

## Questions for the Record

### Hearing on the Oversight of the Copyright Office U.S. Senate Committee on the Judiciary Subcommittee on Intellectual Property

#### Questions from Chairman Thom Tillis:

- 1. The consent decrees cover two music licensing groups, but not all music licensing groups. The two licensing groups not covered by the consent decrees compete in the free market. Clearly the free market is working. Do you agree their example is a model for a future free market in music?**

In February 2015, the Copyright Office released a comprehensive report on the U.S. music licensing landscape titled “Copyright and the Music Marketplace.” In its report, the Office noted that in considering the consent decrees, it was not advising on matters of antitrust policy, and the Office similarly understands this question to be directed specifically at copyright-centered concerns.

As part of that report, the Office applied certain guiding principles to its analysis of the broader music licensing system, including that government supervision should enable voluntary transactions while still supporting collective solutions. The Office examined the functioning of the four performing rights organizations from a copyright law and policy perspective, including the consent decrees governing conduct by ASCAP and BMI, the two largest performing rights organizations (PROs). The report made a number of recommendations, including for example, that Congress consider migrating rate setting for the performance right of musical works to the CRB on an as-needed basis and separating that process from any required antitrust oversight role, as part of a pre-MMA proposal for comprehensive reform of musical work licensing (mechanical and public performance rights). At the same time, because the consent decrees have been in place since 1941, the Office recognized that certain industry customs and practices may have developed around them, affecting a range of interests from licensees to songwriters to publishers.

The Office appreciates that the existing consent decrees direct the licensing practices of the two largest PROs in many ways that are unregulated for other music licensing groups, *i.e.*, SESAC and GMR. Meanwhile, SESAC operates pursuant to settlement agreements with radio and television consortiums that, for example, obligate it to offer blanket licensing options and viable alternatives to those licensees, and participate in an arbitration process if necessary to establish industry-wide licensee rates and terms. Separately, there are ongoing litigations between GMR and the Radio Music License Committee. While the Office is reluctant to point to the operation of these other two licensing groups as definitive models for the remainder of the market, it is true that the operation of SESAC and GMR in the marketplace may indicate that less government intervention can be successful, and that there may be a demand for increased choice in the PRO marketplace.

**2. I understand one reason that registration times are so long is mandatory correspondence in certain situations. In your opinion, are there legislative changes that could improve the correspondence process?**

The Office has authority under existing law to adjust the conditions under which it corresponds with registration applicants, and the Office has revised its practices as appropriate to better serve the needs of remitters, the Office, and the overall copyright system. For example, the Office of Registration Policy & Practice recently implemented a number of practice changes regarding when examiners should correspond with applicants. These updates are reflected in the most recent public draft of the *Compendium of U.S. Copyright Office Practices, Third Edition*.<sup>1</sup> In several places, the draft *Compendium* replaces “will communicate” with “may communicate.”<sup>2</sup> The proposed revisions also clarify when a claim can be registered with an annotation in the public record noting a potential irregularity (thereby eliminating the need for correspondence to resolve the issue), and when registration should be refused altogether.<sup>3</sup> These new practices are intended to clarify to both Office staff and the general public that not all deficiencies or ambiguities in individual applications require correspondence. In fact, the Office’s correspondence rate has decreased from 31% to 24% within the past two years. As my June 3, 2019 letter to this Subcommittee explained, “the reduction of correspondence was achieved through numerous actions, including regulatory changes to the Single Application and the application for unpublished collections; technical changes, including blocking unacceptable file types; and practice changes, including the use of annotations in lieu of correspondence in appropriate circumstances.”

At the same time, the Office believes that correspondence can play a valuable and important role in clarifying the scope and eligibility of claims registered with the Office. For example, the Office cannot register a claim to copyright without a deposit or an application that complies with the legal and regulatory formal requirements for registration. As the June 3, 2019 letter noted, “[t]he Copyright Office uses correspondence to limit or otherwise clarify the scope of claims, better identify copyrightable contributions, ensure submission of a proper deposit, or secure payment of the correct fee, among other things. But for this correspondence, these claims would likely be refused.”

As a general matter, the Office believes that any updates to title 17 should maintain this flexibility, though we look forward to working with Congress to identify potential legislative changes that may further reduce the need for correspondence with applicants.

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<sup>1</sup> Available at <https://www.copyright.gov/comp3/draft.html>.

<sup>2</sup> See *Compendium* Public Draft Chapter 600, §§ 603.2(C), 610.6(D)(4), 613.5, 618.8(F) (emphasis added).

<sup>3</sup> See, e.g., *Compendium* Public Draft Chapter 600, §§ 605.3(D), 605.4, 605.6(B), 605.6(C), 605.6(D), 606, 610.6(B), 618.8(A)(8), 618.8(C)(3), 618.8(D)(2), 618.8(H), 618.8(I), 619.13(Q), 619.19(T), 620.10(D)(1)(c), 621.9(E)(3), 621.9(F)(2), 621.9(G).

**3. How long does it take for examiners to review deposit copies for the Library’s “best copy” requirement during the registration process? Is the best edition requirement different than the quality generally required for registration?**

The Copyright Office does not formally track how long it takes examiners to review deposit copies for compliance with the Library’s best edition rules. Nor does it measure to what degree examiners correspond over whether applicants have satisfied the best edition requirement. However, as noted in the May 31, 2019 letter to the Subcommittee, the best edition requirement contributes to additional processing times in three ways: (1) it takes more time to process physical copies of works than digital copies; (2) it takes additional time to evaluate deposits for compliance with the complex best edition rules; and (3) examiners spend additional time evaluating deposits for potential inclusion in the Library’s collections.<sup>4</sup> The Library’s best edition standards are frequently higher than the quality of copies that the Copyright Office needs to examine copyright claims.<sup>5</sup> Note that while best edition often refers to a published, physical version of a work, it may also refer to specific formatting specifications, such as a high-resolution version of a work compared to a standard or lower resolution version. Indeed, to confirm the existence and scope of copyrightable subject matter and authorship information, in many cases, the Office need only examine an electronic deposit of sufficient quality of the work or other identifying material, while a best edition copy may be preferable for the Library’s preservation needs. The Office is currently analyzing a number of comments received in response to its October 2018 notice of inquiry regarding whether the Office should permit (or even require), the deposit of electronic copies and phonorecords or identifying material to satisfy the deposit requirement for registration purposes only, to facilitate greater efficiency in the administration of the registration program. Under this approach, copyright owners would separately be expected to satisfy the best edition requirement for copies or phonorecords if they receive a written demand from the Office for that material pursuant to the mandatory deposit provisions set forth in section 407.

**4. Today, as the copyright economy has transformed into fast-paced Internet transactions, including streaming, downloading, and other forms of modern dissemination, it is critically important that registration—the system of securing one’s legal rights—is not encumbered by the unrelated needs of the Library. In the best of all worlds, the Register would decide the deposit needs of the Copyright Office in accordance with the needs of the registration system—which may in fact be a quick digital version of a work. And the Library would have a range of separate options by which to build its collection in a strategic manner. In this modern age, it seems imperative that the Copyright Office be free to implement a wide range of innovative, real time processes by which authors can register their works and users can find rights holders or public**

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<sup>4</sup> See Letter from Karyn A. Temple, Register of Copyrights and Dir., U.S. Copyright Office, to Thom Tillis, Chairman, Subcomm. on Intellectual Prop. of the Comm. on the Judiciary, U.S. Senate, and Christopher A. Coons, Ranking Member, Subcomm. on Intellectual Prop. of the Comm. on the Judiciary, U.S. Senate (May 31, 2019), <https://www.copyright.gov/laws/hearings/response-to-march-14-2019-senate-letter.pdf>.

<sup>5</sup> See *id.*; Registration Modernization, 83 Fed. Reg. 52,336, 52,337 (Oct. 17 2018).

**domain dates. What is your view of Sections 407 and 408, specifically whether the time has come to examine and separate these deposit provisions?**

As the Office has noted, section 407 has served an important role in fostering the growth of the Library of Congress's unparalleled collection of American cultural resources. At the same time, it is also true that the best edition requirement can present challenges in the processing of copyright registrations. This is for a few reasons: (1) it takes more time to process physical copies of works than digital copies; (2) it takes additional time to evaluate deposits for compliance with the complex best edition rules; and (3) examiners spend additional time evaluating deposits for potential inclusion in the Library's collections. The Office has worked with the Library to find ways to balance the Library's important collection needs with the need to ensure that the copyright registration system effectively serves a modern digital marketplace. For example, for certain types of literary works and for musical compositions published in print formats, the Office recently promulgated regulations decreasing the number of best edition copies required to satisfy both mandatory deposit and the registration deposit requirements from two to one.<sup>6</sup> And as noted above, the Office recently solicited public input on whether it should require only electronic and identifying material for purposes of registration, while continuing to administer the best edition requirement to service the Library's collection needs.<sup>7</sup>

The Office has consistently highlighted the importance of regularly reviewing the copyright law to ensure that the copyright system is kept up to date with trends within the copyright and technology industries. Accordingly, it is certainly worthwhile for Congress to consider whether it is feasible and appropriate to more completely separate registration and the mandatory deposit process for the benefit of the copyright registration process. As noted, the Copyright Office has already solicited public input on the possibility, and will continue its consideration of this question in the future. If Congress wished, it could, for example, consider separating 407 and 408 and therefore completely remove the best edition requirement in section 408. Congress could also consider expanding section 407(c), which authorizes the Register to issue regulations providing for "alternative forms of deposit aimed at providing a satisfactory archival record of a work without imposing practical or financial hardships on the depositor."<sup>8</sup> Currently, this authority is limited to narrow circumstances in which the work is a pictorial, graphic, or sculptural work, and (i) less than five copies of the work have been published, or (ii) the work has been published in a limited edition consisting of numbered copies, the monetary value of which would make the mandatory deposit of two copies of the best edition of the work burdensome, unfair, or unreasonable.<sup>9</sup> Congress also could provide additional guidance regarding the categories of materials for which the need for best edition deposits is at its greatest. The Copyright Office looks forward to working with Congress and the Library as these issues are considered.

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<sup>6</sup> See Simplifying Deposit Requirements for Certain Literary Works and Musical Compositions, 83 Fed. Reg. 2,371, 2,371 (Jan. 17, 2018); Simplifying Deposit Requirements for Certain Literary Works and Musical Compositions, 82 Fed. Reg. 38,859, 38,861 (Aug. 16, 2017).

<sup>7</sup> See Registration Modernization, 83 Fed. Reg. at 52,344–45.

<sup>8</sup> 17 U.S.C. § 407(c).

<sup>9</sup> *Id.*

**5. Do you currently have the ability to direct how funding appropriated by Congress for the specific purpose of Copyright Office modernization is spent? If so, please describe.**

Under the Library's centralized IT structure, the Librarian of Congress has made the Chief Information Officer (CIO) the final authority for all technology matters for the agency and its component Service Units, including the Copyright Office. This centralized authority includes approval authority for all procurement and delivery decisions involving IT services, IT hardware, and IT software. The Copyright Office works closely with the Library's Office of the Chief Information Officer (OCIO) as well as Library governance boards (such as the Technology Strategy Board) to obtain final approval for specific modernization projects that will be funded using the appropriations provided by Congress. Once approval is received, the management of these IT projects, including vendor selection, budget, contract oversight, and invoice payment, is handled by the OCIO. For non-IT spending, the Office has broader discretion to choose the vendors, products, and services that are best suited for its non-IT related modernization goals.

Therefore, in practice, the Copyright Office requests all IT products and services through OCIO, including modernization IT needs. If the requests are approved by OCIO, the Copyright Office makes funding available to OCIO, and OCIO fulfills the Copyright Office-funded requests through either OCIO-directed procurements or through OCIO staff. The OCIO's IT approval evaluations include Copyright Office recommendations, but also an assessment of the availability of OCIO resources necessary to manage and monitor proposed modernization investments in the context of all planned Library IT resource needs.

As the business owner for the systems being modernized, the Copyright Office is responsible for identifying the high-level IT system requirements for Copyright modernization. From those requirements, the Copyright Office and OCIO work together to establish the IT acquisitions to be funded by an intra-agency agreement.

**6. Does the fact that the Library has centralized IT services affect your ability to communicate with contractors implementing Copyright Office modernization projects?**

The OCIO retains authority over all Library IT, including the award and management of all contracts for IT products and services. Under the Library's centralized IT structure, an OCIO-appointed employee currently serves as the Contracting Officer Representative (COR) for all IT-related contracts, with authority to provide technical direction to the contractors and liaison between the contractor and the Library's Contracting Officer. Other duties of the COR include monitoring contractor performance and serving as the Authorizing Officer to provide approval for vendor payments. Prior to the centralization of IT services within the OCIO, the Copyright Office had worked directly with the Library's Contracting Office to procure IT services and appointed its own CORs. Under IT centralization, the Copyright Office communicates technical recommendations to contractors through the OCIO COR.

As part of the Library's agile approach to IT development, designated Copyright Office employees regularly interact with contractors through participation in the "scrum" teams that are providing the day-to-day development and testing of system functionality. These teams, which consist of copyright employees providing business input, OCIO technical employees, and

contract developers, determine how system requirements will be prioritized, maintain the agile sprint schedules, test developed products, and ensure appropriate reviews. Communications related to technical direction to the contractors remain limited to those authorized by the OCIO COR to ensure the contractor is maintaining alignment with the scope and deliverables of the contract.

This structure does distance the Copyright Office somewhat from the oversight and management of IT development. In instances where business requirements have been inadvertently excluded and/or added without Copyright Office input, the Copyright Office is working with OCIO and the Library Contracts and Grants Directorate (CGD) to improve the process and modify contract requirements to ensure that identified Copyright Office business needs are met.

**7. Are there any pilot projects you'd like to implement with respect to modernization? What challenges do you face with doing so?**

The Copyright Office is interested in exploring a variety of new initiatives during its ongoing modernization efforts. We began that process by issuing a Notice of Inquiry (NOI) in October 2018 soliciting public comment on several topics pertaining to modernization of the copyright registration system. The NOI and the comments received in response highlighted several items for further study and possible pilot projects, including the use of application programming interfaces (APIs) in the new electronic registration system and the adoption of dynamic or subscription-based pricing models for calculating and collecting fees. The Office plans to follow up the current NOI with further NOIs on specific topics as we develop the parameters for future pilot projects. Some of the challenges that may affect our ability to promptly implement pilot solutions are contracting deadlines and resources due to appropriation limitations, as well as the need for statutory changes, or regulatory updates subject to Library approval (including, for example, changes that may impact the Library's ability to build its collections through the best edition requirement).

**8. Are the IT improvements being specifically tailored to meet the needs to the copyright community?**

The Copyright Office is committed to modernizing both its IT systems and its business practices to support a well-functioning copyright system for the benefit of creators and the general public, and recognizes the investment and interest the entire copyright community has in the success of the Office's IT modernization. The Office has dedicated significant resources to a robust program of stakeholder communication and outreach so that the transformation of the Office's services provides for the evolving needs of a modern, digital society.

As an example, early in fiscal year 2018, the Office issued a Notice of Inquiry requesting written comments on how to improve the regulations and practices related to the registration of copyright claims in the digital age. The inquiry's varied topics included improving application user assistance and the public record, to possibilities for reform of deposit requirements. The public comments continue to be reviewed and recommendations will be incorporated where possible as part of the Office's ongoing evaluation of both system requirements and potential regulatory changes.

Public feedback has also been integral to the earliest system development activities. Beginning in fiscal year 2018, the Office launched extensive public outreach activities with OCIO's digital User Interface/User Experience (UI/UX) contractors to design the public interfaces relating to recordation functions and registration applications within the Enterprise Copyright System (ECS). The Office visited four cities (Washington, D.C., New York, Los Angeles, and Nashville), conducting sixty-eight in-depth interviews with copyright registration and recordation applicants and other public stakeholders to gain an understanding of end-user needs for the registration and recordation systems. The Office also conducted an extensive online survey, receiving over 10,000 responses. The public feedback resulting from these and other ongoing outreach efforts has been directly incorporated into the look and feel of the automated recordation application, which will be piloted in the spring of 2020.

Some of the proposed changes and improvements related to IT may require congressional and/or specific Library approval, such as unique IT infrastructure or platforms for certain copyright services such as a call center, enhanced web and video services, or greater focus on electronic registration deposits. The Office is committed to making recommendations to the Library on these issues in ways that benefit the entire copyright community.

**9. With respect to development and implementation of the new enterprise copyright system, will you be conducting a full and open competition for the development of these new systems, or will you be working primarily with your existing staff and internal contractors? If you think you will be working primarily with existing staff and internal contractors only, why?**

In June 2019, the Library's CIO determined that for fiscal year 2020 and beyond, IT development for all of the Library's systems would be conducted partially by in-house OCIO employees. OCIO has said this shift will ensure that the Library maintains the knowledge and skills necessary to support the long-term health and sustainability of its software products, as well as providing greater flexibility in work assignments for agile development. The OCIO has initiated hiring (NTE positions) to absorb Library development work that previously would have been conducted by those external contract developers.

More recently, the Copyright Office, the OCIO, and Library leadership have been in discussions about the feasibility of outsourcing at least part of the planned Enterprise Copyright System (ECS) development to external contractors at the same time the OCIO pursues the standup of its in-house development resources. The Copyright Office and OCIO are already engaged with the General Services Administration (GSA) to issue Requests for Information (RFI) and/or Requests for Proposals (RFP) in fiscal year 2020. These RFI and RFP solicitations will be public calls for targeted vendor communities to submit documentation of interest, experience, and proposals for Copyright Office IT modernization. Even more recent discussions have centered on providing USCO with broader authority to directly manage development activities for the Registration component of ECS, within the boundaries of Library IT governance and IT security and the broader ECS system architecture.

Discussions involving a potential split between OCIO-managed Copyright Office IT development and Copyright Office-managed development are in the earliest stages of evaluation, and feasibility questions are still being compiled for further analysis. The Copyright Office anticipates that initiation of development of the registration module of the ECS will be delayed at least through fiscal year 2020 to accommodate the important additional planning necessary to evaluate and implement these new approvals and to conduct additional critical path development.

**10. The timeline laid out in your 2019 Strategic Plan indicates pilot programs of new systems will not be ready until 2020 and it will likely take several more years to implement the systems after the pilots are ready. What are the major obstacles limiting your ability to more rapidly develop and implement the new systems? What can this committee do to speed up this timeline?**

The timeline outlined in the Office's Strategic Plan is based on Copyright Office and OCIO estimates of the potential for system development progress given various project dependencies and resource constraints that were part of earlier development planning. These dependencies and constraints included the Office's need to collect public feedback both ahead of and following releases of system functionality, the potential need for regulatory changes that may affect system requirements, the Office's ongoing business process reengineering efforts, and limitations on personnel resources within the Copyright Office and within OCIO needed to support accelerated development.

In addition to the constraints and dependencies above, unanticipated changes, such as the OCIO's recent shift from a development model using primarily external contract support to a plan to use federal employees for all development, and the even more recent proposal to split ECS development between the OCIO's in-house developers and a Copyright Office-managed external development contract (as discussed in the response to question number nine), will likely cause the timeline for modernization to shift outward. After the notification of the OCIO's plan to use internal development staff, both the Copyright Office and the OCIO determined that additional planning would be needed and are anticipating an award of a contract for consultants to assist both Offices in identifying and estimating a new "critical path" to modernization completion.

The OCIO plans to continue copyright modernization throughout fiscal year 2020 using existing contracts for the recordation automation pilot scheduled for release this spring, and also for the launch of development for the new public records system; however, the recent changes in development strategy did delay the initiation of development of registration functionality, and that delay may be further extended should the Offices need to plan for a pivot to Copyright-managed registration development involving external contracts.

The Copyright Office appreciates the support of the Committee in overcoming obstacles to the completion and release of the Office's modernized systems, and the Office will continue to advise the Committee when there are updates to the Office's estimated modernization timeline.

**11. Have you heard any feedback from the copyright community expressing concerns about the current centralized Library of Congress structure for managing Copyright Office modernization?**

Yes, the Office has heard views from members of the copyright community on the issue of centralization. The copyright community is a large one, and their views are diverse. Some stakeholders support the centralized IT structure reflected in the 2017 Modified IT Plan, and others have expressed concern about it. Over the years, there have been a number of vehicles for the Office to receive public comments and views on copyright modernization of our IT systems. From a hearing in the House Judiciary Committee in 2015, to the Office's 2016 notice on inquiry on possible funding strategies for its IT plan and timelines, to the Office's 2018 Notice of Inquiry on registration modernization, to the 2018 Request for Information ("RFI") that asked for comments on creative solutions, including possible no-cost options, for the development of a next-generation ECS, the public has shared its views, ranging from the critical to the positive, regarding modernization efforts. Certainly, the efficient and accountable use and application of funds to create modern and effective IT copyright systems for all users is a common theme.

**12. What are the next steps for implementing the MMA?**

On July 8, 2019, the Copyright Office, with approval from the Librarian of Congress, designated the entities, and their board members, that will serve as the mechanical licensing collective (MLC) and digital licensee coordinator (DLC). With those entities now designated, the Office is preparing a notice of inquiry to seek public comment on promulgating regulations to govern the operation of the revamped blanket mechanical license and operation of the MLC, such as regulations regarding the form of notices of license and notices of non-blanket activity, usage reports, information to be included in the musical works database, requirements for the usability, interoperability, and usage restrictions of that database, and the disclosure and use of confidential information. The Office expects to issue the notice shortly and encourages stakeholders across the music industry to participate in the public comment process.

As required by the MMA, the Copyright Office will also engage in a wide variety of education and outreach activities to inform the public of important changes under the new law. For example, the Office's website is regularly updated with information about the MMA and its ongoing implementation, and the Office is in the process of creating a comprehensive tutorial that will walk the public through the changes made by the MMA. The Office is also planning to undertake a number of speaking engagements throughout the music industry at both major and niche events. The Office hopes to build significant knowledge and understanding within the music community through these efforts, including by educating songwriters and others about the process by which they may claim ownership of musical works in the MLC database and receive royalties for uses of their works. The MLC and DLC are also tasked with facilitating education and outreach to the broader songwriter community, and the Office looks forward to working with the MLC, DLC and other industry groups on such endeavors.

Additionally, this winter, the Copyright Office will commence a policy study that will provide best practice recommendations to the MLC regarding the issue of unclaimed royalties. As directed by the MMA, the study will solicit input on how the MLC can best "identify and locate

musical work copyright owners with unclaimed accrued royalties held by the collective,” “encourage musical work copyright owners to claim the royalties of those owners,” and “reduce the incidence of unclaimed royalties.” The Office hopes that this study may yield practical suggestions for the MLC to consider as it undertakes its various duties. The study will be released by July 2021.

Separately, the MLC and DLC will be engaging in activities to ready themselves for the license availability date, such as by hiring staff, formalizing internal policies, and working with vendors to build out the musical works database and core processing functions. The MLC and DLC are currently participating in the administrative assessment proceeding commenced by the Copyright Royalty Board to fund the MLC, and are both expected to participate significantly in the Office’s upcoming rulemakings.

**13. Software developers often change and update their software, even on a weekly basis. They need to register these variations as derivative works to better protect their content. But some in the software industry are concerned about the lack of guidance for updating these derivative works. There is also concern about the impracticality and expense of frequently registering updates. What do you plan to do to ensure that the rules for software updates and changes are aligned with how the industry operates today?**

The Office currently provides extensive guidance on how to register computer programs. Chapter 700 of the *Compendium* includes more than 20 pages of detailed information on how to complete the application, and Chapter 1500 provides 8 pages of information on the deposit requirements.<sup>10</sup> Circular 61 was updated in 2017 to provide much of this information in condensed form.<sup>11</sup> That said, the Office appreciates the unique challenges associated with registering derivative computer programs. Stakeholders raised these concerns during the 2017 revision of the *Compendium*, and the Office noted its intention to “revisit this issue in the future through a formal notice of inquiry.”<sup>12</sup> The Office also recently engaged in an academic partnership with Stanford Law School on revising requirements for computer software registration.<sup>13</sup> Based in part on recommendations provided in that study, the Office is currently considering potential regulatory updates to its practices in this area. We expect to seek further stakeholder input this fall.

**14. Do you think that the Congress providing clear authority to the Register to ensure that the Copyright Office has direct responsibility for the management and administration of its operations, including exercising independent control of its budget allocations and expenditures, personnel decisions and processes, procurements and other**

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<sup>10</sup> Available at <https://www.copyright.gov/comp3/>.

<sup>11</sup> U.S. COPYRIGHT OFFICE, CIRCULAR 61: COPYRIGHT REGISTRATION OF COMPUTER PROGRAMS (2017), <https://www.copyright.gov/circs/circ61.pdf>.

<sup>12</sup> *Compendium of U.S. Copyright Office Practices*, 82 Fed. Reg. 45,625, 45,626 (Sept. 29, 2017).

<sup>13</sup> See <https://law.stanford.edu/education/only-at-sls/law-policy-lab/practicums-2016-2017/copyright-policy-practicum-revising-the-requirements-for-computer-software-registration/>.

**administrative and management functions that affect the Office’s ability to administer Title 17 would allow the Copyright Office to more effectively fulfil its mission?**

Section 701(a) of Title 17 indicates that “[a]ll administrative functions and duties under this title, except as otherwise specified, are the responsibility of the Register of Copyrights,” and that the Register, along with subordinate officers and employees of the Office, “shall act under the Librarian’s general direction and supervision.”

When Congress has provided non-statutory guidance on how the Copyright Office and the Library of Congress work on IT matters, that guidance has come in the form of appropriations language in committee reports. For example, the Senate Report issued in connection with the Copyright Office’s FY 2019 budget appropriations directed the OCIO and the Office to work together “to achieve efficiencies in shared services, while allowing for mission-specific modernization to be the responsibility of the Copyright Office.”<sup>14</sup> Obviously, appropriations language is not hard-wired into a statute, and the guidance can change over budget cycles.

There are other statutory models providing levels of guidance and autonomy between parent agencies and its service units. In the case of the Congressional Research Service, a sister agency of the Copyright Office, there is specific statutory language indicating, for example, that “the Librarian of Congress shall grant and accord to the Congressional Research Service complete research independence and the maximum practicable administrative independence consistent with these objectives.”<sup>15</sup> Another model is that of the U.S. Patent and Trademark Office and its relationship with the Department of Commerce. While the Director of the PTO is “subject to the policy direction of the Secretary of Commerce,” by statute the PTO Director retains “responsibility for decisions regarding the management and administration of its operations” and exercises “independent control of its budget allocations and expenditures, personnel decisions and processes, procurements, and other administrative and management functions,” as well as having enumerated authorities covering issues such as fees and contracting.<sup>16</sup>

As the parent agency, the Library provides its Service Units, including the Copyright Office, with a range of centralized services, including human resources services, facilities management, and IT services (such as email), for example. However, there has been continued discussion within the stakeholder community as to whether greater autonomy, for example more control over IT-related contracts, decision-making, and budgeting, would allow the Office to better harness its resources to meet the very unique and distinct needs of the copyright community.<sup>17</sup>

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<sup>14</sup> S. REP. NO. 115-274, at 43 (2018).

<sup>15</sup> See 321 P.L. 91-510 (1970).

<sup>16</sup> See, e.g., 35 U.S.C. §§ 1, 2, 41.

<sup>17</sup> See, e.g., *U.S. Copyright Office: Its Functions and Resources: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 10, 15–16 (2015) (written statement of Keith Kupferschmid, Software & Information Industry Association); *id.* at 34–35 (written statement of Lisa A. Dunner, American Bar Association, Section of Intellectual Property Law); *id.* at 50–51 (written statement of Nancy J. Mertz, American Intellectual Property Law Association).

**15. Should the Copyright Office be protected from fees being diverted from Copyright Office control, for example, through a special treasury reserve account like the United States Patent and Trademark Office has?**

Although the Copyright Office is subject to annual appropriations ceilings that prevent use of fee balances in excess of authority to spend, section 708(d) of the Copyright Act expressly provides that all fees shall be deposited and credited to the appropriation for necessary expenses of the Copyright Office, and that the fees shall remain available until expended. The availability of copyright fees is not contingent on any further appropriation. In contrast, the statute governing U.S. Patent & Trademark Office (PTO) fees at 35 U.S.C. § 42 (c), states: “*To the extent and in the amounts provided in advance in appropriations Acts*, fees authorized in this title or any other Act to be charged or established by the Director shall be collected by and shall be available to the Director to carry out the activities of the Patent and Trademark Office” (emphasis added). The Copyright Act does not similarly limit the availability of copyright fees to the amounts provided in advance in annual appropriations Acts.

Although the Copyright Act includes language that prevents the type of diversion that was resolved for the PTO through its special reserve account, the Copyright Office would still benefit from additional flexibility in use of all user fees collected, and has proposed Library-supported changes to annual appropriations language to that end. Unlike the U.S. Patent and Trademark Office, fee offsetting restrictions in the Copyright Office’s budgetary language prevent the Office from operating during a lapse in appropriations, even if fee balances exist that would provide for those operations. The appropriations language changes, if authorized, would be included in future budget requests to allow for use of available fee balances to operate during a funding lapse. The proposed appropriations language change would also make available 20% of the user fee balances available in addition to appropriated amounts, without fiscal year limitation, to facilitate large, non-recurring projects, including modernization.

**16. For several years before your tenure, with the support of Congress, the Copyright Office engaged in extensive public outreach, including through formal public notice processes, regarding how to fund improvements to the Copyright Office’s IT systems, in order to produce a more robust enterprise architecture, better security of copyrighted works, and more innovative, nimble, and mobile-friendly registration and recordation services. There was wide agreement from this process that the Copyright Office cannot adequately carry out the duties that are prescribed to it in the Copyright Act, unless it has some control of the operations, including IT. Although the Library has improved in recent years—the fact is that the Copyright Office is very different than all other parts of the Library because it administers public laws that affect people’s rights and remedies in a 21<sup>st</sup> century marketplace of rapid copyright transactions and products worth trillions of dollars. Currently the Copyright Office is still subject to, and dependent on, the Library’s IT shop, and in fact—as we understand things—the Copyright Office must pay the Library for some IT services by transferring customer fees or appropriated dollars. Do you have any concerns—or are you aware of any**

**stakeholder concerns—about this process? What is your recourse as Register if the Library is unable to deliver the IT services that you need and are helping to finance?**

As noted previously, the Copyright Office transfers appropriated Copyright IT modernization funds to the Office of the Chief Information Officer (OCIO) through an intra-agency agreement.

The ultimate authority for all Library IT investments is the Librarian of Congress. Under the Library's IT governance model, large IT investment requests from the Copyright Office and other Service Units are evaluated by the Technology Strategy Board (TSB) and approved by the CIO and the Principal Deputy Librarian of Congress. The TSB recommends to the Librarian what strategic investments should be made and maintains accountability for technology projects across the Library. Within the Library's IT governance structure, the Library's executive leaders—including the Register of Copyrights—provide the highest level of consideration for IT decision-making. This means that other Library Service Units provide input and feedback on whether Copyright Office IT proposals should be approved. There is some concern that these Service Units do not have sufficient expertise in copyright matters to adequately assess specific Copyright Office needs, and this issue has been raised to Library leadership.

Because the Copyright Office does not have direct control over IT activities, including decisions involving IT contracting and source selection, the Copyright Office must also work through OCIO to ensure that IT modernization projects are meeting the Office's business needs. The Copyright Office does not currently have input into the review of vendor proposals or the ultimate selection of the vendors who are building Office IT systems, and the designated COR and Authorizing Officer for Office IT systems are in OCIO. As noted above, this has resulted in some communication issues, such as instances where business requirements have been added to Copyright Office IT systems without consulting the Office and instances where business requirements have been inadvertently excluded from the contract. The Copyright Office is working with OCIO and CGD to modify contract requirements to ensure that identified Copyright Office business needs are met.

Also, as noted, there are additional mechanism and procedures that do distance the Copyright Office from direct control of its resources and modernization efforts. For example, the Copyright Office website was previously maintained by staff within the Copyright Office so that changes and updates from the business could happen quickly and fluidly. Under the current structure, the website is maintained by the OCIO and changes must be weighed against the priorities and needs of all LOC websites, which could impact the timeliness and responsiveness to USCO needs. In addition, IT modernization needs require OCIO approval and resources, which affect the Copyright Office's ability to immediately improve and update our IT services even if USCO funding is available (OCIO would need to approve the project, weigh it against all LOC business needs, have the resources to assign a COR to manage the project and review the contract proposals, etc. These matters were previously handled within the Service Unit). The Office has expressed concern about the impact of these new procedures on delivery of Copyright Office IT services and is working with OCIO and the Library to minimize any negative impacts as much as possible as we fully employ the centralized IT model.

In terms of oversight of the IT services provided to the Office, the Copyright Office does not control funding of IT projects or have direct oversight over IT personnel; accordingly, those functions are currently managed by the Librarian and the OCIO. If the Library is unable to deliver the required systems for copyright modernization, there is no formal mechanism for the Register of Copyrights to seek redress. Ultimate oversight of the delivery of IT services to the Copyright Office by the Library rests with Congress.

### **Questions from Senator Chuck Grassley:**

**1. The success of the Music Modernization Act (MMA) will depend, to a large extent, on the effective and efficient operation of the Mechanical Licensing Collective (MLC). The MMA included provisions to ensure that there was robust ongoing oversight of the MLC by both the Copyright Office and Congress, and that the new MLC would be accountable to the stakeholders. Specifically, the MMA tasked the Copyright Office with a number of responsibilities to oversee the MLC and ensure that it was functioning effectively and efficiently, and serving the best interests of all stakeholders.**

- **What is the Copyright Office doing to ensure that the new entity is in compliance with the MMA's requirements? What steps did you take through the designation process to ensure ongoing accountability of the MLC?**

The Office conducted an extensive public inquiry soliciting proposals from entities seeking to be designated as the MLC, as well as input from interested members of the public. The Office received over 600 comments from stakeholders throughout the music industry, including numerous copyright owners. The Copyright Office carefully evaluated the entities seeking designation, and considered ongoing oversight and accountability issues as part of the designation process.

The Office took care to select an entity that best met the statutory selection criteria, including demonstrating an understanding of the many functions and duties of the MLC under the new law. The designated entity presented a detailed operational framework, garnered input from a broad set of interested parties, and demonstrated detailed plans for operation, including with respect to organizational structure, vendor selection, and collection and distribution procedures. The designated entity further pledged to operate under bylaws that will address conflicts of interest and appropriate disclosures in accordance with applicable state laws and professional duties of care. The Office concluded that among the candidates, the designated entity's proposal, as a whole, reflected a more realistic understanding of the MLC's responsibilities under the new blanket licensing system and indicated that it is better positioned to undertake and execute the full range of administrative functions required of the MLC. The Office expects the designated entity to build upon its considerable planning in a flexible and conscientious manner that also considers input from the DLC, as well as the broader musical work copyright owner and songwriting communities.

The Office's notice of designation also noted that the Register expects the MLC to equally represent the interests of copyright owners and songwriters, and to administer the new blanket license in a fair, efficient, and legally compliant manner. The designation further noted the

Register's intention to exercise oversight over the MLC through additional rulemaking activities. The MMA directs the Register to promulgate regulations regarding the form of notices of license; notices of non-blanket activity; usage reports; information to be included in the musical works database; requirements for the usability, interoperability, and usage restrictions of that database; and the disclosure and use of confidential information. Under the MMA, the Register also has "broad regulatory authority" to conduct such other proceedings and adopt such regulations as may be necessary or appropriate to effectuate the provisions of this subsection of the MMA, with the legislative history suggesting that this authority be exercised, for example, in reviewing policies and procedures such as those adopted by the MLC committees. In addition, the Presidential Signing Statement accompanying enactment of the MMA suggests that the Register should work with the MLC to address issues related to the appointment and removal of successive MLC directors.

The Office will shortly seek additional public comment regarding regulations to govern the operation of the MLC and the new blanket mechanical license. The Office expects to issue an initial notice regarding these issues shortly and encourages stakeholders across the music industry to participate. The Office anticipates that the resulting regulations will address the Office's continued oversight of the MLC, as well as the MLC's accountability to the DLC and musical work copyright owners and songwriters.

Next, the Office intends to commence the first steps in the congressionally-mandated policy study concerning best practices that the MLC may engage in to reduce the incidence of unclaimed royalties. The MLC is obligated to give substantial weight to these recommendations when establishing its related procedures.

Additionally, every five years, the statute requires the Office to evaluate whether the designation should be continued or if a new entity meeting the statutory criteria should be designated. As the legislative history notes and the initial designation recognized, "evidence of fraud, waste, or abuse, including the failure to follow the relevant regulations adopted by the Copyright Office over the prior five years should raise serious concerns within the Copyright Office as to whether that same entity has the administrative capabilities necessary to perform the required functions of the collective."

**2. A primary goal of the MMA was to ensure that the MLC and Digital Licensee Coordinator (DLC) would deliver as much money as possible to as many songwriters as possible by matching as many works and royalties as possible. To help accomplish this goal, the MLC has to take steps to ensure that it is managed effectively, does not engage in waste fraud or abuse, and undertakes efforts to maximize the results and efficiency of matching.**

- **During the designation process and now moving forward, what role did and can the Copyright Office play in ensuring that the MLC operates in a manner that effectively and efficiently utilizes its funding and other resources? What are the**

### **Copyright Office's ongoing responsibilities to oversee and interact with the MLC and DLC now that the entities have been designated?**

As noted in response to the prior question, during the designation process, the Copyright Office solicited comprehensive proposals from entities seeking designation as the MLC, and based on these submissions and the public comment received, concluded that the designated entity was best equipped to perform the MLC's core duties, including matching as many works (or shares thereof) to copyright owners, taking other steps to reduce the incidence of unclaimed accrued royalties, and generally ensuring that songwriters received the royalties due to them under the blanket license.

The Office's response to the previous question outlined many of its ongoing responsibilities to oversee and interact with the MLC and DLC. As noted above, the Office is currently preparing a notice of inquiry to seek public comment on regulations to govern the operation of the MLC. The Office anticipates that the resulting regulations will help ensure that the MLC operates in a manner that effectively and efficiently utilizes its funding and other resources. As discussed below, the Copyright Royalty Judges also have opportunities to ensure that the MLC is expending its funds judiciously, as they may only set an administrative assessment that is calculated to defray the MLC's "reasonable collective total costs." Moreover, because the statute requires the Office to re-evaluate the designated entity every five years, evidence of waste, fraud, or abuse, or the failure to adhere to relevant regulations, would raise serious concerns about whether re-designation is appropriate. If the designated entity were to make unreasonable distributions of unclaimed royalties, that could call into question whether the entity still has the "administrative and technological capabilities to perform the required functions of the [MLC]" as the statute requires.

As also noted above, this winter, the Copyright Office will commence its policy study regarding unclaimed royalties, which will result in best practice recommendations for the MLC to identify and locate copyright owners with unclaimed royalties to reduce the incidence of unclaimed royalties. By statute, the MLC must give "substantial weight" to recommendations provided by the Office. The Office hopes that this study may yield practical suggestions on how the MLC may operate in a manner that effectively and efficiently utilizes its funding and other resources.

### **3. The MMA directs the Copyright Office to help educate songwriters about the existence of the MLC and how to claim ownership of their works and any royalties owed to them. What are the Copyright Office's plans to educate songwriters and the public about the MLC? What have you done so far, and have your efforts been successful?**

The same day the MMA was enacted, the Copyright Office began providing important information about the new law on its website, including a quick guide, frequently asked questions, and updated versions of the law. The Office has continued to update its website and other publications, such as circulars and related pamphlets, to inform the public on MMA implementation efforts. In addition, the Office has provided keynote presentations and participated on conference panels attended by relevant music industry stakeholders, including several state bar association meetings, as well as technology and copyright oriented conferences. The Office has also promulgated a number of rules required under titles I and II of the MMA,

and all of its rulemaking documentation is publicly accessible on [copyright.gov](http://copyright.gov). The Office has received considerable positive feedback from music stakeholders regarding these significant steps.

The Office is now developing long-term outreach plans to fulfill the directive to engage in public outreach and educational activities focused on educating songwriters and other interested parties about how a copyright owner may claim ownership of musical works (and shares of such works). We are actively planning to continue such outreach up to and beyond the January 1, 2021 license availability date. The Office's future outreach plans include development of an online tutorial that will walk the public through the changes made by the MMA, various social media outreach, and more panel participation at conferences. All of these outreach steps will continue to focus on reaching as diverse an audience as possible.

In addition, the MLC and DLC, along with the Copyright Office, are tasked with facilitating education and outreach regarding the new blanket licensing system to the broader songwriting community, including by educating songwriters and others about the process by which they may claim ownership of musical works in the MLC database and receive royalties for uses of these works. The Office is currently exploring ways to partner with MLC, DLC, and others on these endeavors.

Because the blanket license will not be available until January 1, 2021, and the MLC's claiming portal is not yet available, the Office is currently more focused on general education efforts about these changes to the music laws, including the ongoing regulatory implementation steps it is undertaking. Once the claiming portal and the musical works database become available, however, the Office will refocus efforts to help educate songwriters and reduce incidence of unclaimed royalties before 2023, the earliest potential distribution.

**4. Under the MMA, licensees are required to directly pay the reasonable costs of the MLC's operations. If the MLC and DLC cannot reach a voluntary agreement on reasonable costs, the MMA provides that the Copyright Royalty Board (CRB) will determine the amount of those costs. In the event that the MLC and DLC cannot reach an agreement, how would you recommend that the CRB, Congress and industry stakeholders approach the question of defining reasonableness of costs?**

In the event that the MLC and DLC are unable to reach a voluntary agreement on the administrative assessment to fund the operational costs of the MLC, the Copyright Royalty Board (CRB) will be responsible for conducting a full proceeding to determine the amount and terms of the administrative assessment paid by significant non-blanket licensees and digital music providers operating under the section 115 blanket license. In such an instance, the CRB should look to the criteria set forth in 17 U.S.C. 115(d)(7)(D), which directs the CRB to determine an amount calculated to defray the reasonable collective total costs, and to anticipate future collective total costs and collections of the administrative assessment.

The Office notes that the CRB has initiated a proceeding to determine the administrative assessment that digital music providers and any significant non-blanket licensees must pay to fund the operations of the MLC. While the Copyright Office's process for designating the MLC

and DLC examined the proposed budgets of the MLC candidates as part of assessing which candidate was best prepared to establish the administrative and technological capabilities to perform the required functions of the MLC, the designation process was separate and without prejudice to the CRB's administrative assessment proceeding. The Office trusts the CRB to follow the statutory criteria and consider all relevant and current evidence if called upon to determine the administrative assessment absent a stakeholder settlement. To the extent that the CRB may have questions about the required functions of the MLC and the expected administrative and technical capabilities of the MLC, the July 2019 Federal Register notice explaining the designation of the MLC by the Register may provide useful guidance. The CRB also has the ability to refer any questions of substantive law to the Register.

**Questions from Senator Dick Durbin:**

- 1. As you discuss in your testimony, creators of copyrighted works—including songwriters, artists, graphic designers, authors, and app developers—often lack the ability to effectively enforce their copyrights against infringement due to the expense of bringing a federal lawsuit.**

**The CASE Act will create a voluntary small claims process within the Copyright Office to help individual creators and small businesses resolve copyright disputes quickly and at reasonable cost.**

**The bill has been endorsed by a wide range of stakeholders including the Chamber of Commerce, labor unions, authors, songwriters, publishers, photographers, musicians, graphic artists, actors, and intellectual property law associations. I appreciate your support and leadership on this important legislation.**

- Can you talk about what you have heard from creators and small businesses about why a small claims process is needed for copyrights?**

Individual creators and small business have been champions of a copyright small claims tribunal for many years. Indeed, it was a comment from the Professional Photographers of America during the Copyright Office's 2006 orphan works study and in testimony before the House Judiciary Subcommittee on Courts, the Internet & Intellectual Property that initiated the current discussion on the necessity of a small claims tribunal. Since then, creators and small businesses have consistently demonstrated how and why the current federal court system does not work to effectively enforce their copyrights.

In 2011, then-House Judiciary Chairman Lamar Smith requested that the Copyright Office conduct a study on improving the adjudication of small copyright claims. During this study, which led to the Office's 2013 Copyright Small Claims report, the Copyright Office received several comments from creators and small businesses detailing situations where their works had been infringed but they did not have the resources to pursue a claim in federal court. Because infringers know that smaller creators often cannot afford to bring a case to trial in federal court, these creators' cease and desist letters and licensing offers are routinely ignored. As I explained in my recent written testimony, studies have found that the median cost to litigate a copyright

infringement suit with less than \$1 million at stake was estimated at \$200,000 in 2017, and the median time to trial in the Southern District of New York is 720 days. These factors, along with the practical necessity of hiring an attorney to navigate the procedural complexities inherent in federal court litigation, make such a process impossible for the vast majority of small creators. One vivid example of this was presented by Jenna Close, a commercial photographer, who spoke at a September 2018 hearing of the Committee on the Judiciary of the U.S. House of Representatives in favor of small claims legislation. Ms. Close described how she “witness[ed] [her] photos enlarged as the backdrop to a competitor’s tradeshow booth, while [her] paying client was rightfully using the same art work at the same trade show in their own booth.” Despite this evident infringement, Ms. Close could not pursue a claim because “[f]ederal court litigation is too burdensome and too expensive.” This lack of an effective remedy has driven creators and small businesses to organize in support of a copyright small claims tribunal.

Additionally, one important but little-discussed aspect of a copyright small claims tribunal is how it will assist users who want declaratory determinations that their use of a particular copyrighted work is non-infringing. The current CASE Act allows such claims and uses the same streamlined procedure as claims seeking to enforce a copyright. Often, users may want to make non-infringing uses of copyrighted works, whether a *de minimis* use, a fair use, or protected by another statutory limitation or exception, but are hesitant to make use of the work due to legal uncertainty. Or such a user may receive a cease and desist letter that the user believes is inaccurate because a particular use does not violate copyright law. Seeking a declaratory determination at the Copyright Claims Board for such uses can give copyright users a firm and final decision.

**2. As you note in your testimony, there are significant due process protections built into the CASE Act’s small claims system. Most importantly, parties faced with a claim will receive ample notice and can opt-out of the Copyright Office proceedings and proceed instead in federal court.**

- **Can you talk about how the Copyright Office will make sure that respondents are adequately notified about claims and opt-out rights under this system?**

The CASE Act, in its most recent iteration, provides a multi-step process to insure that a respondent has clear notification of a claim against it and is clearly and repeatedly notified of the consequences of opting out or not opting out. First, after a claim is reviewed and accepted by a Copyright Claims Attorney, the claimant notifies the respondent of the claim. This notice—in a form prescribed by Copyright Office regulations—must, in addition to notifying the respondent of a pending claim, set forth the consequences of either opting out or failing to opt out, including a prominent statement that, by not opting out, the respondent both loses the opportunity to have the dispute decided by an Article III court and waives the right to a jury trial regarding the dispute. Under the CASE Act, rules for service of this first notification are based on Rule 4 of the Federal Rules of Civil Procedure. The respondent has sixty days to respond to this initial notice. In addition, a completely separate notification is sent to the respondent by, or on behalf of, the Copyright Claims Board itself. This second notification contains the same information concerning the respondent’s right to opt out or not opt out. It may also contain additional information as prescribed by Copyright Office regulations.

The Office believes that by requiring two separate notifications, including an official notice originating from the Copyright Claims Board itself, the CASE Act will provide respondents with appropriate notification about claims and opt-out rights. Should the CASE Act become law, the Copyright Office will also ensure that the notifications from the claimant and the Copyright Claims Board are as clear and understandable as possible.

**3. While the small claims system that the CASE Act would create contains significant due process protections, it also provides streamlined processes that would help resolve copyright disputes at lower cost.**

**For example, under the bill claimants can participate in hearings before the Copyright Claims Board on the phone or online, instead of in person. Proceedings are based on simplified written submissions. And Copyright Office attorneys conduct an initial review of claims to ensure that deficient claims do not move forward.**

- **Can you discuss how these streamlined procedures would make the small claims process an appealing, lower-cost option for copyright holders seeking to enforce their rights and for users of works who are seeking to obtain a declaratory judgment of non-infringement?**

There are several important advantages of resolving small copyright claims in an efficient and effective process, and providing all parties with a streamlined and cost-effective way to resolve their disputes. A small claims process will help all parties mitigate risks of federal litigation, while providing authors more time to focus on their creative activities and allowing users to validate their non-infringing uses. In short, providing a way to resolve all of these disputes promotes a healthy copyright system, reducing frustration on all sides.

The current CASE Act promotes efficient and effective resolution through a number of streamlined procedures. For example, while the Act allows some discovery, it is limited to the production of relevant information and documents, written interrogatories, and written requests for information, as provided in regulations established by the Register. Notably, the Act excludes depositions, which can require the investment of significant resources. This, along with other streamlined procedures regarding evidence, hearings, and motion practice, will help the parties focus on the core issues.

The CASE Act also promotes efficient and streamlined proceedings by including Copyright Claims Attorneys to, among other things, provide assistance to claimants and respondents with respect to the procedures and requirements of the Copyright Claims Board. This assistance will help avoid unnecessary confusion and wasted resources. Along with the streamlined practices mentioned above, this assistance is particularly helpful to pro se parties who do not have the means to retain legal assistance, allowing them to more meaningfully participate in the adjudicatory process.

**4. Some have argued that the creation of a small claims process might generate bad faith litigation or copyright trolling. But as you note in your testimony, there are numerous checks in the CASE Act to safeguard against abusive claims. These include:**

- ✓ **a non-refundable filing fee for claimants;**
  - ✓ **initial review of claims by a Copyright Claims Attorney for deficiencies before the claim can be served;**
  - ✓ **the ability for the Board to award attorneys' fees and costs against bad actors;**
  - ✓ **the ability for the Board to cap the number of claims a party can file and to bar claimants for a year; and**
  - ✓ **the ability for respondents to opt-out of the proceedings.**
- **Can you elaborate on how the safeguards built into the legislation will ensure that the small claims process serves as a helpful and constructive option for resolving disputes and not a forum ripe for abuse?**

All of the safeguards you list are important in curbing possible abuses of a Copyright Claims Board system. At the outset, a non-refundable filing fee acts as a barrier against those who would file frivolous claims. Obviously, a fee is not an insurmountable barrier, nor should it be, but it will serve to deter some meritless claims. As a further safeguard, a claimant cannot serve a claim on a respondent until a Copyright Claims Attorney approves the claim by ensuring it complies with both the statute and the regulations. Because the Register can issue regulations that both (a) limit the number of claims per year a party may initiate, and (b) prevent harassing and improper use of the Copyright Claims Board, this step is an important check on malicious or abusive claims. The CASE Act also provides that if the Copyright Claims Board finds that if, on more than one occasion within a twelve-month period, a party pursued its interests before the Copyright Claims Board for harassing or improper purposes or without reasonable basis in law or fact, that party can be barred from initiating another claim for 12 months. Additionally, if a party pursues a claim, counterclaim, or defense in bad faith, the Copyright Claims Board is empowered to award attorneys' fees and costs against that party of up to \$5,000, or more in extraordinary circumstances, such as where there is a demonstrated pattern or practice of bad faith conduct.

The CASE Act's opt-out provisions also serve to guard against respondents being victimized by malicious or improper claims. Respondents under the CASE Act will receive two separate opportunities to opt-out at the beginning of the process, the first in response to a communication from the claimant and the second in response to a communication from the Copyright Claims Board itself, both of which will have to explain in detail the consequences of opting-out or not opting out. The Copyright Claims Board also has the option of allowing a respondent an additional sixty days in which to opt out, if it is in the interests of justice. Additionally, if the Copyright Claims Board is about to issue a default judgment, it must notify the respondent of this and allow thirty days for a response. Finally, the Copyright Claims Board has discretion to vacate default determinations in the interests of justice.

5. **There are some who argue that setting up a non-Article III administrative tribunal to resolve small copyright claims would usurp the prerogatives of the Article III courts. I would note several factors that help demonstrate the CASE Act’s constitutionality.**

**First, this proceeding is voluntary and parties can decline to participate and opt instead for federal court.**

**Second, the claims that this system would handle are not currently being litigated in Article III courts because the costs of district court litigation outweigh the damage amounts involved. So the impact on Article III courts from this bill is *de minimis*.**

**Third, the Supreme Court has said the Copyright Clause “empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the clause.” The rights and remedies of copyright owners are created and calibrated by statute, and the CASE Act would simply calibrate them further.**

- **Do you agree that, in the assessment of the Copyright Office, the administrative proceeding set up by the CASE Act passes constitutional muster?**

The Copyright Office agrees that the Copyright Claims Board process as envisioned by the CASE Act passes constitutional muster. During our study of copyright small claims, many commenters advocated for a mandatory tribunal, but the Copyright Office found that, for constitutional purposes, the tribunal must be voluntary. Specifically, Article III requires that federal courts must retain judicial power to decide copyright litigation, and certain claims provide parties with the right to a trial by jury under the Seventh Amendment. Additionally, there are Fifth Amendment due process concerns that informed the Copyright Office’s recommendation. A mandatory scheme would strip parties of these important constitutional protections, but it has been long recognized that parties are free to waive certain rights in civil cases. Thus, the Copyright Office recommended a voluntary tribunal using either an opt-in or opt-out procedure, which could be informed by policy considerations regarding the usefulness of the tribunal to all parties.

The current bill proposes an opt-out system whereby respondents have multiple opportunities to opt out of participation in a Copyright Claims Board proceeding. Indeed, the bill would mandate two stages of notice to a respondent, first by the claimant and then by the Copyright Claims Board itself, both of which will explain the consequences of opting out and not opting out with respect to the opportunity to have the dispute heard by an Article III court and the right to a jury trial. Additionally, great care was taken to ensure that the provisions in the CASE Act remain fundamentally fair for both plaintiffs and defendants. Finally, service of process provisions are based on Rule 4 of the Federal Rules of Civil Procedure, and thus are fully in accord with due process.

**6. Is the Copyright Office prepared to hit the ground running when it comes to implementing the CASE Act?**

The Copyright Office is absolutely prepared to implement all aspects of the CASE Act should it pass, including standing up and maintaining the Copyright Claims Board and promulgating all necessary regulations. We note, however, that while the Act authorizes the funds necessary to establish and maintain the Copyright Claims Board, such funds will have to actually be appropriated for the Office to have the resources to implement the CASE Act.

**7. Thank you for your work in implementing the 2018 Music Modernization Act, which I was proud to cosponsor. I appreciate that the Copyright Office is moving quickly to issue regulations to carry out the Act, and I also appreciate your designations for the mechanical licensing collective and the digital licensee coordinator. It is my hope that we can continue the cooperative spirit that has marked the passage and implementation of this bill, so that this new licensing system will succeed.**

**The Music Modernization Act made great progress on many issues facing music creators. But one issue Congress did not address was the fact that sound recordings are not afforded a performance right for AM/FM radio airplay.**

**Currently, musicians only receive royalties for performances of their copyrighted sound recordings when the works are played on digital media, like satellite and Internet radio. Musicians do not receive royalties when their songs are played on broadcast radio. The lack of a performance right for musicians for broadcast radio airplay is an anomaly in copyright law. Songwriters and composers receive royalties when their songs are played on terrestrial radio, but musicians are not compensated for such use of their songs.**

**In the past, the Copyright Office has supported a full performance right for sound recordings that includes AM/FM radio. Will the Copyright Office continue this support?**

Yes, the Copyright Office continues its longstanding support for the creation of a public performance right for sound recordings that includes AM/FM radio.<sup>18</sup> As the Office has noted in the past, because the United States lacks a full public performance right, U.S. recording artists are denied the full range of incentives for creation of works that other authors, such as the authors of musical works, enjoy. This includes being precluded from the receipt of substantial

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<sup>18</sup> See, e.g., *The Performance Rights Act and Parity Among Music Delivery Platforms: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 117–18 (2009) (statement of Marybeth Peters, Register of Copyrights); *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm. on the Judiciary*, 111th Cong. 13–30 (2007) (statement of Marybeth Peters, Register of Copyrights); *Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners with Those of Broadcasters: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 108th Cong. 8–22 (2004) (statement of David O. Carson, General Counsel, U.S. Copyright Office); U.S. Copyright Office, *Performance Rights in Sound Recordings* (Comm. Print 1978), <https://www.copyright.gov/reports/performance-rights-sound-recordings.pdf>.

royalties from the use of their sound recordings domestically. Additionally, as the United States is unique among industrialized nations in not having a full public performance right for sound recordings, other countries that do have such a right can deny payment to U.S. rightsholders for the broadcast and other public performances of their sound recordings, doubly disadvantaging sound recording owners as compared to the owners of copyrights in musical works. Thus, U.S. performers and producers would have much to gain if Congress broadened the public performance right to include broadcasts of sound recordings.