



January 31, 2017

Email: copyright.comments@mail.house.gov

The Honorable Bob Goodlatte
Chairman, House Judiciary Committee
The Honorable John Conyers, Jr.
Ranking Minority Member, House Judiciary Committee
2138 Rayburn House Office Building
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Re: Reform of the U.S. Copyright Office

Dear Chairman Goodlatte and Ranking Member Conyers:

Thank you for your leadership in the Judiciary Committee's ongoing review of the U.S. Copyright Act, and in particular, for your proposed framework for modernizing the U.S. Copyright Office. Copyright law enables the creation of works that both enrich the lives of Americans and contribute significantly to the U.S. economy. The significance of copyright in both these respects has only grown in recent years. Accordingly, it is vital that the expert agency charged with administering the Copyright Act – the Copyright Office – be fully empowered to meet the needs of the copyright system in the 21st Century. Toward that end, the Entertainment Software Association ("ESA") agrees that improvements should be made to the Copyright Office to enable it to better serve the needs of the U.S. copyright system, and generally supports the Committee's proposed framework.

ESA is the U.S. trade association serving companies that publish computer and video games for video game consoles, handheld gaming devices, personal computers, and the Internet. It represents nearly all of the major video game publishers and major gaming platform providers in the U.S. The growth of the video game industry over the last several decades has been a great copyright success story. Video game companies have always been on the cutting edge of creativity and innovation. Today, more than 150 million Americans play video games, and 42% of them play video games regularly, or at least three hours per week. Thanks in large part to copyright protection for those games and the software embedded in game platforms, the industry in 2016 generated U.S. revenues of \$30.4 billion from sales of game software, other content, subscriptions, hardware, accessories and services. ESA's members have diverse interests in the creation of software, audiovisual content, hardware, mobile apps and online platforms. As a result, ESA has a unique – and uniquely-balanced – perspective on the application of copyright law. In the remainder of this letter, we provide certain suggestions concerning implementation of the Committee's specific proposals for modernizing the U.S. Copyright Office.

The Register of Copyrights and Copyright Office Structure

ESA supports the Committee's proposals concerning appointment of the Register of Copyrights and the structure of the Copyright Office. As copyright becomes increasingly important, especially online, it is critical that the Office be structured in a way, and have the resources necessary, to allow it to serve the interests of creators, both large and small, in the United States. Most important, the Register of Copyrights and staff of the Office should have the ability to move quickly in the best interests of the copyright system, whether in providing advice to Congress on copyright law and policy, registering copyrights and recording documents, addressing information technology needs, or otherwise responding to the evolving marketplace for copyrighted works.

ESA believes that having a Chief Technologist in the Office would be a particularly desirable improvement. As technological issues have assumed an increasingly prominent role in copyright policy, stakeholders have frequently made broad claims about how particular products or technologies work or what is, or is not, technologically feasible. There is a risk of policymakers being misled by any such claims. The Office's understanding of technological issues, and hence its actions and policy advice, would be enhanced by employing a senior official who understands computer software, the operation of the Internet and other relevant issues well enough to examine skeptically technological claims (by all sides of any policy debate) and inform policy discussions within the Office.

Just as the Patent and Trademark Office has a Chief Economist, ESA also believes that the Copyright Office would benefit from having a Chief Economist to study and advise other members of the Office's policy staff on the economic implications of policies and practices affecting copyrights. One rationale for copyright protection in the U.S. has been to provide economic incentives for creators to invest in making the best works possible.¹ Given that rationale, it is desirable that the Office's policy recommendations and practices be informed by rigorous analysis of the effects of copyright on innovation, entrepreneurship, job creation, international trade, and other economic activity.²

ESA also agrees with the Committee that it is important for the Office to have a degree of autonomy over its policy advice and decisions, as well as its budget and technology needs. The Office's expertise, needs, and priorities differ, at times, from those of the rest of the Library of Congress. For example, while it is easy to focus on the Office's important policy role, it is also important to remember that most of the Office's employees perform a unique "customer service" mission of registering copyrights. While the

¹ See U.S. Const. art I, § 8, cl. 8 ("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").

² It is less apparent to us what role a Deputy Register would have that is distinct from the roles of the Register, the various Associate Registers, and the Chief of Operations.

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Library's other duties are critically important to the public, they are sufficiently distinct from those of the Copyright Office that we believe it makes sense for the Office to have greater autonomy than it currently has.

Copyright Office Advisory Committees

ESA agrees with the Committee that it is critical for the Office to have ready access to information concerning technological and marketplace changes as it develops policies and provides guidance to the Congress and federal agencies. Based on our experience, the Office has done a very good job of soliciting and obtaining information from stakeholders with diverse perspectives, both through informal means such as private meetings and interactions at conferences, and through more formal means such as written comments and public roundtables. We believe such input is important, and should be encouraged.

We also think there could be virtue in the creation of advisory committees focused on operational aspects of the Copyright Office (rather than its policy role), as we understand to be the case with the Patent Public Advisory Committee and Trademark Public Advisory Committee (*see* 35 U.S.C. § 5). Those committees review the policies, goals, performance, budget and user fees of patent and trademark operations and advise the Patent and Trademark Office concerning those matters. They would provide an obvious model for one or more Copyright Office advisory committees devoted to subjects like improving the functional aspects of the registration and recordation systems as well as public outreach efforts.

However, the Copyright Office and Congress, not advisory committees, should be the principal parties responsible for substantive copyright policy. First, the Copyright Office is the expert agency charged with formulating copyright policy proposals, and it has a staff of professionals who do that well. Second, introduction of a formal system of advisory committees charged with developing policy recommendations would raise complicated questions like who would serve, how balance would be achieved, what procedures would apply, and how a committee's recommendations should inform the Office's actions and recommendations. We tend to think that the public interest would best served by the Office's soliciting input on copyright policy questions through an open, public process, rather than through an advisory committee that would necessarily seem to elevate the weight attached to a limited number of viewpoints on particular issues.

Information Technology Upgrades

To serve the needs of the copyright system in the 21st century, the Office should have robust, functional, flexible, and efficient information technology systems that support its mission and provide the public ready access to the information that the Office curates. Thus, ESA supports the goals of the Office's information technology modernization plan, and also supports giving the Office the resources and autonomy necessary to modernize its systems and infrastructure. However, ESA is not sufficiently familiar

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with the Office's and the broader Library's systems and networks to have an informed opinion concerning details such as the ability of the Library's new datacenter to meet the Office's needs.

The Office's primary functions include registering claims to copyright, obtaining and retaining deposit copies, and maintaining a public record of documents pertaining to copyrights. See 17 U.S.C. §§ 205, 407-410. Thus, maintaining a database of historical and current copyright information is not a new mission for the Office, and the Office has made progress at digitizing its historical records to improve public access thereto. ESA agrees, however, that it generally would be desirable to have more information about copyrighted works available, and provide better public access to such information. Thus, for example, ESA generally supports initiatives to collect additional information from copyright owners on a voluntary basis, and also initiatives to provide high speed, high volume access to the Office's database.

The Committee's White Paper refers specifically to pilot projects to increase copyright registration. Copyright registration is an appropriate focus for efforts to build a more robust database of copyright information, because registering copyrights is the principal way the Office acquires information about copyrighted works. Copyright registration fees have increased over the years, and it is our sense that overall registration costs for copyright owners have increased even further due to registration practices that require multiple registrations for certain sets of related works to secure full protection for them. Consideration should be given to holding the line on fee increases, and streamlining the examination process when necessary, to promote registration and thus data collection.

Small Claims

ESA does not take any position on whether there ought to be a small claims system. Given the scale of ESA members' businesses and the complexity of the issues presented in most copyright litigation to which they have been parties, it likely would not make sense for claims by or against ESA members to be adjudicated in such a system. However, if there were such a system, ESA believes that it should be voluntary in nature, consistent with the Office's 2013 report concerning small claims.

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Thank you for the opportunity to share ESA's views with you concerning the important matter of Copyright Office modernization. We look forward to engaging with the Committee further as it considers turning its proposals into legislation.

Sincerely,

ENTERTAINMENT SOFTWARE ASSOCIATION

A handwritten signature in black ink, appearing to read "Stanley Pierre-Louis". The signature is stylized and cursive, with the first name "Stanley" being the most prominent.

Stanley Pierre-Louis
Senior Vice President & General Counsel