July 23, 2015

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

Honorable John Conyers, Jr.
Ranking Member, Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers:

As you will recall, I testified before the Committee in February on behalf of the Section of Intellectual Property Law of the American Bar Association (“the Section”) concerning the U.S. Copyright Office and the need for improvements to its budget, information technology resources, and rulemaking authority. Although at the time the Section did not have a position on the desirable placement of the Office, I am now writing to express the Section’s view that, to meet the goals and avoid the concerns raised during the hearing, the U.S. Copyright Office should be an independent agency with its head appointed by the President with the advice and consent of the Senate. These views have not been submitted to the American Bar Association’s House of Delegates or Board of Governors, and should not be considered as views of the Association.

The most common suggestions put forth with respect to restructuring the Office have been (1) keeping the Copyright Office within the Library of Congress, but with greater autonomy (such as that which CRS currently enjoys); (2) combining the Copyright Office with another federal agency; or (3) making the Copyright Office an independent agency, with its head appointed by the president with the advice and consent of the Senate. I discuss each of these alternatives in turn.

While the Section believes the current relationship between the Copyright Office and the Library of Congress is not sustainable for the reasons highlighted in my statement at your February 26 hearing, certain improvements are possible.
For example, the Office could receive greater budgetary and fee-setting authority, as well as control of its own, independent information technology systems. Even with these much-needed improvements, however, a critical issue would remain if the Office were to stay within the Library: The Constitution would require that any rulemaking by the Office must be subject to review by the Librarian of Congress. Because of the nature of that relationship, the scope of the Office’s rulemaking authority would likely continue to be very restricted. Moreover, it could be counterproductive to require the Librarian’s approval of every Copyright Office regulation as there is no requirement that the Librarian have any expertise in copyright matters.

One might conclude that, if the Copyright Office were removed from the Library of Congress, it should be placed within another federal agency. The same concerns about independence from the Library of Congress, however, could just as easily apply to placing the Office within any other agency. In the past it has been suggested that the Copyright Office should be combined with the USPTO because both agencies administer and develop policy concerning intellectual property. The Section, however, believes that relocating the Copyright Office to the USPTO is not in the best interests of the Office, its stakeholders (or those of the USPTO), or the public. In particular, the forms of IP that these agencies administer are very different—patents and trademarks are often referred to collectively as “industrial property” because they are typically owned and exploited by commercial enterprises, whereas copyright is fundamentally about cultural output. As a result, the Copyright Office serves countless individuals and noncommercial entities (e.g., universities, libraries, archives, foundations) that seek to register copyrights; search Office files to determine the term of an existing copyright, its owner, and other relevant information, commonly without the aid of an attorney; or seek independent guidance on the scope of copyright law. It also has an important perspective on the creation and use of such works. Placing the Office within the USPTO would expose the Office to a reorientation of Office priorities toward the USPTO’s industrial focus; conversely, it also could lead to USPTO resources being diverted to support the needs of the Office. In short, neither USPTO stakeholders nor Office stakeholders would be properly served by moving the Office into the USPTO.

Accordingly, the Section recommends that the Office be made an independent agency, with its head appointed by the President with the advice and consent of the Senate. As an independent agency, the Copyright Office would be able to manage its own budget (and prepare its own budget requests), making its own determinations about where funds are most needed to improve the Office’s functions and services. Moreover, the Office could obtain the IT support that is essential to its modernization to meet the needs of the 21st Century.

Perhaps most importantly, an independent Copyright Office would be able to apply its well-regarded copyright expertise to conduct independent rulemaking. Appropriately crafted, greater rulemaking authority would allow the Copyright Office to regulate in the copyright field and obviate the need to put almost every copyright mandate into the statute itself, relieving Congress of the burden of deciding almost every issue. Moreover,
the Copyright Office has long been an important resource to all branches of government, which have benefited from its impartial expertise. That role would be best protected by making the Office an independent agency.

Very truly yours,

Lisa A. Dunner
Section Chair
American Bar Association
Section of Intellectual Property Law