



January 31, 2017

The Honorable Bob Goodlatte
Chairman
U.S. House Committee on the Judiciary
2138 Rayburn HOB
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
U.S. House Committee on the Judiciary
2142 Rayburn HOB
Washington, DC 20515

Re: Reform of the U.S. Copyright Office

Dear Chairman Goodlatte and Ranking Member Conyers:

The Digital Media Association (“DiMA”) sincerely appreciates the opportunity to submit our views on the topic of “*Reform of the U.S. Copyright Office*”.¹ Modernization of the Copyright Office (“USCO”), if properly implemented, will empower the USCO to better support the Library of Congress in carrying-out its primary mission of serving as the leading repository for the nation’s most treasured cultural works. It also promises to usher in unparalleled innovation through the creation of new opportunities for the legitimate distribution of online content.

DiMA takes its commitment to innovation quite seriously. In the past decade or so, DiMA members have truly revolutionized the way individuals consume their favorite forms of digital content. Thanks to our entrepreneurial spirit, music can now be purchased from an online music store or accessed from one of several different online streaming services. Video programming can be watched linearly or viewed subject to time or format-shifting preferences. And, reading materials can be enjoyed in the comfort of one’s home or on-the-go via a consumer’s chosen mobile device.

The benefit of the digital revolution hasn’t just made content more affordable and *legally* accessible. It has also created new revenue streams for content creators. In the case of the music

¹ <https://judiciary.house.gov/wp-content/uploads/2016/12/Copyright-Reform.pdf> [hereinafter “whitepaper”].

industry, in particular, it's been the driving force behind the industry's recent growth.² It also has served as a powerful ally in the music and film industry's ongoing battle against online piracy.³

Unfortunately, the U.S. Copyright Office has failed to keep pace with recent trends. As consumers have demonstrated greater interest in digital formats, the USCO has continued to operate primarily in an analog era. From its outdated IT infrastructure to its cumbersome registration and recordation procedures, the USCO has made it difficult for copyright owners to properly record information regarding protected works and even harder for copyright users to search existing databases for information on such materials.

These concerns and a few additional issues are discussed in greater detail below.

I. The Librarian of Congress Should Continue to Appoint Future Registers

Notwithstanding the need to focus primarily on IT upgrades and related improvements, one of the first issues addressed in the Committee's whitepaper is the question of whether future Registers of Copyrights should be subject to nomination by the President of the United States, along with confirmation by the U.S. Senate.⁴ Subjecting future Registers to such a process would likely lead to considerable disruption, diminished accountability and inspire a level of partisanship within the Copyright Office that has not previously existed.

Earlier this month, Doug Wilson, a former assistant secretary of defense for public affairs, shared his experiences as a recent presidential nominee.⁵ In his Washington Post article, Mr. Wilson described how the 114th Congress came to a close last month with 80 nominees including himself and Judge Merrick Garland eagerly awaiting confirmation. He went on to mention how nominees often "wait months and sometime years for consideration" and how "appointments are one way senators can fight a president from the other party."⁶ The continued operations of the U.S. Copyright Office are too important to be left to such a system.

Nor can it be said that the proposed changes in the appointment process are justified based upon the need for greater transparency. This past December, the Librarian of Congress

² Anna Nicolaou, "How Streaming Saved the Music Business" Financial Times (Jan 16, 2017)(Some analysts and executives are beginning to confidently predict a new golden age). *See also*, Ed Christman, "BMI Collections Top \$1 Billion Again" Billboard (Sep 8, 2016) (...BMI's digital revenues grew nearly 51 percent....). *See also*, ASCAP "2015 Annual Report" (Apr 11, 2016)(New Media revenues increased significantly at + 36.3%...). Retrieved from <https://www.ascap.com/-/media/files/pdf/about/annual-reports/2015-annual-report.pdf?la=en>.

³ CALinnovates, "Availability of 'Freemium' Music Cuts Down on Piracy" Press Release (Sep 16, 2015) (...54% of users of ad-supported music services saying it's made them less likely to pirate). *See also*, Michael D. Smith, "Delaying Content Leaves Money on the Table" The Hill (Nov 29, 2011) (When NBC removed its content from the iTunes store for about nine months in 2007 and 2008, there was an 11.4% increase in piracy...). *See also*, Glenn Peoples, "How Netflix Reduces Piracy" Billboard (May 6, 2013) (...BitTorrent traffic drops as the Netflix traffic grows when the service launches in a territory).

⁴ *See* whitepaper, supra note 1.

⁵ Doug Wilson, "My three maddening, futile years inside the broken Senate confirmation process" Washington Post (Jan 6, 2017).

⁶ *Id.*

unveiled her process for selecting the next Register of Copyrights.⁷ Included as part of her announcement was the release of an official survey which provides interested parties with an opportunity to comment on the specific skill set the next Register should possess, as well as the top three challenges the Copyright Office should tackle.⁸ Providing the American people with the ability to offer direct input, at the earliest stages of the process, promises a more transparent experience than what would be afforded through a mere confirmation hearing held by the U.S. Senate.

II. USCO Modernization Efforts Should Primarily Focus on Enhancing the Internal IT Operations of the Copyright Office

Instead of focusing on the manner by which future Registers are selected, USCO modernization efforts should dedicate the vast majority of their attention towards improving the Copyright Office's internal IT systems, as well as its registration and recordation procedures. In particular, the Committee should consider making legislative improvements in the following five areas.

a) Creation of an Electronic Database

An important starting point for USCO modernization is the creation of an electronic database that properly stores records related to sound recordings, musical works and other copyrighted materials. To ensure the newly-established database is adequately populated, the Copyright Office's system should allow databases controlled by third-parties such as content creators to fully integrate with the USCO's infrastructure to permit the seamless flow of records between the Copyright Office and those who create the works registered there. The public, of course, should have complete access to the electronically maintained records. Metadata associated with each record should be as complete as possible (including but not limited to the standardized identifiers mentioned below), so as to help distinguish between works with similar titles, and to serve as a public resource of information about the copyrighted works.

b) Improved Registration that Includes the Collection of Standardized Identifiers

As part of the registration process for sound recordings and musical works, the USCO should be encouraged, if not required, to collect unique identifiers such as International Standard Name Identifiers (ISNIs), International Standard Recording Codes (ISRCs), International Standard Musical Work Codes (ISWCs) and Universal Product Codes (UPCs). The collection of this type of metadata would permit online distributors of such works to conduct more efficient searches of the USCO's existing records and facilitate increased licensing transactions that benefit content creators, as well as consumers of online music.

c) The Digitization of Records Created Prior to 1978

⁷ Librarian of Congress "Seeks Input on Register of Copyrights" Press Release (Dec 16, 2016). Retrieved from <https://www.loc.gov/item/prn-16-215/librarian-of-congress-seeks-input-on-register-of-copyrights/2016-12-16/>

⁸ Id.

More than 35 million records created prior to 1978 have been digitized, but millions more remain accessible only in paper-based format. The inability to access these records online creates a tremendous problem for potential licensees who are not located in Washington, DC and would have to travel to the region to conduct physical searches of the documents. The USCO should expedite the digitization process for the remaining records and make sure that all resulting documents are posted online in a searchable format.

d) Electronic Recordation

In 2008, when the Copyright Office decided to permit the online registration of copyrighted materials for the very first time, it terminated its simultaneous plans to offer the electronic recordation of documents due to budgetary constraints.⁹ As part of USCO modernization efforts, copyright owners should be permitted to update existing records – particularly, with respect to transfers in ownership - online; and users of such works should also be permitted to access such records via the internet.

e) Incentivizing Greater Participation

A limited number of incentives are already built into existing federal copyright law to encourage the registration of protected works, but greater enticements need to be developed to guarantee that the USCO's resulting system of records are as accurate and robust, as possible. To this end, the Copyright Office and U.S. Congress should look to administrative as well as possible legislative solutions to motivate copyright owners to take full advantage of any newly established registration or recordation opportunities.

Listed above are just a few examples of key policy changes that should be addressed in any effort designed to reform the U.S. Copyright Office. Should the Committee decide to take the next step of actually preparing legislation in this area, we would be more than happy to supplement these initial comments with more detailed recommendations.

III. Congress Should Fully Fund the IT-related Improvements Described above without Authorizing the USCO to Collect New Service Fees from Copyright Owners or Users.

A third and final topic referenced in the Committee's whitepaper centers around the possibility of authorizing the U.S. Copyright Office to impose a series of new fee-related charges on copyright owners and users to cover the costs associated with USCO modernization.¹⁰ The implementation of any new fees, along such lines, would be unwarranted and likely produce significant unintended consequences.

⁹ U.S. Copyright Office Notice of Inquiry, "*Technological Upgrades to Registration and Recordation Functions*", 78 Fed. Reg. 17722 (March 22, 2013).

¹⁰ See whitepaper, supra note 1.

First and foremost, approximately two-thirds of the USCO's budget is already dependent on fees collected from copyright owners and users. Under such circumstances, it would be unreasonable to ask creators or users of such works to shoulder a greater burden of the responsibility to fund operations that are predominantly public interest in nature.

Second, as previously pointed out by the USCO, voluntary participation in the registration and recordation process serves an important national objective.¹¹ The imposition of new or increased fees would only frustrate such efforts. As the Copyright Office, itself, has recently observed in the months following a modest increase in 2007, registration filings declined by as much as 17%.¹² Considering the undeniable sensitivity on the part of copyright owners to absorb additional fee increases and the importance of maintaining a robust public record of registration and copyright status, Congress should appropriate the necessary monies to fully fund USCO modernization efforts.

Indeed, if any changes are to be made to the existing set of registration or recordation charges at all, the fees associated with the electronic filing of notices of intent ("NOIs") to obtain a compulsory license under Section 115 of title 17 USC should be modified to reflect the rapidly declining marginal costs attendant to processing such notices submitted in bulk. Under the current system, licensees are charged a \$75 dollar fee for filing a notice with a single title and \$10 additional dollars per one hundred extra titles submitted. In a world where modern digital music services offer tens of millions of tracks, this fee arrangement limits the usefulness of the mechanical license and discourages distributors from engaging in commercial transactions that would otherwise benefit content creators and consumers of online music.

IV. Conclusion

DiMA again thanks the Committee for the opportunity to provide these comments and for engaging in its current review of the U.S. Copyright Office. Should the Committee have any questions regarding the above recommendations or require any additional information, please do not hesitate to contact me.

Sincerely,

/s/ Gregory Alan Barnes
General Counsel
Digital Media Association
gbarnes@digmedia.org

cc: Members of the U.S. House Judiciary Committee

¹¹ U.S. Copyright Office Report on "*Proposed Schedule and Analysis of Fees to go into Effect on or about April 1, 2014*" (p. 5) (Nov 14, 2013).

¹² *Id.* at 12.