Via Electronic Mail (copyright.comments@mail.house.gov)

January 31, 2017

The Honorable Bob Goodlatte
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Re: *Proposal on Reform of the U.S. Copyright Office*

Dear Chairman Goodlatte and Ranking Member Conyers:

I write in response to your solicitation for stakeholder input on December 8, 2016,[1] regarding a Policy Proposal on Reform of the U.S. Copyright Office. On behalf of the Computer & Communications Industry Association (CCIA),[2] I offer the following observations on various aspects of Copyright Office reform.

As the U.S. Government and members of the Supreme Court appeared to agree in an argument earlier this month, copyright and copyright registration represent a "powerful, important government program"[3] — a program that for years has struggled to overcome well-documented administrative challenges. The Office's inability to surmount these obstacles imposes continuing costs upon stakeholders who are beneficiaries of, and regulated by, the copyright system. CCIA is thus encouraged by the discussion to reform the Copyright Office. The Copyright Office's need for technological modernization is plainly apparent. While views vary on precisely how the Office should be reformed, the need to update the Office's capacity to execute its registration and recordation missions appears to be a consensus issue among stakeholders.

The Register of Copyrights and Copyright Office Structure: The proposal calls for the Office to remain part of the Legislative Branch. In CCIA's view, this proposal should clarify that the Office should remain within the Library of Congress. Creating a new, free-standing agency in the Legislative Branch would prove counterproductive, as infrastructure, organization, and resources presently provided by the Library itself would have to be replicated. Such duplication would risk wasting stakeholders' fees and delay efforts to reduce processing backlogs, while providing little benefit.

While providing the Office more autonomy over its budget and technology is likely to advance the goal of IT modernization, complete separation of the Office into a new agency, regardless of the Branch in which it resides, would be an expensive undertaking. Doing so is unnecessary to

[1] Available at https://judiciary.house.gov/press-release/goodlatte-conyers-release-first-policy-proposal-copyright-review/.

[2] CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of $540 billion. A list of CCIA members is available at https://www.ccianet.org/members.

[3] Transcript of Oral Argument at 3-4, *Lee v. Tam*, No. 15-1293 (S. Ct. Jan. 18, 2017).

achieve the objective of Office modernization, and subjecting the Register to the nomination and consent process could lead to conflicting oversight by the Library and the Administration.

To the extent the Office engages in policy-making activities, such efforts should be evidence-based. A Chief Economist and Chief Technologist could assist in this regard by ensuring that any policy activities are data-driven and informed by technological expertise. While a Deputy Register may also assist the Register's work, any new personnel should be statutorily directed to prioritize advancing the Office's core missions of registration and recordation.

Copyright Office Advisory Committees: CCIA agrees that the Office should be listening to all stakeholders, including not only regulated industry such as online platforms, tech companies, and universities, but also the important constituencies the proposal suggested of libraries, museums, and archives. The establishment of Advisory Committees, such as those of the U.S. Patent & Trademark Office (USPTO), could be useful to achieving that end. To promote information-sharing and advance interagency dialogue, it would make sense to allow the Commerce Department's copyright policy personnel (including USPTO) to participate in meetings of these Advisory Committees.

Information Technology Upgrades: CCIA supports reforms to the Office's information technology systems. In particular, CCIA is encouraged about the suggestion that the Office maintain a fully searchable, digital database of copyright ownership and licensing information. Overlapping claims of ownership and the inherently fuzzy boundaries of copyright already introduce considerable complexity and cost in copyright licensing. The lack of adequate and accessible public record-keeping further complicates potential licensees' ability to find and compensate rightsholders, to the detriment of creators. For this reason, CCIA regards IT modernization and a public, searchable database of rightsholders as necessary elements of any modernization effort.

Small Claims: For CCIA to endorse a small claims process, legislation would need to resolve several problems, for which solutions have not yet been identified. In addition, developing a new adjudicative apparatus should not distract from the Copyright Office's existing mission.

1. *Abuse of process:* As CCIA previously testified to the Judiciary Committee,[4] a small but prolific group of litigants, sometimes referred to as "copyright trolls,"[5] have attempted to use copyright litigation for improper purposes.[6] These actors' small-return, high-volume litigation campaigns have victimized many Americans and could be redirected toward a small claims

[4] *Copyright Remedies: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (statement of Matt Schruers, Vice President for Law and Policy, Computer & Communications Industry Association).

[5] Miles Bryan, *Why Are So Many People In Northern Illinois Being Sued For Downloading Porn?*, WBEZ News, Aug. 10, 2016, https://www.wbez.org/shows/wbez-news/why-are-so-many-people-in-northern-illinois-being-sued-for-downloading-porn/12dfcadf-7646-48d9-a121-307f2c42e7cd (citing research from Prof. Matthew Sag which found that pornography-related copyright cases filed in U.S. federal court went from 2.7% of all copyright cases in 2010 to 39% in 2015).

[6] The availability of statutory damages as a copyright remedy has enabled a small minority of litigants to engage in inappropriate litigation activities, often involving pornographic content, most notably the notorious Prenda outfit. Michael Hiltzik, *Happy New Year, porno-trolls: You've been indicted for fraud*, L.A. Times, Dec. 30, 2016, http://www.latimes.com/business/hiltzik/la-fi-hiltzik-prenda-indict-20161230-story.html.

process. For this reason, any small claims initiative would need to be structured so as not to provide additional tools to bad actors. Presently, no gatekeeping mechanism to filter abusive litigants from legitimate plaintiffs has been proposed.

2. Constitutional challenges: The Copyright Office's 2015 small claims report acknowledged that constitutional impediments to the small claims proposal would, at a minimum, likely dictate that participation remain voluntary for both parties. The prospect of default judgments would likely coerce more participation, but if penalties are imposed on non-participants, the process cannot plausibly be defended as voluntary.[7] Even a voluntary small claims process is not safe from legal challenge, however.

3. DMCA abuse: CCIA agrees with the implication of the proposal including bad faith DMCA notices in this context — that individuals whose online speech is suppressed by bad faith copyright notices lack a meaningful remedy under current law. A voluntary small claims process is unlikely to offer remedies to victims of DMCA abuse, however. Bad faith notices constitute an abuse of process to suppress speech, and entities willing to abuse legal processes cannot be expected to participate in a voluntary process. As noted above, a process made compulsory by the availability of default judgments may provide more deterrence to DMCA abuse, but then presents separation of powers problems.

Thank you for considering these comments. CCIA remains ready to assist the Committee as it continues to evaluate copyright reform proposals.

Sincerely,

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[7] This would likely result in legal challenges that the legislative branch was impermissibly performing a judicial function. *See Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012).