February 11, 2016

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:

I write on behalf of the Section of Intellectual Property Law of the American Bar Association ("the Section") to express its views on the future of copyright law in the United States. 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.

As you will recall, the Section’s then-Chair Lisa Dunner appeared before the Committee in February 2015 to discuss the U.S. Copyright Office, and supplemented her testimony in July 2015. In October 2015, members of the Section met with the Committee’s staff to continue that discussion.

Today, I write to express the Section’s views on certain additional matters that were raised during the conversation with the Committee’s staff, but on which our members were unable to speak at that time on behalf of the Section. Specifically, this letter addresses the Section’s views concerning: (a) the Library of Congress’s continued ability to acquire copyrighted works for its collections if an independent U.S. Copyright Office is established; (b) the resources and authority necessary for the Office to maintain a robust and up-to-date recordation system; (c) if Congress establishes a copyright small claims tribunal within the U.S. Copyright Office, the need to empower the Office to prevent potential abuse of the tribunal and determine appropriate payment mechanisms; and (d) certain particulars of proposed orphan works legislation. 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.
A. Deposit Copies

As previously discussed with the Committee, there are two separate deposit requirements for copyright owners. On the one hand, the Copyright Office requires a deposit for the purposes of examination when registering a copyrighted work. On the other hand, the Library of Congress requires copyright owners to deposit a “best edition” of their works for the Library’s collection. Currently, when published works are submitted for registration, the copyright owners must deposit best edition copies with the Office, which the Office uses for examination purposes and then offers them to the Library for its collections.

The question arises whether the separation of the Office from the Library necessarily would change this relationship. It is the Section’s view that an independent Copyright Office could continue to provide the Library with access to examination copies. Further, many copyright holders want their works included in the Library’s collections and likely would submit best editions whether or not the relationship continues. Finally, even the current statute requires all copyright owners of published works to deposit copies of the best editions of the works with the Library of Congress, regardless of whether they register the works. If they do not do so, the Library is empowered to demand the deposit of a best edition, and failure to respond can result in financial penalties. While the Section does not believe resort to these provisions would be more necessary if the Office were to become an independent agency than it is today, they should provide a backstop should the need arise. The Section is confident the Library and an independent Copyright Office could navigate these waters effectively and efficiently.

B. The Recordation Process

The Section continues to recommend that the Copyright Office reengineer the recordation process from top to bottom so that recordation materials may be submitted electronically and processed quickly, and recordation materials can be linked in the database to the related registration information. Nevertheless, the Section does not believe a form of renewal or recordation requirement is the proper means to achieve that goal. The Berne Convention, to which the United States is a signatory, does not permit the enjoyment or exercise of copyrights to be subject to any formality. Moreover, a renewal requirement would place unnecessary burdens on copyright holders and would unfairly disadvantage creators who are individuals—those who can least afford to lose their copyrights. Instead, if the Office is given autonomy, budget authority, and an independent IT system, whether through changes within the Library or a relocation of the Office, it will be better positioned to ensure its records are accurate and up-to-date, as well as to benefit from the existing robust and reliable databases that have been developed by various rights holders and their agents. As a result, the burden of developing and maintaining such databases will not fall on the Office. Rather than enacting new registration or renewal requirements, the Section believes creation of appropriate incentives for copyright owners regularly to record certain relevant documents with the Office may be an effective way of maintaining more robust records.
C. Copyright Small Claims Tribunal

The Section supports the creation of a copyright small claims tribunal, and it has submitted comments to the Copyright Office in that regard. The Section believes the Office should be empowered to make determinations concerning the procedures by which the tribunal would operate. For instance, the Office should be empowered to monitor and, if necessary and supported by the record before it, promulgate regulations to prevent abuse of the tribunal. Of course, the potential for abuse would be significantly reduced if the Section’s recommendation that the tribunal be voluntary is adopted. Similarly, the Office should be empowered to investigate and determine how to fund the tribunal, including to set any fees and adjust those fees as necessary. The Section recommends that the Office look to other small claims tribunals as models, but also that the Office should be given latitude to determine appropriate fees or other payment mechanisms (and consider options that include a loser pays system, Congressional appropriations similar to those received by Article III courts, and others).

D. Orphan Works

The Section supports appropriate legislation to limit the remedies available in copyright infringement suits against users of orphan works who make a good-faith, reasonably diligent effort to identify and locate the copyright owners of such works without success. With regard to a diligent search, a user should be required to take reasonably diligent steps to locate the copyright owner of the work that the user intends to use prior to, and reasonably proximate in time to, commencing use. These steps should include actions reasonably likely to be useful in identifying and locating the copyright owner, which will vary by type of work. The Section supports giving the Office the authority to promulgate regulations on recommended resources to search for particular types of works. For instance, those seeking protection as users of orphan works should contact and/or search the databases of any applicable rights and licensing organizations.

It is not, however, reasonable to expect a user to access a “dark archives” (that term refers to “[a] collection of materials preserved for future use but with no current access”) or any database that is not made publicly available. An archives is not considered “dark,” however, merely because access may entail a fee. The Section believes a user should not be exempt from a diligent search obligation merely because a search tool may have a cost. There may be times when a search of such a source would be reasonable and appropriate. Whether resort to such a tool should be required will depend on the circumstances, such as the type of work, the type of use, the amount of the fee, and other reasonable and relevant considerations.

In addition, the Copyright Office has recommended that orphan works legislation provide that the Register of Copyrights create and maintain a registry of Notice of Use filings. These filings would allow copyright owners to periodically search the Office’s registry to determine whether any of their works have been considered orphaned, making it more likely a willing licensee will be able to find the owner of an orphaned work. To avoid the possibility that a user would be required to reveal competitive or confidential information, the Office recommends the notice be required to include only “a general
description of the use of the work,” such that a potential copyright owner would be able to “recognize his or her work.” The Section believes the Office’s proposal is a sensible balance of the burdens between a user who wants to use a work and a copyright owner that wants to ensure proper remuneration. It recognizes, however, there may be certain circumstances when even this balanced approach may prove burdensome. Thus, the Section recommends the issue be studied closely by the Office after being adopted and that the Office be empowered to determine whether there should be exceptions to the notice requirement in certain circumstances.

Once again, the Section commends the Committee’s attention to these issues and appreciates the opportunity to offer these additional comments.

Very truly yours,

Theodore H. Davis, Jr.
Section Chair
American Bar Association
Section of Intellectual Property Law

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3 Those comments are attached as Annex A.
4 In other words, if the tribunal is made available only when both parties agree to waive their right to have the matter adjudicated in federal district court, any party that believes that the system is being abused simply could decline adjudication by the tribunal.
5 The copyright holder of most musical works can be identified by working with performing rights organizations—such as ASCAP, BMI, or SESAC—or the Harry Fox Agency, Inc. Similarly, authors of literary works can be identified by working with various entities, such as The Authors Registry and Copyright Clearance Center; visual artists can be identified using the Art Museum Image Consortium, Artists Rights Society, or PLUS; and the owners of motion pictures and other audiovisual works can be identified using the Internet Movie Database or footage archives, such as ITN Source. Further, many copyright holders have licensing pages on their own websites, such as CNN’s CNN Collection licensing hub.