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January 31, 2017

The Honorable Robert William Goodlatte
Chairman of the Judiciary Committee
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Re: Comments of the New York Intellectual Property Law Association on the Judiciary Committee's proposal dated December 8, 2016, entitled "Reform of the U.S. Copyright Office."

Dear Chairman Goodlatte:

The New York Intellectual Property Law Association ("NYIPLA" or the "Association") welcomes the opportunity to provide comments on the Judiciary Committee's proposal regarding Reform of the U.S. Copyright Office (the "Proposal"). The NYIPLA is a professional association of over 1,100 lawyers whose interests and practices lie in the area of patent, trademark, copyright, trade secret, and other intellectual property law and who predominantly live or work within the jurisdiction of the United States Court of Appeals for the Second Circuit or the United States District Court for the District of New Jersey. The NYIPLA's mission is to promote the development and administration of intellectual property law and educate the public and members of the bar on intellectual property issues. Its members work both in private practice and government, and in law firms as well as corporations, and they appear before the federal courts, the United States Patent and Trademark Office, and the United States Copyright Office. The NYIPLA provides these comments on behalf of its members professionally and individually and not on behalf of their employers. The NYIPLA respectfully offers the following comments on the Proposal.

The NYIPLA agrees that the U.S. Copyright Office (the "Copyright Office" or the "Office") is in need of reform and modernization to keep pace with the challenges facing the Office in the 21st century, particularly in light of the rapid pace of technological change, including ever-increasing use of electronic and other new, non-traditional media in which works of authorship are fixed and disseminated by authors, and may be stored, archived, searched and retrieved by the public. The NYIPLA believes that any reforms carried out for the benefit of the Office should adhere to the following guidelines and principles:

1. The Copyright Office must at all times strive for neutrality and fairness in serving all interests in the copyright community, including media and technology companies, individual artists, and consumers of copyrighted content.

2. The Copyright Office should be expected – and afforded the necessary authority, budget, personnel, and infrastructure – to adapt its policies, practices, and procedures in an effective and timely manner in response to changes in technology and copyright law; and
3. The public information retained by the Copyright Office, including registrations, deposits, and information concerning assignment of copyright ownership, should at all times be readily available to the interested public through technologically current and user-friendly methods of access. Likewise, non-public information should be available to persons or entities who have authorized access to such information with technologically current and user-friendly methods of access.

With these principles in mind, NYIPLA turns to each of the specific suggestions set forth in the Proposal:

The Register of Copyrights and Copyright Office Structure. The Judiciary Committee has proposed that the Copyright Office remain as part of the Legislative Branch, and that the Copyright Office have autonomy over its budget and technology needs. The Committee further proposed that future Registers of the Copyright Office be appointed by the Congress subject to a nomination and consent process with 10-year term limits, subject to re-nomination. The Committee also proposed that several positions be created at the Copyright Office to advise the Register, including a Chief Economist, Chief Technologist and Deputy Register.

Irrespective of whether the Office remains a part of the Legislative Branch, the NYIPLA respectfully submits that the office of the Register should be afforded sufficient independence so as to enable the Register (i) to exercise her/his copyright expertise and authority in as discretionary a manner as practicable and appropriate within the greater agency or department, etc. in which the Register is employed; and (ii) to propose, duly implement and manage copyright policies and practices that she/he believes are in the best interests of the copyright community and of the United States. To that end, the NYIPLA agrees that the Register of Copyrights should be appointed by a nomination and consent process with 10-year term limits, and subject to re-nomination. It is important that the Register have the maximum appropriate administrative authority that will enable him or her to exercise the Copyright Office's expertise in the best interests of the copyright community at large. Shifting the power to select the Register from the Librarian of Congress to elected officials will achieve this important objective by providing more public accountability for selection of the Register and by underscoring the importance of copyright expertise to decision-making related to the Copyright Office. Similarly, the Association agrees that a term limit should be imposed. The proposed 10-year limit, subject to re-nomination, is adequate to enable the Register to develop and implement an approach toward improving the functioning of the Copyright Office.

Finally, the NYIPLA agrees that there should be additional high-level positions to advise the Register, particularly a Chief Technologist, who can advise with respect to rapidly changing technology and its potential impact on the Office. A key task for this individual would be to apprise the Register of new media and emerging content-creation, distribution and publication platforms so that the Office can prepare to receive and evaluate works in new formats, and incorporate them into a readily searchable database.

Copyright Office Advisory Committees. The Judiciary Committee has proposed that the Copyright Office should follow the model used by other federal agencies to establish a combination of permanent and ad-hoc advisory committees to advise the Register on critical issues. The issues to be addressed would include, without limitation, the registration and recordation system, public outreach efforts, access for the visually impaired, and issues related to libraries, museums, and archives. Membership in the committees would reflect a wide range of views and interests, and limits on the term of membership and the number of committees each member could join would ensure diversity of viewpoints for such committees.

The NYIPLA agrees that the Copyright Office's ability to respond to changes in the marketplace should be improved. Advisory committees could help the Copyright Office to become more informed and effective in responding to such changes. To the extent such committees are created, it is of utmost importance that these committees reflect and sustain the full diversity of interests that exist within the copyright community, and that they do so in a balanced manner so that no one constituency dominates the committee. We support fixed term limits for committee membership and prohibitions against individuals serving on more than one committee at a time, as such restrictions will promote diversity of membership and points of view on the various committees. The NYIPLA further suggests that the advisory committees include at least one representative from each of the different copyright communities, such as corporate content creators, small business content creators, individual content creator organizations, content distributors, academics, and content users.

Information Technology Upgrades. The Judiciary Committee has proposed that the Register should have the autonomy to determine whether the costs, suitability, and reliability of the datacenter currently being built in Virginia for its future IT needs fall short, match or exceed what can be obtained from private-sector providers and then choose accordingly. The Committee has also proposed that the Copyright Office maintain a searchable, digital database of historical and current copyright ownership information that is available to the public and encourage the inclusion of additional information such as licensing agents. The database should allow copyright owners to include additional metadata for a fee. The Committee further proposed that the Copyright Office be granted the autonomy to charge fees for advanced services, including high-speed access to publicly available Copyright Office databases, with such fees to generate revenue for further IT modernization at the Office. Finally, the Committee proposed that the Copyright Office be authorized to undertake pilot projects to increase the federal registration of copyrights.

The NYIPLA believes that modernization at the Copyright Office with respect to how information is received, maintained and delivered should be among the Office's highest priorities. Currently, the process for applying for copyrights via the Office's website is unwieldy. The interface is not user-friendly or intuitive. It falls far short of the Patent and Trademark Office's web site in terms of accessing data and completing forms.

The methods for uploading or delivering deposits to accompany copyright applications in certain instances have not kept pace with advances in technology that generate new forms of copyrightable works. For example, the systems to be employed should enable users to upload digital content that is ubiquitous in today's content creation communities, such as, for example, ".mp4" file formats for motion pictures and ".stl" file formats for computer-aided design drawings (CAD) that are used as pictorial, graphic, sculptural, and architectural works. The systems should also be able to automatically solicit from these and other such file types the requisite metadata (e.g., creation dates, authors, modifications) that can easily be populated in a database searchable to the public. Additionally, the use of readily available comparison utilities for file formats would allow

users to understand differences in subsequent registrations of different versions of content (e.g., source code, literary works, screen plays). Such comparison utilities would enable the Office to know what new or revised material the subsequent registration covers.

The data available on registered copyrights, particularly those registered prior to 1978, is hard to find and incomplete. Among other things, this makes searching for copyrighted works difficult and cumbersome, and oftentimes deficient. Currently, the public does not have meaningful on-line access to the deposits accompanying the registrations, and as a result in certain circumstances cannot identify the specific nature of the work beyond whether it is a text, visual, or other general category of work. The NYIPLA believes that each of these issues should be addressed by the Copyright Office. In addition, the NYIPLA supports upgrades to these databases that would provide the name and contact information for licensing agents with respect to copyrighted works, as this would provide a practical benefit to the entire copyright community.

The NYIPLA strongly agrees that the Copyright Office should be granted authority to build up reserve accounts and charge fees for certain services, but counsels that: (i) the fees should be reasonable, (ii) the fees should not in any way limit public access to traditionally publicly available information under the Office's control, and (iii) revenue from the fees be used for maintenance and modernization of the Copyright Office's IT capabilities. The Copyright Office for years has offered expedited registration of copyright applications for additional fees, and such fees for service seem to be widely accepted by the public. Fees for high-speed, high-volume access to publicly available Office databases appear to be appropriate and consistent with prior Copyright Office practices.

Small Claims. The Judiciary Committee proposed that the Copyright Office host a small claims system consistent with the system proposed by a report released by the Copyright Office to handle low monetary value infringement cases as well as bad-faith Section 512 notices, and that the Copyright Office be granted authority to promulgate regulations to ensure that the system works efficiently.

The NYIPLA believes that development and implementation of an administrative system for expeditiously resolving certain copyright disputes, including those regarding alleged bad-faith Section 512 notices (the "**Small Claims System**"), is worthy of further exploration. The Association believes that, in order for such a system to be effective, it should comply with the following principles:

1. The Small Claims System should incentivize claimants to use it in lieu of filing actions in federal court. It is understood that such a system would likely offer capped recovery amounts that fall below the statutory fees and attorneys' fees that prevailing parties can obtain through federal litigation. Rather than highlight that aspect in the title of the system, we recommend focusing on the advantages that the forum will offer to claimants: expediency, lower costs, and so forth, while also providing for limitations against abuse by mass-filers of copyright claims. Calling the system a "small claims" system highlights its limitations for potential claimants and may inadvertently discourage participation in a worthwhile system.
2. The scope and range of controversies available for resolution under the Small Claims System should be clearly defined, to avoid disputes over whether the claim is properly brought under that system.

3. The procedures and forms for prosecuting a claim via the Small Claims System should be simple, inexpensive, and something that claimants could pursue without the need for legal counsel.
4. The procedure should be expeditious, with decisions being rendered in a matter of weeks or months.
5. The decisions rendered as a result of a proceeding brought in that administrative system should be subject to judicial review of some form.

The NYIPLA is sensitive to the needs of the public to be protected from abusive and bad-faith Section 512 notices. Although providing a new forum to resolve whether such notices are appropriately issued is a step in the right direction, adding a forum by itself does little until there is further development and clarification of existing law regarding the conditions under which a Section 512 notice may be determined to be abusive or in bad faith. The Association is prepared and would be pleased to provide comments on whether legislation is appropriate to address the issue of abusive and bad-faith Section 512 notices.

Thank you for affording the NYIPLA the opportunity to provide comments on the Proposal. We are at the Committee's disposal if there are any questions regarding any of the foregoing, or if the Committee wishes to receive additional input on one or more related issues.

Respectfully submitted,



Walter E. Hanley, Jr., President

Lauren Emerson and Joseph Farco, Co-Chairs, Copyright Law & Practice Committee

New York Intellectual Property Law Association