Public Knowledge

February 1, 2017

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Goodlatte and Ranking Member Conyers:

Public Knowledge[1] respectfully submits the following comments on your December 2016 proposal, "Reform of the U.S. Copyright Office."

Modernization

We strongly support the goal of modernizing the Office's systems and operations, to reflect both the needs and opportunities of the digital age. Any effort to reform the Copyright Office should begin with this focus. It offers the best prospects for consensus, as many stakeholders share common interests in facilitating registration and recordation, expanding public access to copyright information, and reducing transaction costs in rights clearance. It is also where improvements at the Copyright Office are most overdue. For example, as of 2011, the Office had active initiatives to digitize pre-1978 registration records and reengineer its paper-based processes for recording transfers in copyright ownership.[2] Over five years later, neither of these efforts are complete.

Public Knowledge agrees that the creation of "a searchable, digital database of historical and current copyright ownership" should be a top priority in modernization.[3] Legislation should impose clear requirements for this database, such as the inclusion of pre-1978 registrations and ownership transfer records. Ultimately, the system should provide easy online access to "an integrated life-cycle of copyright information – not only the date on which a work was created, published or fell into the public domain, but also all of the authors, owners, licensees," and other details "that are both relevant to the marketplace and invaluable to meaningful research."[4] Specific statutory mandates will help ensure that the Copyright Office is accountable to its modernization plans and realistic about the funding and other resources that they will require.

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[1] Public Knowledge is a non-profit organization dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding the rights of consumers to use innovative technology lawfully.

[2] Maria A. Pallante, *Priorities and Special Projects of the United States Copyright Office, October 2011–October 2013* at 15 (Oct. 25, 2011), available at https://copyright.gov/docs/priorities.pdf.

[3] Proposal of Chairman Goodlatte and Ranking Member Conyers, *Reform of the U.S. Copyright Office*, available at https://judiciary.house.gov/wp-content/uploads/2016/12/Copyright-Reform.pdf.

[4] U.S. Copyright Office, *Strategic Plan 2016–2020* at 2 (Dec. 1, 2015), available at https://www.copyright.gov/reports/strategic-plan/USCO-strategic.pdf.

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For the same reasons, statutory deadlines for intermediate progress and/or completion of the database may also be warranted.

The Committee should also consider the value of other advanced databases for copyright information, such as secure digital repositories that could enable copyright information searches based upon video and/or audio samples from a work. These may be particularly appropriate for visual works like photographs and graphic illustrations, as well as other types of works for which traditional metadata is often not available or apparent.[5] Such systems may be achievable through an integration of Copyright Office data with private databases and search technologies,[6] and the Committee should consider ways to facilitate such interfaces.

As the Copyright Office invests significant public funds to modernize its databases, there should be stronger incentives for rightsholders to update the copyright information found therein. Under current law, statutory damages are generally not available for infringement that occurred before a copyright was registered.[7] Similarly, statutory damages should not be available when a rightsholder fails to record information necessary for "would-be users of a creative work to determine quickly and inexpensively whether the work in question was under copyright, and, if so, from whom to seek a license."[8] This added incentive for accurate and timely registration and recordation would help ensure that the Copyright Office's modernized systems fulfill their intended purpose and justify their costs.

We generally agree that the Office should have additional authority to collect the fees necessary fund modernization efforts. However, the Committee should exercise caution in either allowing or mandating fees for third-party access to copyright ownership information. Fees on high-volume data access may foreclose societally valuable uses of copyright information, such as research projects and other activities that do not generate direct profits. The Committee should consider whether to exempt non-commercial entities and activities from data access fees. It should also consider whether free high-volume access to copyright information may encourage the development of private systems that save taxpayers in the long run, by supplanting databases and functionality that the Copyright Office would otherwise build itself.

Structure

Modernization should not be made contingent on other controversial reforms, such as severing the Copyright Office from the Library of Congress. Not only is restructuring unnecessary for successful modernization, but it would likely undermine such efforts.

The Library of Congress first assumed responsibility for copyright registration in 1870, reflecting the natural fit between receiving registrations and deposits and growing

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5 Michael Weinberg, et al., *A Copyright Office for the 21st Century* at 9 (2010), available at https://www.publicknowledge.org/files/docs/ACopyrightOfficeforthe21stCentury.pdf.
6 *See* Pamela Samuelson, et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1203–1205 (2010).
7 17 U.S.C. § 412.
8 Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 500–502 (Nov. 2004).

comprehensive collection of published works.[9] In 1897, the Copyright Office was established to handle the growing administrative burdens of copyright registration, but remained in the library for the same reasons.[10] In the digital age, this connection between the Copyright Office and the Library has only grown, with both institutions now working to construct and expand online catalogs of literary and cultural works, and to make this information more accessible and useful to the public. Additionally, the Library continues to accumulate large portions of its collections from deposits at the Office.[11] Especially with a new Librarian of Congress who is focused on digitization efforts,[12] this is not the time to sever the Copyright Office from the Library or otherwise inhibit their cooperation.[13]

Nor is there good reason to believe that independence from the Library would accelerate the Office's modernization. To be sure, under Dr. Hayden's predecessor, major shortcomings developed in the Library's IT systems and management.[14] But the Copyright Office also has a poor track record of planning and implementing information technology, which cannot be blamed entirely on the Library. In 2015, for example, the GAO found that the Office had failed to submit its proposed IT investments for appropriate Library review,[15] while also suggesting that the former Register of Copyrights was limiting collaboration with the Library on information technology in anticipation of greater independence.[16]

With increased support for modernization from appropriators,[17] the Office may be on a better footing to implement the IT plan it put out just last year.[18] The prospects for effective coordination will likely improve with new leadership at both the Library and the Office.[19] When concerns arise about specific operational or technological decisions—such the Virginia data

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[9] John Y. Cole, *Of Copyright, Men & a National Library*, 28 Q.J. OF THE LIBR. OF CONGRESS 1, 15 (1971), available at https://www.copyright.gov/history/125thanniversary.pdf.
[10] *Id.* at 24.
[11] Samuelson, *supra* note 6, at 1187; *see also* Erik Stallman, *A 21st Century Copyright Office: Renovation Over Relocation*, Center for Democracy & Technology (September 30, 2015), available at https://cdt.org/blog/a-21st-century-copyright-office-renovation-over-relocation/ ("The Copyright Act contemplates cooperation between the Office and the Library in many places, such as Section 407's deposit requirement.").
[12] *See, e.g.*, Baynard Woods, *Carla Hayden: new librarian of Congress makes history, with an eye on the future*, THE GUARDIAN (Sept. 15, 2016), available at https://www.theguardian.com/us-news/2016/sep/15/carla-hayden-librarian-congress-first-woman-african-american-post-interview.
[13] Some parties have claimed that the Library and the Copyright Office have opposing missions and interests. These arguments are entirely unfounded. Not only do they ignore the ultimate public interest underlying copyright law, but they overlook the extensive connections between libraries, creators and rightsholder interests. *See* Letter from Brandon Butler et al. to Hon. Chuck Grassley et al. (December 14, 2016), available at http://thetaper.library.virginia.edu/images/42-Experts-Letter-re-CO-signed.pdf.
[14] *See* Government Accountability Office, GAO-15-315 (Mar. 2015), available at http://www.gao.gov/assets/670/669367.pdf.
[15] Government Accountability Office, GAO-15-338 at 26–27 ((Mar. 2015), available at http://www.gao.gov/products/GAO-15-338; *see also* Stallman, *supra* note 11.
[16] Government Accountability Office, *supra* note 17, at 28 & 31.
[17] H. Rept. 114-594 at 17 (stating that the House Appropriations Committee "recognizes and strongly supports the need for a robust information technology modernization effort within the Copyright Office").
[18] *See* United States Copyright Office, *Provisional Information Technology Modernization Plan and Cost Analysis* (Feb. 29, 2016), available at https://www.copyright.gov/reports/itplan/technology-report.pdf.
[19] Cf. H. Rept. 114-594 at 17–18 (instructing the Copyright Office that "all efforts by the Copyright Office to modernize its mission critical software application should be accomplished in close collaboration with the Library's Chief Information Officer").

center mentioned in your proposal—Congress may exercise its usual powers of oversight and appropriations. For example, last year the House Appropriations Committee directed the Copyright Office "to utilize the [Library's] new hosting facility as the primary data center for infrastructure support including data storage and mission oriented software applications."[20]

Accountability

As you know, the Register of Copyrights acts "under the Librarian's general direction and supervision."[21] As in other relationships between department heads and subordinate agencies, the Librarian has a legal obligation to ensure that the Register fulfills her or his responsibilities while remaining faithful to the public trust.

This basic mechanism of accountability is especially important for the Copyright Office, given its unusual hybrid identity within the federal government. As part of the Library, the Office is housed in the Legislative Branch.[22] But while some of its functions are legislative, others are recognized as executive.[23] At least for the purposes of the latter, it appears that the Office is constitutionally regarded as part of the executive branch.[24] And if the Librarian's supervision is eliminated, the Register would necessarily be removable at will by the President, and thus subject to his direction.[25]

There are strong reasons to doubt that the President would, in practice, exercise meaningful supervision over the Register. As opposed to independent agencies within the executive branch, the President and his assistants would likely keep their distance from the Copyright Office, based on its continued proximity to and affiliation with Congress, including the Register's role as a legislative advisor on copyright matters. Furthermore, because of its formal status in the legislative branch, the Copyright Office is not subject to many of the laws and orders that govern other agencies. For example, the Paperwork Reduction Act does not apply to the Copyright Office,[26] nor do the processes for regulatory review by the Office of Management and Budget.[27]

Of course, Congress would still exercise oversight of an independent Copyright Office maintained within the legislative branch. But Congressional attention is uneven, at best, and cannot come close to replacing regular management and supervision by a superior federal officer.[28]

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[20] *Id.* at 18.
[21] 17 U.S.C. § 701(a).
[22] *See* Pamela Samuelson, *Will the Copyright Office Be Obsolete in the Twenty-First Century?*, 13 CARDOZO ARTS & ENT. L.J. 55, 62–63 (1994).
[23] *See* Andy Gass, *Considering Copyright Rulemaking: The Constitutional Question*, 27 BERKELEY TECH. L.J. 1047, 1051–53 (2012).
[24] *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1342 (2012).
[25] *See PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1, 39 (2016).
[26] *See* 44 U.S.C. § 3502(1).
[27] *Gass*, *supra* note 23, at 1089.
[28] *See generally* Elaine C. Kamarck, *A Congressional Oversight Office: A proposed early warning system for the United States Congress*, Center for Effective Public Management at Brookings (June 2016), available at https://www.brookings.edu/wp-content/uploads/2016/07/Congressional-Oversight.pdf; Steven Shimberg, *Checks and Balance: Limitations on the Power of Congressional Oversight*, 54 L. & CONTEMPORARY PROBLEMS 241 (1991), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4116&context=lcp.

Eliminating accountability to the Librarian would be especially problematic given the Copyright Office's susceptibility to, and widely recognized history of, regulatory capture.[29] This is a challenge for many administrative agencies, especially those focused on particular industries. For instance, there is a significant revolving door at the Copyright Office between its senior legal and policy staff and positions representing the interests of major rightsholders.[30] This and other systemic pressures produce institutional bias, leading the Office to overreach on policy matters well beyond its expertise[31] and take aggressively one-sided positions that only deepen discord in policy debates.[32]

One common model for mitigating regulatory capture is supervision by a separate department or official with different incentives and/or constituencies than the captured agency.[33] To be sure, regulatory capture has been a persistent problem at the Office even under the Library's supervision. But eliminating this accountability would likely make these tendencies even worse.

Regardless of how the Copyright Office is structured, the Committee should close a loophole exempting Copyright Office staff from most of the post-employment restrictions under 18 U.S.C. § 207. For example, 18 U.S.C. § 207(a)(1) prohibits a former federal employee from representing another party before the government "in connection with a particular matter" in which the employee "participated personally and substantially" during their federal service (among other conditions). These restrictions are part of the "revolving door" laws, which Congress enacted to protect against various risks from the phenomenon, such as the use of proprietary information learned during government service on behalf of private parties, and improper influences on government employees who negotiate lucrative future employment.[34] Yet most of the restrictions only apply to employees of the executive branch and not the legislative branch.[35] For the purposes of this statute, the Copyright Office is classified as the latter.[36]

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[29] *See* Meredith Rose, et al., *Captured: Systemic Bias at the U.S. Copyright Office* at 3–10 (Sept. 8, 2016), available at https://www.publicknowledge.org/assets/uploads/blog/Final_Captured_Systemic_Bias_at_the_US_Copyright_Office.pdf; Peter Dicola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173, 195 (2012) (noting problems of "informational capture" at the Copyright Office); Jason Mazzone, *An Uncomfortable Fit?: Intellectual Property Policy and the Administrative State*, 14 MARQ. INTELL. PROP. L. REV. 441, 464 (2010) (noting capture at the Copyright Office, "which has by and large become the Copyright Owners Office"); Jessica Litman, DIGITAL COPYRIGHT 74 (2001) (stating that "the Copyright Office has tended to view copyright owners as its real constituency"); *see also* William M. Landes & Richard A. Posner, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 407–415 (2003) (discussing instances of capture in copyright law); Herbert Hovenkamp, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 250 (2005) ("the idea that IP laws overprotect and reflect significant interest-group capture . . . has become mainstream").

[30] *See* Rose et al., *supra* note 29, at 3–6.

[31] *See id.* at 31–36.

[32] *See id.* at 20–30.

[33] *See* Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 163 (2004) (discussing how the Copyright Office's structure within the Library "may have the effect of making the Copyright Office more public-regarding, certainly more so than an agency that is more closely aligned with the industries being regulated").

[34] Jack Maskell, *Post-Employment, "Revolving Door," Laws for Federal Personnel*, CRS 97-875 at 1–2 (May 12, 2010), available at https://fas.org/sgp/crs/misc/97-875.pdf.

[35] *E.g.*, 18 U.S.C. § 207(a).

[36] *See* 18 U.S.C. § 202(e)(3).

There is no persuasive justification for this discrepancy between the Copyright Office and other agencies. For example, there is no reason why Copyright Office staff should not be held to the same revolving door restrictions that apply to employees of the Patent & Trademark Office. In order to close this loophole, Congress could easily limit the change to the Copyright Office (perhaps along with the Library of Congress), without affecting other parts of the legislative branch.

Small Claims

As an initial matter, we suggest that the Committee separate efforts to reform of the structure and responsibilities of the Copyright Office from the even more complex legal and policy questions raised by a possible small claims system for copyright law. The latter inquiry could amount to a substantial and novel expansion of the Copyright Act's enforcement provisions, and would be better considered in a broader discussion of copyright remedies and how they ought to be balanced. Ultimately, the merits of any small claims proposal are not germane to the IT needs and management of the Copyright Office, and the former should not inhibit progress on the latter.

As the Committee heard during its comprehensive review, copyright law has features that are attractive to trolls and other abusive plaintiffs looking to manipulate the system.[37] These include: statutory damages that can range up to $150,000 per work,[38] regardless of actual damages suffered; powerful injunctions, which can financially cripple defendants with even meritorious defenses; extensive theories of secondary liability, which allow plaintiffs to target parties beyond the direct infringer; and relatively consequence-free opportunities to send masses of spurious takedown notices under the DMCA.[39]

The powerful remedies of copyright law have been used to bankrupt legitimate online services,[40] engage in half-baked schemes to monetize litigation threats that target protected fair uses,[41] and

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[37] Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary of the House of Representatives, *Copyright Remedies* (July 24, 2014), available at https://judiciary.house.gov/wp-content/uploads/2016/02/113-107_88815.pdf.

[38] 17 U.S.C § 504(c)

[39] Jennifer M. Urban, et al., *Notice and Takedown in Everyday Practice*, UC Berkeley Public Law Research Paper No. 2755628, at 42 (March 29, 2016), available at https://ssrn.com/abstract=2755628. ("There was almost universal agreement among OSPs that a lack of effective disincentives or remedies for erroneous notices amplifies the problem of mistaken or spurious notices. As one OSP put it: it is "way too easy for spurious takedown notices to be filed," whether by individuals or by large automated systems sending tens or hundreds of thousands of requests.")

[40] Mike Masnick, *Veoh Wins Important Case Against Universal Music Over DMCA Safe Harbors Again; But Is Still Dead Due To Legal Fees*, Techdirt (March 15, 2013), available at https://www.techdirt.com/articles/20130314/16415922328/veoh-wins-important-case-against-universal-music-over-dmca-safe-harbors-again-is-still-dead-due-to-legal-fees.shtml.

[41] Dave Kravets, *Newspaper Chain's New Business Plan: Copyright Suits*, Wired, July 22, 2010, available at https://www.wired.com/2010/07/copyright-trolling-for-dollars/; Kurt Opsahl, *Court Declares Newspaper Excerpt on Online Forum is a Non-Infringing Fair Use*, Electronic Frontier Foundation Deeplinks Blog (March 10, 2010), available at: https://www.eff.org/deeplinks/2012/03/court-declares-newspaper-excerpt-online-forum-non-infringing-fair-use.

underpin a multi-million dollar extortion scheme.[42] These outcomes are the predictable result of a remedial scheme that offers possible windfalls to those willing to try their luck, while scaring users away from the exercise of their lawful rights for fear of unpredictable liability.

We are very concerned that a small claims system for copyright would encourage more of these tactics and behaviors. As a starting point, there are three temptations for abusive plaintiffs that the Committee should exclude from any small claims system: statutory damages, overly permissive damage limits, and "opt-out" jurisdiction (especially if it allows for default judgments).

Statutory damages

This Committee has already been well-briefed on the problems created by the existing statutory damages regime. Their wide range creates uncertainty as to liability, and their size attracts abusive litigation by trolls looking to scare risk-averse defendants into settlements, regardless of the merits of the case.[43]

Making any significant amount of statutory damages available in a small claims venue would create a low-cost, low-risk, high-reward environment for claimants. This could attract not only rightsholders with legitimate claims, but also those willing to roll the dice with questionable claims, as well as clever trolls who may try to leverage a combination of statutory damages and an "opt-out" mechanism (discussed in greater detail below) to develop a business model around default judgements.

Jurisdictional Limits

Any small claims system would need strict caps on the amount of damages a claimant may recover. One of the defining features of state small claims courts is that they impose a cap on damages in return for the expedited adjudication of claims.[44] In a November 2015 survey of all

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[42] Joe Mullin, *Prenda Law 'copyright trolls' Steele and Hansmeier arrested*, Ars Technica (December 16, 2016), available at https://arstechnica.com/tech-policy/2016/12/breaking-prenda-law-copyright-trolls-steele-and-hansmeier-arrested/.

[43] Testimony of Sherwin Siy, Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary of the House of Representatives, *Copyright Remedies* (July 24, 2014), available at https://judiciary.house.gov/wp-content/uploads/2016/02/Siy-PK-Remedies-Testimony.pdf; Testimony of Matt Schruers, Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary of the House of Representatives, *Copyright Remedies* (July 24, 2014), available at https://judiciary.house.gov/wp-content/uploads/2016/02/Schruers-CCIA-Remedies-Testimony.pdf; Mathew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105, 1114, (2015). ("Copyright trolls are best defined by a cluster of attributes rather than any single definitive feature. A troll that deserves its name asserts rights it does not have, makes poorly substantiated claims, or seeks disproportionate remedies. Trolls do at least one of these things systematically. In copyright, this opportunism is primarily directed towards statutory damages.").

[44] Bruce Zucker and Monica Her, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 U.S.F. L. REV. 315, 317 (2003). ("Although the financial claims limits, methods of procedure, and overall structure vary from state to state, the concept is essentially the same: relatively minor disputes involving dollar amounts that are insufficient to warrant processing the case through the normal court procedure justify expedited and simplistic handling.")

fifty states and the District of Columbia, the median small claims limit was $6,000.[45]

In a December 2016 press release announcing her sponsorship of copyright small claims legislation, Rep. Judy Chu focuses on plaintiffs with infringement claims "for $3,000 or less."[46] This is consistent with comments from another small claims advocate, the American Society of Media Photography, which told the Copyright Office that "the amount in controversy [in its members' small claims] is likely to be only a few hundred to a few thousand dollars."[47]

Setting a dollar-value jurisdictional limit higher than $6,000 (the national median) would likely do nothing to help the bulk of claimants. But a permissive cap could make the small claims system significantly more attractive to speculative claims and copyright trolls.

Default Judgment Avoidance/Opt-Out

The Committee should avoid any procedural mechanism that could result in a significant number of default judgments. This is a particular concern for any small claims copyright system, which must be voluntary for the defendant. Currently, federal courts have exclusive jurisdiction over copyright claims,[48] and defendants are guaranteed a right to a jury trial.[49] In order for a jury-free alternative for a small claims tribunal to adjudicate an infringement claim, the defendant must consent to its jurisdiction.

Many proposals for copyright small claims would manufacture such consent through an "opt-out" mechanism, in which defendants may be subject to jurisdiction even without giving affirmative consent if they fail to respond after being served with a complaint. This procedural trap is ripe for abuse by copyright trolls. Especially in combination with a permissive damages cap and the availability of statutory damages, it would likely encourage abusive plaintiffs to file numerous claims with the expectation that at least some defendants will default.

An "opt-out" mechanism also essentially guarantees that the vast majority of defendants in adjudicated cases will not be sophisticated bad actors. Given that the purpose of creating a small claims system is to address claims that would not be viable in district court litigation, any sophisticated defendant will likely recognize this dynamic, and consistently opt-out. As a result, after the opt-outs, the system may end up as little more than a default-judgement mill.

Small claims courts at the state level attempt to solve a basic problem: the costs of litigating a legal claim in court can be so expensive as to outweigh any potential recovery. The difficulty arises in reducing the costs of litigation without unduly prejudicing the due process rights of

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[45] *50-State Chart of Small Claims Court Dollar Limits*, Nolo (November 12, 2015), available at: https://www.nolo.com/legal-encyclopedia/small-claims-suits-how-much-30031.html.
[46] *Reps. Judy Chu and Lamar Smith Introduce Small Claims Reform for Creators* (December 8, 2016), available at: https://chu.house.gov/media-center/press-releases/reps-judy-chu-and-lamar-smith-introduce-small-claims-reform-creators) ("The small claims system is intended to help individual artists and creators more easily pursue copyright infringement claims, many of which of are for $3,000 or less.")
[47] Initial Comments of the American Society of Media Photographers (January 16, 2012), available at https://www.copyright.gov/docs/smallclaims/comments/04_asmp.pdf)
[48] 28 U.S.C. § 1338
[49] *Feltner v. Columbia Pictures Television, Inc*., 523 U.S. 340 (1998).

defendants to get a full and fair determination of their liability. A copyright small claims system that is not limited to actual damages, that does not have a strict damages cap limit, and that invites plaintiffs to trap masses of defendants with default judgment would fail that balancing test.

In addition, the Committee should only allow registered copyrights to be asserted in a small claims tribunal. Registration serves important functions in the copyright system by creating public records of authorship and ownership. One of the few remaining incentives for rightsholders to register is that it is a prerequisite to filing an infringement claim. The Committee should not allow registration incentives to be further weakened by a small claims system.

Review by Article III Courts

Congress may assign judicial activities to non-Article III tribunals, subject to certain critical constitutional limitations.[50] Examples of such assignments include magistrate judges in the federal district court and the U.S. bankruptcy courts. Congress has also created tribunals limited to specific subject matter within agencies, such as the Trademark Trial and Appeal Board (TTAB) within the United States Patent and Trademark Office, and even the Copyright Royalty Board within the Library of Congress.

One of the key features of all of these tribunals is that decisions are ultimately reviewable by an Article III judge.[51] This is constitutional requirement, and would apply by extension to any forum for copyright claims created by Congress as an alternative to an Article III courts.[52] The Committee should ensure that any small claims proposal allows for appeal to an Article III federal court, and not merely for review of misconduct or fraud as contemplated by some proposals.

Other Considerations

A copyright small claims venue is not appropriate for questions of secondary liability, especially for online intermediaries. Secondary liability claims are fact intensive and complex, especially in situations involving online intermediaries that may be protected by the DMCA's safe harbors.[53] Even in instances where the safe harbors do not apply, knowledge is an element of contributory liability, and establishing knowledge would likely require extensive e-discovery and/or depositions. Furthermore, most large-scale and sophisticated operators will likely opt-out of any claims as a matter of course.

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[50] *See*, *e.g., Crowell v. Benson*, 285 U.S. 22 (1932); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986); *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

[51] *See, e.g.* 15 U.S.C. § 1071(a) (right to appeal TTAB decisions to United States Court of Appeals for the Federal Circuit); 17 U.S.C. § 803(d) (right to appeal any determination by Copyright Royalty Judges to the United States Court of Appeals for the District of Columbia Circuit); 28 U.S.C. § 158(a) (vesting jurisdiction of appeals from bankruptcy judge rulings with United States district courts).

[52] Jeffrey Bils, *David's Sling: How to Give Copyright Owners A Practical Way to Pursue Small Claims*, 62 U.C.L.A. L. REV. 464, 484–85, 496 (2015) ("The Supreme Court discussed the basic framework for such questions in Crowell v. Benson, in which the Court upheld Congress' authority to vest decisionmaking in an Article I agency so long as those decisions were subject to review by an Article III court.") (footnote omitted).

[53] 17 U.S.C. § 512(a)–(d).

For a similar reason, granting a small claims tribunal jurisdiction over claims brought under § 512(f) by recipients of faulty takedown notices would provide little benefit. While we support the strengthening of protections for users in the notice and takedown system, sophisticated copyright owners, like Universal Music Group, would likely opt-out of any § 512(f) small claims brought against them.[54]

Finally, any small claims proposal considered by the Committee should be in the form of a limited-term pilot program. This would be uncharted water for copyright law, and should be explored carefully in order to minimize unintended consequences and opportunities for abuse.

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Public Knowledge is grateful for the opportunity to submit these comments. We believe that reform of the United States Copyright Office will be best served by a focus on modernization, which should not be held hostage to other controversial proposals. Separating the Office from the Library would be ill-advised, both for the sake of modernization and because it would reduce the Office's accountability to the public interest.

Respectfully submitted,

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[54] *See, e.g., Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016).