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January 31, 2017

The Honorable Bob Goodlatte Chariman House Judiciary Committee 2038 Rayburn House Office Bldg. Washington, D.C. 20515 The Honorable John Conyers, Jr. Ranking Member House Judiciary Committee 2138 Rayburn House Office Bldg. Washington, D.C. 20515

Dear Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee,

We reviewed with great interest the first policy proposal issued by the House Judiciary Committee (the "Committee") in connection with its review of U.S. Copyright law, and we thank the Committee for the opportunity to submit these comments on behalf of the Authors Guild's 9,000 members. The Authors Guild and its predecessor organization, the Authors League of America, have been leading advocates for authors' copyright and contractual interests since the League's founding in 1912. Our members represent the broad sweep of American authorship; among them are historians, biographers, poets, freelance journalists, and novelists, bestselling and self-published alike. These writers are among the chief clientele of the United States Copyright Office (the "Copyright Office," or "Office"), the reform of which is contemplated in the policy proposal at issue here.

The Copyright Office is currently the only U.S. government agency dedicated to serving the interests of our nation's creative workers; the other federal agencies that address intellectual property rights, such as the office of the U.S. Trade Representative and the U.S. Patent and Trademark Office, are primarily focused on the interests of businesses. The labor of authors and other individual creators supports the growth of

our economy and fortifies the intellectual and imaginative welfare of our citizens. But as authors' ability to compete in the digital economy is increasingly besieged, they need representation within the federal government more than ever—not only for their own benefit, but for that of the nation as a whole. It is the role of the Copyright Office to provide that representation, and in order to do so thoroughly and efficiently, it must be reformed to meet the needs of a 21st-century copyright system, as the Committee has recognized.

We address your specific proposals concerning reform of the U.S. Copyright Office below.

I. The Register of Copyrights and Copyright Office Structure

The Copyright Office is the warden of the U.S. copyright system and the administrator of the duties prescribed it under the copyright law. The copyright protection afforded by the copyright law contributes over one trillion dollars to the U.S. economy and is essential to furthering public discourse and artistic progress in this nation. The political status and power of the Copyright Office must reflect the importance of the copyright system to the U.S. economy and to U.S. culture. To fulfill this important role, the Office needs independent authority over its budget, its technology, and its promulgation of regulations under the Copyright Act. We strongly agree with the Committee's proposal that the Office should have autonomy over its budget and technology needs, as discussed in greater detail below, and we applaud the Committee for this important proposal.

A 21st-century Copyright Office needs to be structured in a manner that works in the 21st century and not as a relic of the late 19th century. It made sense to place the Copyright Office in the Library of Congress (the "Library") in 1897 in order for the Library to obtain the deposit copies (e.g., books) accompanying copyright registration. However, technology, as well as the position of copyright in our economy and culture, has changed to such an extent that it no longer makes sense for the Copyright Office to report to the Librarian of Congress. The concerns, needs, and particularly the technology requirements of the Copyright Office today are far removed from those of the Library; there are no synergies in keeping the Office in the Library;

instead, crippling inefficiencies are created. The Library's need for copyright deposits can be addressed through legislation; no matter where the Office resides, in other words, it can continue to turn deposits over to the Library. And, as we have explained in the past, the copies needed for copyright examination and deposit, as well as the Library's purposes of preservation and access over the long term, are no longer the same copies. Sections 407 and 408 of the Copyright Act thus should be disentangled.

Further, there are unnecessary administrative burdens placed on the Office as a result of having to report to the Library. For instance, we understand that the Library currently requires communications with the public and Congress to be channeled through the Librarian's office. This must unnecessarily slow down the Office in its important work with Congress. Moreover, as discussed below, in a move that will very likely cause major roadblocks to building a well-functioning IT system for the Office, the House of Representatives Committee on Appropriations' 2017 Legislative Branch Subcommittee Appropriations Report, which has been supported by the Librarian, directed the Office build its updated IT systems around the datacenter that the Library has planned for itself. This will prevent the Office from building a system customized to its own needs.

Copyright Office Placement

The Guild supports the Committee's proposal to keep the Copyright Office in the Legislative Branch. It appears to be the best and most expedient solution, and would allow Congress to maintain its productive working relationship with the Office. Far more important than where the Office resides, though, is to ensure the Office's independence from the Library's oversight. As such, we would not oppose alternative solutions to to the Office's placement.

One major consequence of leaving the Office in the Library and reporting to the Librarian, among other issues described below, is that the Library will oversee the building of

¹ Prepared Statement of Mary Rasenberger, Executive Director, The Authors Guild, Inc., Hearing Before the Subcommittee of Courts, Intellectual Property, and the Internet of the Committee on the Judiciary, Oversight of the U.S. Copyright Office, Sept. 18, 2014, available at https://judiciary.house.gov/wp-content/uploads/2016/02/113-116-89810-1.pdf; Prepared Statement of Mary Rasenberger on behalf of the Authors Guild, Hearing Before the Committee on the Judiciary, U.S. Copyright Office: Its Functions and Resources, Feb. 26, 2015, available at https://judiciary.house.gov/wp-content/uploads/2016/02/114-4 93529.pdf

the Copyright Office's IT system and will utilize the Library's planned new data center. Setting aside the fact that this data center is still only in the planning stages and will take a very long time to build, it seems self-evident that any new Copyright Office system developed around the data center to comply with the Library's needs—as opposed to the Office's requirements—would be unsuitable to the Office's current needs and defunct before it is even operational, costing tax payers and copyright registrants (whose fees pay a substantial part of the Office's budget) millions of dollars in wasted funds.

Nomination and Expertise of the Register of Copyrights

We support the Committee's proposal that future Registers of Copyrights (or such other title as the head of the Office will have, but for convenience, we use the term "Register") should be subject to a Presidential nomination and Senate confirmation process with a 10-year term limit, subject to potential re-nomination. A 10-year term is a reasonable amount of time for the head of the Office to accomplish important goals without becoming too entrenched.

With respect to the expertise required of the Register, deep knowledge and expertise in copyright law is of utmost importance, as the Copyright Office is charged with overseeing the copyright registration system (where obscure issues of copyright law sometimes emerge) and with advising Congress, federal agencies, and the courts on often intricate matters of copyright law. The Register should also have the managerial experience necessary to oversee the Office's registration and recordation services, its policy work, and the development of a new IT system.

A nomination-and-consent process for the Register of Copyrights is preferable to the current state of affairs, where the Register is appointed by the Librarian of Congress. For reasons that remain opaque to authors, the major library associations (i.e., the American Library Association and the Association of Research Libraries) have adopted copyright minimalist policies, aligning themselves with technology platform companies, whose businesses have grown as conveyors of content without paying for that content or protecting it, at the expense of the creative sector.² As a result, in recent years revenues to creators are diminishing to unsustainable

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² See Jonathan Taplin, "Forget AT&T. The Real Monopolies are Google and Facebook." THE NEW YORK TIMES, Dec. 13, 2016, available at https://www.nytimes.com/2016/12/13/opinion/forget-att-the-real-monopolies-are-

levels and many creators are being forced to leave the creative sector.³ While we whole-heartedly understand why libraries are interested in inexpensive access to works and ease of distribution as a way to fulfill their own noble mission of preservation and public access, it should not come at the cost of professional creators. Unless Congress is determined to weaken and undermine copyright law even further than it has been in the last decade, it makes no sense to have the Office report to the Librarian, whose main interests and allegiance will naturally and rightfully rest with the library sector. (In the meantime, we will continue to try to find common ground with the library sector, as authors and libraries should be natural allies.)

The importance of nomination-and-consent has become all too clear in recent months, after the Librarian of Congress removed then-Register Maria Pallante, a proponent of Copyright Office independence. This removal, as the Committee is aware, caused wide-ranging consternation within the copyright community. Ms. Pallante was highly regarded in the copyright community, and by the House and Senate Judiciary committees that oversee the policy work of the Office, for having served Congress and the copyright community diligently. This should not have been allowed to occur without the input of your Committee. To be clear, the fault lies with the current law and *not* with the new Librarian, who likely determined based on the law alone (i.e., Section 701 of the Copyright Act) that the Register was merely one of her reports. It is clear that Section 701 needs to be amended to remove the provision that subjects the Register to the direction and supervision of the Librarian.

Moreover, the Office needs authority to independently promulgate copyright regulations. Since it may not be practical for Congress to legislate effectively for the long term on technology-specific matters, one of the more important policy functions of the Copyright Office is the promulgation of copyright regulations. Yet, oddly, these remain subject to the approval of

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google-and-facebook.html ("In the past decade, an enormous reallocation of revenue of perhaps \$50 billion a year has taken place, with economic value moving from creators of content to owners of monopoly platforms.").

3 A 2015 Authors Guild survey showed that full-time authors suffered a 30% drop in income from 2009 to 2015. See THE WAGES OF WRITING: KEY FINDINGS FROM THE 2015 AUTHORS GUILD MEMBER SURVEY, available at https://www.authorsguild.org/industry-advocacy/the-wages-of-writing/; according to the Nashville Songwriters Association International, the number of full-time Songwriters in Nashville has fallen 80 percent since 2000. See "Nashville's Musical Middle Class Collapses," THE TENNESSEAN, Jan. 3, 2015, available at http://www.tennessean.com/story/entertainment/music/2015/01/04/nashville-musical-middle-class-collapses-new-dylans/21236245/.

the Librarian of Congress, who is not required to have any copyright expertise. This divergence in mission and policy argues against keeping the powers to appoint the Register—and to approve copyright policy—with the Librarian of Congress. Accordingly, Section 702 of the Copyright Act also needs to be amended to allow the Register to independently issue regulations.

Positions to Advise the Register

Regarding the Committee's proposed addition of several positions to advise the Register of Copyrights (including Chief Economist, Chief Technologist, and a Deputy Register), we agree that the Office needs more internal expertise, particularly in the areas of technology. The Office, like many other agencies that communicate interactively with the public, is increasingly reliant on technology as an integral part of its business.

Moreover, the Office should employ software expertise in order to properly examine applications to register software. It is difficult for someone without any software expertise to understand what is or is not original text in a software program, meaning that unoriginal software might be registered when it should not be. This has the potential to undermine copyright law. As the Guild's members are both users and owners of copyrights, the Guild advocates for balanced copyright laws that encourage creation by allowing professionals to make a sufficient return to keep creating, without overextending copyright protections and preventing works from entering the public domain or being exploited pursuant to the principles of traditional fair use. Instances of over-protection often are used to argue in front of courts and Congress for diminished protections, which adversely affects authors who are fully entitled to protection under the Copyright Act.

II. Copyright Office Advisory Committees

The Authors Guild sees no real need for permanent or *ad hoc* committees to advise the Register, particularly if the Register is indeed a copyright expert (as discussed above). That said, the Guild would not be opposed to advisory committees, subject to the following considerations.

We support the Committee's recommendation that the members of these committees should "reflect a wide range of views and interests." Indeed, viewpoint diversity would be in keeping with the Copyright Office's longstanding practice of soliciting feedback from the entire spectrum of copyright stakeholders—and, even more importantly, of addressing that feedback and incorporating it in the Office's policy recommendations.

To ensure the diversity described above, we support the Committee's proposal that advisory committee membership should be term-limited and the ability of individuals to serve on more than one committee be limited.

Further, we urge the Committee to keep in mind, when creating these committees and determining the issues they will advise on, that the Copyright Office exists to advance the purposes of copyright—namely, to benefit the public by incentivizing the production of new works—not to undermine copyright's goals or to dilute the copyright protections our country's creators rely on to continue producing their works.

III. Information Technology Upgrades

The Copyright Office's infrastructure is a remnant of the analog era. Bringing it into the 21st century particularly requires: (1) modernization of the registration and recordation systems; (2) staff that in quantity and expertise can execute the amount and complexity of the work it performs for stakeholders; and (3) independence and improvement of its IT resources. The Authors Guild agrees with the Committee in welcoming and supporting the suitability and thoroughness of the Office's own \$165 million, 5-year IT modernization plan, and we too believe the quickest effective rollout possible would be best for the copyright community.

The Office Should Not Be Required to Rely on the Library Data Center

Relatedly, we strongly agree with the Committee's proposal that the Copyright Office should have the autonomy to determine whether the costs and reliability of using the Library of Congress' planned data center (which, we agree, is more appropriate for archival purposes than

the needs of a modern copyright economy) is indeed best suited to the Office's current and future IT needs.

We have previously expressed concern about the directives to the Office contained in the House of Representatives Appropriations Committee's 2017 Legislative Branch Subcommittee Appropriations Report—specifically, that the Copyright Office "utilize the new hosting facility [to be shared with the Library of Congress] as the primary data center for infrastructure support." The Library's new IT plan, it bears repeating, is so wholly different from that which would serve the needs of the U.S. copyright system that inefficiencies will be incurred rather than alleviated through shared services with the Library's planned new data center. A nimble copyright system should not be tied to a data center.

The Office engaged in a study of and proposal for the technological requirements of the Office, soliciting and incorporating public input. It is this thoroughly considered and well-documented IT modernization plan,⁴ which Congress should support, as it is built around the needs of copyright owners and users, not as a workaround to accommodate the Library's data center.

Of particular concern to the nation's creators is the fact that this data center could be partially funded by an increase in Copyright Office fees. Authors and other individuals may not be able to afford increased fees, which will inevitably result in a reduced number of registrations by individuals. The prospect of increased fees is especially troubling if those fees are used to fund an imperfect IT solution (one built around the Library's data center, as oppsed to the Copyright Office's IT modernization plan). Essentially, under this plan, copyright owners' fees might be used to help build the Library's infrastructure, as opposed to one developed specifically for the copyright owner and user community. Copyright owners already subsidize the Library by providing free deposits under Sections 407 and 408 of the Copyright Act. It is not fair to impose an additional burden on them to subsidize the Library's technology.

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⁴ United States Copyright Office, Provisional Information Technology Modernization Plan and Cost Analysis, Feb. 29, 2016, *available at* https://www.copyright.gov/reports/itplan/technology-report.pdf.

A Searchable, Digital Database of Copyright Ownership Information

A registration and recordation system that is still largely paper-based cannot meet the needs of today's authors and businesses. It is crucial that copyright documentation be processed more quickly and retrieved more easily. It is also essential that information received be more thorough, accurate, and reliable. The Office needs an authoritative, dependable, secure, and *integrated* database containing all copyright information relating to a given work—both registration and recordation information. A reliable and intuitive copyright record system would have the additional benefit of increasing commerce by removing uncertainty for those seeking to license works for downstream use. It would also alleviate the problem of orphan works by minimizing the number of rightsholders who can't be found. Accordingly, we support the Committee's recommendation that the Copyright Office should build and maintain a fully searchable, integrated digital database of historical and current copyright registration and ownership (i.e., chain of title) information.

Currently, the registration and recordation databases are not integrated. The current bifurcated system impedes businesses trying to sell, buy, or collateralize copyrights, as well as users seeking permissions from current owners or trying to determine copyright status. But the Copyright Office, in its IT modernization plan suggests building a fully integrated and automated registration/recordation system that provides for a more fluid chain of title. We support this proposal for maintenance of a searchable, digital database of historical and current copyright ownership information.

Fee-for-Service Options and Pilot Projects

The Committee's proposal explores fee-for-service options by which Copyright Office customers could receive additional services for an increased fee, such as (1) the inclusion of additional metadata, such as standardized identifiers, in Copyright Office records, and (2) high speed, high volume access to the Copyright Office records database. These fee-for-service options should be deployed in a tiered-fee manner that does not disproportionately burden small businesses and independent creators.

The Authors Guild recognizes the Copyright Office's need to build up reserve accounts and generate revenues for IT modernization, and recognizes that collecting fees from Copyright Office users is a sensible way to ensure the Office's financial viability. But it is essential that the Committee and the Office be mindful that many creators have limited financial resources, and thus, because registration is voluntary, a significant increase in fees for individual authors and other creators likely will result in fewer registrations, leading to less, not more, income from registration fees and defeating the goal of improving the public record of copyright ownership.

Moreover, any across-the-board fee increase would exert a disproportionate burden on authors and other individual and small copyright holders whose revenues don't come close to matching those of corporate copyright holders. We want to underscore that it would be much more sensible to institute a tier-based fee structure based on the size of the user and the volume of the use, including the increased fee for high speed, high volume access to the Office's database mentioned in the Committee's proposal. Those who pay a higher fee could be entitled to certain services, such as an expedited execution of requests. Further, a tiered fee schedule would also account for the unique position of individual authors who we believe will be using and needing Copyright Office services more than ever, with the increase in self-publishing and self-republishing. The Internet age finds more authors self-publishing or self-republishing. In sum, if the Office absolutely must raise fees to help pay for technological improvements, we strongly favor a tiered-fee schedule; corporate copyright holders, who use the Copyright Office's services in much greater volume than individuals, should pay a higher fee rate than independent creators.

Lastly, we agree wholeheartedly with the Committee's recommendation that the Copyright Office be authorized and encouraged to undertake pilot projects to increase the federal registration of copyrights. An increase in registrations benefits all parts of the copyright owner and user communities: more copyright holders will be eligible for the benefits of registration, and copyright users and the public at large will benefit from the increased ability to find rightsholders and make licensed use of their works.

IV. Small Claims

The costs of obtaining counsel and maintaining a copyright infringement cause of action in federal court effectively preclude most individual copyright owners whose works are infringed from being able to assert their rights and deter continuing violations. This means that only wealthy copyright owners can effectively protect their rights, and others—most authors included—have an empty right without a remedy. Consequently, we agree with the committee that the Copyright Office should host a tribunal to dispose of small copyright claims efficiently and affordably.

We agree too that the court should be consistent with the plan outlined in the Copyright Office's 2013 report on the matter. Indeed, as this Committee knows, draft legislation consistent with the Office's plan has been circulated among copyright stakeholders, and legislation on the matter is planned to be introduced this legislative session. We have only one serious substantive issue with the Copyright Office's report and the draft legislation: the limit of \$15,000 per work infringed is too low to be helpful to authors in most situations. Whereas a photographer, for instance, might shoot a thousand photographs in a day, and so several thousand dollars might represent fair compensation. Most books, on the other hand, take multiple years to write. If the value of a book is drastically reduced due to an infringement, \$15,000 often will not be sufficient compensation.

Conclusion

The Copyright Office provides important, effective services with the resources it has, but its infrastructure, funding, and status within the U.S. government need upgrading to meet the needs of 21st-century owners and users of copyrighted works. Increased funding is the first and most obvious solution to the Office's need for infrastructure improvements. This lack of funding is complicated by the Librarian of Congress's control of the Copyright Office's budget and the Office's inability to build and use its reserve fund at its discretion. Again, as the Committee has recognized, the Office needs authority over its budget needs, especially over its own allocation of funds. Equally important, the Office should also be given the authority and autonomy of an

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⁵ United States Copyright Office, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS, Sep. 2013, available at https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf.

expert agency, so that it may provide guidance on complex copyright issues and issue its own regulations.

The Authors Guild thanks the Committee for its attention to this important matter, and we are available for consultation.

Sincerely,

Mary Rasenberger

Executive Director

The Authors Guild