March 28, 2016

 Submitted by Online Submission Procedure

Hon. Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Avenue, S.E.
Washington, DC 20559


Dear Register Pallante:

I write on behalf of the Section of Intellectual Property Law of the American Bar Association (“the Section”) in response to the Copyright Office’s March 1, 2016 Notice of Inquiry concerning information technology upgrades for a twenty-first century Copyright Office. These views have not been submitted to the American Bar Association’s House of Delegates or Board of Governors, and they should not be considered as views of the Association.

The Section appreciates the Copyright Office’s inquiry on this matter and applauds the Office’s efforts to modernize its IT infrastructure. As you are aware, the Section strongly believes that a key to the future success of the copyright system is the substantial improvement of the Office’s systems and services to effectuate fully electronic registration and recordation of works, enhanced security for electronic copyright deposits, and comprehensive, integrated publicly accessible databases. In addition, the Section believes the Office must have adequate resources and authority to implement these changes and others necessary to support the vital communities that the Office serves, including: (1) rule-making authority; (2) its own IT system to serve the needs of the Office and the public for speed and flexibility; and (3) a budget to support modernization, as well as a budget process that allows the Office to make its own budget requests and carry over funds for capital expenditures from year to year.

Indeed, the Section has advocated these types of changes before Congress on multiple occasions. The Section’s prior statements and letters to Congress on
this subject are enclosed. In addition, in 2013, the Section submitted comments in response to a Copyright Office Notice of Inquiry concerning technological upgrades to registration and recordation functions, which also are enclosed.

With regard to the implementation and funding of a modern copyright IT system, the Section makes the following observations, suggestions, and comments.

**Inquiry No. 1:** Please comment on the proposed five-year timeline for IT modernization based on the phases set forth in detail in the IT Plan, which incorporate best practices of the federal government.

The Section believes that the necessary modernization efforts should be made on an expedited basis, but defers to the Office’s expertly drafted report as to the specific timing.

**Inquiry No. 2:** Should the modernization be funded from fees, appropriated dollars, or a combination of both, and, if both, is there an ideal formula or ratio?

The Section recommends that Congress make an initial appropriation sufficient to develop the modernized systems described in the Copyright Office’s report. Due to inadequate funding over a number of years, the Office’s systems have become inadequate to the task ahead. An investment in modernization, however, will yield significant public benefits through better structured and organized records, and a fully electronic recordation and filing system. As many copyright holders are individuals or non-profit organizations, the burden of creating these societal benefits cannot be satisfied merely by registration fees.\(^1\)

If Congress instead asks the Copyright Office to rely on a combination of appropriated dollars and fees to fund modernization, those monies should not be used to undermine the goals of modernization. As noted in the Section’s statement to the Committee on the Judiciary of the House of Representatives during its February 26, 2015, “The U.S. Copyright Office: Its Functions and Resources” hearing, the Section does not believe that the Office can raise fees “enough to make ends meet and engage in capital improvement projects. There comes a point at which higher fees will discourage registration and recordation, and undermine the important goal of providing a comprehensive, accurate database of copyright information.”\(^2\) Indeed, the Copyright Office hopes that copyright holders will be drawn to a 21st century registration system so that it can create a database of works that is as comprehensive as possible. Yet, forcing individual customers to pay for modernization will be unduly burdensome and disincentivize the very copyright holders that the Office hopes to attract, thereby resulting in less copyright information in the Office’s records.

The Section supports consideration by the Copyright Office of a fee-setting strategy that considers the services provided by the Office to a customer and that prices the Office’s fees

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1. As discussed below, certain fees already exceed what is reasonable for individual creators.

accordingly. Thus, for example, consideration is warranted as to whether the Office could charge higher fees in exchange for faster or otherwise prioritized services. Similarly, further consideration is warranted as to whether high-volume, for-profit, corporate copyright holders could pay higher fees as long as precautions are taken to ensure that individuals who file through small corporate entities are protected. The Section, however, notes that some copyright holders feel that the Office’s fees already make registration unduly expensive and that care must be taken in going back to the same well to support modernization lest it run dry.

Charging individual users for access to public records is not advisable for the same reason that unduly burdensome fees on individual creators are unhelpful. It would be appropriate, however, for users of the Copyright Office’s records through a modernized system to contribute to its development and maintenance. The Office’s modernization proposal contemplates providing access to the Office’s records through APIs and other mechanisms to potential high-volume users. These users will be exponentially bigger beneficiaries of a modernized Copyright Office than individual users or copyright holders, and likely will use such records for their own profit-making projects. In addition, their use will place a larger burden on the Office’s systems. As a result, it is proper to grant the Office authority to determine appropriate fees for such high-volume use that can fund the maintenance and further modernization efforts.

Inquiry No. 3: What authorities or flexibilities, if any, should be included in 17 U.S.C. 708 regarding whether and how the Office may recover its reasonable costs of operation (including in the aggregate as opposed to based upon individual services), differentiate between customers or users, and/or fund future investments, not only as to the five-year plan but on an ongoing basis?

In light of the Copyright Office’s interest in becoming a nimble and robust service provider, changes to its fee setting authority under 17 U.S.C. § 708 are warranted. Section 708 specifically delineates the services for which the Copyright Office may charge copyright holders fees. As discussed above, however, much of the benefit of the Office’s proposed modernization strategy will be to users of the Office’s records system. Consequently, and in keeping with the Office’s desire to act with alacrity, Congress should authorize the Office to set fees for access to the Copyright Office’s records in appropriate circumstances (e.g., use by high-volume users or those accessing multiple records through APIs). In determining such fees, the Office should be authorized to cover the reasonable costs incurred by the Copyright Office for the services as well as the development and maintenance of the Office’s modernized IT service overall. The Section acknowledges that to accomplish this goal may require amendment of 17 U.S.C. § 708(b)(2). As a result of such changes, the Office will have greater comfort in developing new services that it will be able to recover the costs of creating and running them.

In addition, Congress should permit the Copyright Office to consider new business models that may be useful to particular constituencies and amplify the quality of its modernized systems. For example, the Copyright Office could offer subscription rates to high-volume creators. As you may be aware, photographers create larger numbers of works in comparison to other types of authors and also frequently have considerable information about those works embedded in the original digital files. A modernized IT system could permit such photographers to automatically upload the files with all appropriate metadata to the Office’s systems for examination and
registration, thereby enhancing the Office’s records and simplifying the examination process. Photographers, however, are unlikely to do so unless the fees associated with registering their works accurately reflect their needs.\(^3\) Subscription rates at different levels would encourage greater registration by that constituency without unduly burdening it, and the Office could ensure that the total subscription fees net out to its operating costs for providing the services.

As another example, many computer program developers and Internet content creators create new versions of their software and websites at frequent intervals. The Office currently requires that each version of such software or website be registered separately, which is neither practicable nor financially feasible.\(^4\) As a result, many software developers and Internet content creators simply do not register their computer programs or websites with the Office or, at best, only register major releases. If the Office, however, offered a subscription fee that permitted minor revisions to a computer program or a website (i.e., not major releases) to be added to the existing registration record without additional payment, the Office’s records for those works likely would better reflect the numerous works being created by an important sector of our economy.

**Inquiry No. 4:** Should the Copyright Office fund capital and operating expenses differently? If so, how?

The Section supports granting the Office the ability to build a reserve account from which funds can be drawn on a multi-year cycle. Our understanding is that at present, any monies retained by the Office at the end of a fiscal year are offset against its allocation for the following year. As a result, it is difficult, if not impossible, for the Office to secure sufficient funding for long-term projects. If, however, the Office were given the authority to manage its own budget in a manner that does not affect the Law Library of Congress, it may be able to build a sufficient reserve of monies such that it can limit the need for additional project-based appropriations. In addition, as discussed above, to the extent that certain uses of the modernized Copyright Office record systems will be more burdensome than others, section 708 should be modified to permit the Office not only to recover its operating expenses from such use, but also its capital expenditures.

**Inquiry No. 5:** Please identify anything else that the Copyright Office should consider in relation to the funding strategy, benefits, or implementation of IT modernization.

One of the goals of the Copyright Office’s modernization is to increase the Office’s efficiency, thereby shortening registration and recordation wait times. As a result, after modernization, it would be appropriate to reevaluate the Office’s fees for certain services. For instance, the Office

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\(^3\) Similarly, if Congress were to create a Copyright Small Claims Court within the Copyright Office, some copyright holders have requested that they be able to file a complaint in the Court and register the asserted works at the same time with one filing and one fee.

\(^4\) We also note that some courts disagree with the Office’s view, which may warrant reexamination. See *Streetwise Maps, Inc. v. Vandam, Inc.*, 159 F.3d 739, 747 (2d Cir. 1998) (holding that registration of derivative work by copyright owner of pre-existing work is sufficient to permit owner to maintain infringement action based on infringement of pre-existing work); *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 539 (4th Cir. 2007) (same).
currently charges $800 per claim for expedited registration processing, and $250 for the first reconsideration request ($500 for the second). Modernized IT systems should reduce the work associated with such services and allow these fees to be commensurately reduced.

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The Section appreciates the opportunity to comment on the Copyright Office’s inquiry and hopes that its comments will provide the Office with useful insights as it seeks to expand and develop its IT systems.

Very truly yours,

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

Statement of Lisa A. Dunner on “The U.S. Copyright Office: Its Functions and Resources,” February 26, 2015...........................................................................................................1

Letter from Theodore H. Davis Jr. to Chairman Goodlatte and Ranking Member Conyers regarding the future of copyright law in the United States, February 11, 2016 .........................2

Letter from Joseph M. Potenza to Register Pallante regarding technological upgrades to registration and recordation functions, May 31, 2013 .................................................................3
STATEMENT

of

LISA A. DUNNER

Chair of the

SECTION OF INTELLECTUAL PROPERTY LAW

AMERICAN BAR ASSOCIATION

before the

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

for the hearing

on

“THE U.S. COPYRIGHT OFFICE: ITS FUNCTIONS AND RESOURCES”

February 26, 2015
Thank you for the invitation for the Section of Intellectual Property Law of the American Bar Association to participate in this hearing of the House Judiciary Committee on "The U.S. Copyright Office: Its Functions and Resources." The views I express have not been approved by the ABA House of Delegates or Board of Governors, and should not be considered to be views of the Association.

The speed of technical innovation, the needs of the public (as both users and creators of material subject to copyright), the increasing importance of international markets, and the potentially high stakes of infringement in our interconnected world require a Copyright Office that can effectively and efficiently supply information and provide services to its users. The Office's existing systems simply are not up to the task. The Copyright Office, led by Register of Copyrights Maria Pallante, is aware of the challenges. But the Office's ability to develop new solutions to operational and policy challenges is constrained by budget and infrastructure limitations. Resolving those difficulties is necessary to create a truly 21st century Copyright Office.

The Copyright Office of today is a far cry from what it was in 1897, when it became a separate department in the Library of Congress to process registrations and acquire deposit copies for the Library’s use. Just as the copyright law and the scope of domestic and international policy issues have expanded in the past 100-plus years, so too has the United States Copyright Office. The Office remains part of the Library of Congress, but its responsibilities have multiplied. Among other things, it examines and registers claims to copyright in works of all kinds; records assignments, transfers, terminations and other information relevant to ownership of those works; maintains a record of designated agents of online service providers under the Digital Millennium Copyright Act; and provides copyright information to the general public through its website, databases and public information service. In addition, the Office administers the mandatory deposit provisions of U.S. law, as well as certain statutory licenses in the Copyright Act. It provides support to Congress through consultation and studies on issues such as Copyright Small Claims and Federal Copyright Protection for Pre-1972 Sound Recordings. Its most recent study, on Music Licensing, was issued on February 5, 2015. The Office participates in negotiations concerning trade agreements and international treaties, and provides legal assistance


to other executive agencies and the courts; for example, it works with the Justice Department on briefs filed with the courts on copyright issues. It conducts rulemaking proceedings related to the statutory duties of the Register and in connection with 17 U.S.C. § 1201 concerning technological protection for copyrighted works.

The growth of the Copyright Office reflects the expansion of copyright industries and their increasing sophistication, as well as the broader scope of the copyright law itself. New works and new uses of works have become subject to copyright law over the years, and new exceptions and statutory licenses have been added to ensure the availability of copyrighted works in appropriate circumstances. Over time, international issues have occupied more of the Office’s attention. The Office became a separate department within the Library of Congress in 1897, only six years after enactment of the first law permitting non-U.S. works to qualify for U.S. copyright protection. Since then, the United States has joined the Universal Copyright Convention, the Berne Convention, and many bilateral and multilateral copyright and trade treaties. The development of the Internet has expanded markets for U.S. copyright works throughout the world – whether authorized or not. Unfortunately the resources available to the Copyright Office have not allowed it to keep pace with the needs of its users, which is of critical importance in the fast-moving copyright world of the 21st century.

(a) The Compelling Need for a 21st Century Copyright Office

The Copyright Office serves the needs of many different constituencies. Perhaps the most obvious are the copyright industries, which are a vital segment of the U.S. economy. A recent report found that the “core” copyright industries contributed 1.1 trillion dollars to the U.S. GDP in 2013 and accounted for $156 billion in foreign sales and exports. They employ nearly 5.5 million U.S. workers, more than 4 per cent of the entire U.S. workforce. The 2009–13 annual growth rate of these industries of 3.9 per cent was 70 per cent more than the growth rate of the U.S. economy as a whole. As is apparent to even the most casual industry observer or consumer, the business models in these industries are changing with unprecedented speed, as different sectors experiment with different means of disseminating copyrighted works in the digital environment.

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5 Int’l Copyright Act of 1891, 26 Stat. 1106.
6 Stephen E. Siwek, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2014 REPORT 2 (2014), available at http://www.iipa.com. The “core” copyright industries were characterized as those industries “whose primary purpose is to create, produce, distribute or exhibit copyrighted materials” including software and videogames, books, newspapers, periodicals and journals, motion pictures, recorded music and radio and TV broadcasting. Id. at 1 n.1.
7 Id. at 2.
8 Id.
Individual copyright owners, who may face particular challenges in registering their works, are an important group of constituents. The Copyright Office also serves users, including individuals, vital institutions such as libraries, archives, and educational institutions, and large corporations whose principal business is to disseminate or provide means of dissemination of copyrighted materials.

Of course, characterizing the Copyright Office’s constituents simply as “owners” or “users” understates the complexity of the copyright world. Many copyright owners are also users, and many users build on copyrighted works to become copyright owners themselves. They share an important characteristic, however: they participate in a dynamic and fast-moving environment and are accustomed to immediate access to the information that they seek. Despite its best efforts, the Copyright Office has been unable to keep pace with the communities it serves.

(b) What is Needed To Achieve a 21st Century Copyright Office?

The Copyright Office must modernize to stay relevant in the 21st century and beyond. Below, we first identify essential improvements to the services the Office provides. Second, we describe ways that Congress could assist the Office in achieving its goals, including removing budget and infrastructure obstacles, and providing the Office with greater autonomy and rulemaking authority.

(i) Necessary Improvements to Copyright Office Operations.

(1) Registration.

The Copyright Office must be able to quickly and efficiently ingest applications for copyright registration in electronic form, and process those applications as speedily as possible. Thanks to the electronic registration system that was developed with off-the-shelf software and fully implemented in 2008, some 80% of registration applications are filed at least in part online. The average time for the Office to turn around applications filed online is 3.3 months, as compared with 8.2 months for applications submitted in paper form.

Despite this progress, there is no question that the existing registration system could be improved. For example, the user interface could be more informative and user friendly, and the

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9 The Next Generation Copyright Office, supra note 1 at 217–18.

system software updated to provide greater flexibility and interoperability with other systems to simplify the registration process.\footnote{Some copyright owners could benefit from batch processing of works being registered electronically. It would also be helpful if the Copyright Office could allow electronic filing of designation of agent forms that service providers file under 17 U.S.C. § 512, allowing such notices to be filed more quickly and efficiently.}

One of the main obstacles to moving to an almost entirely online registration system is the requirement for the copyright deposit that accompanies the registration application. In most cases, an electronic version of a work is adequate for the Office to examine the work for registration purposes. However, copyright law provides that registration deposits for published works must satisfy certain statutory requirements for deposit with the Library.\footnote{17 U.S.C. § 408(b). Deposit for the Library must be made even if the work is not registered. Id. § 407.} The deposit for registration of a published work, as a general rule, must be in the “best edition” prescribed by the Library, i.e., the version the Library wants for its collections. The “best edition” is usually a physical copy of the work; thus, even if the registration is made in electronic form, the deposit must be in hard copy. (This is what is meant above when we refer to applications being submitted “at least in part online.” Of that 80%, approximately half fall into this category.\footnote{The Next Generation Copyright Office, supra note 1 at 217–18.})

To streamline the registration process, it may be advisable to separate the requirement of deposit for registration (which would likely be in electronic form) from the deposit for the Library (which could be in hard copy form). Waiting for receipt of the Library’s copies would not hold up the progress of the registration application. In addition, receiving registration deposit copies electronically would enable the Copyright Office to retain copyright deposit copies indefinitely. Currently, the Office has too little storage space to keep copyright deposits, and consequently few are kept longer than five years.\footnote{This is especially problematic when there is a dispute concerning the registered work. Electronic deposit copies would also permit easier access to these important records. Right now, only the copyright owner or a litigant can have access to the deposit copy. While we recognize that there are security concerns with respect to some works, consideration should be given to making these records more accessible in appropriate circumstances.}

\textbf{(2) Recordation.}

Recordation of transfers, assignments, security interests, and other documents theoretically provides a means by which someone searching to find the copyright owner of a work could trace the chain of title. Making this information accessible to the public promptly in a user-friendly integrated database is an essential role of a 21st century Copyright Office. The current system of recordation, however, is the relic of an earlier time and provides relatively little help in establishing chain of title and/or encumbrances on title. It is still largely paper-based, and recordation information is not linked to registration records. It takes about 17 months to process a recordation, in large part because the department is significantly understaffed, with only nine
recordation specialists to process approximately 12,000 documents each year.¹⁵ A prospective purchaser or lender is charged with notice of a transaction recorded within 30 days of its execution, although it may take 17 or more months before that transaction can be discovered in the Copyright Office records by a diligent purchaser or lender.¹⁶ This long lead time can hinder loans for which copyrights are collateral, and film and financing deals, which are generally dependent on demonstrating an up-to-date clean title. Thus, the state of the recordation function in the Office frustrates transactions in copyright assets.

The recordation function of the Copyright Office must be reengineered, top to bottom. It should be possible for the Office to ingest materials for recordation in electronic form, process them promptly, and if the copyright is registered, link the recordation record with the registration so that a search for the registration or the recordation would provide a full record with all of the relevant information returned together.

A recently published study by the Copyright Office, *Transforming Copyright Recordation in The Copyright Office*,¹⁷ is a critical first step, but reengineering recordation will be an expensive and complicated task.

(3) Enhanced Security.

As the Copyright Office increasingly accepts and maintains copyrighted works in digital form, it is imperative that the Office employ appropriate security measures to prevent unauthorized access to these works. Security is especially critical for works such as secure tests, answer books, source code, and for unpublished works generally. Because copyright registration is not mandatory, copyright owners may simply bypass registration if they believe their works are not secure in the Copyright Office, which would threaten the integrity and utility of the national copyright registry.

(4) Upgrade Copyright Office Databases.

Many changes could be made to assist users in discovering important information about copyrighted works. First, it is essential to digitize pre-1978 records and make them available to the public in a searchable, user-friendly manner. The copyright registration database currently

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¹⁶ “As between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice under subsection (c), within one month after its execution in the United States or within two months after its execution outside the United States, or at any time before recordation in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such manner, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer.” 17 U.S.C. § 205(d).

contains records from January 1, 1978 (the effective date of the 1976 Act) to the present. The Copyright Office is in the process of digitizing some of these records, but what is lacking is an easily searchable online database of them. To ascertain registration and recordation information about these works, one must still go to Washington D.C. and search the old card catalogues in the Copyright Office.

While it might seem as though these records are too old to be useful, they contain valuable information about works copyrighted prior to 1978, many of which are still protected by copyright. In fact, it is all the more important to have these records accessible to all, precisely because they are older, and copyright status, ownership and other key copyright information is not readily available. Just as important, many of those works are no longer protected by copyright, particularly those whose copyrights were not renewed when renewal was mandatory. A complete database would be an important tool in identifying these public domain works for the benefit of those who wish to make use of them.

Second, the Copyright Office records should include unique identifiers which have become standard in many creative industries, such as International Standard Recording Code (ISRC), to assist users in seeking information about copyrighted works maintained in other databases. Ideally, the Copyright Office system would link to other trusted databases that contain such information.

Third, the Copyright Office database was developed largely as a text-based tool. There is no practical way to search the database for visual artworks or musical works, unless one knows the title under which it was registered (which, particularly in the case of photographs, is often not the title by which it later became known in the marketplace). It would also be useful if, going forward, the Copyright Office could license or develop software to enable image or music searches, at least on a going-forward basis. We are aware that these tools could require a significant ongoing dedication of resources, as these types of software are constantly being improved. It may be that linking to existing, trusted databases established in the various creative fields could provide this type of functionality.

The measures discussed above would not only encourage registration and recordation, but also respond to the increasing need to know whether a copyrighted work has been registered and who owns it, important considerations to individuals or entities seeking to further develop or use an existing work. Users of works that are potentially protected by copyright rightfully complain that it can be difficult to clear rights because owner information is not available. Rights clearance is an integral part of the copyright ecosystem; new creators often incorporate older works and rights owners are dependent on that licensing income to be able to invest in new works. The Copyright Office has an essential role in providing a robust means to acquire copyright information in the digital age.

These measures would go a long way to reduce the “orphan works” problem. One of the Copyright Office’s goals in recommending a legislative approach to orphan works was to
encourage the development of rights databases and so reduce the number of orphan works. The Copyright Office’s own database has an important role in making information accessible to the public.

(ii) Essential Requirements for Achieving Operational Goals.

There is no lack of vision or energy in the Copyright Office’s management. Since she became Register of Copyrights in 2011, Maria Pallante, together with her staff, has focused significant time and resources to assess the state of Copyright Office operations, plan for the future, and make what inroads they could in addressing the problems. But issues of infrastructure, budget and autonomy must be addressed before the Office can effectively tackle these issues.

(1) Technology.

The Copyright Office needs a sophisticated, well-functioning IT system that can accommodate its needs. Currently, the Copyright Office must work through the Library’s IT system and its existing software, developed and managed with the Library’s different priorities in mind. The Copyright Office often has to compete with other Library departments for IT services. It is difficult for the Office to make even minor changes to the online form to address changes in practices or regulations; those changes are often put on a waiting list of months, if not years. This is not acceptable for an Office that serves a vital segment of the U.S. economy. Moreover, the IT department is not always sensitive to the needs of the Office and its users. During the 2012 government shutdown, the Library’s website was taken offline, although the Register of Copyrights requested that the Copyright Office site remain online, like many government agency sites. She encountered considerable resistance from the Library’s IT staff and it took days to get the Copyright Office’s site restored. The Copyright Office and its users deserve a better level of service. The Copyright Office requires a nimble, responsive IT system focused solely on its needs, which often differ from those of the Library.

With a more robust IT system to manage applications, recordations, and other digital records, the Copyright Office will be better positioned to participate in various initiatives currently under consideration, such as federal protection for pre-1972 sound recordings, or the institution of a

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new regime for small copyright claims. The recommendations resulting from both studies, if followed, would likely place additional responsibilities on the Copyright Office.

(2) Budget.

Simply put, the Copyright Office needs significantly more money to do its job, not the small increment proposed in the federal budget for this year. It requires a budget that realistically reflects the scope of its responsibilities and the sheer volume of its work. Since 2010 its budget has dropped by $3.51 million or 7.2%. As a result of budget cuts and retirement packages offered to Library employees, the Office is operating with approximately 360 full time employees, well below its authorized ceiling of 439. It is significantly in need of experienced copyright lawyers and technical professionals, as well as registration and recordation specialists and others. (We take no position on whether specific types of employees should be hired, as this is a matter best suited for the expert judgment of the Register and her staff.) For example, although it is important that the Register or her staff participate in meetings that involve international treaties or trade agreements, the Office’s budget for travel is so inadequate that there are times when Copyright Office personnel are unable to attend such meetings, or the U.S. P.T.O. has to pay their way. Similarly, the Office's databases are compared unfavorably with those of other public and private sector databases because the Office is so inadequately funded.

The Copyright Office needs a way to fund long term improvement projects. In fiscal year 2014, the Copyright Office budget was $45 million, of which approximately two-thirds came from fees and one-third from appropriations. The law does not empower the Office to raise fees to fund capital improvements; it can charge only the costs it incurs in performing a service in the ordinary course of business. The Register has suggested that the Office’s fee-setting authority be made more flexible so that the Office can experiment with different fee structures that permit the Office to budget for its long-term future, and better serve the needs of the copyright community. Even if the Office is given greater flexibility to innovate with respect to fees, however, it simply cannot raise enough to make ends meet and engage in capital improvement projects. There comes a point at which higher fees can discourage registration and recordation, and undermine the important goal of a providing a comprehensive, accurate database of copyright information.

22 Statement of Maria A. Pallante, supra note 10 at 8.
23 The Next Generation Copyright Office, supra note 1 at 231.
24 Id. at 233.
(3) **Budget Process**

The Office lacks authority to set its own budget. The Copyright Office budget is a separate line item on the budget presented by the Library to Congress. The number does not necessarily reflect the Office’s needs as submitted to the Library, however, because the Library must balance the Office’s needs against those of its many other departments and ultimately decide what to request for the Copyright Office after considering the needs of all of its service units. The Office needs to be able to make its own budget request.

Moreover, long term improvement projects require a multi-year commitment, and such commitments are very difficult to make in the Office’s current budget environment. Often any money it has at the end of a fiscal year is offset against its budget allocation for the following year, so it is difficult to secure funding for long-term projects. To effectively manage substantial improvement projects, the Office needs the ability to build up a reserve account, and be afforded a multi-year budget cycle.

(4) **Greater Autonomy and Rulemaking Authority**

Effective and efficient Copyright Office operations and sound copyright policy considerations both suggest that the Copyright Office should have greater autonomy, and it should have control of its own budget and infrastructure. Such a change would allow the Copyright Office to develop an IT system focused on the particular needs of the Copyright Office and its users, one that can rapidly respond in a fast-paced business environment that mirrors that of the copyright community that the Office supports. The Office should be allowed to accumulate a reserve account to help its budgeting process, and provided with a multi-year budget cycle. We believe these changes would allow the Office to move forward with the operational upgrades vital to a 21st century Copyright Office.

Currently the Librarian of Congress must approve any regulations the Copyright Office formulates, even though copyright expertise is not a job requirement for the Librarian. Enhanced autonomy from the Library would bring with it an opportunity to expand the substantive role of the Copyright Office by granting it appropriately crafted rulemaking authority. The law presently gives the Copyright Office the primary responsibility for considering requests for exemptions under the anti-circumvention provisions of the Digital Millennium Copyright Act,\(^{25}\) but some have suggested expanding the Office’s regulatory role in certain circumstances, such as giving it the ability to adjudicate copyright infringement claims of relatively small economic value,\(^{26}\) to render advisory opinions on fair use cases,\(^{27}\) or to form


standards and practices that animate certain broad principles of the copyright law, such as the Shawn Bentley Orphan Works Act of 2008 would have done, by empowering the Copyright Office to establish “recommended practices” for finding copyright owners.\textsuperscript{28}

There is another important policy reason to provide the Office with greater autonomy. Libraries, including the Library of Congress, regularly take positions on various policy matters that are the subject of Copyright Office studies and rulemaking proceedings. At the same time, the Copyright Office’s conclusions and recommendations are subject to review by the Library. In short, the Library’s control of the Copyright Office presents a conflict of interest, regardless of whether or not the Library formally weighs in with comments. Providing the Office with greater autonomy will remove the conflict or appearance of conflict on the part of the Library.

Serious consideration should be given to the manner in which the Copyright Office’s independent authority might best be achieved.

In sum, the Copyright Office requires greater autonomy to effectively support copyright owners and users in the 21st century. Both the Copyright Office and the Library of Congress serve invaluable roles, and we believe that such a change would be mutually beneficial. Both entities could focus their energies on what they do best, and apply their budgets and develop their infrastructures in a way that best serves their users and the nation.

\textsuperscript{27} Michael W. Carroll, \textit{Fixing Fair Use}, 85 N.C. L. REV. 1087, 1090 (2007) (calling for the creation of a Fair Use Board within the U.S. Copyright Office).

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.
May 31, 2013

Submitted by Online Submission Procedure

Hon. Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Avenue, S.E.
Washington, DC 20559-6000

Re: Technological Upgrades to Registration and Recordation Functions

Dear Register Pallante:

We are writing to express the views of the American Bar Association’s Section of Intellectual Property Law (the Section) in response to the Copyright Office’s March 22, 2013 Notice of Inquiry concerning technological upgrades to registration and recordation functions. The views expressed herein have not been submitted to or adopted by the ABA House of Delegates or the ABA Board of Governors, and should not be considered to be views of the Association.

The Section appreciates the Copyright Office’s inquiry on this matter and has listed below recommendations offered from our members regarding the general areas in which the Copyright Office requested comments, specifically (1) “how stakeholders use the current online offerings…especially with respect to registration and recorded documents, and how the current offerings fail to meet, or exceed user expectations”; and (2) “…what online services, or aspects of existing services stakeholders would like to see” developed in the future. In gathering these recommendations from members, the Section noted the budgetary constraints and heavy workload under which the Copyright Office operates and made a particular effort to identify improvements to the Copyright Office’s online system that could be accomplished quickly and/or may be feasible in terms of the cost of implementation.

The Section’s suggestions, which are not ranked in order of importance, are listed below:
• Electronic filing should be expanded to include recordation.

• Online services should be expanded for filing and maintaining DMCA designation forms, especially in connection with creating an easier mechanism for updating agent contact information.

• An online repository of Copyright Office Board of Review decisions should be made available through the Copyright Office website.

• Samples or portions of registration deposit material should eventually be made available online, in order to, e.g., assist the public in conducting searches to identify the owners of registered materials.

• Changes of address should be allowed other than by Form CA, in order to keep the copyright registration database accurate and up to date.

• Electronic applications should be made available for group registrations of material published in periodicals.

• PDF copies of certificates of registration should be made available online. These certificates appear to already be publicly available via computer terminals in the Copyright Office Reading Room, and their expanded availability would be particularly helpful in cases in which the certificate may contain additional details beyond what is available in the current online database of registration records.

• Pre-1978 registration records should be made available.

• There are sometimes significant delays in the appearance of registration records in the Copyright Office’s online database following the issuance of corresponding registrations. If technology will allow the issuance and cataloging of registration certificates into online records simultaneously, this would be helpful for attorneys attempting to verify registrations.

• The Office should consider permitting users to add International Standards Organization (“ISO”) approved, identification numbers to their registrations, either at the time of registration, or afterwards, when available to the user.

• With respect to recordation, the Copyright Office may wish to consider the technology used by the U.S. Patent and Trademark Office as a potential model for reflecting chain of title in an accessible format.

• A potentially low-cost improvement to the eCO claims interface could be to integrate “Tips” for practitioners with respect to each of the fields that need to be filled in, whereby an applicant could click a link to clarify the nature of the
information requested by the application. For example, a tip for the “Comments” field could list common types of information that the applicant may wish to include in that section (such as, e.g., a request for special relief from the deposit requirement or trade secret designation of a computer programs application). Other “Tips” could seek to preempt the mistakes that online applicants have commonly made over the course of the six-year history of the eCO system, and/or could simply link to relevant Copyright Office Circulars. An internal survey of Registration Specialists could potentially help identify the areas in which errors are most often made, and providing guidance directed at these areas may reduce costs, correspondence with applicants and examining/processing times.

- In eCO applications for derivative works, the current size of the field that lists previous works is sometimes inadequate, and the Copyright Office may wish to consider expanding this field.

- The ability to send in a client's separate signature supporting an eCO application after the application and deposit have been filed electronically with the Register.

- Regarding the eCO claims system, it is important for attorneys to be able to present draft applications to clients for approval in an accessible format. The current format is not easily presentable to clients because, even when captured as a screenshot, the text of the eCO claims screen that displays a completed draft application is often tiny, in poor resolution and may be truncated (with text replaced by “…” due to the inadequate size of the fields on the online form. If the eCO claims software can incorporate a mechanism to display completed applications in a more accessible format, such as, e.g., a format akin to Form CO that is downloadable, or a forwardable link to a screen that would display the completed draft application, this would be extremely helpful to our members. In this regard, and as a more general point, closer alignment between the eCO interface and the appearance and content of the former paper forms would be a welcome development.

- In concluding an application for registration within the eCO system, the applicant must click through a button relating to transmission of deposit material, after which the application closes and further submissions are not accepted. A final button stating “Are you sure?” before the application closes would add clarity and avoid errors in accidental, incomplete filings.

Again, the Section appreciates the opportunity to comment on the Copyright Office’s inquiry regarding technological upgrades to registration and recordation functions and applauds the technological advances and efficiencies that the Copyright Office has made over the last
decade. The Section hopes that its comments will provide the Copyright Office with useful insights as it seeks to expand and further develop its online offerings.

Very truly yours,

Joseph M. Potenza
Section Chair
American Bar Association
Section of Intellectual Property Law