

Intellectual Property Scholars’ Comments in Response to Chairman Goodlatte’s and Ranking Member Conyers’ Request for Comments on the House Judiciary Committee’s First Copyright Policy Proposal: “Reform of the U.S. Copyright Office”

We appreciate this opportunity to comment on the First Copyright Policy Proposal, concerning “Reform of the U.S. Copyright Office” (the “Proposal”), released for public comment by House Judiciary Committee Chairman Goodlatte and Ranking Member Conyers.

As professors of intellectual property law, we share the Committee’s interest in an appropriately resourced, well-functioning, modern Copyright Office, capable of meeting the needs of all of its digital stakeholders in the twenty-first century and beyond. We write this letter to endorse the main contours of the Proposal and to express our agreement that this is an urgent issue to resolve.

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.

I. The Register of Copyrights and Current Copyright Office Structure

The Proposal suggests that the Copyright Office should remain part of the Legislative Branch, and that it should have autonomy over its budget and technology needs. It further proposes that the Register of Copyrights be subject to a nomination and consent process (*i.e.*, a presidential appointee) with a 10-year term limit, similar to other senior government officials, and that the Office add several additional roles including Chief Economist, Chief Technologist, and Deputy Register.

We agree with the Committee that the current structure of the Copyright Office, as a department of the Library of Congress completely reliant on Library resources for its budget and technical needs, 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* statutorily vested with authority to perform “[a]ll administrative functions and duties under [Title 17]” 17 U.S.C. § 701(a). Likewise, it is important to unwind the intertwined and inefficiently mingled budget and technology needs of the Library of Congress and the Copyright Office so that each may more efficiently modernize to meet current and future needs.

We believe the operational impediments associated with integration with the Library of Congress could be removed by reorganizing the Copyright Office in a variety of ways, each having their own positive and negative attributes. We are particularly mindful and sympathetic, however, to the views expressed by the Committee in the Proposal that the Copyright Office has played an important role in providing Congress independent and timely advice on copyright law and policy.

We also agree with the Proposal that the Copyright Office will likely require additional executive-level expertise to carry out the functions required of it as it executes its modernization plan. We defer to the next Register to determine in consultation with Congress and other funding authorities how to prioritize the identification and hiring for such roles, but endorse the addition of such expertise.

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 wholeheartedly agree with the Proposal on this: Regardless of what other modernization efforts Congress undertakes with respect to the Copyright Office, we firmly believe that the Office should be led by a principal officer of the government, nominated and confirmed like other senior government officials. This structure would ensure that the Copyright Office has appropriate authority to administer the nation's copyright laws, and as the Proposal notes, would provide the American people input into the selection process through their elected officials.

It is concerning to us that while the Committee is engaged in this thoughtful policy review, the Librarian is simultaneously conducting her own selection process, taking the unusual step of using an online survey tool to identify knowledge, skills, and abilities required to fulfill the Register of Copyrights position when the duties and responsibilities of the Register are already statutorily established by Congress. As set forth in 17 U.S.C. § 701(b), those responsibilities are:

(b) In addition to the functions and duties set out elsewhere in this chapter, the Register of Copyrights shall perform the following functions:

- (1)** Advise Congress on national and international issues relating to copyright, other matters arising under this title, and related matters.
- (2)** Provide information and assistance to Federal departments and agencies and the Judiciary on national and international issues relating to copyright, other matters arising under this title, and related matters.
- (3)** Participate in meetings of international intergovernmental organizations and meetings with foreign government officials relating to copyright, other matters arising under this title, and related matters, including as a member of United States delegations as authorized by the appropriate Executive branch authority.
- (4)** Conduct studies and programs regarding copyright, other matters arising under this title, and related matters, the administration of the Copyright Office, or any function vested in the Copyright Office by law, including educational programs conducted cooperatively with foreign intellectual property offices and international intergovernmental organizations.
- (5)** Perform such other functions as Congress may direct, or as may be appropriate in furtherance of the functions and duties specifically set forth in this title.

The competencies required to serve as Register of Copyrights must be targeted to meet these statutory obligations, as well as to ensure the successful candidate can meet the management and leadership expectations attendant to a senior executive officer position in the federal government. While it is often laudable to seek public input on important issues of policy, an online survey

seeking input on job competencies from any internet user is an inefficient and inappropriate approach for developing selection criteria for this important role, particularly where such minimal background is provided to survey-takers and where there appears to be no mechanism to encourage constructive comments.

II. Copyright Office Advisory Committees

The Proposal suggests that the Copyright Office appoint a variety of permanent and ad-hoc advisory committees to ensure that a diverse set of voices is represented and can advise the Register on critical issues. We agree that advisory committees may be a valuable means of bringing additional resources and expertise to the Copyright Office. We note, however, that the Office already has a strong record of convening roundtables, hearings, and other events around the country to solicit public input on studies and policy proposals it is considering. In the last three years, the Copyright Office has convened numerous events in locales including Silicon Valley, Boston, New York City, Los Angeles, Nashville, and Washington, D.C. We urge that any permanent advisory committee recommendations take note of the existing practices of the Copyright Office and ensure that the public, and in particular individuals not likely to be able to participate in meetings in Washington, D.C., continue to be afforded equal opportunities to be heard and to interact with Copyright Office officials.

III. Small Claims

We agree that a tribunal should be established within the Copyright Office to adjudicate infringement claims and Section 512 claims of relatively low monetary value (“Small Claims”), and that the “Copyright Small Claims” report promulgated by the Copyright Office provides a valuable roadmap to how the key components of such a process could be resolved. While a discussion of every aspect of the report is beyond the scope of this letter, several of the signatories to this letter have a particular interest in this issue, as well as experience in representing individual artists and small businesses in the arts, and offer their further assistance should the Committee find such input valuable.

In our view, the criteria by which the effectiveness of a Small Claims tribunal should be judged are whether: (1) it offers individuals and small businesses who as a practical matter are currently locked out of federal courts a viable, straightforward, and cost-efficient alternative to federal courts; (2) there are appropriate incentives to ensure defendants voluntarily agree to use the forum; (3) the dockets are properly managed so as to enable access to the tribunal by its intended beneficiaries; and (4) that judgments are readily enforceable—ideally by recourse to courts in the plaintiff’s home jurisdiction. The legislation establishing the tribunal should ensure that procedural obstacles, such as requiring the use of federal process servers to initiate an action rather than allowing other accepted means of service of process, do not put the benefits of the tribunal out of reach for its intended users. Finally, as law professors, we cannot let pass the opportunity to note the valuable role students enrolled in legal clinics could play in advising plaintiffs and defendants in these actions.

We thank the Committee for undertaking this important review, and we thank Chairman Goodlatte and Ranking Member Conyers for sharing this thoughtful first policy proposal for

public comment. We stand ready to participate in any further review or drafting process where our input would be helpful.

Sincerely,

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