



**SIIA**

Accelerating Innovation in  
Technology, Data & Media

**THE MOST IMPORTANT AND IMMEDIATE  
COPYRIGHT REFORM FOR CONGRESS:**

***MODERNIZING THE  
U.S. COPYRIGHT OFFICE***

FEBRUARY 2015

## INTRODUCTION

A properly functioning copyright system is critical to the success and prosperity of the software and information industries and the short and long-term success of the U.S. economy.<sup>1</sup> As the Office responsible for administering matters relating to copyright, few other government offices are more important to the growth of creativity and commercial activity in our nation than the U.S. Copyright Office. The ability of our nation's independent creators and small and large businesses to promptly register and record their copyright interests with the Office, and of the public to obtain copyright information that facilitates the licensing of copyrighted works creates new industries, which in turn assists our global competitiveness and technological leadership.

Unlike other government offices that administer the country's intellectual property laws, the Copyright Office resides in the legislative branch, within the Library of Congress. This current structure creates numerous challenges for the Office, its customers<sup>2</sup> and the public. The Office is significantly underfunded and understaffed. Because it is housed within the Library, the Copyright Office is obligated to use the Library's information technology (IT) systems, which are both antiquated and intended for a very different purpose than the IT systems needed by the Copyright Office to achieve its objectives and mission. These funding, staffing, and technology problems – in conjunction with many other internal operational and policy differences that exist between the Office and the Library – make it exceedingly difficult for the Copyright Office to provide timely and effective services to its constituents and to make the necessary operational and infrastructure changes that are crucial to transforming and modernizing the Office. These problems have gotten worse over the past several years. Consequently, it is time to reconsider the present structure of the Copyright Office and to begin to evaluate alternatives.

---

<sup>1</sup> In 2012, the copyright industries contributed over one trillion dollars to the U.S. economy and directly employed 5.4 million workers. Stephen Siwek, *Copyright Industries in the U.S. Economy: The 2013 Report* 11 (2013) at [http://www.iipa.com/pdf/2013\\_Copyright\\_Industries\\_Full\\_Report.PDF](http://www.iipa.com/pdf/2013_Copyright_Industries_Full_Report.PDF).

<sup>2</sup> The customers of the Copyright Office are copyright owners, who use the copyright registration system for its legal, artistic and commercial benefits, and users, who seek copyright information for research or business needs, for example, those seeking data about copyright ownership, the termination of legal transfers, the expiration of copyright term or to access deposit copies.

## HISTORY AND STRUCTURE OF THE U.S. COPYRIGHT OFFICE

From 1790 to 1870, clerks of the federal district courts were responsible for the registration of copyright claims.<sup>3</sup> In 1870, that changed when Congress centralized the copyright registration system by taking these responsibilities away from the district courts and assigning them to the Library of Congress.<sup>4</sup> Then, in 1897, Congress appropriated money for a Copyright Department of the Library of Congress.<sup>5</sup> This Department went on to become the U.S. Copyright Office.

Today, the Office resides in the James Madison Memorial Building and employs about 400 full time staff.<sup>6</sup> The mission of the Copyright Office is to promote creativity by administering and sustaining an effective national copyright system.<sup>7</sup> It annually registers half a million claims to copyright, records more than 11,000 documents, and collects and distributes to copyright holders a quarter of a billion dollars in compulsory license funds.<sup>8</sup>

The Copyright Office is led by the Register of Copyrights.<sup>9</sup> The Register and all subordinate officers and employees of the Copyright Office are appointed by the Librarian of Congress and act under the Librarian's "direction and supervision."<sup>10</sup> The Library of Congress is established

---

<sup>3</sup> 1 Paul Goldstein, Copyright Principles, Law & Practices 3.19 (1989). U.S. Copyright Office Circular 1a, *United States Copyright Office: A Brief Introduction and History* at <http://copyright.gov/circs/circ1a.html> [Hereinafter *Circular 1a*]

<sup>4</sup> *Circular 1a*, *supra* note 3.

<sup>5</sup> See Act of Feb. 19, 1897, ch. 265, 29 Stat. 538, 545 (1897) (providing for the creation of a separate Copyright Department in the Library of Congress).

<sup>6</sup> *Circular 1a*, *supra* note 3; LIBRARY OF CONGRESS, ANNUAL REPORT OF THE LIBRARIAN OF CONGRESS 88 (2013), available at <http://www.loc.gov/about/reports/annualreports/fy2012.pdf>.

<sup>7</sup> *Circular 1a*, *supra* note 3.

<sup>8</sup> *Id.*

<sup>9</sup> The present Register is Maria Pallante. Prior to being appointed Register, Pallante held several prior positions with the Office as well as various copyright-related positions with Guggenheim Museums, the Authors Guild, the National Writers Union and others. See <http://copyright.gov/about/office-register>.

<sup>10</sup> 17 U.S.C. § 701(a)

under Title 2 of the U.S. Code,<sup>11</sup> which governs the legislative branch.<sup>12</sup> Since the Copyright Office is housed within the Library and is subject to its oversight and direction, it is likewise considered to be a legislative branch agency.<sup>13</sup>

## PRIMARY DUTIES OF THE COPYRIGHT OFFICE

The duties of the Register are enumerated throughout the Copyright Act.<sup>14</sup> These duties include:

- *Registration*, which includes examining and registering copyright claims;
- *Recordation*, which includes recording assignments, licenses, termination notices, security interests, and other copyright documents;
- *Administering Statutory Licenses and Rulemaking*, which includes statutory licenses affecting online music services, cable operators, satellite carriers, and broadcasters and often requires the Office to manage and disperse private monies and to review final determinations of rates and terms for statutory licenses that are set by the Copyright Royalty Judges;
- *Advice on Policy Matters*, which includes advising Congress on national and international issues relating to copyright through studies and other means, providing information and legal assistance to Federal agencies, and participating in negotiations and international meetings;

---

<sup>11</sup> 2 U.S.C. §§ 131, seq

<sup>12</sup> Several provisions in Title 5 also refer to the Library of Congress as a “legislative agency.” See e.g., 5 U.S.C. § 5531(4) (2008), 5 U.S.C. § 592 (2) (2008).

<sup>13</sup> This is an important and complex issue that will be addressed in more detail in the section of this paper titled “Different Approaches to Modernizing the Copyright Office” (below).

<sup>14</sup> Many of these duties are listed in 17 USC § 701(b), but other duties are scattered throughout the Copyright Act.

- *Education and Information Services*, which includes maintaining public databases, materials to educate its customers and the public about copyright and related information, and education services.

Over time the responsibilities and duties of the Copyright Office have gradually increased. As more complex copyright issues arose, Congress often entrusted the Office with additional duties, both by design and by default. As a result, the Register's duties have evolved over time, and now also include additional, atypical responsibilities, such as the examination of claims to mask works filed under the Semiconductor Chip Protection Act of 1984<sup>15</sup> and examination of claims in vessel hull designs filed under the 1998 Vessel Hull Design Protection Act.<sup>16</sup>

### ***Registration***

Since 1870, the Copyright Office has registered more than 33 million claims to copyright and mask works.<sup>17</sup> Copyright protection automatically subsists in original works of authorship from the moment of their fixation in a tangible medium of expression.<sup>18</sup> Thus, copyright registration is not necessary to obtain copyright protection. Although there is no requirement that a copyrighted work be registered with the Office, there are numerous benefits for doing so.<sup>19</sup>

A copyright registration application consists of three parts: the application, a copy of the copyrighted work to be deposited with the Office and the filing fee. The Office staff examine all applications and deposit copies to determine whether the standards for copyrightability are met

---

<sup>15</sup> 17 U.S.C. §§ 901- 914 (1988).

<sup>16</sup> 17 U.S.C. §§ 1301- 1332 (1998)

<sup>17</sup> *Circular 1a*, *supra* note 3.

<sup>18</sup> 17 U.S.C. §§ 302, 408.

<sup>19</sup> Registration is a necessary prerequisite for U.S. authors to file suit for copyright infringement. 17 U.S.C. § 411. If registration is made within five years after first publication of the work, the certificate of registration constitutes prima facie evidence of the validity of the copyright and of the facts stated in the registration certificate. 17 U.S.C. § 410(c). Perhaps most importantly, eligibility for statutory damages and attorneys' fees is contingent upon registration before infringement commences, with limited exceptions. 17 U.S.C. § 412. Although registration is voluntary, these benefits are so significant that they often make registration indispensable for authors who wish to protect their rights.

under the Copyright Act and regulations and whether all other the requirements in the regulations are satisfied.<sup>20</sup>

The Copyright Office makes the deposit copies it receives available to the Library so the Library can review them and decide which deposits to take from the Copyright Office to include in its collections.<sup>21</sup> As a result of this relationship, the Copyright Office has helped to make the Library of Congress the largest Library in the world by supplying the Library with millions, if not billions, of deposits – movies, music, books, newspapers, photographs, software and many other works – that become part of the collections of the Library.<sup>22</sup>

The Library also receives published works directly from copyright owners through a separate provision – section 407(a) – of the Copyright Act. This provision, which is often referred to as “mandatory deposit,” legally requires copyright owners to deposit copies of their works within three months of publication in formats specified by regulation, regardless of whether they seek to register their copyright claims with the Copyright Office.<sup>23</sup> Thus, unlike the deposit copies that must accompany a copyright registration application, the section 407(a) mandatory deposit requirement is independent of copyright protection. This provision enables the Library to obtain copies of published works for its collections even when the copyright owner does not submit a copyright registration application to the Copyright Office.<sup>24</sup> In fiscal year 2012,<sup>25</sup> the Copyright

---

<sup>20</sup> 2012 U.S. COPYRIGHT OFFICE ANN. REP. 13 (Fiscal year ending September 30, 2012).

<sup>21</sup> The copies are deposited in accordance with 17 U.S.C. § 408(a) (2012).

<sup>22</sup> *Circular 1a*, *supra* note 3; 2012 U.S. COPYRIGHT OFFICE ANN. REP. 5 (The Copyright Office has the primary responsibility for acquiring published copyrightable works for the collections of the Library of Congress). Even though copyright registration has been voluntary since the 1976 Act was enacted, the United States receives more copyright registration applications annually than all other countries combined. *See* Dotan Oliar et al., *Copyright Registrations: Who, What, When, Where, and Why*, 92 TEX. L. REV. 2211, 2212-13 (2014) (citing to the Survey of National Legislation on Voluntary Registration Systems for Copyright and Related Rights by the WIPO Standing Committee on Copyright and Related Rights at Annex II, SCCR/13/2 (Nov. 9, 2005)).

<sup>23</sup> 17 U.S.C. § 407(a).

<sup>24</sup> A copyright owner who fails to submit a section 407 deposit copy to the Library after a written demand from the Library may be subject to a fine but cannot lose copyright protection for the work. 17 U.S.C. § 407(d).

<sup>25</sup> As of the writing of this paper in early 2015, the most recent Annual Report available on the Copyright Office site is for FY2012. As a result, most of the numbers provided in this report will be for FY2012. Where the Office has published more up-to-date numbers in other documents or reports this paper attempts to use those more current numbers.

Office collected more than 636,000 copies of published works for the Library with a total estimated value of over \$30 million.<sup>26</sup> The acquisition of these works was fairly evenly split between the registration system and mandatory deposit.<sup>27</sup>

There are a myriad of critical problems with the existing registration system, the most significant of which include:

*Decreased Staffing Has Caused a Backlog of Copyright Applications:* In fiscal year 2012, the Copyright Office processed more than 560,000 claims for registration.<sup>28</sup> Despite this herculean effort, the number of copyright registration applications pending with the Office increased over the course of the year. At the start of fiscal year 2012, there were 183,676 registration applications pending with the Office and at end of the fiscal year 194,689 applications were pending.<sup>29</sup> This growing backlog of applications is a direct result “of decreases in staffing levels.”<sup>30</sup>

Until and unless the Office’s staffing problems are effectively addressed this backlog will continue to grow.<sup>31</sup> Applicants may become more disenchanted with the Office and many may begin to question (if they haven’t already done so) why they spend their time and resources to

---

<sup>26</sup> Library of Congress, *Fiscal 2014 Budget Justification* 133, 141 (2013), available at [www.loc.gov/about/reports/budget/fy2014.pdf](http://www.loc.gov/about/reports/budget/fy2014.pdf) (providing fiscal year 2012 statistics); 2012 U.S. COPYRIGHT OFFICE ANN. REP. 5.

<sup>27</sup> 2012 U.S. COPYRIGHT OFFICE ANN. REP. 5.

<sup>28</sup> *Id.*, at 13.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> The backlog issue is not a new one. Twenty years ago stakeholders were concerned about this backlog. See Howard B. Abrams, *The Role of the Copyright Office: An Introduction*, Cardozo Arts and 13 Ent. L.J. 27, 27 (1994) (“The backlog of registrations and filings has left the Copyright Office weeks and months behind in fulfilling its basic function as a useable public record. Is this acceptable in a world of computer technology easily capable of on-line real-time information? Is improvement possible in the light of the continuing budget cuts which have hindered the Copyright office as much as any branch of government?”). See also Maria Pallante, *The Next Generation Copyright Office: What It Means And Why It Matters*, 61 J. Copyright Soc’y 213, 226 (2014) [Hereinafter *Next Generation Copyright Office*]

register their works. This would result in the submission of fewer applications, which in turn would translate to fewer deposit copies for the Copyright Office and thus fewer works for the Library of Congress' collections.

*The Library of Congress' Demands for Deposit Copies in Certain Formats Causes Friction with the Copyright Office and Copyright Applicants:* The deposit copy required by the Copyright Office serves numerous purposes. It is used by the Office in the examination process to determine whether the work meets the conditions of copyrightability and to certify the copyright record for parties, for example, as in the case of infringement litigation.<sup>32</sup> As noted above, these deposit copies are also used by the Library of Congress to stock their collections. Because the deposit copy is used by the Library for one purpose and by the Copyright Office for a completely different – and often competing – purpose, the Library and the Office are sometimes at odds with one another over the type and use of the deposit copy.<sup>33</sup>

The Library of Congress regularly reviews the deposits submitted for copyright registration and then selects the deposits that it wants to include in its collection.<sup>34</sup> The Copyright Office must turn over its copy to the Library because under the statute the Library controls the Office. However, if the Library makes a selection and takes the Office's only copy, then the Office cannot satisfy its obligation to certify the copyright record in the case of copyright litigation.

To date, the deposits the Library has selected have been primarily physical formats.<sup>35</sup> Often, the Copyright Office and registrants would prefer to submit a digital deposit copy, but because the Library desires that the deposit be in a physical format, the Copyright Office must require the registrant to submit a physical copy. "Like many parts of the Copyright Act, [the deposit] provisions were enacted with analog works in mind and do not seamlessly translate to the digital

---

<sup>32</sup> *Next Generation Copyright Office*, *supra* note 31, at 226.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* The Library does not take the deposit copy until after the Office has had the opportunity to examine it.

<sup>35</sup> *Id.*



environment.”<sup>36</sup> This is a major obstacle to the Copyright Office’s efforts to make the registration process more efficient and less expensive for copyright owners.<sup>37</sup>

The registration process could be significantly improved by requiring digital deposits.<sup>38</sup> For example, the Office could allow MP3s for sound recordings or thumbnail images for photographs.<sup>39</sup> But in many cases the Library of Congress is not willing to allow the Copyright Office to accept digital deposits, and the IT system used by the Copyright Office (which is the same system used by the Library)<sup>40</sup> may not be capable of handling such deposits.

SIIA has direct experience with this problem. One of the services that SIIA offers its members is to assist them with registering claims to their copyrighted works with the Copyright Office. One SIIA member discontinued registering their newspapers with the Copyright Office because they found it to be too expensive and cumbersome. Because they are experiencing significant online piracy of their newspapers and wanted to begin taking action against online infringers they reconsidered their decision and approached SIIA for assistance with the registration process.<sup>41</sup> We had hoped to file registrations on their behalf using an XML copy of the newspapers.<sup>42</sup> This was not possible because the Office’s IT system, which is supplied by the Library, was not

---

<sup>36</sup> Statement of Maria A. Pallante, Register of Copyrights and Director, United States Copyright Office before the Subcommittee on the Legislative Branch Committee on Appropriations, Fiscal 2015 Budget Request (April 8, 2014) [Hereinafter *Pallante 2015 Budget Request*]

<sup>37</sup> *Next Generation Copyright Office*, *supra* note 31, at 226.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> The problems associated with the Library’s IT system are discussed in more detail in the section titled “Copyright Office Budget and Infrastructure.”

<sup>41</sup> Section 411 of the Copyright Act requires that a copyrighted work owned by a U.S. national be registered with the U.S. Copyright Office as a precondition for bringing a copyright infringement action in federal court. 17 U.S.C. § 411(a) (providing that “no action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made....)

<sup>42</sup> XML is a markup language, similar to HTML. It’s mainly used to import or export data for websites, RSS feeds, and the like. To effectively use an XML document the Copyright Office would, ideally, have a database setup to process the XML and dump it into a database, which could easily be made searchable. Through XML, parts of an article (headline, byline, date, author, etc...) can be standardized, making the data universally usable, presentable and warehouse-able.

capable of enabling an examiner to review the XML copy of the deposit. We then offered to translate the XML file into a PDF that would be readable by the examiner, but were told that this also was not possible because the Library requires that newspaper deposits be in microfilm format.<sup>43</sup> The SIIA member concluded that it was too expensive and cumbersome to produce a microfilm copy solely for this purpose. This publisher is not alone in their frustration with the current system. As publishers and institutions move away from microfilm, the Library's continued and unreasonable demand for microfilm copies places an undue financial and administrative burden on newspaper copyright owners. The end result is that everyone loses – the Library may not be able to obtain these valuable copies for its collection,<sup>44</sup> the public may be missing valuable historical knowledge, and the resulting financial hardship precludes newspaper publishers from registering their newspapers, making it more difficult for them to take action against the online infringers.<sup>45</sup>

*The Functionality of the Registry is Outdated:* The Office's registration system and its companion recordation system constitute the world's largest database of copyrighted works and copyright ownership information.<sup>46</sup> However, the functionality of the registry is drastically out of date relative to search and database technologies available today.

---

<sup>43</sup> See Compendium of U.S. Copyright Office Practices, Third Edition, Ch. 1100, Sec. 1110.5(A) *Newspapers Subject to the Microfilm Deposit Requirement* (2014). "The deposit requirement ... varies depending on whether the Library of Congress has selected the newspaper for its collections. If the newspaper has been selected by the Library, the applicant must submit one complete copy of the final edition of each issue that was published in the month specified in the application on 35mm silver halide microfilm containing a positive print of each issue (i.e., black text printed on a white background)." See 37 C.F.R. § 202.3(b)(7)(i)(D); see also 37 C.F.R. pt. 202, app. B, ¶ X.A.1. The Library's list of titles for which microfilm is mandatory for group registration of newspapers/newsletters can be found here: [http://www.loc.gov/r/news/ncr\\_list.php](http://www.loc.gov/r/news/ncr_list.php). Special relief cannot be granted where the Library wants the required deposits.

<sup>44</sup> As noted above, under certain circumstances, under section 407 of the Copyright Act, the Library could still demand a microfilm copy from the publisher separate and apart from the deposit copy required for copyright registration purposes (by section 408).

<sup>45</sup> It is possible, but unlikely, that the Library's insistence on a microfilm copy is a formality that violates the Berne Convention. See Berne Convention for the Protection of Literary and Artistic Works, art. 5, *opened for signature* Sept. 9, 1886, revised at Paris on July 24, 1971, and amended on Sept. 29, 1979, 25 U.S.T. 1341, 828 U.N.T.S. 221, S. Treaty Doc. No. 99-27, 99th Cong. (1986) [hereinafter *Berne Convention*], (providing that "[t]he enjoyment and the exercise of these rights shall not be subject to any formality")

<sup>46</sup> 2012 U.S. COPYRIGHT OFFICE ANN. REP. 5

A good example of the functionality problems is demonstrated by a simple search of the database records on the Copyright Office website.<sup>47</sup> A search for “The Godfather” does not display either the Oscar-winning movie or the best-selling book by Mario Puzo within the first 25 search results.<sup>48</sup> In comparison, the first 25 search results for “The Godfather” on Google and Bing display virtually nothing but references to the movie and/or book.

#	Title <	Full Title	Copyright Number	Date
[1]	The Godfather.	<a href="#">16 most requested songs / [performed by] Andre Kostelanetz.</a>	SR0000072140	1986
[2]	The Godfather.	<a href="#">16 most requested songs / [performed by] Ray Conniff.</a>	SR0000072144	1986
[3]	Godfather --	<a href="#">2 Step. et al.</a>	SRu000877417	2008
[4]	The Godfather	<a href="#">Alfie / lyric by Hal David ; music by Burt Bacharach. Come Saturday morning / words by Dory Previn ; music by Fred Karlin. Love theme from "The Godfather" / words by Larry Kusik ; music by Nino Rota ... [et al.]</a>	PA0000113964	1981
[5]	The Godfather.	<a href="#">All. et al.</a>	SRu001090793	2012
[6]	The Godfather	<a href="#">All the things you are.</a>	SR0000045767	1982
[7]	The Godfather	<a href="#">Andy Williams' greatest hits / [performed by] Andy Williams.</a>	SR0000064404	1984
[8]	The Godfather.	<a href="#">Andy Williams : his greatest hits and finest performances.</a>	SR0000016722	1980
[9]	The Godfather.	<a href="#">Antico canto siciliano. From the motion picture. The Godfather. Arr. &amp; adaptation: Paramount Pictures Corporation. employer for hire of Carmen Coppola.</a>	RE0000843656	1972
[10]	The Godfather	<a href="#">As time goes by / Lakatos.</a>	SR0000316910	2002
[11]	The Godfather	<a href="#">Autumn leaves : the best of Roger Williams.</a>	SR0000012600	1979
[12]	The Godfather	<a href="#">Award winning movie themes of the 70's.</a>	SR0000198262	1993
[13]	Godfather	<a href="#">Azrael's beats collection 1.</a>	SRu000613887	2006
[14]	The Godfather	<a href="#">Best of Andy Williams.</a>	SR0000073635	1985
[15]	The Godfather	<a href="#">Best of Andy Williams : v. 1.</a>	SR0000052178	1982
[16]	The Godfather	<a href="#">Best of Ray Conniff / Ray Conniff, his orchestra, and the singers.</a>	SR0000008578	1979
[17]	Godfather --	<a href="#">Beyond the mix / [performed by] Frankie Knuckles.</a>	SR0000133254	1991
[18]	The Godfather	<a href="#">Chris Goodman songs : no. 1.</a>	PAu002968437	2005
[19]	The Godfather	<a href="#">Cinema Italiano / music of Ennio Morricone and Nino Rota : the Mancini Pops Orchestra : [conducted by] Henry Mancini.</a>	SR0000133289	1991
[20]	The godfather	<a href="#">Come live your life with me. From The godfather. w Larry Kusik &amp; Billy Meshel. m Paramount Pictures Corporation. employer for hire of Nino Rota.</a>	RE0000823396	1972
[21]	The godfather	<a href="#">Come live your life with me (the godfather waltz) From the motion picture The godfather. m Paramount Pictures Corporation (employer for hire of Nino Rota). w Larry Kusik &amp; Billy Meshel. arr. Famous Music Corporation (employer for hire of George Terry)</a>	RE0000823615	1972
[22]	The godfather	<a href="#">Enter at your own risk / Misfits in the Attic.</a>	SR0000185676	1993
[23]	The godfather	<a href="#">Fish police : episode ti. The godfather.</a>	PAu001648032	1992
[24]	The godfather	<a href="#">Gangsters, Inc.</a>	PAu001849446	1994
[25]	THE GODFATHER.	<a href="#">GODFATHER.</a>	SR0000705435	2012

This problem is not unique to *The Godfather*. Searches for countless other popular books, movies and music resulted in similar difficulties.

<sup>47</sup> <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First>. (Special thanks to Eric Schwartz of Mitchell Silberberg & Knupp LLP for bringing this to our attention)

<sup>48</sup> Entry number 25 is actually for a sound recording, which appears to be an audio book. If Paramount sold the rights to *The Godfather* it is doubtful that a searcher could believe with any level of confidence that they would find the transfer records based on a search of the Office records when the record of the work itself is so difficult to uncover.

## *Recordation*

The Office records documents related to copyright ownership such as copyright assignments, licenses, and other transactions related to a copyrighted work's chain of title, and makes these records available to the public.<sup>49</sup> Similar to copyright registration, there is no requirement that copyright owners or others with an interest in a copyrighted work record with the Copyright Office transfers of copyright ownership, licensing information, security interests, or other matters relevant to a copyrighted work. There are, however, many benefits to filing these types of documents with the Office.<sup>50</sup>

The database of these records maintained by the Copyright Office is extremely valuable. These records are accepted by courts of law as authentic evidence of official transactions.<sup>51</sup> People rely on this information to resolve ownership issues; verify the legitimacy of alleged prior transactions before entering into new ones; compile information on a copyright owner's portfolio of registrations; and research the extent to which a work is protected by the copyright law.<sup>52</sup> In fiscal year 2012, the Office recorded 8,687 documents containing titles of more than 170,000 works.<sup>53</sup>

The present recordation process is shockingly antiquated, cumbersome, and costly. It requires manual examination and manual data entry from paper documents much the same way as when the recordation system was first launched in the 1870's.

---

<sup>49</sup> 17 U.S.C. §§ 205, 302(d), 304(c)(4)(A) (2012).

<sup>50</sup> Benefits of recordation of copyright transfers and other copyright documents include: (i) recordation may establish legal priority between conflicting transfers or between a transfer and a nonexclusive license; (ii) recordation establishes a public record of the contents of the recorded document; (iii) some courts have held that in order to perfect the creditor's interest in a security interest in a copyrighted work the creditor must record that interest with the Copyright Office; and (iv) recordation of a document in the Office may provide constructive notice to the public of the facts stated in the document. *See* U.S. Copyright Office Circular 12, *Recordation of Transfers and Other Documents* at <http://copyright.gov/circs/circ12.pdf>.

<sup>51</sup> 17 U.S.C. § 410(c).

<sup>52</sup> *Next Generation Copyright Office*, *supra* note 31, at 229.

<sup>53</sup> 2012 U.S. COPYRIGHT OFFICE ANN. REP. 13.

The recordation process is extremely time consuming because all information, except for information included in the recordation cover sheet (which often is never filed), is hand-entered (*i.e.*, keyed in) by Copyright Office staff regardless of whether the recordation materials submitted are in digital or print form. The process takes twelve to eighteen months for the Office to enter the data – largely because of insufficient staffing and because documents must be submitted on paper. This is much too long. The copyright marketplace moves quickly and licensees, lawyers, and others need this information immediately – not a year and a half later.<sup>54</sup>

The efficiency and reliability of the recordation system must improve in order to keep up with the creative community it serves. It is essential that the Office reengineer the recordation process to both make historic records available, and to build a comprehensive, publicly accessible database of copyright ownership transactions that is easily searchable and user friendly. It must become easier and less costly for ownership and other documents to be recorded with the Office and the Office must improve the efficiency and speed of the recordation process, as well as making it easier to search and retrieve documents from the Office’s recordation database.

The Office has been making progress toward these goals, but this progress has been slow. It will continue to be slow so long as the Copyright Office continues to be encumbered by budget and staffing deficiencies and IT limitations imposed by the Library of Congress.

### ***Administering Compulsory and Statutory Licenses and Rulemaking***

The Register of Copyrights conducts rulemakings,<sup>55</sup> implements regulations, and publishes practices related to copyright registration, documents recordation, and administration of statutory

---

<sup>54</sup> As a consequence, the creators and users of copyrighted works have had to develop their own systems to generate and disseminate copyright information that is relevant to their activities. Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L. J. 28 (2010) at [http://www.law.berkeley.edu/files/bclt\\_CPP.pdf](http://www.law.berkeley.edu/files/bclt_CPP.pdf). [Hereinafter “CPP”]

<sup>55</sup> The Register is granted authority to “establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title.” 17 U.S.C. § 702.

licenses.<sup>56</sup> Under the Copyright Act, the Register administers statutory and compulsory licenses for:

- secondary transmissions by cable systems;<sup>57</sup>
- making ephemeral recordings;<sup>58</sup>
- secondary transmissions of distant and local television programming by satellite carriers;<sup>59</sup>
- distribution of digital audio recording devices or media;<sup>60</sup>
- public performances of sound recordings by means of a digital audio transmission;<sup>61</sup>
- making and distributing phonorecords;<sup>62</sup>
- public performances on coin-operated phonorecord players;<sup>63</sup> and
- the use of certain works in connection with noncommercial broadcasting.<sup>64</sup>

The Copyright Royalty Board is an independent and separate unit of the Library of Congress that sets royalty rates and determines terms and conditions for the use of statutory licenses. The Office's Licensing Division collects royalty fees from cable operators for retransmitting television and radio broadcasts; from satellite carriers for retransmitting "superstation" and network signals cable operators; and from importers and manufacturers who distribute digital audio recording devices or media in the United States, and invests the fees in interest-bearing securities with the U.S. Treasury. The Office disperses these fees (less reasonable operating

---

<sup>56</sup> 2012 U.S. COPYRIGHT OFFICE ANN. REP. 9

<sup>57</sup> 17 U.S.C. § 111.

<sup>58</sup> 17 U.S.C. § 112.

<sup>59</sup> 17 U.S.C. §§ 119, 122.

<sup>60</sup> 17 U.S.C. § 1004.

<sup>61</sup> 17 U.S.C. § 114.

<sup>62</sup> 17 U.S.C. § 115.

<sup>63</sup> 17 U.S.C. § 116.

<sup>64</sup> 17 U.S.C. § 118.

costs) to copyright owners.<sup>65</sup> In fiscal year 2012, the Office collected \$312 million in royalty fees, and distributed more than \$800 million from prior years to copyright owners whose works were used under these licenses.<sup>66</sup>

The vast majority of copyright law is directly administered by Congress by statute, and more recently by the courts. Although the Register has authority to conduct rulemakings, that authority is extremely limited.<sup>67</sup> Section 702 of the Copyright Act provides that the “Register of Copyrights is authorized to establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title.”<sup>68</sup> However, it also requires that all regulations be approved by the Librarian of Congress.<sup>69</sup>

This approach has caused considerable problems. The Copyright Office conducts various studies and issues many policy recommendations. However, there is often no follow-on action taken as a result of these efforts because the Office lacks substantive rulemaking authority to take the next logical step. If the Office were granted more regulatory and adjudicatory authority, the Office could more easily take these next steps, resulting in a more flexible, contemporary and user-friendly copyright law.

Limiting the Office’s ability to administer the copyright law by regulation is also a significant factor in why some people may perceive that the copyright law is outdated or too complex. This approach has forced Congress to codify too much detail into the Copyright Act making it extremely lengthy and unwieldy.<sup>70</sup> Copyright issues are inherently fast-moving issues that

---

<sup>65</sup> 2012 U.S. COPYRIGHT OFFICE ANN. REP. 5, 16

<sup>66</sup> 2012 U.S. COPYRIGHT OFFICE ANN. REP. 5

<sup>67</sup> Elizabeth Townsend Gard, *Conversations with Renowned Professors on the Future of Copyright*, 12 TUL. J. TECH. & INTELL. PROP. 35, 65 (Fall 2009) (stating that “the Copyright Office is a rather unique entity because historically, it has not had much rulemaking or regulatory power”)

<sup>68</sup> 17 U.S.C. § 702.

<sup>69</sup> *Id.*

<sup>70</sup> For example, Chapter 10 of the Copyright Act, titled “Digital Audio Recording Devices and Media,” was enacted in the Audio Home Recording Act of 1992, to address concerns of copyright infringement on what are now largely obsolete devices and formats, such the Digital Audio Tape (DAT), Digital Compact Cassette (DCC) and Sony’s

require quick consideration and response to changes in economic conditions and new technologies. As explained in more detail below, the Copyright Office has a knowledgeable and experienced staff that is well versed in all aspects of the copyright law as well as marketplaces and technologies affecting and affected by the law. Consequently, the Office is adept and well suited to act expeditiously and effectively to address complex copyright issues as they arise.

Because the Copyright Office has been unable to fine tune the copyright law through regulations and adjudicatory proceedings, the federal courts have often been compelled to liberally interpret and apply the copyright law.<sup>71</sup> If the Copyright Office had more regulatory authority than it presently has, owners and users in the copyright community would likely have a better idea of the parameters of the copyright law, which might lead to more compromise and licensing agreements between the parties and less litigation and more public support for the copyright law.

In many respects the Copyright Office is also in a better position than the federal courts to interpret and modify the copyright law. Unlike the courts, the Copyright Office is able to make complex determinations regarding the application of the copyright law divorced from specific facts that might arise in a given case and well before any actual case or controversy arises. The Office may also consider how its interpretation of the copyright law might affect the copyright community and the operation of the copyright law as a whole. On the other hand, the federal courts are generally required to consider the specific facts before them without regard to how their decision might implicate other copyright stakeholders.

The fact that Congress and the courts are directly administering the copyright law is a factor in the increasing disenchantment with the copyright law. Some have voiced concerns that the law is outdated and in need of a substantial revision. Regardless of whether those concerns are justified, it is abundantly clear that the present approach of Congress and the courts doing all the heavy lifting is not a recipe for success. Therefore, one step that Congress should consider in

---

Minidisc. 17 U.S.C. § 1000. *See* Terry Hart, *Copyright Reform Step Zero*, 19 INFO. & COMM. TECH. LAW 2, 5, 6 (2010). *See* Joseph Liu, *Regulatory Copyright*, 83 N.C.L. REV. 87, 93, 95-99 (2004) (submitting that provisions in the Copyright Act often became obsolete because of the Copyright Office's lack of regulatory power.)

<sup>71</sup> This has become most clear in the many recent cases applying the fair use defense to acts of mass digitization and orphan works. *See e.g., Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *Authors Guild v. Google*, 954 F. Supp. 2d 282 (S.D.N.Y.2013)



any attempt to update the copyright laws is whether to give the Copyright Office more regulatory and adjudicatory authority to administer the law moving forward.

### *Advice on Policy Matters*

The Copyright Office provides critical law and policy functions, including

- serving as the principal advisor to Congress on national and international copyright matters;
- drafting copyright legislation;
- studying and reporting on important matters of domestic and international copyright policy, often at the request of members of Congress;
- assisting the U.S. Department of Justice in cases involving issues of copyrightability, copyright ownership or other copyright matters;
- providing copyright-related support for the judiciary (courts) and executive branch agencies;
- participating in conferences sponsored by the World Intellectual Property Organization (WIPO) and serving on U.S. government delegations for bilateral and regional trade and copyright treaty negotiations between the United States and other countries;
- participating in intergovernmental meetings and other international events; and
- providing public information and education.<sup>72</sup>

The expertise of the Copyright Office is reflected in countless contributions over the last hundred years, including official studies, congressional hearings, treaty negotiations, trade agreements, policy recommendations, and legal interpretations.<sup>73</sup> Since Maria Pallante became the Register in June 2011, the Copyright Office has conducted eleven (11) studies and public inquiries.<sup>74</sup>

---

<sup>72</sup> 2012 U.S. COPYRIGHT OFFICE ANN. REP. 5-8

<sup>73</sup> Maria Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 341 (2013) [Hereinafter “*Next Great Copyright Act*”].

<sup>74</sup> Of the 11 studies and public inquiries, six are past studies (see Copyright Small Claims Study (Sept 2013); Fee Study (Nov 2013); Resale Royalty Study (Dec 2013); Study on Federal Copyright Protection for Pre-1972 Sound

Interestingly, the Library of Congress participated in *all* three of the *active* policy studies, submitting comments in two studies and testifying in the other.<sup>75</sup> The Library filed comments because, as a library, it is a stakeholder with a particular interest in the outcome of the inquiry. It is essential that the Copyright Office be an independent arbiter of the issues it is asked to evaluate and comment on both in reality and perception. To ensure this independence, the Copyright Office should have the same autonomy as the Congressional Research Service.<sup>76</sup> CRS is mandated to provide Congress with analysis that is authoritative, confidential, objective and nonpartisan, and maintains its independence from the Librarian of Congress in fulfilling this mission.

To accomplish the number of responsibilities imposed on the Copyright Office, the Office has a team of a mere 20 lawyers in two offices:

---

Recordings (Dec 2011); Mass Digitization Study (Oct 2011); and Study of the Satellite Television Extension and Localism Act (Aug 2011) at <http://copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf>); three are active studies (see studies on Making Available, Orphan Works, and Music Licensing at <http://copyright.gov/policy/>) and two are public inquiries (see public inquiries relating to Recordation Reengineering and Technological Upgrades to Registration and Recordation at <http://copyright.gov/inquiries/>). This does not include past and active rulemakings undertaken by the Copyright Office, which can be found here: <http://copyright.gov/rulemaking/past-rulemaking.html> and <http://copyright.gov/rulemaking/>.

<sup>75</sup> It was not possible to determine how many of the studies that are no longer active that the Library participated in. See *Comments of the Library of Congress Submitted by Gregory Lukow Chief, National Audio-Visual Conservation Center – Packard Campus In Response to the Copyright Office Notice of Inquiry “Music Licensing Study”* (Submitted May 23, 2014) at [http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014\\_3/Library\\_of\\_Congress\\_MLS\\_2014.pdf](http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Library_of_Congress_MLS_2014.pdf) and *Comments of the Library of Congress In Response to the Copyright Office Notice of Inquiry “Orphan Works and Mass Digitization”* (submitted February 4, 2013) at [http://copyright.gov/orphan/comments/loi\\_10222012/Library-of-Congress.pdf](http://copyright.gov/orphan/comments/loi_10222012/Library-of-Congress.pdf), and Public Roundtable on the Right of Making Available (May 5, 2014) at [http://copyright.gov/docs/making\\_available/public-roundtable/Final-Making-Available-Agenda.pdf](http://copyright.gov/docs/making_available/public-roundtable/Final-Making-Available-Agenda.pdf).

<sup>76</sup> Dr. James Billington has served as the Librarian of Congress since 1987. With one notable exception, he and his staff have largely not publicly interfered with the Copyright Office's policy making duties. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 143 (July 27, 2010) at <http://www.copyright.gov/fedreg/2010/75fr43825.pdf> (the Librarian rejected the Register's recommendation to deny a request for a DMCA exception for literary works distributed in ebook format.) After many years of devoted service, Dr. Billington is likely to retire soon. When he does, a new Librarian of Congress will be nominated by the President to take his place. Since there are no restrictions in the Copyright Act on how the Librarian directs and supervises the Copyright Office, the new Librarian may take a very different approach than Dr. Billington, resulting in copyright laws and policies that may improperly favor the library community, rather than policies that are best for the copyright community as a whole.

1. The Office of the General Counsel is headed by the General Counsel and Associate Register of Copyrights. This Office, which consists of only eleven (11) lawyers (including the General Counsel), is responsible for any and all legal interpretation of the copyright law. The General Counsel liaises with the Department of Justice and other federal agencies on a wide range of copyright matters, such as litigation and the administration of the Copyright Act. The General Counsel also has primary responsibility for the formulation and promulgation of regulations and the adoption of legal positions governing policy matters and the practices of the U.S. Copyright Office.<sup>77</sup>
2. The Office of Policy and International Affairs is headed by the Associate Register of Copyrights and Director of Policy and International Affairs. This Office, which consists of nine (9) lawyers, assists the Register with critical policy functions of the U.S. Copyright Office, including domestic and international policy analyses, legislative support, and trade negotiations. This office represents the U.S. Copyright Office at meetings of government officials concerned with the international aspects of intellectual property protection, and provides regular support to Congress and its committees on statutory amendments and construction.<sup>78</sup>

To say that these two offices are understaffed – especially in relation to the amount and complexity of their workload – is an understatement. By comparison, the U.S. Patent and Trademark Office’s Office of Policy and International Affairs, Office of Governmental Affairs, and Office of the General Counsel have a total staff of approximately 200 (about 75% of whom are lawyers) to accomplish roughly the same duties but for patent, trademark and, to some extent, copyright policy.<sup>79</sup>

---

<sup>77</sup> See <http://copyright.gov/about/offices/>

<sup>78</sup> *Id.*

<sup>79</sup> About 10% of these 200 employees work directly on copyright issues. The PTO has a staff to deal with domestic and international copyright matters because the Copyright Office is located in the legislative branch and the executive branch needs to have an agency with its own expertise to handle copyright matters on behalf of the Administration.

The complexity and the sheer number of domestic and international policy responsibilities of the Copyright Office combined with the limited number of attorneys in these two offices to handle these duties places a significant burden on the Office to accomplish its policy and litigation responsibilities in a timely and effective manner. This burden will surely increase, placing further strain on the Office, as the House Judiciary Committee moves to the next stage(s) in its ongoing policy review of the copyright law and likely calls upon the Copyright Office for its expertise and assistance in determining what changes to the law, if any, would be appropriate. This is not a short-term problem that will disappear once the Committee completes its present deliberations on copyright policy. As the marketplaces and technology continue to evolve and the Office's users and the public continue to require a more modern Office, the demands on the Copyright Office legal team are sure to escalate.

The Copyright Office's ability to hire experienced attorneys is not only limited by the number of staff the Copyright Office can hire, but also by the total compensation the Copyright Office can pay that staff. The Copyright Office has scientific or senior level (SL/ST) positions but no senior executive service (SES) positions.<sup>80</sup> Those in SES positions get paid more than SL/ST positions. This is significant impediment to the Copyright Office's ability to attract the best and the brightest senior attorneys to work for the Office.

Presently, the basic pay for SES and SL/ST positions ranges between \$120,749 to \$167,000.<sup>81</sup> The high end of the range can increase to as much as \$181,500 if an agency has a certified performance appraisal system in place. Most agencies have a performance appraisal system in place, but the Library of Congress does not.

Moreover, SES positions are statutorily entitled to performance awards.<sup>82</sup> Those who achieve the highest performance ranking are entitled to as much as twenty percent of their basic pay as a

---

<sup>80</sup> 5 U.S.C. § 3131-3136, 5381-5385. The pay systems are administered by the Office of Personnel Management ("OPM").

<sup>81</sup> 5 U.S.C. §§ 5384, 5376, 5382.

<sup>82</sup> 5 U.S.C. § 5384.

lump-sum bonus.<sup>83</sup> In fiscal year 2010, the average SES employee received a \$14,221 bonus.<sup>84</sup> In comparison, in fiscal year 2011, the average bonus for all employees – including SL/ST employees – was a mere \$922.<sup>85</sup>

The Library's limitation on the number of legal staff the Copyright Office can hire in conjunction with its refusal to allow the Copyright Office to hire senior employees under the SES employment scale and to certify its performance appraisal system by OPM has significantly hampered the Copyright Office's ability to hire experienced copyright lawyers and thus affecting its ability to accomplish its policy objectives.

### *Education and Information Services*

In its role as the primary source of authoritative information about copyright law, the Copyright Office is responsible for disseminating information about the copyright law and the operations of the Copyright Office, educating the public about the copyright law, and responding to requests for information about the copyright law.<sup>86</sup> The advent of new and widely available digital devices and communications technologies has made it easier for anyone to create, publish, distribute, aggregate and infringe copyrighted works. As a result, more people than ever before find themselves in need of information about the copyright law and the public and Congress have become much more reliant on the education and information services provided by the Office. The Copyright Office needs to identify new ways to reach and educate this expanded audience.

---

<sup>83</sup> *Id.*

<sup>84</sup> See Office of Personnel Management, *Report of Senior Executive Pay and Performance Appraisal Systems for Fiscal Year 2010* at 1 (Nov. 2011), available at <https://www.opm.gov/policy-data-oversight/senior-executive-service/facts-figures/annual-data-reports/fy2010.pdf>.

<sup>85</sup> See Paul D'Ambrosio & Ken Serrano, USA Today, *Who got \$332 million in federal bonuses* (Jun. 6, 2013), at <http://www.usatoday.com/story/news/nation/2013/06/06/332-million-federal-bonuses/2396111/>.

<sup>86</sup> 2012 U.S. COPYRIGHT OFFICE ANN. REP. 18

A key goal of the Office is to make its practices more transparent and accessible to the public.<sup>87</sup> To accomplish this goal the Register and her staff regularly make presentations at domestic and international events, meetings and symposia.<sup>88</sup> The Office also regularly conducts public events relating to copyright law and publishes circulars to inform the public about different aspects of the copyright law and the operations of the Office. In fiscal year 2012, the Office staff also answered 237,777 inquiries by phone and email, retrieved and copied 3,873 copyright deposit records for parties involved in litigation, and assisted 9,583 in-person visitors.<sup>89</sup>

The Office co-sponsors international training with the World Intellectual Property Organization (WIPO).<sup>90</sup> The Office promotes improved copyright protection for U.S. creative works abroad through its International Copyright Institute (ICI). The ICI, which was created within the Copyright Office by Congress in 1988, provides training for high-level officials from developing and newly industrialized countries.<sup>91</sup> The Office also holds a lecture series titled “Copyright Matters” in which authors, publishers and other industry experts discuss the creation process and their business models as a way to educate the public and help the Office staff better understand the practical implications of the copyright law.<sup>92</sup>

In addition, as explained above, the Office provides public access to its records of deposits, registrations, recorded documents, transactions related to the compulsory licenses it administers and other records pertaining to copyright.<sup>93</sup> The Copyright Office records date back to 1870, but only records from 1978 to the present are available online. In other words, one hundred years of

---

<sup>87</sup> *Next Generation Copyright Office*, *supra* note 31, at 225.

<sup>88</sup> 2012 U.S. COPYRIGHT OFFICE ANN. REP. 18

<sup>89</sup> *Id.* at 13

<sup>90</sup> 2012 U.S. COPYRIGHT OFFICE ANN. REP. 18

<sup>91</sup> *Circular 1a*, *supra* note 3.

<sup>92</sup> See <http://copyright.gov/copyrightmatters/>.

<sup>93</sup> The Office also maintains a directory of service provider agents for notification of claims of infringement as required by the Digital Millennium Copyright Act. 17 U.S.C. § 512(c).

records, which amounts to 70-million entries, exist only in the Office's physical catalogues.<sup>94</sup> The Copyright Office is in the process of trying to digitize these records.<sup>95</sup> The long-term plan is to capture index terms from the card images and to build indexes for online searching.<sup>96</sup> This is a difficult and expensive task that will take a very long time under the present structure. In today's world of online access, expecting people to wait for these records to be digitized or travel to the Copyright Office to access the physical catalogue is unrealistic.<sup>97</sup> For many, public records that aren't accessible online simply don't exist at all.<sup>98</sup>

It is crucial that the information that the Office collects as part of its registration and recordation systems be more easily accessible, current and searchable by the public through the Copyright Office website, and perhaps other services which are afforded access to the Office's data in bulk. New digital technologies have dramatically quickened the pace of commercial transactions involving copyrighted works. Parties to these transactions require access to copyright information at a commensurate speed.<sup>99</sup> Anything less, may slow the pace of commercial innovation and the copyright marketplace. Therefore, it is critical that the Copyright Office make the most current registration and recordation information available on its site.

## **COPYRIGHT OFFICE BUDGET AND INFRASTRUCTURE**

The Office is significantly underfunded and understaffed. It is obligated to use the Library of Congress' information technology systems, which are both antiquated and impractical in regards

---

<sup>94</sup> Leigh Beadon, *Public Domain Starves While Copyright Office Struggles To Modernize*, techdirt (April 2, 2012) at <https://www.techdirt.com/articles/20120323/09045818223/public-domain-starves-while-copyright-office-struggles-to-modernize.shtml>. [hereinafter *Techdirt*]

<sup>95</sup> As of March 2012, more than 12,000 of the 25,723 drawers in the Copyright Card Catalog have been scanned. Mike Burke, *A virtual Copyright card catalog?* Copyright Matters Blog (March 22, 2012) at <http://blogs.loc.gov/copyrightdigitization/2012/03/a-virtual-copyright-card-catalog-tell-us-what-you-think/>

<sup>96</sup> *Id.*

<sup>97</sup> *Techdirt*, *supra* note 94.

<sup>98</sup> *Id.*

<sup>99</sup> *CPP*, *supra* note 54, at 27.

to the Office's underlying objectives and mission. These problems have gotten worse over time and consequently the Copyright Office is struggling to provide timely and effective services to its users and the public.

### *Copyright Office Budget*

Although the Copyright Office resides within the Library of Congress, it receives a separate appropriation.<sup>100</sup> The budget for the Copyright Office is exceedingly small, given the amount and complexity of its responsibilities. In fiscal year 2013, the Office had an overall budget of only \$44.2 million.<sup>101</sup> By comparison the budget of its sister organization, the U.S. Patent & Trademark Office (PTO), was \$2.8 *billion*.<sup>102</sup> About two-thirds of the Copyright Office's budget (approximately \$28.7 million) came from user fees for registration, recordation, and other public services.<sup>103</sup> The other third (about \$15.5 million) came from appropriated dollars.<sup>104</sup> The Copyright Office is "also supported in part by Library services provided without charge, such as security, financial services and automation support, and does not pay rent."<sup>105</sup>

---

<sup>100</sup> See H.R. REP. NO. 112-511, at 15-16 (2012); S. REP. NO. 112-197, at 33-37 (2012); U.S. Copyright Office Testimony on Administration and Budget, available at <http://www.copyright.gov/regstat/leadership.html>. Even with a modest increase in appropriations in FY2014, appropriations were still down 7% from 2010 levels. *Pallante 2015 Budget Request supra* note 36.

<sup>101</sup> *Next Generation Copyright Office, supra* note 31, at 231. There is a distinct budget for activities of the Office's Licensing Division. U.S. Copyright Office, PROPOSED SCHEDULE AND ANALYSIS OF COPYRIGHT FEES TO GO INTO EFFECT ON OR ABOUT APRIL 1, 2014, 2, 3 (submitted to congress November 14, 2013) [Hereinafter "*November 2013 Fee Study*"] ("The Licensing Division had a separate operating budget of \$5 million in fiscal 2012 for its role in administering royalty payments and royalty accounts under certain statutory licenses. This separate budget was funded by deductions from the royalty pools it administers.")

<sup>102</sup> Blog by Under Secretary of Commerce for Intellectual Property and Director of the USPTO David Kappos, *Increased Fees v. Operational Efficiencies*, Director's Forum: A Blog from USPTO's Leadership (Mar. 20, 2012) at [http://www.uspto.gov/blog/director/entry/an\\_efficient\\_ip\\_system\\_that](http://www.uspto.gov/blog/director/entry/an_efficient_ip_system_that).

<sup>103</sup> *Next Generation Copyright Office, supra* note 31, at 231.

<sup>104</sup> *Id.*

<sup>105</sup> *The Omnibus Patent Act of 1996: Hearing on S.1961 Before the S. Comm. on the Judiciary*, 104th Cong. 24 (1996) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) at <http://copyright.gov/docs/ipo.html>.



Since 2010, the dollars appropriated to the Office have been reduced by 20.7% and its total budget authority has been reduced by 8.5%.<sup>106</sup> This decrease in funding has caused staffing shortages (see below) and technology maintenance lapses (see below).<sup>107</sup> Under its present structure there seems to be no immediate solution to these budget problems. The Copyright Office is unable to increase user fees enough to offset the shortfall because the Office is statutorily required to limit its fees to the costs incurred by the Office for the registration of claims, the recordation of documents, and other services.<sup>108</sup> The Office also may not use the money it collects from user fees for capital improvements or other investments.<sup>109</sup> That seems to be a moot point in any event as “in recent years fee collections have regularly fallen below [the Office’s] spending authority.”<sup>110</sup> As a result, the Copyright Office has no money for infrastructure improvements, like an overhaul of its IT systems.

The Office revisits its fee schedule every three years according to procedures set forth in the copyright law.<sup>111</sup> The Copyright Office initiated a study in October 2011 examining the costs it incurs and the fees it charges for copyright registration, documents recordation, and other public services. The results of this study were forwarded to Congress in November 2013 and a new fee schedule went into effect on May 1, 2014.<sup>112</sup> The new fee schedule is the first fee adjustment since 2009.<sup>113</sup>

---

<sup>106</sup> Statement of Maria A. Pallante, Register of Copyrights and Director, United States Copyright Office before the Subcommittee on the Legislative Branch Committee on Appropriations, Fiscal 2014 Budget Request (May 7, 2013)

<sup>107</sup> *Next Generation Copyright Office*, *supra* note 31, at 231.

<sup>108</sup> *Next Generation Copyright Office*, *supra* note 31, at 232.

<sup>109</sup> “[I]f fees exceed the Office’s annual spending limit, the surplus is maintained in a reserve account. The Office organizes its operations with the expectation that it will be able to draw upon this money in the future to cover unexpected operational costs and short-term deficits....” *November 2013 Fee Study*, *supra* note 101, at 2. Although section 708(d) of the Act states allows that “fees that are collected shall remain available [to the Office] until expended,” in practice, Congress usually requires the Office to offset its appropriation request by the amount of reserve income it has, if any, at the end of a fiscal year. This approach results in the Office having no reserve for capital improvements or other investments in its operations. *Next Generation Copyright Office*, *supra* note 31, at 232.

<sup>110</sup> *Pallante 2015 Budget Request* *supra* note 36.

<sup>111</sup> 2012 U.S. COPYRIGHT OFFICE ANN. REP. 9

<sup>112</sup> See “United States Copyright Office to Adjust Fees” at <http://www.loc.gov/today/pr/2014/14-066.html> (April 28, 2014)

It is evident that Congress needs to increase the Office's budget. Insufficient funding is preventing the Office from accomplishing its statutory responsibilities. For instance, due to budget constraints, the Office was unable to attend several meetings at the World Intellectual Property Organization and participate in bilateral and multilateral treaty negotiations.<sup>114</sup> As the copyright landscape becomes more dominated by trade and treaty discussions taking place in various international fora, the absence of the U.S. Copyright Office from those discussions is cause for grave concern.

Insufficient funding also prevents the Office from keeping pace with technology, business practices and user demands.<sup>115</sup> These struggles are not the result of a one or two year belt-tightening, but rather twenty or more years of systemic monetary neglect. The Office is in desperate need of a complete overhaul. That cannot happen without Congress first committing to provide the Office with the necessary funding to modernize the Office.

The Office also needs more flexibility in its legal spending authority. The Office should have the ability to build a reserve account from the fees collected so it has the necessary funds to draw from to make capital and other improvements in different budget cycles, including during periods when incoming fee receipts might be slightly down. Because fee revenue can be erratic, it is essential that the Office maintain an adequate reserve fund to deal with the ups and downs inherent in its fee collections.<sup>116</sup>

---

<sup>113</sup> *Id.* A complete list of the new fees can be found at [www.copyright.gov/docs/fees.html](http://www.copyright.gov/docs/fees.html).

<sup>114</sup> *Pallante 2015 Budget Request supra* note 36. (explaining that “the Office has been unable to attend all of the relevant meetings of the Standing Committee on Copyright at the World Intellectual Property Organization in Geneva and has been unable to attend all of the trade negotiations pertaining to intellectual property in the Pacific Rim.”)

<sup>115</sup> *See e.g., Pallante 2015 Budget Request supra* note 36. (noting that “the Office had to forego improvements to the paper-based recordation function due to budgetary constraints”)

<sup>116</sup> *Pallante 2015 Budget Request supra* note 36. (stating that the “unpredictability of fee revenue makes it critical that the Copyright Office maintain sufficient reserve funds to deal with contingencies effectively”)

### *Copyright Office Staffing*

In fiscal year 2012, the Library employed 3,270 staff. Only 10% (or 396) of Library employees worked in the U.S. Copyright Office.<sup>117</sup> This is the first time in many years that the number of Copyright Office staff has dropped below 400.<sup>118</sup> The most recent reduction in staff is a result of voluntary separation programs for employees administered by the Library of Congress as a way of reducing payroll obligations in response to the Library's decreasing budget.<sup>119</sup> The program resulted in the Copyright Office losing ten percent of its staff, creating more work for and putting more pressure on those employees that remained with the Office.<sup>120</sup>

Unfortunately, this was not a one-time reduction. The Library has gradually reduced Copyright Office staff over the past several years. Due to budgetary constraints and other reasons, the number of Copyright Office staff has dropped precipitously over the past five years when the Office's number of full-time staff was 483.<sup>121</sup> This dramatic reduction in staff has placed an impossible burden on the Office to accomplish its registration, recordation, policy and litigation responsibilities in a timely and effective manner.

The Copyright Office is faced with a tremendous challenge – given its budgetary constraints how does it attract, retain, and train a talented and experienced staff. Salaries for the federal civil workforce have remained frozen at 2010 levels, and budget cuts have had a serious effect on staff morale.<sup>122</sup> To make matters worse, (as noted above) the Library has significantly impeded

---

<sup>117</sup> LIBRARY OF CONGRESS, ANNUAL REPORT OF THE LIBRARIAN OF CONGRESS 88 (2013), available at <http://www.loc.gov/about/reports/annualreports/fy2012.pdf>. As of April 8, 2014, the Office was down to 387 FTEs. *Pallante 2015 Budget Request supra* note 36.

<sup>118</sup> 2012 U.S. COPYRIGHT OFFICE ANN. REP. 5

<sup>119</sup> *Next Generation Copyright Office, supra* note 31, at 222.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

the Office's ability to hire and retain senior level copyright experts by placing undue limitations on the range of compensation the Copyright Office can pay to senior staff.<sup>123</sup>

The Copyright Office must be able to hire staff to carry out its daily responsibilities and prepare for future challenges. The Office needs additional lawyers to adequately meet the litigation and (domestic and international) policy demands faced by the Office now and in the future.

Considering the numerous copyright policy review hearings held the past two years by the House Judiciary Committee and the copyright debates taking place throughout Europe and the rest of the world, there is more interest and analysis of the world's copyright laws happening today than at any other time in our history. Copyright issues are emerging in more and more fora and more new, complex and diverse copyright issues are emerging every day. It is essential that the Office have the legal staff necessary to effectively address these policy challenges.

The Office also needs additional staff to adequately address its registration and recordation responsibilities. Having a sufficient and experienced staff is essential to ensuring the accuracy and efficiency of the registration program.<sup>124</sup> The registration program alone has been decimated by budget cuts and retirements, which has resulted in 48 vacancies out of a staff of 180 experts.<sup>125</sup> These staff reductions have resulted in longer copyright registration pendency periods.

The recordation division of the Office also faces enormous staffing challenges. Shockingly, there are only nine employees to handle the annual filing of 12,000 recordation documents.<sup>126</sup> This has resulted in a processing time of 17 months – an unacceptable turnaround time by any measure. The recordation processing delays have an immediate real-world effect. It drastically hinders the ability of rights holders, potential licensees, businesses, litigants and numerous other

---

<sup>123</sup> See *supra*, Advice on Policy Matters section.

<sup>124</sup> *Pallante 2015 Budget Request* *supra* note 36 (stating that “[a]dequate staffing levels are essential to the integrity of the registration system – both its accuracy and efficiency”)

<sup>125</sup> *Statement of Maria A. Pallante [Register of Copyrights and Director of the United States Copyright Office] to the House Subcommittee on Courts, Intellectual Property, and the Internet* at page 8 (Sept. 18 2014).

<sup>126</sup> *Id.*

users of the copyright system to quickly and easily locate and identify copyright owners for purposes of licensing, litigation or other purposes, which in turn can adversely affect the U.S. economy and jobs.

Perhaps the most glaring staffing problem is the Office's lack of adequate IT experts. As discussed in more detail below, the Copyright Office is obligated to use the Library of Congress' IT infrastructure, including its network, servers, telecommunications and security operations. As a result, the Office has only 23 full-time employees to provide support for the entire Office and its existing registration and recordation systems.

### ***Information Technologies Infrastructure***

The Copyright Office does not have its own IT infrastructure; it uses the network, servers, telecommunications, security and all other IT operations controlled and managed by the Library of Congress.<sup>127</sup> The Library's technical capacities – its bandwidth, networking equipment, electronic storage capacity, hardware and software, and the like – do not meet the short-term or long-term needs of the Copyright Office.<sup>128</sup>

The Copyright Office's reliance on the Library's IT system is a significant problem that needs to be addressed. The Library's IT system is meant to service a library and its associated functions. It is not intended to be used to by an organization like the Copyright Office, which has a very different mission from the Library and which is expected to provide services that affect the legal rights and economic interests of creators, owners, users and others who rely on the Copyright Act for their economic and creative well-being.<sup>129</sup> Moreover, because the Copyright Office is

---

<sup>127</sup> The Library hosts and manages the IT system, but the Copyright Office is still responsible for the development and maintenance costs of its core systems. *Pallante 2015 Budget Request supra* note 36.

<sup>128</sup> *Next Generation Copyright Office, supra* note 31, at 217-18.

<sup>129</sup> Several members of the House Judiciary Committee referenced the different and often conflicting missions of the Copyright Office and Library of Congress at the U.S. Copyright Office Oversight Hearing held on September 18, 2014. *U.S. Copyright Oversight Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee On the Judiciary House Of Representatives*, 113<sup>th</sup> Cong. (Sept 18, 2014) at <http://judiciary.house.gov/cache/files/546bfbd8-5aec-47f6-bbe0-4bbe2a00e549/113-116-89810.pdf>.

just one of several departments within the Library that relies on the Library to meet its IT needs, the Office must compete with these other departments for IT resources. Since the needs of these departments are more closely aligned with the Library and its mission, in a competition for IT resources, the Copyright Office is likely to find itself drawing the short straw.

The Office needs a more advanced IT infrastructure – one that is dedicated to the Office and can better support the specific needs of the Copyright Office staff and the copyright owner and user communities and the public.<sup>130</sup> Its constituents need a more user-friendly registration and recordation system that is quickly adaptable to changes in the copyright marketplace and easily searchable across numerous data fields.<sup>131</sup> SIIA’s members – and numerous others – have moved (or are moving) from distributing their products on print, microfilm and/or physical discs to born-digital products and subscription services that are not distributed to consumers in physical form (*e.g.*, software available in the cloud). The Office’s IT system needs to be able to quickly and effectively adapt to the changing marketplace as well as any new challenges that may be in store for the future.

As copyright registration deposits continue to move toward digital copies, copyright owners are increasingly concerned about the security of the Office’s database of copyright deposits. For example, many SIIA publishers produce copyrightable test banks and solution manuals that are not published or otherwise legally made available to the general public. For obvious reasons, these testing materials are closely held by these publishers and not made available to others lightly. These publishers are required to deposit digital copies (where there are no print copies) with the Office as part of the copyright registration process. They are justifiably concerned

---

<sup>130</sup> The Senate has already acknowledged this problem. Last year, the Senate Appropriations Committee in the report accompanying its fiscal year 2015 legislative branch appropriations bill ordered the Government Accounting Office (GAO) to “provide a legal and technical evaluation of the information technology infrastructure that the Copyright Office shares with the Library of Congress” “to ensure that taxpayer investments in modernizing the Copyright Office will be used efficiently and effectively, and that existing infrastructure and resources will be used to the fullest extent possible.” S. REP. No. 113-196, at 40-41 (2014).

<sup>131</sup> The Copyright Office itself has acknowledged the shortcomings of its electronic registration system, saying that it is merely an “adaptation of off the shelf software designed to transpose the previously-existing paper-based system of the 20th Century into an electronic interface.” *Oversight of the U.S. Copyright Office: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Comm. on the Judiciary.*, 113th Cong. 4 (2014) (statement of Maria Pallante, Register of Copyrights, U.S. Copyright Office).

about the security measures the Office takes to protect against accidental leakage of these works and unauthorized intrusions into the Office's database. Public disclosure of these test materials would not only destroy the value of the tests themselves, but in many cases, would also destroy the value and the integrity of the certification and other programs associated with these testing materials. These concerns certainly exist(ed) in the print environment, but the ease of copying and dissemination of purely digital copies in conjunction with the risk of cyberattacks has exponentially increased these fears. As digital deposits become more prevalent, copyright owners will demand more clarity as to the steps the Copyright Office and the Library are taking to ensure the security of these deposits. To inspire their trust and participation in the copyright registration system, the Office and the Library will need to employ commercial-grade digital security measures and take other steps to ensure the safety of works registered with the Office.<sup>132</sup>

Improvements to the Office's IT system should also take into account the need for users to access information from the Copyright Office database for various purposes, including to seek out potential licenses as well as text and/or data mining of the Office's database for research purposes. Such improvements would require enhancing access and improving the searchability of the database. These IT improvements could also have an immediate beneficial effect on various policy issues. For example, improved access and searchability of the Office's database could help address the orphan works problem, which Congress has wrestled with for many years.

Under the present structure – with the Copyright Office dependent on the Library for its IT systems and just about everything else – the situation is unlikely to improve anytime soon. Budgetary restrictions on the Office make IT improvements a virtual impossibility. The fee provisions in the Copyright Act do not allow the Office to use money obtained through fees on capital improvements. Moreover, because the technology needs of the Copyright Office are so

---

<sup>132</sup> *Next Generation Copyright Office*, *supra* note 31, at 227. The Copyright Office has numerous security measures in place to prevent unauthorized access and copying of copyright deposits by third parties. For example, the Copyright Office regulations limit who is allowed to access a deposit copy and how the deposit can be accessed. When a qualified person is permitted to access a copy at the Copyright Office, the person does so at a viewing station that is monitored through security cameras. No copying devices are allowed in the viewing stations. The Library has no such security measures. If the Library obtains a deposit copy from the Copyright Office it can make that copy available to anyone without any of the access and copying restrictions employed by the Copyright Office. This security flaw could be used by anyone to circumvent the Copyright Office's security measures.

distinct from the Library's, it is doubtful that the Library will authorize the necessary expenditure of funds on the specific Copyright Office IT requests.<sup>133</sup> If the Copyright Office is going to move into the 21<sup>st</sup> Century its IT systems cannot continue to be so intertwined with and managed through the Library, and its IT systems must be completely revamped.

## THE FUTURE OF THE COPYRIGHT OFFICE

New technological advances and innovative business models are continuously being developed and exploited which make creating, distributing, performing, obtaining, accessing and infringing copyrighted works easier than ever before. This creates more new types of authors, publishers, businesses, customers and infringers that use the copyright law and the services of the Copyright Office.

The Copyright Office is tasked with the tremendous challenge of keeping pace – or at the very least not falling too far behind – this fast-moving copyright juggernaut. The rapid changes in copyright will require dramatic changes to the structure and operations of the Copyright Office.<sup>134</sup> It will require a number of paradigm shifts that will affect many of the Office's registration, recordation and other services; its use of technology and its funding.<sup>135</sup>

The Copyright Office's customers are demanding more innovative services. They want the Copyright Office to do the things it already does but do them better and faster, and also to do many new innovative things to make the copyright law more functional, more efficient and more user-friendly. For example, stakeholders have suggested that the Office:

---

<sup>133</sup> See Nanette Petruzzelli (former Associate Register for the Registration Program), Comments Submitted in Response to U.S. Copyright Office's Mar. 22, 2013 Notice of Inquiry at 3 (May, 18, 2013) ("Although the Office is a department of the Library of Congress, the Office now creates (unlike Library) records of works which . . . give copyright information as opposed to bibliographic (library) information.").

<sup>134</sup> *CPP*, *supra* note 54, at 27.

<sup>135</sup> *Next Generation Copyright Office*, *supra* note 31, at 214.



- administer enforcement proceedings (such as a small copyright claims tribunal), offer arbitration or mediation services to resolve questions of law or fact (for example, where ownership, rights or a license is unclear), issue advisory opinions (for example, on questions of fair use), and engage in educational activities (such as providing copyright guidance to educators);<sup>136</sup>
- re-engineer the way it communicates with its users, especially lawyers, so that data can be processed “in a way that can be easily printed, viewed, and forwarded outside of the system, and that allows clients to sign applications prepared by attorneys” (similar to how trademark applications are handled at the Patent and Trademark Office);<sup>137</sup>
- implement a self-cataloguing system, similar to many local government offices that record real property documents, as a way to improve the flexibility of the registration system. Documents submitted to the Office would contain integrated, formatted information that would be validated and used to create catalog entries. This type of system could potentially empower the Office to catalog most documents without human intervention, and could make these documents instantaneously available to the public;<sup>138</sup>
- help people identify copyright ownership when searching the Office’s records by collecting and incorporating short digital samples of musical works as part of its registration records<sup>139</sup> and by using image recognition technologies to help people more easily locate works of visual art in the Copyright Office records;<sup>140</sup>

---

<sup>136</sup> *Next Great Copyright Act*, *supra* note 73, at 342; *CPP*, *supra* note 54, at 31.

<sup>137</sup> American Intellectual Property Law Association, Comments Submitted in Response to U.S. Copyright Office’s Mar. 22, 2013 Notice of Inquiry at 2 (May 20, 2013) at [http://www.copyright.gov/docs/technical\\_upgrades/comments](http://www.copyright.gov/docs/technical_upgrades/comments).

<sup>138</sup> *Next Generation Copyright Office*, *supra* note 31, at 230.

<sup>139</sup> Broadcast Music, Inc., Comments Submitted in Response to U.S. Copyright Office’s Mar. 22, 2013 Notice of Inquiry at 2 (May 21, 2013). See Notice of Inquiry, Technological Upgrades to Registration and Recordation Functions, 78 Fed. Reg. 17,722 (Mar. 22, 2013) at [http://www.copyright.gov/docs/technical\\_upgrades/comments](http://www.copyright.gov/docs/technical_upgrades/comments).

- expand the registration and recordation database to include pricing, licensing, and rights clearances<sup>141</sup> and adopt commercially successful metadata standards for digital content;<sup>142</sup> and
- develop APIs so that third-party developers, rights management organizations and aggregators can interface with Copyright Office systems to create their own tools to register new copyrighted works, search for information about previous works, and create innovative applications for collecting and disseminating information regarding copyrighted content.<sup>143</sup>

This is just the tip of the iceberg. Through the use of new technologies a modern Copyright Office could dramatically rework the present registration system into a multi-tiered registration system with different legal and commercial incentives for various types of registrations.<sup>144</sup> In a multi-tiered system, copyright registrants could choose from a menu of options depending on their needs and expectations. For example, if reducing the cost of registration is more important to an applicant than a presumption of copyrightability,<sup>145</sup> the applicant could opt to register his or her works without requesting an examination. This could allow for lower cost automated

---

<sup>140</sup> American Society of Media Photographers, Comments Submitted in Response to U.S. Copyright Office's Mar. 22, 2013 Notice of Inquiry at 5; Graphic Artists Guild, Comments Submitted in Response to U.S. Copyright Office's Mar. 22, 2013 Notice of Inquiry at 10 (May 21, 2013) at [http://www.copyright.gov/docs/technical\\_upgrades/comments](http://www.copyright.gov/docs/technical_upgrades/comments)

<sup>141</sup> Eric Schwartz, *The Role of the Copyright Office in the Age of Information*, Cardozo Arts and 13 Ent. L.J. 69, 72 (1994) (stating that with this expansion "the commercial benefits of registration might outweigh the legal benefits.")

<sup>142</sup> Association of American Publishers ("AAP"), Comments Submitted in Response to U.S. Copyright Office's Mar. 22, 2013 Notice of Inquiry at 8 (May 21, 2013) at [http://www.copyright.gov/docs/technical\\_upgrades/comments](http://www.copyright.gov/docs/technical_upgrades/comments)

<sup>143</sup> SoundExchange, Inc., Comments Submitted in Response to U.S. Copyright Office's Mar. 22, 2013 Notice of Inquiry at 6 (May 21, 2013) at [http://www.copyright.gov/docs/technical\\_upgrades/comments](http://www.copyright.gov/docs/technical_upgrades/comments); Chris Reed, the Next Great Copyright Act, A View From Washington, at <http://artlawjournal.com/great-copyright-act-view-washington/>.

<sup>144</sup> Schwartz, *supra* note 140 at 72.

<sup>145</sup> A copyright registration certificate is *prima facie* evidence of validity of the copyright and of the facts stated in the certificate, including ownership, and is given significant deference by the federal courts. 17 U.S.C. § 410(c).

registrations, resulting in reduced staffing needs at the Office.<sup>146</sup> The next tier could be a simplified automated registration system in which the registrant submits an electronic version of the work along with the appropriate forms and the Copyright Office automatically scans the new work and compares it to other works in the Copyright Office database. If there is no close or exact match, the Copyright Office could automatically issue an electronic certificate of registration and email it to the registrant without any or very little human intervention. This type of automated registration might get a presumption of validity. And, of course, a manual registration and examination would continue to be available, albeit at a higher cost than the other tiers. Perhaps those who choose the more thorough manual examination process would receive not only a presumption of validity but also expanded enforcement tools that are reflective of the higher level of scrutiny undertaken by the Office prior to registering the work and the commercial importance of the work to the copyright owner.

This multi-tiered registration proposal, as well as many of the aforementioned suggestions, would certainly help address many of the various copyright policy issues currently under consideration by the House Judiciary Committee. For example, for several years now Congress has been considering whether and what to do about the so-called orphan work problem.<sup>147</sup> A multi-tiered registration approach, like the one suggested above, would likely result in more

---

<sup>146</sup> Very few registration applications are ever rejected by the Office. Of those few that are rejected, many are rejected for reasons that have nothing to do with copyrightability (like submission on an incorrect fee). A very small fraction of the remaining applications are rejected due to a determination of uncopyrightability. Thus, moving toward an automated registration system should not be a radical idea.

<sup>147</sup> An “orphan work” is a copyrighted work in which the owner of the work cannot be identified and located. The orphan work issue relates to whether and if so, how U.S. law should permit a user of a work protected by copyright to lawfully engage in a proposed use of the work that implicates the exclusive rights of the copyright owner when the user cannot identify and locate the copyright owner for purposes of obtaining permission for such use. To enable the user in such circumstances to proceed with the proposed use of an orphan work despite the risk that the copyright owner could subsequently appear and object to the use as infringing, legislation to amend the Copyright Act was proposed that would limit the legal remedies that would be available to the copyright owner where the user could not, after a “reasonably diligent” search, identify and locate the copyright owner before commencing the use of the work. If the copyright owner came forward after such use commenced, the copyright owner would be entitled to a reasonable licensing fee or royalty (as determined by reference to market practices) but would not be entitled to recover statutory damages, the user’s profits, or (in most cases) attorneys’ fees, and would not be entitled to an injunction against such use. Both the 109th and the 110th Congresses considered the orphan works problem. *See* Orphan Works Act of 2008, S. 2913, 110th Cong. (2008), which was passed by the Senate; the Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); and the Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006). *See also* United States Copyright Office, Report on Orphan Works (2006) at 1, at [www.copyright.gov/orphan/orphan-report.pdf](http://www.copyright.gov/orphan/orphan-report.pdf), and the Copyright Office’s active study at <http://copyright.gov/orphan/>.

authors registering their works with the Office because it will be cheaper and easier than the present system. Increased registrations should result in fewer orphan works since more authors will be locatable through the Copyright Office registration records. If the Office were to promptly make all its records available online and start using meta tags and image recognition technologies to help people more easily locate copyrighted works in the Copyright Office records, then works – especially works of visual arts – would be less likely to be considered to be “orphaned.”

Like many of the other policy issues being considered by Congress, the orphan works issue is a complex one. The purpose of this paper is not to delve into the potential need for orphan works legislation or other broad policy issues, but rather, to present and analyze the inner-workings of the Copyright Office and the need for modernizing the Office. The orphan works issue is raised in this context merely to demonstrate how improvements in the operations and structure of the Office could play a meaningful role in advancing certain policy objectives that Congress may find desirable.

In her speech “The Next Great Copyright Act,” Maria Pallante, the Register of the Copyright Office, said that people want a twenty-first century Copyright Office. Because of staffing reductions and budgetary restrictions that have been in place for many years, the Copyright Office has been unable to keep pace with changes in technology and user demands. As a result, many of the suggested improvements outlined above seem like a pipedream to the copyright community. To have any prospect of achieving these improvements, immediate and wholesale changes in the structure and operations of the Copyright Office are necessary.

## **DIFFERENT APPROACHES TO MODERNIZING THE COPYRIGHT OFFICE**

It goes without saying that SIIA greatly appreciates all the hard work and dedication of Register Pallante and the Copyright Office staff toward needed improvements to Office operations. However, regardless of their level of effort and commitment, the Office is fraught with funding

deficiencies and structural problems that fatally impede its ability to accomplish its responsibilities and to move forward with modernizing the Office.

This paper delineates the litany of resource deficiencies and operational problems with the services provided by the Copyright Office: the Office is underfunded and understaffed; the Office has limited to no ability to make capital improvements; the registration system and the recordation system are antiquated and not user-friendly; the Office has insufficient regulatory and adjudicatory authority; and the Office's IT systems are woefully inadequate to meet present and future demands. The question is what to do about these problems.

It would be easy to take the Copyright Office to task for all these shortcomings. But that would only be addressing the symptoms of the problem, rather than its cause. After reviewing each of the operational deficiencies, it is clear that most of the Copyright Office's struggles to administer the copyright law seem to lead down one path, and that path stops at the doorstep of the Library of Congress.

Many of the staffing and budgetary limitations and restrictions, the technical IT constraints and inadequacies, and the registration deposit problems stem from restraints on the Copyright Office's infrastructure by virtue of its placement within the Library of Congress. Consequently, it is unlikely that the many operational problems can be resolved or that many of the suggestions for modernizing the Office can be achieved in the near future so long as the Copyright Office continues to operate under the supervision and direction of the Library of Congress.

This begs the question – if the Copyright Office is no longer under the supervision and direction of the Library, what should we do with the Copyright Office? In no particular order, the four most likely solutions are:<sup>148</sup>

---

<sup>148</sup> See Sandra M. Aistars, *The Next Great Copyright Act, or a New Great Copyright Agency? Responding to Register Maria Pallante's Manges Lecture*, 38 COLUM. J.L. & ARTS \_\_ (2015) (providing an excellent discussion of the various options to modernize the Office). Another option that has been raised is to bifurcate the Copyright Office into two separate agencies – one that administers the copyright law and resides in the legislative branch and another that is responsible for copyright policy and resides within the executive branch. This option is not considered in this paper because it shares many of the pros and cons of the other four options. It also seems like the worst option because splitting the Office into two agencies likely means that neither would have an authoritative voice on copyright. It is important that the functions of copyright policy and administration of the copyright law

- Retaining the Copyright Office within the Library of Congress while increasing its autonomy.
- Moving the Copyright Office from the Library and making it a free-standing independent agency within the executive branch.
- Moving the Copyright Office to the Patent and Trademark Office, thereby creating a new executive-branch U.S. Intellectual Property Office that resides within the Department of Commerce.
- Integrating the Copyright Office and the Patent and Trademark Office, thereby creating a new executive-branch U.S. Intellectual Property Office, and making that agency a free-standing independent agency that resides outside of the Department of Commerce.

None of these alternatives is a perfect solution and each has its own advantages and disadvantages.

### *Increasing the Copyright Office's Autonomy*

The path of least resistance would be to maintain the Copyright Office within the Library of Congress while vesting the Office with more autonomy. This would not be a radical or novel solution since there is already a department within the Library – the Congressional Research Service (CRS) – that presently enjoys this relationship and could serve as a model. CRS resides within the Library of Congress, but unlike the Copyright Office, the Library has no authority to

---

work in concert. Thus, separating the two functions is the wrong approach, accomplishes very little, if any, improvement over the present structure, and could create a whole new set of problems.

supervise or direct the activities of CRS. To the contrary, the Library is statutorily required to “encourage, assist, and promote” the CRS’s activities “in every possible way.”<sup>149</sup>

By giving the Copyright Office more autonomy and the Library less control over the Office many of the operational issues identified in this paper could be resolved. For instance, concerns about the Office’s policy independence and the Library’s ability to control the type of deposit copies the Office can accept from copyright owners could be easily remedied under this new structure, and the Library would still have an opportunity to participate as a stakeholder, just as it does now (as described above).

Although the increased-autonomy option certainly would be an improvement over the present situation, it would fall short in many other areas. Because most of the Office’s operational difficulties stem from inadequate funding and the Office’s budget would continue to be largely determined by the Library, many of the Office’s current staffing and budget problems might remain largely unaddressed by this option and thus the Office would continue to be hamstrung in its efforts to modernize the Office.

Another problem with this option is that the Copyright Office would continue to reside in the legislative branch. Retaining the Office in the legislative branch may pose constitutional concerns that could hinder Congress’ ability to increase the Office’s regulatory or adjudicatory authority. Even under the present structure the Library is no stranger to constitutional challenges

---

<sup>149</sup> **§ 166. Congressional Research Service**

**(b) Functions and objectives**

*It is the policy of Congress that—*

*(1) the Librarian of Congress shall, in every possible way, encourage, assist, and promote the Congressional Research Service in—*

*(A) rendering to Congress the most effective and efficient service,*

*(B) responding most expeditiously, effectively, and efficiently to the special needs of Congress, and*

*(C) discharging its responsibilities to Congress;*

*and*

*(2) the Librarian of Congress shall grant and accord to the Congressional Research Service complete research independence and the maximum practicable administrative independence consistent with these objectives.* 2 U.S.C. § 166(b)

to its ability to administer the copyright law.<sup>150</sup> In *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, the constitutionality of the Librarian's appointment of Copyright Royalty Board (CRB) judges under the Appointments Clause was challenged in D.C. Circuit Court by a plaintiff trying to overturn a decision by the CRB.<sup>151</sup> The Appointments Clause mandates that principal officers of the United States be appointed pursuant to Presidential nomination and Senate confirmation.<sup>152</sup> The court held that appointment of the CRB judges by the Librarian of Congress violated the Appointments Clause because they were principal officers,<sup>153</sup> but the court remedied the problem by striking the part of the statute that restricted the judges' removal, clarifying that the CRB judges could be appointed and dismissed at will by the Librarian, thereby rendering them inferior officers, in compliance with constitutional mandate.<sup>154</sup>

For the purposes of Copyright Office modernization efforts, the most important part of the decision is the court holding that, for purposes of the Appointments Clause, the Librarian is the head of an executive department because the Librarian is appointed by the President, confirmed

---

<sup>150</sup> While not considering the Office's authority to regulate, the Supreme Court and other courts, have ruled on Copyright Office regulations many times. In *Eltra v. Ringer*, 579 F.2d 294 (4<sup>th</sup> Cir. 1978), which is one of the few appellate cases to directly address a constitutional challenge to the Register of Copyright's rulemaking authority, the Fourth Circuit held that because the Library of Congress performs a mix of legislative and executive functions, it could conceivably have been codified with either branch of government. See also 1 William Patry, Patry on Copyright § 1:41 n.4 (2009) (The constitutionality of the Library of Congress and Copyright Office to engage in rulemaking was addressed by Congress when the Copyright Office was first created.)

<sup>151</sup> *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012). As discussed *supra*, the Copyright Royalty Board (CRB) is a department within the Library of Congress. The CRB judges are appointed by the Librarian of Congress. The constitutional issues that arise in the *IBS* case would therefore be quite similar to those that could arise with any challenge to the appointment of the Register and any administrative law judges appointed by the Register or the Library.

<sup>152</sup> In contrast, inferior officers may be appointed by the President alone, courts, or heads of executive departments, as Congress chooses. U.S. CONST. art. II, § 2, cl. 2 (providing that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

<sup>153</sup> *IBS*, 684 F.3d at 1341.

<sup>154</sup> *Id.*



by the Senate, and removable at will by the President.<sup>155</sup> Unfortunately, this is just one court's opinion.<sup>156</sup> The issue could certainly come before a different court that could reach an entirely different opinion. This risk would be increased if the Copyright Office were granted both greater autonomy from the Library and expanded authority to regulate and adjudicate. That risk is obviated by moving the Office out of the Library and into the executive branch.

In sum, maintaining the Copyright Office within the Library of Congress while reducing the authority the Library presently has over the Office would be an improvement over the present situation, but would be a missed opportunity. While this option would permit the Office to make some improvements in its operations and to address potential policy conflict issues between it and the Library, many of the existing operational obstacles would remain intact and any hope of achieving the types of comprehensive modernization of the Office suggested in the "Future of the Copyright Office" section of this paper would most assuredly remain a pipedream.

### *The Copyright Office as its Own Free-Standing Independent Agency*

Another option would be for Congress to remove the Copyright Office from the Library of Congress altogether and reconstitute it as its own independent agency within the executive branch.

Creating an independent Copyright Office agency may be a better alternative than merely increasing the Office's autonomy because it would provide the same benefits associated with the increased autonomy approach, while also providing many additional benefits due to the Copyright Office being financially and operationally independent from the Library of Congress.

Instead of the Register being appointed by the Librarian, the Register would either be appointed by the President or be replaced by a bi-partisan panel of experts that are appointed by the

---

<sup>155</sup> *Id.* at 1341-42.

<sup>156</sup> *See also Eltra v. Ringer*, 579 F.2d 294 (4<sup>th</sup> Cir. 1978)

President for staggered terms, much like FTC Commissioners. There are benefits to both approaches. Having the President appoint the Register prevents the Librarian from appointing a Register whose interests are more aligned with the library community, better ensures that the Register is an individual whose primary objectives and expertise are copyright related and alleviates any lingering policy conflict concerns that might exist if the Copyright Office remained under the Library's supervision.<sup>157</sup> It would also completely quash the potential constitutional issues that might arise from a congressional granting of increased regulatory authority to the Office as discussed above. On the other hand, some might be concerned that a presidentially appointed Register in charge of an independent Copyright Office would vest too much power to one organization or that it creates an imbalance in the federal government's intellectual property system since neither the patent nor trademark commissioners are presidential appointees.

The Copyright Commissioners approach has the advantage of providing stability over time. The concern with this approach is that, agency action could be hindered to some extent when there is a disagreement amongst the experts.

As an independent agency, the Copyright Office would submit its own budget directly to Congress rather than having to first get its budget approved by the Librarian prior to the Librarian submitting it to Congress as part of the Library's budget. In developing its budget request, the Librarian must balance the needs of all its departments.<sup>158</sup> As with any budget process, if the budget of one of these departments were to be increased, the budget of another department would likely need to be decreased to offset that increase. Since the Copyright Office's mission is different than the other departments within the Library and the missions of these other departments are more aligned with the Library's overall mission, the budget proposed by the Office to the Library is more vulnerable to getting slashed by the Librarian than the budget of other departments within the Library and is also more difficult to increase (because to

---

<sup>157</sup> Recent Registers, such as Maria Pallante, Marybeth Peters, and Barbara Ringer, all are/were prominent copyright experts whose primary motivation was the well-being of the copyright system at the time they were appointed. There is no guarantee that the next Librarian would continue this practice.

<sup>158</sup> See Library of Congress Organizational Chart at <http://lcweb2.loc.gov/master/libn/about/documents/lcorgchart.pdf>.

do so the Librarian may have to reduce another department's budget that is more aligned with the Library's mission and goals). Consequently, the ability to submit its own budget to Congress without the Library having the ability to alter the Office's budget request is an important benefit of removing the Office from the Library.

It makes little sense that the administration of patents and trademarks are within the purview of the executive branch, while the administration of copyrights is the responsibility of the legislative branch. Furthermore, because the Copyright Office is in the legislative branch and the executive branch needs to be able to influence domestic and international copyright policy, the PTO has been vested with responsibility for copyright policy. This results in governmental redundancy – as both the PTO and Copyright Office employ copyright policy experts and incur expenses relating to the same copyright policy activities.

Moving the Copyright Office to the executive branch would allow Congress and the Administration to put an end to this redundancy. If the Copyright Office moves to the executive branch as an independent agency there would be no need for the PTO to have copyright policy experts. This would reduce the PTO's expenses, but would do nothing to help reduce the Copyright Office budget, as the Copyright Office would still need to pay the expenses associated with having its own copyright policy experts. And since the PTO gets no appropriation dollars from Congress,<sup>159</sup> the PTO's savings would not pass to other parts of the federal government. So the potential monetary savings from this move would likely be minimal, if any.

The biggest concern with the independent agency approach is money. Presently, there are certain services (such as security, financial services and automation support) that the Library provides to the Copyright Office at no charge.<sup>160</sup> Most significantly, the Copyright Office does

---

<sup>159</sup> The PTO is funded completely from its user fees. This is discussed in more detail below.

<sup>160</sup> *The Omnibus Patent Act of 1996: Hearing on S.1961 Before the S. Comm. on the Judiciary*, 104th Cong. 24 (1996) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) at <http://copyright.gov/docs/ipo.html> .

not pay any rent.<sup>161</sup> These are all new expenses that the Copyright Office would incur if it became its own independent agency.

Also, if the Copyright Office is going to be able to fully modernize it is going to need an enormous infusion of staff and new technologies.<sup>162</sup> Those needs come with a big price tag. In the battle over appropriation dollars, will Congress be willing to provide the Copyright Office with what the Office needs to modernize? When one considers how important the copyright industries are to the U.S economy and jobs, increasing the Office's appropriations for modernization purposes is certainly justified.<sup>163</sup>

Increasing the Copyright Office budget is also a good investment that makes long-term fiscal sense. Although the costs of implementing new functionalities and improvements in the Office will be significant expenditure at the outset, these costs will likely be offset in the long run by the long-term cost savings created by these new functionalities and improvements and by revenue that the Office might generate from use of its new services and increased information availability.

Although the need to increase the Office's budget exists regardless of whether the Copyright Office is an independent agency or continues to reside in the Library, if the Copyright Office were to remain within the Library, the fundamental conflicts in mission and technology may hinder the Copyright Office's ability to most effectively utilize its increased budget.<sup>164</sup>

---

<sup>161</sup> *Id.*

<sup>162</sup> While the Copyright Office will no doubt continue to try to effectuate whatever progress it can under its existing structure, due to the quantity and complexity of the new functionalities suggested in the Future of the Copyright Office section of this paper and other necessary improvements, the Copyright Office would need to create a number of new staff positions and implement various new technological solutions.

<sup>163</sup> According to government statistics, in 2012, copyright-intensive industries accounted for 4.4% of GDP. Economics and Statistics Administration and the Patent and Trademark Office, INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: INDUSTRIES IN FOCUS 45 (March 2012) at [http://www.uspto.gov/news/publications/IP\\_Report\\_March\\_2012.pdf](http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf).

<sup>164</sup> For example, the Library's communications department decided to make all Library websites unavailable during the federal government shutdown in 2013 without consulting the Copyright Office and without considering the harm that might be caused to the Copyright Office or its users separate and apart from other Library users. This caused a significant disruption to Copyright Office services and limited the operational capacity of the Office. *Statement of Sandra Aistars [CEO of the Copyright Alliance] before House Judiciary Committee Subcommittee on Courts,*

Reforming the Copyright Office into an independent agency would empower the Office with the necessary freedom to determine how best to use these new resources to modernize.

*A New U.S. Intellectual Property Office within the Department of Commerce*

On the surface, moving the administration of the copyright laws into the U.S. Patent and Trademark Office (PTO) makes a world of sense.<sup>165</sup> The present structure – with patents and trademarks in an executive branch agency and copyrights in a legislative branch department – has led to numerous redundancies, resulting in higher operational costs and reduced efficiencies. Moving the Copyright Office into the PTO would unite all three major forms of intellectual property within one executive branch agency and reduce or eliminate many these redundancies and inefficiencies and lower operational costs.

There are some significant benefits to this approach. One benefit of this new intellectual property agency is that it would consolidate all international and domestic intellectual property policy making within one office in the executive branch. At present, both the Copyright Office and the PTO both have copyright policy staff and both play a role in the development of international and domestic copyright policy. Presumably, moving the Copyright Office into the PTO would remove this redundancy, which would also likely result in cost savings to the federal government. For example, instead of bearing the cost of representatives from both the Copyright Office and the PTO attending international copyright policy discussions, it would be necessary for only one agency to be present, thereby reducing travel and staffing costs.

---

*Intellectual Property and the Internet*, U.S. Copyright Office Oversight, 113<sup>th</sup> Cong. 97 (November 4, 2014) at <http://judiciary.house.gov/cache/files/546bfbd8-5aec-47f6-bbe0-4bbe2a00e549/113-116-89810.pdf>.

<sup>165</sup> Moving the Copyright Office into the PTO is not a new idea. It was proposed back in 1996 when Senator Hatch introduced *The United States Intellectual Property Organization Act* to create a government corporation called the U.S. Intellectual Property Organization (IPO) that would be responsible for all intellectual property matters and would report to the Secretary of Commerce. Omnibus Patent Act of 1996, S. 1961, 104th Cong. (1996). Under the bill, the IPO would have been a self-funding corporation comprised of a patent, copyright and trademark office, with each independently led by its own commissioner and each responsible for administering the duties of examining and registering/issuing patents, copyrights and trademarks.

Other benefits of moving the Copyright Office into the PTO are that the Copyright Office could avail itself to the PTO's world class IT system, office of chief economist, its operational reserve (which is essential in preventing work stoppages caused by government shut downs) and numerous other services, programs and offices the PTO already has in place.

This paper discusses at length the problems with the Library of Congress's IT system. Unlike the Library's IT system, there is significant synergy between the PTO's IT system and the Copyright Office's IT needs. The PTO has a massive IT infrastructure that is supervised by a Chief Information Officer (CIO)<sup>166</sup> and Deputy CIO<sup>167</sup> and consists of the Office of Organizational Policy and Governance;<sup>168</sup> the Office of Program Administration Organization;<sup>169</sup> the Office of Application Engineering and Development;<sup>170</sup> the Office of Infrastructure Engineering and Operations;<sup>171</sup> and the Office of Information Management Services.<sup>172</sup> These offices manage the PTO's interconnected and comprehensive, forward-looking IT systems that provide the PTO staff and the public with patent and trademark data and services. Although these systems are built for patent and trademark processes and systems, the similarities between the IT needs of the Copyright Office staff and the copyright community and the IT needs of the

---

<sup>166</sup> <http://www.uspto.gov/about/offices/cio/index.jsp>

<sup>167</sup> <http://www.uspto.gov/about/offices/cio/index.jsp#heading-1>

<sup>168</sup> PTO *Overview of Information Technology Plan for FY 2010 – 2015* at [http://www.uspto.gov/about/offices/cio/ITP\\_Overview.pdf](http://www.uspto.gov/about/offices/cio/ITP_Overview.pdf) and <http://www.uspto.gov/about/offices/cio/index.jsp#heading-2> (the OPG provides the management and oversight of enterprise Information Technology (IT) strategies, guidance, policies, and agency-wide cybersecurity.”)

<sup>169</sup> *Id.* at <http://www.uspto.gov/about/offices/cio/index.jsp#heading-3> (the OPAO is “responsible for the management of the overall USPTO IT program. The Office provides the major points of contact for OCIO customers, specifically Patent, Trademark, Corporate, Policy and International accounts.”)

<sup>170</sup> *Id.* at <http://www.uspto.gov/about/offices/cio/index.jsp#heading-4> (the OAED is “responsible for the full life cycle management of the USPTO's automated information systems, consistent with the USPTO's strategic IT plans and supporting technical architecture.”)

<sup>171</sup> *Id.* at <http://www.uspto.gov/about/offices/cio/index.jsp#heading-5> (the OIEO provides “day-to-day operational support for the USPTO automated information systems.”)

<sup>172</sup> *Id.* at <http://www.uspto.gov/about/offices/cio/index.jsp#heading-6> (the OIMS provides access to “information products and services to meet USPTO, public, and intellectual property community needs and ensures the quality and integrity of the intellectual property data. The Office provides access to collections of patents, trademarks, and related information through multiple nodes, and promotes dissemination of information to the public on the use of patent and trademark information systems.”)

PTO staff and the patent and trademark communities are such that it may be more cost effective to “retrofit” these systems to also serve the needs of the copyright community and the Copyright Office as opposed to building an entirely new system from scratch for the Office.

The PTO’s Office of the Chief Economist (OCE), which was established in 2010, provides advice on the economic implications of policies and programs affecting the domestic IP system.<sup>173</sup> The OCE conducts economic research programs to provide evidence on a range of matters relevant to policymaking and the effect of IP on economic outcomes, such as relating IP to economic growth, performance and employment; understanding the economics of PTO initiatives (such as initiatives to reduce application backlogs); and analyzing the role that IP plays in the markets for technology and knowledge.<sup>174</sup> With the numerous changes in the Copyright Office infrastructure that are necessary to modernize the Office it is essential that the Office be able to conduct the type of research and analysis that the OCE does on a daily basis. The Copyright Office does not have a chief economist or a staff with the requisite experience to conduct these types of important economic programs. Nor does the Copyright Office presently have the funds necessary to create its own OCE. The Copyright Office would benefit immensely from access to the OCE and having such access would be one of the more significant factors justifying a move of the Copyright Office into the PTO.

Some may see the unification of the two offices as a negative. In the past, it has been argued that moving the Copyright Office into the PTO “would mean the loss to Congress and the public of a balanced, non-partisan voice in the formulation of copyright policy.”<sup>175</sup> That argument presupposes that, as an executive branch agency whose head is appointed by the President of the United States, the PTO is unable to provide a balanced and non-partisan viewpoint. If that were true, then over the years there should be a record of disagreement between the PTO and Copyright Office on copyright policy matters. In fact, the opposite is true. On both domestic

---

<sup>173</sup> See <http://www.uspto.gov/ip/officechiefecon/index.jsp>

<sup>174</sup> *Id.*

<sup>175</sup> *The Omnibus Patent Act of 1996: Hearing on S.1961 Before the S. Comm. on the Judiciary*, 104th Cong. 19-20 (1996) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) at <http://copyright.gov/docs/ipo.html>.

and international copyright policy matters the PTO and the Copyright Office are almost always in agreement. Moreover, like most intellectual property issues, copyright issues tend to be non-partisan and therefore the political party of the President or the Undersecretary of the PTO tends to have little, if any, bearing on IP policy.

Some may also express funding concerns with moving the Copyright Office into the PTO. The PTO is financed by the fees it collects from its users. It receives no taxpayer money. While most of the Copyright Office is funded by user fees, about one third of its budget still comes from appropriations.<sup>176</sup> The question therefore becomes, if the Copyright Office were to be moved into the PTO would it be expected to be funded in the same manner as the PTO and thus be fully fee-funded? Or would the Copyright Office continue to be funded as it is today, with most of its funding being generated by user fees but a portion coming from appropriated dollars? There are concerns with both approaches.

If the Copyright Office is not required to be fully fee funded, then the Office could continue to be funded by some combination of user fees and appropriations. Patent and/or trademark owners might be upset that they are required to fully fund the patent and trademark offices, while copyright owners pay reduced fees because the copyright office is partial funded by appropriation dollars. More significantly, there may be fears within the patent and trademark community that allowing the Copyright Office to receive appropriation dollars might adversely affect or negate the progress the PTO has made to ensure its operational and budgetary independence. After years of struggling to prevent Congress from diverting PTO fees to non-PTO programs, the patent and trademark community might naturally be concerned that Congress would begin diverting patent and trademark user fees to fund the Copyright Office or other non-PTO programs.

---

<sup>176</sup> In FY2012, approximately \$28.7 million of the Copyright Office's budget came from fees paid by copyright owners for registration, recordation, and other public services and about \$15.5 million came from appropriated dollars. *Next Generation Copyright Office*, *supra* note 31, at 231. "Historically, fees have made up the lion's share of the Office's basic budget, with a range of 59% to 67% over the past five years." *November 2013 Fee Study*, *supra* note 101, at 2.



On the other hand, if the Copyright Office is required to be fully fee-funded, like the PTO, the Office would need to increase its fees to cover more of its costs. The problem is that, unlike patents, and to a lesser extent trademarks, the copyright law does not require copyright owners to register their copyrighted works in order to receive protection under the law.<sup>177</sup> Copyright owners receive many of the same benefits under the copyright law regardless of whether they register their copyrighted works with the Copyright Office or not.<sup>178</sup> An inventor deciding whether to spend the money necessary to obtain a patent must contemplate the difference between obtaining patent protection or having no protection at all.<sup>179</sup> In this context, an increase in patent fees to cover costs is unlikely to have the same effect that it would have in the copyright context. Because copyright owners receive protection regardless of whether they register their works with the Office or not, the calculus is not between protection and no protection, rather it's between the benefits one gets by registering against the cost of obtaining those benefits. An increase in fees changes this calculation, and therefore could result in the filing of fewer registrations. Therefore, any increase in registration fees resulting from a move to a fully fee-funded Copyright Office would need to be carefully considered as it could result in fewer registrations and thus, reduced copyright information and deposits for the Office, the public and the Library.<sup>180</sup>

In 1996, when registration fees were only \$20, then-Register Marybeth Peters predicted that “becoming self-supporting outside of the Library would entail a five-fold increase in fees (from

---

<sup>177</sup> 17 U.S.C. § 408(a).

<sup>178</sup> The primary benefits of copyright registration include: (i) registration of a work that is first published within the United States is required to bring an infringement suit in federal court. 17 U.S.C. § 411(a); (ii) registration prior to infringement or within three months from publication allows the copyright owner to obtain attorneys' fees and statutory damages in an infringement suit. 17 U.S.C. § 412; (iii) registration within five years of publication creates a presumption of validity of the copyright and the facts set forth in the registration certificate. 17 U.S.C. § 410(c).

<sup>179</sup> Innovators can opt to seek trade secret protection in lieu of patent protection. At present, trade secrets are protected under state law only. Pending legislation may change that, federalizing trade secret protection. Companies are increasingly looking to trade secret law for protection over patent law. For more information on this trend and the relationship between trade secrets and patents can be found at [http://www.uspto.gov/ip/init\\_events/trade\\_secret\\_symposium.jsp#](http://www.uspto.gov/ip/init_events/trade_secret_symposium.jsp#).

<sup>180</sup> Any fee increase should not be placed exclusively on copyright owners. The Copyright Office serves owners, users and other members of the public. Thus, the burden of any fee increases should be spread equitably amongst these stakeholders, as appropriate.

\$20 to the \$100 range).”<sup>181</sup> She also stated that “experience shows that registrations decrease in number whenever fees are increased.”<sup>182</sup> We now have the benefit of time to consider Register Peters’ statements in relations to fee increases that have occurred since.

The chart below shows the number of registration applications that were submitted to the Copyright Office from FY1997 to FY2012. During this time there have been three registration fee increases. On July 1, 1999, the registration fee increased from \$20 to \$35. The registration fees remained unchanged until August 1, 2009, when the filing fee was increased from \$45 to \$65 for paper filing. The cost of filing an electronic registration (eCO), which was first tested in 2007 and fully implemented in 2008, remained the same at \$35. The registration fees were increased again on May 1, 2014 from \$35 to \$55 for eCO filings, and \$65 to \$85 for paper filings. (The new fee schedule also created a new low-cost category of registration aimed at independent creators.)

<b>Fiscal Year</b>	<b>Registration Applications Received</b>
1997	627,864
1998	645,000
1999	619,022
2000	588,498
2001	590,091
2002	526,138
2003	607,492
2004	614,235
2005	600,535
2006	594,125
2007	526,378
2008	561,428
2009	532,370
2010	522,796
2011	539,332
2012	547,000*

*\*\*approximate number. Precise number not included in the report.*

There is a decrease in registrations from 1999 to 2000 and again from 2009 to 2010. However, it is not clear that the decrease is due in whole or in part to the fee increase. The number of

---

<sup>181</sup> *The Omnibus Patent Act of 1996: Hearing on S.1961 Before the S. Comm. on the Judiciary*, 104th Cong. 24 (1996) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

<sup>182</sup> *Id.*

registration applications filed with the Office seems to be quite volatile and fluctuates often without regard to fee changes.<sup>183</sup> The biggest change, for example, occurs between 2002 and 2003 when about 80,000 more applications were filed and fees remained unchanged. Consequently, without further study one cannot conclusively say that a fee increase will result in fewer registration applications over the long term.

Even if a fee hike is necessary for the Office to be fully fee-funded, there are many ways that the Copyright Office could offset any potential adverse effects that might result from a fee increase. For certain types of works, the cost of deposit copies far outweigh the cost of registration fees. For example, motion pictures are increasingly distributed to movie theaters in digital cinema packages (DCPs), not 35mm film. However, the Library of Congress demands that the Copyright Office require an “archival quality version” of the movie, such as a 35mm film, for the copyright deposit.<sup>184</sup> A 35mm film print costs around \$2,000 to create a new print which qualifies as an archival quality version. As noted above, a similar problem occurs in the newspaper industry with microfilm deposits.<sup>185</sup> Due to the Library’s demands, the Copyright Office must continue to require that newspapers deposit microfilm copies at significant expense and inconvenience to newspaper publishers, most of whom no longer make microfilm copies. If the Copyright Office had more freedom to accept alternative deposit copy formats, the cost to copyright owners of providing these deposit copies could drop dramatically. In many cases, this decrease would far exceed any fee increase imposed on these copyright owners.

There are other potential ways to prevent fee increases from reducing registrations. Businesses and others who profit from their copyrighted works are more likely to be able to absorb a fee increase without it affecting their copyright registration frequency. Thus, the Office could consider increasing fees for commercial works and works made for hire, while keeping the fees low for individual authors and noncommercial works (similar to the PTO’s distinction between

---

<sup>183</sup> See *November 2013 Fee Study*, *supra* note 101, at 2 (stating that “fee receipts can and do fluctuate unpredictably”).

<sup>184</sup> See Copyright Office Circular 7B, *Best Edition of Published Copyrighted Works for the Collections of the Library of Congress*, available at <http://www.copyright.gov/circs/circ07b.pdf>.

<sup>185</sup> See discussion of registration in the “Primary Duties of the Copyright Office” section *supra*.

small and large entities). In fact, as noted above, the Office's most recent fee increase partially implements this approach.

As noted above, the Copyright Office could also create a multi-tier registration process in which lower-fee automated registrations are available. Giving copyright owners the option of a lower-fee automated registration should help offset any potential decrease in registrations that would result from an increase in fees for the (existing) manual registration process. Even though the fees for an automated registration would likely be less than the fees for a manual registration, the lower cost and increased simplicity of an automated system would probably lead to many more copyright owners registering their copyrighted works, which in turn will lead to more registration revenue for the Office.

Lastly, improvements to the database of Copyright Office registration and recordation records and IT infrastructure could lead to more demand for the Office's copyright information and greater usage of the Office's services, which in turn could lead to an increase in revenue for the Office. Therefore, while there are justifiable reasons to be concerned that an increase in fees resulting from a conversion of the Office to one that is fully fee-funded would reduce registrations, there are many potential ways to address this concern and therefore, the concern about increased fees, standing alone, is probably an insufficient reason to preclude the Copyright Office from moving into the PTO.

Before leaving the topic of a fee-funded Copyright Office, it is worth pointing out that the Copyright Office is actually closer to being a fully user-free funded agency than it first appears on the surface. Slightly more than one third of the Copyright Office's budget comes from appropriated dollars.<sup>186</sup> But the Copyright Office also routinely collects copies of published works for the Library with a total estimated value of around \$30 million.<sup>187</sup> Thus, the value of the materials collected by the Copyright Office is about double the amount that the Office

---

<sup>186</sup> This number is subject to fluctuation and is based on estimated from the FY12 and FY11 Annual Reports.

<sup>187</sup> Library of Congress, *Fiscal 2014 Budget Justification* 133, 141 (2013), available at [www.loc.gov/about/reports/budget/fy2014.pdf](http://www.loc.gov/about/reports/budget/fy2014.pdf) (providing fiscal year 2012 statistics); 2012 U.S. COPYRIGHT OFFICE ANN. REP. 5.

receives in appropriated dollars. If the Copyright Office were to stop providing these published works to the Library, Congress would have little choice but to appropriate funds to the Library to obtain these works through other means.<sup>188</sup> The Library could use these funds as it sees fit, but certainly one way might be to pay the Copyright Office in exchange for providing certain deposit copies. That gives both the Library and the Copyright Office more freedom to obtain the types of copies they need to accomplish their distinct missions without burdening copyright owners, as is the case with the present system.

Another concern with moving the Copyright Office into the PTO that has been expressed by some is that grouping copyrights with patents and trademarks might alter the public perception of copyright and that copyright policy will be driven solely by commercial considerations. Patents and trademarks are perceived as the province of commerce.<sup>189</sup> Copyright, on the other hand, is not solely the domain of business. Copyrighted works are a tremendous boon to the U.S. economy and jobs, but there are also often substantial social and cultural components to these works. Unifying the Copyright Office and PTO policy and operational functions into one agency residing within the PTO and reporting to the Department of Commerce might raise concerns that cultural and societal considerations intrinsic to copyright will be overshadowed by commercial and economic interests.

A related concern with moving the Copyright Office to the PTO is that the PTO might favor patent policy concerns over copyright policy concerns because the revenue generated by copyrights (less than \$30 million) pales in comparison to that generated by patents and trademarks (combined is slightly less than \$3 *billion*). Based on experiences drawn from the present structure of the PTO, these concerns are unlikely to come to fruition. Ever since the

---

<sup>188</sup> As noted above, the Library also has the ability to obtain copies of published works through a separate provision – section 407(a) – of the Copyright Act. This provision legally requires copyright owners to deposit copies of their works within three months of publication in formats specified by regulation, regardless of whether they seek to register their copyright claims with the Copyright Office. 17 U.S.C. § 407(a). Even though this provision would allow the Library to obtain a work without paying for it there are administrative costs that the Library would incur from identifying, locating and obtaining these works. The Library does not incur any of these costs when it obtains published works through the copyright registration system.

<sup>189</sup> However, there is also a noncommercial element to certain patents, for example patents relating to public health or security.

patent and trademark offices were first unified in 1975 into the present-day PTO,<sup>190</sup> revenue from the PTO's patent operations has always dwarfed revenue from its trademark operations.<sup>191</sup> Despite this fact, there have been no complaints asserted by the trademark community or evidence that the PTO has prioritized patent policy issues over trademark policy issues.

While these last two points raise concerns that need to be further considered, neither concern, standing alone, should justify precluding the Copyright Office from moving into the PTO if Congress decided that is the appropriate solution. This gets us to the last option, which would largely address the perception concerns.

### *A New, Independent U.S. Intellectual Property Office*

This paper started with the option that would be the easiest for Congress to implement, but would accomplish the least – keeping the Copyright Office in the Library of Congress but reducing the Library's authority over the Copyright Office – and concludes with the option that would be most difficult for Congress to implement, but may arguably be the best long-term solution. This option entails not only moving the Copyright Office out of the Library of Congress and into the PTO but also moving the newly constituted PTO out of the Department of Commerce and creating one free-standing Intellectual Property Office (IPO) within the executive branch that would be responsible for administering the patent, copyright and trademark laws of the United States as well as all policy relating to those laws, and other IP laws, such as trade secret law.<sup>192</sup>

---

<sup>190</sup> Pub. L. No. 93 -596, s 3, 88 Stat. 1949 (1975).

<sup>191</sup> About 90% of the PTO's revenue comes from its patent operations. See [http://www.uspto.gov/about/stratplan/ar/2011/mda\\_06\\_01\\_03.html](http://www.uspto.gov/about/stratplan/ar/2011/mda_06_01_03.html)

<sup>192</sup> The PTO already covers trade secret issues for the executive branch. Most recently, on January 8, 2015, the PTO held a trade secret symposium in which experts discussed legislative proposals regarding trade secret protection, losses due to trade secret theft and challenges to protecting trade secrets, the intersection of patent and trade secret protection, issues in civil litigation, trade secret protection in foreign jurisdictions, and proposed responses to the threat of trade secret theft in the U.S. See [http://www.uspto.gov/ip/init\\_events/trade\\_secret\\_symposium.jsp#](http://www.uspto.gov/ip/init_events/trade_secret_symposium.jsp#).

This option has all the same benefits of moving the Copyright Office into the PTO while also addressing several concerns that stakeholders might have with such a move. As noted, there is perception by some that, by moving the Copyright Office into the PTO and retaining the PTO within the Department of Commerce, copyright policy will be driven solely by commercial considerations rather than a mix of commercial, social and cultural considerations. Taking the new IPO (or whatever this newly created IP agency might be called) out of the Department of Commerce should effectively address this concern.<sup>193</sup> Because the PTO is already a self-sufficient agency whose mission is somewhat distinct from the other Commerce Department agencies, extricating it from the Commerce Department should not be particularly problematic or difficult.

## **RECOMMENDATIONS**

Of the various options discussed above there is one option that clearly should be taken off the table immediately. That option is the status quo. To the detriment of its users and the economy, the Copyright Office has fallen behind in its ability to operate the national registration and recordation systems. As this paper discusses, many of these deficiencies have been caused by many years of budgetary neglect and structural deficits that would make it difficult for any agency to keep pace, to say nothing about modernization.

The need to modernize the Office is not a new issue. It was discussed by Congress about twenty years ago and since that time, the Office's challenges have only gotten bigger. There can be little doubt that so long as the Library of Congress is able to retain its present level of authority and control over the Office and the Office continues to be inadequately funded, the Office will be unable to take the steps necessary to modernize.

---

<sup>193</sup> An alternative that would also address this concern would be to move the PTO into the Justice Department. It has also been suggested that the new head of the IPO could report directly to the Intellectual Property Enforcement Coordinator (IPEC). In this case the IPEC's title may also need to be changed to reflect a focus not just on enforcement but also on the administration of IP rights.

If there is agreement that structural changes in the relationship between the Office and the Library need to take place, the next question is – which of the four options presented above is the best. Each of these options has its pros and cons and supporters and detractors. Due to the complexity and extent of the issues to consider with each of the options SIIA believes that there needs to be a more in depth study of the different options to determine which is the best long-term solution for the Office and its constituents.

The biggest challenge with a study of this magnitude is the time it will take to conduct the study and to implement its recommendations. Time is not a luxury the Office or its constituents can afford. The more time that passes with inaction, the further behind the Office will fall. There are certain immediate steps that Congress can and should take to address the two most significant problems facing the Office: the Library's authority over the Office and the Office's insufficient funding. These steps can be accomplished concurrently with a congressionally sanctioned study.

Accordingly, SIIA recommends that the following steps to modernize the Office be taken immediately:

- Congress should authorize a study to determine whether the Copyright Office, its various constituencies, and the public at large, are best served by either: (i) retaining the Copyright Office within the Library of Congress while reducing the authority the Library has over the Office; (ii) moving the Copyright Office from the Library and making it a free-standing independent agency within the executive branch; (iii) moving the Copyright Office to the Patent and Trademark Office, thereby creating a new executive-branch U.S. Intellectual Property Office that resides within the Department of Commerce; or (iv) moving the Copyright Office to the PTO, thereby creating a new executive-branch U.S. Intellectual Property Office, and making that agency a free-standing independent agency that resides outside of the Department of Commerce. This study should also examine whether the Register (or whomever heads the Office) should be a Presidential appointee. The study shall be completed and submitted to Congress no later than nine months after the date Congress approved the study.



- Congress shall provide the Copyright Office with increased funding to enable the Office to make critical improvements to operations, staffing and IT.
- Congress should pass legislation immediately that gives the Copyright Office the same type of autonomy that Congress has granted to CRS.

## **CONCLUSION**

This paper merely scratches the surface of many of the operational, structural, budgetary, technical, and resource issues confronting the Copyright Office and its users. Views may differ on the extent and cause of the Copyright Office's problems as well as the potential solutions to these problems. If there is one inescapable conclusion that can be drawn from this paper it is that there needs to be wholesale changes in the structure and operations of the U.S. Copyright Office and those changes needed to take place yesterday. We cannot continue to delay the inevitable changes that need to be made to keep pace with the demands of the copyright community.

It is therefore essential that Congress focus its efforts on fixing the Office before it takes on any other possible legislative copyright reforms. Although the funds needed to effectuate such change are massive, in the long term the expenditure will be well worth it. The services provided by the Copyright Office are critical to the U.S. economy. The money spent today investing in an efficient and user-friendly Copyright Office will result in substantial benefits in the future for the U.S. economy and jobs, and of course, the U.S. Copyright Office itself.