



Internet Association

January 27, 2016

The Honorable Bob Goodlatte
Chairman
House Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers
Ranking Member
House Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

RE: Comments on ‘Reform of the U.S. Copyright Office’ Proposal

Dear Chairman Goodlatte and Ranking Member Conyers:

The Internet Association appreciates the opportunity to comment on the December 2016 proposal ‘Reform of the U.S. Copyright Office.’ Internet companies, and the positive benefits they create in the economy and society, cannot exist without the U.S. copyright system. Internet industries and their users depend on the U.S. Copyright Office (USCO) for clarity, transparency, and effective administration of balanced copyright laws, and we are encouraged that you are engaged in legislative efforts to modernize the administrative and policy structures at the USCO. The Internet Association supports tailored legislative strategies that prioritize solutions to better serve and provide accountability to the public interest.

The Internet Association is the unified voice of the Internet economy, representing the interests of leading Internet companies and their global community of users.¹ It is dedicated to advancing public policy solutions that foster innovation, promote economic growth, and empower people through the free and open internet.

Robust limitations and exceptions in law, strong safe harbor provisions, and mechanisms for efficient licensing are crucial to the ongoing development of online distribution channels for the lawful sale and distribution of copyrighted works. Internet distributors of digital content are also global leaders in online expression, fueling our 21st century innovation economy. Additionally, the traditional lines between industries have blurred, creating a dynamic copyright ecosystem with lower barriers to entry for creators and new forms of online content creation.

¹ The Internet Association’s members include Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Match Group, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Snap Inc., Spotify, SurveyMonkey, Ten-X, TransferWise, TripAdvisor, Turo, Twitter, Uber Technologies, Inc., Upwork, Yahoo!, Yelp, Zenefits, and Zynga.



Our comments below are meant to serve as initial commentary and identification of issues relevant to the provided outline, rather than a comprehensive legislative agenda.

The Register of Copyrights and Copyright Office Structure

The Copyright Office does not suffer from a lack of independence: instead, it is in need of robust leadership, technical expertise, and tailored policies and resources from Congress that provides a pathway for successful modernization. Reforming the position of the Register to a Senate-confirmed position and/or removing the Office from the Library are neither necessary nor helpful steps in achieving the end goals of a more technology-friendly, balanced system of administration. Solutions must be tailored to the issues in need of resolution: areas most in need of modernization and reform, including IT infrastructure and accountability, do not require that the Register's position be elevated or that the Office be removed from the Library and housed independently within the Legislative Branch.

Rather than focus on the elevation of a position, we encourage the Committee to strengthen accountability mechanisms built into the structure of the Office. The Register should not be a political position: the Register's role should focus on management, with a proven ability to oversee a workforce, ensure technological integrity and accessibility of data and IT systems, and responsibly execute a core mission.

As the proposal notes, public participation is critical: however, removal of the office and creating a political position as Senate-confirmed for the Register do not guarantee that the Office would be any more accountable to the public. Both the Librarian and Register may be called before Congress at any time and we support Congress' continued oversight of both positions. Legislative efforts to enhance and modernize the USCO should be focused on mechanisms for transparency and accountability in its current structure. In addition to a public advisory committee and statutorily outlined ownership database, a statutory mission statement that better reflects the holistic view of the copyright ecosystem, diversity of copyright stakeholders, and responsibility to the public good should also be considered.

Suggestions that the Library of Congress competes with the USCO and stunts the ability of the USCO to effectively meet the needs of stakeholders do not reflect the nature of the agencies: the institutions, in fact, are rooted in common goals that have the potential to complement and enhance one another when performed, managed, and exercised correctly.² The Library of Congress, like the Copyright Office, is long overdue for technological upgrades that have been widely, and rightly, criticized.³ However, a recent GAO report found that even within its own planning capabilities, the Copyright Office lacked the necessary leadership and foresight to effectively administer long overdue upgrades to the system.⁴ Together, under new and robust

² See Letter from Brandon Butler, J.D. et al. to The Honorable Charles Grassley et al. (Dec. 14, 2016) available at <http://thetaper.library.virginia.edu/images/42-Experts-Letter-re-CO-signed.pdf>.

³ U.S. Gov't Accountability Office, GAO-15-315, Strong Leadership Needed to Address Serious Information Technology Management Weaknesses (2015).

⁴ U.S. Gov't Accountability Office, GAO-15-338, Copyright Office Needs To Develop Plans that Address Technical and Organizational Challenges (2015).



leadership, both institutions should be able to enhance common functions and missions to serve the public interest.

The creation of new leadership roles that will facilitate better administrative and policy positions are encouraging steps in developing the USCO. In particular, a Chief Economist would be a welcome resource to provide factual data on the copyright ecosystem to better inform decision makers and would mirror a position commonly held in comparable agencies.⁵

The creation of a Chief Technologist should be clearly defined to differ from and/or compliment the work of the current role of Director of Copyright Technology Office (currently housed under the Chief of Operations). We agree that elevating the importance of technical functions at the Office is critical, and urge the Committee to ensure that new restructuring around technology is based in highly skilled and technical roles. Additionally, given the saturation of policy advisor roles at USCO and Associate Register positions, a Deputy Register would best function in a managerial role, assisting the Register in day-to-day technical functions and oversight of the USCO.

Copyright Office Advisory Committees

The Internet Association supports the creation of a Copyright Office public advisory committee. A public advisory committee structure would enhance transparency and accountability to the Office by offering a diversity of stakeholders the opportunity to provide meaningful input on a variety of USCO functions.

We urge the Committee to create one permanent advisory committee rather than multiple standing committees that create distinctions in the copyright ecosystem. The copyright ecosystem operates holistically, with issues working in an interconnected and codependent manner to serve the public good. Issues related to registration and recordation, public outreach efforts, access for the visually impaired, and issues related to libraries, museums, and archives would impact actors across the copyright spectrum.

Copyright administration and policy require diverse perspectives to ensure that the system is operating in the public interest. This is true today more so than ever: the lines between industries have blurred as creative content grows and differentiates and users have access to content at greater scale and diversity of distribution mechanism than ever before. Creating distinctions between areas of copyright administration and policy will create inevitable deficiencies in information.

We urge the Committee to consider the successful Patent Public Advisory Committee (PPAC) and Trademark Public Advisory Committee (TPAC) at the U.S. Patent and Trademark Office.⁶ The PPAC and TPAC have successfully integrated diverse and well-balanced representation over time to ensure a holistic and informed perspective to counsel the agency on both administrative

⁵ See e.g. Office of the Chief Economist, United States Patent and Trademark Office, available at <https://www.uspto.gov/about-us/organizational-offices/office-policy-and-international-affairs/office-chief-economist>.

⁶ See 35 U.S.C. 5.



and policy issues. This model, based on one committee with term limits and a statutorily required diversity of membership, should serve as a basis for creating a similar model at USCO.

The Committee may also consider a separate ad-hoc or temporary structure to provide technical expertise unrelated to unconnected USCO administration or policy as necessary. Such an advisory structure should be strictly limited to a technical capacity advising operations and technologists on best practices and functional efficiencies.

In order to make a permanent committee effective and balanced, it must ensure balanced membership. An advisory committee must reflect the true diversity of the copyright ecosystem, which includes not only industries reliant on exclusive rights, but strong representation for communities that contribute economically and culturally through limitations and exceptions, safe harbors, and licensing rules and regulations. Ensuring that creators, technology industries, internet industries, libraries, individual creators and innovators, museums, archives, users and the public interest are represented is fundamental to the purpose and success of an advisory committee.

A permanent advisory committee should also consider specifically identifying administrative and policy issues for which the Register must seek the committee's consultation. Issues that the Register should consult the committee on include, but are not limited to, review of policies, goals, performance, budget, and fees of the office.

Information Technology Upgrades

The Internet Association supports digital upgrades and the creation of a rights holder information database. A database is an important element of a transparent and successful modern USCO and copyright ecosystem. It would provide better opportunities in the marketplace for fair licensing, efficient identification of individual works, and searchable records that allow licensees large and small to legally procure the use of works. However, a database must be structured carefully in statute to ensure comprehensiveness of information and accuracy in order for it to be a functional marketplace tool.

A database will only be as good as the information contained within it; therefore, there must be statutory requirements and economic incentive to maintain timely records. Legislative language establishing a rights holder database should include a safe harbor from statutory damages when a user or licensee relies on information in the database, or no information is available to the user. There is a strong precedent for establishing the prerequisite of supplying information for access to statutory damages- for example; registration is a prerequisite for statutory damages.⁷⁸

Ensuring a fair, transparent system is a shared responsibility. The law should not demand that users and licensees identify and make payment to a rights holder unwilling to supply information, and then provide a rights holder with advantageous damages claims in litigation. To incentivize

⁷ 17 U.S.C. 412.

⁸ The Internet Association strongly supports reform to 17 U.S.C. 504 and comments made in this section do not reflect on the public policy objectives related to reform of statutory damages provisions.



the use of a database for practical purposes, licensees acting in good faith must be assured that the data is reliable.

Additionally, licensees are highly financially incentivized to ensure legal licensing and payment to avoid costly litigation for infringement. Without similar financial incentive, a database would merely serve as a voluntary and unreliable structure that served little functional purpose in licensing.

The Committee should also consider the statutory bounds of information that must be supplied by rights holders for the database. In the case of musical works, data connecting musical works and sound recordings are indispensable. Therefore, the International Standard Recording Code (“ISRC”) and International Standard Musical Work Code (“ISWC”) numbers must be obligatory. While a database is an important element of a transparent and modern ecosystem, for some categories of content like musical compositions, a blanket license is more appropriate where a database may not adequately suffice.

Reasonable fees to ensure the Office has the ability to invest in necessary infrastructure and maintenance are a practical step in providing resources. Evaluation of a new fee system should include a holistic view of USCO functions. To ensure users of a database do not bear a disproportionate share of the system and in recognition of the long lifespan of exclusive rights, the Committee should allow the USCO to establish maintenance fees on registered works for operational costs, in addition to the authority to consider and use initial registration fees for operational costs.⁹

Small Claims

Reform of the USCO should focus on the structural and administrative updates that the USCO requires to perform its functions in the public interest. While the Internet Association is interested in further discussion of remedies, including a small claims court and statutory damages, we believe that this matter is best addressed in a separate legislative discussion that offers a more comprehensive and holistic view of the remedies system. This would allow the much-needed reforms to the USCO to move forward in a timely and methodical manner excluding peripheral issues requiring distinct consideration.

As the Committee heard during a July 2014 hearing on copyright remedies, there are numerous areas outside of a small claims court that various stakeholders identified as ripe for legislative discussion, most notably the statutory damages provisions of copyright law.¹⁰ The intersection of remedies law in the context of a small claims court, including relationship to statutory damages, Section 512(f) standards, and defenses key to the public interest, requires more complete consideration. Below, we highlight several complexities arising in small claims court consideration.

⁹ Precedent in the patent system has proven successful. The USPTO maintains a certain maintenance fee schedule for utility patents, providing the Office resources for operational costs across the lifespan of the intellectual property protection. *See* 35 U.S.C. 41(b).

¹⁰ *See* Copyright Remedies: Hearing Before the H. Comm. On the Judiciary, 114th Congress (2014).



A small claims court must ensure that copyright trolls and opportunistic plaintiffs are unable to exploit a new venue for action against individual and small users. The potential for abuse against defendants is great, and therefore the concept of a small claims court should be approached with caution.¹¹ Small claims court must not simply be an alternative to district courts that provides faster, cheaper access to threats of liability against individuals that lack the legal and financial tools to ensure protections in the public interest.

The types of cases available for adjudication should therefore be limited, and must be voluntary for both plaintiffs and defendants. A small claims court envisioned by the USCO in its 2013 report would have abbreviated procedures, limited discovery, and short time frames for resolution. Such a tribunal must necessarily restrict access based on limited circumstances. Cases that include complex claims best suited for district court interpretation, such as those that include a claim of fair use, secondary liability, or extensive discovery, should be dismissed without prejudice. Additionally, there is a high risk for fraudulent and harassing claims and punitive measures against such claims should be established to deter bad behavior.

The above represent only a small juncture of complicated matters that remain unresolved and in need of consideration before a small claims court should be considered. The Committee, stakeholders, and the user community would be best served by narrowing the scope of USCO reform to only issues directly concerning long overdue administrative reforms, and discussing resolution of remedies matters in a distinct and more comprehensive approach.

Conclusion

The Internet Association is encouraged by your commitment to modernizing the U.S. Copyright Office. We urge you to consider legislative language that best serves the public interest, creating a more functional, transparent, and accountable USCO. We look forward to working with you and your colleagues on the Senate Judiciary Committee throughout the ongoing process to identify workable solutions.

Respectfully Submitted,

Michael Beckerman
President & CEO

CC: Members of the House Committee on the Judiciary

¹¹ Previous high-volume campaigns against users proved damaging and ineffective in deterring illicit activity. Rather than deter infringement, such suits have the potential to cause disproportionate harm to individuals by flooding the general public with legal threats, opening the door to trolling rather than legitimate claims against bad actors. See David Kravets, "File Sharing Lawsuits at a Crossroads, After 5 years of RIAA Litigation," Sept. 8, 2008.