

January 31, 2017

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”

Dear Chairman Goodlatte and Ranking Member Conyers:

FreedomWorks and the R Street Institute are pleased to submit the following comments on the Committee’s proposal to modernize and reform the U.S. Copyright Office.

We are encouraged that the House Committee on the Judiciary is undertaking this important effort. Copyright protection is a critical incentive for a myriad of economically important creative works. However, it is also a double-edged sword. Overly-broad or improperly applied copyright measures can pose a substantial threat to innovation, property rights, free expression, and economic growth. It is important, therefore, to ensure that the Copyright Office has the capacity to establish a balanced and effective copyright policy to keep pace with a rapidly evolving market, and “meet the needs of a modern 21st Century copyright system.”

We address some specific aspects of the Committee’s reform proposal below.

Register of Copyrights and Copyright Office Structure

The U.S. Copyright Office is structured as a unit within the Library of Congress. Therein, the Register of Copyrights administers the nation’s copyright system by maintaining records of registered works, providing information to the public about those works, advising government on copyright law and policy, and supporting the development of the Library of Congress’ deposit collection.

Why should the Copyright Office be within the legislative branch, under the authority of the Librarian of Congress? Prior to the office’s creation in 1897, works were registered with U.S. district courts¹ and deposited with the Department of State. Beginning with the 1846

¹ United States Copyright Office, “Overview of the Copyright Office,” <https://www.copyright.gov/about/>.

Smithsonian Institution Act and later the 1870 Copyright Act, the registration and depositing of copyrighted works were centralized in the Library of Congress, both to create a unified system of recordation and for the purpose of enriching the Library's collection. In this context, housing the office within the nation's foremost library makes a great deal of sense.

Copyright, as the Constitution mandates, exists to “promote the Progress of Science and the useful Arts.”² It not merely a historical accident our copyright system is housed within the world's largest library. Rather, this reflects that the core purpose of the copyright system is not merely to record and secure rights, but also to make knowledge and creative works available for the benefit of the public. Thus adding to the sum of human experience and, in the long run, expanding the public domain.

This sentiment is reflected in the mission³ of the Copyright Office itself (emphasis added):

To administer the Nation's copyright laws for the **advancement of the public good**; to offer services and **support to authors and users of creative works**; and to provide expert impartial assistance to Congress, the courts, and executive branch agencies on questions of copyright law and policy.

This advancement of public good, the “Progress” spoken of by the Framers, is achieved through carefully balanced incentives for creators in the form of limited monopolies on the use of their work. Getting this balance right requires the office to consider not just the interests of competing stakeholders within the creative community, but also consumers and users. Advancing balanced copyright in a dynamic marketplace, rather than merely protecting the rents accrued to rightsholders, should be the main focus of any reforms to the Copyright Office if we are to keep in line with its mission and foundational context.

The language of the proposal calls for the Copyright Office to have more autonomy over its budget and technology needs, but leaves open whether it will be formally housed within the Library of Congress. We understand the concerns of those who would like to give the office greater autonomy, particularly in light of past challenges,⁴ however we believe Congress should be wary of proposals to fully move it out from under the Library. Putting the Register under the Librarian—whose role is to organize and make works accessible—will help keep the Copyright Office true to its mission to serve both rightsholders and the public, and limit opportunities for capture by special interests.

Information Technology Upgrades

² U.S. Const. Art. 1 § 8.

³ *Ibid.*

⁴ See the Government Accountability Office, “Copyright Office Needs to Develop Plans that Address Technical and Organizational Challenges,” Mar. 31, 2015, <http://www.gao.gov/products/GAO-15-338>.

While the Copyright Office faces serious technical infrastructure challenges, moving the office will be controversial and difficult. Some stakeholders wish to keep it under the library, some want to make it independent within the legislative branch, and other still wish to see it moved under the Department of Commerce. All of this is a distraction from the real issues facing the office, which can be productively addressed if effort is made to tackle⁵ them internally. Former Librarian of Congress James Billington, who retired in 2015, was widely criticized⁶ for technology weaknesses throughout the Library during his decades-long tenure. Now, we should give current Librarian of Congress Carla Hayden—who has a track record⁷ modernizing information technology systems—time to address them. Indeed, it should also be common sense that a professional librarian is better suited to the task of organizing the infrastructure to support vast collections of information.

Bringing the Copyright Office into the 21st century is a challenge which greater autonomy or independence will not solve on its own. Meanwhile, the creation of a new agency will also entail new budgetary needs, new bureaucracy, and duplicative functions. Addressing the management and infrastructure challenges of the existing office internally will help limit the growth of government and more directly get at the underlying problems.

The debate over modernizing the Copyright Office should not be about creating new offices or shuffling political oversight. Rather, the issue of reform should begin with a nuts and bolts approach to tackling the mission of “administering the Nation’s copyright laws.”⁸ To this end, we strongly support the creation of key new positions including a Chief Economist and Chief Technologist. An economic lens, in particular, will be of tremendous value to supporting this mission.

We also strongly support the Committee’s proposal to establish a reliable, searchable database of copyrights and copyright information—however we also believe there is a strong public interest in making this information freely available, particularly to low-volume users. Additionally, we believe an API should be made available with access to bulk machine-readable data, similar to the U.S. Patent & Trademark Office’s Open Data Portal.⁹ This was also contemplated in the Copyright Office’s provisional IT modernization plan released last year.¹⁰

⁵ Library of Congress, “Library of Congress Strategic Plan FY 2016 Through FY 2020,” https://www.loc.gov/portals/static/about/documents/library_congress_stratplan_2016-2020.pdf.

⁶ Michael D. Shear, “Library of Congress Chief Retires Under Fire,” *New York Times*, June 10, 2015, <https://www.nytimes.com/2015/06/11/us/library-of-congress-chief-james-hadley-billington-leaving-after-nearly-3-decades.html>.

⁷ American Library Association, “Rapidly Vote To Confirm Dr. Carla Hayden As Librarian Of Congress,” <http://www.ala.org/advocacy/sites/ala.org.advocacy/files/content/04-25-16%20All%20Issue%20Briefs%20NLLD%202016.pdf>.

⁸ See *supra*, note 1.

⁹ United States Patent and Trademark Office, “Open Data Portal,” <https://developer.uspto.gov/>.

¹⁰ United States Copyright Office, “Provisional Information Technology Modernization Plan and Cost Analysis,” Feb. 29, 2016, <https://www.copyright.gov/reports/itplan/technology-report.pdf>.

Small Claims

Another reform proposal recommends the Copyright Office establish a small claims system to handle low value infringement cases and bad faith Section 512 notices. While we agree providing copyright owners the ability to enforce small claims is important, we have serious concerns about creating such a system within the legislative branch. Our concerns are twofold:

Structurally, the creation of a small claims system within the legislative branch raises serious constitutional questions that detract from enhancing the capabilities of the Copyright Office. How the process will work, especially with respect to appeals is unclear. Additionally, this raises questions as to whether the makeup of the court will be balanced.

Functionally, the system has the potential to create a substantial number of new abusive small claims. While a suit in federal court may be expensive, it provides both parties with procedural safeguards. And even when the amount in controversy is small—which it rarely is—other costs such as discovery, will still burden the small claims procedure. We also question the the transparency of the process. For instance, will records be available to the public? Given these questions, we are presently unable to support a small claims court within the Copyright Office.

Conclusion

It is widely accepted the Copyright Office is overdue for modernization and reform. Rather than attempting to address the larger—and more contentious—debates surrounding copyright law, this reform effort should focus on marginal enhancements to the core capabilities of the office and its infrastructure. We believe this is a goal which all stakeholders ought to share and be able to build consensus around.

Respectfully submitted,

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