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# A 21<sup>st</sup> Century Copyright Office: The Conservative Case for Reform

Center for the Economics of the Internet  
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# A 21<sup>ST</sup> CENTURY COPYRIGHT OFFICE: THE CONSERVATIVE CASE FOR REFORM

## Executive Summary

This white paper examines the history and constitutional status of the copyright functions of the federal government. It concludes that the U.S. Copyright Office will function better, be more respectful of our constitutional structure, and enhance the \$1.1 trillion copyright sector if it is removed from the Library of Congress.

- Copyright functions were placed in the Library in 1870, as a result of lobbying by then-Librarian Ainsworth Spofford, who wanted to add the copies of books sent in for copyright registration to the collections of the Library.
- That structure remains in place; the head of the Copyright Office (the Register of Copyrights) must rely on the Librarian for HR, budget requests, IT, and even sign-off on regulatory matters.
- Rather than supporting and protecting the Copyright Office, the Library prioritizes other functions. As a result of its Cinderella status, the Copyright Offices' services are badly outdated, some still paper-only.
- A bipartisan group of members of Congress and a broad array of stakeholders agree that the Copyright Office needs to modernize and should be removed from the Library.
- To comply with the Appointments Clause of the Constitution, the Register should be appointed by the President and confirmed by the Senate. Currently the Librarian selects the Register.
- The retirement of the current Librarian has led some frequent copyright critics to seek appointment of an activist Librarian to, for the first time in history, use that office to impose their perspectives on the Copyright Office. These comments illustrate an undisguised effort at institutional agency capture by a single interest group. It should be clear that a Copyright Office structured to be permanently answerable only to a particular perspective is bad government.
- The Copyright Office can and should continue to provide its expert, nonpartisan advice to Congress, balancing the interests of all copyright stakeholders as it has always done.
- The Copyright Office is perhaps the best investment in government with a more than \$70,000 to \$1 return on taxpayer funds. Private partnerships can keep modernization costs low. Fees can be raised to offset expenses. And the benefits to reducing regulatory compliance costs and lowering information costs will provide a return through increased economic activity.
- An array of conservative, pro-small government organizations recognize this value proposition. Americans for Tax Reform sees the potential that "A modern Copyright Office will reduce friction in the over \$1.1 trillion marketplace for copyrighted works, and incentivize creativity, innovation investment and jobs...." The American Conservative Union and Citizens Against Government Waste also support a "twenty-first century Copyright Office."
- The question is not *whether* the Copyright Office should modernize – it must. It is whether to do so through the filter of the Library of Congress and its other priorities, or in a way that allows the creation of systems designed for the needs of the Copyright Office? The answer is clear – the Copyright Office should have the authority to modernize for the needs of its customers.

# A 21<sup>ST</sup> CENTURY COPYRIGHT OFFICE: THE CONSERVATIVE CASE FOR REFORM

## I. Introduction

The Copyright Office has been described as a sleepy backwater government agency. Indeed, with about 385 staff and an annual budget in the range of \$45 million, it is miniscule compared to most other federal agencies. But this tiny office is responsible for administering the law that is at the heart of a collection of American industries that account for more than \$1 trillion in annual economic activity.<sup>1</sup>

In 1790, the 1<sup>st</sup> Congress enacted, and President Washington signed into law, the Copyright Act of 1790. Since that time, and without interruption to the present day, the administrative copyright functions of the federal government have been performed by district court clerks and then by the Library of Congress, current home of the Copyright Office, but never by an executive branch agency.

This arrangement has presented constitutional questions about the authority exercised by the Copyright Office and, more recently, practical issues about the ability of the Office, as it is currently structured, to serve the public. As a result, we see widespread support and increasing momentum behind the proposal to reform and restructure the Copyright Office in a way that will facilitate its transformation into a customer-oriented, modern, and nimble organization, whose structure and stature appropriately reflect the importance of its mission to the nation's economic and cultural competitiveness.

Part I of this white paper will review the history of how the copyright functions of the federal government have been performed and how restructuring the Copyright Office in a more strategic way will open the door to enhanced value and performance thereby promoting commerce in copyrighted works in the digital age. Part II will review the constitutional requirements for restructuring the Copyright Office and compare the legal and policy benefits of different approaches, with a view towards creating more efficient and effective government services. Part III will consider the financial costs and benefits of restructuring the Copyright Office, evaluating transition costs and appropriate ways to offset those costs, as well as the economic benefits that can reasonably be expected.

This White Paper concludes that reform of the Copyright Office will more explicitly respect the constitutional framework of government, with properly limited authority and direct oversight, and will better serve the public—by enhancing efficiency, reducing information costs, and facilitating utility-maximizing economic transactions.

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<sup>1</sup> See Stephen E. Siwek, “*Copyright Industries in the U.S. Economy*,” 2014 (available at <http://www.iipa.com/pdf/2014CpyrtRptFull.PDF>).

## II. History of Federal Copyright Functions

### THE ORIGINS OF COPYRIGHT IN AMERICA

Copyright was of such importance in the minds of the Founders that copyright laws were among the first laws enacted by the newly independent states under the Articles of Confederation. Thanks in large part to the advocacy of Noah Webster, Connecticut led the way with the first American copyright law, enacted on January 8, 1783.<sup>2</sup> Within three years, and before the adoption of the Constitution, every other State except Delaware followed suit.<sup>3</sup>

At the same time that the states were enacting copyright laws, the Continental Congress agreed “that a committee be appointed to consider the most proper means of cherishing genius and useful arts through the United States by securing to the authors or publishers of new books their property in such works.”<sup>4</sup> James Madison served as one of the three members of that committee.<sup>5</sup> Ultimately, the Constitution authorized Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries....”<sup>6</sup>

President Washington thought the issue of enacting a federal copyright law under the new Constitution sufficiently important that he explicitly called for it in the first State of the Union Address in 1790:

Nor am I less persuaded that you will agree with me in opinion that there is nothing which can better deserve your patronage than the promotion of science and literature. Knowledge is in every country the surest basis of public happiness. In one in which the measures of government receive their impressions so immediately from the sense of the community as in ours it is proportionably essential.<sup>7</sup>

Congress heeded President Washington, and the Copyright Act of 1790 was enacted just a few months later.<sup>8</sup> Many of the same leaders who served in the First Congress had also been members of the Constitutional Convention and/or state ratifying processes.<sup>9</sup>

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<sup>2</sup> Benjamin W. Rudd, “Notable Dates in American Copyright 1783-1969,” 28 *The Quarterly Journal of the Library of Congress*, No. 2 at 137 (April, 1971) available at <http://copyright.gov/history/dates.pdf>.

<sup>3</sup> *Id.*. Delaware would make amends, of sorts, by becoming the first State to ratify the Constitution, which it did on Dec. 7, 1787. See <http://www.archives.gov/education/lessons/constitution-day/ratification.html>.

<sup>4</sup> Rudd at 137.

<sup>5</sup> *Id.*

<sup>6</sup> U.S. CONST. Art. 1, Sec. 8., Cl. 8.

<sup>7</sup> President George Washington, *First Annual Message to Congress on the State of the Union*, Jan. 8, 1790, available at <http://www.presidency.ucsb.edu/ws/?pid=29431>. See also, Tom Sydnor, “Some President’s Day words about copyrights from George Washington,” Feb. 16, 2015, available at <http://www.techpolicydaily.com/technology/presidents-day-copyrights-george-washington/>.

<sup>8</sup> 1 Stat. 124, chap. 15 (May 31, 1790).

<sup>9</sup> Randolph J. May and Seth L. Cooper, “Appreciating intellectual property rights on Constitution Day,” *The Hill* (Sept. 17, 2015)(available at <http://thehill.com/blogs/pundits-blog/technology/253986-appreciating-intellectual-property-rights-on-constitution-day>).

## EVOLUTION OF COPYRIGHT ADMINISTRATION BY THE FEDERAL GOVERNMENT

The 1790 Act required registration of a work as a condition of eligibility for federal copyright protection. That registration was required to be done with the clerk of the local federal district court.<sup>10</sup> Registration was accomplished by depositing a copy of the title of the work. The author had to register prior to publication of the work or all federal protection was lost.<sup>11</sup> The clerk recorded the title in a ledger and gave the author a certificate of the registration, which the author was required to publish in a local newspaper within four weeks.<sup>12</sup> Additionally, authors were instructed to provide a copy of their work within six months of publication to the Secretary of State for preservation purposes and as a record of copyright protection.<sup>13</sup>

Nine days later, on June 9, 1790, *The Philadelphia Spelling Book*, a textbook for school children,<sup>14</sup> became the first work registered under the federal Copyright Act.

In 1831, Congress enacted a general revision of the Copyright Act.<sup>15</sup> Authors were still required to register the title of the work prior to publication with the clerk of the local federal district court.<sup>16</sup> Among its new provisions, the law included as an element of copyright registration (and thus as an explicit condition of federal copyright protection) the requirement to deposit a copy of the work itself within three months of publication.<sup>17</sup> This appeared to replace the old section 4, which mandated deposit with the Secretary of State separate from registration, as that provision was deleted.<sup>18</sup> The clerks were to send a list of the works registered and the deposit copies to the Secretary of State, again for preservation purposes.<sup>19</sup>

In 1834 Congress provided for the recordation of written transfers or assignment of copyright ownership, again with the local federal district court clerk.<sup>20</sup>

In 1846, the Act establishing the Smithsonian Institution obligated copyright owners to provide a copy of their works to the librarian of the Smithsonian, and another copy to the Library of Congress, for the use of both libraries.<sup>21</sup> This was not required as an explicit element of registration or copyright protection.<sup>22</sup> And in 1859 the preservation role of the State Department

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<sup>10</sup> *Id.* at Sec. 3.

<sup>11</sup> *Id.*

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

<sup>13</sup> *Id.* at Sec. 4. See Peter S. Menell, *Copyright in Context: Institute for Intellectual Property & Information Law Symposium: Article: Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 Hous. L. Rev. 1013, 1026 ((2007)). Within the State Department, the newly formed Patent Office held the preservation copies. See Rudd at 138. The plain text of the 1790 Act appears to provide no consequence for failure to provide a preservation copy. However, the Supreme Court, perhaps influenced by the changes in this regard effected by the 1831 Copyright Act, held that doing so was a necessary step in order to perfect the title in the copyright of the work, even under the 1790 Act. *Wheaton v. Peters*, 33 U.S. 591, 662-65 (1834).

<sup>14</sup> Rudd at 138. See also <http://www.loc.gov/item/99172032/?loclr=twcop>.

<sup>15</sup> 4 Stat. 436, chap. 16 (Feb. 3, 1831).

<sup>16</sup> *Id.* at Sec. 4.

<sup>17</sup> *Id.*

<sup>18</sup> See note 13, *supra*.

<sup>19</sup> *Id.*

<sup>20</sup> 4 Stat. 728, chap. 157 (June 30, 1834).

<sup>21</sup> 9 Stat. 102, chap. 178, Sec. 10 (Aug. 10, 1846).

<sup>22</sup> See *Jollie v. Jacques*, 13 F. Cas. 910, 912 (S.D.N.Y. 1850)(distinguishing this obligation set forth in other legislation from the obligation to provide preservation copies to the State Department specified in the Copyright Act itself).

was transferred entirely to the Department of the Interior,<sup>23</sup> with all previous copies to be transferred as well.<sup>24</sup>

In 1865, Congress got significantly stricter on behalf of the Library of Congress, mandating that if the copy due to the Library of Congress was not provided, the Librarian should “demand” that copy which, if still not provided, would result in a forfeiture of all federal copyright protection.<sup>25</sup> Even that strict measure was apparently not sufficient incentive, so just two years later Congress added a \$25 fine for failure to provide a copy to the Library.<sup>26</sup>

In 1870, Congress enacted the second general revision of the Copyright Act.<sup>27</sup> Among its various changes, it centralized the administration of the Act in the Library of Congress.<sup>28</sup> The district court clerks were relieved of their registration and recordation duties, which were now to be performed by the Library via the postal service.<sup>29</sup> Similarly, all records and preservation copies held by the district courts, State Department, Interior Department, and Smithsonian Institution were to be transferred to the Library of Congress.<sup>30</sup> Failure to provide the Library a deposit copy after publication of the work remained punishable by a \$25 fine,<sup>31</sup> although the forfeiture of copyright protection was omitted from the new law.

The primary driver of this dramatic shift in practice after 80 years was then-Librarian of Congress Ainsworth Spofford. Spofford is credited with transforming the Library into a national institution.<sup>32</sup> He saw the potential for the preservation copies that were being sent to the Smithsonian and the Interior Department to help build the collection of his national Library. He wrote in the 1869 Annual Report of the Library of Congress:

In another view, the question becomes one of national significance, since this library is built up and sustained by the contributions of the American people, and is the only library entitled by law to exact the deposit of all copyright publications. As the permanent custodian, moreover, in trust, of the valuable scientific library of knowledge among men, still greater weight is added to the considerations already urged in favor of rendering this great collection of books as widely useful as is compatible with their safety and preservation...One final suggestion is pertinent to the subject and that is, the propriety of providing, in case such an extension of the privileges of this library as that proposed, that the various department libraries now maintained separately should be consolidated with the library of Congress.<sup>33</sup>

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<sup>23</sup> Upon the formation of the Interior Department in 1849, the Patent Office was moved from the State Department to Interior. See <http://www.doi.gov/whoweare/history.cfm>. The preservation role for deposit copies followed a decade later.

<sup>24</sup> 11 Stat. 379, chap. 22, Sec. 8 (Feb. 5, 1859).

<sup>25</sup> 13 Stat. 540, chap. 126, Sec. 2 and Sec. 3 (March 3, 1865).

<sup>26</sup> 14 Stat. 395, chap. 43, Sec. 1. (April 9, 1867).

<sup>27</sup> 16 Stat. 198, chap. 230, July 8, 1870.

<sup>28</sup> *Id.* at Sec. 85.

<sup>29</sup> *Id.* at Secs. 89-92.

<sup>30</sup> *Id.* at Secs. 109-110.

<sup>31</sup> *Id.* at Sec. 94.

<sup>32</sup> “Ainsworth Rand Spofford, 6<sup>th</sup> Librarian of Congress,” available at <http://www.loc.gov/about/about-the-librarian/previous-librarians-of-congress/ainsworth-rand-spofford/>.

<sup>33</sup> Misc. Doc. No. 11, *Report of the Librarian of Congress*, 41<sup>st</sup> Cong., 2d Sess. at 4-5 (Dec. 15, 1869) available at <http://babel.hathitrust.org/cgi/pt?id=mdp.39015036735051:view=1up:seq=45>.

Spofford followed up this entreaty with a lengthy letter dated April 9, 1870 to Representative Thomas A. Jenckes of Rhode Island, the chairman of the Committee on Copyright and Patent.<sup>34</sup> Jenckes was convinced.

Spofford and Jenckes had reason to be dissatisfied with the contemporary state of affairs in copyright. Both the Smithsonian and the Interior Department were unprepared and unsuited to store and maintain the copies they received and to offer a usable reference library of registered copyrighted works.<sup>35</sup> In contrast, “In the Library of Congress there is room for all these books...They can be catalogued by skilled persons, and will be well taken care of...”<sup>36</sup> Moreover, the district court clerks did not reliably send copies of deposits forward to Washington.<sup>37</sup> Centralizing and unifying the place of registration and the place of deposit would eliminate that problem.<sup>38</sup>

The 1870 Act did just as Spofford sought. And it was so successful that the existing Library staff, and Spofford himself, were overwhelmed by the work. So it was that in 1897 Congress created the Copyright Office within the Library, headed by a Register of Copyrights.<sup>39</sup> Librarian of Congress John Russell Young appointed the first Register of Copyrights, Thorvald Solberg, on July 22, 1897.<sup>40</sup> That structure, sought by Spofford and enacted by Jenckes, remains in place today.

## **COPYRIGHT GROWS UP—MODERN COPYRIGHT FUNCTIONS OF THE FEDERAL GOVERNMENT**

While the structure has remained unchanged, the role and functions of the Copyright Office have matured in the 145 years since Spofford’s and Jenckes realized their vision. The Copyright Act underwent a third general revision in 1909,<sup>41</sup> and a fourth general revision in 1976.<sup>42</sup> Although it has been amended substantially since then, the 1976 Act remains the core of the Copyright Act today.

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<sup>34</sup> See <http://www.loc.gov/loc/lcib/9909/bicreate.html>.

<sup>35</sup> See Menell, *supra* note 13, at 1027 (“The Smithsonian Institution was inundated with materials considered of relatively low archival value...whereas publishers of substantial research works failed to comply with the deposit requirement.”); Statement of Mr. Jenckes, *The Congressional Globe*, 41<sup>st</sup> Cong., 2d Sess. at 2683 (1870)(“The result of the existing law has been to place in the store-rooms of the Department of the Interior from thirty to forty thousand volumes, beyond the reach of consultation, and which with difficulty can be found even with the most diligent inquiry. Some of them, and the greater portion, are in a room accessible only by clambering up a narrow staircase and over an archway—a room which has no light, and where, if the books are to be examined, they must be examined by candle-light. Beside, they are imperfectly catalogued. Since 1850 these publications have only been taken care of when Congress has made appropriations for copyright clerks. Sometimes no such appropriation has been made, and the consequence is that the books sent to the Patent Office during such periods have remained there in the original packages...Not having a proper or convenient place in that building for keeping possession of the books and records, and needing the space now occupied by them for other purposes belonging to the more appropriate business of the Department, they willingly surrender this duty to the Librarian of Congress.”).

<sup>36</sup> Statement of Mr. Jenckes at 2683.

<sup>37</sup> *Id.*

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

<sup>39</sup> 29 Stat. 538, chap. 265 (Feb. 19, 1897).

<sup>40</sup> Rudd at 140.

<sup>41</sup> 35 Stat. 1075, Pub. L. No. 349 (March 4, 1909).

<sup>42</sup> 90 Stat. 2541, Pub. L. No. 94-553 (Oct. 19, 1976).



**Registration of Copyright.** The first and still most elemental copyright function of the federal government is the registration of copyright. While registration is no longer a prerequisite for copyright protection, it still carries critical benefits in litigation.<sup>43</sup>

In the early days, registration was just that—a relatively ministerial function that gave rise to, and official notice of, federal copyright protection. As copyright law matured, both the law and indeed the Constitution were interpreted by the Supreme Court to require a minimum level of creativity in order to support copyright protection.<sup>44</sup> That requirement confirmed and mandated that the Copyright Office must examine applications for registration to determine if the work at issue meets the constitutional and legislative standard.

The primary original purpose of registration was a public record of published, copyrightable works. That purpose is no less valid today. But the original requirement that copyright claims be published in local newspapers would surely strike modern audiences as archaic. Instead, the Copyright Office maintains a database of all copyright registrations. The potential of a vibrant registration database to alert users that copyright owners value their rights, and to provide basic information that can facilitate licensing and other commercial activity is immeasurable.

However, at present, the registration database is woefully unsuited to that task. All copyright registrations from the day that responsibility was assigned to the Library of Congress in 1870 until the 1976 Act took effect on January 1, 1978 have been stored in hard copy (with no backup copy) in a giant card catalog in the Library of Congress, a total of approximately 60 million records.<sup>45</sup> A researcher must physically go to the Madison Building in Washington D.C., or hire someone to do so on his or her behalf, to find registration records from 1870-1977. It was only in 2010 that the Copyright Office finally obtained the necessary funding to begin scanning these records. The scanning process is now mostly complete but the data is being refined, so online searching is still not possible.<sup>46</sup> Registration records from 1978 to date are available for online searching, but only in limited fields (e.g., author, title) and with limited functionality.<sup>47</sup>

**Recordation of Transfers of Copyright.** Another of the core copyright functions dating back to the early days of the American copyright system is the recordation of transfers of copyrights. This procedure provides legal priority in case of future disputes over ownership.<sup>48</sup> Not only are the recorded transfers not searchable online, the application process itself remains entirely paper-based, as it was when the Library took over that function in 1870. The result is a system that takes longer, costs more, is less accurate, and is less easily searchable than it should be. The Office desires to modernize this system and has intensively studied what would be required to make that a reality.<sup>49</sup> At present, however, it does not have the authority, the technology, or the budget to do so.

The combined limitations on registration and recordation processes and databases increase transaction costs, slow the marketplace, and likely increase infringing uses of copyrighted works. The plight of so-called orphan works, where a would-be user cannot identify and locate the

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<sup>43</sup> See Berne Convention Implementation Act of 1988, 102 Stat. 2853, Pub. L. No. 100-568 (Oct. 31, 1988).

<sup>44</sup> *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991).

<sup>45</sup> *Report and Recommendations of the Technical Upgrades Special Project Team*, Office of the Chief Information Officer of the U.S. Copyright Office at 59 (Feb. 2015)(available at <http://copyright.gov/digitization/status.html>).

<sup>46</sup> See <http://copyright.gov/digitization/goals.html>.

<sup>47</sup> See <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First>.

<sup>48</sup> 17 U.S.C. §205.

<sup>49</sup> Robert Brauneis, *Transforming Document Recordation at the United States Copyright Office*, A Report of the Abraham L. Kaminstein Scholar in Residence at 7 (Dec. 2014)(available at <http://copyright.gov/docs/recordation/recordation-report.pdf>).

copyrighted owner of a work in order to seek a license, has been well documented.<sup>50</sup> Fully modernized, searchable, and interoperable databases of registrations and recordings at the Copyright Office would greatly facilitate connecting authors to users by tracking the chain of title in works.

The Copyright Office recognizes these and many other ways in which it could better serve creators, publishers, distributors, users, and consumers alike. In its own internal review of its information technology, the Office recommended changes such as compatibility across different web browsers, issuance of electronic certificates (not exclusively paper certificates of registration), improved searchability of registered works, and the use of a smartphone app to submit registration applications.<sup>51</sup>

**Deposit Copies.** The third original copyright function of the federal government was securing deposit copies of published works. There were two distinct purposes of this function. The copy that was deposited with the court clerk and sent along to the State Department (and later to the Interior Department) was a preservation copy – a public record of registered works. The copies that originally were to be sent to the Smithsonian and the Library of Congress were for library preservation and reference purposes. Improving the receipt, retention, and accessibility of deposit copies was the major motivation of Congressman Jenckes’ legislation unifying the functions in the Library of Congress.

In 1870, that made sense. The shipping of hard copies cost money and time and was subject to loss or damage during the journey. Further, the books and other deposits had to be catalogued, retrieved, and re-shelved after use, they took up significant space, and were subject to damage from fire or water, theft, or simply age if not properly preserved.

**Other Functions.** Over the past century, additional functions have been added to the role of the Copyright Office. The Copyright Office maintains an internal administrative appeals process for rejected registration claims.<sup>52</sup> Congress has enacted several statutory licenses that, in varying ways, are administered by the Copyright Office. In fiscal year 2013, the Copyright Office collected (for subsequent distribution to right holders) over \$300 million in royalties,<sup>53</sup> mostly for the retransmission of broadcast television signals by cable<sup>54</sup> and satellite services.<sup>55</sup> The Office promulgates regulations concerning these licenses as well as registration, recordation, and other filings.<sup>56</sup> And Congress created (and revised twice) a specialized quasi-judicial system to resolve disputes under certain statutory licenses regarding the royalty rate and the allocation of royalties among copyright owners.<sup>57</sup> In addition, under the Digital Millennium Copyright Act, the Copyright Office conducts a triennial review of the prohibition on circumventing access controls to copyrightable works and recommends additional exceptions to the Librarian.<sup>58</sup> The Copyright Office conducts numerous studies at the request of Congress and prepares detailed reports on a variety of copyright issues.<sup>59</sup> It also administers lesser-known aspects of the law allowing for the

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<sup>50</sup> See *Orphan Works and Mass Digitization*, A Report of the Register of Copyrights (June 2015)(available at <http://copyright.gov/orphan/reports/orphan-works2015.pdf>).

<sup>51</sup> See *Report and Recommendations of the Technical Upgrades Special Project Team*, *supra* note 45.

<sup>52</sup> 37 C.F.R. §202.5.

<sup>53</sup> *U.S. Copyright Office Fiscal 2013 Annual Report* at 14 (available at <http://copyright.gov/reports/annual/2013/ar2013.pdf>).

<sup>54</sup> 17 U.S.C. §111.

<sup>55</sup> 17 U.S.C. §119 and §122.

<sup>56</sup> 37 C.F.R. §201 *et seq.*

<sup>57</sup> 17 U.S.C. §801 *et seq.*

<sup>58</sup> 17 U.S.C. §1201(a)(1)(C).

<sup>59</sup> See <http://copyright.gov/policy/policy-reports.html>.

registration of semiconductor chips<sup>60</sup> and vessel hull designs.<sup>61</sup> Further, it provides information on copyright to users of the Office and the general public. Aside from these functions, the copyright policy, enforcement, and international and trade issues are handled, in various respects, by many federal offices.<sup>62</sup>

## THE RIGHT TOOL FOR THE JOB

For all this responsibility, the Copyright Office has surprisingly little actual authority. Its daily operations, including human resources, facilities, information technology, and even building access are “under the Librarian’s general direction and supervision.”<sup>63</sup> Copyright Office regulations are “subject to the approval of the Librarian of Congress.”<sup>64</sup> And perhaps most fundamentally, the Librarian appoints the Register of Copyrights.<sup>65</sup>

All this might still work, except that the Library doesn’t prioritize the Copyright Office. This is not necessarily a fault, at least from the perspective of the Librarian. He is charged with many responsibilities from administering the national library to advising Congress through the Congressional Research Service as well as his responsibility over the Copyright Office. Given these broad responsibilities, the Librarian might not (and did not) place Copyright ahead of other priorities. The Library built IT systems that are general purpose, not designed for the unique needs of the Copyright Office. But that Cinderella status is exactly what is wrong with the current structure. The Copyright Office administers the law that supports over \$1 trillion in economic activity in the United States alone and directly affects our most advanced technology sectors.

The same is true in regards to annual budgets. The Library sets the budget priorities for all parts of the agency, including the Copyright Office. From 2010 to 2013, many federal agencies had budget cuts. Tellingly, during that period the Copyright Office was subjected to budget and staff cuts almost 50% deeper than the rest of the Library.<sup>66</sup> Once again, the Library had prioritized other missions, at the expense of the Copyright Office.

Earlier this year, the House Judiciary Committee held a hearing on the challenges faced by the Copyright Office, and the witnesses agreed across the board.<sup>67</sup> A witness representing the

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<sup>60</sup> 17 U.S.C. §901 *et seq.*

<sup>61</sup> 17 U.S.C. §1301 *et seq.*

<sup>62</sup> In addition to the Copyright Office, these include the Intellectual Property Enforcement Coordinator, the U.S. Patent and Trademark Office and other offices of the Commerce Department, the Justice Department including the FBI, the U.S. Trade Representative, Customs and Border Protection, Immigration and Customs Enforcement, the IPR Center, the State Department and others.

<sup>63</sup> 17 U.S.C. §701(a).

<sup>64</sup> 17 U.S.C. §702.

<sup>65</sup> 17 U.S.C. §701(a).

<sup>66</sup> From 2010 to 2013, the Copyright Office budget was cut by 20% and staff reduced by 15%. See *Annual Report of the Register of Copyrights, Fiscal Year Ending September 30, 2010*, at 9 (available at <http://copyright.gov/reports/annual/2010/ar2010.pdf>); *U.S. Copyright Office Fiscal 2013 Annual Report*” at 16 (available at <http://copyright.gov/reports/annual/2013/ar2013.pdf>.) In contrast, during that same period of time, the rest of the Library had a budget cut of only 12% and staff cuts under 10%. See *Annual Report of the Librarian of Congress For the Fiscal Year Ending September 30, 2010*, at X (available at <http://lcweb2.loc.gov/master/libn/about/reports-and-budgets/documents/annual-reports/fy2010.pdf>); *Annual Report of the Librarian of Congress For the Fiscal Year Ending September 30, 2013*, at 9 (available at <http://loc.gov/portals/static/about/reports-and-budgets/documents/annual-reports/fy2013.pdf>).

<sup>67</sup> *The U.S. Copyright Office: Its Functions and Resources*, Hearing of the Judiciary Committee of the United States House of Representatives (Feb. 26, 2015)(available at

American Bar Association concluded “the Copyright Office requires greater autonomy to effectively support copyright owners and users in the 21<sup>st</sup> century.”<sup>68</sup> The AIPLA agreed, “additional autonomy is essential for the Copyright Office of the future.”<sup>69</sup> The Software and Information Industry Association was candid in its assessment:

Despite the critical nature of the services provided by the Office, many of these services have failed to keep pace with technology and the marketplace. While the Office should be held accountable for its shortcomings to some extent, in truth many of these deficiencies have been caused by many years of budgetary neglect and structural deficits that would make it difficult for any agency to merely keep pace, to say nothing about modernization...As a department of the Library, the Office is obligated to use the Library’s information technology systems, which are antiquated, incompatible and impractical in regard to the Office’s underlying objectives and mission.<sup>70</sup>

And Professor Robert Brauneis, author of the report concerning the process of recordation or transfers testified “Congress should consider reorganizing the Office as an independent agency.”<sup>71</sup>

A wide variety of other stakeholders and interested parties agreed with this general sentiment. For example, the Authors Guild submitted to the Judiciary Committee a written statement for the record noting “the growing importance of the copyright industries to our nation’s economy, as well as the increasing complexities of copyright law, require Copyright Office independence.”<sup>72</sup> And the Internet Association, also in a letter submitted for the record, joined the chorus of voices of “[m]ultiple observers [who] agree that the Office is in need of reform to meet today’s demands and to better service all of its customers including rightsholders, licensees, and Internet users.”<sup>73</sup>

A report issued earlier this year by the Government Accountability Office (GAO) gives a detailed and thorough review of the information technology systems of the Copyright Office and the Library of Congress, and confirms the lackluster state of affairs. The report recognized the shortcomings described by many stakeholders and the by Copyright Office itself, and laid much of the blame at the feet of the Library, “as we have recently reported, the Library has serious weaknesses in its ITS management, which have also hindered the ability of the Library and the Copyright Office to meet mission requirements.”<sup>74</sup> The practical reality of those shortcomings came into stark focus in early September, when the Library’s ITS management was unable to

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[http://www.judiciary.house.gov/index.cfm/hearings?Id=517A06E1-2222-42C6-87B2-05D64633F62D&Statement\\_id=D8C20362-35D7-451A-A98E-3D20A78D8E85](http://www.judiciary.house.gov/index.cfm/hearings?Id=517A06E1-2222-42C6-87B2-05D64633F62D&Statement_id=D8C20362-35D7-451A-A98E-3D20A78D8E85)).

<sup>68</sup> *Id.* (Testimony of Lisa A. Dunner at 1).

<sup>69</sup> *The U.S. Copyright Office: Its Functions and Resources*, Testimony of Nancy J. Mertz on behalf of the American Intellectual Property Law Association at 13.

<sup>70</sup> *The U.S. Copyright Office: Its Functions and Resources*, Testimony of Keith Kupferschmid, General Counsel and Senior Vice President, Intellectual Property, Software & Information Industry Association at 3.

<sup>71</sup> *The U.S. Copyright Office: Its Functions and Resources*, Testimony of Robert Brauneis, Professor of Law, Co-Director of the Intellectual Property Program, The George Washington University Law School at 2.

<sup>72</sup> See [https://www.authorsguild.org/wp-content/uploads/2014/10/AuthorsGuild\\_CopyrightOfficeOversight\\_Final.pdf](https://www.authorsguild.org/wp-content/uploads/2014/10/AuthorsGuild_CopyrightOfficeOversight_Final.pdf) at 6.

<sup>73</sup> See

[http://images.politico.com/global/2015/04/28/4\\_29\\_2015\\_internet\\_association\\_hjc\\_april\\_29\\_letter\\_for\\_the\\_record.pdf](http://images.politico.com/global/2015/04/28/4_29_2015_internet_association_hjc_april_29_letter_for_the_record.pdf) at 4.

<sup>74</sup> GAO-15-338, “Information Technology, Copyright Office Needs to Develop Plans that Address Technical and Organizational Challenges, at 7 (March 2015)(available at <http://gao.gov/assets/670/669401.pdf>).

reboot the online copyright registration system after scheduled maintenance, throwing the Copyright Office back to a paper-only system for a full week.<sup>75</sup>

The problems at the Copyright Office are structural. Congress consolidated copyright functions in the Library in 1870 to advance the ancillary goals of library preservation of and reference to the deposit copies. It was not done for the benefit of the core copyright system: registration and recordation. That worked well enough in the late 19<sup>th</sup> century and much of the 20<sup>th</sup> century. But today it is unsatisfactory to have the Copyright Office struggle as the third or fourth priority of a larger agency.

Still, the important goals of preservation and public reference can be sustained. As recently as 19 years ago, the Library and the Copyright Office argued that they needed physical proximity to maintain the deposit system.<sup>76</sup> If that was questionable then, it is surely no longer the case in an age of ubiquitous networked, electronic transmission and storage. Were the Copyright Office to move, either in terms of its legal structure and/or physically, it would remain entirely feasible to maintain, and likely improve, the deposit of copyrighted works for preservation, public notice, reference, and research in the world's greatest library.

Congress has an historic opportunity, for the first time since Spofford's gambit in 1870, to redesign the copyright functions of the federal government, this time to suit the copyright system first and foremost. The time has come to move the Copyright Office out of the Library of Congress and to give it the authority it needs to modernize.

### **III. Constitutional Considerations**

The 19<sup>th</sup> century expediency of placing the copyright functions in the Library of Congress has also raised constitutional questions. In particular, whether or not the current structure violates the doctrine of separation of powers by a legislative branch agency performing executive functions?

The doctrine of "separation of powers" is a fundamental aspect of the U.S. Constitution's design of the federal government. The powers of each branch of the federal government are set forth specifically in the Constitution: legislative powers in Article I, executive powers in Article II, and judicial powers in Article III. However, the powers of the respective branches are not hermetically sealed. For example, the President has a role in the creation of new legislation through the veto power and the Senate has a role in appointment of executive officers through its confirmation power. The separation of powers guards against tyranny, but it is not meant to be an obstacle to effective governance.<sup>77</sup>

It is through compliance with the Appointments Clause of the Constitution that an agency performing executive functions is tied to the President. Specifically, the Appointment Clause provides that the President:

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<sup>75</sup> See [https://www.washingtonpost.com/lifestyle/style/copyright-offices-online-registration-hasnt-worked-for-almost-a-week/2015/09/03/b12781e2-5261-11e5-9812-92d5948a40f8\\_story.html](https://www.washingtonpost.com/lifestyle/style/copyright-offices-online-registration-hasnt-worked-for-almost-a-week/2015/09/03/b12781e2-5261-11e5-9812-92d5948a40f8_story.html).

<sup>76</sup> S. Hrg. 104-813, "The Omnibus Patent Act of 1996," Statement of Hon. Marybeth Peters (September 18, 1996).

<sup>77</sup> *Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

...shall nominate, and by and with the Advice and Consent of the Senate...all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>78</sup>

The Appointments Clause creates a two-tiered system. Officers of the United States (also referred to as “principal Officers”) must be appointed by the President and confirmed by the Senate. Inferior Officers may be appointed by the President without Senate confirmation, or may be appointed by courts or by a “Head of Department.”<sup>79</sup>

**Significant Authority – Is the Register of Copyrights an Officer?** Of course, not every employee of the federal government need be appointed pursuant to the Appointments Clause. The threshold that triggers the Appointments Clause is whether or not that official exercises “significant authority.”<sup>80</sup> The term “significant authority” has a less clear meaning than might be hoped. For example, in determining that the Commissioners of the Federal Election Commission met this standard, the Supreme Court reasoned:

If a Postmaster first class, *Myers v. United States*, 272 U.S. 52 (1926), and the clerk of a district court, *Ex parte Hennen*, 13 Pet. 230 (1839), are inferior officers of the United States within the meaning of the Appointments Clause, as they are, surely the Commissioners before us are at the very least such “inferior Officers” within the meaning of that Clause.<sup>81</sup>

The Court provided somewhat more guidance in its 1991 decision in *Freytag v. Commissioner*.<sup>82</sup> In that case, the Court determined that special trial judges of the U.S. Tax Court are Officers for purposes of the Appointments Clause. The Court based its conclusion on the factors that:

The office of special trial judge is “established by Law,” Art. II §2, cl.2, and the duties, salary, and means of appointment for that office are specified by statute.” See *Burnap v. United States*, 252 U.S. 512, 516-17 (1920); *United States v. Germaine*, 99 U.S. 508, 511-12 (1879). These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute. Furthermore, special trial judges perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.<sup>83</sup>

As is evident from the above passage, the court focused on four factors: the establishment of the position by law, permanence of the position, importance of the function, and exercise of significant discretion.

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<sup>78</sup> U.S. CONST. Art. II, §2, cl. 2.

<sup>79</sup> The phrase “Head of Department” seems to have received little attention in the case law, beyond its plain meaning. See *Buckley*, 424 U.S. at 127 (“The phrase “Heads of Departments,” used as it is in conjunction with the phrase “Courts of Law,” suggests that the Departments referred to are themselves in the Executive Branch or at least have some connection with that branch.”).

<sup>80</sup> *Buckley*, 424 U.S. at 126.

<sup>81</sup> *Id.*

<sup>82</sup> 501 U.S. 868 (1991).

<sup>83</sup> *Id.* at 881.

In 2007, the Office of Legal Counsel (OLC) of the U.S. Department of Justice published a memorandum providing guidance on the requirements of the Appointments Clause.<sup>84</sup> In OLC's view, in order to qualify as an Officer for purposes of the Appointments Clause, a position must have been delegated, by legal authority, a portion of the sovereign powers of the federal government.<sup>85</sup> OLC cited to elements of positions that had been found to constitute Officers under the Appointments Clause. They include, in relevant part, the power to:

- Issue regulations and authoritative legal opinions on behalf of the Government;<sup>86</sup>
- Issue rulemakings;<sup>87</sup>
- Receive, oversee, and disburse large sums of public money;<sup>88</sup> and
- To conduct foreign negotiations.<sup>89</sup>

OLC concluded further that while delegated authority is an element of being an Officer, discretion in the performance of duties need not be present.<sup>90</sup> Instead, the threshold is met by “a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the State.”<sup>91</sup> To qualify as an Officer, OLC also views it necessary that the position be a “continuing” one, not ad hoc or contingent on a particular person holding it.<sup>92</sup>

Comparing these criteria to the functions that the Copyright Office performs leads strongly to the conclusion that the Register of Copyrights is an Officer for purposes of the Appointments Clause. The Copyright Office issues regulations,<sup>93</sup> conducts rulemakings that affect parties' rights under the law,<sup>94</sup> examines and grants or refuses registration of copyright in works and other protected subject matter, also affecting the legal rights of parties,<sup>95</sup> collects and distributes large amounts of funds,<sup>96</sup> and participates in international and bilateral meetings with foreign governments on matters relating to copyright.<sup>97</sup> The position is, of course, established by law,<sup>98</sup> and is continuing in nature.

The 4<sup>th</sup> Circuit Court of Appeals explicitly addressed the constitutional status of the Register under the Appointments Clause in *Eltra Corp. v. Ringer*.<sup>99</sup> In that case, Eltra, a manufacturer of typesetting equipment, was denied registration for the typeface designs on its products and sought a writ of mandamus to compel the Copyright Office to issue the registration. Aside from the

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<sup>84</sup> “Memorandum Opinion for the General Counsels of the Executive Branch,” Opinion of the Office of Legal Counsel, 2007 Lexis 3.

<sup>85</sup> *Id.* at 11.

<sup>86</sup> *Id.* at 38 (citing *Buckley*, 424 U.S. at 140).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 42-46 (citing *Shelby v. Acorn*, 36 Miss. 273 (1858); *In re Corliss*, 11 R.I. 638, 642 (1876); *Commonwealth v. Evans*, 74 Pa. 124, 139 (1873), *United States v. Tingey*, 30 U.S. (5 Pet.) 115, 128 (1831); *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823); *Buckley*, 424 U.S. at 140; *Federalist No. 72*, at 486-87).

<sup>89</sup> *Id.* at 46-47 (citing *Federalist No. 72*, at 486-87).

<sup>90</sup> *Id.* at 54-59 (noting that “registers of the land offices, masters and mates of revenue cutters, inspectors of customs, deputy collectors of customs, deputy postmasters, and district court clerks” had all been found to be Officers)(citations omitted).

<sup>91</sup> *Id.* at 60 (quoting Opinion of the Justices, 3 Greenl. (Me.) 482, 482 (1822)).

<sup>92</sup> *Id.* at 73-111.

<sup>93</sup> 17 U.S.C. §702.

<sup>94</sup> 17 U.S.C. §1201(a)(1)(C).

<sup>95</sup> 17 U.S.C. §410; 17 U.S.C. §908; 17 U.S.C. §1313.

<sup>96</sup> 17 U.S.C. §111; 17 U.S.C. §119; 17 U.S.C. §122; 17 U.S.C. §1003.

<sup>97</sup> 17 U.S.C. §701(b)(3).

<sup>98</sup> 17 U.S.C. §701(a).

<sup>99</sup> 579 F.2d 294 (4<sup>th</sup> Cir. 1978).

substantive copyright arguments (under the 1909 Act), Eltra argued that the Copyright Office regulation against registration of typeface was invalid because that executive function could not be properly performed by the Register, who was not, Eltra argued, properly appointed under the Appointments Clause.

The court agreed that “it would appear indisputable that the operations of the Office of Copyright are Executive.”<sup>100</sup> However, the court did not agree that the Appointments Clause had been violated. Recalling the long history of the Office, the court wrote “the leading case of *Mazer v. Stein* [347 U.S. 210 (1954)], proceeded on the assumption that the Register has such power [to issue rules and regulations].”<sup>101</sup> Turning to the specifics of the Appointments Clause, the court held that the Librarian is a Head of Department who has the authority to appoint inferior Officers. Because the Register is an inferior Officer who is appointed by the Librarian, the construct satisfies the Appointments Clause.<sup>102</sup>

Eltra further raised the seeming inconsistency of executive functions being performed by the Library of Congress, but the court was not persuaded:

The operations of the Office of the Register are administrative and the Register must accordingly owe his appointment, as he does, to appointment by one who is in turn appointed by the President in accordance with the Appointments Clause. It is irrelevant that the Office of the Librarian of Congress is codified under the legislative branch or that it receives its appropriation as a part of the legislative appropriation. The Librarian performs certain functions which may be regarded as legislative (*i.e.*, Congressional Research Service) and other functions (such as the Copyright Office) which are Executive or administrative.<sup>103</sup>

This confirms the view that the Register is an Officer for purposes of the Appointments Clause, albeit an inferior Officer. That the Register is an Officer of the United States does not appear to be in serious dispute.

Another highly relevant Appointments Clause decision was issued in 2012 by the D.C. Circuit in *Intercollegiate Broadcasting System v. Copyright Royalty Board*.<sup>104</sup> That case involved a challenge to the constitutionality of the Copyright Royalty Judges (CRJs). By statute, those judges were appointed by the Librarian of Congress to hear disputes and issue decisions over the royalty rates and the distribution of royalties under certain statutory licenses in the Copyright Act. The judges were appointed to a fixed term of six years and were removable only for cause.

The court found, that while the CRJs were overseen by the Librarian on procedural aspects and subject to the Register of Copyright’s guidance on novel material questions of law, they nonetheless retained significant discretion in setting rates, which are guided only by open-ended statutory terms. That, combined with the non-removability of the CRJs, led the court to conclude that the CRJs exercise substantial discretion.<sup>105</sup> As to the finality of the decisions, the court found that the Register’s review of legal issues and the Librarian’s review of procedural issues meant

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<sup>100</sup> *Id.* at 301.

<sup>101</sup> *Id.* at 299.

<sup>102</sup> Although the court quoted the Appointments Clause, it did not name the Librarian as a “Head of Department” explicitly. Nonetheless, it surely meant that, as Heads of Department are the only Officers (aside from the President and courts) who may appoint inferior Officers. *Supra*, note 78.

<sup>103</sup> *Eltra Corp. v. Ringer*, 579 F.2d 294, 301 (4<sup>th</sup> Cir. 1978).

<sup>104</sup> 684 F.3d 1332 (D.C. Cir. 2012)(“*IBS*”).

<sup>105</sup> *Id.* at 1339.



that the rates set by the CRJs were not reviewed by another executive branch official.<sup>106</sup> Thus, the D.C. Circuit concluded that as enacted the Copyright Royalty Judges were principal Officers who must be appointed by the President and confirmed by the Senate in order to satisfy the Appointments Clause.<sup>107</sup>

In a continuation of this litigation, IBS raised another Appointments Clause challenge when the new panel of royalty judges issued its decision on remand. The D.C. Circuit rejected that challenge, specifically upholding the constitutionality of the judges, properly appointed under Appointments Clause, and serving within the legislative branch.<sup>108</sup>

It is through the Appointments Clause that the President's authority over the executive functions of the federal government is preserved. If, as suggested above, the Copyright Office were to be removed from the Library and the Register given the authority now exercised by the Librarian, it would almost certainly elevate the Register position from inferior Officer to principal Officer. As such, the Appointments Clause would demand that the position be filled through presidential appointment and Senate confirmation; the highest demand of the Appointments Clause. Following that procedure would provide conclusive satisfaction of the Clause in a way that directly connects the President to the Register, and explicitly establishes the appropriate constitutional lines of executive authority.

#### **OPTIONS FOR A RESTRUCTURED COPYRIGHT OFFICE**

That the Copyright Office should have authority over its own operations to facilitate modernization is widely accepted. And it seems clear that objective can be accomplished in a way that is not only constitutional, but is preferable to the current, more convoluted arrangement. That still leaves several options for a new structure of the Copyright Office. At this time, we can point to three leading options. The first is proposed in a discussion draft version of legislation that would restructure the Copyright Office. The draft was circulated by Representatives Marino and Chu ("CODE Act"), and would set up the new Office as an independent agency.<sup>109</sup> Second is for the Copyright Office to become a stand-alone agency remaining in the legislative branch. The third alternative is to move the Copyright Office into the Commerce Department (and, in the view of some, merge it with United States Patent and Trademark Office [USPTO]).

In terms of the constitutional issues, all three can easily pass muster. As noted above, if the Register is appointed by the President and confirmed by the Senate, then both the independent agency and stand-alone within the legislative branch formulations satisfy the Appointments Clause. If it were to be moved into the Commerce Department in one form or another, the Register could still be appointed by the President and confirmed by the Senate.

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<sup>106</sup> *Id.* at 1340.

<sup>107</sup> *Id.* at 1340. The court cured this problem by holding the removal only for cause unconstitutional, and thus demoting the CRJs to inferior Officers, removable at will be the Librarian.

<sup>108</sup> *Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Board*, No. 14-1068 (D.C. Cir. Aug. 11, 2015).

<sup>109</sup> See

<http://marino.house.gov/sites/marino.house.gov/files/Final%20Marino%20Chu%20Discussion%20Draft%20on%20oCODE%20Act.pdf>.

If the Register were appointed by the Secretary of Commerce or the Director of the USPTO,<sup>110</sup> the position would have to be capped at the level of inferior Officer in order to comply with the Appointments Clause, with the consequence that it would not gain the authority to control its own operations. That option merely trades one master (the Librarian of Congress) for another (the Secretary of Commerce or Director of USPTO), as the Register would still have to have approval of the Secretary of Commerce to issue regulations, rulemakings, and so on. The course that achieves the goal of allowing the Copyright Office to modernize in a way suited to its particular needs, regardless of which of the three structures Congress might ultimately selected, is that the Register is appointed by the President and confirmed by the Senate.

**Policy Considerations.** The remaining considerations in selecting one of the three options are therefore dependent on policy considerations as the constitutional issues are identical.

The options of an independent agency or a stand-alone agency within the legislative branch offer the greatest opportunity for the Copyright Office to design and implement a modernization program that is precisely tailored to its needs. However, these approaches raise other concerns, namely that the Office be subject to sufficient limits to its regulatory authority and appropriate oversight to ensure that the Office does not abuse its authority.

At present, the Copyright Office's regulatory authority is relatively narrow. The Register is authorized "to establish regulations...for the administration of the functions and duties made the responsibility of the Register under this title."<sup>111</sup> The functions and duties of the Register involve the registration of copyright, recordation of transfers of copyright, the procedures for submitting statements and royalties under statutory licenses, and the procedures for filings for various other purposes enacted by Congress.<sup>112</sup> The Copyright Office has no enforcement role (beyond the indirect function of advising the enforcement agencies on technical and legal issues), nor does it have a basis to expand the current scope of its functions and duties through regulatory act. Only Congress can do that. This limited scope of authority distinguishes the Copyright Office from certain existing agencies that have generated significant controversy (and litigation) by forays into expansive rulemaking and enforcement activities. Nor is there any reason to think that Congress would have to enact new legislation to expand the scope of the Office's regulatory authority as part of any restructuring option.

It is worth noting that, uncharacteristically for a modern bureaucracy, the Copyright Office has repeatedly and consistently recommended steps that would have the effect of *reducing* its regulatory authority. Specifically, the Copyright Office has recommended for years, across different Registers, the elimination of certain statutory licenses in favor of free market negotiations.<sup>113</sup> Were Congress to adopt this approach, it would reduce significantly the scope of the Office's authority and eliminate the statutory licenses that generate a large amount of the regulatory activity of the Office as well as an overwhelming majority of the royalty payments collected and distributed by the Copyright Office.

Nonetheless, there is always the potential for a more bureaucratically aggressive Register sometime in the future, so strong oversight mechanisms would be important. Some form of stakeholder monitoring and oversight panel – which would include representatives from the full

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<sup>110</sup> The Director of USPTO would have to be regarded as a "head of department" for purposes of the Appointments Clause in order for that office to have authority constitutionally to appoint an inferior officer.

<sup>111</sup> 17 U.S.C. §702.

<sup>112</sup> See 37 C.F.R. §201 *et seq.*

<sup>113</sup> See, e.g., *Satellite Television Extension and Localism Act, A Report of the Register of Copyrights*, (Aug. 29, 2011)(available at <http://copyright.gov/reports/section302-report.pdf>).

range of copyright perspectives, and to which the Register would provide reports on Office activities and receive back comment and criticism – would be advisable. While this body might lack legal authority to constrain the Office, it would be an early warning system and an avenue for whistleblowers should the need arise. In addition, a more formal Inspector General arrangement could be established so that an outside authority can investigate claims of mismanagement or impropriety. Finally, but by no means least, it is envisioned that Congress would continue its long history of close engagement and oversight of the Copyright Office.

Both the independent agency and stand-alone legislative branch agency options tap into the political relationship between executive and legislative branches. The Administration might well argue that because the Register has always been appointed by the Librarian, and the Librarian in turn serves at the pleasure of the President, that the Register has always been in essence an executive branch official. This claim has a technical basis in law, but is weakened by the fact that no Administration in the 118-year history of the position has ever sought to enforce that level of control over the Register of Copyrights. Conversely, Congress might well consider that the Register has always been an official of the Library of Congress, and as such is a legislative branch official. This claim is weakened by the fact that the Register unquestionably performs some executive functions and, as discussed above, must be appointed in compliance with the Appointments Clause.

The Marino-Chu CODE Act seeks to navigate these potentially conflicting visions by giving something to both sides and codifying historic practices. The executive branch is given the authority to appoint the Register directly – for the first time in history the law will guarantee that the President selects the person who serves as Register of Copyrights. The legislative branch is granted for the first time the formal role of Senate confirmation of the Register.

The CODE Act also would codify existing and historic practice – that the Copyright Office is not obligated to clear its policy reports or congressional testimony through the Administration. This is the practice that has always been followed. And while it forecloses the theoretical ability of the Administration to compel the Copyright Office to clear its views through other agencies, the Administration already has ample opportunity to make its particular views on copyright known. For example, the Director of the USPTO holds the dual title of Under Secretary of Commerce and by statutory authority advises the President (through the Secretary of Commerce) on intellectual property policy, including copyright.<sup>114</sup> Indeed, the Copyright Office is the only federal agency with copyright jurisdiction that is not already encompassed by the executive branch interagency clearance process. For the Administration to insist on altering the Copyright Office's historic role as the lone voice not subject to the political dictates of the executive branch, merely to sustain a theoretical privilege, seems unnecessary. The CODE Act's approach gives the Copyright Office the authority it needs to modernize, while maintaining the constitutional and historic balance between the Executive and Legislative branches.

The third approach, placing the Copyright Office in the Department of Commerce, raises its own distinct issues. The approach lacks the inter-branch balance of the CODE Act. However, there is a potential benefit to full participation in the interagency process, as the Copyright Office would then be entitled to a formal seat at the table in all interagency discussions affecting copyright matters. At present, the Copyright Office's participation is by invitation only. Further, in the international context, the Copyright Office would be entitled to participation in its own right, not merely “as authorized by the appropriate Executive branch authority.” Similarly, the Copyright Office would presumably be in a position to assume the leadership role in the U.S. delegation to

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<sup>114</sup> 35 U.S.C. §2(b)(8) and (b)(9)(this authority is without derogation of the duties of the Secretary of State, U.S. Trade Representative, and Register of Copyrights).

copyright-specific meetings, such as the Standing Committee on Copyrights at the World Intellectual Property Organization. Of course, as noted above, this comes at the price of the Copyright Office's ability to provide its own candid counsel to Congress.

The choice of the Commerce Department would in some ways be an odd one. No doubt some see it as logical because the USPTO is housed in the Commerce Department. While the U.S. copyright industries are indeed major contributors to economic growth and quality jobs, they are also creative, cultural forces. A dominant "commerce" focus for copyright may not provide the right balance of perspectives.

Moreover, in modern times the leadership of both major political parties have expressed considerable skepticism about the amalgamation of functions in the Commerce Department and both have called for it to be broken up. In the mid-1990s, when voters swept Republicans into control of both Houses of Congress, the new Republican leadership called for the dismantling of the Commerce Department.<sup>115</sup> President Obama also called for a restructuring of the Commerce Department, albeit on different terms.<sup>116</sup> While neither of these initiatives has been adopted, the discussion raises the question of why it would be appropriate to *add* to the jurisdiction of an agency that has already been singled out for its disjointed mission. And it would certainly be unfortunate to move the Copyright Office there in an effort to facilitate modernization, only to have the Department disbanded at some point in the future, throwing the Copyright Office into limbo.

***Appointment and Confirmation of a New Librarian.*** The resignation of the current Librarian of Congress at the end of September added a further wrinkle. Should Congress be unable to enact legislation to restructure the Copyright Office before a new Librarian is appointed and confirmed, that individual will wield the authority to control the Copyright Office at every level. While that authority is hardly new, it has traditionally been exercised with regard to internal operations, but sparingly if at all with regard to policy judgment.

However, seizing on this perceived opportunity, certain interested parties, who have traditionally sought to limit the scope and effectiveness of copyright protection and enforcement, have been publicly urging the Administration to appoint an activist Librarian. Noted academic Pamela Samuelson observed, "Though formally the Librarian has power, that power has been delegated to the [Copyright] office. Now, that's something that could be shifted if a new Librarian came in and also if the Copyright Office stays where it is."<sup>117</sup>

Some partisans seek a Librarian who will insert himself or herself into debates over the proper scope and application of exceptions and limitations to copyright and to the rules against hacking copyrighted works. One commentator suggested that the new Librarian should explicitly, "join us as we advocate for fair use...."<sup>118</sup> Similarly, the Electronic Frontier Foundation, an advocacy group than consistently seeks weaker copyright laws, wants the next Librarian to, "serve as a zealous advocate for user's rights."<sup>119</sup> And lawyer/lobbyist Jonathan Band, who represents libraries and certain Internet companies, dreams of a boon to those seeking to access copyrighted

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<sup>115</sup> See H.R. 1756, "Department of Commerce Dismantling Act," 104<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1995).

<sup>116</sup> See <http://www.wsj.com/articles/SB10001424052970204542404577158361834894658>.

<sup>117</sup> See Robinson Meyer, "How a New Librarian of Congress Could Improve U.S. Copyright," *The Atlantic* (June 19, 2015)(available at <http://www.theatlantic.com/technology/archive/2015/06/could-a-new-librarian-of-congress-fix-us-copyright-law-dmca/396080/>).

<sup>118</sup> Jessamyn West, *Selecting the Next Librarian of Congress, What Librarians Would like to See in the #nextLoC*, (emphasis in original) available at <https://medium.com/message/the-next-librarian-of-congress-e85d514fc800>.

<sup>119</sup> Parker Higgins, *What Do We Want From the Next Librarian of Congress?*, available at <https://www.eff.org/deeplinks/2015/07/what-do-we-want-next-librarian-congress>.

works without permission: “In theory, the Librarian could do whatever he or she wants...They could be more aggressive and grant more exemptions and broader exemptions.”<sup>120</sup>

Some commentators urge Congress to keep the Copyright Office in the Library, placing their policy hopes ahead of the widespread recognition that the Office cannot effectively modernize under its current structure. For example, the American Library Association issued a press release ostensibly calling for Copyright Office modernization but, not surprisingly, arguing that the Copyright Office should remain under the authority of the Library of Congress.<sup>121</sup> Of course, it is already widely understood that it is precisely the authority of the Library and its preoccupation with competing priorities that have hindered the Copyright Office’s operations. Even if Congress provided all the funding the Copyright Office could need, in the absence of restructuring, it would still be subject to the Library’s implementation.

Others have gone still further, arguing that proposals to move the Copyright Office out of the Library reflect a conspiracy, claiming that an independent Office will be subject to pro-copyright industry capture.<sup>122</sup> But the facts do not bear out these claims. To date the Copyright Office has effectively had policy independence (even if the future seems precarious in that regard). A review of the Copyright Office’s policies do not betray an allegiance or bias toward any particular perspective. For example, the Copyright Office endorses new exceptions and limitations in the Copyright Act to address orphan works, mass digitization, and amendments of the law to modernize the existing library and archive exceptions. In the past the Office has supported other exceptions, such as the exception for making books more easily accessible to the blind as well as the TEACH Act, which provided exceptions for instructional use of copyrighted works in the digital age. In its litigation positions, the Copyright Office has also taken positions against the copyrightability of works it did not believe met the creativity threshold.<sup>123</sup> Conversely, the Copyright Office has long supported vibrant copyright provisions in trade agreements and taken firm litigation positions against piracy in *Grokster*<sup>124</sup> and *Aereo*.<sup>125</sup> And while Copyright Office positions may at times be controversial, there is no pattern of prejudice, and thus no reason to believe that preserving the Copyright Office’s policy discretion is inherently suspect.

Rather, these comments illustrate the reality that libraries are self-interested parties in copyright policy discussions. Keeping the Copyright Office in the Library is an undisguised effort at institutional agency capture by a single interest group. Regardless of one’s views on particular substantive copyright issues, it should be clear that a Copyright Office that is structured to be permanently answerable to only a particular perspective is bad government and unhealthy for our copyright system.

It is also important to note that the Librarian position is a *de facto* appointment for life. The last Librarian of Congress to be removed by an incoming President was John Silva Meehan, a Democrat who was removed by newly elected President Lincoln in 1861.<sup>126</sup> There should be no rush to judgment as to the next Librarian, either by the Administration in selecting a nominee, or by the Senate in its confirmation process. So long as the Copyright Office is under the authority

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<sup>120</sup> See Robinson Meyer, *supra* note 117.

<sup>121</sup> See <http://www.ala.org/news/press-releases/2015/06/ala-president-calls-digital-transformation-copyright-office>.

<sup>122</sup> Kevin L. Smith, “Does the Copyright Office Belong in a Library,” Peer to Peer Review, *Library Journal* (July 2, 2015)(available at <http://lj.libraryjournal.com/2015/07/opinion/peer-to-peer-review/does-the-copyright-office-belong-in-a-library-peer-to-peer-review/>).

<sup>123</sup> See *e.g.*, *Eltra*, *supra*, note 103; *Atari Games Corp. v. Oman*, (888 F.2d 878 (D.C. Cir. 1989); *Atari Games Corp. v. Oman*, (979 F.2d 242 (D.C. Cir. 1992); *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276 (3d. Cir. 2004).

<sup>124</sup> *M.G.M. Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

<sup>125</sup> *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

<sup>126</sup> See <http://www.loc.gov/about/about-the-librarian/previous-librarians-of-congress/john-silva-meehan/>.

of the Library, the nomination and confirmation of a new Librarian will pit those with conflicting views of substantive copyright issues against each other. Should the CODE Act or other legislation that removes the Copyright Office from the Library be promptly enacted, we anticipate that the selection and confirmation of a new Librarian will become correspondingly less politicized.

## **MAKING GOVERNMENT WORK BETTER, NOT BIGGER**

The constitutional imperative that executive functions be performed by a person appointed by the President and confirmed by the Senate stands alongside the historical facts that the copyright functions of the federal government have been performed by court clerks and the Library of Congress. The result is that both the executive branch and the legislative branch consider the Copyright Office to be “theirs.” An approach that provides the Copyright Office with the authority to manage its own operations, with appointment of a Register in compliance with the Appointments Clause, and that allows the Office to continue to provide candid counsel to Congress without political interference respects both the Constitution and the historic practices from the early days of the Republic.

The present system is constitutional, even if some aspects of it, such as the royalty judges, have required some reverse engineering. But restructuring offers an opportunity to increase the respect for our constitutional framework and the historic role of the Copyright Office. From a constitutional perspective, having a Register of Copyrights who is appointed directly by the President and confirmed by the Senate is the purest and highest form of compliance with the Appointments Clause. At the same time, Congress has long relied on the expertise and candid counsel of the Copyright Office, without political interference. Giving the Copyright Office a degree of independence can preserve that role. And a combination of a strictly limited scope of regulatory authority, alongside formalized oversight can act as a bulwark against the kind of bureaucratic mission creep that has occurred in other circumstances.

## **IV. Restructuring Investments**

An additional and important consideration in any reform effort is the cost. The Copyright Office has undergone budget and staff cuts. Added to that, the desired modernization of the Office’s functions, particularly with regard to IT operations, can reasonably be anticipated to involve an up-front capital investment. Ironically, we do not have a reliable estimate of those costs because at present the Copyright Office lacks the authority even to study the matter. Nonetheless, this section will compare in broad-brush the costs and benefits of Copyright Office modernization.

To place the matter in context, general taxpayer funds account for only approximately one third of the of the Copyright Office’s annual budget, roughly \$15 million. In comparison, there is a \$1.1 trillion industry that is supported by the Copyright Office. That’s a return of over \$73,000 per tax dollar spent. The Copyright Office may be the best value in the federal government.

An array of conservative, pro-small government organizations recognize this value proposition. Americans for Tax Reform sees the potential that “A modern Copyright Office will reduce friction in the over \$1.1 trillion marketplace for copyrighted works, incentivize creativity, innovation

investment and jobs....”<sup>127</sup> The American Conservative Union demands that the Copyright Office be “brought into the 21<sup>st</sup> Century.”<sup>128</sup> And Citizens Against Government Waste agrees, “The twenty-first century needs a modern Copyright Office....”<sup>129</sup>

**Keeping Costs Low.** There are several elements than can be employed to help keep the costs of restructuring and modernization as low as possible.

As the Copyright Office moves out of the Library, the cost of services previously provided by the Library for operational elements, including human resources, facilities, and IT, will not be new expenses, the funding for those can simply be rolled over to the restructured Office. Logically, there may be some start-up costs as the new entity opens its doors, but these will be temporary. It is also worth noting that by virtue of the deposit copies supplied to the Library through the copyright system, the Copyright Office provides additional value not normally calculated in the federal budget process.

The restructured Copyright Office can also take steps to keep costs low. For example, no-cost contracting would allow private IT services to supply needed technology (e.g., in support of online recordation submission) which would be billed to the user, with no cost to the Copyright Office or the federal budget. Similarly, in-kind contracting would allow the Copyright Office to receive valuable services at no cost because of the value to the contractor of being the provider of those services. One might imagine a database management company taking on such a role.

These approaches beg the question, why not privatize the entire Copyright Office? While the intake and management of data could be performed efficiently by the private sector, the Copyright Office has roles that are only appropriate for the government. The function of examination of registration applications, among other duties, can determine the existence and ownership of legal rights. This is not a function properly performed by self-interested, for-profit entities. However, the Copyright Office should strive to function as much like a business as possible, and it wants to.<sup>130</sup> No-cost contracting and in-kind contracting are two ways to employ the efficiency of the private sector in support of government operations.

**Economic Benefits of Modernization.** A properly modernized Copyright Office can also offer substantial financial and economic benefits that offset and justify the initial capital investment.

One such benefit is the increased efficiency and reduced costs to users of the Copyright Office. Whether as an applicant for registration or a user searching the database, modernized functions will provide for faster and easier filings, quicker agency responses, and more comprehensive, accurate, and relevant search results. All of these translate into reduced costs of regulatory compliance.

Further, comprehensive, and interoperable registration and recordation databases can become a go-to resource for would-be licensees to identify and locate authors and copyright owners and conduct transactions. This reduction of information costs will facilitate more marketplace

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<sup>127</sup> Americans for Tax Reform, *Copyright Office Modernization: A Win For Consumers, Creators, Innovators, And Congress* (June 9, 2015)(available at <http://www.atr.org/copyright-office-modernization-win-consumers-creators-innovators-and-congress>).

<sup>128</sup> Larry Hart, “Mad Men’ era Copyright Office needs to be brought into the 21<sup>st</sup> century,” *The Hill* (June 15, 2015)(available at <http://thehill.com/blogs/congress-blog/technology/244855-mad-men-era-copyright-office-needs-to-be-brought-into-the-21st>).

<sup>129</sup> Citizens Against Government Waste, *Modernizing the Copyright Office* (June 10, 2015)(available at <http://www.swineline.org/?p=9399>).

<sup>130</sup> See *Report and Recommendations of the Technical Upgrades Special Project Team*, *supra* note 45.

activity. That improvement, in turn, will enhance utility in the marketplace, generating revenue to creators and copyright owners, facilitating new uses of copyrightable works, and enhancing the services available to consumers. And the additional revenue generated by these transactions will increase tax revenue without any increase in tax rates.

Additionally, by promoting lawful uses of copyrightable works a modernized Copyright Office can help reduce the incidence of infringement and corresponding litigation. All of these benefits accrue to creators, publishers, distributors, users, and consumers, thus fulfilling the constitutional vision of “promot[ing] the progress of Science and the Useful Arts...”<sup>131</sup>

**Sources of Funding.** While all the above can minimize and offset the costs of modernization, it is realistic to expect that an up front capital investment will be required. As previously noted, only one-third of the Copyright Office budget is taxpayer funded. Given that the general public does derive benefits from Copyright Office operations, it is reasonable that some portion of the budget come from general taxpayer revenue.

User fees fund the remaining two-thirds of the budget. Fee increases will be necessary and are appropriate as direct users of the Office stand the most to gain from modernization. Fees can be structured to pay off capital investments over a period of years, avoiding the need for a massive, short-term bubble in user fees.

There are good public policy reasons to keep fees as low as reasonably possible. For example, if fees rise too high, it will discourage registration. With fewer registrations, the Copyright Office database will be less valuable as a research tool. If left unchecked, that is a downward spiral that does not end. Fortunately, the same is true of the opposite; if registration is widespread, and the Copyright Office database is well designed and maintained, it is a tremendously valuable tool that will continue to draw users.

The Copyright Office is one of the best values in government. It is in significant need of modernization. A reasonable capital investment, particularly when those costs can be kept as low as possible and are offset by both public benefit and actual revenue to the federal government, is logical. Indeed, it is inevitable, or the problem will continue to worsen. Thus, in the final analysis, the question is not *whether* to modernize the Copyright Office, it is whether to do so through the filter of the Library of Congress and its other priorities, or to do so in a way that allows the creation of integrated, dedicated systems designed specifically for the needs of the Copyright Office? Presented thusly, the answer is clearly that the Copyright Office should have the authority to modernize for the particular needs of its customers.

## V. Conclusion

For nearly a century and a half, the administrative copyright functions of the federal government have resided in the Library of Congress. That connection benefitted the Library tremendously, and for much of that time it was a benevolent home for the Copyright Office. The evidence now indicates that the arrangement is no longer satisfactory. The Copyright Office needs the authority to build the systems that suit its unique needs, and the ongoing flexibility to respond nimbly to changes in the marketplace of the copyright system that the Office serves. The widespread

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<sup>131</sup> U.S. Const. Art. I, Sec. 8, Cl. 8.



recognition of this reality across the users of the copyright system, combined with bipartisan support for restructuring the Copyright Office, presents this Congress and this Administration with a unique opportunity – to design a Copyright Office with the operation of the copyright system as the primary motivation, in a way that is respectful of our constitutional design and honors the historic role of the Office with respect to both the executive and legislative branches. If enacted and implemented, this reform will leave a lasting legacy of innovation, creativity, and economic growth of which this generation of lawmakers can be proud. **H**

## **About the Authors**

### **Steven Tepp**

Steven Tepp is the President & CEO, and founder of Sentinel Worldwide, providing intellectual property legal and policy counsel to companies and associations with interests in protecting intellectual property. His work includes policy advocacy and strategic counseling, analyzing proposed legislation and regulations, drafting submissions to government bodies, amicus briefs, and expert witness testimony.

Steve is a globally recognized expert in intellectual property. He has written and spoken extensively on the subject, including testimony before the U.S. Congress, and has been interviewed by ABC, BBC, CBS, FOX, NBC, and PBS, as well as numerous radio and print U.S.-based and foreign-based media outlets.

Steve is also a Professorial Lecturer in Law, teaching intellectual property at George Washington University Law School. A collection of his recent writings and presentations can be found at <http://sentinelww.com/blog/>.

Prior to forming Sentinel Worldwide, Steve was Chief Intellectual Property Counsel for the Global Intellectual Property Center (GIPC) of the U.S. Chamber of Commerce. In that role, he led a broad coalition in support of effective intellectual property protection and enforcement. He also he provided legal and policy counsel to the U.S. Chamber of Commerce, including collaborating on amicus briefs to the U.S. Supreme Court.

Previously, Steve served as senior counsel for Policy and International Affairs at the U.S. Copyright Office, where he negotiated numerous free trade agreements. He had principal responsibility for all copyright matters in the Asia-Pacific and Latin America regions and litigated the U.S.-China IPR dispute before the World Trade Organization. He also spearheaded the Office's engagement on domestic legislative matters and handled numerous appellate briefs. Steve co-authored the Copyright Office's Digital Millennium Copyright Act Section 104 Report to Congress (2001), as well as its 2003 and 2006 Section 1201 Rulemakings.

In the mid-1990s, Steve was an attorney for the U.S. Senate Judiciary Committee on the staff of the chairman, Sen. Orrin Hatch (R-UT), where he specialized in intellectual property.

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**Honorable Ralph Oman** (former U.S. Register of Copyrights, 1985-1993)

Ralph Oman is the Pravel Professorial Lecturer at the George Washington University Law School. Prior to his move to academia, Oman served as counsel for 15 years with Dechert LLP, an international law firm with more than 700 lawyers. He has more than 35 years of international experience in patent, copyright, and trademark law.

Before entering private practice in 1993, Oman served as the Register of Copyrights, the chief government official charged with administering the national copyright law. During his tenure as Register, he helped move the United States into the Berne Convention for the Protection of Literary and Artistic Works, the oldest and most prestigious international copyright convention, a goal sought by U.S. Registers for 100 years. Before becoming Register, he served in several other government positions, including chief counsel for the Subcommittee on Patents, Copyrights, and Trademarks of the U.S. Senate Committee on the Judiciary, and staff director (and later chief counsel) for the Subcommittee on Criminal Law. Oman continues to participate in the global effort to increase the level of intellectual property protection. In 2002, he received the Jefferson Medal in recognition of his many contributions to intellectual property protection.

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