



**ELECTRONIC FRONTIER FOUNDATION**

Protecting Rights and Promoting Freedom on the Electronic Frontier

January 31, 2017

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

The Honorable John Conyers  
Ranking  
Committee on the Judiciary  
Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers:

We write to you to provide feedback on the House Judiciary Committee's proposal for Copyright Office reform that was issued on December 8, 2016. The Electronic Frontier Foundation (EFF) is a nonprofit legal and policy organization that promotes civil liberties and innovation in the digital world. EFF participates in the development of copyright law through high-impact litigation, grassroots advocacy, and in conversation with lawmakers and agencies.

As a national membership organization with more than 33,000 dues-paying members and over 1 million online and social media followers from across the country, our views are informed by regular communications we receive from our supporters, interactions with the startup community, and our 26 years of copyright litigation practice.

### **Any Copyright Office Reform Must Address Issues of Regulatory Capture**

All uses of digital technology involve copying, copyright directly affects the lives of nearly everyone in the United States. Our copyright policies and practices should acknowledge and accommodate the broad array of interests they affect, rather than being tailored to the needs of a few incumbent media and entertainment industries.

Unfortunately, it has been our experience that Copyright Office representatives take an unduly narrow view of the purposes of copyright, and have used their advisory role to promulgate that political view. They have regularly engaged in what amounts to government lobbying<sup>1</sup> on behalf of a small group of industry actors that represents a decreasing amount of the overall content creation landscape.<sup>2</sup>

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<sup>1</sup> Ernesto Falcon, *Newly Released Documents Show Hollywood Influenced the Copyright Office's Comments on Set-Top Boxes*, Deeplinks Blog, available at <https://www.eff.org/deeplinks/2016/10/newly-released-documents-show-hollywood-influenced-copyright-offices-comments-set>.

<sup>2</sup> Mitch Stoltz, *Copyright Office Jumps Into the Set-Top Box Debate, Says Hollywood Should Control Your TV*, Deeplinks Blog, available at <https://www.eff.org/deeplinks/2016/08/copyright-office-jumps-set-top-box-debate-says-hollywood-should-control-your-tv>



The politicization of the Copyright Office must end. Effective reform should ensure that the Copyright Office provides objective analysis of the many nuances in copyright law and immunize the Copyright Office against regulatory capture.<sup>3</sup>

Reforms that emphasize objectivity when advising Congress are common sense. In fact, such changes would bring the Copyright Office in line with other Legislative Branch agencies that support the work of Congress through objective analysis such as the Government Accountability Office and the Congressional Research Service.

### **Senate Confirmation of the Register of Copyrights Is Unnecessary**

EFF questions the necessity of having the Register of Copyrights subject to Senate confirmation. The Register's role in policymaking is primarily advisory, and the Register has little or no rulemaking authority. The power to make and revise copyright law remains with Congress and most of the Register's work is already reviewable by Congress. Furthermore, requiring the Register of Copyrights to undergo confirmation may risk further politicizing the position, aligning it more closely with well-represented special interests in Washington D.C. Such a result would undermine the goal of ensuring that the advice the Register provides to Congress is non-partisan and objective.

### **EFF Supports Modernization Of the Copyright Office's Infrastructure**

EFF fully supports Congress providing the Copyright Office the requisite funds and authority needed to modernize the agency. Enhancing the ability for the public to search for copyright records will reduce the need for litigation and reduce burdens on the legal system. As more parties regularly create new content and seek registration of their creative works, there will be an ever-greater need for resources to meet demand. The Committee should also consider directing the Office to offer a zero-cost search functionality for users to benefit from the modernization.

### **Proposals For A "Small Claims" Process Risk Biased Outcomes And Abusive Litigation Tactics**

The House Judiciary Committee proposal refers to the "small claims" proposal from a 2013 Copyright Office report, versions of which were introduced as bills in the previous Congress.<sup>4</sup> A new federal tribunal dedicated to copyright claims raises serious risks of abuse by unscrupulous plaintiffs, and of pro-plaintiff bias. For these reasons, EFF strongly opposes the inclusion of a small claims tribunal at the Copyright Office.

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<sup>3</sup> Meredith Whipple, *The Consequence of Regulatory Capture at the Copyright Office*, Public Knowledge, available at <https://www.publicknowledge.org/news-blog/blogs/the-consequences-of-regulatory-capture-at-the-copyright-office>.

<sup>4</sup> H.R. 5757, Copyright Alternative in Small-Claims Enforcement Act of 2016; H.R. 6496, Fairness for American Small Creators Act.



As a public interest law firm, EFF is regularly contacted by concerned Americans who face copyright litigation, or threats of litigation, over their lawful online activities. Under existing law and federal court practice, commercial operators have already created an entire industry devoted to monetizing threats of copyright litigation against Internet subscribers and small website operators. Rather than seeking to reduce infringement, these “copyright trolls” profit from the litigation process itself by coercing nuisance-value settlements from legally unsophisticated defendants. In 2013, mass litigation against individual Internet subscribers represented one-third of all copyright infringement suits filed.<sup>5</sup>

The procedural safeguards of the federal court system have been vital to curbing such abuse. Many federal courts have recognized such suits as potentially abusive, and have tightened limits on joinder of defendants, personal jurisdiction, and civil discovery as a result.<sup>6</sup> Two practitioners of such lawsuit abuse were recently indicted for fraud.<sup>7</sup>

A new tribunal intended specifically to adjudicate a high volume of copyright claims at low cost invites a new campaign of abuse for no benefit. The proposed maximums on monetary awards that the “small claims” tribunal can impose are higher than the maximums allowed in most state small claims courts, and represent a daunting and potentially coercive amount for many Americans, especially if rightsholders bring multiple proceedings against a single household or small business. Arguments that all of these issues can be ignored simply because the legislation includes an “opt-out” provision ring hollow and do nothing to eliminate this potential outcome.

Lastly, like other narrowly-focused tribunals, the proposed “small claims” system would likely exhibit a pro-plaintiff bias that does not exist in courts of general jurisdiction. Creating a process that effectively makes it easier to file lawsuits against a larger array of defendants is a step backwards in copyright reform. We urge the Committee to abandon this provision.

Sincerely,

Electronic Frontier Foundation

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<sup>5</sup> Matthew Sag, “Copyright Trolling, An Empirical Study” (2014), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2404950](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404950).

<sup>6</sup> See, e.g. *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990 (D.C. Cir. 2014) (curtailing mass joinder in copyright infringement cases); *Hard Drive Productions v. Does 1-90*, No. C 11-03825 HRL, 2012 U.S. Dist. LEXIS 45509, 2012 WL 1094653 (N.D. Cal. Mar. 30, 2012) (“[T]he court will not assist a plaintiff who seems to have no desire to actually litigate but instead seems to be using the courts to pursue an extrajudicial business plan against possible infringers (and innocent others caught up in the ISP net).”

<sup>7</sup> Jonathan Bilyk, “Prenda lawyers Steele, Hansmeier indicted over work to ‘extort’ \$6M from porn downloaders,” *Cook County Record* (Dec. 19, 2016), <http://cookcountyrecord.com/stories/511060244-prenda-lawyers-steele-hansmeier-indicted-over-work-to-extort-6m-from-porn-downloaders>.