



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

321 N. Clark Street • Chicago, IL 60654
www.americanbar.org



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.¹ 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 Claims² and Federal Copyright Protection for Pre-1972 Sound Recordings.³ Its most recent study, on Music Licensing, was issued on February 5, 2015.⁴ The Office participates in negotiations concerning trade agreements and international treaties, and provides legal assistance

¹ See, e.g., Maria A. Pallante, *The Next Generation Copyright Office: What It Means and Why It Matters*, 61 J. COPYRIGHT SOC'Y 213 (2014) [hereinafter, "The Next Generation Copyright Office"].

² U.S. Copyright Office, *Copyright Small Claims: A Report of the Register of Copyrights* (Sept. 2013), available at <http://copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

³ U.S. Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings: A Report of the Register of Copyrights* (Sept. 2013), available at <http://copyright.gov/docs/sound/pre-72-report.pdf>.

⁴ U.S. Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights* (Feb. 5, 2015), available at <http://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

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.⁵ 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.⁶ They employ nearly 5.5 million U.S. workers, more than 4 per cent of the entire U.S. workforce.⁷ 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.⁸ 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.

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.⁹ 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.¹⁰

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

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

¹⁰ Oversight of U.S. Copyright Office: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of H. Comm. on the Judiciary, U.S. House of Representatives, 113th Cong. 9 (2014) (statement of Maria A. Pallante, U.S. Register of Copyrights) [hereinafter, "Statement of Maria A. Pallante"].

system software updated to provide greater flexibility and interoperability with other systems to simplify the registration process.¹¹

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.¹² 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.¹³) 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.¹⁴

(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

¹¹ 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.

¹² 17 U.S.C. § 408(b). Deposit for the Library must be made even if the work is not registered. *Id.* § 407.

¹³ The Next Generation Copyright Office, *supra* note 1 at 217–18..

¹⁴ 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.

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

¹⁵ Statement of Maria A. Pallante, *supra* note 10 at 9.

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).

¹⁷ The report of that Study, written by the Copyright Office’s Kaminstein Scholar-in-Residence, Robert Brauneis, and published in December 2014, is available at <http://copyright.gov/docs/recordation/recordation-report.pdf>.

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.¹⁸ 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.¹⁹ 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, recordings, 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,²⁰ or the institution of a

¹⁸ See U.S. Copyright Office, *Report on Orphan Works: A Report of the Register of Copyrights* (Jan. 2006), available at <http://copyright.gov/orphan/orphan-report-full.pdf>. The Office is currently working on another study on Orphan Works in light of intervening events. See <http://copyright.gov/orphan/>.

¹⁹ See, e.g., Maria A. Pallante, *Priorities and Special Projects of the U.S. Copyright Office: October 2011–October 2013* (2011), available at <http://www.copyright.gov/docs/priorities.pdf>; the Office's Technological Upgrades Project (discussed in Statement of Maria A. Pallante, *supra* note 10 at 3); U.S. Copyright Office, *Transforming Copyright Recordation in the Copyright Office* (Dec. 2014), available at <http://copyright.gov/docs/recordation-report.pdf>.

²⁰ U.S. Copyright Office, *Federal Protection for Pre-1972 Sound Recordings: A Report of the Register of Copyrights* (Dec. 2011), available at <http://copyright.gov/docs/sound/pre-72-report.pdf>.

new regime for small copyright claims.²¹ 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 439.²² 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.²³ 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.²⁴ 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.

²¹ U.S. Copyright Office, *Copyright Small Claims: A Report of the Register of Copyrights* (Sept. 2013), available at <http://copyright.gov/docs/sound/pre-72-report.pdf>.

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

²⁵ See 17 U.S.C. § 1201(a)(1)(C). Although the Librarian of Congress ultimately issues the regulations due to certain Constitutional considerations, he has traditionally followed the Register's recommendations. *But see* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control, 75 Fed. Reg. 43825, 43838-39 (July 27, 2010).

²⁶ U.S. Copyright Office, *Copyright Small Claims: A Report of the Register of Copyrights* 97 (Sept. 2013), available at <http://copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

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.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.

²⁷ Michael W. Carroll, *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).

²⁸ Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong., 2d Sess. (2008).