the opportunity to present the views of the American Intellectual Property Law Association (AIPLA) on the U.S. Copyright Office: Its Functions and Resources, and for your continued attention to issues facing the U.S. Copyright System through your comprehensive review.

My name is Nancy Mertz and I am a partner of Schoeman Updike Kaufman & Stern LLP, which is based in New York City. I have been practicing intellectual property law for more than 25 years, with a particular emphasis on copyright. Currently, I am a member of the Board of Directors of AIPLA. I recently served as Chair of the Association's Copyright Law Committee. I am also a member of the Copyright Society of the USA, and previously served as a Trustee. I received my J.D. from American University's Washington College of Law, and my B.A. from the University of Rochester.

AIPLA is a national bar association with approximately 15,000 members who are primarily lawyers in private and corporate practice, in government service, and in the academic community. AIPLA's members represent a wide and diverse spectrum of individuals, companies, and institutions, and are involved directly or indirectly in the practice of copyright, patent, trademark, and unfair competition law. Our members represent both owners and users of intellectual property and many interact with and use the services of the Copyright Office (the "Office") on a regular basis.

Our founding fathers recognized the importance of copyright at the birth of this nation when they included it in the Constitution: among the enumerated powers given to Congress is the power "to promote the Progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>1</sup> The drafters of the Constitution had the foresight to recognize that creativity and innovation are essential to our nation's social and economic well-being.

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<sup>1</sup> U.S. CONST. art 1, 8, cl. 8.

Now, more than two-and-a-quarter centuries later, we are virtually surrounded by the benefits of that foresight. Copyrighted works are an integral part of the U.S. economy. From radio to film and television, and from video games to online entertainment and smartphone apps, we are constantly interacting with copyrighted materials. According to the 2014 Report on Copyright Industries in the U.S. Economy, published by the International Intellectual Property Alliance, total copyright industries added more than \$1.9 trillion to the U.S. Gross Domestic Product in 2013, which accounted for 11.44% of the U.S. economy.<sup>2</sup> From 2009-2013, copyright industries grew at an annual rate of 3.45%, outpacing the growth rate of the entire U.S. economy.<sup>3</sup>

The U.S. Copyright Office plays an essential role in the success of these copyright industries. By administering the exclusive rights that underlie countless business transactions, the Copyright Office has helped these industries grow, benefiting creators, business owners, and the public. The Office expertly administers those rights along with a broad array of responsibilities, including examining works, issuing copyright registrations, recording transfers of copyright ownership and other copyright documents, administering statutory licenses, and managing mandatory deposit requirements. It carries out each of these duties while ensuring public access to all of the related information.

Under the strong leadership of Register of Copyrights Maria Pallante, the Office has not only reduced backlogs while carrying out its ever increasing day-to-day demands, but has also undertaken a number of substantial studies and initiatives designed to better serve owners and users of copyrights. In just the past three years, Register Pallante and her excellent staff have substantially revised the *Compendium of U.S. Copyright Office Practices*,<sup>4</sup> conducted studies on copyright small claims,<sup>5</sup> music licensing,<sup>6</sup> orphan works and mass digitization,<sup>7</sup> and produced an

<sup>2</sup> International Intellectual Property Alliance, *The 2014 Report on Copyright Industries in the U.S. Economy*, 6 (2014) available at <http://www.iipa.com/pdf/2014CpyrtRptFull.PDF>. “Total copyright industries” in the report is the total of the four copyright categories defined by the World Intellectual Property Organization. *Id.* at 5.

<sup>3</sup> *Id.* at 9.

<sup>4</sup> U.S. Copyright Office, *Compendium of U.S. Copyright Office Practice* (3d. ed. 2014).

<sup>5</sup> U.S. Copyright Office, *Copyright Small Claims: A Report of the Register of Copyrights* (2013).

<sup>6</sup> U.S. Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights* (2015).

<sup>7</sup> U.S. Copyright Office, *Orphan Works*, <http://www.copyright.gov/orphan/> (last visited 2/20/2015).

in-depth study on ways to overhaul the Copyright Office's recordation system.<sup>8</sup> In 2013, the Office sought public comment on technological upgrades to its registration and recordation system, and AIPLA offered its suggestions for a creating a technologically savvy 21<sup>st</sup> Century Copyright Office. That initiative produced a comprehensive technical upgrades report that was just published February 19, 2015.<sup>9</sup>

These initiatives are examples of the Copyright Office's awareness of and desire to meet the ever-expanding needs and expectations of its stakeholders. The Office perseveres, but its efforts are severely hampered by limited resources and a lack of autonomy, posing serious challenges for our members who require the services of the Office. As the technical upgrades report acknowledged, the Copyright Office systems are "outdated and overdue for upgrades."<sup>10</sup> The Office is operating with inadequate resources and support, making it difficult for it to meet the constantly growing demands of the copyright system, despite its best efforts.

## II. Constraints on the U.S. Copyright Office

Under the Copyright Act, the Copyright Office has rulemaking authority to develop regulations to implement the statute. However, as a department within the Library of Congress and under 17 U.S.C. § 702, any regulations issued by the Register are subject to the approval of the Librarian. In this respect and in other circumstances, the Office does not have control over important operational and budgetary issues.<sup>11</sup>

The funding of the Copyright Office, which is also subject to approval of the Librarian, is accomplished through a combination of fee collections and appropriated funds. Over fiscal years 2011-2014, the Office experienced a reduction in spending authority of approximately 7 percent from its 2010 appropriation.<sup>12</sup> The appropriation for fiscal year 2015 has shown some progress

<sup>8</sup> U.S. Copyright Office, *Transforming Document Recordation at the United States Copyright Office: A Report of the Abraham L. Kaminstein Scholar in Residence* (2014).

<sup>9</sup> Office of the Chief Information Officer, *U.S. Copyright Office, Report and Recommendations of the Technical Updates Special Project Team* (2015).

<sup>10</sup> *Id.* at 6.

<sup>11</sup> 17 U.S.C. § 702.

<sup>12</sup> *Oversight of the U.S. Copyright Office: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 114<sup>th</sup> Cong. 8 (2014) (Statement of Maria A. Pallante, Register of

toward restoring Copyright Office funding to its 2010 fiscal year level; however this still remains 2 percent below the Office's spending authority for 2010.<sup>13</sup> While the Register has the authority to set fees, Copyright Office fees can only be set at a level to recover costs, which does not permit collections for necessary capital improvements.<sup>14</sup>

Reduced funding for the Office has had a direct impact on its staffing levels. In 2007, the Office had 483 full-time employees,<sup>15</sup> but in September 2014 it had only 360 full-time employees.<sup>16</sup> At that time, Register Pallante testified that the authorized ceiling of 439 employees represents a recent reduction by approximately 100 employees. This is particularly noticeable in the Copyright Office registration program, which as of September 2014 had 48 vacancies out of 180 positions. In other words, over 25% of the registration program positions remain open because of funding constraints. When testifying in April 2014 in support of the Office's requested appropriation, Register Pallante stated the following:

Adequate staff levels are essential to the integrity of the registration program—both its accuracy and efficiency. A copyright certificate of registration is prima facie evidence of validity of the copyright and of the facts stated therein, including the scope of the claim and ownership, and is given significant deference by federal courts. As a result of fewer staff in the registration program, the Office is beginning to see increases in registration processing times—meaning that the public is waiting longer to have their registration applications processed.<sup>17</sup>

Registration is not the only Copyright Office activity affected by budgetary and staffing cuts. The recordation program is staffed by nine employees, the legal and policy staff has fewer than

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Copyrights and Director United States Copyright Office); See Consolidated Appropriations Act, 2014, Public L. No. 113-76, Division I, Title I (2014).

<sup>13</sup> FY2015 Omnibus; Consolidated and Further Continuing Appropriations Act, Public L. No. 113-235, Division H, Title I (2014).

<sup>14</sup> 17 U.S.C. § 708.

<sup>15</sup> Maria A. Pallante, *The Next Generation Copyright Office: What it Means and Why it Matters*, 61 J. Copyright Soc'y, 213, 222 (2014).

<sup>16</sup> *Oversight of the U.S. Copyright Office: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 114<sup>th</sup> Cong. 8 (2014) (Statement of Maria A. Pallante, Register of Copyrights and Director United States Copyright Office).

<sup>17</sup> *FY15 AOC, LOC, and OWLC Budget Requests: Hearing Before the Subcomm. on the Legislative Branch of the S. Comm. on Appropriations*, 114<sup>th</sup> Cong. (2014) (Statement of Maria A. Pallante, Register of Copyrights and Director United States Copyright Office).

twenty lawyers, and the Information Technology (“IT”) department has 23 staffers.<sup>18</sup> In addition, the budget cuts also have limited the Copyright Office’s ability to participate in international copyright policy discussions and prevented the Office from undertaking information technology projects critical to bringing the Copyright Office’s services into the 21<sup>st</sup> century.<sup>19</sup>

As the technical upgrades report explains, “[t]he Office’s technology infrastructure impacts all of the Office’s key services and is the single greatest factor in its ability to administer copyright registration, recordation services, and statutory licenses effectively.”<sup>20</sup> Yet, the Copyright Office does not control its technology. Rather, it is controlled by the Library of Congress, and housed on the Library’s servers. In fact, even equipment purchased by the Copyright Office with its appropriated funds, is controlled by the Library. Additionally, the Office is dependent upon the Library’s IT staff. However, the Library IT staff has other responsibilities, and is not well-versed in the needs of the copyright community.<sup>21</sup> AIPLA urges this Committee to explore ways to give the Copyright Office greater autonomy over its IT infrastructure and services.

AIPLA believes that providing additional resources to the Copyright Office will benefit not only core copyright industries whose primary purpose is to create, produce, distribute or exhibit copyright materials such as music and films, but partial copyright industries as well. Their products include some aspect of copyright, such as fabric and toys, non-dedicated support industries, such as transportation and telecommunications, and interdependent industries, such as TV and computer manufacturers. We hope Congress will consider how it can assist the Office in implementing long overdue improvements to its systems.

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<sup>18</sup> *Oversight of the U.S. Copyright Office: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 114<sup>th</sup> Cong. 8-9 (2014) (Statement of Maria A. Pallante, Register of Copyrights and Director United States Copyright Office).

<sup>19</sup> *FY15 AOC, LOC, and OWLC Budget Requests: Hearing Before the Subcomm. on the Legislative Branch of the S. Comm. on Appropriations*, 114<sup>th</sup> Cong. (2014) (Statement of Maria A. Pallante, Register of Copyrights and Director United States Copyright Office).

<sup>20</sup> *Report and Recommendations of the Technical Updates Special Project Team* at 54.

<sup>21</sup> “Library staff do not have the benefit or experience of working in the Copyright Office, and therefore will never have the context or specialized knowledge that is essential to Copyright Office success.” *Id.* at 11.

### III. Impact on the User Experience

The budget cuts, decreased staffing levels, and limitations described above are felt by AIPLA members in their interactions with the Office. AIPLA members regularly prepare and file applications to register copyrights, record documents, search Copyright Office records, and use other Copyright Office services on behalf of their clients. The Office's lack of control over its infrastructure hinders its ability to implement necessary technological advancements, such as electronic functions that keep pace with the increased workload and additional user requests.

#### *The Electronic Copyright Office Registration System*

Creative works are subject to copyright protection as soon as they are fixed in tangible form, whether or not they are registered, but for United States works a copyright registration is required to bring an infringement action in court.<sup>22</sup> Timely registration also is important for creating a public record of the copyright, for prima facie evidence of copyright validity, and for the possibility of statutory damages and attorney fees in an infringement action.

The Copyright Office's first effort at online filing is its Electronic Copyright Office Registration System ("eCO"). The eCO system was part of a 5-year, comprehensive reengineering project that used off-the-shelf software, and represented the first major overhaul of the Copyright Office since 1870.<sup>23</sup>

Despite a rocky start when first offered to the public in 2008,<sup>24</sup> by FY2011 electronic claims represented over 80% of applications filed with the Copyright Office,<sup>25</sup> and the Copyright Office has significantly reduced average registration processing times.<sup>26</sup> While the eCO system has

<sup>22</sup> 17 U.S.C. §411.

<sup>23</sup> *The Orphan Works Problem and Proposed Legislation: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property, of the H. Comm. on the Judiciary*, 110th Cong., 2nd Session, (2008) (Statement of Marybeth Peters, Register of Copyrights).

<sup>24</sup> Lyndsey Layton, *Move to Electronic System Means Long Waits at U.S. Copyright Office*, Washington Post, May 19, 2009.

<sup>25</sup> *Fiscal Year 2012 Budget Request, Subcomm. on Legislative Branch of the H. Comm. on Appropriations*, 112th Cong., 1st Session March 11, 2011 (Statement of Maria A. Pallante, Acting Register of Copyrights).

<sup>26</sup> See U.S. Copyright Office, *eCO Registration System*, <http://copyright.gov/eco/> (last visited February 22, 2015).



been tweaked, it has not been substantially updated, and it remains far behind state-of-the art technology. For example, the eCO system has an out-of-date user interface, is difficult to use, and can only be used to register certain types of works.<sup>27</sup>

Further, eCO applicants may only submit electronic deposit for certain classes of works, and physical deposit is required for all other types.<sup>28</sup> This slows down the registration process because it requires the physical deposit to be manually matched with the electronic application. It also limits the ability of the Copyright Office to create a repository of electronic deposit materials. While such a repository must be implemented with extreme care to ensure security, it is undoubtedly something that should be considered in the not-so-distant future.

Another shortcoming with the eCO registration system is that it does not permit an attorney to prepare an application for a client to sign. As a result, some practitioners continue to prepare and file paper applications because it is the only way to obtain a client signature on the application without creating a new account and providing the client with the attorney's credentials.

The Copyright Office needs the funding and IT staff to reengineer the eCO system to create a more intuitive user interface that is easier for new users to navigate. AIPLA has advocated for the inclusion of some basic improvements to functionality, including the ability to save draft applications, to print, view, and forward them outside of the system, and the ability for signature by a claimant other than the same person who prepared the application, such as the client of a law firm or creative agency. Our members referenced the Trademark Electronic Application System (TEAS) and other online systems offered by the USPTO as a model to consider.

### ***Recording a Document***

Documents and agreements that affect copyright, such as assignments, security interests, or licenses, may be recorded with the Copyright Office. Although recordation is not mandatory, it

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<sup>27</sup> U.S. Copyright Office, *eCO Frequently Asked Questions*, <http://copyright.gov/eCO/faq.html> (last visited February 20, 2015).

<sup>28</sup> *Id.*

provides many benefits such as establishing legal priority, creating a public record of the content of a legal document, providing constructive notice of a right, and perfecting a security interest.

At this time, documents for recordation may not be submitted using the eCO system, and instead must be submitted by mail or by hand delivery. Users find the current system cumbersome and difficult to use, presenting a number of serious practical and legal challenges for practitioners and copyright owners.

For example, when filing a document, there is no acknowledgment or confirmation that the document has been recorded (or even received) by the Copyright Office. It is not unusual for the recordation itself not to appear on the online catalog for several years after the date of filing, without an effective way to check the status of the recordation or expedite recordation. Additionally, without a filing receipt or other evidence of the recordation, it can be difficult, if not impossible, to try to enforce a U.S. copyright that has been assigned overseas. Some of the technical requirements for proper recordation, such as requiring an original signature or proper certification of the photocopy, also seem needlessly burdensome.

The Office recognized these issues in its detailed study of the recordation system by Robert Brauneis, the Copyright Office Abraham L. Kaminstein Scholar in Residence.<sup>29</sup> That December 2014 study included several proposals for a new electronic system.

AIPLA supports giving the Copyright Office the resources necessary to improve and simplify the recordation system for the benefit of the public, copyright owners, practitioners, and the Copyright Office. This should include creating an electronic recordation system, moving away from reliance on original signatures or other hyper-technical requirements, expanding the scope of persons entitled to record a document, and implementing a user-friendly and effective system to follow up on the status of a recordation, for example, by assigning a named Copyright Office specialist for the filer to contact, among other things.

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<sup>29</sup> *Transforming Document Recordation at the United States Copyright Office* at 54-57.

*Searching the Copyright Office Database and Access to Copyright Records and Other Documents*

The Copyright Office has collected a vast amount of data. Access to this information is essential for investigating the status of registration for a work, identifying the current owner, and obtaining other pertinent information contained in Office records.

In the words of Register Pallante, “The presentation and searchability of our public records should be key factors in helping copyright owners manage their rights, and users to find and assess the information. The Office should help bridge the gap between what constitutes a diligent search and one worthy of the trouble.”<sup>30</sup> Due diligence and the ability to locate works, to locate registrations for those works, and to locate their assignments and licenses in a timely manner is the touchstone of any database of the Copyright Office.

Unfortunately a great deal of information is not available in electronic form. For example, the Copyright Office’s online catalog only has electronic records dating back to 1978.<sup>31</sup> For older works, many of which are still under copyright, a trained searcher must use the card catalogs, the 660 volume Catalog of Copyright Entries (“CCE”) available in print or microfiche, or search the partially digitized and incomplete records of the CCE available at archive.org.<sup>32</sup> Often, it is necessary to hire a search service to do this work, which can add significant expense to a search. Further, the information that is available in the Office’s online database is perceived by many in the bar as difficult to search and inaccurate; yielding either too few, or too many results. The lack of a trusted database of works creates uncertainty, increases the costs of copyright transactions, and impacts sound business decisions.

The inability to effectively search electronic data and rely on the results of any searches performed directly impacts the issue of orphan works, which the Copyright Office has been

<sup>30</sup> Maria A. Pallante, *Orphan Works & Mass Digitization: Obstacles & Opportunities*, 27 Berkeley Tech. L.J. 1251, 1257 (2012).

<sup>31</sup> The Copyright Office is aware of this issue and is working to address it. *Transforming Document Recordation at the United States Copyright Office* at 59.

<sup>32</sup> See U.S. Copyright Office, *Circular 23: The Copyright Card Catalog and Online Files of the Copyright Office*, <http://copyright.gov/circs/circ23.pdf> (last visited February 22, 2015).

studying for more than a decade and has been the subject of Congressional hearings. An “orphan work” is a work protected by U.S. copyright law, for which a user cannot readily identify and/or locate the copyright owner in good faith, in a situation where permission from the copyright owner is necessary as a matter of law.<sup>33</sup> The current Copyright Office system to find rightful copyright owners is cumbersome, which is particularly an issue in the context of mass digitization. The Copyright office has acknowledged need for improvement in this area, stating, “the issues at the heart of mass digitization are policy issues of a different nature: the [orphan] works may in fact have copyright owners, but it may be too labor-intensive and too expensive to search for them, or it may be factually impossible to draw definitive conclusions about who the copyright owners are or what rights they actually own.”<sup>34</sup>

AIPLA has supported proposals to improve the Office’s search functionalities by calling for development of a new electronic database for registered pictorial, graphic, and sculptural works.<sup>35</sup> As discussed above, budget limitations and lack of autonomy have severely impaired the Copyright Office’s ability to move forward with improvements to its electronic systems.

#### *Access to Staff*

Due to the noted understaffing, the demands on the present Copyright Office staff are great, making it difficult at times for users to get in touch with someone who can check the status of or otherwise discuss a registration application. While the Office responds to numerous inquiries, it is often unable to return phone calls or emails on a timely basis.<sup>36</sup>

In addition, the Copyright Office website explicitly states, “Status inquiries will not be answered unless maximum processing times have been exceeded.”<sup>37</sup> Estimated current processing times

<sup>33</sup> Orphan Works and Mass Digitization, 77 Fed. Reg. at 64555 (October 22, 2012).

<sup>34</sup> 77 Fed. Reg. at 64557.

<sup>35</sup> American Intellectual Property Law Association, *Comments Submitted Pursuant to Notice of Inquiry Regarding “Orphan Works and Mass Digitization,”* 77 Fed. Reg. 64555 (2013).

<sup>36</sup> The online option for checking the status of an application is akin to submitting an email via the web.

<sup>37</sup> U.S. Copyright Office, *Status Request*, [http://copyright.gov/forms/status\\_form.html](http://copyright.gov/forms/status_form.html) (last visited February 20, 2015).

are available on the front page of the eCO website.<sup>38</sup> The current processing time for an electronic application is 8 months, and for a paper application it is 13 months. This, effectively, means that the Copyright Office has instituted a policy of not responding to an inquiry of any kind until 8 months has elapsed since the user filed electronically, or 13 months if filed on paper, leaving practitioners in the dark with regard to pending applications.<sup>39</sup> While a user can pay an \$800 fee for special handling to expedite the process, such a requirement on a routine basis for applications that would otherwise cost \$35-55 should be the exception, not the rule.

### ***Access to Deposited Material***

When preparing for litigation, practitioners often need access to deposited copyrighted works. A registration is required by the Copyright Act to enforce rights in Federal Court,<sup>40</sup> and typically copyright litigation involves comparison of the accused material to deposited material (which corresponds directly to the work for which the registration was granted, and may differ from what is available in the market). Other issues may arise with the deposited work, such as whether it was the “best edition,” and these may be tested in litigation.<sup>41</sup> To obtain the deposit copyright, a user must contact the Records Research and Certification Section for a Litigation Statement Form (which is no longer available on the Copyright Office website), complete the form, arrange for payment, and wait to receive the deposit. Ordering a deposit copy takes 8-12 weeks and often costs \$200-\$400 or more.<sup>42</sup>

AIPLA would like to see improved access to deposit material and would support providing public access to a preview portion or representation of the deposit (as approved by the applicant) to allow members of the public to know what was actually registered. This could include, for

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<sup>38</sup> U.S. Copyright Office, *eCO Registration System*, <http://copyright.gov/eco> (last visited February 20, 2015).

<sup>39</sup> *Id.*

<sup>40</sup> 17 U.S.C. § 402.

<sup>41</sup> U.S. Copyright Office, *Circular 71: Mandatory Deposit of Copies or Phonorecords for the Library of Congress*, <http://www.copyright.gov/circs/circ07d.pdf> (“In general, for works other than published electronic works available only online, the deposit must consist of two complete copies or phonorecords of the best edition of the work.”).

<sup>42</sup> U.S. Copyright Office, *Search Estimate*, [http://copyright.gov/forms/search\\_estimate.html](http://copyright.gov/forms/search_estimate.html) (last visited February 20, 2015).

example, the cover of a book or literary work, a preview or snippet of a song or audiovisual work, and a degraded image of a photograph.<sup>43</sup>

#### IV. The Copyright Office of the Future

The Copyright Office currently is doing the best it can under the conditions and limitations in which it must operate. A serious question remains, however, on how to best position the Office to meet current and future challenges. Unless addressed, the difficulties discussed above may only get worse over time. AIPLA believes that giving the Copyright Office sufficient funding and staffing would likely go a long way in resolving a number of these issues.

Additionally, increased autonomy is essential for the Copyright Office of the future. As previously noted, the Copyright Office is housed within the Library of Congress. The mission of the Library includes collecting, preserving, and making available to the public books, recordings, photographs, historical documents, films, and other cultural works. The Copyright Office, is tasked with administering the Copyright Act through its registration, recordation, and other functions. Additionally, the Copyright Office serves Congress and other government officials as expert advisors on copyright policy.

The Office also shares the technical infrastructure of the Library, including its network, servers, telecommunications, and security operations. This raises concerns among copyright owners about the security of the Copyright Office's systems.<sup>44</sup> Allowing the Copyright Office to operate separate computer systems would reduce the security risks associated with sharing systems with the Library. The Office also should be provided sufficient funding and autonomy to develop specialized software and systems designed to run its operations effectively, and meet the business needs of the copyright community.<sup>45</sup> In an age of increasing technological changes, the

<sup>43</sup> This has similarly been addressed by others. See *Report and Recommendations of the Technical Updates Special Project Team* at 25.

<sup>44</sup> *Oversight of the U.S. Copyright Office: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 114<sup>th</sup> Cong., 4 (2014)(Statement for the Record of Keith M. Kupferschmid, General Counsel and Senior Vice President, Intellectual Property, Software & Information Industry Association).

<sup>45</sup> *Report and Recommendations of the Technical Updates Special Project Team*.

Copyright Office needs more autonomy and control over its own budget, infrastructure, and policies in order to administer the copyright laws more effectively.

While AIPLA does not currently have a specific position on how to provide the Office with greater autonomy, we note that it is not the first time such issues have been considered. For example, almost nineteen years ago, the Senate considered legislation which, among other things, proposed to reconstitute the Patent, Trademark and Copyright Offices as a single government corporation: the United States Intellectual Property Organization.<sup>46</sup>

At that time, AIPLA supported the proposal of a government corporation as it pertained to the USPTO. However, in a statement developed for the record, we suggested there were too many unknowns as to such a change for the Copyright Office and said that it should be dropped from the legislative proposal. Additionally, we suggested at the time that the National Academy for Public Administration (NAPA) could be called upon to perform an in-depth study of the Copyright Office, much as it had done for the USPTO on two prior occasions.<sup>47</sup>

This advice and note of caution, first given 19 years ago, may still be applicable today. Armed with such a study by NAPA or some other similar organization, and with appropriate input from across the user and stakeholder community, Congress could better evaluate whether change is warranted, as well as the many other issues that need to be addressed such as funding and fee structures, oversight, staffing and personnel issues, and regulatory authority, to name a few.

## V. Conclusion

The copyright system continues to be a key economic and cultural force in the United States, and AIPLA believes an efficient and effective Copyright Office is an imperative pillar of that system. Such an Office would not only benefit creators and the public, but it would set a standard for the rest of the world as well. We again thank the Members of this Committee for your continued efforts and interest in this area, and we stand ready to assist you in any way we can.

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<sup>46</sup> S. 1961, 104<sup>th</sup> Cong. (1996).

<sup>47</sup> *S. 1961, the Omnibus Patent Act of 1996: Hearing Before the S. Comm. on the Judiciary*, 104<sup>th</sup> Cong. 9-10 (1996) (Statement of Michael K. Kirk, Executive Director of the American Intellectual Property Law Association).

Mr. GOODLATTE. Thank you, Ms. Mertz. Mr. Brauneis, welcome.

**TESTIMONY OF ROBERT BRAUNEIS, PROFESSOR,  
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL**

Mr. BRAUNEIS. Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee, thank you for inviting me to testify here today. I have been teaching copyright law for over a decade, and during the last academic year, as Chairman Goodlatte mentioned, I had the privilege of working at the Copyright Office as the inaugural Abraham L. Kaminstein Scholar-in-Residence. Through that experience, I have come to know and respect the work of that office, and also to learn about some of its challenges and opportunities. I am honored to have the occasion to present some of my views.

There are three topics on which I want to focus today: the registration and recordation functions of the Copyright Office, its independent legislative advisory role, and the constitutional challenges to the structure of the Copyright Office and of the Library of Congress.

Copyright registration and recordation are core functions of the Copyright Office that occupy the majority of its personnel. They provide essential information and evidence to support the copyright marketplace. Because of the emerging importance of information technology to those functions, the funding and control models that once worked to support them no longer work.

Information technology has made those functions capital intensive, requiring large multiyear investments to build the most efficient systems. Information technology has also rendered registration and recordation personnel dependent on a separate IT staff. Unfortunately, funding and control limitations have resulted in chronic underinvestment and ineffective management of necessary computer systems.

To remedy these deficiencies, I recommend that Congress explicitly authorize the Copyright Office to collect fees that cover future capital investments and to build a reserve fund that is not depleted annually by an adjustment to the Office's appropriation. I also recommend that the Office be given greater control over the computer systems on which recordation and registration depend, which are now run outside the Copyright Office by the Library of Congress.

For over a century, the Copyright Office has provided independent advice and support on copyright matters to Congress and to executive branch agencies using the expertise that it has developed from administering copyright law. As I have studied the history of the Copyright Office, I have repeatedly been impressed by the depth of its contributions to copyright legislation, including the comprehensive revisions of 1909 and 1976.

The traditional assumption is that the Copyright Office can provide independent advice to Congress because it and the Library of Congress are in the legislative branch of government. Recent litigation, however, has challenged that assumption. Courts have held that the function of the Copyright Office in developing and applying registration policy and the function of the copyright royalty



judges in setting statutory licensing rates are essentially executive in character.

In order to uphold registration and rate-making decisions, the courts have clarified that the Librarian of Congress is the head of an executive department, who is fully responsible to the President, just as every Cabinet member is. They have also held that the Registrar and the copyright royalty judges must be fully responsible to the Librarian and removable at will by him. Thus, under current rulings the Library and the Copyright Office are in the executive branch. The President has already informed Congress that he is asserting control over the Librarian's power to shift resources between the Copyright Office and other divisions of the Library.

In the face of these developments, Congress may want to consider a number of options. Congress can preserve and reinforce congressional control over the non-copyright functions of the Library, including the Congressional Research Service, because they are not executive in character. Thus, if Congress placed the copyright functions of the Library in a separate agency, it could provide that the Librarian be appointed by a Member or Committee of Congress.

Congress must place the executive functions of the Copyright Office in an executive agency. Although it has a number of options in that regard, I recommend that it consider an independent agency. An independent agency can be empowered to continue to give Congress and executive branch departments impartial expert copyright advice without clearing that advice through the President. An independent copyright commission could thus continue to provide the trusted advice that has benefited Congress for over a century, while also administering the copyright laws on the day-to-day basis that is the source of much of its expertise.

Thank you very much.

[The prepared statement of Mr. Brauneis follows:]

Statement of  
 Robert Brauneis  
 Professor of Law,  
 Co-Director of the Intellectual Property Law Program  
 The George Washington University Law School  
 on “The U.S. Copyright Office: Its Functions and Resources”  
 Committee on the Judiciary, U.S. House of Representatives  
 February 26, 2015

**I. Introduction**

Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee, my name is Robert Brauneis, and I am a Professor of Law at The George Washington University, where I also serve as Co-Director of the Intellectual Property Law Program. During the academic year 2013-2014, I was the inaugural Abraham L. Kaminstein Scholar in Residence at the United States Copyright Office. Over the course of a decade of teaching copyright law, and particularly during the year I spent at the Copyright Office, I have come to know and respect the work of that Office, and also to learn about some of its challenges and opportunities. I am honored to have this occasion to present some of my views.

I am sure that none of the Members of this Committee need to be convinced of the importance of the copyright industries, and of creative works, to the economy and the welfare of this country. In 2013, the core copyright industries contributed over a trillion dollars in value to the U.S. Gross Domestic Product, and employed nearly five-and-a-half million workers, whose average compensation was 34% more than the average compensation paid to all U.S. workers.<sup>1</sup> The copyright industries make a particular contribution to international trade, as the United States exports copyrighted works of far more value than those it imports.<sup>2</sup> And it should not be forgotten that the millions of works that are now in the public domain, or are freely licensed, or

<sup>1</sup> See Copyright Industries in the U.S. Economy: The 2013 Report, at 2, by Stephen E. Siwek of Economists Incorporated, prepared for the International Intellectual Property Alliance (IIPA), November 2013, available at [http://www.iipa.com/pdf/2013\\_Copyright\\_Industries\\_Full\\_Report.PDF](http://www.iipa.com/pdf/2013_Copyright_Industries_Full_Report.PDF) (last visited February 23, 2015).

<sup>2</sup> See id. at 15 (foreign sales of the core U.S. copyright industries in 2012 amounted to \$142 billion); World Bank, Charges for the use of intellectual property, receipts (BoP, current U.S.\$), available at <http://data.worldbank.org/indicator/BX.GSR.ROYL.CD/countries> (last visited February 23, 2015); World Bank, Charges for the use of intellectual property, payments (BoP, current U.S.\$), available at <http://data.worldbank.org/indicator/BM.GSR.ROYL.CD/countries> (last visited February 23, 2015) (in 2013, U.S. receipts for the use of intellectual property exceeded U.S. payments for the use of intellectual property by more than \$90 billion).

are used under privileges such as fair use, also contribute immeasurably to our economy, our culture, and our welfare.<sup>3</sup>

The Copyright Office supports the copyright ecosystem through a wide variety of activities, but perhaps the three most important are its administration of the registration and recordation systems, its advisory role with regard to copyright legislation and policy, and its role in providing expert interpretation of the Copyright Act both for Congress and for executive branch agencies such as the Department of Justice and the Office of the United States Trade Representative. In my comments, I will focus on the first two of these roles. I will argue that the central challenge with regard to registration and recordation is the funding and control of information technology, and I will make some recommendations about how to meet that challenge and to seize the opportunities of the information age. I will then argue that the Copyright Office has played a critical role in providing impartial advice on copyright legislation and policy for more than a century, and contend that this role is important to the future of copyright. Finally, I will provide an analysis of the constitutional challenges that the Copyright Office has recently faced, and suggest that Congress should consider reorganizing the Office as an independent agency.

## **II. The Registration and Recordation Functions in the Information Age: Properly Funding and Managing Capital-Intensive, Critical Operations**

Ever since it was created as a separate department in 1897, the Copyright Office has been responsible for registering copyright claims in creative works and for recording documents concerning copyright transactions. These central functions of the Office have always occupied the majority of Copyright Office personnel. Registration and recordation have been crucial to providing reliable information about creative works. They help potential users of works learn whether those works are under copyright or in the public domain, and if they are under copyright, who created them and who owns them. They provide copyright owners with evidence that their works are indeed protected by copyright, and with evidence of valid transfers of ownership. Timely filings may offer certain remedial benefits such as the availability of statutory damages and attorney's fees, which may mean the difference between bringing or foregoing an infringement suit, or ensuring a fair settlement. That information and evidence in turn supports the financing, licensing, sale, and use of creative works, while protecting the interests of authors, intermediaries, users, and the public.

The increasing importance of information technology has created both serious challenges and significant opportunities for the registration and recordation functions of the Office. The two major challenges concern funding and management. In the era in which all registration and recordation business was handled on paper, registration and recordation systems had two

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<sup>3</sup> See, e.g., Creative Commons, State of the Commons, available at <https://stateof.creativecommons.org/report/> (last visited February 22, 2015) (stating that as of 2014, 882 million pieces of Creative Commons-licensed content were available on the web).

important characteristics: They were labor-intensive, and they were self-contained. The costs of running those systems consisted almost entirely of the current operating costs of paying staff to process applications and documents. Once the staff were in place and supplied with paper, pens, and desks, they did not depend on any other personnel or tools to perform their work.

The rise of information technology, however, has fundamentally changed the nature of registration and recordation. In the new world in which most business is conducted electronically, the most efficient registration and recordation systems are capital-intensive. They require large investments in computer hardware, custom software, and security measures. Moreover, registration and recordation personnel can no longer be self-reliant. Rather, they need complex computer systems and a separate staff of information technology experts.

These changes have serious implications for models of funding and management. As for funding, it made sense in the paper era to calculate registration and recordation fees on the basis of current costs, and to provide for funding of Copyright Office operations on a year-to-year basis. Labor costs, after all, were incurred continuously, and there was little need to invest fees generated in one year on projects undertaken in another year. Unfortunately, the Copyright Office has remained constrained by those fee-setting and appropriations models as it has entered the capital-intensive information technology era. Section 708 of the Copyright Act still limits the Office “to adjust[ing] fees to not more than that necessary to cover the reasonable costs incurred by the Copyright Office for the services”<sup>4</sup> it provides. There is no provision for accumulating funds to finance major computer system improvements that do not qualify as the costs of current services, but that are necessary to provide future, enhanced services. While the Office or the Library of Congress can ask Congress for appropriations to fund capital investments, those requests are as a practical matter weighed against other needs of the Library and of the nation.

The result is both predictable and regrettable: chronic underinvestment in the information technology necessary to support the current copyright marketplace. The recordation system, which the Register asked me to study independently during my year as the Kaminstein Scholar at the Copyright Office, is a prime example. In a world in which more and more copyright documents are electronic, such documents can still only be recorded if they are printed out, signed in ink, put in envelopes, and sent in the mail to the Copyright Office. While over a thousand counties that record deeds of interests in real property have moved to electronic recordation,<sup>5</sup> the Copyright Office is still stuck in the paper era. Conversion to an electronic system has been repeatedly postponed due to lack of funding, as well as to control problems discussed below.

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<sup>4</sup> 17 U.S.C. § 708(b)(2).

<sup>5</sup> See Property Records Industry Association, <http://www.pria.us> (last visited February 23, 2015) (stating that 1,229 counties in the United States now have electronic recording systems).

To give the Copyright Office any chance of solving the funding problems, Congress should grant more flexibility to the Copyright Office to set fees that would generate funds for capital improvements. The Patent and Trademark Office now has the authority to set fees at levels that cover all of its “processing, activities, services and materials relating to patents and trademarks.”<sup>6</sup> The Copyright Office should at least be able to collect for necessary capital improvements. When it does so, it should also be empowered to build a reserve fund that is not depleted on an annual basis through an offsetting adjustment to the Office’s appropriation from taxpayer revenues. Only with such a reserve fund can the Copyright Office budget responsibly for multi-year projects, while at the same avoiding service quality degeneration or interruption when unpredictable fluctuations in incoming fee receipts impose funding constraints.<sup>7</sup>

Congress should also confirm that the Copyright Office has the authority to vary fees across types of claimants and works, in order to take into account the widely varying value of the works and the varying ability of the claimants to pay service fees. In April 2014, the Office for the first time set a discounted fee for registrations of copyright claims involving a single individual author who is also the claimant, following an extensive rulemaking process.<sup>8</sup> That is a welcome development, and the Office should have clear authority to further differentiate fees. For decades, the Patent and Trademark Office has relied heavily and justifiably on differential fees,<sup>9</sup> and the Copyright Office should be able to do so as well.<sup>10</sup> Otherwise, its authority to

<sup>6</sup> Leahy-Smith America Invents Act, Pub. L. 112-29, § 10, 125 Stat. 284 (September 16, 2011). The Patent and Trademark Office has taken the position that this “Section 10” fee-setting authority is independent of and parallel to its authority to set fees under § 41 of the Patent Act, 35 U.S.C. § 41. See Bernard J. Knight, Jr., General Counsel, United States Patent and Trademark Office, Memorandum on USPTO Patent Fee Setting, at 2 (February 10, 2012), available at [http://www.uspto.gov/about/offices/oge/Fee\\_Setting\\_Opinion.pdf](http://www.uspto.gov/about/offices/oge/Fee_Setting_Opinion.pdf) (last visited February 23, 2015).

<sup>7</sup> Section 708(d) of the Copyright Act seems to express the intention of Congress to create a reserve fund for the Copyright Office, because it provides that “[s]uch fees that are collected shall remain available until expended.” However, as Register of Copyrights Maria A. Pallante has explained, “in the practical context of the budget process, Congress has frequently required the Office to offset its request for appropriated dollars by the amount of reserve income it may have at the end of a fiscal year.” Maria A. Pallante, *The Next Generation Copyright Office: What It Means and Why It Matters*, 61 J. Copyright Soc’y 213, 232 n. 68 (2014).

<sup>8</sup> United States Copyright Office, Proposed Schedule and Analysis of Copyright Fees to Go Into Effect On or About April 1, 2014, at 2 n.6 (hereinafter “Proposed Schedule of Copyright Fees”), available at <http://copyright.gov/docs/newfees/USCOFeeStudy-Nov13.pdf> (last visited February 23, 2015).

<sup>9</sup> For example, the PTO now receives between 30% and 40% of its total revenue from patent maintenance fees. See United States Patent and Trademark Office, Fiscal Year 2014 Performance & Accountability Report 31-32, available at <http://www.uspto.gov/about/stratplan/ar/USPTO FY2014 PAR.pdf> (last visited February 23, 2015) (stating that in Fiscal Year 2014, the USPTO earned 91.0% of its earned revenues from patent fees; 45.5% of patent fee revenue was derived from patent maintenance fees.)<sup>9</sup> Patent maintenance fees are a means of obtaining a larger proportion of PTO funding from owners of particularly successful and valuable patents. They are set at levels far in excess of any cost that the PTO incurs in maintaining records of issued patents. See USPTO Fee Schedule, Effective January 1, 2014 (Last Revised on January 17, 2015), <http://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule> (last visited February 23, 2015) (Standard patent maintenance fees are currently set at \$1600 at three-and-a-half years after grant; \$3600 at seven-and-a-half years after grant; and \$7400 at eleven-and-a-half years after grant.).

<sup>10</sup> Treaty obligations would prevent the Copyright Office from charging maintenance fees of the type charged by the PTO, see *supra* n. 4 (discussing those fees), at least during the minimum term of the life of the author plus 50 years. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, 828 U.N.T.S. 221, §§ 5(2) (prohibiting formalities as conditions of enjoying rights granted by the Convention);

raise fees may be hollow, as any increase in fees could be largely offset by a decrease in the number of users who pay those fees.

Of course if the Copyright Office is going to raise fees, those paying them have a reasonable expectation that the fees will be spent in a dedicated manner on the services they are seeking, and that the quality of those services will improve. This presents challenges in practice, however, because the Copyright Office does not currently control the computer systems on which its registration and recordation programs are run. Because the Library of Congress funds and controls these systems, and because the funding comes from the Library's agency-wide appropriation, the Copyright Office's fees do not fully reflect the cost of the information technology it uses. Although that might lead one to believe that the Copyright Office is receiving a welcome off-budget subsidy, in actuality it leads to a greater problem: All information technology support and development rely on the final management decisions and cooperation of outside staff not within or directly accountable to Copyright Office management. This structure may have worked at a time when the Copyright Office's information technology needs were modest, but it is clear by now that it no longer works. During my year at the Copyright Office as the Kaminstein Scholar, I observed firsthand the delays and difficulties that result from dependence on outside IT support.

Those difficulties are compounded by the different services that Library of Congress information technology supports inside and outside of the Copyright Office. The services provided by the Copyright Office are essential to fast-moving business transactions and litigation. Investors will not finance motion pictures, software, transactions in music catalogs, or other copyright-dependent projects unless copyrights are registered and transactions are recorded. Copyright owners cannot ask courts to stop infringement until they have registered their works. Thus, promptness and reliability of copyright services at a very high level are crucial. The Copyright Office also assists searchers in locating copyright information about works whose titles are not known, and for those purposes would ideally accept deposits in forms that would best aid those searches, rather than in forms that would be best for archival purposes.

Outside of the Copyright Office, the Library uses information technology to provide a number of important services, including bibliographic cataloging and electronic archiving of important historical works. None of those services, however, supports high-priority industry operations on a daily basis like copyright services do. Thus, it is also critical that the Copyright Office be able to gain more control over its own information technology. I am not in a position

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7(1) (granting a basic term of copyright of the life of the author plus fifty years). However, in addition to explicitly authorizing differential service fees, Congress should consider other types of fees that could take into account the value of copyright registration and the copyright system to particular works. For example, claimants who believe that their works are of relatively modest value could pay a lower registration fee in exchange for a lower statutory damages cap, while retaining the right to recover all actual damages and any statutory damages up to the cap. Under another approach, those who wished to maintain the availability of statutory damages for more than a decade or two after initial registration of a work could be required to pay an additional fee.

to say whether that means complete separation of Copyright Office IT systems from other Library systems, but some marked transformation is necessary.

I should emphasize that information technology brings not only challenges but also major opportunities to the Copyright Office. Advanced electronic systems can make registration and recordation much easier and less costly. They can also provide potential users of copyrighted works with detailed, timely information about ownership and licensing, thus broadening the market for those works. Government and private computer systems can exchange information directly, reducing the need for costly hand-keying and enabling some transactions to take place automatically. Before that potential can be realized, however, the funding and control problems need to be solved.

### **III. The Impartial Legislative and Policy Advisory Function: A Valuable Tradition to Continue**

The Copyright Office has also always played an important role in assisting Congress with its deliberations on whether copyright legislation is needed, and with the drafting of that legislation. As I have studied the history of the Office, the depth of its contributions to the legislative process has repeatedly impressed me. The Copyright Office has been able to offer independent and impartial advice based on its experience in administering the copyright laws, in part because of its position within the Library of Congress, an institution that until recently has been generally assumed to be part of the legislative branch. In the Part IV of this statement, I will discuss the change in assumptions about the Library's legislative branch status, and the associated challenge to the independence of the Copyright Office's legislative advisory function. In this part, I would like to bring the Committee's attention to some of the Office's most important contributions to copyright legislation. It should be noted that the discussion below does not include the enduring work of the Office in assisting Congress on a more routine basis with respect to questions, bills, and general support. And it does not address the Office's equally important role in assisting executive branch agencies with questions of domestic, bilateral, or multilateral priorities.

The Copyright Office has been centrally and intimately involved in the drafting of the last two major revisions to copyright law—the Copyright Acts of 1909 and 1976—and of the incremental amendments to those Acts. The legislative process that led to the Copyright Act of 1909 began when Thorvald Solberg, the very first Register of Copyrights, convened a series of conferences with a wide variety of stakeholders and interested parties to discuss needed revisions to existing law.<sup>11</sup> Under Solberg's direction, the Copyright Office published comprehensive reference works on the history of U.S. copyright laws and legislation that provided important foundations for legislators, and that still stand as the finest record of copyright legislation and presidential proclamations from the founding of the United States to

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<sup>11</sup> See "The Copyright Code: Its History and Features," 76 *The Publishers' Wkly* 19 (1909).

the Fifty-Eighth Congress.<sup>12</sup> Solberg then wrote and published a report that contained the Copyright Office's legislative recommendations,<sup>13</sup> and wrote and published a first discussion draft of a copyright revision bill.<sup>14</sup> After considering comments on that draft, he then wrote a second draft that was introduced as a bill in Congress in 1906 and became the basis for a series of Congressional hearings. That bill, as modified, became the Copyright Act of 1909.<sup>15</sup>

The legislative process that eventually culminated in the Copyright Act of 1976 featured even greater Copyright Office participation. It began with a series of 34 studies prepared by the Copyright Office over a five-year period addressing every corner of copyright law and of the economics of the copyright industries.<sup>16</sup> Building on the insights of those studies, Register of Copyrights Abraham Kaminstein prepared in 1961 a comprehensive "Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law."<sup>17</sup> Register Kaminstein then held a series of public meetings with copyright stakeholders to discuss the recommendations of that report, and gathered written comments as well.<sup>18</sup> Having gathered that input, the Copyright Office then issued a "Preliminary Draft for Revised U.S. Copyright Law" in late 1962, and in 1963 held a series of public meetings discussing sections of that draft in detail.<sup>19</sup> That led to the first bill introduced in Congress in 1964, which was used as the basis for another series of public meetings held by the Copyright Office.<sup>20</sup> Finally, after a second bill was introduced in 1965, Congress itself began to hold hearings on the proposed legislation.<sup>21</sup>

<sup>12</sup> See Thorvald Solberg, Copyright enactments, 1783-1900: comprising the copyright resolutions of the Colonial Congress, 1783; the copyright laws of the original states, 1783-1786; the constitutional provision concerning copyright legislation, and the public and private copyright laws enacted by Congress from 1790 to 1900; together with the presidential proclamations regarding international copyright (1900); Thorvald Solberg, Copyright in Congress, 1789-1904: A bibliography, and chronological record of all proceedings in Congress in relation to copyright from April 15, 1789 to April 28, 1904, First Congress, 1<sup>st</sup> Session to Fifty-eighth Congress, 2d Session (1905).

<sup>13</sup> See Thorvald Solberg, Report on Copyright Legislation by the Register of Copyrights (1904).

<sup>14</sup> Memorandum Draft of a Bill to Amend and Consolidate to Acts Respecting Copyright, Copyright Office Bulletin No. 10 (1905).

<sup>15</sup> See Abe A. Goldman, "The History of U.S.A. Copyright Law Revision from 1901 to 1954," Copyright Law Revision Study No. 1, Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, at 1-2 (1955; Committee Print 1960).

<sup>16</sup> These reports are available on a Copyright Office web page, <http://www.copyright.gov/history/studies.html> (last visited February 23, 2015).

<sup>17</sup> See Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, Printed for the Use of the House Committee on the Judiciary (July 1961).

<sup>18</sup> See Copyright Law Revision Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, Printed for the Use of the House Committee on the Judiciary (February 1963).

<sup>19</sup> See Copyright Law Revision Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft (1964); Copyright Law Revision Part 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law, Printed for the Use of the House Committee on the Judiciary (December 1964).

<sup>20</sup> See Copyright Law Revision Part 5: 1964 Revision Bill with Discussions and Comments, Printed for Use of the House Committee on the Judiciary (September 2, 1965).

<sup>21</sup> See, e.g., Hearings Before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 89<sup>th</sup> Cong., 1<sup>st</sup> Sess., on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, Bills for the General Revision of the Copyright Law,



Although a number of difficulties, particularly concerning cable television, would delay enactment of a comprehensive revision until 1976, the 1965 bill is in most respects identical to the legislation that became the Copyright Act of 1976 eleven years later. Indeed, the forward-looking nucleus of the 1976 Act, which still sounds fresh in 2015, comes straight from the original 1962 Copyright Office Preliminary Draft. Copyright protection, states that draft, “shall be available for an original work of authorship fixed in any tangible medium, now known or later developed, from which it can be . . . perceived, reproduced, performed, or represented, either directly or with the aid of a machine or device.”<sup>22</sup>

Since 1976, the Copyright Office has continued to assist in the legislative process through reports, consultations, public meetings, and drafts of amendments both large and small. When the United States finally decided to become a party to the principal international copyright treaty, the Berne Convention, in 1989, the Copyright Office provided crucial support with the legislation necessary to join and implement the Convention. The Copyright Office was also centrally involved with the drafting of the Digital Millennium Copyright Act in 1998, and gained a new role in conducting triennial rulemaking proceedings to advise the Librarian on issuing exemptions from the anti-circumvention provisions of that Act. In the very recent past, the Office has continued this tradition by conducting meetings and issuing reports on topics such as Mass Digitization, Pre-1972 Sound Recordings, Copyright Small Claims, Resale Royalties, and The Music Marketplace, and a report that I coordinated on Document Recordation. And of course it advised and assisted this Committee with the twenty hearings that it held in the 113<sup>th</sup> Congress to review and assess copyright law for the digital age.

Although I have discussed the Copyright Office’s legislative advisory role separately from its role in administering the registration and recordation systems, in fact the two roles depend on each other. The Office gains much of the expertise that it provides Congress from its experience of administering the Copyright Act on a daily basis. Every day, for example, the Office must determine whether particular registration applications covering a wide variety of materials concern copyrightable subject matter. Those daily confrontations with submissions that are constantly changing as new technologies and practices develop lead to a deep, comprehensive, and current understanding of the contours of the issue of copyrightability, which in turn informs the Office’s advice to Congress and to other agencies.

In sum, the Office has for over a century provided extremely valuable assistance to Congress, and Congress has justifiably relied on and benefitted from that assistance. At a time

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Title 17 of the United States Code, and for Other Purposes, May 26, 27, 28, June 2, 3, 4, 9, 10, 16, 17, 23, 24, 30, August 4, 5, 11, 12, 18, 19, 26, September 1 and 2, 1965, Serial No. 8, Part I, Printed for the Use of the Committee on the Judiciary (1966).

<sup>22</sup> See Copyright Law Revision Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, at 1 (1964); cf. Section 102(a) of the Copyright Act, 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”)

when we may be in the early stages of another comprehensive revision of the copyright laws,<sup>23</sup> the value of that assistance should be recognized and celebrated, and the Office's impartial advisory role should be supported and protected against challenges.

#### IV. The Structure of the Copyright Office within the Library of Congress: Constitutional Predicaments and Options

In 1897, Congress created and funded the Copyright Office as a separate department of the Library of Congress, and created the position of Register of Copyrights to head that department.<sup>24</sup> It vested important statutory duties with the Register, but directed that she work under the general supervision of the Librarian. Many Members of Congress consider the Library of Congress to be part of the legislative branch of government, and it is so treated both for appropriations purposes and for purposes of the Library oversight committees.<sup>25</sup> In a number of cases, litigants have raised constitutional challenges to this structure,<sup>26</sup> arguing that the Copyright Office performs executive functions that are incompatible with its being part of the legislative branch.<sup>27</sup> In the two cases in which courts have rendered a decision regarding those challenges, they have agreed that the Office performs executive functions. However, they have accommodated the Office's position within the Library of Congress by ensuring that the relevant Office appointees meet the requirements of the Constitution's Appointments Clause<sup>28</sup> and of related separation of powers principles.<sup>29</sup> These mandate that the President be able to

<sup>23</sup> See United States House of Representatives Judiciary Committee Press Releases, "Chairman Goodlatte Announces Comprehensive Review of Copyright Law" (April 24, 2013), available at <http://judiciary.house.gov/index.cfm/2013/4/chairmangoodlatteannouncescomprehensivereviewofcopyrightlaw> (last visited February 23, 2015); Maria A. Pallante, The Next Great Copyright Act, 36 Colum. J. L. & Arts 315 (2013).

<sup>24</sup> See Act of Feb. 19, 1897, ch. 265, 29 Stat. 544.

<sup>25</sup> See, e.g., Legislative Branch Appropriations Act, 2014, Division I of the Consolidated Appropriations Act, 2014, P.L. 113-76, 128 Stat. 5 (Jan. 17, 2014). The Library's Congressional oversight committees are the Committee on House Administration and the Committee on Senate Rules. However, the Judiciary Committees have long exercised oversight of the Copyright Office.

<sup>26</sup> In addition to the two cases cited below, see *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1226-27 (D.C. Cir. 2009) (Kavanaugh, J. concurring) (stating that the means by which Copyright Royalty Judges were appointed raised a "serious constitutional issue," but that the issue had not been timely raised); *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 574 F.3d 748, 755-56 (D.C. Cir. 2009) (declining to rule on the Appointments Clause challenge because it had not been timely raised).

<sup>27</sup> I use the term "executive function" here broadly, to include both core executive functions such as the prosecution of federal crimes, and functions that courts have sometimes called "quasi-judicial" or "quasi-legislative," such as the promulgation of regulations implementing federal law, and the decision of claims regarding federal benefits. Compare *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935) (distinguishing between "political and executive" powers, on the one hand, and "quasi judicial or quasi legislative" powers, on the other); with *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 684 F.3d 1332 (D.C. Cir. 2012) (noting that "the powers in the Library and the Board to promulgate copyright regulations, to apply the statute to affected parties, and to set rates and terms case by case are ones generally associated in modern times with executive agencies rather than legislators").

<sup>28</sup> U.S. Const. Art. II, § 2, cl. 2.

<sup>29</sup> Because the Appointments Clause does not explicitly address the removal of Officers of the United States, the Supreme Court has developed rules regarding removal of Principal Officers under general separation of powers principles. See *Bowsher v. Synar*, 478 U.S. 714, 721-26 (1986) (holding that under the constitutional principle of

exercise certain kinds of direct or indirect control over persons exercising executive authority. The clarification that the Library and the Copyright Office are subject to clear lines of executive control, however, may raise serious concerns for Congress. Thus, to preserve the valuable roles that both the Library and the Copyright Office continue to play, Congress may want to consider restructuring the Copyright Office as a separate agency, and, as I will suggest, as an independent agency.

In both the 1978 case of *Eltra Corporation v. Ringer*,<sup>30</sup> and the more recent 2012 case of *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board* (“IBS”),<sup>31</sup> the courts held that the functions at issue, performed by the Copyright Office or Copyright Royalty Judges, involved exercises of executive authority. When the Register determines whether particular matter – in the case of *Eltra*, a typeface design – is eligible for the statutorily-granted benefits of registration, she is, in the formulation of the Supreme Court, taking “action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch,”<sup>32</sup> and is thus applying or executing the law. Moreover, her registration determinations are not merely ministerial, but involve the exercise of significant discretion.<sup>33</sup> Accordingly, she is an “Officer of the United States” within the meaning of the Appointments Clause, and her appointment must meet the requirements set forth in that Clause.

Similarly, the Copyright Royalty Judges set statutory license rates that determine how much some private parties must pay other private parties to use works under copyright, and they have, in the words of the IBS court, “vast discretion over the rates and terms”<sup>34</sup> of those licenses. Thus they too are “Officers of the United States” and must meet Appointments Clause requirements. That these registration and ratemaking functions must be performed by validly appointed Officers of the United States does not seem open to question. Moreover, there are other Copyright Office functions, such as document recordation and rulemaking under the Digital Millennium Copyright Act, that must equally be performed by Officers of the United States.

The Register of Copyrights and the Copyright Royalty Judges are appointed by the Librarian of Congress. Under the rules established by the Appointments Clause, their appointments as Officers of the United States are valid only if the Librarian qualifies as a “Head

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separation of powers, Congress cannot reserve for itself any power of removal of an officer charged with the execution of the laws other than impeachment).

<sup>30</sup> 579 F.2d 294 (4th Cir. 1978).

<sup>31</sup> 684 F.3d 1332 (D.C. Cir. 2012).

<sup>32</sup> *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 952 (1983).

<sup>33</sup> See *Freytag v. Commissioner*, 501 U.S. 868, 881-82 (1991) (holding that special trial judges of the United States Tax Court are Officers of the United States because they perform “more than ministerial tasks,” and “exercise significant discretion”).

<sup>34</sup> *Id.* at 1339.

of Department,” and if the Register and the Judges qualify as “Inferior Officers.”<sup>35</sup> In both *Eltra* and *IBS*, the courts held that the Librarian qualifies as a “Head of Department.”<sup>36</sup> The Librarian is appointed by the President with the advice and consent of the Senate, and is subject to unrestricted removal by the President, just as the President’s cabinet members are.<sup>37</sup> Although the Librarian is not the head of a traditional Department, such as the Department of Agriculture or the Department of the Treasury, the Supreme Court has confirmed that any “freestanding component of the Executive Branch, not subordinate to or contained within any other such component, . . . constitutes a ‘Departmen[t]’ for purposes of the Appointments Clause.”<sup>38</sup> Thus, held *IBS*, the Library of Congress qualifies as a Department, and the Librarian as a “Head of Department.”<sup>39</sup>

The *Eltra* court also held that the Register qualified as an “Inferior Officer” who could be appointed by the Librarian as a Head of Department, because the Librarian sufficiently directed and supervised the Register’s work, and crucially, had the unrestricted power to remove her.<sup>40</sup> By contrast, the *IBS* court held that the Copyright Act as written did not subject the Copyright Royalty Judges to sufficient direction and supervision by the Librarian for them to qualify as Inferior Officers.<sup>41</sup> However, the court cured that defect by severing and invalidating the statutory language that limited the Librarian’s power to remove the Judges, concluding that if the Librarian had the unrestricted power to remove the Judges, they would then qualify as Inferior Officers.<sup>42</sup>

<sup>35</sup> See U.S. Const. Art. II, § 2, cl. 2 (stating that the President “shall nominate, and by and with the advice and consent of the Senate shall appoint . . . all other officers of the United States . . . but the Congress may by law vest the appointment of such inferior officers, as they think proper, . . . in the heads of departments.”).

<sup>36</sup> See *IBS*, 684 F.3d at 1341–42; *Eltra*, 579 F.2d at 300.

<sup>37</sup> See 2 U.S.C. § 136 (“The Librarian of Congress shall be appointed by the President, by and with the advice and consent of the Senate”).

<sup>38</sup> *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).

<sup>39</sup> See *IBS*, 684 F.3d at 1342.

<sup>40</sup> See *Eltra*, 579 F.2d at 300; *Edmond v. United States*, 520 U.S. 651, 663 (1997) (stating that an Officer is generally an Inferior Officer if his or her work is “directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate”); *id.* at 63 (noting that the unrestricted power to remove an Officer “is a powerful tool for control”). For the provisions governing the Librarian’s appointment of the Register, see 17 U.S.C. § 710(a) (“The Register of Copyrights, together with the subordinate officers and employees of the Copyright Office, shall be appointed by the Librarian of Congress, and shall act under the Librarian’s general direction and supervision.”).

<sup>41</sup> See *IBS*, 684 F.3d at 1340–41. The Copyright Act provides that the Copyright Royalty Judges can be removed only for “misconduct, neglect of duty, or any disqualifying physical or mental disability,” 17 U.S.C. § 802(i), and “shall not receive performance appraisals” other than those related to removal for cause. 17 U.S.C. § 802(f)(2). It also provides that the Judges “shall have full independence in making determinations concerning adjustments and determinations of copyright royalty rates.” 17 U.S.C. § 802(f)(1)(A).

<sup>42</sup> See *IBS*, 684 F.3d at 1340–41. The *IBS* court’s remedy of severing and invalidating limitations on removal followed the Supreme Court’s similar action in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 496–98 (2010) (holding that the members of the Public Company Accounting Oversight Board did not qualify as Inferior Officers because they were not subject to unrestricted removal by Commissioners of the Securities Exchange Commission, and severing and invalidating the language restricting removal to render those members Inferior Officers).

The *Eltra* and *IBS* cases have clarified the lines of executive control, and emphasized that the President can direct the Librarian of Congress just as he directs his cabinet members. That may alarm many Members of Congress, who view the Library as subject to Congressional control, and as providing services to Congress independent of executive control. Of course, the President has in fact had statutory appointment and removal power over the Librarian for over a century,<sup>43</sup> and yet generally has not intruded in the affairs of the Library or of the Copyright Office. Some might hope that he would continue to forbear from asserting any authority in that regard.

There are multiple signs, however, of increased executive assertiveness regarding the Library and the Copyright Office. In late 2011, for example, the President provided a statement to accompany his signing of the Consolidated Appropriations Act 2012. In that statement, he noted that the Act provided the Librarian of Congress with authority “to transfer funds between sections of the Library upon the approval of the Committee on Appropriations of the House of Representatives and the Senate.”<sup>44</sup> The President then took issue with that provision, and stated that he had “advised the Congress of [his] understanding that this provision does not apply to funds for the Copyright Office, which performs an executive function in administering the copyright laws.”<sup>45</sup>

In connection with litigation of the *IBS* case, the Department of Justice has also now taken the position that Congress made a “purposeful and explicit decision to place the Library within the Executive Branch.”<sup>46</sup> Perhaps even more pointedly, it has asserted that the Librarian, in discharging his responsibility to “make rules and regulations for the government of the Library,” . . . is accountable to the President alone.”<sup>47</sup>

This constitutional predicament does not leave Congress without options. Supreme Court precedent makes clear that most functions of the Library of Congress – all those functions not involving the administration of copyright law – are not executive in nature. The Court has held that “powers [that] are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees,”<sup>48</sup> are not subject to Appointments Clause constraints. With respect to those functions, which would include both general Library services and the policy and legal analysis

<sup>43</sup> In the same Act that created the Copyright Office as a separate department of the Library of Congress in 1897, Congress provided that the position of Librarian of Congress would be thereafter subject to Senate confirmation. See Act of Feb. 19, 1897, ch. 265, 29 Stat. 544. That appointment provision, which qualifies the Librarian as a Principal Officer of the United States, has remained unchanged to the present day. See 2 U.S.C. § 136.

<sup>44</sup> Barack Obama, Statement by the President on H.R. 2055 (December 23, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/12/23/statement-president-hr-2055> (last visited February 23, 2015).

<sup>45</sup> *Id.*

<sup>46</sup> Brief for Appellees at 29, *Intercollegiate Broadcasting System v. Copyright Royalty Board*, No. 11-1083 (D.C. Cir. 2011).

<sup>47</sup> *Id.* (quoting 2 U.S.C. § 136).

<sup>48</sup> *Buckley v. Valeo*, 424 U.S. 1, 175 (1976).

performed by the Congressional Research Service, there would be no need for the Librarian to qualify as a Head of Department under the Constitution. Thus, if the Library performed only those functions, Congress could either continue to provide that the Librarian report to the President, or it could provide that the Librarian would be appointed by, say, the Joint Committee on the Library, or by some other Committee or Members of Congress. Each of those alternatives may have advantages and disadvantages, but the latter may be a better means of continuing Congress's traditional relationship with the Library.

The sticking points are the Copyright Office and the associated Copyright Royalty Board. They clearly perform executive functions, such as making registration determinations, promulgating regulations, and setting rates for statutory licenses. Thus, the question becomes, if Congress wants to reassert authority over most of the Library of Congress, what does it do with the Library's copyright administration functions?

There are a variety of alternatives available, and this Committee explored some of them in its oversight hearing on the Copyright Office last September.<sup>49</sup> Congress could combine copyright administration with the administration of patent and trademark law in a single Intellectual Property Office. One version of such a combined office, structured as a government corporation, was proposed in legislation introduced by Senator Hatch almost two decades ago, and may, in the long run, have benefits for the United States.<sup>50</sup> Congress could also reorganize the Copyright Office as a separate unit in a traditional Department, perhaps by making the Copyright Office a sister of the Patent and Trademark Office within the Commerce Department, under an Undersecretary of Copyright.

In my view, however, if Congress decides to restructure the Copyright Office, it should give serious consideration to the vehicle of an independent agency, for at least two reasons. First, copyright simply doesn't fit well with patent and trademark or with commerce more generally, which is probably one of the reasons why, when searching for a home for copyright over a century ago, Congress accepted then-Librarian Ainsworth Spofford's bid to house it in the Library of Congress. While for theoretical and curricular purposes copyright is often grouped with patent and trademark as "intellectual property," in practice copyright law touches different constituencies and reconciles different interests than patent or trademark law. Since the nineteenth century, patent and trademark have been grouped together as "industrial property," because they concern the rights that industrial enterprises need to flourish.<sup>51</sup> While a wide

<sup>49</sup> See U.S. Copyright Office, Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary, House of Representatives, 113<sup>th</sup> Cong., 2d Sess, Serial No. 113-116 (September 18, 2014). For another thorough investigation of such alternatives, see Sandra M. Aistars, *The Next Great Copyright Act, or a New Copyright Agency?*, 38 Colum. J. L. & Arts. (forthcoming 2015).

<sup>50</sup> See United States Intellectual Property Organization Act of 1996,

<sup>51</sup> For example, the principal international treaty regarding patent and trademark law is the Paris Convention for the Protection of Industrial Property, 828 U.N.T.S. 305, whereas the principal international treaty regarding copyright law is the Berne Convention for the Protection of Literary and Artistic Works, 1161 U.N.T.S. 30.

variety of businesses that benefit from trademark protection do not create or own patentable inventions, they are still all commercial enterprises.

By contrast, there are few individuals who do not create works protected by copyright, whether or not they are in business, and there are few if any individuals who do not use and enjoy such works. Although copyright has always been concerned with protecting the economic value of works of authorship, it has also always been concerned with protecting the privacy interests of individuals who do not want to market or share their works, and with ensuring that discourse about phenomena and events in the world – discourse about facts and ideas – is not hindered by private rights. To view copyright through the same lens as patents and trademarks would be to distort and limit its concerns, and an agency that was dominated by patents and trademarks, as a combined agency would likely be,<sup>52</sup> would be in danger of taking such a skewed view. More generally, copyright is not just about commerce or commercial activity, and thus the Copyright Office is at best a Procrustean fit for the Department of Commerce.

Second, as I have argued above, Congress and many executive branch agencies have benefitted richly from the impartial expertise of the Copyright Office in its advisory role. An independent Copyright Office could continue to provide that benefit. Like many other independent agencies, it could be empowered to submit “legislative recommendations, . . . testimony, [and] comments on legislation” to Congress without having to clear them with any “officer or agency of the United States.”<sup>53</sup> That is the arrangement that has been functioning to the great benefit of U.S. copyright law for over century, and it should not be discarded lightly. Indeed, an independent agency would both honor and protect this role.

In establishing an independent Copyright Office, Congress could set qualifications for its head or heads,<sup>54</sup> and specify a term of office.<sup>55</sup> While a Commissioner of Copyright would be

<sup>52</sup> Fiscal Year 2014 trademark program costs at the Patent and Trademark Office totaled \$225.6 million, over four times the budget of the Copyright Office; Fiscal Year patent program costs totaled \$2.5 billion, over forty times the Copyright Office’s budget. See United States Patent and Trademark Office, Fiscal Year 2014 Performance & Accountability Report 35, available at <http://www.uspto.gov/about/stratplan/av/USPTOFY2014PAR.pdf> (last visited February 23, 2014).

<sup>53</sup> 12 U.S.C. § 250 (applying to the Securities and Exchange Commission, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the National Credit Union Administration). For similar provisions, see, e.g., 7 U.S.C. § 2(a)(10)(B) (applying to the Commodities Future Trading Commission); 52 U.S.C. § 30107(d)(2) (applying to the Federal Election Commission); 16 U.S.C. § 470r (applying to the Advisory Council on Historic Preservation). Another form of such a provision requires concurrent submission of recommendations on legislation to the President and Congress. See, e.g., 49 U.S.C. § 48109 (applying to the Federal Aviation Administration); 42 U.S.C. § 7171(j)(2) (applying to the Federal Energy Regulatory Commission).

<sup>54</sup> See, e.g., 15 U.S.C. § 41 (providing that no three of the five Federal Trade Commissioners shall be members of the same political party); *Humphrey’s Executor v. United States*, 295 U.S. 602, 620 (1935) (noting those qualifications, and upholding a limitation on the removal of those Commissioners); 19 U.S.C. § 1330(a) (providing that a person shall be eligible for appointment as a Commissioner of the United States International Trade Commission only if he or she “is a citizen of the United States, and, in the judgment of the President, is possessed of qualifications requisite

appointed by the President with advice and consent of the Senate, he or she could be made removable only for good cause.<sup>56</sup> The independent agency with which I am most familiar, the United States International Trade Commission, looks in many ways like an independent Copyright Office might. It has a staff and budget of a similar size.<sup>57</sup> It provides Congress, the President, and the Office of the United States Trade Representative with independent expert analysis in an important area of law and of the economy. At the same time, it also plays an important role in administering the law – in its case, by investigating the effect of dumped imports on domestic industries, and adjudicating disputes involving imports that allegedly infringe copyright, patent, or trademark rights. It is headed by six commissioners,<sup>58</sup> but of course there are other independent agencies, such as the Social Security Administration,<sup>59</sup> that are headed by a single commissioner. Thus, the independent agency is a model that Congress should keep in mind as it considers the future of the Copyright Office.

## V. Conclusion

Before Congress decides precisely how to strengthen the Copyright Office, it will have to consider many alternatives and weigh many suggestions. Any improvement measures, however, should satisfy three criteria. They should give the Copyright Office the means to fund and manage necessary capital investments in information technology, at a time when that has become the central challenge and opportunity for the functions of registration and recordation. They should safeguard the Office's time-tested role in providing Congress and executive branch agencies with trusted advice on copyright legislation and policy. And they should address the constitutional issues that are looming over both the Library of Congress and the Copyright Office, and provide a solid foundation for continuing Office contributions to copyright law and administration.

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for developing expert knowledge of international trade problems and efficiency in administering the duties and functions of the Commission.”).

<sup>55</sup> See, e.g., 15 U.S.C. § 41 (providing that Federal Trade Commissioners are to serve staggered six-year terms); 42 U.S.C. § 902(a)(3) (providing that the Commissioner of Social Security shall serve a six-year term); 26 U.S.C. § 7803(a)(1)(B) (providing that the Commissioner of International Revenue shall serve a five-year term).

<sup>56</sup> See *Humphrey's Executor v. United States*, 295 U.S. 602, 629-631 (holding that Congress could limit the President's power to remove Federal Trade Commissioners to cases of “inefficiency, neglect of duty, or malfeasance in office”); cf. *Morrison v. Olson*, 487 U.S. 654, 685-692 (1988) (holding that Congress could provide that the Attorney General could remove an Independent Counsel only “for good cause”).

<sup>57</sup> See United States International Trade Commission, Budget Justification Fiscal Year 2015, at 33, 42, available at [http://www.usitc.gov/press\\_room/documents/budget\\_2015.pdf](http://www.usitc.gov/press_room/documents/budget_2015.pdf) (last visited February 23, 2015) (the USITC had actual expenditures of \$79,517,000 in Fiscal Year 2013, and had 366 staff members on board on February 21, 2014 out of 419 positions in its Fiscal Year 2014 staffing plan).

<sup>58</sup> See 19 U.S.C. § 1330(a).

<sup>59</sup> See 42 U.S.C. § 902(a)(1).



Mr. GOODLATTE. Thank you all for your testimony. We will begin our questioning under the 5-minute rule, and I will begin by recognizing myself. I have a question for each of you, in fact, two, and if you could be brief, we will get through all of you and both questions. And I have another question I would like to ask Mr. Brauneis.

So the first question is, it appears that a significant effort will be required to modernize the Copyright Office systems, but there is always the balance between resources and priorities. With change needed in electronic registrations, document recordations, and digitization of older copyright records, which of these problems should be addressed first? Mr. Kupferschmid, we will start with you.

Mr. KUPFERSCHMID. Thank you. First off, I will be quick, but I want to thank you for holding this hearing. I cannot say enough how important this topic is.

Mr. GOODLATTE. Do not say it now because I need you to answer the question. [Laughter.]

Mr. KUPFERSCHMID. Okay. Well, with regard to that, I mean, the biggest, the most important change is changing the IT system because everything you mentioned here—digitization, and document retention, and searchability—that all has to do with improving the IT system.

Mr. GOODLATTE. No question about it, but of those three, which should come first?

Mr. KUPFERSCHMID. Well, I guess before you do anything, you have got to be able to actually digitize everything to be able to put it in a form where it can be searchable and usable.

Mr. GOODLATTE. So you would start with digitization of older copyright works?

Mr. KUPFERSCHMID. I think so. If you could repeat the list again.

Mr. GOODLATTE. That, document recordations, and electronic registrations. Ms. Dunner?

Ms. DUNNER. That is a tough question, but I think I would start with recordation because it is so out of date. It affects so many business transactions today. I agree with Mr. Kupferschmid that you really need to upgrade the IT system as a whole, but recordation would be my first choice.

Mr. GOODLATTE. Ms. Mertz?

Ms. MERTZEL. I am speaking personally, not on behalf of AIPLA. But I am inclined to start with registration because people are registering copyrights every day, and people are avoiding registration because of the problems with it, and still using paper. And I think as you build as a database that can handle online registration, you can work on implementing recordation and digitization in the background.

Mr. GOODLATTE. Good point. So, Mr. Brauneis, we have one for each. How do you break the tie here?

Mr. BRAUNEIS. Recordation. I was the author of a report recently released on recordation, and so I will go with recordation. [Laughter.]

Mr. GOODLATTE. Okay, thank you. Now, here is my second question, and we have got some idea that there is disagreement on what to prioritize, but we still have got to figure out how to pay

for whatever we do. So these efforts are going to require significant financial investments. Is this something that should borne by the copyright community, taxpayers as a whole, or some combination of both? And we will do it in reverse order here, so you get the benefit of listening to the answer. Mr. Brauneis?

Mr. BRAUNEIS. I think the answer is both. I think that there needs to be increased appropriations, but I also think there needs to be increased attention paid to differentiation of copyright fees.

Mr. GOODLATTE. All right. Ms. Mertz?

Ms. MERTZEL. I would agree that differentiation is an area to explore. I do not have a specific answer on the allocation between fees versus appropriations.

Mr. GOODLATTE. All right. Ms. Dunner?

Ms. DUNNER. It is a scary slope or a slippery slope when you talk about increasing fees because I think that can start a whole different conversation. So I think increased appropriations would probably be the best.

Mr. GOODLATTE. It certainly is. Mr. Kupferschmid?

Mr. KUPFERSCHMID. Yes, very clearly I think it is a combination of both. I think there are things that the Copyright Office can do, maybe increase fees, but lessen the total costs that the copyright registrant is paying to offset that. So I think certainly it is a combination of both, appropriations and copyright owners paying additional fees, as well as users.

Mr. GOODLATTE. Very good. So we have a clear majority on that. Now, Mr. Brauneis, I said a question for you as well.

Mr. BRAUNEIS. Indeed.

Mr. GOODLATTE. You have seen the impact of low funding of the Copyright Office from the inside.

Mr. BRAUNEIS. I have.

Mr. GOODLATTE. How would you describe the morale of Copyright Office employees?

Mr. BRAUNEIS. Challenging. I think Copyright Office employees are working hard, but when they do not have enough personnel and they do not have enough colleagues to spread it around, I think I have seen some real challenges.

Mr. GOODLATTE. Very good. Thank you. Anybody else want to comment on that from the outside? Do you have a perspective on that, Ms. Dunner?

Ms. DUNNER. I think the Copyright Office is doing the best it can with what it has.

Mr. GOODLATTE. All right, thank you. The gentleman from Michigan, Mr. Conyers, is recognized for 5 minutes.

Mr. CONYERS. Thank you, and thank you all for your testimony. I would like to direct this to Mr. Kupferschmid. In your written testimony, you suggest that Congress should authorize a study to determine the benefits of a different structure for the Copyright Office. Would you elaborate on why you believe the status quo will not work for the Copyright Office for the 21st century? And before you respond, although the Copyright Office is not testifying here, I would like Ms. Pallante, the registrar, if she is listening, and I suspect she is, to submit for the record her views on the testimony today about whether and how reorganizing the Copyright Office would benefit the copyright community.

Mr. KUPFERSCHMID. Thank you. Yes, in my written testimony and statement, I mentioned the fact that the one option that frankly is not agreeable is the status quo. And the reason for that is because, as we have heard here today already, that the Copyright Office needs more funding to accomplish what it needs to accomplish, to make improvements to the regulation system and the recordation system. But it also needs more autonomy, and those go hand-in-hand, and if there is one without the other, it is frankly not going to be able to accomplish what it needs to accomplish and improve.

Mr. CONYERS. Thank you. Ms. Dunner, in your testimony, you mentioned that the Office's budget has decreased by over 7 percent since 2010. What effect has that had on the ability of the Office to interact with the copyright community?

Ms. DUNNER. I think it is reflected in a number of ways, one of which is its IT systems are very out of date, and so it is unable to keep up with the fast pace of the current copyright community. The community wants things more readily available, more easily accessible, and the Copyright Office is unable to provide that with its current IT system.

Mr. CONYERS. Professor Brauneis, we are here today to discuss the future of the Copyright Office, and all the witnesses have suggested that we consider reorganizing it, and have provided several alternatives for how that would look. I would like to know what is the timeline for when Congress needs to make a decision to ensure that we prepare the Copyright Office for the 21st century?

Mr. BRAUNEIS. Well, as soon as possible with an adequate time for study, so I am not sure whether I can put a number of months on that, but I hope it does not stretch into years.

Mr. CONYERS. I suspected you would be for the immediate action. Now, Ms. Mertz, in your written testimony, you suggest that increased autonomy is essential for the Copyright Office of the future. How would budget autonomy strengthen the copyright ecosystem?

Ms. MERTZEL. Well, budget autonomy would allow the Office to make decisions about how to spend the money it has without having to involve the Library and the Librarian. I think that that would be very important with regard to IT, with regard to space and purchasing of equipment and materials. And I think that the Office should be able to request its own budget and not be included and wrapped up in the larger Library budget.

Mr. CONYERS. Right. Thank you, Mr. Chairman. I return any unused time.

Mr. GOODLATTE. The Chair appreciates that greatly, and is now pleased to recognize the gentleman from California, Mr. Issa, for 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman. I would have gladly taken the Ranking Members' time. I am going to follow up on where the Ranking Member left off, and I will use the Chairman's technique of going right down the row. How many people here believe that regardless of where the entity is, that as it is currently structured and it is not structured, forget about being constitutional for a moment. It is not structured to be efficient, nimble, modern, and progressive in a way that the 21st century would demand?

Mr. KUPFERSCHMID. 100 percent agree with that.

Ms. DUNNER. 100 percent agree with that.

Ms. MERTZEL. Yes, 100 percent.

Mr. BRAUNEIS. I will join them.

Mr. ISSA. Okay. So we have the consensus so seldom seen in Washington. [Laughter.]

So if I understand the various options, we can obviously correct a separation of powers question with and without retaining historic assets, the Librarian, the actual body that belongs historically to this body, to this branch.

But I want to explore the independent commission for a moment. I want you to tell me in a perfect world, because when you talk about major restructuring, all of which falls under this Committee's jurisdiction from the standpoint of the entities, not necessarily the restructuring plan. When you talk about major restructuring, you normally say if we had it to do over again what would be good. And then you figure if there is a road that leads from where you are to where you would like to be in a perfect world.

In a perfect world, would all of you agree that the Patent Office, that Patent, Trademark, and Copyright would have huge independence, would be funded in a way in which the funds and fees were collected and retained, in which there was both congressional and executive branch oversight and control sufficient to insist that those funds be well spent, and in which the stakeholders, whether it's the copyright community or the patenting community, had a real seat at the table to see as customers that they were well served?

Mr. KUPFERSCHMID. I think that is correct, but there are additional issues that come up if you are saying move the Copyright Office into the Patent and Trademark Office.

Mr. ISSA. I am not. I am not. I am saying in a perfect world they would both be independent commissions. They would have both have those three properties: a level of independence that allowed them to be guardians of the constitutional responsibility, input from the executive branch from a standpoint of waste, fraud, and abuse, but enough independence that it is not a tool of a policy of any particular president. Obviously the oversight of this body from a standpoint, as we do all executive branch. And last but not least, the stakeholders having a real seat at the table so that it was efficient, effective for their services, because you have all told us in your opening statements that they are not that today.

But unfortunately I also hear some of the same complaints about the Patent Office, so that is why I have included in a perfect world, would each of those two entities be equally independent, self-governing in that sense, have oversight from both the executive branch and the legislative branch, and, in fact, have a customer looking responsibility. We will go the other direction this time.

Mr. BRAUNEIS. Yes, I think that is exactly right.

Mr. ISSA. Just a quick yes or no, and then I have got a final question.

Ms. MERTZEL. I think that is right. I am not sure about the comparison between Copyright and PTO, and whether they raise the exact same issues.

Mr. ISSA. Okay. Then just answer for Copyright. Should it meet those requirements?

Ms. MERTZEL. Yes.

Ms. DUNNER. Yes.

Mr. KUPFERSCHMID. Yes.

Mr. ISSA. Then would you all agree, and hopefully I will get a trifecta, and I will quit for today. Would you all agree that, in fact, this Committee's goal should be, in fact, to set up that criteria or a process to get to that structure that reviews how we would make sure the executive branch had input, but not, if you will, policy distortion, that they, in fact, had sufficient autonomy while, in fact, being responsive to Congress, and, most of all, responsive to the community of their users, all of which you have said today the Copyright Office as structured is not doing, not just because of a "lack of funds?"

Mr. BRAUNEIS. Yes, exactly right.

Ms. MERTZEL. Just one point on that is that I think that some of the role the Copyright Office plays requires more than just input from the executive branch, for example, internationally. That is part of our foreign policy to some degree, and it does involve other—

Mr. ISSA. Okay. I will come back to you. Quickly, anymore?

Ms. DUNNER. I should just note that the American Bar Association Section of Intellectual Property Law does not take a position as to where the Office should be moved.

Mr. ISSA. Right. I am only talking about what the structure—

Ms. DUNNER. And since you are proposing a hypothetical, I would say yes.

Mr. KUPFERSCHMID. Yes, it would be a huge improvement over what the situation is today.

Mr. ISSA. Okay. And, Mr. Chairman, my time has expired. I wanted to comment on Ms. Metzler's comment. One of the reasons I asked those questions and got your near unanimity on all of these is that as a Member who has looked at free and fair trade, but has also looked at Administrations using an international agenda to essentially distort or potentially distort decisions made here by having trade agreements, and then, back washing them into copyright and patent activities, that, in fact, I asked that question for a reason, because I think this Committee in a structure needs to ensure that these decisions are made domestically first.

And if they are going to be looked at by a delegation in international, that, in fact, the Copyright Office not be a tool of the executive branch, but rather an independent agency with a voice and a reporting requirement equally to the other two branches, which I think is part of what we heard in the testimony. And I thank the Chairman for his indulgence.

Mr. GOODLATTE. I thank the gentleman, and the Chair recognizes the gentleman from New York, Mr. Nadler, for 5 minutes.

Mr. NADLER. I thank the Chairman. It is clear the Copyright Office is facing a series of challenges from improving its tech abilities to enhancing its security through retaining highly-trained staff. What is less clear is how best to address these issues.

The Copyright Office has maintained a high level of service to the public and to Congress in spite of very limited funding and se-

rious staffing shortages. But as we contemplate a new Copyright Act, we need a 21st century Copyright Office that can fulfill the numerous responsibilities we place on it.

In addition to its regulatory administrative functions, the Office provides expert advice to Congress, conducts studies, and makes policy recommendations, any attempt to strengthen and not jeopardize the Office's ability to freely perform these critical duties.

I would like to introduce into the record a forthcoming article by Sandra Aistars titled "The Next Great Copyright Act or a New Great Copyright Agency?" which will appear in the next issue of the Columbia Journal of Law and the Arts. I would like to make sure all Members of the Committee are aware of the article, but also the entire issue in which the article will appear.

[The information referred to follows:]

**The Next Great Copyright Act,  
or a New Great Copyright Agency?  
Responding to Register Maria Pallante's Manges Lecture**

Sandra M. Aistars\*

In March 2013, U.S. Register of Copyrights Maria Pallante gave the Horace S. Manges Lecture at Columbia Law School. Settling in to her role as Register, she compared some of the issues of the day to issues that had faced previous Registers, and urged Congress, the copyright bar, the creative community and the public at large to consider beginning work on “The Next Great Copyright Act.”<sup>1</sup>

Now, after more than a year of comprehensive review hearings before the House Judiciary Committee’s Subcommittee on Courts, Intellectual Property and the Internet,<sup>2</sup> and simultaneous inquiries into various copyright topics by the U.S. Patent and Trademark Office (USPTO)<sup>3</sup> and by the Copyright Office itself,<sup>4</sup> it is possible to explore whether a “Next Great Copyright Act” is the best approach to

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\* Chief Executive Officer, Copyright Alliance. The Copyright Alliance is a non-profit, public interest organization representing the interests of professional creative workers across a variety of artistic disciplines. I am grateful for the open discussions with members of the Copyright Alliance about various topics related to this Article, but the views expressed in the Article are my own and not attributable to the Copyright Alliance or any of its members. I thank Terrence Hart, Sofia Castillo and Leo Lichtman for their generous research and editing assistance.

<sup>1</sup> See Maria Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013) [hereinafter *The Next Great Copyright Act*] (extended version of Pallante’s Manges Lecture).

<sup>2</sup> For a regularly updated list of relevant congressional hearings, see *Congressional Hearings on the Review of the Copyright Law*, U.S. COPYRIGHT OFFICE, <http://perma.cc/CK5D-MVJR> (last visited Feb. 18, 2015).

<sup>3</sup> INTERNET POLICY TASK FORCE, DEP’T OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2013) [hereinafter INTERNET POLICY TASK FORCE GREEN PAPER], available at <https://perma.cc/5XPS-FSJJ?type=pdf>, see also U.S. PATENT & TRADEMARK OFFICE, DEP’T OF COMMERCE ROUNDTABLE DISCUSSIONS ON REMIXES, STATUTORY DAMAGES AND DIGITAL FIRST SALE DOCTRINE [NO. 1] (2014), available at <https://perma.cc/VH5F-2QRB?type=pdf> (transcript of the first roundtable discussion in Nashville, TN on May 21, 2014); U.S. PATENT & TRADEMARK OFFICE, DEP’T OF COMMERCE ROUNDTABLE DISCUSSIONS ON REMIXES, STATUTORY DAMAGES AND DIGITAL FIRST SALE DOCTRINE [NO. 2] (2014), available at <https://perma.cc/BA6J-2XME?type=pdf> (transcript of the second roundtable discussion in Cambridge, MA on June 25, 2014); U.S. PATENT & TRADEMARK OFFICE, DEP’T OF COMMERCE ROUNDTABLE DISCUSSIONS ON REMIXES, STATUTORY DAMAGES AND DIGITAL FIRST SALE DOCTRINE [NO. 3] (2014), available at <https://perma.cc/ECB2-VU7R?type=pdf> (transcript of the third roundtable discussion in Los Angeles, CA on July 29, 2014); U.S. PATENT & TRADEMARK OFFICE, DEP’T OF COMMERCE ROUNDTABLE DISCUSSIONS ON REMIXES, STATUTORY DAMAGES AND DIGITAL FIRST SALE DOCTRINE [NO. 4] (2014), available at <https://perma.cc/9PSQ-G89U?type=pdf> (transcript of the fourth and final roundtable discussion in Berkeley, CA on July 30, 2014).

<sup>4</sup> Music Licensing Study: Notice and Request for Public Comment, 78 Fed. Reg. 14,739 (Mar. 17, 2014); Study on the Right of Making Available; Comments and Public Roundtable, 79 Fed. Reg. 10,571 (Feb. 25, 2014); Orphan Works and Mass Digitization; Request for Additional Comments and Announcement of Public Roundtable, 79 Fed. Reg. 7,706 (Feb. 10, 2014).

address the challenges facing authors and their audiences, or whether other bold approaches, such as a restructuring of the Copyright Office, might better serve the public interest.

As an advocate for artists and authors, I believe that the Copyright Act must first and foremost serve the public interest, which, as Register Pallante aptly noted in her remarks, is inextricably linked with promoting the well-being of authors and artists.<sup>5</sup> Put simply, if the public believes that art matters, then its authors matter. Consequently, a Copyright Act that encourages and empowers artists and authors in the creation and dissemination of works of authorship to the public best serves the public interest. These principles have been at the heart of copyright law in the United States since the beginning. Because copyright law is now more than ever also intertwined with the advancement of new technologies, we also cannot ignore the need to ensure a Copyright Act that is as “future proof” as possible. This suggests that a nimble approach to addressing the issues of the day is needed.

Like any law, the laws applicable to creative works must be understandable and respected by those whose activities they govern—authors, distributors and users of copyrighted works, as well as by the general public. In order for creators’ rights to be respected, and in order for authors to benefit from the commercial value generated by their works, the public must understand and respect the law. Comprehensibility is becoming more and more problematic. Register Pallante is not the only one to note that “the copyright law has become progressively unreadable during the very time it has become increasingly pervasive.”<sup>6</sup> Others have more colorfully referred to the copyright laws as “an obese Frankensteinian monster”<sup>7</sup> and “a swollen, barnacle-encrusted collection of incomprehensible prose.”<sup>8</sup>

Perhaps it is time to examine the underlying reasons why this is so. Today, no agency exists with comprehensive and independent rulemaking authority in the area of copyright law. The Copyright Office is a department within the Library of Congress, and the Register of Copyrights, as head of that department, is limited to establishing regulations for the administration of functions and duties of her office, subject to the approval of the Librarian of Congress.<sup>9</sup> In certain limited cases, such as the triennial rulemaking proceeding relating to exemptions from certain provisions of the Digital Millennium Copyright Act (DMCA), the Register is empowered to conduct notice-and-comment rulemaking, but she may only recommend regulations to the Librarian of Congress.<sup>10</sup> Likewise, the USPTO

<sup>5</sup> *The Next Great Copyright Act*, *supra* note 1, at 340 (“As the first beneficiaries of the copyright law, authors are not a counterweight to the public interest but are instead at the very center of the equation.”).

<sup>6</sup> *Id.* at 338.

<sup>7</sup> Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 557 (2007).

<sup>8</sup> Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 3 (2010).

<sup>9</sup> See 17 U.S.C. § 702 (2012).

<sup>10</sup> See H.R. REP. NO. 105-796, at 64 (1998) (Conf. Rep.) (“The determination will be made in a rulemaking proceeding on the record. It is the intention of the conferees that, as is typical with other rulemaking under title 17, and in recognition of the expertise of the Copyright Office, the Register of Copyrights will conduct the rulemaking, including providing notice of the rulemaking, seeking comments from the public, consulting with the Assistant Secretary for Communications and Information of the Department of Commerce and any other agencies that are deemed appropriate, and recommending final regulations in the report to the Librarian.”); see also *Section 1201 Exemptions to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works*, U.S. COPYRIGHT OFFICE, <http://perma.cc/DEV3-D24L> (last visited Feb. 18, 2015) (“[T]he Librarian of Congress, upon the recommendation of the Register of Copyrights, may exempt certain classes of works from the prohibition against circumvention of technological measures that control access to copyrighted works.”).



executes its duties with respect to intellectual property subject to the policy direction of the Secretary of Commerce.<sup>11</sup> Insofar as copyright matters are concerned, the USPTO Director and the USPTO act in consultation with the Register of Copyrights, and the powers and duties of the USPTO do not derogate or alter those of the Copyright Office.<sup>12</sup>

The lack of any administrative agency with comprehensive regulatory authority and expertise to address the many nuanced, technical matters currently at the intersection of copyright and technology law often results in detailed, industry-specific legislative compromises expressed in complicated language hard-wired directly into the Act. The end result: the Copyright Act today is many times the length of the original Act, contains numerous sections dealing with very narrowly focused issues<sup>13</sup> and, on some issues, provides little guidance for courts.<sup>14</sup>

All this suggests that rather than continuing on the current path of amending and expanding the Copyright Act, Congress should first take the bolder step of considering how the rules governing copyrighted works are themselves crafted and administered.

Congress could pursue a variety of paths to improve upon the current state of affairs. Even if it does nothing else, before Congress engages in a legislative rewrite of the Copyright Act it should examine how the Copyright Office currently operates and is funded, and should ensure that it has all the necessary infrastructure and critical resources to serve the needs of the public in both administering the copyright law and facilitating the innumerable transactions the public wishes to undertake involving copyrighted works.<sup>15</sup> Devoting attention to the structure and resources of the Copyright Office is consistent with the oversight role that the House and Senate Judiciary Committees exercise over the Copyright Office, and is an important part of exercising their jurisdiction over the intellectual property laws of the United States.<sup>16</sup>

If Congress wishes to leave a lasting and meaningful legacy on the development of copyright law, it could also consider options that remove practical, structural and constitutional impediments to more efficient lawmaking and regulation in copyright. For instance, Congress could expand the authority and autonomy of the Copyright Office to afford greater rulemaking authority, and allow it to take on additional adjudicatory functions while leaving it in its current form as a department of the Library of Congress. Or Congress could act more boldly to create a new agency that is able to engage both authors and the public to nimbly address technically and substantively challenging copyright issues.

This Article examines the range of options open to Congress. It first identifies the operational challenges facing the Copyright Office in its current configuration. Next, it outlines the benefits and drawbacks of different approaches to reorganizing the Copyright Office. Finally, it demonstrates how several of the major issues likely to be considered in any further review of the Copyright Act could be more

<sup>11</sup> 35 U.S.C. § 2(c)(5) (2012).

<sup>12</sup> *Id.*

<sup>13</sup> See *The Next Great Copyright Act*, *supra* note 1, at 338–39.

<sup>14</sup> *Id.* at 322–23.

<sup>15</sup> The Register has also advocated for an examination of the Copyright Office's funding and structure. See, e.g., Maria Pallante, *The Next Generation Copyright Office: What It Means and Why It Matters*, 61 J. COPYRIGHT SOC'Y 213 (2014).

<sup>16</sup> Note, for instance, that under Senate Rule XXV the confirmation of the Under Secretary for Intellectual Property, the Director of the USPTO and the Intellectual Property Enforcement Coordinator are referred to the Committee on Judiciary for consideration. See U.S. SENATE, STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at 25–26 (2013), available at <http://perma.cc/2WQS-5NZ6>.

readily resolved if Congress could partner with a responsible, well-resourced, politically accountable entity—a Next Great Copyright Office.

### I. IMAGINING A NEXT GREAT COPYRIGHT OFFICE

Copyright and the creative industries it supports play an important role in the economic, social and cultural well-being of the public. Copyright is the foundation for a thriving and ever-expanding market of cultural, educational and scientific works, one that in 2012 contributed over one trillion dollars to the U.S. economy and directly employed 5.4 million workers.<sup>17</sup> The significant economic impact of the creative industries in the United States justifies a dedication of specialized resources that fosters the continued development of this sector for the public welfare and facilitates smooth interactions between authors and users of copyrighted works.

With the rise of digital technology, and the ability of individuals to more easily create, manipulate and share works of authorship, copyright law has a broader impact on the day-to-day lives of the public than ever before. Ensuring that the Copyright Office has the resources it needs to serve stakeholders and that copyright law and regulations appropriately keep pace with their increasing importance is critical. Yet with its current budgetary and structural constraints, the Copyright Office faces challenges meeting some of the most basic functions stakeholders expect from it.

#### A. UNDERSTANDING THE CHALLENGES FACING THE COPYRIGHT OFFICE

The Copyright Office as currently structured faces three major challenges: (1) insufficient funds, staff and infrastructure to efficiently perform its core functions; (2) operational impediments stemming from its integration with the Library of Congress and (3) potential risk of constitutional challenges to its decision-making authority should the Office take on increased regulatory or adjudicatory responsibility. Congress could improve the effectiveness of any future legislative work it undertakes regarding the Copyright Act by first addressing these structural challenges to ensure it has a strong partner in executing future copyright policy decisions.

##### 1. Registration and Recordation

Among the core functions the Copyright Office must serve for stakeholders is maintaining a reliable and efficient registration and recordation system. While registration has been voluntary since passage of the Copyright Act of 1976,<sup>18</sup> authors have important incentives to register their works.<sup>19</sup> Doing so also provides public benefits such as reducing transaction costs, limiting the risk of unintended infringement, facilitating commercial transactions, providing prima facie evidence of the validity of a copyright and constructive notice to third parties of the facts

<sup>17</sup> STEPHEN SIWEK, INT'L INTELLECTUAL PROP. ALLIANCE, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2013 REPORT 11 (2013), available at <https://perma.cc/Y8M9-6QY2?type=pdf>.

<sup>18</sup> Copyright Act of 1976, Pub. L. No. 94-553, § 408 (codified as amended at 17 U.S.C. § 408 (2012)).

<sup>19</sup> See 17 U.S.C. §§ 410–12 (2012) (establishing that registering a work, while voluntary, confers various legal benefits to a copyright owner such as the availability of statutory damages and attorneys fees as remedies for works registered prior to their infringement, and a prima facie presumption of validity of the copyright when promptly registered).

stated in a recorded document, and aiding transferees in perfecting claims where the underlying work has been registered.<sup>20</sup> As a result of these benefits, and despite the voluntary nature of registration, the United States attracts more registrations annually than all other major countries with public registries combined.<sup>21</sup>

Despite the central role that registration and recordation plays in the efficient and accurate operation of the marketplace for copyrighted works, the Copyright Office lacks autonomous decision-making power over the planning and implementation of the systems used to facilitate registration. The Copyright Office has testified that the current electronic registration system, implemented in 2008, is not optimal for the needs of its stakeholders and is merely an adaptation of “off-the-shelf software” that “was designed to transpose the paper-based system of the 20<sup>th</sup> Century into an electronic interface.”<sup>22</sup> Moreover, the recordation system by which transfers, licenses and security interests in copyrights are recorded has not been updated for many decades, and relies on manual examination and data entry.<sup>23</sup> These infrastructure challenges are exacerbated by the limited funding available to the Copyright Office and the high rate of vacancies in both registration and recordation staff.<sup>24</sup> As a result, the waiting times for processing copyright registrations are currently 8.2 months for paper applications and 3.3 months for electronic applications.<sup>25</sup> Recordation time lags are even longer, averaging 17 months, due to the fact that the work is performed manually and is not online.<sup>26</sup> Backlogs of this magnitude are incompatible with modern digital commerce.

Copyright owners and users alike have requested that the Copyright Office improve its registration and recordation system to ensure that, at a minimum, it can offer a searchable database with accurate, interactive and easily accessible information about registrations and renewals. Such a system could potentially link to private databases of information about copyrighted works on a voluntary basis through the use of Application Program Interfaces (APIs).<sup>27</sup> Improvements like this could be leveraged commercially by businesses operating in the digital space and would ameliorate some of the policy challenges Congress is currently considering in its review of the Copyright Act such as licensing, enforcement and avoiding the creation of so called “orphan works.”

## 2. Integration with the Library of Congress’ Systems

Although the Copyright Office resides within the Library of Congress, it serves a market-oriented function distinct from other departments of the Library. Recognizing that a modern and efficiently functioning Copyright Office is vital not only to protecting and promoting creative works, but also to serving the digital economy as a whole, the Senate Appropriations Committee has directed the Government Accounting Office (GAO) to “provide a legal and technical evaluation

<sup>20</sup> See Dotan Oliar et al., *Copyright Registrations: Who, What, When, Where, and Why*, 92 TEX. L. REV. 2211, 2217–19 (2014).

<sup>21</sup> *Id.* at 2212–13 (citing to STANDING COMM. ON COPYRIGHT & RELATED RIGHTS, WORLD INTELLECTUAL PROP. ORG., NO. SCCR/13/2, SURVEY OF NATIONAL LEGISLATION ON VOLUNTARY REGISTRATION SYSTEMS FOR COPYRIGHT AND RELATED RIGHTS, ANNEX II, at 1 (2005)).

<sup>22</sup> *Oversight of the U.S. Copyright Office: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 34 (2014) (statement of Maria Pallante, Register of Copyrights, U.S. Copyright Office).

<sup>23</sup> *Id.* at 35.

<sup>24</sup> *Id.* at 37–39.

<sup>25</sup> *Id.* at 39.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 33–34.

of the information technology infrastructure that the Copyright Office shares with the Library of Congress” to ensure that any taxpayer investments in modernizing the Copyright Office are used efficiently and effectively.<sup>28</sup> Ideally, the GAO report will consider not only technical issues, but also the strategic implications of separating the infrastructures of the Library and the Copyright Office so that each system is optimized to suit its main purposes and clients. Among the benefits of creating separate, purpose-oriented systems for each entity might be maximizing the use of digital deposits for copyright registration and examination, while separately resolving the delivery of deposit copies in appropriate formats for the Library to archive and make available to the public for research and scholarship.

### 3. Constitutional Concerns

Because the Copyright Office is a department of the Library of Congress, which has a rather unique constitutional structure, the constitutionality of the Librarian’s role in the appointment of officials responsible for administering the copyright laws has been challenged in the past. In *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, a company unhappy with the decision of the Copyright Royalty Board (CRB) judges challenged the constitutionality of the Librarian’s appointment of the judges under the Appointments Clause.<sup>29</sup> The Appointments Clause requires principal officers of the United States to be appointed pursuant to a Presidential nomination and Senate confirmation, in contrast with inferior officers who may be appointed and dismissed by the heads of executive departments.<sup>30</sup> The court held that the CRB judges were acting as principal officers, and that their appointment violated the Appointments Clause. The court corrected the problem by striking part of the statute creating the CRB to clarify that the CRB judges could be appointed and dismissed at will by the Librarian, thus rendering the judges inferior officers. It then also made clear that for purposes of the Appointments Clause, the Librarian is the head of an executive department because the Librarian is appointed by the President, confirmed by the Senate and removable at will by the President.<sup>31</sup>

Although the opinion of the D.C. Circuit as a specialist court on matters of agency law is authoritative, and should put this question to rest, the D.C. Circuit does not have exclusive jurisdiction over such questions. A party “with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights,”<sup>32</sup> thus this issue could arise again with another fact pattern in another circuit.<sup>33</sup>

<sup>28</sup> S. REP. NO. 113-196, at 40–41 (2014).

<sup>29</sup> *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012). The CRB is, like the Copyright Office, a department within the Library of Congress. See 17 U.S.C. § 801 (2012). And, like the Register of Copyrights, CRB judges are appointed by the Librarian of Congress. See *id.* § 801(a). Thus, constitutional analysis of the appointment of the Register and the CRB judges should be similar.

<sup>30</sup> U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

<sup>31</sup> *Intercollegiate Broad. Sys.*, 684 F.3d at 1341–42.

<sup>32</sup> *Buckley v. Valeo*, 424 U.S. 1, 117 (1976).

<sup>33</sup> See, e.g., *Eltra v. Ringer*, 579 F.2d 294 (4th Cir. 1978). In *Eltra*, the Fourth Circuit observed that courts, including the Supreme Court, had long ruled on the Copyright Office’s regulations without

## II. APPROACHES TO REORGANIZING THE COPYRIGHT OFFICE

Given the operational challenges facing the Copyright Office in its current configuration, and the important role it plays for authors, innovators and the public, Congress should consider reorganizing the structure of the Office. There are three basic options for reinvigorating the Copyright Office so that it may better share the burden in administering our copyright laws and limit the need for further expansions of the Copyright Act:

- A. Leave the Copyright Office as a department of the Library of Congress, but address the operational challenges identified earlier as best as possible, and increase the regulatory and adjudicatory role the Copyright Office plays;
- B. Move the Copyright Office to an appropriate executive department, such as the Department of Commerce, relating it to the USPTO or
- C. Create a separate administrative agency, responsible solely for copyright matters.

The following section briefly considers the positive and negative attributes of each of these options, as well as other policy considerations they raise.

### A. LEAVING THE COPYRIGHT OFFICE WITHIN THE LIBRARY OF CONGRESS

The Copyright Office's duties have grown over time, and it has evolved to serve not only a crucially important administrative function, but also to provide technical and policy expertise to all three branches of government, as well as to the public directly. *Nimmer on Copyright* catalogs some of the Office's wide-ranging responsibilities thus:

Congress relies extensively on the Copyright Office to provide its technical expertise in the legislative process. It also relies on studies that, from time to time, it requests the Office to prepare. In addition, the Office prepares voluminous materials to guide the public through the maze of copyright registration—and even to answer basic questions about copyright doctrine.

In addition, the Copyright Office also plays a 'leadership role in international copyright matters to develop policies for the improvement of international standards for the protection of intellectual property.' Most notably, the Office exerts significant impact on the resolution of copyright cases in the courts *via* its examination of registration applications and its resulting decision to accept or to reject registration of the deposited work . . . the *prima facie* presumption flowing from the decision to register—and the concomitant lack of presumption flowing

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questioning or commenting on its regulatory authority. *See id.* at 299. It would be "incredible," said the court, that a constitutional infirmity (in that case, with the 1909 Act) should have escaped the courts and the bar for so long. *Id.* Accordingly, constitutional challenges to the Librarian's and the Register's regulatory authority should be taken with a grain of salt. However, given that *Eltra* was decided in an era where the Register and Librarian exercised essentially ministerial regulatory authority, it would be imprudent to leave the issues unresolved if Congress is to act in this area, because the inefficiencies and time delays introduced by litigation testing the constitutional bounds of any increased substantive regulatory authority for the office could undermine the goals of reform.

from the decision to deny registration—is of inestimable importance to the litigants in any infringement action.<sup>34</sup>

Nevertheless, Nimmer observes that while courts are willing to defer to Copyright Office practices, “one gathers the impression that their deference ends as soon as their disagreement with the Office’s position begins.”<sup>35</sup>

It is also notable that because the Register lacks comprehensive, independent rulemaking authority, the Copyright Office is often asked to undertake studies and issue recommendations, but no further action is taken.<sup>36</sup> Strengthening of the Copyright Office’s regulatory and adjudicatory authority would avoid such a waste of resources.

Increasing the authority of the Copyright Office would have all the typical benefits of delegating authority to an expert agency. Agencies can act more expeditiously and effectively in areas where a fact-specific understanding of complex issues is needed. This is harder for legislators to accomplish because they are required to operate in many areas of the law in their day-to-day activities, and thus rarely can devote the resources to developing as specialized an understanding of any one issue as is possible for an expert agency to do.

Agencies acting in an adjudicatory capacity also have certain advantages over the judiciary branch. Agencies, for instance, are not limited in their activities by the actual case or controversy requirement applicable to judicial decision-making. Nor are agencies limited to considering issues based solely on the specific set of facts in a dispute between two litigants, or on the basis of precedential adjudication. In contrast to courts, agencies may more fully take into account the manner in which a decision will affect other industry participants. Moreover, because the decisions of administrative law judges do not have precedential effect, even in a formal adjudication an agency may have more flexibility to rule in a manner that “gets to the right result” than would a court guided by (and creating new) precedent.

There are notable reasons for not increasing the Copyright Office’s role in its current configuration, however. As a practical matter, if the Office were to continue as a department of the Library of Congress it is questionable whether the Register’s authority could actually be increased—more likely only her ability to advise Congress and the Librarian would be expanded. The three main risks of doing so have already been discussed: (1) the Copyright Office has inadequate resources and relies on the Library of Congress for both financial resources and infrastructure needs; (2) the distinct market-oriented mission of the Copyright Office complicates various functions of both the Library and the Office if the Copyright Office continues fully integrated with the Library of Congress and (3) there is a possibility of continuing constitutional challenges to the Register’s and the Librarian’s authority.

While it would do little to overcome the complications inherent in the Copyright Office’s configuration, it is nevertheless worthwhile to consider

<sup>34</sup> 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.26, 7-236 (rev. ed. 2013) (internal citations omitted).

<sup>35</sup> *Id.* at 7-238.1.

<sup>36</sup> See, e.g., U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT (2001), available at <http://perma.cc/V7TA-MKTT>; U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006), available at <http://perma.cc/7BFA-WLBV>; U.S. COPYRIGHT OFFICE, ANALYSIS OF GAF GRANTS UNDER THE TERMINATION PROVISIONS OF TITLE 17 (2010), available at <https://perma.cc/4YHC-DYG2?type=pdf>; U.S. COPYRIGHT OFFICE, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT (2011), available at <http://perma.cc/A7RW-9A63>; U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS (2011), available at <http://perma.cc/4HCA-RHSW>.

elevating the position of Register of Copyrights to that of a Presidential Appointee. Acknowledging the Register as a principal officer of the United States, and subjecting such a role to Senate confirmation would serve the laudable goal of increasing the political accountability of the Office and better ensuring that the Register, and by extension the Copyright Office, can act directly on important matters of copyright policy where it has unparalleled expertise. As noted earlier, the responsibilities of the Office have increased over time, and are now wide-ranging. Had the evolution of the scope of its duties been foreseen, it is unlikely that the position would have been designed as it exists now—as a role not directly accountable to any elected official and without any time limit on tenure either for the Register or the Librarian of Congress. Moreover, as has been noted, the significant economic impact of the creative industries and the ubiquity of copyrighted works in the lives of the public justify such a change.

#### B. MOVING THE COPYRIGHT OFFICE TO A RELATED EXECUTIVE DEPARTMENT

The suggestion to move the Copyright Office to a related executive department is not without precedent. In 1996, Senator Orrin Hatch introduced the United States Intellectual Property Organization Act to create a government corporation handling all intellectual property matters, reporting through the Secretary of Commerce.<sup>37</sup> The U.S. Intellectual Property Organization (USIPO) would have united the functions of the Copyright Office with those of the USPTO under the directorship of a single individual.<sup>38</sup> The self-funding corporation would have been comprised of three separate offices charged with administering the duties of registering/issuing copyrights, patents and trademarks, each independently led by a commissioner of copyrights, patents and trademarks.<sup>39</sup> All policy functions would have resided with the corporation head. Among the main policy justifications motivating the introduction of the bill was a desire to coordinate all international and domestic intellectual policymaking within one office in the executive branch.<sup>40</sup>

It is not surprising that then-Register of Copyrights Marybeth Peters expressed grave concerns.<sup>41</sup> Register Peters outlined three principal problems with the approach:

1. Placing the Copyright Office on a self-funding basis, as the bill proposed, by requiring increased registration fees would lead to a steep decline in registrations, and a corresponding cost in public access to information;
2. Stripping the Register of her policy duties would mean the loss of a balanced, apolitical, non-partisan voice in policy formulation and
3. The basic concept of copyright would change—it would be treated for the first time as purely industrial property along with patents and trademarks.<sup>42</sup>

Some, but not all, of these shortcomings might be addressed by selecting a different structure if a USIPO were to be created today. One of the characteristics of a federal government corporation such as the USIPO proposed in 1996, as

<sup>37</sup> Omnibus Patent Act of 1996, S. 1961, 104th Cong. (1996).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *The Omnibus Patent Act of 1996: Hearing on S. 1961 Before the S. Comm. on the Judiciary, 104th Cong. 25 (1996) [hereinafter Omnibus Patent Act of 1996 Hearing] (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).*

<sup>41</sup> *Id.* at 19–20.

<sup>42</sup> *Id.*

opposed to a traditional agency of the United States, is that agencies receive the bulk of their financial support from funds appropriated by Congress, whereas government corporations receive most or all of their funding from users of their services.<sup>43</sup>

There may be some surface appeal to limiting the need for appropriated funds to operate an agency by shifting funding responsibilities to customers of an agency. However, in the case of an entity like the Copyright Office, perhaps more so than for the USPTO, the customer base for the agency is really the public at large. The Copyright Office serves diverse functions including providing technical expertise to the legislative process, policy expertise to the executive branch and helping resolve judicial disputes through its registration examination function. In addition, it serves a leadership role in international copyright negotiations and provides guidance to the general public on copyright matters along with serving a crucial role in providing access to information on the ownership of copyrighted works and facilitating marketplace transactions involving such works. In contrast with patents and trademarks, which remain largely the domain of businesses, copyrighted works are ubiquitous in many individuals' daily lives, and policies regarding their use are more relevant to the general public. Consequently, it is important to incentivize registrations (which are voluntary under copyright law, as required by international obligations, but mandatory for patent and trademark protection) because this data is important to digital commerce. Appropriately structured fees are part of the equation.

In order to address the risk to the registration system that would result from the steep increase in registration fees required to put the Copyright Office on a self-funding basis, a more traditional agency structure could be proposed for a USIPO. This would allow the USIPO to continue to draw some, but not all, of its needed funding from registrations when serving copyright functions, and to receive additional funding from appropriations. This, however, might raise fairness concerns among patent and trademark stakeholders if a similar approach is not applied to the operation of the patent and trademark offices. On the other hand, applying a traditional agency funding structure to all three departments of a USIPO would seem to undo budget progress the USPTO has made in recent years towards ensuring that it can operate on a sustainable budget basis, including having an operational reserve to guard against interruptions caused by Congressional budget impasses and government shut downs.<sup>44</sup>

The remaining challenges identified by former Register Peters in 1996—the reduced policy role for the Register, and the conceptual concerns related to treating copyrights together with industrial properties like patents and trademarks—are more or less inherent to the creation of a unified agency. While it would be possible to structure a USIPO with three separate branches, each focused on a specific area of intellectual property, and retain some policy expertise within each department of the agency, the final policy responsibilities for the agency would nevertheless, as a practical matter, need to be overseen by the agency head.

Likewise, it is true that copyrights differ from patents and trademarks and that those inherent differences have been recognized both in the structures governments have selected for administering them, as well as in international treaties in intellectual property. As Register Peters noted in response to the USIPO proposal,

<sup>43</sup> KEVIN R. KOSAR, CONG. RESEARCH SERV., NO. R130365, FEDERAL GOVERNMENT CORPORATIONS: AN OVERVIEW 7 (2011), available at <http://perma.cc/V2AJ-ZW5K>.

<sup>44</sup> See Michelle K. Lee, *Director's Forum: A Blog from USPTO's Leadership*, U.S. PATENT & TRADEMARK OFFICE (June 9, 2014), <https://perma.cc/UM3M-R21B?type=source>.



many countries other than the United States have elected to handle copyright issues in their ministries of culture, while ministries of commerce or trade handle patent and trademark issues.<sup>45</sup> The two leading international treaties on intellectual property issues are also divided this way: the Berne Convention addresses copyrights while the Paris Convention covers patents and trademarks.<sup>46</sup> While copyrighted works provide tremendous economic contributions to the U.S. economy, their social, cultural and scientific contributions cannot be measured, and policy regarding copyright should not be driven purely on commercial grounds. There remains a risk that by joining the policy functions of the Copyright Office with those of the USPTO, and resting responsibility for developing policies regarding the differing areas in one individual (particularly if the USIPO reports through the Department of Commerce) commercial and economic interests may overshadow the unique cultural and societal forces that motivate the creation and dissemination of works protected by copyright law.

### C. CREATING AN ADMINISTRATIVE AGENCY RESPONSIBLE FOR COPYRIGHT MATTERS

The final possibility, creating an administrative agency focused entirely on copyright issues, avoids concerns related to a unified USIPO. It also realizes the benefits of creating a regulatory partner for Congress, with a traditional agency structure that makes it capable of direct action yet appropriately accountable. And it would do the most to reflect the complexities and importance of the copyright system as it exists in the Internet age. Moving the functions of the Copyright Office outside the current Library of Congress structure also addresses operational impediments (e.g., the IT infrastructure challenges and associated harm to the registration and recordation system) and reduces the likelihood of constitutional challenges inherent in the current structure of the Copyright Office as a department of the Library of Congress. Finally, it would free the Librarian of Congress to focus on the important mission of preserving our cultural heritage and encouraging and promoting the important work of the Congressional Research Service (CRS), which serves a vital role in providing authoritative and nonpartisan policy and legal analysis to Congress.<sup>47</sup>

An administrative agency focused on copyright issues could be structured in a variety of ways. The agency could be an executive agency, reporting to the President, or it could be an independent agency or commission, led either by a single agency head or by a bipartisan panel of experts, appointed by the President. There are good arguments favoring each of these approaches.

A single agency head, reporting to the President, is a constitutionally clear and politically accountable structure, not likely to be challenged. On the other hand, because copyright is typically not a politically partisan issue, it may be an area well

<sup>45</sup> *Omnibus Patent Act of 1996 Hearing*, *supra* note 41, at 24 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

<sup>46</sup> *Id.*

<sup>47</sup> CRS currently enjoys greater autonomy within the Library of Congress than the Copyright Office. Pursuant to 2 U.S.C. § 166(b), the Librarian of Congress is directed to “in every possible way, encourage, assist, and promote the Congressional Research Service” and must “grant and accord to the Congressional Research Service complete research independence and the maximum practicable administrative independence.” Affording the Copyright Office equally broad independence within the Library of Congress may be another approach worth considering, at least as an interim step while Congress evaluates the best structure for the Copyright Office for the long term. Such autonomy would not address the constitutional concerns identified earlier, but might allow the Copyright Office greater control over budget and infrastructure issues.

suited for regulation by an independent agency or commission with a panel of experts. The day-to-day work of administering the copyright law entails significant legal and business expertise. A collegial board of experts serving staggered terms could provide stability over time and expand the capacity of the agency. However, where strong policy disagreements exist, agency action could be stymied more so than in a case where a single, politically accountable leader is called to act.

### III. REVIEW OF MAJOR ISSUES: HOW A COPYRIGHT AGENCY COULD IMPROVE THE OPERATION OF THE COPYRIGHT LAW

Regardless of the approach chosen, an examination of major copyright issues currently before Congress demonstrates that, with the exception of the creation or modification of exclusive rights of authors,<sup>48</sup> all of the major issues one might otherwise anticipate addressing in a “Next Great Copyright Act” would benefit from first resolving issues related to the structure of the Copyright Office. Even with respect to issues such as exclusive rights and the nature and scope of exceptions and limitations on copyright—where Congress would have to legislate to implement any significant policy changes—empowering an entity to exercise appropriate regulatory authority could serve an important role and reduce the need for and scope of legislative action.

#### A. EXCLUSIVE RIGHTS

Among the exclusive rights identified by Register Pallante in *The Next Great Copyright Act* as being ripe for discussion are: (1) a fuller public performance right for sound recordings and (2) consideration of the longstanding rights of reproduction,<sup>49</sup> distribution and performance in light of technological developments.<sup>50</sup> The creation or modification of any of these exclusive rights would require legislative action, and the House Judiciary Committee’s Subcommittee on Courts, Intellectual Property and the Internet has already held multiple hearings on these topics to inform its further deliberations.<sup>51</sup> Several legislative proposals have been introduced by members of the Subcommittee to address music licensing-related issues. Additional proposals are anticipated.<sup>52</sup>

The degree to which music licensing issues have consumed the House Judiciary Committee’s time in recent years aptly demonstrates why having the aid of an expert regulator would be helpful. During hearings to consider the Internet Radio Fairness Act, Representative Jim Sensenbrenner, after discussing the various webcaster settlement bills of the past decade, commented with some frustration:

<sup>48</sup> Including enforcement of such rights, and exceptions and limitations pertaining to such rights.

<sup>49</sup> Including issues related to incidental copies.

<sup>50</sup> See *The Next Great Copyright Act*, supra note 1, at 324–26.

<sup>51</sup> See *The Scope of Copyright Protection: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014); *Music Licensing Under Title 17 Part One: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) [hereinafter *Music Licensing Part One Hearing*]; *Music Licensing Under Title 17 Part Two: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014).

<sup>52</sup> Songwriter Equity Act of 2014, H.R. 4079, 113th Cong. (2014); RESPECT Act of 2014, H.R. 4772, 113th Cong. (2014); Free Market Royalty Act, H.R. 3219, 113th Cong. (2013) (note that this bill is no longer active since the main sponsor has since left Congress). Based on comments and questions made at the music hearings, Ranking Member Nadler is expected to introduce an “omnibus music bill” to consolidate all of the various music related proposals, including issues related to the appropriate standards to be used to set royalty rates, etc. See *Music Licensing Part One Hearing*, supra note 51, at 5 (statement of Rep. Jerrold Nadler).

Now here we are back again, and this is the 1, 2, 3, 4, fifth attempt of the Congress and specifically this Committee to deal with this issue.

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Let me say that the Members of this Committee have[] spent probably more time dealing with this issue than with any other single issue in the last decade or decade and a half, and we have got lots of other stuff on our plate that we have got to deal with, as everybody in this room knows.<sup>53</sup>

Representative Sensenbrenner's comments illustrate the limitations of relying purely on legislative action to resolve nuanced, evolving, technical areas of copyright law and speaks to Congress' limited bandwidth to legislate in a manner that stays apace with the marketplace. The Copyright Office has demonstrated the valuable substantive expertise it could bring to resolving issues in this area. One example is its most recent music licensing inquiry, in which it examined all aspects of the challenges facing the music industry, ranging from antiquated consent decrees under which performing rights organizations ASCAP and BMI operate, to the nuances of the various statutory license regimes.<sup>54</sup> Additionally, in recent years the Copyright Office has conducted other detailed reviews of music licensing issues, including, for example, issues related to whether or not pre-1972 sound recordings should receive federal copyright protection.<sup>55</sup>

Similarly, regarding the "making available right," while any modification to the contours of the right would require legislative action, the Copyright Office has already engaged in a thorough review of this issue<sup>56</sup> consisting of initial public comments,<sup>57</sup> a full day of roundtable hearings<sup>58</sup> and an additional opportunity to submit public comments and answer follow-up questions.<sup>59</sup> While some believe that no legislative action is needed to clarify the making available right at this time,<sup>60</sup> numerous participants have noted the benefit that additional regulatory guidance to courts could play in the proper interpretation of the right.<sup>61</sup> Thus, in the

<sup>53</sup> *Music Licensing Part One: Legislation in the 112th Congress: Hearing Before the Subcomm. on Intell. Prop., Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 146-47 (2012).

<sup>54</sup> Copyright Office Music Licensing Study: Notice and Request for Public Comment, 78 Fed. Reg. 14,739 (Mar. 17, 2014).

<sup>55</sup> See U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS (2011), available at <http://perma.cc/4HCA-RHSW>.

<sup>56</sup> *Making Available Study*, U.S. COPYRIGHT OFFICE, <http://perma.cc/MT7E-JJ5F> (last visited Feb. 14, 2015).

<sup>57</sup> Copyright Office Study on the Right of Making Available; Comments and Public Roundtable, 79 Fed. Reg. 10,571 (Feb. 25, 2014) [hereinafter *Making Available; Comments & Public Roundtable*].

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*; Request for Additional Comments, 79 Fed. Reg. 41,309 (July 15, 2014).

<sup>60</sup> *Making Available; Comments & Public Roundtable*, *supra* note 57; Copyright Alliance, *Comments of the Copyright Alliance*, in U.S. COPYRIGHT OFFICE, MAKING AVAILABLE STUDY, COMMENTS IN RESPONSE TO FEB. 25, 2014 NOTICE OF INQUIRY (2014), available at <http://perma.cc/F4AA-3CHV>; Entm't Software Ass'n, *Re: Request for Comments: Study on the Right of Making Available [Docket No. 2014-2]*, in U.S. COPYRIGHT OFFICE, MAKING AVAILABLE STUDY, COMMENTS IN RESPONSE TO FEB. 25, 2014 NOTICE OF INQUIRY (2014), available at <http://perma.cc/8SC6-2ZBD>; Motion Picture Ass'n of Am. & Recording Indus. Ass'n of Am., *Comments of the Motion Picture Association of America, Inc. and the Recording Industry Association of America, Inc.*, in U.S. COPYRIGHT OFFICE, MAKING AVAILABLE STUDY, COMMENTS IN RESPONSE TO FEB. 25, 2014 NOTICE OF INQUIRY (2014), available at <http://perma.cc/RKS2-HVLF>.

<sup>61</sup> U.S. COPYRIGHT OFFICE, PUBLIC ROUNDTABLE ON THE RIGHT OF MAKING AVAILABLE (2014) (statements of Allan Adler, Association of American Publishers; Keith Kupferschmid, Software

main areas involving exclusive rights of copyright owners where one might anticipate legislative action, a reinvigorated Copyright Office or new copyright agency would be well-positioned to lessen the burden on Congress by tackling much of the substantive work that has previously been handled legislatively, and by capably administering the law and providing guidance to the public and to courts on any new legislative enactments.

### B. ENFORCEMENT

Enforcement issues are intimately linked to exclusive rights. Hence, rights and remedies will both require some legislative action to be established, but both will benefit from an expert copyright agency's involvement in administration. This is particularly true where rights can be adjudicated, and for remedies issued in a proceeding before an administrative law judge. Three principal issues have emerged during the copyright review process regarding enforcement of exclusive rights: (1) the need for appropriate penalties for criminal streaming of infringing copyrighted material; (2) issues related to statutory damages and (3) the need for alternative means to resolve copyright claims of relatively small economic value without resort to the federal court system (sometimes referred to as the "small copyright claims court" proposal).<sup>62</sup>

Issues related to changing the level of penalties currently applicable to infringements would require legislative action.<sup>63</sup> Since such penalties, if adopted, would apply only in actions before federal courts, the role of an expert agency would largely be to provide advice and comment to Congress in advance of enacting legislation (as the Copyright Office has already done in various contexts<sup>64</sup>). Formalizing and regularizing such a role would nevertheless be useful.

Congress has received input supporting some of the proposed adjustments (i.e., the harmonization of streaming penalties) from a variety of sources, including the USPTO,<sup>65</sup> the Department of Justice<sup>66</sup> and the Intellectual Property Enforcement Coordinator,<sup>67</sup> but it has not yet enacted a provision to accomplish this goal. The specific drafting expertise of an agency with deep copyright knowledge may be helpful in achieving the suggested improvements to the law while avoiding unintended consequences. This would benefit authors and the public alike.

Issues related to statutory damages levels have been examined in overlapping reviews by a variety of entities in the recent past. Congress and the USPTO have

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& Information Industry Association; & Jane Ginsburg, Columbia Law School), available at <http://perma.cc/5KXQ-WYXD>.

<sup>62</sup> *Copyright Remedies: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 3–5 (2014).

<sup>63</sup> For example: (1) establishing felony penalties for large scale, willful infringements of copyright by streaming so that the penalty is on par with those applicable to similar acts involving infringement using downloading technologies and (2) making any adjustments to the statutory penalty scheme.

<sup>64</sup> See, e.g., *The Register's Call for Updates to U.S. Copyright Law, Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 63 (2013) (statement of Maria Pallante, Register of Copyrights, U.S. Copyright Office); U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS 20–21 (2013) [hereinafter COPYRIGHT SMALL CLAIMS], available at <http://perma.cc/Z5DA-VSKJ>.

<sup>65</sup> INTERNET POLICY TASK FORCE GREEN PAPER, *supra* note 3, at 45.

<sup>66</sup> *Copyright Remedies: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 16 (2014) (statement of David Bitkower, Acting Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice).

<sup>67</sup> U.S. INTELL. PROP. ENFORCEMENT COORDINATOR, 2011 U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR JOINT STRATEGIC PLAN 7 (2011).

held hearings or issued Notices of Inquiry on these topics, and the issue has arisen in related proceedings at the Copyright Office.<sup>68</sup> Regardless of one's perspective on the merits of the issue, the expertise of a copyright agency would be well suited to assisting Congress in balancing the concerns raised with respect to this issue as well.

Finally, a fully empowered copyright agency with a panel of administrative law judges would be best suited to overseeing a small copyright claims alternative dispute resolution mechanism, as is currently proposed by the Copyright Office in its *Copyright Small Claims* report.<sup>69</sup> If such an alternative dispute resolution mechanism were successful, it would reduce costs to all participants and reduce the burden on the federal courts. A small claims approach might also ameliorate certain concerns about statutory damages claims by making the need to pursue such claims less frequent.

### C. THE DMCA

Roughly fifteen years after its passage, the DMCA is not working as intended either for the authors and owners of copyrighted works who rely on its notice-and-takedown and repeat infringer provisions to reduce infringement of their works, nor for the website operators who must respond to the notices sent. When authors are forced to send upwards of 20 million notices a month to a single company—often concerning the same works and the same infringers—something is amiss.<sup>70</sup>

Although the situation for authors enforcing their rights online is bleak, and the burden on sites to respond to notices is staggering, agency rulemaking could be a vehicle to address the many nuanced and technical issues presented by the varied designs of websites, cyberlockers and other forums where infringing content may be posted by users. Addressing such issues in statutory language, which not only complicates the already complicated Act, but locks in such issues for future generations well past the time today's technologies have become obsolete, is less optimal over the long term.

### D. EXCEPTIONS AND LIMITATIONS

As already noted, changes to exceptions and limitations would generally require legislative action. However, the aid of an expert agency would be beneficial in guiding both authors and the public in the new laws' application and in fostering a greater respect for and understanding of the copyright laws.

Exceptions and limitations hold an important place in the copyright law. Among these, the doctrine of fair use is perhaps the most important to authors both to ensure the continuation of practices that lie at the very heart of creativity—the ability to draw inspiration from the work of others—and to simultaneously protect

<sup>68</sup> *Copyright Remedies: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014); Request for Comments on Dept. of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, 78 Fed. Reg. 61,337, 61,339 (Oct. 3, 2013); Remedies for Small Copyright Claims, 76 Fed. Reg. 66,758, 66,759–60 (Oct. 27, 2011).

<sup>69</sup> COPYRIGHT SMALL CLAIMS, *supra* note 64, at 110–12.

<sup>70</sup> *Transparency Report: Requests to Remove Content Due to Copyright*, GOOGLE, <https://perma.cc/UTK4-E6K6?type=source> (last visited Feb. 21, 2015). As of February 2015, Google stated it removes over 33 million URLs a month from its search engine as a result of DMCA takedown notices.

original expression. Fair use is also among the doctrines of copyright law where the interests of the public and authors intersect the most.

During hearings before the House Judiciary Committee's Subcommittee on Courts, Intellectual Property and the Internet in January 2014, witnesses generally agreed that no legislative amendments to the doctrine of fair use were needed.<sup>71</sup> Nevertheless, there are areas where application of the doctrine is still vague, or where interpretations by courts are troubling. Greater clarity and guidance would be useful to creators, users and intermediaries moving forward. An administrative agency with full authority to issue guidance would be in the best position to provide such assistance due to its neutrality, expertise and familiarity with relevant stakeholders.

This suggestion is consistent with those made by academics and practitioners who view copyright issues from a variety of policy perspectives. For instance, among the recommendations reflected in the Copyright Principles Project, is a recommendation that the Copyright Office give serious consideration to offering more guidance to users on the topic of fair use.<sup>72</sup> The Copyright Principles Project suggested issuing fair use letters similar to the "business review letters" issued by the Department of Justice, developing best practices guidelines for various disciplines reliant on the doctrine of fair use, and developing a guidebook for users on fair use issues.<sup>73</sup> All of these suggestions illustrate the useful role an expert agency can play in shaping the development of important parts of the copyright law, without necessarily resorting to legislative amendments.

#### E. ORPHAN WORKS AND MASS DIGITIZATION

As with the general topic of exceptions and limitations, any move to limit existing rights of authors with respect to the licensing of their work would likely implicate legislative action. However, much of what has been suggested thus far stops short of requiring legislative change, and instead implicates increased responsibility for an administrative entity. For instance, with respect to orphan works, solutions proposed by many stakeholders in the creative community urge a greater role for the Copyright Office in defining how those seeking to identify an author of a work should conduct a diligent search.<sup>74</sup> For different reasons, many in the library community urge that expanded exceptions and limitations are not needed to address the orphan works issue, and that any disputes may instead be resolved by

<sup>71</sup> *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (statements of Peter Jaszi, Professor, American University–Washington College of Law; June Besek, Executive Director, Kemoian Center for Law, Media, and the Arts & Lecturer-in-Law, Columbia Law School; & Naomi Novik, Author & Co-Founder, Organization for Transformative Works). Note, however, that June Besek cautioned the Subcommittee about the risks inherent in over-reliance on the transformativeness element. She explained, "A finding that a use is transformative tends to sweep everything before it, reducing the statutory multifactor assessment to a single inquiry. It is important that the fair use pendulum once again be moved back toward the center." *Id.* at 14.

<sup>72</sup> Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1206–07 (2010).

<sup>73</sup> *See id.*

<sup>74</sup> *See, e.g., American Photographic Artists, Proposal for Orphan Works Legislation*, in U.S. COPYRIGHT OFFICE, ORPHAN WORKS, COMMENTS IN RESPONSE TO OCT. 22, 2012 NOTICE OF INQUIRY (2013), available at <http://perma.cc/EFV9-MSMT> ("[T]he final version of any orphan works legislation must empower the Copyright Office to work in tandem with the visual arts community in order to promulgate best practices defining guidelines for a 'reasonably diligent search' requirement . . .").

the courts applying existing exceptions and limitations such as the fair use doctrine.<sup>75</sup>

The record regarding mass digitization is less clear but, to the extent the issue has been considered outside the courts, it has been considered primarily by the Copyright Office in various inquiries. Among the approaches the Copyright Office has hinted at is “extended collective licensing.”<sup>76</sup> Presumably under such an approach representatives of authors could enter into license agreements with entities seeking to digitize their works for purposes such as educational uses or preservation, and authors who do not wish to participate in such agreements could thereafter withdraw their consent. Should such an approach be considered, the licenses required would be best negotiated directly by stakeholders themselves overseen and aided by an agency, rather than imposed by Congress as a legislative enactment such as a statutory license.

#### IV. CONCLUSION

Taking any of the aforementioned approaches to reinvigorate the Copyright Office and ensure Congress has a strong partner to collaborate with in keeping the Copyright Act current is an important first step in any copyright review effort. Properly empowering an agency to act more nimbly than Congress can in this arena also would be consistent with our democratic, common law approach to legislating. In common law countries like the United States, in contrast to civil law countries, the legislative branch does not attempt to engage in comprehensive, continuously updated lawmaking intended to prescribe and codify the necessary outcome of every eventuality. Rather, the legislature creates a more dynamic and evolving body of law, which is further elaborated through agency rulemaking and judicial action.

Each of the approaches analyzed would curb the need to constantly legislate to address rapidly evolving, industry-specific concerns, and instead would allow some of these matters to be handled by regulatory action. As a result, future amendments of the Copyright Act would be limited to matters such as the establishment of overarching policy decisions or the creation of new substantive rights or exceptions. With Congress retaining proper oversight of the agency, a more regularized, direct and politically accountable approach to legislating and rulemaking in this arena could develop.

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<sup>75</sup> See Library Copyright Alliance, *Comments of the Library Copyright Alliance in Response to the Copyright Office’s Notice of Inquiry Concerning Orphan Works and Mass Digitization*, in U.S. COPYRIGHT OFFICE, ORPHAN WORKS, COMMENTS IN RESPONSE TO OCT. 22, 2012 NOTICE OF INQUIRY (2013), available at <http://perma.cc/9XJJ-FDFF>.

<sup>76</sup> See *The Next Great Copyright Act*, *supra* note 1, at 334, 338.

Mr. NADLER. The article recommends that Congress should continue to examine how copyright laws are crafted and administered, and seek to remove practical, structural, and constitutional impediments to make more efficient laws and regulations. It is important for us to explore different ideas and proposals in more detail and evaluate the implications of any proposed changes.

From the witness testimony, I gather there is agreement that the Copyright Office as currently structured faces a variety of challenges in executing the basic functions stakeholders expect from it, and that it lacks independent budget and administrative authority. While the Copyright Office under the current registrar, Maria Pallante, has taken the initiative to address some of these challenges, only Congress can provide the resources and flexibility the Office needs to continue serving the public and Congress.

And I would like to ask Professor Brauneis, if I pronounced it correctly.

Mr. BRAUNEIS. Indeed.

Mr. NADLER. Would additional resources alone be sufficient to address the challenges the Copyright Office faces?

Mr. BRAUNEIS. No, I do not think so. I guess, as I mentioned, I think that control over information technology is important, and that spending money when you do not have the control does not work. And I do think that putting the Office on a sound constitutional basis is important for the long haul as well.

Mr. NADLER. Thank you. Mr. Kupferschmid, there are a variety of options that could be considered if we were to modernize the Copyright Office. How might we best evaluate the pros and cons of each? Do you have a strong opinion about the preferred approach?

Mr. KUPFERSCHMID. I mean, we put three options on the table. For that matter, there may even be more options of that. I think we need to get the people who have the experience from the Copyright Office, from the Patent and Trademark Office, and the Library of Congress, and other stakeholders and users, and folks from the Copyright Office community all together to figure out what is the best solution. All I know is the best solution is not the one that is working right now today.

Mr. NADLER. Okay. And, Ms. Dunner, how might improvements to the structure of the Copyright Office contribute to making the act, the Copyright Act, more understandable and accessible for all parties?

Ms. DUNNER. I think that, first of all, if the Copyright Office had more autonomy and was given more control over its own rules and regulations, I think it would have great improvements to the act, which has just been added on, and added on, and added on. I think if the Copyright Office had the strongest voice where its rules and regulations were given more deference, it would ultimately help to clear up the act.

Mr. NADLER. Thank you. Let me continue, and, in fact, ask each of the witnesses, starting with Ms. Dunner, the following question. In Ms. Aistar's article that I referred to, she argues that the Copyright Office's duties have grown over time, and that it has evolved to serve not only a crucially important administrative function, but also to provide technical and policy expertise to all three branches of government, as well as to the public directly, and that it would



be wise to consider, at a minimum, elevating the position of registrar to a presidential appointee confirmed by the Senate.

What are your thoughts about this, about elevating the registrar to a Senate confirmed presidential appointee?

Ms. DUNNER. Well, I do not know if I am the best person to reply to that, but I would say that the recent IBS case helps lean toward creating an independent agency where potentially the registrar is a presidential appointee, given more authority over the statute and the rulemaking, and all the things that Copyright Office currently does. So I think it would not be a bad idea.

Mr. NADLER. Thank you. Ms. Mertz, same question.

Ms. MERTZEL. I am sorry, but AIPLA does not have a position, and I do not personally have a position yet on that. I need to study it more.

Mr. NADLER. Mr. Brauneis?

Mr. BRAUNEIS. I think it would be appropriate to give the registrar that stature, yes.

Mr. NADLER. Mr. Kupferschmid?

Mr. KUPFERSCHMID. There is certainly some advantages like transparency and accountability to doing that, but there are also some concerns. If you are going to evaluate other options, I think evaluating whether the registrar needs to be a presidential appointee should be considered in that mix.

Mr. NADLER. Well, what are some of the advantages of that and the disadvantages? You said—

Mr. KUPFERSCHMID. Well, so an advantage is you have got transparency and accountability which you do not have today because the registrar reports only to the Librarian, and the Librarian is the only person who can get rid of the registrar. You hopefully will get somebody who assuredly has expertise in copyright. The Librarian could appoint somebody who is just another librarian to head up the office who has no authority.

In terms of the concern, there are some people who believe that it vests too much power in one person at the Office, or that the commissioner of patents and the commissioner of trademarks are not presidential appointees, so why should the head of the Copyright Office be? So there are opinions on both sides, and I think it is something that should definitely be considered.

Mr. NADLER. Thank you. My time has expired.

Mr. GOODLATTE. The Chair thanks the gentleman, and recognizes the gentleman from Pennsylvania, Mr. Marino, for 5 minutes.

Mr. MARINO. Thank you, Chairman. Good afternoon. First of all, I agree with everything that each of you have said. The Copyright Office that we know today faces strict limitations by way of its position within the Library of Congress. Not only does the Copyright Office lack autonomy in how best to run the office, but it also lacks the critical ability to set up and manage its own budget.

I have had the pleasure of meeting with the Registrar of Copyrights, Ms. Maria Pallante, and I have heard firsthand the kind of impact these severe limitations have on her ability to do her day-to-day job. The registrar of copyrights does not have the same level of power and authority the director of the United States Patent and Trademark Office holds, which I believe undercuts the position.

The copyright industries are a vital part of the U.S. economy, which is why it is time we bring the Copyright Office into the 21st century. So being an old business guy who has run a factory, therefore, I take this position. Ms. Pallante should be made the director of the Copyright Office yesterday. Ask her to improve what she can without an increase in cost immediately, and then submit to Congress a prioritized list, along with that list the cost and a time-frame in which to implement that.

With that, I yield back my time.

Mr. GOODLATTE. The Chair thanks the gentleman, and recognizes the gentlewoman from California, Ms. Lofgren, for 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman. I think this a very useful hearing to kind of focus our minds on the issues before us. And it is apparent that there is general agreement that something needs to be done to update the Copyright Office's IT systems. I do not think any Members are disagreeing, and the witnesses are not disagreeing.

You know, we will discuss this further, but I think a lot of Members favor the idea of fully supporting the Office through fees as the Patent Office has done, although I hear some disagreement from the witnesses. So I think we will need discussion on that.

But one of the concerns I have is, whatever structure we end up with, how do we make sure that we have a diversity of views in the Office? And I am going to give you some examples. Ms. Dunner, you testified that having the Librarian was a conflict of interest, but looking back at some decisions, actually I was grateful that the Librarian was there. For example, in 2010, the Registrar recommended against renewing the DMCA exception that allowed the visually impaired to use text to speech software for e-books. Now, there was not a single comment in the comment period who said that the blind should be denied that exception, but the registrar opposed the exception. And luckily, the Librarian overruled the Office, and that was important.

We remember the Stop Online Piracy Act, so-called SOPA, where the Copyright Office came in with all guns blaring in favor of SOPA, and we all know the backlash against that bill, and really the meltdown of the proposal in the House. Her advice I do not think really helped the Congress much in terms of getting to the right answer. And then most recently, the Copyright Office failed to renew the exception for cell phone unlocking. The Congress had to step forward and do it. It created a lot of upset in the country. It was, in my opinion, a nonsensical decision, and it caused a lot of work for the Committee to undo that problem.

I mean, sometimes there is tensions between the tech world and the so-called content world that I think for the most part is quite unnecessary. There should be partnerships. There should be a mutually supportive world, and yet there is no voice to actually keep the Office from making these just boneheaded mistakes when it comes to technology.

I am not sure that moving the Copyright Office or the Patent Office would fix that. I am just wondering what ideas do each of you have in terms of structuring to make sure that broad voices are heard and these mistakes do not continue to get made. And I would like each of you to respond, if you could.

Mr. KUPFERSCHMID. If I could begin here. The issues you mentioned, I am not sure that it is due to a lack of diversity of views. It could be very well because of a different reason. And you mentioned sort of the, you know, technology and content, that their views are oftentimes intentioned. I do not think there is anybody more qualified to speak to that issue than the Software Information Industry Association. And I can tell you, on this issue, copyright modernization, there is no diversity of views.

Ms. LOFGREN. No, no, I understand that, and I premised my comments with that.

Mr. KUPFERSCHMID. But let me get directly to your question. There are some who believe that instead of having a registrar of the Office, having like a panel of experts, like FTC commissioners, that type of approach might be a solution to address that type of concern. Like I said earlier, I think that is one thing that needs to be on the table to be discussed, along with making the registrar a presidential appointee.

Ms. LOFGREN. Ms. Dunner?

Ms. DUNNER. Again, the ABA IP Section does not have a position on this. Our Section is advocating more autonomy for the Office. And I could tell you generally if pushed that we would not advocate that the Office be moved to the PTO for a number of reasons, and the status quo is unacceptable as well.

Ms. LOFGREN. Ms. Mertz?

Ms. MERTZEL. I think the registrar and the Copyright Office do typically solicit views from the stakeholders, and so a lot of copyright law evolved through negotiation, as you know. So I think that that type of process has to continue. I do not know the best way to avoid errors.

Mr. BRAUNEIS. I think there was a time when copyright was really more about business regulation and the business insiders had the inner, you know, run. But I think that, as you mentioned, the experience with SOPA and PIPA, I think that it has been a bumpy road. But over the last couple of decades as copyright has come to affect individuals more directly, individuals have found ways to organize and made their voices heard. And I think the Copyright Office, they are getting inside the Copyright Office's hearings and so forth. So I am not so sure that the Copyright Office needs to do something about that. I think it is a movement outside of the Copyright Office that has brought those views to the Office.

Ms. LOFGREN. Well, my time has expired. But I am just looking for how do we get consideration so the Congress does not have to do the cell phone unlocking bill every year. I mean, there has got to be a better way. Thank you, Mr. Chair. My time has expired.

Mr. GOODLATTE. The Chair thanks the gentlewoman. We do have a vote coming. We can get one or two more series of questions in. How many of you plan to return? We will probably get to Mr. Collins and Mr. Johnson. Are you going to come back? So we are going to have at least one person coming back, and I believe, Mr. Marino, you agreed you can take the Chair because I cannot, so you may want to head over to vote, and you might want to, too. So we will have a short recess because I think there is just one vote. I correct myself. Do not worry about it. Three votes, so it is going to be a while anyway.

Mr. JOHNSON. And, Mr. Chairman, I will probably just yield.

Mr. GOODLATTE. Right. Well, let us go ahead to Mr. Collins. The gentleman is recognized for 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate it. This is a great hearing, and I appreciate the testimony here because I think this is one of the key issues that we have been working on now over, you know, my whole time I have been here, and looking forward to continuing, because the topic of the United States Copyright Office is probably one of the most relevant and timely in this bigger discussion of the Copyright Act and where do we go forward. I have always said that this is a discussion that needs to be had not in the immediate.

And what I mean by that is not what we are doing right this moment. It has got to look at where we are going to be 5, 10, 15, 20 years down the road. If we do not do that, then we are basically—and I agree with my friends across the aisle. We are not doing what we are supposed to be doing here because we have got to get some direction and also some certainty into this.

We can all agree that the Copyright Office should be able to meet both the needs of the users and the creators, and also act independently to carry out the intent and directives of Congress. But there will be difficult choices that we are going to have to make in order to have the Copyright Office worthy of its constitutional task. We have the leadership and the talent in place at the Office to meet the challenges of the 21st century, but unfortunately the resources and technologies at their disposal are inadequate.

I will just state at this point, I think right now Maria Pallante and her staff are excellent. I think she is a forward thinking person who has come to this Committee on many occasions and challenged us to think about things in a different way.

What concerns me is, frankly, it seems to me we have someone who I may not always agree with, but who is willing to put the mental mind power to saying what should my office look at, how should we be able to do this, and what should we look for. And, frankly, the system, including being under the Library of Congress, is straddling that and stopping that. I think there is a problem here that we have got to look at.

And so, the question that comes to mind, you know, really is what comes first, a modernization of the Copyright Office or a modernization of the Copyright Act? You know, sort of what is the question here, because if you modernize the Copyright Act but the Office is not able to handle it, then you are setting yourself up with another road block. And if you modernize the Office but do not modernize the Act, you have got a problem, so I think we have got to work cohesively here as we go forward.

I am interested, and it is something that has come up before, and it is just a short answer, but, I mean, if you have watched before, you know this is something I have asked before. Small claims court pilot program administered through the Copyright Office. Based on the status of the Office and resources, and I have done a lot of looking into this as well, do you think that they are able to handle such a pilot program if it was enacted today? And just start, and you can sort of go down whichever way. We can start at this end, and we will start the next down on this end.

Mr. KUPFERSCHMID. Is the question does the Copyright Office have the resources?

Mr. COLLINS. Yes, to do a pilot program, a small claims kind of—

Mr. KUPFERSCHMID. I mean, that would further drain the Copyright Office resources, which they do not have enough already. Resources is a big, big issue, which comes back to funding.

Ms. DUNNER. I think anything you add to their plate will drain their resources. But the ABA IP Section suggested a virtual small claims court, which would lessen the amount of resources that you would need as opposed to an in-person type of panel.

Mr. COLLINS. Thank you.

Ms. MERTZEL. Same. I agree with my predecessors.

Mr. BRAUNEIS. As do I.

Mr. COLLINS. Okay, because I think that is the issue is it is a drain, but it goes back to the basic question here. One of the issues is what is not happening now in the marketplace, you know, what is, and it is probably the answer to the question, that could happen if the Copyright Office had the ability to more efficiently serve its customers. If we were able to get what we need there, quick answer, what would the marketplace see if we were able to do that, get it out of the restraints? I would love to hear an answer.

Mr. BRAUNEIS. I think it would see a large number of new copyright transactions, particularly smaller transactions that now are priced out by the high cost of registration and recordation.

Mr. COLLINS. Okay.

Ms. MERTZEL. Yes, I think we would see more licensed projects that are just either under the radar where money could be paid and would be paid if it was easy enough to do that. Instead it is either not being licensed and not being found, or you end up with a suit where there is billions of dollars at issue because there are a lot of small actors.

Mr. COLLINS. Right.

Ms. DUNNER. I think you would see increased registration. You would see better recordation, more searchability, better databases, happier Copyright Office employees.

Mr. COLLINS. Outstanding.

Mr. KUPFERSCHMID. Everything that they said. A properly functioning Copyright Office would be just a huge boon to the U.S. economy, to the creative community, and certainly to the public.

Mr. COLLINS. And I appreciate what you just said because the creative community, this is something that I have fought for and will continue to fight for, and as many on this Committee. If we do not protect the content, we do not protect the creative minds in our country, then we are losing the next generation of the great books, the great music, the stuff that we long for, you know, that excitement that builds when you hear the song for the first time, when you open the page. I still love to have a book and smell the ink.

Those are the kind of great things that are protected by a Copyright Office that works properly, and we have got to get it out of the antiquated system it is currently in and move forward. Thank you so much for your coming today. Mr. Chairman, I yield back.

Mr. GOODLATTE. The Chair thanks the gentleman, and recognizes the gentleman from Florida, Mr. Deutch.

Mr. DEUTCH. Thanks, Mr. Chairman, for holding this important hearing. Thanks for your leadership on these issues. During the last Congress and into this session, we have held I think over a dozen copyright review hearings. It is a complex and difficult issue, and these hearings have, I think, been helpful in clearing up some of the confusion and pinpointing areas where we really can make progress.

Currently, we allow the Copyright Office, an entity responsible for a trillion dollars in GDP spending and 5 and a half million jobs to operate with an antiquated and inefficient structure. We need the stature, I believe, the stature and power of this Office to reflect its real world impact on our economy. It is time to enact a restructured, empowered, and more autonomous Copyright Office that is genuinely capable of allowing America to compete and to protect our citizens' property in a global marketplace.

Now, I am sorry. I had another hearing at the same time, but I just want to get a basic sense of this. Frankly, even if just by a show of hands, just if you agree that the Copyright Office needs serious reform and modernization or just nod.

[Nonverbal response.]

Mr. DEUTCH. We are all in agreement there, which I appreciate. So there is widespread agreement across the board on this issue. And in the days ahead, Mr. Chairman, I would appreciate very much the opportunity to work with you and our other colleagues on a bipartisan legislative effort to address these critical issues in the coming months.

My question for the panel today is really, again, getting back to the role that the Office plays, and the changes in technology, and the impact on our economy. Should there be within the Copyright Office, should there be a separate focus? Should there be a chief economist? Should there be someone whose sole focus is technology, a chief technologist? Should there be other positions to better enable the Office to understand and respond to new technologies and to new business models, which are ultimately impacted by the work that they do?

Mr. KUPFERSCHMID. I guess I will start. Absolutely. I mean, if you look at the Patent and Trademark Office, they have exactly those offices you are talking about, and it helps the Patent and Trademark Office decide sort of what improvements and how to make those improvements. I think that would be essential for an improved Copyright Office.

Ms. DUNNER. I think that is really a question for the registrar, but I would think that in order to act like any other business that is not so crippled in the way the Copyright Office is right now, that that would not be a bad idea.

Mr. DEUTCH. Thanks.

Ms. MERTZEL. I agree as well, and I would just note the Registrar did recently appoint, I believe this week, a new person in a technology position.

Mr. BRAUNEIS. Yes, I particularly think it would be important to have something like an office of chief economist to take advantage of the data that the Copyright Office has and collects, and to ana-

lyze it in order to understand the needs of the community, and the changing output of the United States.

Mr. DEUTCH. And finally just before we head to votes and follow up on my colleague, Mr. Collins' question, beyond the issue that we have been grappling with about the structure, the power of the Copyright Office, we have also been working on, as I referred to earlier, many issues that have arisen as technology has changed. Copyright crime and piracy has grown. They have adopted changes in law enforcement. The real question is, can we ultimately do anything to fix these issues, to address these issues in a meaningful way before we first fix the Copyright Office?

Mr. KUPFERSCHMID. No, I do not think so. I mean, the most important issue is a copyright issue. Of all the hearings, of all the issues that have come up, the most important one is fixing the Copyright Office because you can try to address those other ones, but you are just going to only make so much progress if you do not fix the Office. That has got to come first.

Ms. DUNNER. I would agree. I think the place to start is protecting and securing copyrighted works.

Mr. DEUTCH. Great, thanks.

Ms. MERTZEL. I agree with these people.

Mr. BRAUNEIS. I actually think it can proceed on a parallel track. There are some improvements that can be made to the Office that will help in administering some new laws. But if you are considering major revisions, which are necessary, I do not think there is any need to wait until the Copyright Office is perfect in order to start considering the need for a change in the law.

Mr. DEUTCH. Okay. I thank the witnesses. Mr. Chairman, thanks for letting me——

Mr. GOODLATTE. I thank the gentleman. The gentleman from Pennsylvania would return after votes. We have at least one Member, Ms. Chu, who wishes to ask questions, so we apologize, but if you can wait while this vote is going on, we will reconvene after the vote. But Mr. Collins had a motion to make.

Mr. COLLINS. Mr. Chairman, in my excitement for this topic, I ask unanimous consent for an article by Dina LaPolt on copyright and also an article by Sandra Aistars entitled, "The one copyright issue everyone should agree on," to be added to the record.

Mr. GOODLATTE. Without objection, they will be made a part of the record.

[The information referred to follows:]

9/12/2015

Dina LaPolt: Copyrights different than patents, trademarks | TheHill



## Dina LaPolt: Copyrights different than patents, trademarks



By Dina LaPolt - 12/10/14 07:48 PM EST

Getty Images

While the average music creator might not have an intricate understanding of governmental bodies in Washington, there's one that nearly all of them could name: the U.S. Copyright Office. Even the most amateur songwriters and recording artists can easily figure out how to register their copyrights, a simple way of ensuring their important intellectual property assets are protected.

Before I was an attorney, I was a musician. I remember the thrill of receiving a copyright registration certificate, complete with the signature of then-Register of Copyrights Marybeth Peters. Many years later I met Peters, after I had become a music lawyer. It was a special moment for me. For a creator, receiving your first certificate of registration brings with it a strong connection to the Copyright Office. Today, the signature is by Register Maria A. Pallante, an excellent advocate for creators' rights and one of the country's foremost experts on copyright law.

The Copyright Office plays an essential role in our country's copyright system. Not only does it administer and maintain copyright registrations for countless works, but its employees are also the country's foremost experts on copyright law with invaluable insight into its workings. As legislative review of copyright laws continues in Washington, we cannot take this expertise for granted.

However, the president and secretary of Commerce receive advice on copyright-related policy issues from another governmental body, the U.S. Patent and Trademark Office (USPTO). Inexplicably, USPTO holds duties that would be better performed by the Copyright Office. Patents and trademarks are very different from copyrights. They cannot be easily registered by creators. Unlike copyrights, patent and trademark registrations require extensive attorney assistance and significant legal fees.

Further, the Copyright Office's ongoing review of copyright laws is being compromised by involvement from the USPTO. The Commerce Committee Internet Policy Task Force, which includes USPTO employees, released a green paper titled *Copyright Policy, Creativity, and Innovation in the Digital Economy* in July 2013, extensively discussing various copyright-related issues that the task force thinks deserve consideration as copyright reform efforts continue. The task force followed up the green paper with two calls for public comments and a series of roundtable discussions across the country on the topics raised.

All of this has been carried out despite the fact that the USPTO has no particular expertise in copyright law. This is confusing and harmful to the creative community. In fact, the task force has prejudiced creators by raising and extensively discussing topics such as a compulsory license for remixes, mashups and sampling that should never have been raised in the first place.

Further, the Copyright Office, not the USPTO, should be advising the president on copyright issues. Why is the USPTO involved in anything related to copyright? It is severely disconnected from the creative community and therefore has no credibility. There is no "C" in PTO.

The Copyright Office has expertise in copyright law and daily sees how that law plays out for creators of all types. As a new Congress continues to review copyright law, it is the Copyright Office that should be allowed to inform much of the discussion. However, as part of the Library of Congress, the register of copyrights and her team are severely hindered in operating effectively and contributing a needed voice to legislative reform discussions by an oppressive oversight structure and confusing, overlapping roles with other agencies. The register of copyrights must seek the library's approval over the regulations she establishes pursuant to the Copyright Act. Also, the Copyright Office must use the library's limited technical infrastructure and has to compete with other library departments for resources. That's not ideal for the 21st century. It is essential that we give the Copyright Office the resources it needs to operate effectively by removing it from the Library of Congress and giving it its own infrastructure and budget.

Not to mention, news is out that a new biography of Mark Twain, co-authored by the Library of Congress, extensively plagiarized at least five

<http://thehill.com/opinion/206722-dina-lapolt-copyrights-different-than-patents-trademarks>

1/2



2/12/2015

Dina LaPolt: Copyrights different than patents, trademarks | TheHill

different sources. Because it contains the Copyright Office, the library is the very place where authors register their copyrights. Creators place trust in the library to protect their works, yet the library is being questioned about its use of works without permission or attribution. It would appear that the library is not in tune with the Copyright Office's mission.

At the end of the day, the Copyright Office is held back from reaching its full potential and contributing effectively to copyright policy discussions by its inclusion in the Library of Congress and unclear distinctions between itself and other, less-qualified governmental bodies that take on copyright roles.

Under the guidance of House Judiciary Committee Chairman Bob Goodlatte (R-Va.), who tirelessly advocates for creators' rights in Congress, Congressional Creative Rights Caucus Co-Chairs Judy Chu (D-Calif.) and Doug Collins (R-Ga.), as well as incoming Judiciary subcommittee on intellectual property Chairman Darrell Issa (R-Calif.), have power to help our country's creative community. A great step toward providing such help would be independence and resources for the Copyright Office.

We have the experts in place. Let's allow them to do their jobs.

*LaPolt is an entertainment attorney based in Los Angeles at LaPolt Law, P.C. In addition to practicing law, she is an advocate for creators' rights in the areas of copyright, trademark and privacy and is regularly involved in legislative issues in Washington that affect the creative community. @dinalapolt @lapoltlaw*

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2/12/2015

The one copyright issue everyone should agree on | The Hill



February 26, 2015, 01:30 pm

## The one copyright issue everyone should agree on

By Sandra Alizars

There is one issue in the ongoing copyright review process everyone should agree on: step one in any review of the Act needs to focus on modernizing the Copyright Office itself. Register of Copyrights Maria Pallante has repeatedly called for support in bringing the Office into the 21st Century, and Congress seems to agree it's an issue worth taking up. With simultaneous hearings on the functions and resources of the Copyright Office occurring on Thursday in the House Judiciary Committee and the House Appropriations Legislative Branch Subcommittee, agreement to modernize the Copyright Office could also bring momentum to more easily address targeted changes Congress has been examining over nearly two years of hearings on copyright law and policy.

Copyright issues tend not to split across partisan lines, though there can be a so-called "copyright/copyleft" split on certain substantive issues. The one area many seem to agree on regardless of their other views is that the Copyright Act has become progressively less comprehensible to ordinary people at the same time that copyright issues are becoming ubiquitous in our day-to-day lives. Some copyright academics have colorfully referred to the Copyright Act as "an obese Frankensteinian monster" and "a swollen, barnacle encrusted collection of incomprehensible prose." This is because nuanced, industry and technology specific compromises are routinely addressed via legislation that hard-wires soon-to-become-obsolete provisions into the Act for generations to come - long past the time both the creative industries and the technology sector have moved on.

This should not be so. Copyright and the creative industries it supports play an important role in the economic, social and cultural well-being of the public. Copyright is the foundation for a thriving and ever-expanding market of cultural, educational and scientific works, one that in 2012 contributed over one trillion dollars to the U.S. economy and directly employed 5.4 million workers. Those who rely on licensing, using, and distributing copyrighted works in their businesses multiply this economic impact. Such important economic interests justify a dedication of specialized resources to foster continued development of these sectors for the public welfare and to facilitate smooth interactions between authors and users of copyrighted works. All of these stakeholders require a modern, efficiently functioning Copyright Office with appropriate regulatory and adjudicatory powers. Yet as it exists today, the Office lacks administrative control over even its own budget and infrastructure needs. Moreover, because no agency exists with comprehensive, independent rulemaking authority in the copyright sphere, issues better suited for regulatory action continue to be resolved directly in the Act, or worse - are ignored entirely.

The Copyright Office was first established in 1897 as primarily a ministerial entity. Over time it has steadily acquired responsibilities and today is a crucial independent policy advisor to all three branches of the government and provides important guidance on copyright matters to the public. It is inconceivable that had all these responsibilities been envisioned at the time of its creation the Office would have been structured as it is now - without the political accountability and transparency leadership by a Presidential Appointee confirmed by the Senate would provide, and without independent control over its resources and planning.

Congress needs a responsible, well-resourced, politically accountable partner in tackling any future legislative work it might undertake. A Next Great Copyright Office.

*Alizars is chief executive officer of the Copyright Alliance, a non-profit, non-partisan organization representing the interests of creators, producers and distributors of creative works across the spectrum of creative disciplines. The views expressed are her own.*

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Mr. GOODLATTE. The Committee stands in recess. We have 3 and a half minutes to get to the vote.

[Recess.]

Mr. MARINO [presiding]. The full Judiciary Committee hearing will come to order. And are you ready?

Ms. CHU. Yes.

Mr. MARINO. Okay. The Chair recognizes the gentlewoman from California, Congresswoman Dr. Chu.

Ms. CHU. Thank you, Mr. Chairman, for holding this important hearing. I cannot stress how critical it is for our country to have a robust central entity to support our copyright system. We have heard the witnesses stress today that our core copyright industries added over a trillion dollars to our economy per year while providing jobs to over 5 million people.

At the center of it all is the Copyright Office, which has proven to be such an invaluable resource and important partner to lawmakers, international counterparts, and creative industries. I believe that Registrar Pallante and her team do a remarkable job in carrying out the Office's mission, but at the same time they face challenges. They work on very complex issues without technology, policies, and very limited resources.

And so, it is time that we have a serious discussion about how we can bring the Copyright Office into the modern age and give it the tools and resources necessary to perform the job that we have tasked them to do. That includes not only more funding, but the flexibility to the Office to invest in a 21st century IT infrastructure. We also have to consider the level of independence that the Office needs to perform its core mission so that it can administer the Copyright Act. So I look forward to working with my colleagues on the Committee, the Registrar, and impacted stakeholders to make sure that we overcome the existing challenges and get it right.

I would also like to enter into the record an op-ed that speaks to the importance of today's examination of the Copyright Office written by former chairperson of the IP Subcommittee, Howard Berman, and Senator Leahy's former IP counsel, Aaron Cooper.

Mr. MARINO. Without objection.

[The information referred to follows:]

3/12/2015

Important examination of what a 21st century copyright office needs | The Hill



## Important examination of what a 21st century copyright office needs

By former Rep.-Howard L. Berman (D-Calif.) and Aaron Cooper - 03/09/15 07:00 AM EDT

Copyright legislation is rarely partisan, but it can often become as heated and controversial among industry participants as any partisan issue. But whatever position one has on copyright policy, the copyright laws -- and the books, movies, music, photographs, and other works protected by copyright -- unquestionably have a dramatic impact on our economy. One frequently cited study found that the copyright industries contributed more than \$1 trillion to the U.S. gross domestic product in 2013.

Today's House Judiciary Committee hearing on "The U.S. Copyright Office: Its Functions and Resources" is refreshing because it charts promising new territory. And because everyone benefits from a modern, well-functioning Copyright Office, there is real opportunity that this hearing may lead not only to bipartisan cooperation, but to cooperation among and between industries that often find themselves at odds.

The Office has an incredibly important, but often overlooked, role in making the system work both for owners and users. It examines and registers copyrights, records ownership information, administers statutory licenses and provides policy advice to Congress. These functions are as crucial for owners to protect their works as they are for those who want to use works owned by others.

A 21st-century Copyright Office could make tremendous progress in helping those who create works, those who license works to use in new projects, and those of us who simply enjoy what others have created. But the Office must have the authority and funding it needs to improve the current system. By modernizing and leveraging more advanced technology, the Office can facilitate licensing in a manner that will benefit everyone.

The Copyright Office is run by the Register of Copyrights, who is appointed and supervised by the Librarian of Congress. Today's hearing offers an opportunity to explore questions that are too often left unexamined. How should the Office be funded? Should the Register of Copyrights be a position nominated by the president and confirmed by the Senate? What structure and authority will best position the Office to further the objectives laid out in the Constitution?

We have both worked closely with, and benefited from, the policy expertise that exists in the Copyright Office, the Patent and Trademark Office, and elsewhere in the executive branch. We have no doubt that as the discussion unfolds, the perspectives of each agency with a role in intellectual property policy and protection will be important to the analysis.

Chairman Goodlatte (R-Va.) has held nearly 20 hearings as part of the Committee's copyright review. Many hearings have revealed some dissatisfaction with the current copyright laws, but no clear path to the cross-industry agreement needed for successful legislation.

Ensuring that the Copyright Office has the resources and authority needed to make the system work effectively is an objective that can garner consensus. And, if it does, may well improve all aspects of the copyright system for years to come.

Today's hearing is one well-worth watching.

*Berman served in the House from 1983 to 2013. He is a senior adviser at Covington & Burling. Cooper is of counsel at Covington & Burling and former Chief Intellectual Property and Antitrust Counsel to Sen. Leahy (D-Vt.) on the Senate Judiciary Committee. The views expressed are those of the authors and do not necessarily reflect those of the firm or its clients.*

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Ms. CHU. Thank you. Now, I would like to ask Mr. Brauneis, you state that if Congress decides to restructure the Copyright Office, we need to give serious thought to the vehicle of an independent agency. One reason that we are here in Congress is that we are hearing Congress and the executive branch agencies benefit from the advisory role that the Office performs. Could you describe why you think it is important to maintain these advisory functions in any proposed reorganization?

Mr. BRAUNEIS. Yes, absolutely, I will give you one example. The Office has become very intimately aware of the problems of identifying and locating owners of older copyrighted works, and so it has taken a position that orphan works are something that we really need to look into and do something about. And that is expertise that it has developed that it has wanted to explore the policy implications of.

And it seems to me that its continued ability to do that without having to go through many levels of executive clearance before advising Congress is something important to maintain. It is an important role that it can play to maintain.

Ms. CHU. Thank you for that. Ms. Dunner, I think most people are surprised when they learn that our Nation's Copyright Office is housed under the Library of Congress because the missions are so different. The Library is focused on preservation, while the Copyright Office is focused on recording and registering works, and, most importantly, instituting legal and economic rights protection. The Registrar also does not have independent rulemaking authority, but she must have the Librarian officially establish regulations.

Why is it important for the Office to gain autonomy in the rule-making process? Is there a conflict of interest between the two, and, if so, why?

Ms. DUNNER. I think the short answer is the Registrar and the Copyright Office, they have the expertise that the Library does not have on copyright law. So that is a primary reason for the Copyright Office being able to speak without having to run everything through the Librarian. And in terms of a conflict, what I have articulated earlier was that often the Library, because the Librarian has the last word, they are often having the last word on something that they may oppose policy wise that has been brought forward by the Copyright Office.

Ms. CHU. In fact, Mr. Kupferschmid, you described the differences and the need for deposit copies by the Copyright Office and the Library of Congress. Could you describe the Library's desire to receive the deposit in the physical form and what obstacles this presents?

Mr. KUPFERSCHMID. Yes, thank you. That is a huge obstacle. The example I gave in the testimony is if newspapers, which are required to deposit copies of their newspapers in microfiche format, which is certainly being phased or has been phased out already. So that is too expensive for these newspapers to produce, too cumbersome, and a lot of them are not registering their newspapers with the Copyright Office because of that. And that is just one example.

Ms. CHU. Thank you. I yield back.

Mr. MARINO. We are waiting for one of our colleagues to come back. Dr. Chu, if you have any more questions——

Ms. CHU. Yes.

Mr. MARINO. I am just going to throw one out until you come up with one——

[Laughing.]

Mr. MARINO [continuing]. Just to stretch this. Is that how they do it on TV? I am going to stretch this thing out now.

Can any of you respond to the statement that I made earlier about—I think Ms. Pallante is incredible—I think she is one of the smartest women that I have ever met, and I truly believe that she could take that ball and run with it if we gave her authority. What, if there is anything, that she could do that is not going to increase the cost, but yet try and make things more efficient at this point until we resolve where money is coming from? Anyone have any input on that?

Ms. DUNNER. If I may respond, I really think Registrar Pallante has been doing everything she can do that would not cost extra money, for example, seeking comments from the users, bringing in scholars, like Professor Brauneis, to perform studies and reports. I think she is really doing as much as she can possibly do.

Mr. MARINO. Let me expand that for one moment. If she had the authority, not just based on what has taken place, but if she had unfettered authority, if she were the director just like this, is there anything that you would add to your statement?

Ms. DUNNER. Well, not much these does not cost money. So, I mean, I am sure that we could probably think about some things and submit report on possible items and action items that she may utilize. But I do not have a direct answer to that.

Mr. MARINO. Okay.

Mr. BRAUNEIS. I think if your question is what could be done without changing the Library's budget as a whole, the answer might be reallocate some of the IT budget of the Library and give the Copyright Office greater control over its own IT. The Copyright Office does receive a kind of budget subsidy from the Library because it is the Library's IT budget that is serving the Copyright Office. But it is not serving it very well because the Office and the Library have different missions.

So without increasing the budget of the Library as a whole, I think that giving the Copyright Office greater control over the portion of the IT budget that is serving it is something that would give a great advantage to the Copyright Office.

Mr. MARINO. Anyone else?

Mr. KUPFERSCHMID. I mentioned the deposit issue, right? So if the Copyright Office is independent from the Library, they could presumably allow different type of deposits. The Copyright Office uses deposits for a different purpose. They do not need the best quality deposits. The Library needs the best quality because they are using them for archival purposes, so I think without any change to funding they could do that. But quite honestly, the vast majority of changes, there needs to be an increased funding component.

Mr. MARINO. Sure, I agree. The Chair now recognizes the gentleman from New York, Congressman Jeffries.

Mr. JEFFRIES. I thank my good friend, the Chair, from the great State of Pennsylvania, and I thank all of the witnesses for their presence here today. I think I will start with Professor Brauneis. Can you just elaborate on what you think the fundamental mission of the Copyright Office or the Library of Congress is, and how is that mission either consistent or inconsistent with the mission of the Copyright Office?

Mr. BRAUNEIS. Well, the mission of the Library of Congress, I think, is to serve as an archive of American and world culture, and to promote that, and to disseminate works, and I think it does that very well. The mission of the Copyright Office, I think, is to sort of promote and facilitate the copyright ecosystem, which includes, you know, both licensed uses of works, and also fair use of works, and everything else. But, in particular, the kinds of registration and recordation functions, which take up most of the Copyright Office's personnel time, that is really to collect and provide information about particular copyrighted works in a way that enables copyright transactions. And that needs to be done at a far greater speed than the Library's other functions need to be performed.

Mr. JEFFRIES. And has the fact that we are now in a digital era and that raises new challenges as it relates to the Copyright Office's functions sort of accelerated the incompatibility between the Library of Congress and the Copyright Office?

Mr. BRAUNEIS. I think there is no question about that, that, you know, 20, 30, 40 years ago, the Office could sort of operate in synchrony, and there was not as much problem. Now, it would facilitate matters if the Copyright Office computers could be communicating directly and automatically with computers of outside users to provide them with information, and they do not do that. They do not have the capability of doing that.

Mr. JEFFRIES. Thank you. And, Ms. Dunner, there are a variety of different configurations that have been discussed in terms of how you might realign the Copyright Office. I am wondering if you can comment on a simple change that would have the copyright registrar appointed by the President of the United States. Would that be sufficient to establish a degree of independence, or do we really need to contemplate independently placing the Copyright Office someplace else?

Ms. DUNNER. As I mentioned earlier, the ABA IP Section does not have policy on this, but my personal view is that the simplest way to go would be to have a registrar appointed by the President and make the Copyright Office an independent agency where it would have its own autonomy. Decisions over technology, and funding, and rulemaking would be optimal for the Copyright Office.

Mr. JEFFRIES. One of the options, and anyone on the panel can respond. One of the options that has been contemplated is placing the Copyright Office within the Department of Commerce and perhaps partnering it with the PTO. Would that be a combination that would also create some incompatibility problems?

Ms. MERTZEL. I would be happy to answer that if I may. I think that it would not be a good idea to put the Copyright Office inside the PTO. That question feels a little bit like Back to the Future because it came up about 22 years ago when there was proposed legislation to put the Copyright Office inside the PTO. At the time,

the Registrar, Mary Beth Peters, came and testified, I believe it was in the Subcommittee, about her views on that.

And I think she expressed it very articulately that there are incompatibilities in the nature of what is protected under patent and trademark versus what is protected under copyright. Every person in this country is a copyright author. They may not have a registration, but everyone has written something, drawn a picture on a napkin. Every child is a copyright author. And not everybody has used a trademark. Even under common law rights, not everyone has created a brand name, and certainly not everyone has invented anything that is patentable.

The rights are subsist from creation on copyright, and in the PTO they are creating those rights, and so that impacts user fees. It makes a lot more sense that user fees are covered in the PTO whereas on copyright it is different. You need to give people, individuals, the incentive to register their copyrights. And I think it would be very difficult for the copyright function to get enough attention if it was housed in the PTO and for the funding to be worked out because the copyright system probably would be very difficult to self-fund.

Mr. JEFFRIES. I thank the panel. I thank the Chair, and I yield back.

Mr. MARINO. Thank you. Seeing no other congressional Members here to ask questions, I want to thank you for being here. So this concludes today's hearing. Thanks to all the witnesses. Thanks to the people out in the audience.

And without objection, all Members will have 5 legislative days to submit additional written questions for the witness or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 3:37 p.m., the Committee was adjourned.]



## A P P E N D I X

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MATERIAL SUBMITTED FOR THE HEARING RECORD



The Register of Copyrights of the United States of America  
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559 · 60606 · (202) 707-8350

The Honorable John Conyers, Jr.  
Ranking Member  
Committee on the Judiciary  
United States House of Representatives  
2426 Rayburn House Office Building  
Washington, DC 20515

March 23, 2015

Re: The U.S. Copyright Office: Its Functions and Resources  
February 26, 2015

Dear Ranking Member Conyers:

I am writing to submit my views for the official record of the above-referenced hearing in accordance with your request.<sup>1</sup> Specifically, you asked me to respond to the testimony of the witnesses on the subject of “whether and how reorganizing the Copyright Office would benefit the copyright community.”<sup>2</sup> It is a privilege to assist you and Chairman Goodlatte as you evaluate these important questions. Thank you for the opportunity to do so.

For a number of reasons, my view as the current Register of Copyrights is that the Copyright Office requires congressional direction to meet the challenges and opportunities of the twenty-first century.<sup>3</sup> I am assuming for purposes of this letter that the Judiciary Committee will be further deliberating on the issues discussed at the hearing, and I am assuming further that the Committee is likely to alter the status quo, in which all Copyright Office staff are part of the Library of Congress and the Librarian appoints, supervises, and may remove the Register and other subordinate officers. This framework was uniformly questioned by the Committee’s Members and rejected by all of the hearing’s witnesses, who

<sup>1</sup> *The U.S. Copyright Office: Its Functions and Resources: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (2015) (“2015 USCO Hearing”). Witnesses were Robert Brauneis (Professor, George Washington University Law School), Lisa Dunner (Partner, Dunner Law PLLC, on behalf of the American Bar Association Section of Intellectual Property Law), Keith Kupferschmid (General Counsel, Software & Information Industry Association), and Nancy Mertz (Partner, Schoeman Updike Kaufman & Stern LLP, on behalf of the American Intellectual Property Law Association).

<sup>2</sup> 2015 USCO Hearing, oral testimony at 1:07:21, available at <http://judiciary.house.gov/index.cfm/hearings?ID=517A06E1-2222-42C6-87B2-05D64633F62D> (statement of Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary).

<sup>3</sup> In arriving at the conclusions outlined in this letter, I consulted with my predecessor, Marybeth Peters, who served as Register of Copyrights from 1994-2010. She agrees with the views presented here, including restructuring the Copyright Office as an independent agency.

noted concerns about budget independence, administrative authority, and mission effectiveness.<sup>4</sup>

In light of these concerns, it would be helpful if Congress could decide the Copyright Office's organizational structure soon, so that both the Library and the Copyright Office know whether and how to plan for the capital projects the Copyright Office so sorely needs. As the Committee is aware, major technology investments must be routed through the Library's central departments and infrastructure, a paradigm that presents significant challenges for all involved. Moreover, the Library is under pressure to tighten its existing processes and controls in this area in order to further leverage economies of scale throughout the agency and adopt other "best practices" of the federal government.<sup>5</sup> The combination of these developments makes rather pressing the question of whether the Copyright Office should continue to be subject to the Library's agency-wide goals.

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<sup>4</sup> During the hearing, Representative Nadler observed that, "[f]rom the witness testimony, I gather there's agreement that the Copyright Office as currently structured faces a variety of challenges in executing the basic functions stakeholders expect from it, and that it lacks independent budget and administrative authority. While the Copyright Office . . . has taken the initiative to address some of these challenges, only Congress can provide the resources and flexibility the Office needs to continue serving the public and Congress." *Id.* at 1:18:16 (statement of Rep. Jerrold Nadler, Member, H. Comm. on the Judiciary).

Additionally, Representative Issa asked the witnesses whether they believed that the Copyright Office is "structured to be efficient, nimble, modern, and progressive in a way that the twenty-first century would demand." *Id.* at 1:11:06 (statement of Rep. Darrell Issa, Member, H. Comm. on the Judiciary). The witnesses unanimously agreed "a hundred percent" that they did not believe it to be so structured. *Id.* at 1:11:18. Representative Deutch also expressed his concerns over the current structure, noting that "[i]t's time to enact a restructured, empowered, and more autonomous Copyright Office that's genuinely capable of allowing America to compete and to protect our citizens' property in a global marketplace." *Id.* at 1:36:40 (statement of Rep. Ted Deutch, Member, H. Comm. on the Judiciary).

Similar questioning took place at recent budget hearings. During the House Legislative Branch Subcommittee hearing on the Library budget, Ranking Member Wasserman Schultz asked whether the Copyright Office's "current structure and [its] budget . . . [is] sufficient for [the Copyright Office] to perform the duties that [it is] responsible for, meet the user community's concerns and their needs." *Fiscal Year 2016 Budget Hearing on the Architect of the Capitol and Library of Congress Before the H. Subcomm. on Legis. Branch of the H. Comm. on Appropriations*, 114th Cong., oral testimony at 1:13:56 (2015), available at <http://appropriations.house.gov/calendar/eventsingle.aspx?EventID=393997> (statement of Rep. Debbie Wasserman Schultz, Ranking Member, Subcomm. on Legis. Branch).

In the Subcommittee on the Legislative Branch of the Senate Appropriations Committee, Ranking Member Schatz stated that, while it did at one time make sense for the Library and the Copyright Office to share the same "roof," "reality has changed," he is "worried that the Copyright Office may be outgrowing its home within the Library of Congress," and the Library "may no longer be the right fit" for the Copyright Office. It is time, he recommended, to "reevaluate whether this fit . . . makes sense anymore." *FY16 Library of Congress & Architect of the Capitol Budget: Hearing Before the Subcomm. on the Legis. Branch of the S. Comm. on Appropriations*, 114th Cong., oral testimony at 51:57 (2015), available at <http://www.appropriations.senate.gov/webcast/legislative-branch-subcommittee-hearing-fy16-library-congress-architect-capitol-budget> (statement of Sen. Brian Schatz, Ranking Member, Subcomm. on the Legis. Branch).

<sup>5</sup> At the request of appropriators, the Government Accountability Office has in recent months performed two audits involving information technology challenges in the Library and Copyright Office. GAO will publish its reports and recommendations, as well as agency responses, on or around March 31, 2015.

Although several alternative paths emerged at the hearing, my staff and I focused specifically on the long-term interests of the nation's copyright system. We believe that these interests would be served best by establishing an independent copyright agency to administer the law, and by designating a leader that is appointed by the President with the advice and consent of the Senate. This would: provide a sound constitutional foundation for both new and existing copyright functions; ensure that Congress, federal agencies, and the public continue to benefit from the Copyright Office's expert legal proceedings and impartial policy advice; and attract future qualified leaders able to interact at the highest levels of a modern government.

*Eliminating Constitutional Challenges*

Professor Brauneis's testimony presents what he calls the "constitutional predicament" that is presented by the Copyright Office's placement as a subordinate department of the national library.<sup>6</sup> His statements highlight the somewhat unusual nature of the Library of Congress in the modern administrative state—the fact that it encompasses both purely executive functions (exercised through the Copyright Office and the Copyright Royalty Board) and purely legislative ones (exercised through the Congressional Research Service). This bifurcated structure has recently been subject to constitutional challenges in the courts.

The Department of Justice has defended against those challenges by concluding and asserting that the Library as a whole is within the executive branch, a view adopted in recent court decisions.<sup>7</sup> As a legal construct, it has to be this way, because the Librarian of Congress is removable by the President alone and there is no particular congressional committee that has similar or shared supervisory authority over the Librarian. As Professor Brauneis notes, this conclusion runs counter to the assumption of many who "consider the Library of Congress to be part of the legislative branch of government."<sup>8</sup> The prospect that the President can assert plenary authority over the Library of Congress may be cause for concern for Members of Congress.<sup>9</sup>

More fundamentally for me, this confusion has the potential to compromise confidence in the copyright system at the very time we need to plan it forward. It is quite possible there will be further litigation involving the disposition of copyright functions and authorities,

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<sup>6</sup> 2015 USCO Hearing (written statement of Robert Brauneis at 9-15, available at [http://judiciary.house.gov/\\_cache/files/4f8fc2ao-10de-4075-9b4b-26cbetf1e05c/revised-brauneis-testimony.pdf](http://judiciary.house.gov/_cache/files/4f8fc2ao-10de-4075-9b4b-26cbetf1e05c/revised-brauneis-testimony.pdf)) ("Brauneis Statement").

<sup>7</sup> See *id.* at 10-12 (citing *Eltra Corp. v. Ringer*, 579 F.2d 294 (4th Cir. 1978); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012)).

<sup>8</sup> *Id.* at 9.

<sup>9</sup> *Id.* at 12.

and it is also possible that the courts will weigh in with further decisions on this matter. It would be better for Congress to address the equities prospectively, namely, what is the best way to meet the overall objectives of the copyright law.<sup>10</sup>

#### *Creating an Independent Agency*

Many people, including Members of Congress, are surprised to find that the copyright system is currently accountable to the national library.<sup>11</sup> There are mounting operational tensions with this arrangement<sup>12</sup> and, as discussed at the hearing, a number of legal concerns.<sup>13</sup> In considering the issues and the options, we have come to believe that the national copyright system would be better served by an independent copyright agency.

An independent agency would both solve the current administrative challenges and position the copyright system for future success. It would also recognize and continue the Copyright Office's extensive but impartial role in domestic and international affairs.

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<sup>10</sup> The appropriate organizational and reporting structure for the Library itself, aside from the copyright system, is beyond the purview of our analysis. When Congress created the position of Librarian in 1802, it specified that the Librarian was to be appointed by the President acting alone. Then, when Congress created the Copyright Office in 1897, it insisted on Senate confirmation of the Librarian to satisfy Appointments Clause requirements. John Russell Young was the first Librarian to be formally appointed in this manner.

<sup>11</sup> 2015 USCO Hearing, oral testimony at 2:16:23 (statement of Rep. Dr. Judy Chu, Member, H. Comm. on the Judiciary) ("I think most people are surprised when they learn that our nation's Copyright Office is housed under the Library of Congress, because the missions are so different.").

<sup>12</sup> As discussed at the hearing, information technology is governed according to central Library processes and priorities, although the Copyright Office's needs are distinct. Copyright Office staffing allocations and pay are subject to the Library's decisions and rules. The Library's salaries for top officials throughout the agency are considerably lower than salaries for comparable positions in executive agencies, including for copyright officials at the U.S. Patent and Trademark Office.

<sup>13</sup> As Lisa Dunner, speaking on behalf of the American Bar Association Section of Intellectual Property Law, noted, "there is an inherent conflict of interest in having the Library sign off on and control regulations formulated by the Office, especially since the Library, like other libraries, often takes position[s] on policy matters that are the subject of the Office's studies and rulemaking proceedings." *Id.* at 0:49:21; *see also id.* (written statement of Lisa Dunner at 9-10, *available at* [http://judiciary.house.gov/\\_cache/files/9614a33b-39fd-4b57-b053-055362b611d4/dunner-testimony.pdf](http://judiciary.house.gov/_cache/files/9614a33b-39fd-4b57-b053-055362b611d4/dunner-testimony.pdf)) (voicing concern over potential conflicts of interest regarding copyright issues).

This is not a new concern; instead it has been voiced by some in the copyright community for decades. *See, e.g., Copyright Reform Act of 1993: Hearing on H.R. 897 Before the Subcomm. on Intell. Prop. & Jud. Admin. of the H. Comm. on the Judiciary*, 103d Cong. 118 (1993) (statement of Steven J. Metalitz, Vice President & General Counsel, Information Industry Association) ("[W]e think it is time for Congress to consider severing the link between effective copyright protection and the acquisitions objectives of the Library. Those are important objectives, but we simply don't feel that a creator's right to obtain effective copyright protection should depend on how quickly he or she gives a free copy of the work, or two free copies of the work, to the Library of Congress."); *see also* 2015 USCO Hearing (written statement of Keith Kupferschmid at 6-7, *available at* [http://judiciary.house.gov/\\_cache/files/998864fa-c779-494d-998e-44859ec3911a/kupferschmid-siia-testimony.pdf](http://judiciary.house.gov/_cache/files/998864fa-c779-494d-998e-44859ec3911a/kupferschmid-siia-testimony.pdf)) (stating that many newspapers no longer register their works because the Library continues to require microfilm copies when newspapers no longer use microfilm, thus making registration a financial and administrative burden).

Countless Members of Congress, the Department of Justice, the Department of State, the United States Trade Representative, the Department of Commerce and, most recently, the Intellectual Property Enforcement Coordinator, have turned to the Copyright Office to interpret and advise on copyright legislation, litigation, trade agreements, and treaties arising under the Copyright Act and related provisions of Title 17. An independent agency would be free to serve all branches of government without political restraint, including especially through expert studies and congressional testimony.<sup>14</sup> It could lead, participate in, or analyze issues relating to a variety of international meetings and negotiations, not only assisting the President in representing the intellectual property interests of the United States, but also assisting Congress in assessing the impact and implementation requirements for domestic laws. And, an independent agency could ably carry out executive functions (such as registration and rulemakings) without the complications that arise from being organized in the Library and treated for certain purposes as a legislative branch entity.

As explored at the hearing, an independent copyright agency would also give Congress something it has never had before, a dedicated agency that is capable of absorbing more of the detail and administration of the copyright code.<sup>15</sup> This is a considerable advantage for a law that is both critical to the economy and invariably complex, not only for individual members of the public, but also for the many authors, businesses, and public interest

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<sup>14</sup> We should recognize that, over the years, the Library has offered a form of shelter to the Copyright Office with respect to its legal work and policy analyses, and that multiple Librarians have exercised a largely hands-off approach with respect to this portion of the Register's portfolio. This deference helped the Copyright Office "to be an independent voice for ensuring balanced treatment of copyright-related matters." *The Omnibus Patent Act of 1996: Hearing on S. 1961 Before the S. Comm. on the Judiciary*, 104th Cong. 18 (1996) (statement of Marybeth Peters, Register of Copyrights, quoting a letter to Sen. Hatch from the library, book publishing, and scholarly communities) ("1996 Hearing"). The same result can be achieved by creating an independent agency, albeit one with greater responsibilities and safeguards appropriate to the digital age.

<sup>15</sup> See, e.g., 2015 USCO Hearing, oral testimony at 1:19:56 (statement of Lisa Dunner) ("if the Copyright Office had more autonomy and was given more control over its own rules and regulations I think it would have great improvements to the Act . . . if the Copyright Office had the strongest voice where its rules and regulations were given more deference it would ultimately help to clear up the Act."); see also Sandra M. Aistars, *The Next Great Copyright Act, or a New Great Copyright Agency? Responding to Register Maria Pallante's Manges Lecture*, COLUM. J. L. OF L. & THE ARTS at 304 (forthcoming 2015) (entered into the 2015 USCO Hearing record by Rep. Nadler) (noting that "empowering an entity to exercise appropriate regulatory authority could serve an important role and reduce the need for and scope of legislative action").

The possibility of using regulations to improve copyright law has been considered since the beginning of the copyright review process, and before. See *The Register's Call for Updates to U.S. Copyright Law: Hearing Before the H. Subcomm. on Courts, Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 35 (2013) (incorporating *The Next Great Copyright Act* Manges lecture) ("As more than one professor has noted, the Office has had very little opportunity to apply its expertise, leading Congress to write too much detail into the code on matters that are constantly changing, such as economic conditions and technology.").

organizations that must regularly navigate and apply it. Moreover, creating an independent agency does not necessarily preclude later steps, for example, congressional consideration of an Intellectual Property Office, along the lines of previous congressional thinking on this subject.<sup>16</sup>

Although the Copyright Office is a small operation and would be a rather small agency, we see this as a significant benefit. An independent agency configuration would allow the Copyright Office to operate in a lean and innovative manner that befits the innovative needs of the copyright system. The Copyright Office could control its own budget and apply its fees in a targeted manner that does not dilute its mission or statutory duties. It could also harness synergies from across the government. For example, in the federal government today, there is no reason that the Copyright Office could not share or purchase services from other agencies, including office space, financial systems, cloud services, and other needs. At the same time, the Copyright Office would be much better able to harness the considerable talents of the copyright community, particularly when investing in the enterprise architecture, data management strategies, and business-to-business services that copyright stakeholders require.

Congress is in an exciting situation here. It has an opportunity to position the Copyright Office to act nimbly and efficiently, and in doing so to facilitate the extraordinary digital economy of the United States. As the witnesses noted, a well-functioning Copyright Office that is able to effectively service its constituents would produce significant benefits to the United States, including by generating “a large number of new copyright transactions,”<sup>17</sup> “more licensed projects,”<sup>18</sup> and “increased registration[s].”<sup>19</sup> In short, a “properly-functioning Copyright Office would be just a huge boon to the U.S. economy, to the creative community, and certainly to the public.”<sup>20</sup>

Although the costs of a small agency are difficult to assess, they are surely manageable, especially when considered with the possibility of new fee models.<sup>21</sup> At Congress’s direction, my staff and I would be pleased to create and submit a summary of other financial considerations. Otherwise, at this very early stage in the discussion, we would

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<sup>16</sup> See Omnibus Patent Act of 1996, S. 1961, 104th Cong. (1996) (legislation that would have established a single government corporation to formulate policy and administer patents, trademarks, and copyrights). Senator Hatch stated that it would be difficult to increase the Copyright Office’s executive powers, given its current “anomalous position in the legislative branch.” 1996 Hearing, at 2 (statement of Sen. Orrin Hatch, Chairman, S. Comm. on the Judiciary).

<sup>17</sup> 2015 USCO Hearing, oral testimony at 1:34:30 (statement of Robert Brauneis).

<sup>18</sup> *Id.* at 1:34:42 (statement of Nancy Mertz).

<sup>19</sup> *Id.* at 1:35:04 (statement of Lisa Dunner).

<sup>20</sup> *Id.* at 1:35:17 (statement of Keith Kupferschmid).

<sup>21</sup> *Id.* at 1:04:39 (witnesses discussing potential fee differentiation).

observe that any new plan should accomplish three things: (1) it should codify Congress's decision regarding leadership and reorganization; (2) it should include an effective date for any change as well as a transition period for operations; and (3) it should require agency leaders to commission and present short-term and long-term priorities and investment justifications, including on such issues as office space, data centers, staffing priorities, and urgent IT expenditures.<sup>22</sup> We know that other agencies and businesses in the copyright and technology sectors, which are extraordinarily talented and forward-thinking, have already expressed an interest in helping and would be invaluable to leaders undertaking these processes.

#### *Creating a Sub-Agency*

Some have suggested that the Register could be a Presidential appointee within a sub-agency of the Library of Congress. This approach would be an improvement over the current structure. For example, it would help with certain accountability issues,<sup>23</sup> and it would presumably provide the Register with more of a voice in appropriations requests, technology investments, and other management decisions that affect Copyright Office staff. However, this model would leave other concerns unresolved. The Librarian would remain the constitutional head of the agency and the copyright system, and the Register would not necessarily have autonomy over copyright policy and regulations.<sup>24</sup> The Register also would not be able to appoint inferior officers—for example, judges on a small copyright claims court, if Congress decided to create such a body—because the Register would not be considered a Head of Department for purposes of the Appointments Clause.<sup>25</sup> These positions would instead be accountable to the Librarian, and, perhaps more to the point, it would unambiguously make the Librarian, and therefore the entire Library of Congress, part of the executive branch.

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<sup>22</sup> The question of funding has arisen throughout congressional discussion of the Copyright Office, with Members stating that the Copyright Office should be fully funded. *See, e.g., U.S. Copyright Office: Hearing Before the Subcomm. on Courts, Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 25 (2014) (“2014 USCO Hearing”) (statement of Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary) (“And most importantly, a strong copyright system requires that we fully fund the Copyright Office, and in that regard the Chairman of this Committee, Bob Goodlatte, joins me in supporting that idea.”). More specifically, Members have inquired about the need for funds for the Copyright Office’s IT needs, including the scope of necessary funding. *See, e.g., id.* at 44 (statement of Rep. Jerrold Nadler, Ranking Member, Subcomm. on Courts, Intell. Prop., & the Internet).

<sup>23</sup> 2015 USCO Hearing, oral testimony at 1:21:36 (statement of Keith Kupferschmid) (noting that a presidential appointment would help with transparency and accountability).

<sup>24</sup> Lisa Dunner, speaking on behalf of the American Bar Association Section of Intellectual Property Law, observed that the “Librarian’s broad authority over Copyright Office functions is problematic on multiple levels,” including because the Librarian need not be a copyright expert. *Id.* at 0:49:11.

<sup>25</sup> *See, e.g., Intercollegiate Broad.*, 684 F.3d 1332 (discussing Appointments Clause issues, including that Heads of Departments may appoint inferior officers).



In general, Congress could indicate its preference that the Library remove the sub-agency from central Library priorities and workloads, especially if these would present a legal or practical conflict, *i.e.*, participating in Library committees regarding acquisitions strategies or budget needs. This would be helpful because Copyright Office staff are frequently called upon to support the Library's broader mission, including participating in agency-wide protocols and projects that have little to do with administering the Copyright Act.

Nonetheless, in a sub-agency, it would still be the case that the Librarian could, in his or her discretion, exert influence or control over the Register's management or policy decisions. This is not necessarily an unusual dynamic within large or cabinet-level agencies, but in this case, where the Librarian's primary duty is always going to be the agency's mission as a library, it would be difficult for Congress to protect against either a real or potential conflict of interest.<sup>26</sup> Congress could not enact a legal wall between the two parts of the agency, as is sometimes done to deal with potential conflicts of interest within an institution, because this would effectively remove the Librarian from the very role he or she is constitutionally responsible for as the agency head. It is therefore difficult to imagine how a sub-agency would stabilize or solve the current problems for very long.

*Considering the Department of Commerce*

Although witnesses spoke against the possibility<sup>27</sup> and the Copyright Office does not recommend it, Congress could relocate the Copyright Office to the Department of Commerce as a sibling to the U.S. Patent and Trademark Office. This would ameliorate constitutional concerns and combine the administration of intellectual property laws under one roof. Congress would need to be clear about the longstanding policy role of the Register, which otherwise could be compromised or even eliminated, as the case may be, depending on how reporting lines are established.

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<sup>26</sup> Although the Librarian serves at the pleasure of the President, Librarians have enjoyed lengthy careers and tenures in modern times. Current Librarian of Congress James H. Billington was appointed in 1987 by President Reagan, and former Librarian Lawrence Quincy Mumford served from 1954-1974. Additionally, while the President has the power to remove the Librarian, this has happened only rarely. See *About the Librarian, Previous Librarians of Congress, George Watterston and John Silva Meehan*, available at <http://www.loc.gov/about/about-the-librarian/previous-librarians-of-congress/george-watterston/> and <http://www.loc.gov/about/librarianoffice/meehan.html> (upon election to the presidency, both President Andrew Jackson and President Lincoln removed the Librarian of Congress).

<sup>27</sup> See 2015 USCO Hearing, oral testimony at 2:25:23 (statement of Rep. Hakeem Jeffries, Member, H. Comm. on the Judiciary) (asking whether placing the Copyright Office within the Department of Commerce or combining it with the U.S. Patent and Trademark Office would present "incompatibility problems"); *id.* at 2:25:52 (statement of Nancy Mertz) (noting that placing the Copyright Office in the Department of Commerce or incorporating it into the U.S. Patent and Trademark Office "feels a little bit like back to the future because it came up twenty-two years ago," and further noting that patents, trademarks, and copyrights have very different legal schemes, and combining them would cause funding challenges).

On a different point, Congress would want to consider whether the copyright law itself would be lost or compromised in an agency as large as Commerce—specifically whether administrative and policy priorities would be subsumed. And, while Congress (and for that matter the Department of Justice) would still have access to a Copyright Office located in the Department of Commerce, the Copyright Office's views would not be independent. Rather, its policy advice and legal interpretations would be subject to the coordination, clearances, and, as applicable, restraints that are normal for executive branch officials. This would fundamentally change the role the Copyright Office has always played in the copyright system generally and with Congress specifically.<sup>28</sup> Additionally, as former Register Marybeth Peters noted when testifying two decades ago, copyright law and policy go beyond promoting commerce and, indeed, have “a unique influence on culture, education, and the dissemination of knowledge,” and “may be slighted if . . . wholly determined by an entity dedicated to the furtherance of commerce.”<sup>29</sup>

*Honoring the Library of Congress*

We would also make a point that was not raised at the hearing. An independent agency would ensure the most flexibility to continue the Copyright Office's relationship with the Library of Congress, which is the beneficiary of mandatory deposit provisions administered by the Register as well as certain works submitted by authors and other copyright owners for registration purposes. Although both of these provisions must be recalibrated for the digital age, we can assume that they will continue to exist in some form. The Register and the Librarian will therefore need to continue to work together on regulatory parameters and practices, either informally or through statutorily mandated committees or consultations.<sup>30</sup> At the core, what we are recommending is that Congress codify the structure that many assume to be the case already, by conferring independent agency

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<sup>28</sup> “Among other key duties, the Register serves as the principal adviser to Congress on matters of copyright law and policy.” 2014 USCO Hearing, at 27 (statement of Rep. Howard Coble, Chairman, Subcomm. on Courts, Intell. Prop., & the Internet). The Copyright Office “provides expert copyright advice to Congress . . . and the Office recommends much-needed improvements to the copyright system based on its research and analysis.” 2015 USCO Hearing, oral testimony at 0:32:43 (statement of Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary).

<sup>29</sup> 1996 Hearing, at 19, 24 (prepared statement of Marybeth Peters, Register of Copyrights).

<sup>30</sup> Congress has already created statutory relationships between the Copyright Office and other federal entities. For example, the Undersecretary of Commerce for Intellectual Property (who is also the Director of the U.S. Patent and Trademark Office), a Senate-confirmed advisor to the President on intellectual property, must by law “consult with the Register of Copyrights on all copyright and related matters.” 35 U.S.C. § 2(c)(5) (2014). Likewise, the Register serves as a statutory advisor to the Intellectual Property Enforcement Coordinator, a Senate-confirmed position that was created by Congress in 2008 and is in the Executive Office of the President. 15 U.S.C. § 8111(a), (b)(3) (2014).

status on the Copyright Office and making it a partner with, rather than a subordinate to, the Library.

The Library, of course, is a singularly important bibliographic institution known around the world for its unparalleled collections, curators, and scholars. Many Librarians and many Registers over the years have worked together appropriately and respectfully, to the mutual benefit of the public. Concerns about how to position the Copyright Office for the digital age certainly should not be framed as criticism of the Library. These issues more aptly reflect the unprecedented importance and complexity of the copyright law in modern times.

*Conclusion*

My staff and I are indebted to the Committee for its timely attention to the nation's copyright system, including the United States Copyright Office. It is a privilege to assist with the forward-thinking questions you are exploring and addressing. At your request, we would be pleased to provide additional documentation or analysis in support of the operational and policy views expressed above.

Respectfully,



Maria A. Pallante  
Register of Copyrights and Director  
U.S. Copyright Office

cc: Hon. Bob Goodlatte  
Chairman  
U.S. House of Representatives, Committee on the Judiciary  
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Association of American Publishers<sup>1</sup>  
 Statement Submitted for the Hearing Record  
 House Judiciary Committee  
 Subcommittee on Courts, Intellectual Property, and the Internet  
 March 5, 2014

Hearing on “The U.S. Copyright Office: Its Functions and Resources”  
 February 26, 2014

## Introduction

The inescapable takeaway from the House Judiciary Committee’s (“Committee”) hearing on “The U.S. Copyright Office: Its Functions and Resources” is that, whatever other action the Committee may pursue based on the evidentiary record at the conclusion of its comprehensive review of U.S. copyright law, modernizing the Copyright Office is an urgent priority. Such change is necessary to realize the full potential of a fair, efficient and effective copyright system that benefits American society as a whole. In particular, the Copyright Office must be modernized in three key ways: (1) its information technology (IT) infrastructure must be updated; (2) its budget must be increased to ensure adequate staffing and capacity to make capital improvements; and (3) perhaps most importantly, the Register of Copyright, as the head of the Copyright Office, must be given greater authority over its internal operations and external policy decisions.

The imbalance between the numerous important responsibilities of the Copyright Office and its budgetary and IT constraints is well-documented, as are the practical problems that arise from this imbalance.<sup>2</sup> It is also clear that the creative industries, individual artists,

<sup>1</sup> The Association of American Publishers (AAP) represents nearly 450 publishers, ranging from major commercial book and journal publishers to small non-profit, university, and scholarly presses (for more information, please visit [www.publishers.org](http://www.publishers.org)).

<sup>2</sup> See generally, *The U.S. Copyright Office: Its Functions and Resources: Hearing Before the H. Comm. on the Judiciary, 114th Cong. (2015)* (Testimony of Software and Information Industry Association) (hereinafter *SIIA Testimony*); *The U.S. Copyright Office: Its Functions and Resources: Hearing Before the H. Comm. on the Judiciary, 114th Cong. (2015)* (Testimony of American Intellectual Property Law Association); *The U.S. Copyright Office: Its Functions and Resources: Hearing Before the H. Comm. on the Judiciary, 114th Cong. (2015)* (Testimony of Professor Robert Brauneis); *The U.S. Copyright Office: Its Functions and Resources: Hearing Before the H. Comm. on the Judiciary, 114th Cong. (2015)* (Testimony of Lisa Dunner); *Oversight of the U.S. Copyright Office: Hearing*

innovative businesses and the broader public would all benefit from a fully-staffed Copyright Office that manages its own budget and uses modern IT more suitable for copyright-related transactions than those that primarily concern the archival-oriented mission of the Library of Congress. Making such improvements will no doubt increase the efficiency of the Copyright Office's operations. However, while increased efficiency of registration, recordation and other operations is necessary for a robust, 21<sup>st</sup> century-creative economy,<sup>3</sup> it is not sufficient to fully "promote the Progress of Science and the useful Arts"<sup>4</sup> in the digital age.

The Association of American Publishers (AAP) appreciates this opportunity to place its views in the hearing record regarding the third (and, in our view, most essential) area of needed modernizing change— greater Copyright Office autonomy. Specifically, establishing the necessary and appropriate authority of the Register, as head of the agency responsible for administering the copyright system, to control its budget, IT, and policy decisions is fundamental, not just to the Copyright Office's efficient administration of the Copyright Act ("Act"), but also to its ability to support Congressional efforts to modernize the Act's implementation.

#### A Modern Copyright Office

Over the past two years, this Committee has held numerous hearings to review the efficacy of the Act. One of the chief complaints throughout this process, from all stakeholder communities, has been the civil code-like complexity of the provisions of the statute.<sup>5</sup> This

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*Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary, 114th Cong. (2014)* (Testimony of Register of Copyrights, Maria Pallante) (hereinafter *Register Pallante Oversight Testimony*); SIIA, *The Most Important and Immediate Copyright Reform for Congress: Modernizing the U.S. Copyright Office* (Feb. 2015) (hereinafter *SIIA Copyright Modernization Report*).

<sup>3</sup> See *id.*; see also, *Technological Upgrades to Registration and Recordation Functions*, Notice of Inquiry 78 Fed.Reg. 17,722 (Mar. 22, 2013) (Comments of Association of American Publishers)

[http://copyright.gov/docs/technical\\_upgrades/comments/AAP.pdf](http://copyright.gov/docs/technical_upgrades/comments/AAP.pdf); *Strategic Plan for Recordation of Documents*: Notice of Inquiry, 79 Fed.Reg. 2,696 (Jan. 15, 2013) (Comments of Association of American Publishers)

[http://www.publishers.org/\\_attachments/docs/copyright\\_policy/aaprecordationc31514.pdf](http://www.publishers.org/_attachments/docs/copyright_policy/aaprecordationc31514.pdf); U.S. COPYRIGHT OFFICE, REPORT AND RECOMMENDATIONS OF THE TECHNICAL UPGRADES SPECIAL PROJECT TEAM (Feb. 2015)

[http://copyright.gov/docs/technical\\_upgrades/usco-technicalupgrades.pdf](http://copyright.gov/docs/technical_upgrades/usco-technicalupgrades.pdf) (hereinafter *Technical Upgrades Report 2015*); COPYRIGHT OFFICE, ABRAHAM L. KAMINSTEIN SCHOLAR IN RESIDENCE, TRANSFORMING DOCUMENT RECORDATION AT THE UNITED STATES COPYRIGHT OFFICE (Dec. 2014)

<http://copyright.gov/docs/recordation/recordation-report.pdf> (hereinafter *Recordation Report 2014*).

<sup>4</sup> U.S. Const. ART. I, § 8, cl. 8.

<sup>5</sup> *The Register's Call for Updates to U.S. Copyright Law: Hearing Before the H. Comm. on the Judiciary, 113th Cong. (Mar. 2013)* at 2 (Testimony of Register of Copyrights) (hereinafter *Register Pallante 2013 Testimony*); *A Case Study in Consensus Building: The Copyright Principles Project: Hearing Before the H. Comm. on the Judiciary, 113th Cong. (May 2013)* at 1-2 (Testimony of Professor Pam Samuelson) (hereinafter *Prof. Samuelson Testimony*) (calling the current copyright law "patchwork quilt" and noting that the "length of the 1976 Act, as amended, its complexity, and the highly technical language in many provisions have become impediments to the law's comprehensibility"); see generally, Pamela Samuelson, et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175 (2010).

complexity makes copyright law practically incomprehensible to the average consumer and impedes its ability to adapt to the dynamic copyright ecosystem. The principal suggestion for remedying the complexity and adaptability issues inherent in the current Act, as advocated by the Register of Copyrights, user groups, academics, and copyright owners, is to clarify the meaning and application of its statutory text—possibly through targeted legislative action, but mainly through the ability of the Copyright Office to provide authoritative guidance that will help to explain the Act’s proper implementation while improving public awareness and understanding of the Act consistent with Congressional intent.<sup>6</sup>

As demonstrated in the hearings addressing the “whack-a-mole” issue of online piracy, Section 108, fair use, and the making available right, the various provisions of the Act are effective manifestations of their underlying public policies only to the extent that they are meaningfully understood and implemented. In an era where new technologies have made copyrighted works instantly available and easily portable as well as re-mixable and shareable by millions of Internet users with a click of a button, the legal framework that establishes the “rules of the road” for this creative ecosystem must be clear and flexible.<sup>7</sup>

Achieving these goals requires a partnership between Congress and the Copyright Office. This partnership should reflect the same kind of division of labor that Congress has with other agencies and departments of the U.S. Government in establishing and implementing, respectively, national public policies through federal statutory laws.<sup>8</sup> Absent a clear grant of independent rulemaking authority to the Copyright Office, Congress itself will continue to bear the primary burden of having to use the often difficult and cumbersome legislative process to refine the language of detailed statutory provisions in order to address the new particularities of their application. By granting the Copyright Office broader substantive rulemaking authority, Congress could instead focus on updating and streamlining the Act through a framework of general principles and leave the detailed application of the statute to the Government’s substantive and administrative copyright experts—the Copyright Office—subject to continuing Congressional oversight.

Independent rulemaking authority that eliminates the need for the Register to seek approval from the Librarian of Congress, would allow the Copyright Office to ensure the

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<sup>6</sup> See *id.*; see also, Maria Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 323 (Spring 2013) (stating that “we need a clearer copyright act for a rather simple reason: more and more people are affected by it”); Prof. Samuelson *Testimony*, *supra* note 4, at 2 (urging that “now that this law applies to virtually everyone and to online activities that pervade modern life, it needs to be more comprehensible.”).

<sup>7</sup> Register Pallante 2013 *Testimony*, *supra* note 4, at 2 (noting that “the next great copyright act...will need to be more forward thinking and flexible than before” and that the “law also should be less technical and more helpful to those who need to navigate it.”).

<sup>8</sup> *Id.* at 3 (stating that the “statute has become too detailed and less nimble, and could be more useful and flexible if certain aspects were handled administratively.”).

responsiveness of the Act to owners and users of copyrighted works as well as intermediaries.<sup>9</sup> Instead of gathering stakeholder input and issuing legislative recommendations that may take years before Congress acts upon them, if ever<sup>10</sup> (likely, well-behind the pace of technological change within the copyright industries), the Copyright Office could conduct detailed public rulemakings to update the application of the statute in a more *participatory, transparent, and timely* manner than can be achieved through the legislative process.<sup>11</sup> Among the many benefits of this approach, granting the Copyright Office this authority to set rules of nationwide application and issue official interpretations of the Act entitled to *Chevron* deference<sup>12</sup> would undoubtedly provide a more stable environment for creation and innovation.

To be sure, Congress and the courts each play a critical role in developing and interpreting U.S. copyright law. Providing the Copyright Office with substantive rulemaking authority does not diminish the importance of these roles. Rather, this change will ensure that

<sup>9</sup> AAP uses the term “intermediaries” to refer to entities that may not create, own or use copyrighted works, but play integral roles in producing, distributing, displaying, making available and otherwise providing access to copyrighted works.

<sup>10</sup> For example, while some of the details of Section 108 remain relevant to analog copies of copyrighted works, many of the details in this exemption are not applicable to digital works (*Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary, 113th Cong. (Apr. 2014)* (Statement of AAP) (hereinafter *AAP Section 108 Statement*) [http://www.publishers.org/\\_attachments/docs/copyright\\_policy/orphanworkshearing.pdf](http://www.publishers.org/_attachments/docs/copyright_policy/orphanworkshearing.pdf)). In 2006, in an early attempt to modernize just this discrete provision of the Act, the Copyright Office (in conjunction with the Library of Congress) conducted an extensive study to assess how to update Section 108. In 2008, the Copyright Office issued its recommendations for amending the statute to implement beneficial changes. *SECTION 108 STUDY GRP., THE SECTION 108 STUDY GROUP REPORT* (2008) <http://www.section108.gov/index.html>. Seven years later, despite widespread acknowledgement that Section 108 is out-of-date, Congress still has not updated the statute. This situation could be avoided by granting the Copyright Office greater substantive rulemaking authority to promulgate new rules for applying Section 108 in light of technological change.

<sup>11</sup> In a number of AAP’s previous statements submitted to the IP Subcommittee during the course of its review of the Copyright Act in 2013-2014, AAP encouraged Congress to expressly authorize the Copyright Office to work with stakeholders to develop more flexible and nimble solutions than could be achieved through legislation alone. See e.g., *AAP Section 108 Statement*, *supra* note 9, at 20 (proposing that, “to the extent that any efforts to update Section 108 or address orphan works or mass digitization would need to be responsive to legal and market developments, AAP encourages Congress to author high-level, principles-based legislation and authorize the Copyright Office to provide nuance for implementing any new laws through rulemaking proceedings.”); *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary, 113th Cong. (Feb. 2014)* (Statement of AAP) (hereinafter *AAP Fair Use Statement*) [http://www.publishers.org/\\_attachments/docs/copyright\\_policy/aapfairusephs2614.pdf](http://www.publishers.org/_attachments/docs/copyright_policy/aapfairusephs2614.pdf) (suggesting that Congress “consider directing the Copyright Office to: (1) provide guidance as to the relationship between specific limitations and exception and fair use; (2) engage stakeholders in the development of balanced best practices for fair use; and (3) explain the distinction between ‘transforming’ a work as an act of fair use and ‘transforming’ a work in the creation of a ‘derivative work.’”).

<sup>12</sup> *Chevron* deference is a fundamental principal of federal administrative law established by the U.S. Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which controls judicial review of a federal agency’s construction of the statute which it administers. Where Congress has not “directly spoken to the precise question at issue” in a case, a court must defer to the agency’s interpretation of the statutory language at issue, unless the interpretation is unreasonable.

each branch of government contributes its efforts to shape copyright law in the most efficient, effective and appropriate manner.

Without question, Congress must establish the fundamental rights and responsibilities that create a balanced copyright law. History has shown, however, that it is impractical for Congress to conduct detailed public hearings and legislative amendment processes every time a new technology or business model challenges the current application of the law. With independent rulemaking authority, the Copyright Office will be able to quickly coordinate public roundtables, develop a robust and transparent evidentiary record through public notice-and-comment proceedings, and issue authoritative guidance to provide nation-wide stability in the interpretation and application of a principles-based copyright law.

Furthermore, courts will remain on the front-lines of teasing out ambiguities in the copyright law as they resolve disputes between individual parties in specific factual contexts on a case-by-case basis. Granting the Copyright Office rulemaking authority would, however, help to relieve the current pressure on courts to create new *de facto* exceptions and limitations to address perceived ambiguities or gaps in the underlying law. Where important ambiguities are identified, the Copyright Office's ability to promulgate authoritative statutory guidance will help federal courts to apply copyright law in a more consistent and up-to-date manner.<sup>13</sup> Moreover, by clarifying the Copyright Office's rulemaking authority, courts will be able to rely on established case law to more accurately ensure that the Office does not overstep its rulemaking authority.

In these ways, strengthening the Copyright Office will bolster the role of Congress and the courts and increase the benefits of the U.S. copyright system for all of society.

### Long-Term Change

AAP is in general agreement with the Software and Information Industry Association (SIIA) that Congress should take immediate steps to begin modernizing the Copyright Office as an essential prerequisite to considering major, substantive, legislative actions to revise the Copyright Act. Modernizing the authority and functioning of the Copyright Office, on its own, will improve the efficiency and efficacy of the U.S. copyright system. Moreover, as explained above, the level of detail required in any legislative revision of the Act will depend upon the degree of substantive interpretative and rulemaking authority granted to the Register. Thus,

<sup>13</sup>As noted in AAP's statement following the IP Subcommittee's hearing on Fair Use, "the inconsistent output of the judiciary [with respect to fair use], as well as the evolution of copyright-related technologies and the ubiquity of copyrighted works in our daily lives, make it clear that copyright owners, users, and courts would all benefit from guidance, at a *national level*, regarding the appropriate application of the fair use doctrine in practical terms." (emphasis added). AAP suggested that Congress expressly authorize the Copyright Office to issue such guidance. *AAP Statement on Fair Use*, *supra* note 10, at 8.



modernizing the Copyright Office is the most essential reform for achieving a copyright system that can maximize its benefits for all stakeholder communities well into the future.

The Committee's hearing indicated that there is a broad consensus regarding the nature of the major problems that need to be addressed in modernizing the Copyright Office in structural, operational, policy and budgetary terms. However, the hearing also made clear that there are competing options to be considered for addressing each of these problems.<sup>14</sup> Each potential solution will require an efficient and effective process to articulate its nature and scope. Such a process will also be critical to evaluating the respective merits of the defined solutions, including their broader potential impact across problem areas they may not have been specifically proposed to address.

While AAP does not yet have a particular position as to the best structure<sup>15</sup> for a modern Copyright Office, we endorse SILA's call for Congress to "authorize a study" to address this question within "nine months after the date Congress" approves the study.<sup>16</sup> Congress has recently entrusted such independent studies specifically to the National Academy of Public Administration<sup>17</sup> for a wide variety of government agencies,<sup>18</sup> including the Patent and Trademark Office.<sup>19</sup> One particular advantage of having NAPA conduct this study is its

<sup>14</sup> For example, the SILA Testimony lists the following options, although there may be others to consider as well: "(i) retaining the Copyright Office within the Library of Congress while reducing the authority of the Library over the Office; (ii) moving the Copyright Office from the Library and making it a free-standing independent agency within the executive branch; (iii) moving the Copyright Office to the PTO, thereby creating a new executive-branch U.S. Intellectual Property Office that resides within the Department of Commerce; or (iv) integrating the Copyright Office and the PTO, thereby creating a new executive-branch U.S. Intellectual Property Office, and making that agency a free-standing independent agency that resides outside the Department of Commerce." *SILA Testimony*, *supra* note 2, at 14.

<sup>15</sup> The question of the best "structure" for a modern Copyright Office also includes whether the Office should be separated from the Library of Congress and, if so, whether it should be established as part of the Executive Branch, either as an independent agency or an autonomous department within another agency.

<sup>16</sup> *SILA Testimony*, *supra* note 2, at 14.

<sup>17</sup> NAPA's website provides more detail about how the Academy conducts studies requested by Congress. NAPA, *How We Work*, <http://www.napawash.org/about-us/how-we-work.html> (last visited Mar. 5, 2015) (noting in particular that "the Academy has a unique status as a Congressionally-chartered institution that is largely exempt from the Federal Advisory Committee Act (FACA). According to FACA, "any committee that is created by the National Academy of Sciences or the National Academy of Public Administration" is not considered an "advisory committee." This, in turn, allows the Academy to act as a truly "safe place," where leaders in government looking to address management challenges can consult a broad array of stakeholders.").

<sup>18</sup> In just the past year, NAPA has conducted studies at the request of Congress regarding federal agencies as varied as the: Social Security Administration

([http://www.napawash.org/images/reports/2014/2014\\_AnticipatingTheFutureSSA.pdf](http://www.napawash.org/images/reports/2014/2014_AnticipatingTheFutureSSA.pdf)); National Aeronautics and Space Administration ([http://www.napawash.org/images/reports/2014/2014\\_NASA\\_ExecSum.pdf](http://www.napawash.org/images/reports/2014/2014_NASA_ExecSum.pdf)); and the Department of Justice Civil Rights Division ([http://napawash.org/images/reports/2015/DOJ\\_CRT\\_Report.pdf](http://napawash.org/images/reports/2015/DOJ_CRT_Report.pdf)).

<sup>19</sup> NAPA, U.S. PATENT AND TRADEMARK OFFICE: TRANSFORMING TO MEET THE CHALLENGES OF THE 21<sup>ST</sup> CENTURY (Aug. 2005) <http://www.napawash.org/images/reports/2005/05USPatentandTrademarkOffice.pdf> (explaining that "the House Appropriations Subcommittee on Science, State, Commerce, and Justice asked the Academy to review the agency's structure and business processes" "to help ensure that [the] U.S. Patent and Trademark Office (PTO) [was] on a path to effectively achieve modernization and meet its challenges.").

previous comprehensive examination of the structure and functioning of the PTO, which would allow it to more accurately assess the restructuring options that suggest combining the Copyright Office with the PTO or establishing some operational interrelationship between these two government offices.

While AAP is certainly open to other proposals for how various modernization options may be assessed and who should be assigned to conduct the assessment, it is likely that each will come with their own set of political or other drawbacks to be evaluated in terms of the expertise, resources, objectivity and timely execution they could bring to the task. In light of the record of Congressional confidence in NAPA's ability to perform similar studies on budgetary, operational and governance issues for a variety of federal entities, authorizing NAPA to conduct the study may well be Congress's most expedient and reliable path to achieve the predicate evaluations necessary to determine the best actions that Congress should take in deliberately shaping the future of the Copyright Office.<sup>20</sup>

#### Short-Term Action

Conducting the study and implementing a comprehensive restructuring of the Copyright Office, if recommended, will take time. While incremental changes to increase the autonomy of the Copyright Office over its IT system, budget and rulemaking authority would no doubt benefit copyright owners, users, intermediaries and the public at large—not to mention the short-handed and under-resourced Copyright Office staff—AAP cautions Congress not to undertake superficial changes in the short-term at the expense of more deliberative changes necessary to the long-term success of the Office.

To the extent Congress believes it may be necessary and appropriate to advance specific interim measures while methodically exploring its overall options for modernizing the Copyright Office, the most impactful and beneficial change would be to move forward with legislation to make the Register of Copyrights subject to Presidential appointment and Senate confirmation. Doing so would clearly establish the Register's authority, independent from the Librarian of Congress, to issue substantive regulations and guidance to administer and interpret the Act in the best interest of all beneficiaries of copyright. If, however, there are significant concerns regarding the legal and practical implications of such a change, further review of the consequences of changing the Register's status in this manner could be evaluated in the comprehensive restructuring study.

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<sup>20</sup> Any study, conducted by NAPA or otherwise, should take into account the significant body of recent material the Copyright Office has already compiled that addresses its IT, budget and rulemaking authority among other areas to improve its functionality. *See generally, Technical Upgrades Report 2015, supra* note 3; *Recordation Report 2014, supra* note 3.

## Conclusion

AAP appreciates this opportunity to give the House Judiciary Committee the publishing industry's perspective on the importance of ensuring that the Copyright Office is fully-equipped to administer and interpret the Copyright Act so that its benefits are fully realized in a modern creative economy. Housing the Copyright Office within the Library of Congress may have made sense in the 1800s, when hard-bound books were the primary works registered for copyright protection as well as the chief items at issue in building the Library of Congress' collection of cultural resources. Today, however, the Copyright Office must do so much more—from creating an efficient, digital copyright registration and recordation database suitable for works from video games to eBooks, to advising everyone from Congress to various international bodies to millennials about the proper application of U.S. copyright law.

To enable the Copyright Office to meet these new and growing responsibilities, AAP encourages Congress to consider authorizing a study by NAPA to determine how to restructure the Copyright Office to promote a fair, effective, and efficient copyright system. Such a system is essential to the growth of the U.S. economy, the promotion of the arts and sciences, and our nation's cultural heritage. Achieving this goal initially requires granting the head of the Copyright Office the same degree of authority in the interpretation and application of the Copyright Act that the leadership of other federal agencies and departments have with respect to the areas of federal statutory law entrusted to their respective administration. We look forward to continued engagement with the Committee on this issue and how it relates to other areas of potential copyright reform.

Respectfully Submitted,



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U.S. HOUSE OF REPRESENTATIVES  
COMMITTEE ON THE JUDICIARY

**Statement of Mary Rasenberger on Behalf of the Authors Guild**  
**In Response to the February 26, 2015 Hearing on**  
**“The U.S. Copyright Office: Its Functions and Resources”**  
**Submitted March 9, 2015**

The Authors Guild submits this Statement in response to the Committee’s recent Hearing on the Functions and Resources of the U.S. Copyright Office (the “Hearing”). The Guild and its predecessor organization, the Authors League of America, have a 100-year history of contributing to debates before Congress on the proper scope and function of copyright law. With a membership of over 9,000, the Authors Guild is the nation’s largest and oldest professional authors’ organization.

The Hearing’s centrality to the Committee’s broader goal of copyright reform was reflected throughout the testimony and in many of the Members’ questions. The Authors Guild submits these comments in response to issues raised at the Hearing on Copyright Office autonomy, funding for Copyright Office modernization, and a Small Copyright Claims Court. These comments are intended to supplement the statement The Authors Guild submitted to the Subcommittee on Courts, Intellectual Property, and the Internet on November 12, 2014, attached here as Appendix A.

As Chairman Goodlatte said in his statement at the hearing: “America’s creativity is the envy of the world and the Copyright Office is at the center of it.” American authors and the American people need and deserve a Copyright Office that can keep pace with their remarkable creative output. As the witnesses described at the hearing, copyright is an important part of our economy; and it is also essential to our evolving culture and progress as a nation.

**1. Copyright Office Autonomy**

Both Members and witnesses at the Hearing agreed that the Copyright Office needs greater operational, financial, technological and rule-making autonomy from the Library of Congress. We agree fully. The most immediate concern perhaps is to separate the Office’s technology from the Library’s IT systems and upgrade it to create a flexible, interactive, user-friendly system required for a 21<sup>st</sup> century Copyright Office. As a 24/7 e-service platform, which is trusted to keep digital deposit copies secure, the Copyright Office’s has unique IT needs within the Library, and those needs are not being adequately met.

The Copyright Office also needs autonomy and authority to promulgate regulations on its own. Copyright law has become increasingly complex in recent years due to the rapidly evolving technologies used to create, distribute and enjoy copyrightable works. Congress cannot legislate for each new technology; they change too fast. Like the Section 1201 exceptions that are reviewed by the Copyright Office every 3 years, many parts of the copyright law could use updating on a more regular basis than Congress could do in the best of circumstances. The Copyright Office is far better equipped than Congress to handle technical copyright issues that require deep copyright expertise and study to fully understand. Moreover, the Copyright Office should have the authority to issue its own regulations; they should not be issued by the Librarian of Congress, who is not a copyright expert and not required to be a copyright expert. It might have made sense to have the Librarian sign off on copyright regulations a hundred years ago when copyright law was a relatively simple matter, but that is not true today. Copyright law has become a highly complex field requiring years if not decades of practice to master, and even then it is constantly changing, requiring continuous learning. Aside from the potential conflict of interest noted in our November statement and by the witnesses, the Librarian of Congress simply cannot be asked to fully understand and keep abreast of all of the copyright issues that might come before him or her.

It is also crucial for the Office to have autonomy with respect to its budget. Its needs, which have increased due to years of neglect, should not have to compete with the very different priorities of the rest of the Library.

*Approaches for Achieving Autonomy*

At the hearing there was no consensus as to the best way for the Office to achieve autonomy. Because this is such a complex issue, involving constitutional issues with no single, clear solution, the Authors Guild believes the Register of Copyrights should be given time to solicit recommendations from stakeholders and experts on the Office's most fitting place in the government structure.

Of the proposals discussed at the hearing, the Authors Guild believes that the independent agency model is the best. Most importantly, the Copyright Office must be given independence. It should not be moved to another existing agency where the same or similar issues will arise. Specifically, the Authors Guild urges Congress not to move the Copyright Office to the United States Patent and Trademark Office ("USPTO") simply because, like patents and trademarks, it is a form of intellectual property. Copyright is a very different kind of intellectual property, with different constituents and different concerns. Copyright does not belong in the USPTO or anywhere

in the Department of Commerce. The USPTO serves industry and corporate entities; its users' interests largely relate to business and commerce. The Copyright Office, on the other hand, primarily serves individual creators and users of copyrights whose interests primarily are in the arts and humanities. It is true that the copyright industries contribute significantly to the nation's economy, as the witnesses testified; we are a nation that excels in the creative arts and sciences. But copyrighted works provide far more than measurable dollars to the economy and culture. Copyrighted works provide learning in the form of textbooks, literature, motion picture, and computer software; and they provide culture, entertainment and joy through music, film, arts and novels. These benefits are immeasurable. If the Copyright Office were placed in the Commerce Department, these important cultural and educational aspects of copyright law risk getting buried.

Moreover, moving the Copyright Office to the USPTO would merely replicate the current structural challenge the Copyright Office faces as part of the Library of Congress; namely, the Office's lack of authority to issue its own regulations about the interpretation of copyright law, an essential policy function of the Copyright Office. A Copyright Office with independence and increased regulatory authority would help ensure that our copyright law keeps pace with technological developments. Placing the Office within the PTO would undermine this goal and merely reproduce the circumstances that warranted the Hearing in the first place.

Copyright cannot compete financially with the trademark and patent community. Again, because copyright production is as much about promoting learning and culture as economics. Most of our members struggle financially. They do not become authors to get rich; rather they are compelled to write because they want to contribute to learning and culture. Our members and the Copyright Office's user base as a whole would not be well served if forced to compete with the commercial interests of trademark and patent owners.

## **2. Funding for Copyright Office Modernization**

There was equally strong consensus at the Hearing that the Copyright Office suffers from a lack of funding, and as a result, its services have failed to keep pace with technology and with the marketplace. Members and witnesses agreed that the Office needs an immediate injection of funds in order to hire the staff necessary to meet the increasing demands of its workload and to build an IT infrastructure capable of serving its technologically sophisticated twenty-first century customer base.

To appropriately serve creators, copyright owners, and users in the digital age and to provide the nation with a robust, public, searchable record of copyright works that includes chain of title, it is imperative that the Office have greater resources to improve its technology to bring it into the 21st century and to hire more staff. The current staff is extremely hard-working, but there are simply too few. Hence, there are delays of up to two years to obtain a record of a simple change of ownership or release of a security interest. This can severely hamper business. It can also take 8-12 weeks to obtain deposit materials which are an integral part of the registration. The certificate of registration alone does not describe the registered work; only a review of the deposit copy together with the certificate shows what was actually registered. The wait for this part of the registration record robs victims of infringement from prompt enforcement of their rights, and it can delay defendants' ability to bring a fair defense.

Members at the Hearing were rightfully concerned about *how* to allocate sufficient funds for Copyright Office modernization. Recognizing the Office's shortage of resources, Chairman Goodlatte asked the witnesses whether the funding gap should be addressed through increased appropriations, increased user fees, or a combination of both. There was no consensus among the witnesses, and the Authors Guild takes no position on how exactly the necessary funds should be secured.

What must be avoided, however, is a simple increase in Copyright Office user fees across the board. Nearly everyone in the country is a copyright owner and a potential customer of the Copyright Office; its services must remain affordable for all. Raising fees for individual customers would burden the copyright owners who choose to utilize the Office's services and disincentivize other individuals from using those services; it's a blueprint for making the Copyright Office irrelevant to individuals.

Ideally, modernization could be achieved exclusively through increased appropriations, but understanding we do not live in an ideal world, if fee increases must be part of the solution, the Authors Guild recommends instituting a tiered fee structure that allows fees for individual creators to remain relatively affordable. For instance, the fees could differentiate between rates for individuals and for corporations, apportioning more of the burden to corporate customers who use the Office in their daily business practices—such as publishing houses, record companies and motion picture studios.

The Authors Guild also favors instituting a separate, reduced-cost tier of registration for individuals wishing to register their copyright simply for documentation purposes. This type of

registration would not carry with it the presumption of copyright ownership that standard registration does, because it would not be carefully examined by Copyright Office staff. It would allow individuals to record their works cheaply and efficiently and would have the added benefits of increasing the thoroughness of Copyright Office databases, improving search results for users, and further chipping away at the “orphan works” problem. It would not, however, provide the same presumption of copyrightability and ownership accorded to regular registration.

### 3. Small Copyright Claims Court

At the Hearing, Representative Collins asked the witnesses about the effect a small claims pilot program would have on the current Copyright Office budget. The witnesses agreed such a pilot program was key to the eventual adoption of a small claims court, but that it would further drain the already paltry resources of the Copyright Office.

One of the most pressing issues for individual creators is the need for a small copyright claims court, and this project needs to be properly funded. For a copyright to mean anything, there must be an accessible enforcement mechanism. Without a real potential for enforcement, it is a right without a remedy. The cost of obtaining counsel and maintaining a copyright cause of action in federal court effectively precludes many individual authors facing clear instances of infringement from vindicating their rights and deterring continuing violations. On an individual level, the inability to enforce one’s rights undermines the economic incentive to continue investing in the creation of new works; on a collective level, the inability to enforce rights corrodes respect for the rule of law and deprives society of the benefit of new and expressive works of authorship.

If created with care, a small claims court for copyright infringement would allow individual authors much greater access to the courts to protect their property rights, appreciably enhancing market incentives to create the literary works that the public values. Frivolous, harassing claims could be avoided by routine, automatic rejection of claims that do not raise a *prima facie* case of infringement. Dismissal without prejudice of claims in which a substantial fair use defense is raised would greatly speed and simplify the court’s proceedings, as would permitting the proceedings to be conducted by mail and phone. Affiliation with the Copyright Office would assure the court’s competence in copyright law. Finally, granting the court limited power to issue injunctions would greatly and reasonably strengthen the court.



**Conclusion**

It was clear from the Hearing that copyright stakeholders and Members of Congress recognize Copyright Office modernization to be an integral part of copyright reform, and that there is consensus that the Office needs much greater independence and greater resources for staffing and improved technology infrastructure. Such a consensus is encouraging. We would simply ask the Committee to bear in mind that any meaningful efforts at Copyright Office modernization must take full account of the individual authors and creators who are its core customers.

The Authors Guild is grateful to the Committee for the opportunity to submit this Statement, and for acknowledging that a modernized Copyright Office can be the cornerstone of lasting copyright reform.

**Motion Picture Association of America**  
**Submission for the Record**  
**Feb. 26, 2015, House Judiciary Committee Hearing**  
**“The U.S. Copyright Office: Its Functions and Resources”**  
**March 5, 2015**

In administering U.S. copyright law and advising the federal government on copyright matters, the Copyright Office plays a vital role in support of the copyright system and the constitutionally recognized function of copyright as a driver of American intellectual, cultural, and economic prosperity. The economic and cultural significance of copyright is hard to overstate. Copyright now contributes more than \$1 trillion to the country’s gross domestic product, representing 6.7 percent of the U.S. economy.<sup>1</sup> Our nation’s core copyright industries—those primarily engaged in creating, producing, distributing and/or exhibiting copyrighted works—employ nearly 5.5 million workers, representing 4 percent of the entire U.S. workforce and 4.8 percent of total U.S. private employment.<sup>2</sup> And those industries are growing 70 percent faster than the overall U.S. economy, with an aggregate annual growth rate of 3.9 percent from 2009 to 2013.<sup>3</sup> Copyright also continues to drive unparalleled cultural exports and a tradition of creativity and innovation that makes America unique among nations.

The tremendous success and growth of our nation’s copyright industries is evidence that our copyright laws are advancing their intended objective of promoting the production and dissemination of creative works. A significant part of that success is attributable to the Copyright Office, which administers aspects of the copyright law and helps guide copyright policy on both

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<sup>1</sup> STEPHEN E. SIWEK, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2014 REPORT 1.n1, 2 (2014), *available at* <http://www.iipa.com/pdf/2014CpyrtRptFull.PDF>.

<sup>2</sup> *Id.*, at 2.

<sup>3</sup> *Id.*

the domestic and international stage. But this success and the rise of the digital economy means that the Copyright Office's responsibility is growing both in complexity and importance. Meeting that responsibility demands robust tools and a level of authority commensurate with the significance of the issues the Office addresses.

The Motion Picture Association of America applauds the Committee's attention to the functions and resources of the Copyright Office. Dealing with the demands of a 21<sup>st</sup> century creative economy requires a Copyright Office that stands firmly on a 21<sup>st</sup> century footing. The Committee is right to be asking questions not only about the resources and technology infrastructure of the Copyright Office, but also about the structure and authority of the office and how it might best be equipped to serve the needs of the copyright community, both copyright owners and users alike.

A number of questions deserve consideration. For example, the Copyright Office is currently located within the Library of Congress and is overseen by the Librarian of Congress.<sup>4</sup> While the Register of Copyrights leads the Office, the Register remains subordinate to the Librarian on matters involving not only the Office budget and infrastructure, but also on substantive copyright policy and regulatory matters. The Office is also dependent on the Library's information technology resources, which are stretched to meet the dual and perhaps impossibly disparate needs of a national library and a modern copyright registration system. While issues involving registration and Library deposits led to the decision to house the Copyright Office in the Library, it is worthwhile to consider whether that arrangement continues to make sense today.

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<sup>4</sup> See 17 U.S.C. § 701(a) ("The Register of Copyrights, together with the subordinate officers and employees of the Copyright Office, shall be appointed by the Librarian of Congress, and shall act under the Librarian's general direction and supervision.").

Without question, the Office has benefitted from the able stewardship of Dr. James Billington, the Librarian of Congress since 1987. Over the course of his tenure the share of copyright's contribution to GDP has grown more than six-fold, and the number of people employed by the core copyright industries has more than doubled.<sup>5</sup> The growth in importance of copyright as an economic and cultural sector warrants considering whether the current arrangement properly reflects the national significance of the functions delegated to the Copyright Office.

Are those functions accorded proper weight by vesting them in the Librarian of Congress, for whom copyright is not a full-time job, but just one issue in a broader portfolio that itself has tremendous national significance? Is there sufficient intersection of interest that it makes sense to vest ultimate policy and regulatory authority for administration of the copyright system in the official whose primary responsibility is the operation of the national library? Does sharing administration of the information technology systems of the Library and the Copyright Office create efficiencies, or would granting the Register the pen over a designated budget help the Office assign resources where needed, rather than compete with the other important needs of the Library? Would putting influence over copyright policy closer to the locus of copyright expertise and giving the Register decision-making power over copyright policy issues better serve the copyright system? And would allowing the Register to design and implement the Office's own IT infrastructure produce more facile systems for gathering, organizing, parsing, and making available to the public data regarding copyright ownership?

The objective of such inquiry should be enabling a more nimble agency, better able to serve both owners and users of copyrighted works in today's rapidly growing digital economy.

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<sup>5</sup> STEPHEN E. SIWEK AND HAROLD W. FURCHTGOFF-ROTH, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY ii (1990) (stating that in 1989 the core copyright industries' contribution to GDB was \$173 billion and employed 2.6 million people).

The purpose of copyright is, after all, to encourage creation, facilitate market-based transactions, and promote distribution. As the trade association representing some of the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets, the Motion Picture Association of America believes the time has come to consider granting the Copyright Office not only increased resources, but a greater degree of autonomy, so that it can better fulfill its mandate.

Granting the Office more autonomy with enhanced resources would make it better equipped to facilitate transactions between owners and users. Registration and recordation, for example, are instrumental in ensuring creators and owners can secure and exercise their rights, and in assisting users in finding owners and obtaining licenses. Strengthening the Copyright Office would address issues the Committee's copyright review hearings have examined. Improving the tracking and public availability of registration and recordation information with a stronger and more accessible IT system, for example, could help potential licensees identify and locate the proper licensor, resulting in market-based transactions and thus reducing the population of "orphan" works. Many other proposals made in the course of the review process have similarly involved enhanced rulemaking and other involvement by the Copyright Office.

Legislation addressing these sorts of autonomy and resource issues could garner consensus that might be much harder to find in other copyright debates. At the same time, updating the Copyright Office's structure and autonomy could have significant and overarching benefits to copyright policy. This is a worthwhile endeavor in which the Committee should be willing to invest serious attention and thought.

We thank the Committee for calling this hearing, engaging in this discussion, and allowing us the opportunity to submit these comments.





February 26, 2015

The Honorable Bob Goodlatte  
Chairman, Committee on the Judiciary  
U.S. House of Representatives

The Honorable John Conyers  
Ranking Democratic Member, Committee on the Judiciary  
U.S. House of Representatives

Dear Chairman Goodlatte and Ranking Member Conyers:

On behalf of the RIAA<sup>1</sup> and our member companies, I would like to thank the Committee for holding this hearing on the Copyright Office's functions and resources. This is an important topic and an appropriate component of your comprehensive review of copyright law.

The copyright industries remain key to our country's economy. In 2013, the copyright industries accounted for \$1.9 trillion, or 11.44%, of the U.S. economy and employed more than 11.2 million workers, accounting for 8.26% of all U.S. employment. American copyrighted content is appreciated and enjoyed the world over, sharing American culture and democratic values, and resulting in a positive trade balance. The creative industries also drive the development of technology and share credit for that sector's contributions to the economy, as innovators develop more and better means to share creative content with consumers.


Perhaps more than ever, we need a Copyright Office that can ensure the continued growth of our creative industries and protect the works they create. The Office requires a qualified expert staff necessary to address the increasingly heavy workload and myriad policy and legal issues. Given the limited resources it has at its disposal, the Office has done an admirable job in transitioning to the digital age – in updating the Office's infrastructure and dealing with an increasingly complex set of legal challenges posed by the crossroads of law and technology. But as the Office itself has acknowledged, much more must be done to assure proper funding and resources.

America remains a global leader not only in creating content, but in respecting and protecting it as well. The Copyright Office plays a large role in that. Its rulemaking authority and rate determinations play a significant role, as does its role as advisor to Congress. We look forward to working with you during this review process to assure the functions, resources, authority and

<sup>1</sup> The Recording Industry Association of America, Inc. ("RIAA") is a trade association whose member companies create, manufacture and/or distribute approximately 85% of all legitimate sound recordings produced and sold in the United States.

operations of the U.S. Copyright Office are robust enough to match the responsibility required in an area that drives such a large and vital portion of the U.S. economy.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Sherman', with a long horizontal flourish extending to the right.

Cary Sherman  
Chairman and CEO  
Recording Industry Association of America

cc: The Honorable Darrell Issa  
The Honorable Jerold Nadler