



January 31, 2017

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RE: First Policy Proposal – Reform of the U.S. Copyright Office

The Association of American Publishers (“AAP”) is the national trade association of the U.S. book and journal publishing industry. AAP’s nearly 400 members include most major commercial publishers in the U.S., as well as smaller and non-profit publishers, university presses, and scholarly societies, and they publish works in every field and format, including popular books, scholarly journals and monographs, software, websites, and a variety of other electronic publications. Among AAP’s highest public policy priorities are the protection and enforcement of intellectual property rights, defense of the freedom to read and the freedom to publish, and promotion of research, education and literacy.

AAP and its members enthusiastically welcome this First Policy Proposal (“Proposal”) from Chairman Bob Goodlatte and Ranking Member John Conyers arising out of the House Judiciary Committee’s thorough review of U.S. copyright law. As we have expressed in the past, we believe modernizing the technology infrastructure of the Copyright Office and both the appointments process and portfolio of the Register of Copyrights are an outstanding legislative starting point for the Committee in modernizing the overall copyright framework of the United States.¹ We commend the Committee for its careful work in arriving at this point and we note further that the timing of the Committee’s work could also present an important appointment opportunity for the new President.

To this end, AAP is also pleased to note the significant overlap between the Proposal and the Draft Principles for Copyright Office Structural Improvements and Modernization Legislation (“Senate Draft Principles”), which were circulated by the leadership of the Senate Committee on the Judiciary in July 2016.² AAP is ready to offer its assistance in any bicameral efforts towards a 21st Century U.S. Copyright Office.

The Register of Copyrights and Copyright Office Structure

AAP supports the Proposal’s call for the Copyright Office to have autonomy over its budgetary and technology needs, which for reasons of efficacy and practicality should include related operational autonomy over staffing matters and administrative

¹ *The U.S. Copyright Office: Its Functions and Resources: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary, 114th Cong. 120-127, 120 (2015)* (statement of the Association of American Publishers) [hereinafter *AAP Copyright Office Hearing Statement*] (“[W]hatever other action the Committee may pursue based on the evidentiary record at the conclusion of its comprehensive review of U.S. copyright law, modernizing the Copyright Office is an urgent priority.”), available at

https://judiciary.house.gov/wp-content/uploads/2016/02/114-4_93529.pdf

² *Draft Principles for Copyright Office Structural Improvements and Modernization Legislation* (2016) [hereinafter *Senate Draft Principles*], available at <https://publishers.sharefile.com/d-sf50ac1db2034bcea>.

actions. In order to ensure that the Register of Copyrights can act autonomously on these matters, as well as establish Copyright Office regulations without the need for approval of the Librarian of Congress, AAP continues to support making the Register of Copyrights a Presidential appointee subject to Senate confirmation.³ We also favor placing a 10-year term limit on the position subject to potential reappointment.⁴ In addition, we urge the Committee to adopt the Senate Draft Principles proposals to make the Register removable by the President only for cause and to establish post-employment restrictions on the position consistent with 18 U.S.C. 207(e).

While we fully understand the skepticism that greets calls for giving greater substantive rulemaking authority to the head of any federal agency, there are special considerations for providing the Register with such authority. The provisions of the Copyright Act have evolved to embody a civil code-like complexity, and the legislative process cannot move at the rate of rapid technological, economic and cultural developments that affect and are affected by copyright law. Given these realities, Congress and the Copyright Office would be more efficient and effective in keeping the substance, administration and implementation of copyright law current and comprehensible if they could replicate the well-established division of labor that Congress has with other U.S. Government agencies and departments establishing and effectuating, respectively, national public policies through federal statutory laws and implementing regulations. By allowing the Register to exercise the substantive rulemaking authority typically available to other heads of federal agencies responsible for administering major federal laws, Congress could focus its efforts on updating the Act through a streamlined statutory framework of general principles and leave the detailed application of the statute to the Government's substantive and administrative

³ See *AAP Copyright Office Hearing Statement*, *supra* note 1, at 126.

⁴ See, e.g., Librarian of Congress Succession Modernization Act of 2015, S.2161, 114th (2015), available at <https://www.congress.gov/bill/114th-congress/senate-bill/2162/text/pl> for a good example of language we would support limiting the Register's term to 10 years and providing for renewed appointment.

copyright experts – the Copyright Office – subject to continuing Congressional oversight and the Register’s accountability as a Presidential appointee.

AAP notes its participation in the Library of Congress’ survey regarding the qualifications of the next Register.⁵ In that submission, we urged the Librarian to coordinate her actions with this Committee as well as Senate Judiciary, as the Committees with substantive jurisdiction over copyright law that are currently considering proposals to update the statutory terms for the appointment and service of the next Register of Copyrights.

Although the Librarian has long had the legal authority to appoint and generally supervise the Register, we strongly believe that the specialized mission and responsibilities of the Copyright Office have evolved from their historical origins to the present dynamic circumstances where there are significant benefits to be realized from updating both the status of the Register as an agency head and the process by which the Register is appointed. We do not doubt that the Copyright Office can manage and meet its new and evolved responsibilities even if it remains within the structure of the Library of Congress. However, we are concerned that failing to acknowledge its distinct and divergent mission, in favor of treating it as merely a division of the Library that can be drawn further into the Library’s own mission responsibilities at the discretion of the Librarian, will undoubtedly hinder its ability to do so. Moreover, we believe that the current Acting Register has the experience and necessary skills to perform the Register’s duties while Congress decides on new appointment and confirmation processes more appropriate for a 21st Century Copyright Office. We urge the Committee to maintain communication with the Library and clearly convey its authority, intention and

⁵ *Comments of the Association of American Publishers in Response to Librarian of Congress’ Survey on the Expertise Needed by Register of Copyrights* (Jan 31, 2017), available at <https://publishers.sharefile.com/d-sedddd9ab53b4b879>.

rationale for making such much-needed changes to the status and process for appointment of the next Register.

Copyright Office Advisory Committees

The AAP agrees that it would be beneficial to add the disciplined expertise of a Chief Economist, Chief Technologist and a Deputy Register to the Copyright Office, but views the benefits of creating a collection of permanent and ad-hoc “advisory committees” as far less clear. One of the strengths of the Copyright Office today is that it regularly provides inclusive and transparent opportunities for stakeholders from across the copyright ecosystem to express their views on matters under its consideration. Rather than adding value to the status quo, authorizing these committees to consider public policy issues that underlie the substance of statutory copyright law is more likely to generate allegations of imbalance, undue influence, or other unnecessary controversies regarding their membership, activities and the relationship of their input to that which is currently obtained from stakeholders through open processes for soliciting public comment via Federal Register notices, public roundtables, and other highly participatory means.

For these reasons, if the Committee should nevertheless decide that the Copyright Office must establish such bodies, AAP urges the Committee to limit their scope to *operational* issues concerning systems and processes of the Copyright Office.⁶

⁶ See *Senate Draft Principles*, *supra* note 2, for a proposal modeling a Copyright Office Public Advisory Committee after the Patent Public Advisory Committee with a focus on operational issues.

Information Technology Upgrades – Funding and Steps towards a Robust Public Record

AAP continues to support rapid implementation of the Copyright Office IT Modernization Plan.⁷ AAP also supports the Committee’s proposal to give the Copyright Office the authority to build up reserve accounts and offer additional fee-for-service options to contribute to the Office’s IT modernization. The Office should also be allowed to charge new fees to customers that are not themselves copyright owners but whose businesses are built around licensing the use of copyright protected works. However, AAP reiterates its view that the increasing importance of copyright and accurate copyright ownership records to the U.S. economy and a host of other societal interests justify the continued funding of the Office and its modernization plans primarily through appropriated dollars rather than user fees.

AAP also supports all steps towards a robust, accurate and searchable online database of historical and current copyright ownership information. We believe that authorizing the Office to undertake pilot projects to increase registration is an effective way to achieve that goal. In contrast, we believe that, if copyright owners – especially individuals and small businesses – are discouraged from registering their works by increased or new fees, we will have a weaker public record. As standardized identifiers become more prevalent and important in the identification of copyrighted works online, we do not believe their inclusion in the record should be subject to an additional fee. The proposal to include additional registration information in the Copyright Office’s database, such as licensing agents, would certainly be desirable but not a necessary first step.

⁷ *Comments of the Association of American Publishers in Response to the Copyright Office Request for Comment on Information Technology Upgrades for a Twenty-First Century Copyright Office* (Mar 31, 2016), available at <https://www.regulations.gov/document?D=COLC-2016-0002-0051>.

Finally, given the significant needs of the Copyright Office to address its own technology challenges, AAP agrees with the Committee that the Register should have the autonomy to decide whether the Office's needs would be best served by directing Copyright Office's resources to help finance the current construction of the Library's collections datacenter in Virginia.

Small Claims

AAP supports implementing a streamlined system to address frequent occurrence, low value copyright infringement claims. Although there are many issues to consider in constructing a small claims process that will be both practical and constitutional, in general, we believe such a system would be beneficial for the copyright ecosystem as long as participation is voluntary and it includes meaningful deterrents for nuisance claims.⁸ In addition to participating in the Copyright Office's inquiry on the matter of small claims, AAP has been supportive of the introduction of H.R. 5757, the Copyright Alternative in Small-Claims Enforcement (CASE) Act by Representatives Jeffries and Marino, and H.R. 6496, the Fairness for American Small Creators Act by Representatives Chu and Smith.

We question, however, whether allowing cases of "bad faith Section 512 notices" would conflict with the goal of a streamlined process for a small claims system. In

⁸ AAP *Initial Comments of the Association of American Publishers in Response to the Copyright Office Notice of Inquiry on Remedies for Small Copyright Claims* (Jan 17, 2012), available at https://www.copyright.gov/docs/smallclaims/comments/06_association_of_american_publishers.pdf; *Additional Comments of the Association of American Publishers in Response to the Copyright Office Notice of Inquiry on Remedies for Small Copyright Claims* (Oct 19, 2012), available at https://www.copyright.gov/docs/smallclaims/comments/noi_10112012/AAP.pdf; *Submission of the Association of American Publishers in Response to the Copyright Office Notice of Inquiry on Remedies for Small Copyright Claims* (Apr 12, 2013); available at https://www.copyright.gov/docs/smallclaims/comments/noi_02263013/AAP.pdf.

addition to entailing heavily factual inquiries that are likely to require costly and burdensome discovery, the sheer volume of notices that copyright owners are compelled to send on a regular basis, combined with the availability of such a dedicated new forum for contesting their validity, seems likely to exponentially increase allegations of “bad faith” notices to the point where they could overwhelm the system. Therefore, we urge careful consideration of how the primary goal of creating an effectively streamlined small claims review process for low value copyright infringement claims would be impacted by including “bad faith Section 512 notice” claims within the scope of actions to be addressed through that process.

Conclusion

AAP commends the Committee for its dedication to bringing the Copyright Office into the 21st century. We look forward to working with you to ensure that the goals of the Copyright Act guide the Committee’s decisions on changes to the Copyright Office’s structure, authority and resources.

Sincerely,



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