

January 31, 2017

The Honorable Bob Goodlatte
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

The Honorable John Conyers
Ranking Member
House Judiciary Committee
2142 Rayburn House Office Building
Washington, D.C. 20515-6216

Submitted electronically via email to copyright.comments@mail.house.gov

Re: Reform of the U.S. Copyright Office

Dear Chairman Goodlatte and Ranking Member Conyers,

We are writing on behalf of the Independent Film & Television Alliance (“IFTA”) in response to your request for written comments in connection with your White Paper entitled “Reform of the U.S. Copyright Office”.¹ IFTA has been actively involved in the House Judiciary Committee’s review of the U.S. Copyright Law and welcomes this opportunity to provide its views on the initial policy proposal emerging from the Committee’s work with respect to the modernization of the U.S. Copyright Office.

About IFTA and its Member Companies

Based in Los Angeles, California, IFTA is the global trade association for the independent motion picture and television industry worldwide and is dedicated to protecting and strengthening its Members’ ability to finance, produce, market and distribute independent films and television programs in an ever-changing and challenging global marketplace. IFTA represents more than 125 companies in 23 countries, the majority of which are small to medium-sized U.S.-based businesses² which generate nearly 80% of the feature films made in the United States each year.

Copyright is the foundation of the motion picture and television industry. Independent producers and distributors rely heavily on the legal framework provided by Copyright Law to finance, license, and protect their creative work and investment worldwide. Independents rely on third party investment to finance their films and partner with third party distributors (licensees)

¹ See <https://judiciary.house.gov/wp-content/uploads/2016/12/Copyright-Reform.pdf>.

² A complete list of IFTA Members is available online at: <http://www.ifta-online.org>.

to “pre-sell” the rights and secure distribution prior to the production of films and television programming. The copyright to the film is held by the bank as part of the collateral for the production loan. Once the production loan is paid back to the bank, the copyright is assigned back to the producer. This financial model assumes that the licensed exclusive rights that have been granted to exclusive distributors can be protected and fully exploited to recoup production costs, pay off the production loan(s) and generate a profit so that independent producers may continue to finance and produce films and television programming. Operating in a global arena, these companies are able to export films and programming worldwide solely by demonstrating clear chain of title under copyright, thus deepening the independents’ reliance upon the Copyright Office and its recording systems. In 2015, IFTA Members’ total collective sales were over US\$4 billion with exports over US\$2.1 billion and domestic sales nearly US\$2 billion.

The economic impact of the independent film and television industry evidences that copyright drives innovation, creation and prosperity. Our sector accounts for over 75% of all films produced in the U.S. In 2014, independent production companies shot 365 films in the U.S. This independent production activity resulted in the creation of 23,175 direct full-time jobs and another 69,836 full-time jobs for the various vendors that service the industry. Combined, both classes of employees earned over \$9.3 billion. Total business revenue that resulted from this independent production activity totaled over \$14.4 billion in economic output. It also generated nearly \$1.95 billion in income and sales taxes for both the federal and individual state governments. The federal government’s share of income tax received was over \$1.22 billion. Protection of the exclusive rights is paramount and content theft seriously undermines the independent sector’s ability to sustain business operations and to employ American workers. The protection of exclusive rights for limited times as contemplated in the U.S. Constitution is the basis on which this country’s innovators and creators are able to work.

Below, IFTA responds to the framework posed by the Committee where the experience of IFTA Members may be of greatest assistance in evaluating the suggested reforms to ensure the Copyright Office keeps pace in the digital age.

The Constitutional Protection of Authors and Inventors and Importance of Copyright

*“Congress shall have the Power.....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.”*³ In 1790, this core American value to protect creation and innovation was established in the Constitution and the authority to promulgate necessary legislation was endowed in Congress, providing the cornerstone for great American inventors, creators and authors and their contributions to our way of life, culture and general well-being. The power of this one Clause cannot be understated and must be vigorously protected. Congress has steadfastly discharged its responsibilities in this regard for many decades, modernizing the Law when necessary and providing adequate funding for the Copyright Office to carry out its unique and special mission. The careful protection of laws and policies ensures that innovation and creativity are continuous and that the environment envisioned and intended by our Founders is maintained. In exercising its authority under the Constitution, Congress has established the Copyright Office with the power to administer the copyright system, designated it as the

³ United States Constitution, Article I, Section 8.

Congress' expert advisor on domestic and global copyright issues, and instructed it to assist federal agencies and the courts addressing such issues. Congress also directed the Office to participate in international meetings and negotiations to support U.S. government delegations on copyright matters.⁴ The time has come once again to modernize so that Americans can continue to lead in creation and innovation. IFTA commends this Committee and Congress for its careful and diligent process of modernization of the Copyright Office that will propel the creators and innovators of today and tomorrow.

Register of Copyrights and Copyright Office Structure

As a trade association representing the interests of over 125 small to medium sized companies that rely on copyright and licensing of exclusive rights, IFTA believes that the views of those who make their living in whole or in part through exploitation of their exclusive rights contemplated and granted under Copyright Law (as well as those who represent the interests of those creators) should be given great weight as the House Judiciary Committee moves forward with its efforts. These companies and individuals regularly rely on the fundamental promise of the U.S. Copyright Law -- the ability to protect the integrity of and recoup the investment in their own works -- and on the Copyright Office's ability to maintain full and adequate records of those rights throughout the cycle of exploitation.

The independent film and television industry also relies on the Copyright Office and the Register to provide expert advice and information regarding Copyright Law, regulations, procedures and processes to the legislative, judicial and executive branches of government, as well as to copyright owners and the public. It is fundamental that such advice and information is grounded in an in-depth understanding of the importance and value of copyright and creativity while promoting the benefits of a strong copyright system and a modern Copyright Office. IFTA fully agrees with the Committee that the next Register must be given the autonomy to comply with its obligations, and that the structure of the Copyright Office must support that mission. The Register must have the flexibility to communicate and provide information to the private sector, authors, creators and the public, as well as to Congress, about the registration of copyright, protection of and limitations on exclusive rights and the conditions in which fair use may be exercised by users of copyrighted works.

The next Register of Copyrights who "should be subject to a nomination and consent process" and "have autonomy over its budget and technology needs"⁵ will need the support and structure of Congress provides in order to provide independent leadership and carry out its mission for the administration of copyright registration and other functions for the 21st Century and beyond. While remaining independent from the Library of Congress, the Copyright Office and our next Register should have a strong relationship with those national institutions that will shape copyright policy and law, including the U.S. House and Senate Judiciary Committees, the U.S. Patent & Trademark Office, the Intellectual Property Enforcement Coordinator and with the

⁴ See 17 U.S.C. § 701

⁵ Reform of the U.S. Copyright Office, H. Comm. on the Judiciary, <https://judiciary.house.gov/wp-content/uploads/2016/12/Copyright-Reform.pdf>.

U.S. trade and diplomatic mission to set international copyright treaties, standards and policies that will promulgate “healthy markets” for U.S. produced copyrighted works.

IFTA is concerned about a term limit for the Register position and strongly believes that any term should be renewable (i.e., subject to re-nomination). The Copyright Office is a unique entity with responsibilities that span copyright law and practice and encompasses massive records management, technology, customer service and reporting, and domestic and international policy participation. Expertise in the many functions will develop over time and there should be the flexibility to renew the appointment of a successful Register. History proves that the past 12 Registers have provided steady and sure guidance and leadership with the valued commodity of institutional history and expertise drawn from tenures longer than 10 years. Thorvald Solberg took office as the first Register of Copyrights on July 1, 1897 and served until his retirement on his 78th birthday in 1930. More recently, Marybeth Peters, the 11th Register, served from August 7, 1994, through December 31, 2010. She had a longer tenure than any other Register with the exception of Mr. Solberg⁶. Providing expertise to Congress, the Courts and relevant agencies are enhanced with experience and time in the position so any term set by Congress should be renewable, in line with the Copyright Office’s 120 year history and reflecting the esteemed Registers of Copyrights who have served as leaders.

Copyright Office Advisory Committees

We are uncertain about the role of the proposed Copyright Office Advisory Committees as proposed in the White Paper and whether these Committees would be focused on operational matters only. We would also like to see clearer delineation of how the Board’s members would be selected, including a requirement that all interested sectors be fully represented. In conjunction with the Copyright Office’s long history of receiving Public Comments and organizing public meetings and roundtables, we agree that Advisory Committees (both ad hoc and permanent) may be useful to advise the Copyright Office and the Register. However, the issues cited in the White Paper, which include *inter alia* “registration and recordation system, public outreach efforts, access for the visually impaired and issues related to libraries, museums, and archives” are (with the exception of registration and recordation) focused on the limitations and exceptions to copyright and exclusive rights and the Committees must also include rights holders in equal proportion. Since the Copyright Office also advises Congress, Courts and government agencies on policy and law and advises our U.S. trade and diplomatic delegations on copyright issues impacting rights holders worldwide and given that the majority of the users of the Copyright Office’s primary services are creators who rely on the exclusive rights granted to them under copyright law, a permanent Advisory Committee specifically focused on the needs of the rights holders which would include registration, recordation, search functions, and protection of copyright in the U.S. and foreign markets would add the necessary balance.

Smaller rights holders, in particular, must always be included in the membership of all committees to avoid the adoption of “Cadillac solutions” that often rely on voluntary agreements or on mechanisms which are too expensive for independent rights holders to participate in when available. This is of substantial concern to IFTA whose independent Membership includes

⁶ <https://www.copyright.gov/about/register/index.html>

numerous owner-operated, entrepreneurial ventures with limited resources. Their perspective is critical to the full and effective implementation of copyright law in the U.S.

Information Technology Upgrades

The current Copyright Office has suffered from the lack of commitment of funds to technology and thus is not able to provide the type of comprehensive services and analysis that are needed for rights holders, the public and policymakers today. We take on board the contents of recent audits that indicate this failure to dedicate the necessary funds reflects the Copyright Office's position as a subordinate division of the Library of Congress, without the ability to advocate directly for the resources the Copyright Office requires to service its constituency. Re-establishing the Office as a stand-alone agency within the Legislative Branch will be the solution if the lines of authority within Congress to ensure that the Office's voice is heard in the budgeting and appropriations process are carefully laid out.

We implore Congress to support modernization of the Copyright Office by immediately implementing the Copyright Office's IT Modernization Plan contained within the USCO's Strategic Plan for 2016-2020⁷, which includes making the registration and recordation process easier and more affordable. Unfortunately, all copyright registrations filed prior to 1978 are only stored in hard copy, and searching for ownership information is an expensive and time consuming endeavor. This harms both the public as potential users and copyright owners who may be contacted by potential licensees in order to exploit their works. While the Modernization Plan will come at a cost⁸, modernization must not be funded through substantial increased fees for registration and recordation but rather be considered a necessary allocation of federal funds to ensure that the Copyright Clause of the Constitution and the benefits it has brought to the United States continues to grow for all of us and future Americans.

Small Claims

Pursuant to the request of Congress, the Copyright Office undertook the task of evaluating the current system available for resolving small copyright claim disputes and exploring possible alternative systems. IFTA took part in some of those public meetings and filed its Comments⁹ and Additional Comments¹⁰ with the Copyright Office, lending its support for an alternative forum to resolve small copyright claims despite the proposal's limited applicability to the IFTA Membership and the films and television programs they produce.

IFTA is supportive of a forum that could ease the burden of litigation for small rights holders such as photographers, graphic artists and the like because litigation of copyright claims includes significant time, money, and effort and, for claims with small economic value, the cost

⁷ See U.S. Copyright Office, Positioning the United States Copyright Office for the Future: Strategic Plan 2016-2020 (2015), <https://www.copyright.gov/reports/strategic-plan/USCO-strategic.pdf>.

⁸ U.S. Copyright Office, Provisional Information Technology Modernization Plan and Cost Analysis (Feb. 29, 2016), <https://www.copyright.gov/reports/itplan/technology-report.pdf>.

⁹ IFTA Comments filed with U.S. Copyright Office in connection with the Treatment of Small Copyright Claims [Docket No. 2011-10] https://www.copyright.gov/docs/smallclaims/comments/26_ifta.pdf

¹⁰ IFTA Additional Comments in connection with Remedies for Small Copyright Claims [Docket No. 2011-10] https://www.copyright.gov/docs/smallclaims/comments/noi_10112012/IFTA.pdf.

does not justify the potential award. However, the budgets of commercially produced films and television programs can begin at \$750,000 and exceed \$100 million dollars and for investments of that significant amount a small claims court is not appropriate. Further, a small claims court would not issue (and IFTA does not advocate it is able to do so) injunctive relief as this is an essential power vested only in Courts but such relief is especially necessary in the case of pre-release or mass commercial piracy. The Copyright Office issued a report related to its public process to receive input on small claims in September 2013¹¹ and it specifically addresses the extent to which copyright owners are prevented from seeking relief from infringements due to the constraints in the current system. The report also provides recommendations to improve the system for resolving small copyright claims, which may include changes to the administrative, regulatory and/or statutory authority currently in place. We believe there is room for small claims defined as no more than \$50,000 or perhaps even a lower threshold and IFTA will continue to provide its input on any such mechanism as the process evolves.

Conclusion

We support the Committee's goal to modernize the Copyright Office and look forward to working with you on this important legislation toward the development of an autonomous, well-funded 21st Century Copyright Office. We encourage all Committee Members to call on IFTA for information regarding the impact of Copyright Office modernization on the independent film and television industry, as well as the selection of our next Register. Once again, thank you for this opportunity and your time and support of the intellectual property industry.

Respectfully submitted by,

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Susan Cleary, Vice President & General Counsel

Eric Cady, Senior Counsel

Independent Film & Television Alliance

¹¹ <https://www.copyright.gov/docs/smallclaims/>