

**Motion Picture Association of America
Submission to the House Judiciary Committee
Regarding the Copyright Review Proposal
on Copyright Office Modernization**



Jan. 31, 2017

I. Overview

Chairman Goodlatte and Ranking Member Conyers' decision to adopt Copyright Office modernization as the first proposal of the House Judiciary Committee copyright review¹ makes perfect sense. More than any other topic over the four-year, 20-hearing, 100-witness review,² Copyright Office modernization has emerged as a critical, consistent, and consensus issue.

The Copyright Clause of the Constitution grants Congress 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 doing so, the Constitution recognizes that respecting content creators' rights to determine how to disseminate their works not only enables them to earn a living from their labors, but benefits the public by promoting the creation and wide distribution of culture and knowledge, as well as spurring economic growth. To help Congress promote such creativity and the resulting public benefit, Congress has put the Copyright Office in charge of administering the copyright system, designated the Office as the legislative branch's expert advisor on national and international issues pertaining to copyright, charged it with assisting federal agencies and courts on copyright-related matters, and directed it to participate in international meetings and negotiations on copyright.⁴ Consequently, a 21st century copyright system requires a 21st century Copyright Office.

The Motion Picture Association of America therefore supports Chairman Goodlatte and Ranking Member Conyers' proposal to make the Register of Copyrights a nominated and confirmed position with autonomy over Copyright Office policy, its budget, its personnel, and its technology needs, subject to congressional oversight.⁵ Codifying the Office's policy and operational autonomy from the Library of Congress will better enable Congress to exercise its authority granted by the Copyright Clause and to receive from the Copyright Office the

¹ See Press Release, H. Comm. on the Judiciary, Goodlatte & Conyers Release First Policy Proposal of Copyright Review (Dec. 8, 2016), <https://judiciary.house.gov/press-release/goodlatte-conyers-release-first-policy-proposal-copyright-review/>.

² See Copyright Review, H. Comm. on the Judiciary, <https://judiciary.house.gov//issue/us-copyright-law-review/>.

³ See U.S. CONST. art. I, § 8, cl. 8 (vesting in Congress 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”).

⁴ See 17 U.S.C. § 701.

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

impartial, expert, unfiltered advice it needs to do so,⁶ including on all the other issues raised in the House Judiciary Committee’s copyright review. It will also give the Copyright Office the tools necessary to exercise its statutory obligations under the Copyright Act, put the Copyright Office on par with other government entities responsible for administering comparable statutory regimes upon which similarly significant sectors of the economy rely, and allow the American people and all interested parties to provide input through their elected officials into the selection of the Register. For this to occur, the Copyright Office itself must be allowed to manage the modernization according to the Office’s specific knowledge and experience, relying upon people who work with and report to Copyright Office experts and who are not burdened by the demands of another institution with competing priorities. If the Copyright Office is required to work through, or is subject to review by, supervisors who are neither copyright experts nor accountable to the Office, the effort will bog down in the conflicting demands and interests of the larger bureaucracy.

II. Background

A. *The Rise of Copyright Office Modernization as a Consensus Issue*

Maria Pallante, then-Register of the Copyright Office, raised the need to evolve both the Copyright Office’s structure and its information technology systems at the very first House Judiciary copyright review hearing, held March 20, 2013,⁷ as well as the very last one, held April 29, 2015.⁸ And at a Feb. 26, 2015, Committee hearing dedicated to the topic,⁹ modernizing the Office’s structure and information technology systems received unanimous support from the participating Republican and Democratic members and all the witnesses, with discussion centering not on whether to modernize, but on the various ways Congress could do so.¹⁰ Following all the hearings, the Committee also invited any interested parties to meet with Committee staff to further discuss the issues raised over the course of the review, while the

⁶ See Rep. Howard Berman, Former Chairman, House Subcommittee on Courts, the Internet and Intellectual Property, *A tribute to an outstanding Register of Copyrights*, THE HILL, Nov. 9, 2016 (explaining the important role of the Register as an impartial, expert advisor to Congress), <http://origin-ny1.thehill.com/opinion/op-ed/305335-a-tribute-to-an-outstanding-register-of-copyrights>.

⁷ See *The Register’s Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong., Statement of Maria A. Pallante, Register of Copyrights of the United States, at 3 (March 20, 2013), <https://judiciary.house.gov/wp-content/uploads/2016/02/Pallante-Testimony.pdf>.

⁸ See *The Register’s Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong., Statement of Maria A. Pallante, Register of Copyrights of the United States, at 4, 6-10 (April 29, 2015), <https://judiciary.house.gov/hearing/hearing-the-register-s-perspective-on-copyright-review/>.

⁹ See *The U.S. Copyright Office: Its Functions and Resources: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (Feb. 26, 2015), <https://judiciary.house.gov/hearing/hearing-the-u-s-copyright-office-its-functions-and-resources/>.

¹⁰ See *id.*, Serial No. 114–4 (transcribing opening statements and questions supportive of modernization from Chairman Goodlatte, Ranking Member Conyers, and Reps. Issa, Nadler, Marino, Lofgren, Collins, Deutch, Chu, and Jeffries, as well as the supportive testimony of the Software & Information Industry Association, the American Bar Association, the American Intellectual Property Law Association, and Robert Brauneis, Professor, George Washington University Law School), https://judiciary.house.gov/wp-content/uploads/2016/02/114-4_93529.pdf.

Committee members embarked on a listening tour around the country to hear directly from a variety of stakeholders.¹¹

Modernization has garnered the support of a wide range of technology, intellectual property, business, academic, think tank, and library organizations.¹² The Motion Picture Association of America is among their number.¹³

¹¹ See Copyright Review, H. Comm. on the Judiciary, <https://judiciary.house.gov/issue/us-copyright-law-review/>.

¹² See, e.g., Letter from Michael Beckerman, President & CEO, Internet Association, to Chairman Goodlatte and Ranking Member Conyers, House Judiciary Committee (April 29, 2015), <http://internetassociation.org/wp-content/uploads/2015/04/Internet-Association-Copyright-Review-Letter-to-HJC-042915.pdf>; Press Release, Re:Create Coalition, Re:Create Coalition Reacts To Copyright Office Reform Proposal (Dec. 8, 2016), http://www.recreatecoalition.org/press_release/recreate-coalition-reacts-copyright-office-reform-proposal/; Press Release, Software & Information Industry Association, SIIA Applauds House Judiciary Movement on Copyright Office Modernization (Dec. 9, 2016), <http://www.siiia.net/Press/SIIA-Appraises-House-Judiciary-Movement-on-Copyright-Office-Modernization>; Letter from Mark Whitaker, President, American Intellectual Property Law Association, to Donald Trump, President-Elect of the United States, at 7 (Jan. 4, 2017), <http://www.aipla.org/resources2/reports/2017AIPLADirect/Documents/AIPLA%20Letter%20to%20President-Elect%20Donald%20Trump.pdf>; Press Release, Copyright Alliance, Copyright Alliance CEO Kupferschmid Comments on Today's Announcement by Goodlatte and Conyers on First Policy Proposal for Copyright Office Reform (Dec. 8, 2016), <http://copyrightalliance.org/wp-content/uploads/2016/12/Goodlatte-Reform-PR-Dec-8-2016.pdf>; Letter from Nancy Wolff, Counsel for Digital Media Licensing Association, to Maria Pallante, Register, U.S. Copyright Office (March 30, 2016), <https://www.regulations.gov/document?D=COLC-2016-0002-0007>; Letter from Kevin Rhodes, President, Intellectual Property Owners Association, to Donald Trump, President-Elect of the United States, at 3 (Dec. 22, 2016), http://www.ipo.org/wp-content/uploads/2016/12/20161222_IPO-to-Pres.Elect-Trump-Ltr-Re-Key-Issues-to-IP-Owners.pdf; Press Release, Association of American Publishers, Publishers Applaud Circulation of the Copyright Office for the Digital Economy (CODE) Act Discussion Draft (June 4, 2015), <http://publishers.org/news/publishers-applaud-circulation-copyright-office-digital-economy-code-act-discussion-draft>; *In re* Information Technology Upgrades for a *Twenty-First Century Copyright Office*, Copyright Office, Docket No. 2016-2, Comments of the Authors Guild (March 31, 2016), https://www.authorsguild.org/wp-content/uploads/2014/10/2016-2-NOI_CO_IT-Upgrades.Authors-Guild.pdf, Comments of the Graphic Artists Guild (March 30, 2016), <https://www.regulations.gov/document?D=COLC-2016-0002-0048>, Comments of the American Society of Media Photographers (March 31, 2016), <https://www.regulations.gov/document?D=COLC-2016-0002-0005>, Comments of the National Press Photographers Association (March 31, 2016), <https://www.regulations.gov/document?D=COLC-2016-0002-0006>, Comments of the Professional Photographers of America (March 31, 2016), <https://www.regulations.gov/document?D=COLC-2016-0002-0050>; *In re* Technological Upgrades to Registration and Recordation Functions, Copyright Office, Docket No. 2013-2, Comments of the American Association of Independent Music (May 21, 2013), https://www.copyright.gov/docs/technical_upgrades/comments/A2IM.pdf, Comments of the National Music Publishers Association, https://www.copyright.gov/docs/technical_upgrades/comments/NMPA.pdf, Comments of SoundExchange (May 21, 2013), https://www.copyright.gov/docs/technical_upgrades/comments/ASMP.pdf, Comments of Dominican University Graduate School of Library and Information Science (April 14, 2013), https://www.copyright.gov/docs/technical_upgrades/comments/DUGS.pdf; *In re* Strategic Plan for Recordation of Documents, Copyright Office, Docket No. 2014-1, Comments of the American Society of Composers, Authors, and Publishers & Broadcast Music, Inc. (March 15, 2014); Letter from Carey Sherman, Chairman and CEO, Recording Industry Association of America, to Chairman Goodlatte and Ranking Member Conyers, House Judiciary Committee (Feb. 26, 2015), https://judiciary.house.gov/wp-content/uploads/2016/02/114-4_93529.pdf; Press Release, U.S. Chamber of Commerce, U.S. Chamber Applauds Copyright Modernization Efforts (Dec. 8, 2016), <http://www.theglobalipcenter.com/u-s-chamber-applauds-copyright-modernization-efforts/>; 60 Plus Association, Statement from the 60 Plus Association in Support of Modernizing the U.S. Copyright Office (June 9, 2016), <https://60plus.org/us-copyright-office-must-be-modernized-for-the-times/>; American Commitment, It's Time to Modernize the Copyright Office, <http://www.americancommitment.org/content/its-time-modernize-copyright-office>; Larry Hart, Director, American Conservative Union, *'Mad Men' era Copyright Office needs to be brought into the*

The MPAA serves as the voice and advocate of the American motion picture, home video and television industries, and represents Walt Disney Studios Motion Pictures, Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, and Warner Bros. Entertainment Inc. The American film and television sector is best known for its creative output. It is responsible for producing more than 400 scripted

21st century, THE HILL, June 15, 2015, <http://thehill.com/blogs/congress-blog/technology/244855-mad-men-era-copyright-office-needs-to-be-brought-into-the-21st>; Tom Sydnor, American Enterprise Institute, Copyright Office modernization efforts deserve broad support (June 25, 2015), <http://www.techpolicydaily.com/technology/copyright-modernization/>; Americans for Tax Reform, Copyright Office Modernization: A Win For Consumers, Creators, Innovators, And Congress (June 9, 2015), <http://www.atr.org/copyright-office-modernization-win-consumers-creators-innovators-and-congress#ixzz4XNStr48S>; Timothy Lee, Center for Individual Freedom, Bipartisan Copyright Office Modernization Legislation Introduced in Congress (June 5, 2015), http://cfif.org/v/freedom_line_blog/22889/bipartisan-copyright-office-modernization-introduced-in-congress/; Deborah Collier, Citizens Against Government Waste, Modernizing the Copyright Office (June 10, 2015), <http://www.cagw.org/swineline/modernizing-copyright-office>; Hance Haney, Discovery Institute, Modernize the Copyright Office (June 9, 2015), http://www.disco-tech.org/2015/06/modernize_the_copyright_office.php; Press Release, Free State Foundation, FSF President Randolph May Applauds CODE Act Draft Bill (June 9, 2015), <http://us10.campaign-archive1.com/?u=7086da6c8d739e6b66a92092e&id=ed717a8097>; Statement of George Landrith, President, Frontiers of Freedom (June 11, 2015), <https://www.ff.org/copyright-office-modernization/#more-14749>; Harold Furchtgott-Roth, Senior Fellow, Hudson Institute, *Copyrights Are Important Across America*, FORBES, June 16, 2015, <http://www.forbes.com/sites/haroldfurchtgottroth/2015/06/16/copyrights-are-important-across-america/#1c5675285d06>; Carrie L. Lukas, Independent Women’s Forum, Intellectual Property Protection – The Most Important Issue You Don’t Hear About (June 12, 2015), http://iwf.org/blog/2797409/A-Copyright-Office-For-The-Modern-Age?utm_source=Full+List&utm_campaign=81c1015b8f-WBR_06172015&utm_medium=email&utm_term=0_e50abae2e5-81c1015b8f-108244637; Letter from Robert D. Atkinson, President and Founder, Information Technology and Innovation Foundation, to Chairman Goodlatte and Ranking Member Conyers, House Judiciary Committee (Jan. 30, 2017), <http://www2.itif.org/2017-copyright-modernization.pdf>; Tom Giovanetti, Institute for Policy Innovation, Modernizing the Copyright Office (June 11, 2015), http://www.ipi.org/policy_blog/detail/modernizing-the-copyright-office; Gabriel Horwitz, Vice President, Third Way, *It’s Time To Modernize The Copyright Office*, FORBES, Jan. 26, 2017, <http://www.forbes.com/sites/washingtonbytes/2017/01/26/its-time-to-modernize-the-copyright-office/#7f97b8f7484d>; Letter from Emily Feltren, Director of Government Relations, American Association of Law Libraries, to Maria Pallante, Register, U.S. Copyright Office (March 31, 2016), <https://www.regulations.gov/document?D=COLC-2016-0002-0039>.

¹³ See, e.g., *In re* Request for Comments on Strategic Plan for Recordation of Documents, Copyright Office, Docket No. 2014-1, MPAA Comments (March 14, 2014); *Oversight of the U.S. Copyright Office: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Sept. 18, 2014), MPAA Submission for the Record (Nov. 14, 2014), <http://www.mpa.org/wp-content/uploads/2015/01/MPAA-HJC-Copyright-Office-Oversight-Hearing-Record-Submission.pdf>; *The U.S. Copyright Office: Its Functions and Resources: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (Feb. 26, 2015), MPAA Submission for the Record (March 5, 2015), <http://www.mpa.org/wp-content/uploads/2015/03/150305-MPAA-House-Judiciary-Copyright-Office-Hearing-Submission.pdf>; *The U.S. Copyright Office: Its Functions and Resources: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (April 29, 2015), Letter for the Record from Christopher J. Dodd, Chairman & CEO, MPAA, to Chairman Goodlatte and Ranking Member Conyers, House Judiciary Committee, <http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=103385>; *In re Information Technology Upgrades for a Twenty-First Century Copyright Office*, Copyright Office, Docket No. 2016-2, MPAA Comments (March 31 2016), <http://www.mpa.org/wp-content/uploads/2016/04/MPAA-IT-modernization-3-31-16.pdf>.

shows and 700 movies in 2016.¹⁴ These programs and films are distributed across a variety of platforms, including in theaters, on broadcast and cable networks and online, and are accessible over an ever-growing array of devices at a time and place of a viewer's choosing. Television and movie studios are now making their content available through more than 120 lawful online sources in the United States,¹⁵ and U.S. audiences used those sources to access 8.4 million movies and 76.1 billion television episodes in 2015, alone.¹⁶

Perhaps less known is how much this creativity helps drive the local and national economies. Approximately 1.9 million people go to work each morning in U.S. jobs connected to the production and distribution of movies and TV shows, and our industry generates \$121 billion in wages. The motion picture and TV industry is composed of 89,000 businesses spanning every state of the nation. Of those businesses, 84 percent are small businesses employing fewer than 10 people. The industry contributes \$131 billion in sales to the overall economy. U.S. movies and television shows are the envy of the world, with a positive balance of trade in nearly every country, generating \$16.3 billion in exports and a 5-to-1 export to import ratio. This resulted in a positive services trade surplus of \$13.1 billion, or 6 percent of the total U.S. private-sector trade surplus in services, more than each of the surpluses in the advertising, mining, telecommunications, legal, information, and health-related services sectors. The American movie and TV industry injects \$250,000 dollars a day into a local community when filming on location, regardless of whether the movie or show turns out to be a blockbuster, and makes more than \$40 billion a year in total payments to approximately 350,000 local businesses.¹⁷

Modernizing the Copyright Office will help maintain the film and TV industry's momentum in the digital age. The Office's role in administering the Copyright Act and as the statutorily designated advisor to Congress on copyright-related matters has been essential, and continues to grow in importance as copyright has become a larger portion of the overall economy. That is why the MPAA sent a letter for the record in the House Judiciary Committee's April 29, 2015, hearing agreeing with the Internet Association that the Committee should prioritize Copyright Office modernization in the copyright review.¹⁸ The common ground on

¹⁴ See Lesley Goldberg, *Scripted Originals Hit Record 455 in 2016, FX Study Finds*, HOLLYWOOD REPORTER, Dec. 21, 2016, <http://www.hollywoodreporter.com/live-feed/scripted-originals-hit-record-455-2016-fx-study-finds-958337>; MPAA, THEATRICAL MARKET STATISTICS (2015), http://www.mpa.org/wp-content/uploads/2016/04/MPAA-Theatrical-Market-Statistics-2015_Final.pdf.

¹⁵ Julia Jenks, MPAA, *The Number of Online Services Continues to Expand, Benefiting Consumers and Creators* (March 22, 2016), <http://www.mpa.org/the-number-of-online-services-continues-to-expand-benefiting-consumers-and-creators/#.WI9XfU0VCUI>.

¹⁶ Underlying data available from IHS. See <https://www.ih.com/>.

¹⁷ MPAA, THE ECONOMIC CONTRIBUTION OF THE MOTION PICTURE & TELEVISION INDUSTRY TO THE UNITED STATES (January 2016), <http://www.mpa.org/wp-content/uploads/2016/09/MPAA-Industry-Economic-Contribution-Factsheet-2016.pdf>.

¹⁸ See *The U.S. Copyright Office: Its Functions and Resources: Hearing Before the H. Comm. on the Judiciary*, 114th Cong., Serial No. 114-22, at 92 (April 29, 2015), Letter for the record from Christopher J. Dodd, Chairman & CEO, MPAA, to Chairman Goodlatte and Ranking Member Conyers, House Judiciary Committee, at 1, 3 (stating that “[w]hile we disagree with the Internet Association on some issues, we are pleased that we have both come to the conclusion that Copyright Office modernization should be the Committee’s priority at this point”) and Letter for the record from Michael Beckerman, President & CEO, Internet Association, to Chairman Goodlatte and Ranking Member Conyers, at 2, 4-5, 9 (stating that “[m]odernization of the Copyright Office should occur prior to

modernization amongst a diverse array of interests is a testament to the importance of the Copyright Office to all stakeholders.

B. Bicameral, Bipartisan Support for Copyright Office Autonomy and Information Technology Upgrades.

Based on the Committee's thorough public processes and the wide consensus in the resulting record, Chairman Goodlatte and Ranking Member Conyers have outlined legislation to modernize the Copyright Office. Among other things, they propose "granting the Copyright Office autonomy with respect to the Library of Congress," as well as "requiring the Copyright Office to maintain an up-to-date digital, searchable database of all copyrighted works and associated copyright ownership information."¹⁹

The leadership of the Senate Judiciary Committee echoed that sentiment the same day, with Chairman Grassley and then-Ranking Member Leahy stating that for the previous year they, too, had been working "on a legislative proposal to modernize the U.S. Copyright Office in order to better fulfill its mission in a rapidly changing digital environment."²⁰ They said that their "extensive consultation with a broad range of stakeholders" led them to "believe the Copyright Office should have more independence, accountability, and authority to make decisions in areas such as IT, budget, and staffing," and that they were prepared to work with their House colleagues on this important issue in the 115th Congress.²¹

All of this builds on important work by Reps. Marino, Chu, and Comstock, who last Congress introduced the Copyright Office for the Digital Economy Act,²² and Reps. Deutch and Chaffetz, who also worked with various parties to develop key principles for Copyright Office modernization.

any legislative efforts" and requesting that "Congress avoid sweeping legislative reform of domestic copyright policy," instead "focus[ing] its efforts on working with stakeholders to determine how best to modernize the Copyright Office"), *both available at* <http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=103385>.

¹⁹ Press Release, H. Comm. on the Judiciary, Goodlatte & Conyers Release First Policy Proposal of Copyright Review (Dec. 8, 2016), <https://judiciary.house.gov/press-release/goodlatte-conyers-release-first-policy-proposal-copyright-review/>.

²⁰ News Release, S. Comm. on the Judiciary, Reforming the Copyright Office: Comment of Senators Grassley and Leahy on the House Judiciary Proposal to Reform the Copyright Office (Dec. 8, 2016), <http://www.grassley.senate.gov/news/news-releases/reforming-copyright-office>.

²¹ *Id.*

²² H.R. 4241, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/4241?q=H.R.+%204241>.

III. Structural Reform

A. *An Accident of History*

As Chairman Goodlatte and Ranking Member Conyers’ observe in their proposal outline, “[t]he 20th Century statutory framework for the U.S. Copyright Office is not sufficient to meet the needs of a modern 21st Century copyright system.”²³

The Copyright Office resides in the Library of Congress, but it does so as a matter of historical happenstance, not because the Librarian has any particular copyright expertise. Indeed, Congress placed administration of the copyright system in the Library of Congress in 1870 only because Librarian Ainsworth Rand Spofford convinced legislators it was a cost-effective way to grow the Library’s collection with copies of registered works.²⁴ By 1875, Spofford was overwhelmed, expressing concern to Congress that he “would soon be presiding over the ‘greatest chaos in America,’” and by 1896 he was complaining that administering the registration system was taking up 75 percent of the Library’s time, preventing him from focusing on the Library’s essential mission.²⁵ Based on his pleas, in 1897 Congress authorized creation in the Library of the Copyright Office and the position of Register to take the job out of the hands of the Librarian.²⁶ Librarians have largely deferred to the Register’s policy expertise ever since.²⁷

When Congress created the Copyright Office in the Library of Congress those 120 years ago, the U.S. copyright industries were far less diverse and dynamic. In the modern era of digital mass communication, the core U.S. industries that produce and distribute copyrighted works now contribute more than \$1.2 trillion dollars to the United States’ gross domestic product, representing almost 7 percent of the U.S. economy; employ more than 5.5 million workers; and generate foreign sales of almost \$180 billion, more than each of the chemical, aerospace, agricultural, electrical, pharmaceutical, and medical products industries.²⁸

²³ Reform of the U.S. Copyright Office, H. Comm. on the Judiciary, <https://judiciary.house.gov/wp-content/uploads/2016/12/Copyright-Reform.pdf>.

²⁴ JOHN Y. COLE, LIBRARY OF CONGRESS, COPYRIGHT IN THE LIBRARY OF CONGRESS: 125TH ANNIVERSARY 15 (1995), <https://copyright.gov/history/125thanniversary.pdf>.

²⁵ *Id.*, at 22-23.

²⁶ *Id.*, at 24.

²⁷ See STEVEN TEPP & RALPH OMAN, HUDSON INSTITUTE, A 21ST CENTURY COPYRIGHT OFFICE: THE CONSERVATIVE CASE FOR REFORM 18 (2015), <https://hudson.org/research/11772-a-21st-century-copyright-office-the-conservative-case-for-reform>. See also Letter from Former Registers of Copyright Ralph Oman and Marybeth Peters to Senate Judiciary Committee Chairman Grassley and Ranking Member Leahy and House Judiciary Chairman Goodlatte and Ranking Member Conyers (Nov. 28, 2016) (explaining history of the Copyright Office and the relationship with the Library of Congress), <https://www.scribd.com/document/333303415/Ralph-Oman-Marybeth-Peters-Letter>.

²⁸ STEVEN E. SIWEK, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2016 REPORT 2 (2016), http://www.iipawebsite.com/copyright_us_economy.html.

B. *The Need for Change*

As the importance and impact of copyright has grown, so, too, have the responsibilities of the Copyright Office. Congress has made the Register of Copyrights the expert officer statutorily tasked not just with copyright registration, but with nearly “[a]ll administrative functions and duties under [the Copyright Act].”²⁹ It has also charged the Register with advising Congress, federal agencies, and the courts on domestic and foreign issues pertaining to copyright policy and related matters; participating in meetings with international intergovernmental organizations and foreign governments, including as part of U.S. delegations; conducting copyright studies and programs, including foreign and international education programs; and performing other functions necessary to accomplish those ends.³⁰

A vibrant copyright system depends on a vibrant Copyright Office and an empowered Register of Copyrights as its head. But while the demands on the Copyright Office have increased, the governmental structure continues to lag, with the Office remaining as a subdivision of the Library. The essential mission of the Library rightly gives it different priorities than needed in an office charged with advising on and administering copyright law. The Library’s mission is to provide “a rich, diverse, and enduring source of knowledge” by doing what one expects of a library: “[a]cquire, describe, make accessible, secure, and preserve a universal collection of knowledge in physical and electronic formats.”³¹ The Copyright Office, on the other hand, helps produce that knowledge in the first place through its mission “[t]o 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.”³²

To help the vital copyright sector continue to create, innovate, and grow, the expert entity Congress tasked with administering the copyright system must have policy autonomy to advise Congress, agencies, and the courts, as well as operational autonomy to organize its staff and allocate its resources. Today, the most significant nexus between the Library and the Copyright Office is the administrative convenience of gaining access to copyrighted works. The MPAA supports the archiving role of the Library,³³ as this function benefits both creators and the public. But continuing the archiving function neither requires nor justifies maintaining the current organizational structure. Placing the most senior official of the Copyright Office in a better position to chart the destiny of that office would better serve both copyright policy and administrative efficiency.

²⁹ 17 U.S.C. § 701(a).

³⁰ *See id.* at § 701(b).

³¹ LIBRARY OF CONGRESS, STRATEGIC PLAN: FY2016 THROUGH FY2020, at 9, 15 https://www.loc.gov/portals/static/about/documents/library_congress_stratplan_2016-2020.pdf.

³² U.S. COPYRIGHT OFFICE, POSITIONING THE UNITED STATES COPYRIGHT OFFICE FOR THE FUTURE: STRATEGIC PLAN 2016-2020, at 5 (2015), <https://www.copyright.gov/reports/strategic-plan/USCO-strategic.pdf>.

³³ *See* 17 U.S.C. § 407.

C. *Register as Nominated and Confirmed Head of an Autonomous Office in the Legislative Branch*

The MPAA therefore supports Chairman Goodlatte and Ranking Member Conyers' proposal that "the next Register and all that follow should be subject to a nomination and consent process with a 10-year term limit, subject to potential renomination," and that the Copyright Office "should have autonomy over its budget and technology needs."³⁴ This would subject the Register "to the same nomination and consent process as other senior government officials"³⁵ responsible for administering areas of law upon which similarly significant sectors of economy rely. As Chairman Goodlatte and Ranking Member Conyers also point out, selecting the Register through a nomination and confirmation process would also allow the American people, including all interested parties, to provide more direct input through their elected officials into the selection of the Register.³⁶ By contrast, today the Librarian has unilateral discretion to hire and fire the Register, even though copyright expertise is not a criterion upon which the Librarian is chosen.

The MPAA also agrees with Chairman Goodlatte and Ranking Member Conyer that "[t]he Copyright Office should remain part of the Legislative Branch where it can provide independent and timely advice to Congress on copyright law and policy."³⁷ The Copyright Clause of the Constitution authorizes Congress to secure the rights of creators, and recognizes that respecting creators' rights to determine how to disseminate their works promotes the creation and wide distribution of knowledge and culture to the public benefit.³⁸ Leaving the Copyright Office in the legislative branch preserves Congress' prerogatives as well as its determination in the Copyright Act to make the Copyright Office its expert advisor.³⁹ Ensuring the Office's policy and operational autonomy would also provide the Office the tools it needs to meet its statutory obligations and provide the impartial, expert advice Congress needs to exercise its authority under the Copyright Clause.

Because the Register's role as an advisor to Congress involves prerogatives of the legislative branch granted by the Constitution, the Committee might consider adopting a similar nomination process as applies to the selection of the Government Accountability Office's Comptroller General: the provision to the President of a slate of nominees recommended by a bicameral, bipartisan committee composed of the President Pro Tempore in the Senate, the Speaker of the House, the Majority and Minority Leader in each chamber, and the Chair and

³⁴ Reform of the U.S. Copyright Office, H. Comm. on the Judiciary, <https://judiciary.house.gov/wp-content/uploads/2016/12/Copyright-Reform.pdf>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See U.S. CONST. art. I, § 8, cl. 8 (vesting in Congress 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").

³⁹ See 17 U.S.C. § 701(b)(1) (making it the responsibility of the Register of Copyrights to "[a]dvice Congress on national and international issues relating to copyright, other matters arising under [Title 17], and related matters").

Ranking Member of the committees of jurisdiction.⁴⁰ For similar reasons, the MPAA recommends the Register be removable only for cause.

D. Creation of Additional Positions and an Advisory Committee

Chairman Goodlatte and Ranking Member Conyers' suggestion that "[t]he Copyright Office should also add several positions to advise the Register, including a Chief Economist, Chief Technologist, and a Deputy Register,"⁴¹ also makes sense, consistent with appropriated resources. As the importance of copyright and the Register have expanded, so, too, should the staff upon which the Register can rely.

The MPAA also welcomes the opportunity to work with the Committee on Chairman Goodlatte and Ranking Member Conyers' proposal to create a Copyright Office advisory committee,⁴² although we note that the Office has a long tradition of seeking public comment, holding roundtables and other public gatherings,⁴³ and convening meetings and other communications with those who request them. If the Committee does choose to create an advisory committee, it should be limited to making recommendations on operational issues. An advisory committee of people with experience interacting with the Copyright Office could be helpful in suggesting improvements to Copyright Office management and process, but the advisory committee's recommendations should neither bind the Register, nor take precedence over public comments provided through other fora.

IV. Information Technology Upgrades

A. Modern Systems for a Modern Era

The MPAA agrees with Chairman Goodlatte and Ranking Member Conyers that "[t]he Copyright Office should maintain a searchable, digital database of historical and current

⁴⁰ See GAO, *How the Comptroller General Is Selected*, <http://www.gao.gov/about/cgprocess.html> (describing process found at 31 U.S.C. § 703(a)).

⁴¹ Reform of the U.S. Copyright Office, H. Comm. on the Judiciary, <https://judiciary.house.gov/wp-content/uploads/2016/12/Copyright-Reform.pdf>.

⁴² *Id.*

⁴³ See, e.g., *In re* Section 108: Draft Revision of the Library and Archives Exceptions in U.S. Copyright Law, Docket No. 2016-4, *Notice of Inquiry*, 81 Fed. Reg. 36594 (June 7, 2016); *In re* Mandatory Deposit of Electronic Books and Sound Recordings Available Only Online, Docket No. 2016-3, *Notice of Inquiry*, 81 Fed. Reg. 30505 (May 17, 2016); *In re Information Technology Upgrades for a Twenty-First Century Copyright Office*, Docket No. 2016-2, *Notice of Inquiry*, 81 Fed. Reg. 10672 (March 1, 2016); *In re* Section 512 Study, Docket No. 2015-7, *Notice of Public Roundtables*, 81 Fed. Reg. 14896 (March 18, 2016); *In re* Software-Enabled Consumer Products Study and Section 1201 Study, Docket Nos. 2015-6 & 2015-8, *Notice of Public Roundtables*, 81 Fed. Reg. 17206 (March 28, 2016); *In re* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. 2014-07, *Notice of Public Hearings*, 80 Fed. Reg. 19255 (April 10, 2015); *In re* Orphan Works and Mass Digitization, Docket No. 2012-12, *Request for Additional Comments and Announcement of Public Roundtables*, 79 Fed. Reg. 7706 (Feb. 10, 2014).

copyright ownership information and encourage the inclusion of additional information such as licensing agents that would be available to the public.”⁴⁴

The increasing importance of copyright and the Copyright Office makes an advanced and user-friendly electronic database all the more important to help copyright holders register and protect their works, to help potential licensees identify and contact copyright holders to facilitate licensing opportunities, and to allow the public to better track and analyze the role of copyright in our modern society. Codifying Copyright Office autonomy, as discussed above, will free the Register to focus on these and other critical information technology modernization needs.

The MPAA’s members use the full range of the Copyright Office’s services. They register thousands of works per year, record transfers of rights, and routinely search existing records. They also use a number of the Office’s special services, including preregistration, special handling, and expedited retrieval of deposit copies in support of litigation.⁴⁵ Despite the exceptional work of the Copyright Office leadership and staff, the services of the Copyright Office do not meet the needs of its users. The Office’s online search functionality is limited and unstable. The 45 million copyright registrations filed between 1870 and 1978 are stored in hard copy, and can only be searched by physically visiting the Madison Building or paying someone to do a physical search for you.⁴⁶ The recordation system remains almost entirely paper-based.⁴⁷ These shortcomings affect not only copyright owners, but also potential licensees and other users of works, as well as the public at large seeking information about copyrights.

B. Leveraging Copyright Office Expertise to Tailor a Solution For Customer Needs

To address the challenges this antiquated system presents, the Copyright Office recently issued the most forward-looking strategic plan and information technology plan in its history.⁴⁸ Like Chairman Goodlatte and Ranking Member Conyers, we “urge the quickest rollout possible” of those plans,⁴⁹ as they would benefit copyright holders, users, and the general public by, among other things, increasing efficiency through a modern intake system for registration and recordation applications, reducing information costs and facilitating copyright licensing

⁴⁴ Reform of the U.S. Copyright Office, H. Comm. on the Judiciary, <https://judiciary.house.gov/wp-content/uploads/2016/12/Copyright-Reform.pdf>.

⁴⁵ See *In re* Information Technology Upgrades for a Twenty-First Century Copyright Office, Copyright Office, Docket No. 2016-2, MPAA Comments, at 1 (March 31 2016), <http://www.mpa.org/wp-content/uploads/2016/04/MPAA-IT-modernization-3-31-16.pdf>.

⁴⁶ See Copyright Office, Circular 23, THE COPYRIGHT CARD CATALOG AND THE ONLINE FILES OF THE COPYRIGHT OFFICE, <https://www.copyright.gov/circs/circ23.pdf>.

⁴⁷ See ROBERT BRAUNEIS, ABRAHAM L. KAMINSTEIN SCHOLAR IN RESIDENCE, U.S. COPYRIGHT OFFICE, TRANSFORMING DOCUMENT RECORDATION AT THE UNITED STATES COPYRIGHT OFFICE (December 2014), <https://www.copyright.gov/docs/recordation/recordation-report.pdf>.

⁴⁸ 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>; U.S. COPYRIGHT OFFICE, PROVISIONAL INFORMATION TECHNOLOGY MODERNIZATION PLAN AND COST ANALYSIS (Feb. 29, 2016), <https://www.copyright.gov/reports/itplan/technology-report.pdf>.

⁴⁹ Reform of the U.S. Copyright Office, H. Comm. on the Judiciary, <https://judiciary.house.gov/wp-content/uploads/2016/12/Copyright-Reform.pdf>.

transactions through improved search functionality, making systems internally interoperable and using application programming interfaces (APIs) to facilitate interoperability with private sector platforms, and improving reliability with modern systems for storage and processing.

We also agree with Chairman Goodlatte and Ranking Member Conyers that “[a]lthough the Library of Congress is building a datacenter in Virginia for its own collections, this datacenter is more appropriate for archival purposes than the needs of a modern copyright economy” and that “[t]he Register should have the autonomy to determine whether the costs and reliability of using this datacenter for its future IT needs match or exceed what can be obtained from private sector providers and choose accordingly.”⁵⁰

The Copyright Office has long sought to modernize its systems so the public can better file, retrieve, and analyze copyright registration information, all of which would serve the valuable goal of facilitating the licensing of copyrighted works,⁵¹ but the Office does not have the authority, technology, or budget allocation from the Library to do so. That a 2015 Library IT failure took the Copyright Office’s registration system down with it for more than a week, costing the Office in excess of \$650,000 in lost fees and frustrating 12,000 customers, further shows why Copyright Office autonomy is needed.⁵² The only thing that prevented the outage from permanently eradicating the Copyright Office’s entire database was the foresight of the Copyright Office’s own IT staff, who had been conducting routine backups separate from the Library systems.⁵³ To truly serve copyright holders, licensees, and the public, the Copyright Office must be allowed to design its own systems so they are tailored to its specific mission and can be managed by people in the Office with expertise and experience in the particulars of copyright.⁵⁴

C. *Funding Copyright Office Modernization*

Regarding modernization costs, it is reasonable to expect general tax revenues to fund capital improvements of a federal agency. In light of the history of sharing the burden of funding the Copyright Office, however, and because a modernized Copyright Office would benefit direct users of the Office as well as the public, the MPAA would be happy to discuss with the Committee whether some of the cost of modernization should be borne more directly by the

⁵⁰ *Id.*

⁵¹ See Rep. Howard Berman, Former Chairman, House Subcommittee on Courts, the Internet and Intellectual Property, *A tribute to an outstanding Register of Copyrights*, THE HILL, Nov. 9, 2016 (noting the Copyright Office’s efforts to modernize its information technology systems), <http://origin-ny1.thehill.com/opinion/op-ed/305335-a-tribute-to-an-outstanding-register-of-copyrights>.

⁵² See Peggy McGlone, *Copyright Office’s online registration hasn’t worked for almost a week*, WASH. POST, Sept. 3, 2015, https://www.washingtonpost.com/lifestyle/style/copyright-offices-online-registration-hasnt-worked-for-almost-a-week/2015/09/03/b12781e2-5261-11e5-9812-92d5948a40f8_story.html?postshare=5051441319119819&utm_term=.862d17d5bfd8.

⁵³ See Rep. Howard Berman, Former Chairman, House Subcommittee on Courts, the Internet and Intellectual Property, *A tribute to an outstanding Register of Copyrights*, THE HILL, Nov. 9, 2016 (referencing the Library IT failure and the efforts of the Copyright Office IT staff to minimize its impact on the copyright community), <http://origin-ny1.thehill.com/opinion/op-ed/305335-a-tribute-to-an-outstanding-register-of-copyrights>.

⁵⁴ See *id.*

users of the Copyright Office’s services. This presumes of course, that the modernization occurs pursuant to the Copyright Office’s recently released IT plan, which we have reviewed and support; increasing fees as part of broader Library IT plans would require further discussion, as it would be inappropriate to require copyright holders to subsidize general Library modernization.

As for recovering the ongoing costs of operations, keeping fees at reasonable levels avoids discouraging parties from using the Copyright Office’s services—most importantly registration and recordation, which are essential to maintaining a comprehensive public record of copyright ownership. But because the current statutory language and Library relationship have prevented the Copyright Office from setting fees at levels that truly reflect its overall operating costs, maintenance, and need to invest in IT infrastructure, the MPAA is prepared to discuss a statutory amendment that would provide a more flexible approach to fees. For a fuller discussion of cost recovery issues, please see our comments in the Copyright Office’s technology upgrades proceeding.⁵⁵

The Copyright Office has performed outstanding work over the past several years, under difficult conditions and financial limitations.⁵⁶ It has kept up as best it can through budget cuts, staff reductions, and unreliable support from the Library of Congress; produced numerous policy analyses and reports to Congress; achieved a major and much-needed update of the *Compendium of Copyright Office Practices* to guide users of Office services; and produced thoughtful, forward looking strategic and IT implementation plans. This is a record of accomplishment that deserves to be recognized and supported. Additional autonomy and resources will enable the Copyright Office to shine even brighter in the future, to the benefit of Congress, the Administration and federal agencies, the courts, copyright holders and users, and the public.

V. Creation of a Small Claims Process

The MPAA is sympathetic to authors, photographers, graphic artists, illustrators, and others who argue that their copyrighted works are frequently infringed, but that the high cost of litigation leaves them without effective remedies. For such creators, the protections found in the Copyright Act may in certain circumstances be illusory, depriving them of their “legitimate demand for effective—not merely symbolic” copyright protection.⁵⁷ The MPAA supports efforts to ensure that all copyright owners have a practical and realistic means of seeking redress for infringement of their works.

The MPAA thus agrees with Chairman Goodlatte and Ranking Member Conyers’ proposal that “[t]he Copyright Office should host a small claims system consistent with the report on the issue released by the Copyright Office,” with the Register having “the authority to

⁵⁵ *In re* Information Technology Upgrades for a Twenty-First Century Copyright Office, Copyright Office, Docket No. 2016-2, MPAA Comments (March 31 2016), <http://www.mpa.org/wp-content/uploads/2016/04/MPAA-IT-modernization-3-31-16.pdf>.

⁵⁶ See Rep. Howard Berman, Former Chairman, House Subcommittee on Courts, the Internet and Intellectual Property, *A tribute to an outstanding Register of Copyrights*, THE HILL, Nov. 9, 2016 (reciting some of the Office’s accomplishments), <http://origin-ny1.thehill.com/opinion/op-ed/305335-a-tribute-to-an-outstanding-register-of-copyrights>.

⁵⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

promulgate regulations to ensure that the system works efficiently.”⁵⁸ This builds on important work last Congress by Reps. Hakeem Jeffries and Tom Marino, who introduced the Copyright Alternative in Small-Claims Enforcement Act of 2016,⁵⁹ and Reps. Judy Chu and Lamar Smith, who introduced the Fairness for American Small Creators Act.⁶⁰ Consistent with the Copyright Office’s report, the MPAA believes that:

- The system must be voluntary for plaintiffs and defendants. This is so for both constitutional and policy reasons. A mandatory system would violate the parties’ rights under the Seventh Amendment, and would not afford them the procedural protections that they rightfully enjoy in federal court.⁶¹
- The small claims tribunal must not be authorized to grant injunctive relief over the objection of the defendant. A small claims tribunal would be particularly ill-suited to the kind of careful, thorough fact-finding and legal analysis that is required before a court may take the “extraordinary” step of enjoining an accused infringer, either preliminarily or permanently. An injunction is wholly different in kind than a small monetary award, and those potentially subject to such an order must not be forced to give up the full panoply of procedural and substantive rights currently available to litigants in the federal courts.⁶²
- A registration application must have been filed by the plaintiff prior to commencing a small claims action.⁶³
- Discovery should be very limited, with no depositions.⁶⁴
- Damages in a small claims action should be capped at \$30,000.⁶⁵
- Losing parties should be afforded only a limited appeal right.⁶⁶
- Decisions of the small claims tribunal should not have precedential value.⁶⁷

⁵⁸ Reform of the U.S. Copyright Office, H. Comm. on the Judiciary, <https://judiciary.house.gov/wp-content/uploads/2016/12/Copyright-Reform.pdf>.

⁵⁹ See H.R. 5757, 114th Cong. (2016), <https://www.congress.gov/bill/114th-congress/house-bill/5757?q=H.R.+%205757>.

⁶⁰ See H.R. 6496, 114th Cong. (2016), <https://www.congress.gov/bill/114th-congress/house-bill/6496?q=H.R.+%206496>.

⁶¹ See U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS 97-99 (September 2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

⁶² *Id.* at 112-115.

⁶³ *Id.* at 107-109.

⁶⁴ *Id.* at 124-125.

⁶⁵ *Id.* at 109-110.

⁶⁶ *Id.* at 129-130.

⁶⁷ *Id.* at 130.

- Lastly (and not directly addressed by the Copyright Office report), a small claims system should provide finality to both parties that choose to participate, under traditional principles of collateral estoppel and *res judicata*. That is, the parties should be confident that, once the small claims proceeding is over, the dispute between them is fully and finally resolved, once and for all. There should be no opportunity to re-litigate the same or related infringements in a later suit.

VI. Conclusion

The Copyright Office administers the vital U.S. copyright registration and recordation systems; serves as Congress' expert advisor on copyright law; and provides information and assistance to federal agencies and departments on domestic and international copyright matters. Currently, however, it is a division within the Library of Congress, making copyright just one in a broader portfolio of issues before the Librarian. This anomalous structure does not reflect the significance and value of our nation's copyright system and is causing the Office to fall further and further behind.

Copyright is a key pillar of our nation's cultural and economic prosperity. It is a significant driver of our nation's innovation economy, and the Copyright Office is integral to ensuring that copyright continues to effectively support American creativity and development of knowledge. Combine that with the rise of the digital era, and you quickly see why the demands on the Copyright Office have become more complex and important. But as it exists today, the Copyright Office is hindered in its ability to rise to the challenges of a dynamic and ever-growing creative marketplace. Codifying its policy and operational autonomy, as well as granting it better tools to do its job, will help it to serve the Congress, the copyright community, and the public.