

Open Letter of Intellectual Property Professors on the Appointment of a New Librarian of Congress and the Need for Copyright Office Modernization

We congratulate Dr. Carla D. Hayden on her nomination by President Obama as the 14th Librarian of Congress. Dr. Hayden's exemplary record in library science dates back nearly four decades, and her recent tenure as CEO of the Enoch Pratt Free Library in Baltimore, Maryland, is testament to her commitment to and expertise in the field. It is clear from the White House's [video](#) inviting us to get to know Dr. Hayden that she will be an enthusiastic leader dedicated to promoting culture, free speech, and access to knowledge, and that she fully understands the vital role libraries play in our communities. As Dr. Hayden recognizes, libraries, the keepers of our culture, are the "original treasure chests." We share her enthusiasm for the great works of culture and science the Library of Congress preserves and makes available to Americans from all walks of life.

As professors of Intellectual Property law, we write this letter to suggest to Congress that the confirmation of Dr. Hayden offers an opportunity to make further progress on the important work of updating and improving the status and resources of the Copyright Office, a department of the Library of Congress. Congress has been considering this issue since at least 2014. The United States Copyright Office has itself been at the forefront of this effort to examine and update the Office's services for the digital age by leading an open and transparent conversation not just internally within the Library of Congress, but also with policy makers and users of the Copyright Office's services.

The Copyright Office as currently structured faces three major challenges: (1) insufficient funds, staff and infrastructure to efficiently perform its core functions; (2) operational impediments stemming from its integration with the Library of Congress; and (3) potential risk of constitutional challenges to its decision-making authority should the Office take on increased regulatory or adjudicatory responsibility. Congress could improve the effectiveness of any future legislative work it undertakes regarding the Copyright Act by first addressing these structural challenges to ensure it has a strong partner in executing future copyright policy decisions.

- **Funding and Infrastructure Concerns:** As a market supporting entity, the Copyright Office has very different business needs than the Library of Congress, and it requires an information technology (IT) infrastructure tailored to those needs. However, a [recent report](#) by the Government Accountability Office (GAO) notes that the U.S. Copyright Office is required to rely heavily on the Library of Congress's systems to carry out its mission with respect to registering copyrights, depositing copies of works, recording ownership transfers, and providing information to the public. The GAO found that these Library IT systems have "serious weaknesses" that hinder the ability of the Copyright Office to fulfill its mission. Likewise, the Copyright Office's new [strategic plan](#) points out that "there is no question that it must now modernize to meet current and future needs." The plan also notes that while technological improvements are essential, true modernization requires "re-envisioning almost all of the Copyright Office's services."

- Operational Impediments: In modernizing the U.S. Copyright Office, Congress should make sure that it puts in place a legal structure that best positions the Copyright Office for success. Today, no agency exists with comprehensive and independent rulemaking authority in the area of copyright law. The Copyright Office is a department within the Library of Congress, and the Register of Copyrights, as head of that department, is limited to establishing regulations for the administration of functions and duties of her office, subject to the approval of the Librarian of Congress. In certain limited cases, such as the triennial rulemaking proceeding relating to exemptions from certain provisions of the Digital Millennium Copyright Act (DMCA), the Register is empowered to conduct notice-and-comment rulemaking, but she may only recommend regulations to the Librarian of Congress.
- Risks of Constitutional Challenges: Similarly, although she is the head of the U.S. Copyright Office and an expert in copyright law, because she is not a principal officer of the government (*i.e.*, a Presidential Appointee), the Register of Copyrights is not empowered to appoint and oversee the work of administrative law judges adjudicating copyright matters within the Office. After litigation challenging the constitutionality of the appointment of the Copyright Review Board judges by the Register, the authority to appoint and dismiss Copyright Royalty Board judges was vested in the Librarian of Congress (a Presidential Appointee), with the Register merely reviewing the work of the judges for error.

Should Congress continue the trend over recent decades of assigning the Copyright Office additional duties (*e.g.*, as a result of the ongoing review of the Copyright Act), such problems will be compounded unless the Register is appropriately empowered by Congress. We believe the current structure is inefficient and incompatible with good government administration. It saddles the Librarian with responsibilities outside the core competencies for which the role of Librarian is established and vetted. Moreover, it muddles the authority and accountability of the Register, who *is* fully vetted for administering the Copyright Act.

Although the signers of this letter have a variety of perspectives on copyright and where the functions of the Copyright Office should ultimately reside within the government, we agree on this: Regardless of what other modernization efforts Congress undertakes with respect to the U.S. Copyright Office, we firmly believe that the U.S. Copyright Office should be led by a Register who is a principal officer of the government—appointed by the President and confirmed by the Senate. This structure would ensure that the Office has appropriate authority to administer the nation’s copyright laws and that the Register is accountable to the Administration and to Congress for her actions.

As the Library of Congress ushers in a new era with a new Librarian, the time is ripe to ensure that the Copyright Office has the accountability and authority to best serve all of its stakeholders—most of all the American public. The nomination of Dr. Hayden as the next Librarian of Congress provides us with the opportunity to clarify the importance of the roles both the Library of Congress and the U.S. Copyright Office play in creating, cataloging, and administering the systems that preserve and promote our nation’s culture, by ensuring that the

two talented leaders have a close partnership and a direct working relationship, with appropriately defined authority and responsibility for their respective areas of expertise.

We have no doubt that Dr. Hayden will rise to the task of modernizing the Library of Congress, while properly focusing on preserving our culture and providing greater access to knowledge. At the same time, we strongly believe that now is the time to modernize the Copyright Office. Given its critical role and expertise in copyright law, the continued success of our copyright system requires a Copyright Office that has the resources and authority to serve its users in the digital age.

Sincerely,

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