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REGISTER OF COPYRIGHTS SELECTION AND ACCOUNTABILITY ACT

HEARING

BEFORE THE

COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

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REGISTER OF COPYRIGHTS SELECTION AND ACCOUNTABILITY ACT

WEDNESDAY, SEPTEMBER 26, 2018

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The committee met, pursuant to notice, at 2:38 p.m., in Room SR–301, Russell Senate Office Building, Hon. Roy Blunt, Chairman of the committee, presiding.

Present: Senators Blunt, Fischer, Wicker, Klobuchar, and King.

OPENING STATEMENT OF HONORABLE ROY BLUNT, CHAIRMAN, A U.S. SENATOR FROM THE STATE OF MISSOURI

Chairman BLUNT. The Committee on Rules and Administration will come to order.

Good afternoon. Glad to have all of you here this afternoon. Senator Klobuchar and I are pleased to begin to get some more information on this topic, and the topic today is on the Register of Copyrights Selection and Accountability Act.

H.R. 1695 passed the House in April 2017 by a vote of 378 to 48. Its Senate companion, Senate bill 1010, sponsored by Senators Grassley, Hatch, Feinstein, and Leahy, have—would change the way the Register of Copyrights is selected and appointed.

Currently, the Register of Copyrights is appointed by the Librarian of Congress. The proposed legislation would give Congress a greater role in selecting the Register and making the position a Presidential appointment, subject to confirmation by the Senate.

During the nomination hearing of Dr. Hayden in this room in 2016, many of—on this committee asked questions and raised issues about the Copyright Office, and I think rightly so. Every day, people across the world enjoy the creations of our authors, our photographers, bloggers, artists, and others. These creations have significant impact on our economy, to our trade balance, and to our culture. The Copyright Office plays a crucial role in serving both users and creators.

I think all of us would have to agree that the Copyright Office would benefit from some modernization, and some of that is already happening. Since being sworn in in 2016, Dr. Hayden, her CIO, Bud Barton, and the Acting Register of Copyrights, Karen Temple Claggett, have taken steps to improve the Copyright Office, especially its information technology systems. This is a long-term project that will take many years to accomplish, but Dr. Hayden and her team are continuing to head in the right direction.

The legislative branch agencies this committee oversees—the Library of Congress, the Architect of the Capitol, the Government Publishing Office—serve the Congress and the Nation. They are led by agency heads who exercise significant authority, pursuant to the laws of the United States. These agency heads are nominated by the President and confirmed by the Senate.

The legislation we are considering today would treat the Register of Copyrights in a similar manner, while maintaining the Copyright Office within the Library of Congress, which I believe is exactly where it should be physically located and where it would remain located.

When it comes to legislative branch agencies, Congress should play a significant role beyond the Senate's traditional advice and consent role even in the selection process of those who head agencies and those who will serve in other significant positions. The Register of Copyrights is one of these positions.

Ensuring that legislative branch officials have been selected by a transparent, bicameral, bipartisan process like what would be proposed in the Register of Copyrights Selection and Accountability Act, it is an important addition to the system based on the view of the sponsors of this legislation.

I am glad to be here. I am glad to be joined by the Ranking Member of the committee, Senator Klobuchar. Senator Klobuchar, I would turn to you for any opening statements you might have.

OPENING STATEMENT OF HONORABLE AMY KLOBUCHAR, A UNITED STATES SENATOR FROM THE STATE OF MINNESOTA

Senator KLOBUCHAR. Well, thank you very much. Thank you, Senator Blunt, Mr. Chairman, for holding this hearing.

I want to thank you for doing this because this is such an important topic on the Register of Copyrights Selection and Accountability Act. I join you in welcoming our two witnesses, and I look forward to hearing their testimony.

Today's hearing is about the Register of Copyrights at the U.S. Copyright Office. This is a position that most people have never heard of before. It is possible people are focused on another hearing and other work going on this week, but it is very important that we continue on because this important job affects our lives every single day.

Whether you are listening to music, reading a novel, or watching your favorite show, you are consuming work that is protected by copyright. If you are an inventor, author, scientist, musician, filmmaker, or any one of the millions of Americans who create original work, the Copyright Office is the place you go to safeguard your work.

This is important in my state. We are the home of Prince, who we miss. We are the home of Bob Dylan. We are fiercely protective of copyrights, I would say, and of musicians' rights to their work. My own dad wrote for many, many years—he is now 90—and wrote a bunch of books. I am well aware of these issues and was at a private law firm for 14 years, and I have handled some of these cases peripherally myself.

Ensuring that creators can protect their original works is one of the hallmarks of our free market system, and it fosters competi-

tion, creativity, and entrepreneurship. Copyrighted work is fundamental to our economy. Last year, copyrighted industries contributed more than $1 trillion to our economy. That translates to about 7 percent of the total U.S. GDP and 5.5 million jobs.

In other words, copyrighted work doesn't just entertain and inspire us, it drives economic activity and translates into jobs for millions of Americans. We need to keep this area of our economy strong because, now more than ever, innovation will be the key to moving our economy forward in the United States. We need to be a country that invents, that makes stuff, that exports to the world, and promotes ingenuity.

Continuing to foster an environment of innovation requires us to be adaptable and forward-thinking. In the 21st century, we need a modern Copyright Office that is secure, efficient, and accessible to all.

To achieve the goal of a modern Copyright Office, the next Register of Copyrights must continue the critical work being done today to upgrade and update the infrastructure in the Copyright Office. Meeting the IT needs of the copyright community won't happen overnight. It will take a commitment from Congress, the Copyright Office, and the Library of Congress.

The appropriations legislation for 2019, which was signed into law last Friday, will allow the progress made on IT modernization to continue in the coming year. The bill includes funding for important priorities like continuing investment in the next-generation registration system, rebuilding the capacity of registration examiners by adding 15 new positions, digitizing copyright records dating back to 1870—that sounds like a lot of records—in a searchable format, advancing the design of the Copyright Office's first-ever automated recording system, and continuing support of the Copyright Modernization Office.

The legislation that we are considering today will complement the work already underway toward modernization. The bill would change the process for selecting a Register of Copyrights by making it a Presidentially nominated, Senate-confirmed position for a term of 10 years. The Register of Copyrights would have the same stature as the Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office. Senate confirmation of the nominee would enhance the relationship between the Register and Congress, give Congress a direct role in the process to select our chief copyright policy adviser, and strengthen accountability.

The portfolio of responsibilities of the Copyright Office is just as diverse as the creative community that it serves. Copyright policy promises to get more complex in the digital age, and as innovation continues, we must ensure that we have a transparent selection process in place to select the most qualified candidate to lead the Copyright Office on behalf of the American people.

Mr. Chairman, I look forward to working with you to advance the legislation to the full Senate.

Thank you very much.

Chairman BLUNT. Thank you, Senator Klobuchar.

We are pleased to have our two witnesses today. Keith Kupferschmid is the chief executive officer of the Copyright Alli-

ance. Before that job, he served as the general counsel and senior vice president for intellectual property for the Software and Information Industry Association.

Jonathan Band not only is an adjunct professor at Georgetown University, but an expert on these issues. In 2017, he received the American Library Association's L. Ray Patterson Copyright Award, which recognizes an individual who has supported the constitutional purpose of the copyright law, fair use, and public domain.

We are pleased you are both here, and Mr. Kupferschmid, if you would like to go first, and then Mr. Band, and then we will have some questions.

OPENING STATEMENT OF KEITH KUPFERSCHMID, CEO, COPYRIGHT ALLIANCE

Mr. KUPFERSCHMID. Well, thank you.

Chairman Blunt, Ranking Member Klobuchar, and members of the committee, thank you for the opportunity to testify before you today to discuss the importance of the Register of Copyrights Selection and Accountability Act, H.R. 1695 and S. 1010.

I am Keith Kupferschmid, the CEO of the Copyright Alliance, a nonprofit, nonpartisan organization dedicated to advocating policies that promote and preserve the value of copyright. I testify here today in support of H.R. 1695 and S. 1010.

There are several reasons why making the Register of Copyrights a Presidential appointee confirmed by the Senate makes good sense. Copyright is critical to the United States economy. The core copyright industries contribute over $1.2 trillion to the U.S. GDP and employ more than 5.5 million U.S. workers. As the Government agency responsible for administering the copyright system, as well as providing expert advice to Congress on copyright policy issues, it should, therefore, come as no surprise that few Government offices are more important to the U.S. economy, to jobs, and to creativity than the U.S. Copyright Office.

The Register, who heads the Copyright Office and serves as Congress' statutorily designated copyright expert, is a large component of that. Making the Register a Presidential appointee confirmed by the Senate would reflect the growing importance of copyright to our economy and our culture. It would show our international trading partners how much we value copyright and the importance of protecting the fruits of America's creators.

Second, making the Register a Presidential appointee would ensure that she is treated like other officials with oversight over similar organizations. For example, the Patent and Trademark Office is led by a Presidential appointee. Similarly, chairs of the NEA and NEH and the Director of the Institute of Museum and Library Services are all Presidential appointees. In short, there is simply no reason for Copyright to be treated with less significance, especially when one considers its importance to the U.S. economy and culture.

Third, making the Register a Presidential appointee ensures a more transparent, a more balanced, and a more neutral selection process compared to the existing process. The existing process does not require any direct input from the administration or from Con-

gress. Today, the Register is chosen by the Librarian without any input.

This bill would change that by allowing the President to nominate the Register from a slate of candidates and the Senate to give its advice and consent. Through this process, if there are concerns about a nominee for the registration position, the bill would allow those concerns to be voiced to Congress prior to confirmation. That opportunity does not exist today.

Fourth, Congress has historically enjoyed a direct line of communication with the Copyright Office for expert impartial advice on copyright law and policy. But recent changes to the organizational structure of the Library of Congress have disrupted that direct line. The bills ensure that Congress will continue to receive this expert impartial advice.

Fifth, enacting these bills will provide the Copyright Office with a greater say in how it operates and enable it to improve its operations. Of course, Copyright Office modernization is an issue that requires much more than increasing the accountability of the Register selection process, but changing the appointment process and providing the Register with the ability to discharge her duties effectively is an important component for modernization of the Copyright Office. It will help ensure that the Register has the voice and the resources needed to implement policy, to manage its operations, and to organize its information technology in a way that brings the Copyright Office into the 21st century.

Equally important to what the bills do is what they don't do. H.R. 1695 and S. 1010 largely do not alter the existing statutory relationship between the Copyright Office and the Library or the Register's statutory responsibilities.

While the urgency to address the appointment of the Register is new, the recognition that this change is needed is not. We have long advocated and supported the Register being Presidentially appointed with the advice and consent in the Senate well before Dr. Hayden became the Librarian, well before Donald Trump became President. With the position now vacant, the time is now to make that change.

The modest approach outlined in H.R. 1695 and S. 1010 enjoys widespread bipartisan, bicameral, and stakeholder support. We respectfully ask that the committee vote in favor of H.R. 1695 and S. 1010. We look forward to continuing to work with this committee as the bill moves forward, and I am happy to answer any questions.

[The prepared statement of Mr. Kupferschmid was submitted for the record.]

Chairman BLUNT. Thank you.

Mr. Band?

OPENING STATEMENT OF JONATHAN BAND, ADJUNCT PROFESSOR OF LAW, GEORGETOWN UNIVERSITY

Mr. BAND. Chairman Blunt, Ranking Member Klobuchar, members of the committee, I am an adjunct professor at Georgetown University Law Center. I also serve as counsel to the Library Copyright Alliance, which consists of three major library associations. I note that the Library of Congress is a member of one of LCA's as-

sociations, but it did not participate in the preparation of this testimony.

I appreciate this opportunity to express our opposition to the Register of Copyrights Selection and Accountability Act, S. 1010. As explained in detail in a report attached to my testimony, Congress has repeatedly considered the best location for the Copyright Office and has consistently reaffirmed that the Library of Congress is its most effective and efficient home.

While S. 1010 would not technically remove the Copyright Office from the Library, it would effectively achieve this result by ceding to the President the power to select the head of the office. The rationale for S. 1010 is elusive. It is hard to comprehend why Congress would voluntarily cede to the executive branch the authority of its own Librarian to select a key congressional adviser.

Recognizing the illogic of this legislation, the House amended the companion bill to require the President to appoint the Register from three candidates recommended by a panel consisting of the congressional leadership and the Librarian. This structure obviously increases congressional oversight, but limiting the President's authority in this manner raises serious separation of powers questions.

Moreover, it is difficult to understand how the public or Congress itself would benefit from politicization of the Register's position by making it subject to Presidential appointment and Senate confirmation. Such politicization of the position necessarily would result in a Register more politically—more actively engaged in policy development than in competent management and modernization.

Additionally, a politicized selection process likely would result in a Register who does not balance the competing interests of all stakeholders in the copyright system. Further, politicizing the process of appointing the next Register would severely delay his or her installation. Indeed, the introduction of this legislation, as a practical matter, has already prevented the appointment of a Register for over a year and a half.

S. 1010's 10-year term for the Register would also lead to less accountability to Congress and the public. This contradicts the stated intent of the bill made plain in its title.

Finally, one of the claimed rationales for this legislation is that more autonomy from the Library would enhance the Copyright Office's ability to modernize its technology. In fact, the technology-related progress made jointly by the Library of Congress and the office over the past 18 months proves that this legislation is not needed, and this is, as Chairman Blunt has recognized, under Dr. Hayden, the Library has made significant advances in addressing the issues that were identified in the 2015 GAO report.

There is no question that there is broad consensus that the Copyright Office must improve its IT capabilities, but the point is that process of improvement is already well underway. This past May, Acting Register Karen Temple testified in the Senate Appropriations Committee that the Copyright Office and the Library's chief information officer jointly developed the new Copyright Office IT modernization plan that focuses on leveraging resources within the Library to take full advantage of possible economies of scale.

In her testimony, the Acting Register explained that in accordance with the plan, the Copyright Office established the Copyright Modernization Office, which complements the Library's technical support by providing necessary business direction. Also consistent with that plan, the Acting Register and the Library's CEO jointly chair a Copyright Office Modernization Governance Board.

Numerous projects are already underway under the supervision of the CMO and the governance board, including preliminary work on a new automated recordation system, a next-generation registration system, a virtual card catalogue, and an integrated data management model. All these improvements are occurring without the legislation. Accordingly, the legislation simply isn't necessary.

For all these reasons, we oppose the Register of Copyrights Selection and Accountability Act and urge the committee to do the same. I am happy to answer any questions the committee may have.

[The prepared statement of Mr. Band was submitted for the record.]

Chairman BLUNT. Well, thank you, Mr. Band and Mr. Kupferschmid.

Mr. Band, as you pointed out, I think one of your observations was why would the—why would the Congress want the President to be more involved in appointing someone who works at its Library, the Library of Congress? Of course, the President appoints the Librarian of Congress, who then becomes the only person who chooses at this point the copy—the person who runs the office of copyrights.

By the way, as I mentioned before, this is a topic that came up when Dr. Hayden was confirmed. She has appointed the current person in an acting capacity as Congress looks at an issue we told Dr. Hayden we would be looking at in the future, and we are doing that now. But your views here are well thought out, I know, and important to us.

How is it better that one person appoints someone who works at the Library of Congress in an area that relates, but certainly the same skills that the Librarian of Congress has would not necessarily be the right skill set for the Director of Copyrights. What is your view of why, in that case, the one-person selection is better than congressional input and confirmation by this committee?

Mr. BAND. Thank you very much for the question, Mr. Chairman.

I guess part of it is a recognition or an understanding of what the proper role of the Register is, and you know, we see that the—although the Register certainly does give advice, and that is part of the statutory role, to give advice to Congress, in large measure, it is a—as indicated by the title, it is the Register of Copyrights. The focus of the job really is on the nuts and bolts of administering the copyright system, the registration, recordation, and now, you know, there are other functions relating to that.

A lot of these are very technical functions, and so in many respects, having someone with that technical expertise of not just IT technical, but copyright technical is important. For example, the last three Registers, including the Acting Register, have all been people who have been, in essence, elevated from within. They have been internal promotions.

The Acting Register, Karen Temple, I mean, she was at the Copyright Office prior to her elevation. Prior to that, Maria Pallante, even though I think at the exact time that she became Register she was working elsewhere within the Library, but she had come out of the Copyright Office. Marybeth Peters, before that, also was working in the Copyright Office. I think that that—having that sense of internal promotion is terrific and I think for this kind of technical position is appropriate.

Whereas, if it becomes a more political position, it is, you know, you are going to get someone—you are much more likely to get someone from the outside who doesn't have the experience working in the Copyright Office. They will come in. The first 2 years are going to be spent trying to figure out how the place operates, and I just don't think that that is what best serves the nature of this position.

Also to the extent that this notion of sort of this equivalence to other agencies, the Patent—the Director of Patents and Trademarks is the Under Secretary not of Patents and Trademarks but is the Under Secretary of Intellectual Property and is the chief spokesperson for the executive branch with respect to all forms of intellectual property, including copyright. They have—you know, currently, they have terrific people in the PTO with great expertise in copyright.

There is no—copyright is not getting short shrift by leaving things the way they are.

Chairman BLUNT. Thank you.

Mr. Kupferschmid, I think I will get you in my second 5 minutes since the answers here may be long.

Senator Klobuchar?

Senator KLOBUCHAR. Thank you very much, Mr. Chairman.

Chairman BLUNT. Helpfully long, too, by the way. I didn't mean that to be a pejorative description of that answer.

Senator KLOBUCHAR. Mr. Kupferschmid, in the 21st century, we need a modern Copyright Office. In your testimony, you note that the office has been in dire need of a more modern IT infrastructure. What is your assessment of the modernization effort right now?

Mr. KUPFERSCHMID. It certainly seems like the office is on the cusp of a significant modernization of the office. I think that ultimately is why we need to pass this bill. We need to get a Register in place, Presidentially appointed Register in place, who can show the leadership, who understands the specialized needs of the Copyright Office when it comes to IT.

But it is also very important to understand that when we talk about modernizing the Copyright Office, we are not just talking about IT modernization. That is one aspect. But the other aspect of modernizing the office is modernizing copyright registration policy, and those two need to go hand in hand.

To the best of my knowledge, nothing has happened in that regard, and the Library doesn't have the experience to do that. You need somebody heading the office, not in an acting capacity, but you need somebody heading the office who can—who can take that lead and have the vision to know where the law needs to be tweaked and the regulations need to be tweaked.

Senator KLOBUCHAR. Okay. Thanks.

Mr. Band, as you know, the Copyright Office exists within the Library of Congress. How are the IT needs of the Copyright Office different than the IT needs of the Library of Congress?

Mr. BAND. Well, obviously, they do have different functions. But the key under the current system is that, first of all, you have the right personnel supervising the process, both at the—at the Library level with the new CEO, as well as with the Copyright Modernization Office. Even though the functions are a little different, you know, the Library oversees many different functions, it is—on the one hand, it is a library, but it also has CRS. It has the Copyright Office and so forth. And so the expertise that they have allows them to manage systems, different kinds of IT systems effectively.

Senator KLOBUCHAR. One of the threats we are seeing is cybersecurity threats, and do you believe the modernization plans—either of you, both of you—at the Copyright Office appropriately consider these threats? Just briefly.

Mr. KUPFERSCHMID. Yes. That is a significant concern for the creative and copyright communities. This is an area where the Library has a very different mission than the Copyright Office. The Library, any library, really is about access and providing access to different works.

The Copyright Office is going to be much more concerned about security. Because if they cannot guarantee security for copyrighted works and somebody hacks into that system, people are going to stop registering their works, and that hurts everyone. That hurts the Copyright Office because they don't get collections. It hurts the public and archivists and historians who won't be able to rely on a comprehensive data base, copyright ownership data base. Of course, it hurts the creative community tremendously.

Senator KLOBUCHAR. Why don't—do you mind if I just move on and then to a question key here, I think, for me? That is the public interest and how we meet the public interest.

Mr. Band, I know that you disagree with making the Register of Copyrights a Presidentially appointed position. What other ways, if we don't do that, can we work to address the needs of the Copyright Office and ensure that the Register of Copyrights balances the interests and needs of all stakeholders?

Mr. BAND. Well, it is—I think one of the things that could be done is the legislation could be amended so that it provides criteria for the Register—for the Librarian to use when selecting the Register. Right now, there are no criteria. That would be a constructive amendment.

I think, at the end of the day, it is with—like with anything else, it always matters who you select, not so much the structure of the selection.

Senator KLOBUCHAR. Right.

Mr. BAND. As—and so you do, you want to make sure you don't have structures that create impediments, and I think this structure that is proposed in the legislation of having this commission that needs to make a recommendation, and then that is binding on the President and so forth, I think that structure is going to get in the way rather than improve the process of getting the best person to that job.

Senator KLOBUCHAR. Just one last question, Mr. Chairman. Mr. Kupferschmid, what would you do, along the lines of what Mr. Band was referring to, to ensure a fair selection process, if we were to pass this bill, that results in a Register as not beholden to any particular interest, but instead prioritizes the public interest?

Mr. KUPFERSCHMID. I think the bill accomplishes that actually quite well. It not only gives the—gives the Senate the ability to confirm, go through the confirmation process, and therefore, the public has a voice in whether the right candidate is chosen or not and confirmed. But more—also importantly is that the President just doesn't get to select someone. The President must choose off of a slate of individuals that is created by leadership from both the Democratic and the Republican Party and the Librarian, who gets to participate.

I think the bill reaches that compromise in a very good way.

Senator KLOBUCHAR. Okay, last question. Just because we have had an acting person, and she is doing a good job, excellent work, but she has been in this acting role for nearly 2 years. Some rightly argue that when an agency is led by an acting designee instead of a permanent leader, it can hinder the agency's work.

How does having an Acting Register instead of a permanent Register affect the operations of the Copyright Office?

Mr. KUPFERSCHMID. I think that is right, what you said, in terms of I think Karen Temple has done a fabulous job as the Acting Register, but there are certain limitations on any person who is in an acting position. We are at, like I said, the cusp of modernization. Not only IT modernization, but modernizing the laws and having to do with—and regulations having to do with registration, copyright registration policy.

It is important that we have somebody who is in a permanent position in that capacity rather than just an acting.

Mr. BAND. I would agree that it would be better to have someone in a permanent position, and that is why this legislation is always going to make it slower to get someone permanent in that job.

Senator KLOBUCHAR. Thank you very much, both of you.

Chairman BLUNT. Senator King?

Senator KING. Thank you, Mr. Chairman.

First, I have to say I published a book this summer, and when I opened the cover, I didn't expect to be so thrilled by seeing the little "c" and my name next to it. That was—that was an unexpected treat.

Mr. Kupferschmid, after this change, and what is not apparent in the language of the legislation, what will be the relationship, the structure, the organizational chart, if you will, between this new Presidentially appointed position and the Librarian of Congress?

Mr. KUPFERSCHMID. Really the only thing that changes is the process for selecting the Register. Everything else stays the same. Right now——

Senator KING. But does that mean that you have got two Presidentially appointed people, one who works for the other? I mean, I am——

Mr. KUPFERSCHMID. Correct. Correct. That is not unique in the Government. Look, for instance, at the Patent and Trademark Office, you have the Secretary of Commerce, who is a Presidential ap-

pointee confirmed by the Senate or the—and you have got the Director, rather, who is——

Senator KING. You are not really separating the functions of the office from the Library of Congress. You are simply changing the appointment of this one official.

Mr. KUPFERSCHMID. Because that——

Senator KING. It doesn't change the organizational order?

Mr. KUPFERSCHMID. That is correct. It will remain in the Library, and the Library will continue to supervise and manage, as it says in the statute.

Senator KING. Let me followup on your—I think you are creative to try to have this list of the three that have to—the President has to submit—has to choose from the list. Is that constitutional? Is there any precedent for that? Do you have any opinion?

It strikes me that is—might be a violation of separation of powers? The President either gets to appoint, or he or she doesn't.

Mr. KUPFERSCHMID. Yes. First of all, I am not a constitutional expert. I will say that. I am sure we can find some additional information here, but there are currently statutes that provide similar selection panels. For instance, the selection of the Comptroller General in GAO, and of course, ultimately, the President is free to interpret the bill in a way that is consistent with the appointments clause and can say so in the signing statement, and that has been done in the past.

Senator KING. But in the GAO case, there is the President has to choose from a finite list?

Mr. KUPFERSCHMID. From a slate of—yes, a slate of possibilities.

Senator KING. Do you know if that has ever been tested?

Mr. KUPFERSCHMID. I do not know the answer to that.

Senator KING. If you could supply the committee for the record some background on this issue, I think it is of some concern that we need to take seriously.

Mr. KUPFERSCHMID. I am happy to do that.

Senator KING. Thank you.

Mr. BAND. If I may, Senator King? The wording of the statute involved with the Comptroller General is different. While with the Comptroller General, there is a commission that makes a recommendation, the President is not obligated to choose from that slate.

Senator KING. From the slate.

Mr. BAND. Now, of course, if the President doesn't choose from the slate of recommended people, you know, the Senate might not confirm the person.

Senator KING. But it is a different structure than what is suggested here?

Mr. BAND. It is worded differently, yes. Here, it says, S. 1010 says, you know, that the Register shall be appointed by the President from the individuals recommended under the paragraph.

Senator KING. I appreciate that.

Mr. BAND. So that is—that is——

Senator KING. Well, if you would like to supply something for the record on the constitutional issue, that would be helpful as well because I know you have a different view.

Mr. Band, the Librarian is already appointed by the President, why not have another—I mean, don't give me your whole testimony again. But succinctly, what is the big deal here? You have already got one Presidential appointment, and what we are trying to do here is to elevate and underline the significance of the importance of this job. Why does it matter if you have a second position that is Presidentially appointed?

Mr. BAND. Well, first, as I mentioned, because of the structure, it would take a long time. I think it would take a long time——

Senator KING. You are suggesting that we don't act with total efficiently and alacrity around here?

Mr. BAND. You said that. You said that, not me. Also, and I think that this is important, you know, to realize that this is part of a much bigger picture. Of course, we are looking at this one bill, and which is relatively narrow and technical at this point.

But as Mr. Kupferschmid has indicated, I mean, this is—you know, this is something that the content folks have been seeking for a while, but it is part of a bigger objective, I think——

Senator KING. Why isn't—that was going to be final question. Why isn't the fact that the content folks, who are the people most concerned with this, are supporting this change, it seems to me that that bears a lot of consideration. They are the ones who are going to have to live with this change. They are the ones who are advocating it. They are the most intimately involved with it.

Why should we—why should we second-guess the constituents of this office if they think this would be a beneficial change?

Mr. BAND. Well, the first point is, is that we are all constituents. Meaning everyone is part of this copyright system. Meaning it is not only the creators, but also the users. But also in the 21st century, all users are also creators. Meaning, so there is this line, the sort of the distinctions are gone.

Therefore, it is important—you know, the importance of having balance in the office is perhaps more critical than ever. But also, as I was saying, there has been a degree over the past 20, 30 years, a certain mission creep at the Copyright Office, and there are some who want the Copyright Office to be an independent agency, and there are always more functions being inserted into the Copyright Office.

In fact, Mr. Kupferschmid tomorrow is testifying in support of a bill that would create a small claims court in the Copyright Office, and the Copyright Office has over——

Senator KING. Well, that might—might that not simply reflect the growth of the importance of this sector of the economy? I mean, it seems to me the fact that it is—you would call it mission creep, I might call it growth to reflect the current—the 21st century creative economy.

Mr. BAND. Well——

Senator KING. I have run out of time, but if you have thoughts on that, please supply them for the record.

Mr. BAND. I would be happy to.

Senator KING. Thank you, Mr. Chairman.

Chairman BLUNT. Senator King, I think you and I can take extra time if we want to since it is down to the two of us. But let me ask a couple of questions while——

Senator KING. We can do anything we want to.

[Laughter.]

Chairman BLUNT. We may vote something out here. We may just decide we are the committee.

Mr. Band, on the topic, you know, it was very unclear for a long time how long the term of the Librarian would be, to the point that it almost drifted into some area where it might be permanent. Before the current Librarian was named, before any name was mentioned, Senator Schumer and I introduced legislation, we created a 10-year term.

This also produces—provides a term for the Director of the Copyright. Do you see any advantage to the person having that office having both the confirmed responsibility and the 10-year window to know that, barring some inappropriate action on their part, they have that job for 10 years. They are not—the Librarian can't decide they don't like the way the space is being used, or do you see any advantage to a copyright person running that office that knows they have a 10-year window and they are answerable to this committee and the Congress beyond their answer to any—their landlord, the Librarian?

Mr. BAND. To be sure, there are advantages to having a set term, provided that it is the right person. That is why, you know, conceivably, if there was the legislation that again simply identified the qualities, the qualifications for the office as well as a term, that might be acceptable for our point of view.

But I think it is sort of the combination of the 10-year term and this process, which, again, I think it is going to result in a politicized process, and you could end up with someone who really doesn't have the right—the right level of expertise and technical expertise that we have seen in recent Registers. That is why, again, getting the wrong person in for 10 years is a problem.

Chairman BLUNT. I suppose it would be an equal problem if we get the wrong person in as the Librarian for 10 years.

Senator KING. Or the Secretary of Defense.

Chairman BLUNT. Or the Secretary of Defense. Though that term is not as specific. I would say that the process here is almost a replica with a slightly different membership of the process that was put in place in the not-too-distant past to select the Architect of the Capitol. The same process, the same three names to be submitted. The President makes that, and we will be exercising that process very quickly.

The Architect of the Capitol has resigned, effective November of this year. A very similar committee with a very similar process will hopefully produce a Presidential nominee that is back before this committee not too far into next year or maybe even late this year. But that is where the model for this, the three names, the congressional input, but with somebody else to make that final decision about the names.

Mr. Kupferschmid, Mr. Band has pointed out that the Director of Patents and Trademark Policy is a Presidentially appointed individual. How would the creators and users of copyright material benefit from having that, the copyright Register, the Director of Copyrights to have the same standing in this process as the Patent Office does?

Mr. KUPFERSCHMID. I think it is important——

Chairman BLUNT. Patent and Trademark Office does.

Mr. KUPFERSCHMID. I think it is important, and it would certainly benefit creators and users by showing and demonstrating the importance of intellectual property. More specifically, the copyright to the economy, how important it is to jobs, to the economy, to our culture, and to show that to our international trading partners.

Right now, the Register of Copyrights is not—is just selected by the Librarian, and that sends a certain message that about the importance of copyright. It is a message that we don't want to be sending. Hopefully, the way the creators and users can benefit is this will lead to perhaps improved IP protections, more respect for intellectual property, whether it is global or certainly domestic here.

Perhaps, most importantly, it gives these creators and users a voice in selecting the Register. Very much like the PTO Director, there would be a transparent process, as opposed to the Librarian just potentially picking someone behind closed doors without any consultation. Under the process envisioned by this bill, it would be very open, very transparent. It would make the Register accountable.

Right now, the President can simply knock on the door of the Librarian and say, "This is the person I want to be the Register." Bypass Congress and the Senate entirely. If the Librarian decides not to do it, well, he can fire the Librarian because he has that power and hire a new Librarian that will do it.

What we are looking for is a transparent process here, and we think this bill does that, and it does it in a very balanced and neutral way.

Chairman BLUNT. I think you may have misstated there. I don't think the President can fire the Librarian, but the Librarian could fire the Copyright Director.

Mr. KUPFERSCHMID. Yes.

Chairman BLUNT. The Librarian has a 10-year term and would—this committee could act and make recommendations and other things.

We just passed the Music Modernization Act, the Orrin Hatch Music Modernization Act that is at the White House now awaiting the President's signature.

Mr. Kupferschmid, what advantages would a permanent person in this job with the new standing have in implementing that act? Then we will go back to my friend, Mr. King.

Mr. KUPFERSCHMID. Before I answer your question, I would like to thank this committee, the members of the committee, and the full Senate for their support of the Music Modernization Act, I guess, the Orrin Hatch and Bob Goodlatte Music Modernization Act, as it is called now. We look forward to it being signed by the President.

The MMA gives the Register new rulemaking authority that is necessary for both creators and digital services to engage in effective licensing. The Register appointment by the President will address any outstanding appointment clause issues, like were mentioned earlier, since the soon-to-be new law hopefully vests authority in the Register itself.

Right now, the Register sort of sits in this cloudy zone, and this bill would make the role more parallel with other agency heads who have similar roles in Government. But at the same token, it leaves the position, leaves the entire office within the Library of Congress. We think it is a very good compromise because that it takes a very targeted, very modest approach, and we think it would certainly be a benefit to the Music Modernization Act, which this entire Senate really supported unanimously.

Chairman BLUNT. Senator King?

Senator KING. I still want to—I still would hope for the record that you could give us some thoughts about the—it seems to me we are doing sort of a half way. I mean, we are upgrading the status of this office, but it is still under the Librarian of Congress. Just some thoughts about whether that creates administrative awkwardness.

But my other question is, we have got two—we are now talking about two 10-year terms. Is it the concept of this bill that that—those 10 years would be coterminous with the Librarian of Congress, or would there be an overlap?

Any——

Mr. KUPFERSCHMID. Yes, I don't think they would be coterminous. I think it all is just a matter of when the Librarian position needs to be filled and when the Register position needs to be filled. In terms of, like I said, the inconsistencies, there are other—many other areas of Government where you have one Presidential appointee reporting to another Presidential appointee, and those work very well, but we are happy to provide you additional information about that.

Senator KING. Appreciate that.

Do I take it from your presence here that the—your organization represents the community of authors, musicians, and those who are interested in this topic? Is that correct?

Mr. KUPFERSCHMID. Oh, absolutely. I mean, we represent about 13,000 different organizations and about 1.8 million individual creators across the country that rely on copyright for their careers, for their livelihoods, and they are—every single one of them, they are supportive of this bill.

Senator KING. Thank you.

Thank you, Mr. Chairman.

Chairman BLUNT. Thank you, Senator King.

Any concluding thoughts from either of you as we wrap up here? Mr. Band?

Mr. BAND. No. Just I would just amplify the point that I was making before, that the—one should view this legislation in its broader context, and we started to talk about that, and you, Senator King, as you alluded to, there is this conceivable awkwardness. Then I think maybe the next step is to say, well, we now need to make it an independent agency, and as it grows, I mean, we are going to have this bigger and bigger agency, and then it will be in conflict with the Patent and Trademark Office.

We want to—I think the goal is to avoid sort of a "Washington solution." A Washington solution to a problem is just to sort of rearrange the deck chairs instead of saying what is the real problem?

Let us find a solution. Let us not just do a reorganization for the sake of doing a reorganization.

I think at some level, this legislation, this is a solution in search of a problem.

Chairman BLUNT. Mr. Kupferschmid?

Mr. KUPFERSCHMID. Yes, I would have to very much disagree with that. I mean, at the heart of it, we are supporting a more transparent process here, one that would increase the accountability of the Register. It just doesn't exist today.

I mean, it is, frankly, hard to oppose something like that, or when you add up the fact that the Library of Congress has a different mission, is a stakeholder in a lot of these issues, could have conflicts of interest issues, when you add up the fact that there are other similarly situated agency heads that are Presidential appointees, when you add up the fact that right now is the perfect time to do this, there is a window of opportunity because there is a vacancy in the position, not hurting any feelings or going after anyone, and you look at the fact that the Copyright Office is on the cusp of modernizing and they need—you know, they need leadership to help that, this is the perfect bill at the perfect time.

It doesn't do any of the parade of horribles that Jonathan just mentioned. It simply doesn't do that. We have a very narrowly targeted, modest approach to make the Register a Presidential appointee confirmed by the Senate.

We hope you will support the bill.

Chairman BLUNT. Well, thank you both. We have been looking for the perfect bill at the perfect time. I have never voted on a——

[Laughter.]

Chairman BLUNT. I have never voted for a perfect bill before. I have introduced a couple of perfect bills, but I——

[Laughter.]

Chairman BLUNT. I have never voted on one of them, and that may be the reason to do this.

Very helpful for both of you to be here. We appreciate it.

There may be some additional questions for the record from others who couldn't attend or from those of us who did. The record will remain open for 1 week from today.

[The information referred to was submitted for the record.]

Chairman BLUNT. The committee is adjourned.

[Whereupon, at 3:27 p.m., the hearing was adjourned.]

APPENDIX MATERIAL SUBMITTED



Statement of

Keith Kupferschmid
Chief Executive Officer
Copyright Alliance

before the
SENATE COMMITTEE ON RULES AND ADMINISTRATION

September 26, 2018

The Copyright Alliance, on behalf of our membership, submits this statement for the record concerning the hearing on the *Register of Copyrights Selection and Accountability Act* (H.R. 1695 and S.1010) by the Senate Committee on Rules and Administration. We urge this Committee to report H.R. 1695 and S.1010 favorably.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The Copyright Alliance represents the copyright interests of over 13,000 organizations in the United States, across the spectrum of copyright disciplines, and over 1.8 million individual creators, including photographers, authors, songwriters, coders, bloggers, artists and many more individual creators and small businesses that rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

The Copyright Office resides within the Library of Congress for reasons that made sense one hundred years ago but no longer do. The Office's creation within the Library of Congress is the result of efforts by former Librarian Ainsworth Spofford beginning in the 1870s to centralize copyright deposits within the Library—the idea was to use these deposit copies, required under the copyright law at that time to perfect title to copyright, to build the Library's collections for free. He got his wishes, but the plan worked a little too well. Within two years, Spofford was raising concerns about the "large amount of clerical labor" involved in maintaining the copyright department and how quickly the deposits were taking up the available space for the Library.[1] In 1897, motivated by Spofford's repeated complaints, Congress created the Copyright Office and the Register position within the Library to take the job out of the hands of the Librarian.

H.R. 1695 and S.1010 largely do not alter the existing statutory relationship between the Copyright Office and the Library. The statute continues to provide that the Register and all subordinate officers and employees of the Copyright Office "shall act under the Librarian's

[1] Library of Congress, Annual Report of the Librarian of Congress, year ended December 1, 1872, 6-7 (1872).

general direction and supervision."[2] Nor do the bills change the Register's statutory responsibilities, which continue to include the duty to "Advise Congress on national and international issues relating to copyright."[3]

The bills also does not alter the deference that the Library of Congress has historically provided to the Copyright Office on copyright policy matters. The Librarian's deference is a recognition of the Copyright Office's expertise on copyright policy matters. This deference is also important for avoiding a conflict of interest. The Library of Congress itself is a stakeholder when it comes to copyright policy. No interested party—whether it's a library, user group, or copyright holder—should have more of a say in the selection of the Register than any other party or the public.

Today, more so than ever before, the Library and the Copyright Office have different missions and priorities. It's an unfortunate fact that the interests and priorities of the Library frequently do not align with those of the Copyright Office, and this has led to the Office being neglected for many years and in dire need of a more modern IT infrastructure. A strong and well-functioning U.S. Copyright Office is a priority for the Copyright Alliance and our members, and the Copyright Alliance has long called for modernization of the Office.[4] A key part of modernization is making sure the Copyright Office is structurally able to address the challenges of the 21st century. Congress shares this vision. Following its recent review of the copyright laws, the House Judiciary Committee expressed support for Copyright Office modernization as a critical component for ensuring that our copyright laws continue to work in the twenty-first century.[5]

One benefit of making the Register of Copyrights a Presidential appointee, confirmed by the Senate, is that it will provide the Copyright Office with a greater say in how it operates and enable it to improve its operations. Of course, Copyright Office modernization is an issue that requires much more than increasing the accountability of the Register selection process, but changing the appointment process, and providing the Register with the ability to discharge her

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[2] 17 U.S.C. §701(a).

[3] 17 U.S.C. §701(b).

[4] *E.g.*, Copyright Alliance, US Copyright Office Modernization, https://copyrightalliance.org/policy/position-papers/copyrightoffice-modernization/ (last visited Aug. 24, 2018); Copyright Alliance, Statement of Keith Kupferschmid before the House Comm. on Appropriations Subcomm. on Legislative Branch (Apr. 17, 2018), https://copyrightalliance.org/wpcontent/uploads/2018/04/House-Leg-Branch-AppropriationTestimony.pdf; Copyright Alliance, Statement of Keith Kupferschmid before the House Comm. on Appropriations Subcomm. on Legislative Branch (May 3, 2017), https://copyrightalliance.org/wp-content/uploads/2017/05/House-Leg-Branch-Approp-hrg-testimony-May-20171.pdf; Copyright Alliance, Statement of Keith Kupferschmid before the House Admin. Comm. on Improving Customer Service for the Copyright Community (Dec. 2, 2015), https://copyrightalliance.org/wpcontent/uploads/2016/08/copyright_alliance_testimony_on_usco_it_systems_hearing_in_house_admin_com_dec_2_2015_0.pdf; Copyright Alliance, Letter from Keith Kupferschmid on U.S. Copyright Office Modernization Efforts and Appropriations (Apr. 15, 2016), https://copyrightalliance.org/wp-content/uploads/2016/10/041516-Copyright-Alliance-Letter-USCO-Appropriations.pdf.

[5] House Judiciary Committee, *Goodlatte & Conyers Release First Policy Proposal of Copyright Review* (Dec. 8, 2016), available at https://judiciary.house.gov/press-release/goodlatte-conyers-release-first-policy-proposal-copyright-review/.

duties effectively, is an important component for modernization of the Copyright Office. It will help ensure that the Register of Copyrights has the voice and resources needed to implement policy, manage the Office's operations, and organize its information technology in a way that brings the Copyright Office into the 21st century. To date, its efforts to do so have been frustrated by the competing needs and direction of the Library.

Copyright is critical to the United States economy, with core copyright industries contributing over $1.2 trillion to the U.S. GDP and employing more than 5.5 million U.S. workers.[6] As the government agency responsible for administering the copyright registration and recordation systems, as well as providing expert advice to Congress on copyright policy issues, it should therefore come as no surprise that few government offices are more important to the U.S. economy, jobs, and creativity than the U.S. Copyright Office. And the Register, who heads the Copyright Office and serves as Congress' statutorily designated copyright expert, is a large component of that. Making the Register a Presidential Appointee, confirmed by the Senate, would reflect the growing importance of copyright to our economy and culture and would show our international trading partners how much we value copyright and the importance of protecting the fruits of America's creators.

Making the Register of Copyrights a Presidential appointee would also ensure that the Register is treated like other officials with oversight over similarly significant industries. For example, patent and trademark policy is led by a Presidential appointee—the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office (USPTO). Similarly, the Chairs of the National Endowments for the Arts and for the Humanities and the Director of the Institute of Museum and Library Services are all Presidential appointees. A 2012 Congressional Research Service study estimated that there were between 1200-1400 positions that were appointed by the President and confirmed by the Senate.[7] In short, there is simply no reason for copyright to be treated with less significance given its importance to the U.S. economy and culture.

Congress has historically enjoyed a direct line of communication with the Copyright Office for expert, impartial advice on copyright law and policy, but recent changes to the organizational structure of the Library of Congress have disrupted that direct line. H.R. 1695 and S.1010 would ensure that Congress can continue to receive the expert advice it needs to discharge its responsibility under Article I, Section 8, Clause 8 of the Constitution to promote knowledge and culture though copyright policy.

Making the Register a Presidential appointee ensures a more transparent, balanced, and neutral selection process compared to the existing process, which does not require any direct input from the Administration or Congress. Today, the Register is chosen by the Librarian without any input. These bills would change that by allowing the President to nominate the

[6] Stephen Siwek, Int'l Intellectual Property Alliance, Copyright Industries in the U.S. Economy: The 2016 Report (2016).

[7] Maeve P. Carey, Congressional Research Service, Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress 7 (2012).

Register and the Senate to give its advice and consent. Through this process, if there are concerns about a nominee for the Register position, those concerns could be voiced to Congress prior to confirmation. That opportunity does not exist today.

The bills provide Congress and the public with input into the selection of the Register, by establishing a selection panel, consisting of the Speaker of the House of Representatives, the President pro tempore of the Senate, the majority and minority leaders of the House and the Senate, and the Librarian of Congress, to provide the President a list of at least three individuals recommended for the position. This process is similar to the selection process currently in place for the Comptroller General and Deputy Comptroller General of the Government Accountability Office.[8] The bills would also limit the term of the Register to ten years (though an individual currently serving as Register may be reappointed). This term mirrors the ten-year term of the Librarian of Congress, a term that was created in 2015 by a bill introduced in this Committee.[9]

While the urgency to address the appointment of the Register is new, the recognition that this change is needed is not. We have long advocated in support of the Register being Presidentially appointed with the advice and consent of the Senate.[10] The Copyright Office is currently being headed by an Acting Register, so it is critical that the issue be addressed now.

The modest approach outlined in H.R.1695 and S.1010 enjoys widespread bipartisan, bicameral and stakeholder support. H.R. 1695 was introduced by Chairman Goodlatte and Ranking Member Conyers with close to 30 additional original co-sponsors—and with a joint statement by Goodlatte and Conyers, Senate Judiciary Committee Chairman Grassley, Senate Judiciary Committee Ranking Member Feinstein, and Senate Judiciary Committee Member Leahy.[11] H.R. 1695 passed the House Judiciary Committee with a decisive 27-1 vote, and the House 378-48. Senators Grassley, Feinstein, Leahy, and Hatch introduced S. 1010 May 2, 2017. The Copyright Alliance is joined by a significant number of individuals, companies, labor unions, industry groups, and associations, who have voiced their support.

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[8] 31 U.S.C. § 703(a)(2).

[9] Librarian of Congress Succession Modernization Act of 2015, Pub. L. No. 114-86 (2015).

[10] *See* Statement for the Record of Sandra Aistars Before the House Judiciary Committee, Subcommittee on Courts, IP and the Internet, Copyright Office Oversight, November 17, 2014.

[11] House Judiciary Committee, *Goodlatte, Conyers, Grassley, Feinstein, Leahy Call for Quick Action on Legislation to Provide Selection Process for Register of Copyrights* (March 23, 2017), available at https://judiciary.house.gov/press-release/goodlatte-conyers-grassley-feinstein-leahy-call-quick-action-legislation-provide-selection-process-register-copyrights/.

We respectfully ask that the Senate Rules Committee vote in favor of H.R. 1695 and S.1010. The bills reflect the consensus view of policymakers that Presidential appointment and Senate confirmation puts the Copyright Office on a better footing to meet its statutory duties and serve the American people for generations to come. We thank the Committee for its consideration of these points. Please let us know if we can provide additional information or answer any questions regarding our views on this matter.



Keith Kupferschmid
Chief Executive Officer
Copyright Alliance

UNITED STATE SENATE
COMMITTEE ON RULES AND ADMINISTRATION

TESTIMONY OF JONATHAN BAND
ON REGISTER OF COPYRIGHTS SELECTION AND ACCOUNTABILITY ACT

Chairman Blunt, Ranking Member Klobuchar, members of the Committee, my name is Jonathan Band. I am an Adjunct Professor at the Georgetown University Law Center. I also serve as Counsel to the Library Copyright Alliance ("LCA"). LCA consists of three major library associations: the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries.[1] These associations represent over 100,000 libraries in the United States employing more than 350,000 librarians and other personnel. An estimated 200 million Americans use these libraries over two billion times each year.

I appreciate this opportunity to express our opposition to the "Register of Copyrights Selection and Accountability Act of 2017," S. 1010. The bill would make the position of the Register of Copyrights subject to Presidential appointment and Senate confirmation. Under current law, 17 U.S.C. § 701, the Librarian of Congress selects the Register.

The Register Should Not Be A Presidentially-Appointed Position

As explained in detail in the attached report prepared by LCA member the American Library Association,[2] Congress has repeatedly considered the best locus for the U.S. Copyright Office and has consistently reaffirmed that the Library of Congress is its most effective and efficient home. While S. 1010 would not technically remove the Copyright Office from the Library, it would effectively achieve that result by ceding to the President the power to select the head of the Office.

The rationale for S. 1010 is elusive. Why Congress would voluntarily cede its own Librarian's authority to select and oversee a key Congressional advisor on copyright matters to the Executive Branch is hard to comprehend. Recognizing the illogic of the legislation, the House amended H.R. 1695, as introduced, to require the President to appoint the Register from three candidates recommended by a panel consisting of the Congressional leadership and the Librarian. Limiting the President's authority in this manner, however, raises serious questions regarding the separation of powers.

Moreover, it is difficult to understand how the public or Congress itself would benefit from politicization of the Register's position by making it subject to presidential appointment and Senate confirmation, as this legislation proposes. Such politicization of the position necessarily

[1] The Library of Congress is a member of ARL, but it did not participate in the preparation of this testimony.
[2] Alisa Holahan, *Lessons from History: The Copyright Office Belongs in the Library of Congress* (2017), https://districtdispatch.org/wp-content/uploads/2017/08/Lessons-From-History.pdf.

would result in a Register more actively engaged in policy development than in competent management and modernization. Additionally, a politicized selection process likely would result in a Register who does not balance the competing interests of all stakeholders in the copyright system.

Further, politicizing the process of appointing the next Register would severely delay his or her installation. Indeed, the introduction of this legislation as a practical matter has already prevented the appointment of a Register for over a year and half.

S. 1010's 10-year term for the Register of Copyrights also would lead to less accountability to Congress and the public. That contradicts the stated intent of the bill made plain in its title.

Copyright Office Modernization Is Proceeding Without This Legislation

One of the claimed rationales for the legislation is that more autonomy from the Library would enhance the Copyright Office's ability to modernize its technology. In fact, the technology-related progress made jointly by the Library and the Office over the past eighteen months proves that this legislation is not needed.

There is broad consensus that the Copyright Office must improve its information technology capabilities.[3] In 2015, the Government Accountability Office found that the Library's information technology systems were outdated, and that the Library's lack of coordination with the Copyright Office impeded the Office's ability to serve its customers. However, under the leadership of the current Librarian, Dr. Carla Hayden, the Library has made significant advances in addressing these issues.

Last year, the Library's Chief Information Officer, Bernard Barton, reported to Congress that he was working with the Acting Register of Copyrights to further the modernization process. As Mr. Barton explained, the Library provides all of its service areas with umbrella IT support. The Office thus can focus on its mission-specific needs rather than worrying about general systems issues, such as staff computer problems or server maintenance.

This past May, Acting Register Karyn Temple testified to the Senate Subcommittee on Legislative Branch Appropriations that "developing and deploying modernized systems that facilitate and enhance the Office's work and provide a positive experience for the public is…one of the Office's highest priorities." To that end, last September, the Copyright Office and the Library's Office of the Chief Information Officer ("OCIO") jointly submitted to the House and Senate Committees on Appropriations a revised Copyright Office IT modernization plan that

[3] The challenges faced by the Copyright Office's IT systems are not unique to the Copyright Office or the Library. Many government agencies have experienced serious IT problems ranging from massive data breaches (*e.g.*, the Office of Personnel Management data breach affecting the records of over 20 million current and former government employees) to system crashes (*e.g.*, the State Department's system for processing visas) to cost overruns (*e.g.*, the Federal Aviation Administration's NextGen air traffic control system) to systemic failures (the roll-out of the Affordable Care Act).

focused on leveraging resources within the Library to take full advantage of possible economies of scale. That revised plan supplemented the Office's 2016 Provisional Information Technology Modernization Plan and Cost Analysis, and drew upon "the collaborative work of the Office and the OCIO to identify possible synergies that might exist now or in the future, as both the Office and the Library engage in dual modernization efforts."

Acting Register Temple explained that in partnership with the Office, the Library's OCIO developed detailed cost projections and timelines for full IT modernization that align with the revised provisional IT modernization plan. The OCIO took full responsibility for the technical IT responsibilities for the Office, as the Library consolidated all Office information technology positions within the OCIO in December 2017. At the same time, in accordance with the revised plan, in January 2018 the Copyright Office established the Copyright Modernization Office ("CMO"), which complements the OCIO's technical support by "providing the business direction necessary to ensure that modernization projects are continuously aligned with the Office's mission and strategic goals." Consistent with the plan's "dual-governance approach," the Acting Register of Copyrights and the Library's Chief Information Officer jointly chair a Copyright Office Modernization Governance Board, "which provides the executive direction critical to meeting the Offices' long-term modernization goals."

Numerous projects are already underway under the supervision of the CMO and Governance Board, including preliminary work on:

- the Copyright Office's new automated recordation system, which will overhaul the current manual recordation of documents;
- the Office's next-generation enterprise registration system, which will provide the user interfaces that will unify how end users experience the Office's applications;
- release of the Office's "proof of concept" Virtual Card Catalog, which provides preliminary and accelerated public access to historical copyright records in advance of full digitization of all Office records; and
- a data management model that will provide for a federated search technology to allow users to search across registration, recordation, and licensing databases, and that will establish chain-of-title sequencing that can link registrations to recordations or other documents.

Under the timeline developed by the Library's OCIO, Copyright Office IT modernization activities planned for the next five years include development and unification of public interfaces and all Office workflows through an enterprise solution. This enterprise solution will consist of modular applications including the next-generation registration system, the recordation system, the public interfaces, back-end processes, and future incorporation of statutory license processing.

All these improvements are occurring without the legislation. Accordingly, Copyright Office modernization does not require the Register to be a Presidentially-appointed, Senate-confirmed position.

For all these reasons, we oppose the Register of Copyrights Selection and Accountability Act, and urge the Committee to do the same.

September 26, 2018

UNITED STATES SENATE
COMMITTEE ON RULES AND ADMINISTRATION

SUPPLEMENTAL STATEMENT OF JONATHAN BAND
ON REGISTER OF COPYRIGHTS SELECTION AND ACCOUNTABILITY ACT OF 2017

This supplemental statement responds to Senator King's questions concerning the constitutionality of S. 1010. Mr. Kupferschmid, in support of his contention that the process proposed in S. 1010 did not violate principles of separation of powers, stated in his testimony that the process in S. 1010 was similar to the selection process of the Comptroller General. Likewise, Chairman Blunt mentioned that S. 1010 was modeled on the selection process for the Architect of the Capitol. Both of these processes, however, differ fundamentally from the process proposed in S.1010.

Under 31 U.S.C. § 703(a)(2), when a vacancy occurs in the office of the Comptroller General or Deputy Comptroller General, a commission composed of specified members of Congress must be established to recommend individuals to the President for appointment to the office. The President, however, is not required to select one of the individuals recommended by the commission.

Similarly, under 2 U.S.C. § 1801, a commission composed of specified members of Congress must be established to recommend individuals to the President for appointment as Architect of the Capitol. Once again, the President is not required to select one of the individuals recommended by the commission.

17 U.S.C. § 701 as amended by S. 1010 would establish a panel consisting of specified members of Congress and the Librarian of Congress to recommend individuals to the President for appointment as Register of Copyrights. But in contrast to the statutes relating to the selection of the Comptroller General or the Architect of the Capitol, S. 1010 provides that the Register "shall be appointed by the President from the individuals" recommended by the panel. Thus, under S. 1010, the President would not have the discretion to select someone not on the list of individuals recommended by the panel. This restriction on the discretion of the President most likely renders S. 1010 unconstitutional.

Another difference between S. 1010 and the statutory framework relating to the Comptroller General underscores the "administrative awkwardness" of the structure created by S. 1010 recognized by Senator King. S. 1010 empowers only the President to remove the Register. Conversely, the Comptroller General (and the Deputy Comptroller General) may be removed by impeachment or a joint resolution of Congress. By granting the power to remove the Register only to the President, S. 1010 would prevent both the Librarian of Congress and Congress itself from exercising any control over the Register. Thus, the Register would be less accountable to Congress than currently.

Defending Liberty
Pursuing Justice

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December 6, 2018

The Honorable Roy Blunt
Chairman, Committee on Rules and Administration
U.S. Senate
Washington, D.C. 20510

The Honorable Amy Klobuchar
Ranking Member, Committee on Rules and Administration
U.S. Senate
Washington, D.C. 20510

Dear Chairman Blunt and Ranking Member Klobuchar:

On behalf of the Section of Intellectual Property Law of the American Bar Association (the "Section"), I write to express the Section's support for passage of S.1010, *Register of Copyrights Selection and Accountability Act of 2017*, introduced by Senator Charles Grassley on May 2, 2017, and which was the subject of recent hearings in the Rules and Administration Committee. The views expressed in this letter have not been submitted to the American Bar Association's House of Delegates or Board of Governors, and should not be considered as views of the Association.

As you may be aware, the ABA is the legal profession's leading national voluntary bar organization, with more than 400,000 members hailing from each of the 50 states, the District of Columbia, and the U.S. Territories, with an equally broad representation of the countless different areas of law. The Section is the world's largest organization of intellectual property professionals, with over 17,000 members. The ABA-IPL Section membership includes lawyers and others representing all intellectual property law practices as well as a wide array of business and other interests. The Section's views, therefore, reflect a broad perspective of the important issues our country faces in developing, improving, and enforcing intellectual property rights for the overall benefits of the United States economy. Critically, our members represent a diverse set of interests in the evolution of the copyright system, including outside counsel and in-house counsel from all types of companies.

The Section has been actively involved in the conversations across the country concerning the future of the U.S. Copyright Office, including through Congressional testimony. In 2015, the Section called for improvements to the Copyright Office's budget, information technology resources, and rulemaking authority. It also expressed the view that modernizing the Copyright Office would require, among other things, a Register of Copyrights who is appointed by the President with the advice and consent of the Senate.

As a result, the Section supports the *Register of Copyrights Selection and Accountability Act of 2017*. The Bill will help to realize the Section's vision and provide the opportunity for the Copyright Office to have a truly independent voice that will balance the interests of multiple stakeholders and to advise both the President and Congress using the Copyright Office's significant expertise.

Very truly yours,



Mark K. Dickson
Chair, ABA Section of Intellectual Property Law

cc: Senator Charles Grassley

Statement of

Sarah Howes
Director and Counsel, Government Affairs and Public Policy
Screen Actors Guild – American Federation of Television and Radio Artists

before the
SENATE COMMITTEE ON RULES AND ADMINISTRATION

September 26, 2018

INTRODUCTION

Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA), on behalf of our membership, submits this statement concerning the hearing and markup of the *Register of Copyrights Selection and Accountability Act* by the Senate Committee on Rules and Administration. We urge this Committee to report this legislation favorably.

SAG-AFTRA represents appropriately 160,000 actors, announcers, broadcasters, journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt performers, voiceover artists, and other media professionals. Our members live in all fifty states, and in addition to working under union contracts, many practice other artistic disciplines and are creative entrepreneurs. We are the nation's largest labor union representing media artists, and our members are beneficiaries of healthy intellectual property laws. SAG-AFTRA members rely on this country's copyright system to receive good union wages and residual income, qualify for healthcare coverage, contribute to a pension, and remain in their respective fields.

The United States Copyright Office ("Office") plays a vital role in advising Congress on copyright policy, assisting federal agencies and courts on copyright-related matters, including trade agreements, and in administering aspects of the law. Designating the Register of Copyrights ("Register") a Principal Officer under the Constitution is a modest, yet critical, step towards modernizing the Office. This legislation ensures any appointed Register be carefully considered, and accountable to elected officials and, by extension, the American people. The *Register of Copyrights Selection and Accountability Act* (S. 1010) is a bipartisan bill introduced by Chairman Chuck Grassley (R-IA), Ranking Member Dianne Feinstein (D-CA), Senator Orrin Hatch (R-UT), and Senator Patrick Leahy (D-VT). The House companion bill (H.R. 1695) passed with overwhelming bipartisan support in April 2017.

This legislation is reflective of the enormous role copyrighted works play in driving our national economy: the copyright industries add $1.2 trillion to U.S. gross domestic product and provide jobs to over 5.5 million workers. It is essential the Register advance the law's Constitutional purpose of promoting the arts & sciences. This body of law should protect creative works from theft, incentivize content creators to invest in new production and reward them with the fruits of their creative labors.

The Office needs the autonomy to provide impartial expert advice to Congress on copyright policy. More than ever, the Office's duties and functions affect the lives and careers of artists and journalists. Still, someone other than an elected official selects the Register. Libraries, a copyright stakeholder, should not have unilateral control to appoint or remove a Register. The idea that the head of the Office may be chosen without extensive consultations with Congress and affected members of the private sector deeply concerns the entertainment labor unions. As such, members of Congress and affected constituencies, including entertainment labor unions, should be able to provide input on whom should be the Register. Currently, an unelected official may unilaterally determine the selection of this position, which is integral to union members' personal livelihood and creative work.

PRINCIPAL ADVISOR TO CONGRESS

Copyright policy is of critical importance to all creators, including SAG-AFTRA members. Especially considering the severe impact copyright theft has on the number of jobs available in our creative industries, and the ability of all of our members to receive residual or royalty compensation.

Consequences of online theft include:

- Lost performance royalties to the music community, including session singers and musicians who receive royalties through the AFM & SAG-AFTRA Fund.
- Lost job opportunities if a film producer is unable to invest in a new project because a prior, otherwise successful, movie was unable to make a return on investment due to piracy.
- Lost residual compensation for the creative professionals responsible for audiovisual works.

Residual payments are deferred compensation based on the continued use of the creative works on which they were employed. These monies also add to health and pension funds for creative professionals. A benefit that accounts for, on average, thirty-six percent of a performer's overall compensation. Recently, an actor told me about the small sum he received for performing in a relatively low-budget film, which is now one of the most iconic teen movies ever made. Where he made money was the residuals. His first residual check was ten times larger than that original paycheck. Acting jobs are highly competitive. It is common for even the most successful performer to go long bouts between roles, which makes ongoing residual compensation necessary to stay in the craft.

Hundreds of thousands of union members across the country suffer when music and films are stolen on the internet. We need our elected officials to determine, through a transparent process, whether a candidate for the Register position will duly consider the economic and artistic needs of our members. This modest legislation will allow union members to voice concerns or praise, through their elected representatives, prior to a final confirmation.

OVERSEES THE MODERNIZATION PLAN

Efforts are underway to execute the strategic plan to overhaul the Office IT system; however, those efforts are frustrated by the reality that the Library of Congress and the Office serve distinct roles, retain employees of different talents and backgrounds, and have independent IT needs. The eCO system, which is the massive, searchable database that manages information obtained from registrations and other records, has greater, more complicated functions than the library's archival IT system. Creators and potential licensees rely on the eCO system to conduct business and legal transactions. Even SAG-AFTRA, a labor union, uses the system on a daily basis to track transfers of rights and to file any security agreements it has in motion pictures. Valuable content is being created every second of every minute of every hour in America, and the Office needs resources and authority to see this IT overhaul through to completion.

It is important that the Office continue to consider the IT needs of individual creators. To give one example, several years ago, before the IT system overhaul began, I managed Springboard for the Arts' Minnesota Lawyers for the Arts program in St. Paul, Minnesota. Springboard serves roughly 11,000 professional artists who work and live in the state. One of my duties was to assist artists in understanding copyright registration. Every year, an aging photographer came into Springboard with his adult daughter to register hundreds of photographs on our resource computer. The process of navigating the eCO system was trying for the gentleman, but he overcame the challenge nonetheless. At that point in the photographer's life, he wanted to make sure his works were protected and properly archived for estate planning purposes. We need to make sure the Office continues to strive for policies and technologies that are attentive to and accessible for all artists, including seniors, foreign-language speakers, the disabled, entrepreneurs, and those of lesser means. We need to continue having a Register who appreciates the unique, diverse needs of the millions of artists living across America, and is empowered to voice the purpose, objectives, and priorities of this modernization effort.

CONCLUSION

SAG-AFTRA asks that the Senate Rules Committee vote in favor of S. 1010. Making the Register of Copyrights a presidential appointment subject to the advice and consent of the Senate will send the clear message domestically and internationally that America is proud of our copyright industries and is proud of our vibrant creative workforce. *The Register of Copyrights Selection and Accountability Act* enjoys the strong support of the arts and entertainment labor unions, including American Federation of Musicians, Directors Guild of America, International Alliance of Theatrical Stage Employees, Screen Actors Guild – American Federation of Television and Radio Artists, and Writers Guild of America, East.

We thank the Committee for allowing the union to testify on this matter. Please reach out to us if you have any further questions.

Sarah Howes
Director and Counsel, Government Affairs and Public Policy
Screen Actors Guild – American Federation of Television and Radio Artists

Senate Committee on Rules and Administration
Register of Copyrights Selection and Accountability Act
September 26, 2018
Questions for the record
Mr. Kupferschmid

Senator Cortez Masto

1) *The unique placement of the Register of Copyrights within the Legislative Branch has resulted in litigation about whether this is in violation of the Constitution's Appointments Clause. Addressing that question is one of the stated purposes of this legislation. How significant is this concern?*

The Register of Copyrights is Congress' statutorily designated expert advisor on copyright matters. The Register serves both legislative and executive functions. This makes it unique in relation to every other aspect of the Library of Congress. Because the Register performs some executive functions, the selection process must comply with the Constitution's Appointments Clause. In the one case to challenge the constitutionality of the Register selection process, the court concluded that the arrangement was constitutional under the Appointment's clause because the Register is appointed by the Librarian, who is in turn nominated by the President and confirmed by the Senate. The legislation would create a more direct process for complying with the Appointments Clause by eliminating the contrivance of having the Librarian select the Register and making the Register position itself nominated by the President and confirmed by the Senate.

To be clear, the problem has never been with the constitutionality of the selection process, but instead with the transparency and lines of accountability. Today, the Register is chosen by the Librarian, without any formal requirement for input from Congress or the American people. The legislation would improve the selection process by giving Congress a formal role in selecting its own, statutorily designated expert advisor on copyright matters, making the selection process more transparent, and giving the public and all interested parties a voice through their elected representatives into the selection of the Register. This more direct process will also make the Register more accountable to Congress and put the Register on a better footing to serve Congress and the American people.

2) *Your organization has advocated for moving the Copyright Office out of the legislative branch and making it a completely independent agency. Do you believe that would be the best solution to the Office's problems?*
    a. *Why should the Senate forward with a bill that does not go all the way to making that change?*

We have *not advocated* for moving the Copyright Office out of the legislative branch and making it an independent agency. We have advocated that the Copyright Office remain where it is—in the Library of Congress. Neither of the two bills (H.R. 1695/S. 1010) would move the Office out of the Library or the Legislative Branch. The bills would simply alter the process by which the Register of Copyrights is selected and appointed to provide more transparency and accountability. The bill makes no other

changes to the relationship between the Register and the Librarian, or the relationship between the Office and the Library of Congress.

The Register position is now vacant. Karyn Temple is the Acting Register and doing an excellent job in that capacity. Because the position is vacant, it is imperative that we move expeditiously to consider and enact the bills now. If and when someone is selected by the Librarian to be the next Register, there is a risk that it will polarize the issue as there will be those who support the person selected and those who do not. Once that occurs, consideration of the bills becomes about a person rather than about what constitutes the best policy.

This is bipartisan legislation and is not about any particular President, Librarian, or Register. The Copyright Alliance has been advocating for legislation that would make the Register position nominated by the President and confirmed by the Senate since before November 2014, which was only midway through President Obama's second term, and nearly a year before Dr. Billington, predecessor to Dr. Hayden, announced his plan to retire.

Delaying the bills will also make it significantly more difficult to find quality candidates for the Register position in the interim, since most good candidates will be reluctant to apply, knowing that Congress is considering legislation that will change the nature and selection process for the Register, especially since this means that even if they were selected to be the next Register by the Librarian, they might only hold the position for a brief time.

To the extent there are broader questions concerning the organization and structure of the U.S. Copyright Office or modernization of the Office that need to be addressed, those can be addressed in due time. Trying to address those now, in conjunction with H.R. 1695/S. 1010, would only serve to jeopardize and delay the passage of these important bills without any real benefit.

These bills represent the most expeditious and least disruptive approach to modernizing the Office. The bills are narrowly drafted to address how the Register of Copyrights is selected. Other proposed changes to modernizing the Office are more complex and would benefit from additional deliberation.

3) *In your testimony you state that the Library of Congress and the Copyright Office have different missions and priorities. Can you describe how the missions of the two organizations are actually in conflict?*

By statute, the Register of Copyrights is meant to be the principal advisor to Congress on national and international copyright matters, providing impartial expertise on copyright law and policy. Congress relies upon, and directs, the Copyright Office to provide critical law and policy services, including domestic and international policy analysis, and legislative support for Congress. In fulfilling this responsibility, the Office engages in numerous rulemakings and issues numerous policy reports.

The Library is not impartial on copyright policy issues. It is a stakeholder, with a particular point of view that often differs from others in the copyright community, and which the Library has advocated that the Copyright Office adopt on several occasions. For example, the Library filed comments in the

Copyright Office's studies on orphan works and mass digitization[1] and on music licensing,[2] as well as in the Office's Section 1201 rulemaking.[3] The ability of the Librarian to select the Register, and to replace the Register with another one, can create undo pressure on a Register's decision-making, even if only inadvertently.

The missions of the two organizations are also potentially conflicting. For example, to register a work, the copyright owner must submit to the Copyright Office a completed registration application, a fee, and a deposit copy of the work, which is made available to the Library to include in its collection. The Office is charged with ensuring that the copy of the work is secure and that the public cannot access the work in a way that could harm the interests of the copyright holder.[4] The Copyright Office has numerous measures in place to prevent unauthorized access and copying of copyright deposits by third parties. For example, the Copyright Office regulations limit who is allowed to access a deposit copy and how the deposit can be accessed. When a qualified person is permitted to access a copy at the Copyright Office, the person does so at a viewing station that is monitored through security cameras. No copying devices are allowed in the viewing stations. Furthermore, as copyright registration deposits continue to move toward digital copies, copyright owners are justifiably concerned about the security of the Office's database of copyright deposits to protect against accidental leakage of these works and unauthorized intrusions into the Office's stores of deposit copies. These concerns certainly existed in the print environment, but the ease of copying and dissemination of purely digital copies in conjunction with the risk of cyberattacks has exponentially increased these fears. As digital deposits become more prevalent, copyright owners will demand improved security and more clarity as to the steps the Copyright Office and the Library are taking to ensure the security of these deposits. To inspire their trust and participation in the copyright registration system, the Office will need to employ commercial-grade digital security measures and take other steps to ensure the safety of works registered with the Office.

The mission of the Library of Congress, by contrast, "is to develop qualitatively the Library's universal collections... and to *provide access to* ... these collections" (emphasis added). If the Library obtains a deposit copy from the Copyright Office, it can make that copy available to anyone without any of the access and copying restrictions employed by the Copyright Office. This is just one of the many tensions between the Copyright Office and the Library.

In November 2016, two former Registers wrote a letter to Congress highlighting the many other tensions between the Library and the Copyright Office that "threaten the integrity of the U.S. copyright system." As they said:

> Libraries, especially the Library of Congress, have a special place in our hearts, our history, and our society. They have the admirable goal of offering to the public the greatest possible

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[1] https://www.copyright.gov/orphan/comments/noi_10222012/Library-of-Congress.pdf

[2] https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/Library_of_Congress_MLS_2014.pdf

[3] https://www.copyright.gov/1201/2000/comments/initial/175.pdf

[4] https://www.copyright.gov/circs/circ06.pdf

volume of material, often at little or no direct cost to their patrons. This mission is manifested in their approach to copyright policy, where the voice of librarians has long been respectfully heard. Congress has responded to the concerns of librarians in shaping copyright law. But an institution with these laudable but limited goals cannot be the keeper of a balanced copyright system that must serve a broader long-term public interest.[5]

[5] https://copyrightalliance.org/wp-content/uploads/2016/11/Copyright-Office-letter-and-Enclosure-2.pdf

United States Senate
Committee on Rules and Administration

Responses of Jonathan Band to
Senator Cortez Masto's Questions for the Record on
The Register of Copyrights Selection and Accountability Act of 2017, S. 1010

1) **The unique placement of the Register of Copyrights within the Legislative Branch has resulted in litigation about whether this is in violation of the Constitution's Appointments Clause. Addressing that question is one of the stated purposes of this legislation. How significant is this concern?**

Courts have repeatedly affirmed the constitutionality of the fundamental organizational structure of the Library of Congress. After the decisions of the U.S. Court of Appeals for the District Columbia Circuit in *Intercollegiate Broadcasting System v. Copyright Royalty Board*, 796 F.3d 111 (D.C. Cir. 2015) and *Intercollegiate Broadcasting System v. Copyright Royalty Board,* 684 F.3d 1332 (D.C. Cir. 2012), there is no doubt that the current structure of the Register of Copyrights reporting to the Librarian of Congress is constitutional. The court found that under the Constitution's Appointments Clause, an officer could exercise significant authority only if she was a principal officer—that is, if she was appointed by the President—or if she was supervised by a department head who had been appointed by the President. The structure of the Copyright Royalty Board ("CRB") in 2012 violated the Appointments Clause because its judges exercised significant ratemaking authority even though they were not appointed by the President and were not supervised by the Librarian, who did not have the power to remove them. The D.C. Circuit remedied the problem by granting the Librarian the power to remove CRB judges.

Because she can be removed by the Librarian of Congress, the Register clearly is an "inferior officer" rather than a principal officer. The current structure thus avoids the Appointments Clause infirmity addressed by the D.C. Circuit in 2012.

However, the Register of Copyrights Selection and Accountability Act, S. 1010, would introduce a new constitutional problem. 17 U.S.C. § 701 as amended by S. 1010 would establish a panel consisting of specified members of Congress and the Librarian of Congress to recommend individuals to the President for appointment as Register of Copyrights. But in contrast to the statutes relating to the selection of the Comptroller General or the Architect of the Capitol, where the President is not required to select one of the individuals recommended by a panel consisting of Congressional leadership, S. 1010 provides that the Register "shall be appointed by the President from the individuals" recommended by the panel. Accordingly, under S. 1010, the President would not have the discretion to select someone not on the list of individuals recommended by the panel. This restriction on the discretion of the President most likely renders S. 1010 unconstitutional.

2) **Do you believe that this bill would be the end of the discussion when it comes to the role and location of the Copyright Office within the Library of Congress, or do you think this would be just the first step to completely moving the office out of the Legislative Branch?**
    a. **What would the harms of such a move be?**

Unfortunately, I believe that enactment of this legislation would be just the first step towards removing the Copyright Office from the Library of Congress. Where it would end up is far from clear.

One obvious harm of any such move is the confusion and uncertainty it would cause. For five to ten years, the energy of the Office would be focused on the logistics of the move as well as turf-fighting with the many other federal entities that deal with copyright matters to establish a new hierarchy. During this period, the main task of the Office—administering the nuts and bolts of the copyright registration system—would be neglected.

Stripping the Copyright Office of its current support systems and organizational context would also unmoor it from its mission to promote creativity and innovation, responsive to the needs of various sectors and balanced in its approach to both users and rightsholders.

Additionally, removing the Office from the Library could interfere with the deposit system that has created the world's most comprehensive library collection.

3) **Mr. Kupferschmid's testimony states that the Library of Congress and the Copyright Office have different missions and priorities. Do you agree that the missions of the Library and the Copyright Office are in direct conflict with one another?**

The mission of the Copyright Office reinforces the mission of other components of the Library of Congress and vice versa. The Office and the Library both seek to fulfill the mandate of the Constitution's intellectual property clause, promoting the progress of science and useful arts. They both are interested in encouraging the creation and distribution of literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, audio, audiovisual, and architectural works.

Although they have different roles in the creative eco-system, the Office and the Library operate in the same ecosystem with the same overall objective. The Copyright Office is responsible for the registration of copyrights and the recordation of their transfer. The Library is responsible for preserving our cultural heritage and making it accessible for authors to use in creating new works. Their ultimate responsibility, however, is to serve all Americans. At a policy level, both the Office and the Library seek to promote a healthy copyright environment where authors have the incentive to create new works but at the same time have the ability to use existing works as the raw material for their new creations.

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