

QUESTIONS FOR THE RECORD FY2015 BUDGET

Committee on Appropriations Subcommittee on the Legislative Branch Unites States House of Representatives

Questions for the Register of Copyrights Maria A. Pallante

On March 20, 2013 you testified before the House Judiciary Committee regarding the need for possible revisions to the copyright law. Since then the Judiciary Committee has had further hearings on the way the copyright law may need to be improved and/or updated. In administering major provisions of the copyright law, would changes in the law require changes to the way the Copyright Office does business?

It is possible that revisions to the copyright law could add to the Copyright Office's responsibilities. For example, Congress has been discussing possible changes to statutory rates and compulsory licenses and the Copyright Office has delivered a major study recommending the creation of a small claims system that would be administered under the Register's supervision. It is generally true that a nimble, forward-leaning Copyright Office could absorb oversight, education and regulatory functions of the law and facilitate licensing or voluntary standards amongst private parties, thereby reducing the need for legislation in some instances. Moreover, the framework for copyright law today is increasingly international, driven by treaties, trade negotiations and global business models. As a result, many countries around the world, including, for example, Member States of the European Union, Canada and Australia, are also engaged in review or revision of domestic copyright laws. Among the many subjects of interest is how registries and data standards might improve the efficacy of copyright law on a global basis.

However, even under existing provisions it is vital that the Copyright Office have the resources and technical capacity to administer, interpret and otherwise support the law. The Office needs to stay relevant to the public interests that it serves, including several critically important sectors of the U.S. economy. These include industries that create and disseminate creative works (and invest in the technologies and platforms to do so), and those that rely upon accurate and timely copyright records for a variety of research and business endeavors.

It is for this reason that the Copyright Office commenced, and has nearly completed, an overhaul of its practices and policies for copyright registration, aligning them more comprehensively with the digital marketplace (the Compendium of Copyright Office Practices). These practices address issues such as how to register websites and how to submit deposits for databases and software. This project, though significant, is just the beginning of adjustments and

new paradigms that will be necessary in the years ahead. In short, the 20th century practices of the Office (many of which were moved to electronic processes but which otherwise have not been changed significantly since the 1970s) will need to be very carefully evaluated in the near future. Because the practices of the Office have the potential to affect the legal rights and economic interests of both copyright owners and users of copyrighted works, the Office will need to conduct a series of comprehensive analyses, including public hearings, consistent with the Administrative Procedures Act under which it operates. To the extent statutory changes may be prudent, the Register will make appropriate recommendations to Congress.

As a foundation for this work, and as I stated in my budget testimony, the Office published and conducted a series of special projects from October 2011- October 2013. Through these projects, staff of all levels participated in internal and external discussions regarding the relative strengths and weaknesses of the Office in carrying out its services and its general preparedness to meet the demands of the digital era. In November 2013, I reported on this public exchange, in a legal lecture at George Washington University sponsored in part by the members of the Copyright Society of the USA. (“The Next Generation Copyright Office: What it Means and Why it Matters.”)

Among our conclusions is that the Copyright Office’s functions and technologies should be more efficient and interoperable with those of its customers and that additional precautions should be exercised with respect to the exchange of digital works. In the case of copyright registration, these works are provided to the care of the Office by authors, publishers and producers seeking the protections of the law.

Specific strategies may require investing in commercial-grade security measures to ensure the safety of digital works; reducing or otherwise altering the deposit requirements for certain works; improving the interface, functionality and security of the Copyright Office website (www.copyright.gov) *vis-a-vis* the Register’s specific duties and authorities articulated in Title 17; offering new ways to register and identify copyright interests, for example, registering photographs through mobile device applications or identifying the individual tracks of a sound recording through new investments in Meta data and web interfaces; and implementing platforms and data standards that allow for business-to-business applications with programs and databases in the copyright industries or technology sectors.

The kinds of improvements referenced above will require capital investments but are necessary to make the Copyright Office a twenty-first century institution. More importantly, it would help create a less burdensome, more efficient and more useful copyright system for the benefit of global commerce and cultural exchange. The Copyright Office has long been a model for agencies and stakeholders in foreign countries. However, it has a clear obligation to acknowledge and plan for the next generation of services.

The Committee understands that, in accordance with the Copyright Act, the Copyright Office recently concluded a fee study, in which you assessed the costs of the Copyright Office in

providing services. Please summarize the results of the fee study, including the nature and timing of any fee increases that the Copyright Office may be implementing?

The Copyright Office expects to implement a new fee schedule on or about May 1, 2014. The current fee schedule was implemented in 2009 and includes a number of artificially deflated fees that I understand were designed to incentivize participation in the electronic system.

By way of background, the Office reviews its fees every several years in accordance with Section 708 of the Copyright Act. Pursuant to these provisions, the Register is instructed to consider both the costs of the Office in providing services and the overall objectives of the copyright system. This review is extremely important to the Office because approximately two-thirds of the Office's spending is facilitated by fee revenue. In November 2013, the Register delivered a proposed fee schedule which showed the most significant fees, including those for the registration of copyright claims and the recordation of copyright documents (which account for more than 90% of the Office's fee receipts). Congress has 120 days to disagree with the proposal and pass contrary legislation. Other fees are established directly by the Register after reviewing the costs—for example, fees charged for the copying of public records.

In summation, the Office determined that some fees should be increased, a few should be decreased, and some should remain the same. With respect to registration, the Office proposed to increase the standard registration fee for electronic registrations from \$35 to \$55, but to institute a new, reduced fee of \$35 for single authors registering single works electronically. The basic recordation fee of \$105 will remain the same, although the Office proposed a modest increase from \$30 to \$35 for processing up to ten additional titles of works in connection with a recorded document. Recordation fees remain more expensive than registration fees, but this is the subject of current public discussions on related legal, business and technology matters. The Office also collects fees for the filings of royalty reports by cable and satellite providers, and established a new fee schedule for these services in 2013 as directed under the Satellite Extension and Localism Act of 2012 (“STELA”).

We understand that some copyrighted works are more complex than others, and that copyright owners range in size from individuals to multinational corporations. Did the Copyright Office take these kinds of facts into consideration when establishing fees?

Yes. For what I believe to be the first time in the Office's history or at least modern history, we differentiated certain fees in the latest fee study, leaving fees flat for some individual authors while raising fees for publishers, producers and those filing multiple claims or claims in multiple works.

The Copyright Act directs the Register to take into account the objectives of the copyright law when recovering costs. To this end, the Office believes that individual authors should be encouraged to register the copyright interests in their works, and that pricing has a bearing on whether they will do so. Authors are the first beneficiaries of the copyright law, as prescribed by the Constitution and upheld by the Supreme Court. Registration provides an

important level of legal protection as well as an enhanced public record. The Office thus refrained from increasing the fees of single authors in instances where the applications are relatively easy to process, i.e. when they are registering copyright interests in single works electronically. By contrast, there is no compelling policy reason to subsidize the registrations of multinational corporations. These claimants cannot only afford the cost of filing but they frequently have claims that are more complex and time consuming to examine. The Office believes that the new registration fees are properly calibrated to reflect these differences and will further the goals of the copyright system. To be clear, the Office did not have the authority to charge any set of claimants more than the reasonable costs of recovery. In differentiating fees, it exercised its ability to recover less for some than for others. This approach was supported in public comments.

I expect to initiate additional fee studies over the next few years to make additional changes to the fee schedule. As the Office further refines its registration practices around digital technologies and specific categories of works (e.g. collections of digital photographs, e-books, sound recordings), it is likely to fine-tune its recommendations as to costs for specific services. Moreover, I anticipate working with Congress to assess whether and how costs might be assessed through more innovative equations. This might include mechanisms to allow for the recovery of costs in aggregate, or the recovery of capital costs that are in the interest of the copyright system, as a supplement to such funds as Congress may continue to appropriate and invest in the Copyright Office.

QUESTIONS FOR THE RECORD FROM CHAIRMAN COLE

Ms. Pallante it is very important to the Committee that a vibrant, efficient and automated copyright process is available to the public. The Committee understands from a March 22, 2013 notice in the Federal Register that you have been working with the copyright community to identify and evaluate potential improvements including information technology platforms that support the online system for copyright registration.

We also noticed a second public notice, dated January 15, 2014, regarding five options for reengineering the recordation function. To be clear we fully understand that recordation is distinct from registration. The former is the process by which you examine creative works and issue certificates of ownership and copyrightability. Recordation however refers to the system of records licenses, assignments, security interests, wills and other documents relating to the transfer or sale of copyright interests between parties. This is very important for the digital market place and we are dismayed to find out that this is still a paper-based service.

Beginning in fiscal year 2000 an investment of over \$50 million dollars has been provided to the Library for a major Copyright Office Re-engineering Project. It is our understanding that electronic registration was part of this project.

We realize this was before your tenure, but would you update us on the registration system?

Although it is a purely voluntary system, the copyright registration system has become a major focus of my tenure because I believe it has the potential to play an increasingly important role in facilitating transactions and creative partnerships in the global marketplace—following a period of several decades in which its relative purpose and usefulness was the subject of considerable debate within and outside the United States. In general, the fast-moving environment in which creative works are disseminated, streamed and otherwise used would benefit greatly from a series of interoperable identification and licensing protocols anchored by a twenty-first century registration system, in the first instance, and an equally relevant recordation system to track transfers of title, terminations and other transactions made after a registration certificate is issued, in the second instance. Thus, in the past two years, we have spent considerable time updating the Compendium of Copyright Office Practices for the digital environment, and we have spent considerable time discussing with our customers the Office's level of service in these areas and the improvements it might or should make. It is clear that in this digital era of copyright law, the ability of the Register to run the national registration system and otherwise administer the copyright law is largely dependent upon the investment, planning and management of technology infrastructure.

The electronic system that is now in place was fully implemented in 2008 by the previous Register of Copyrights, thanks to several years of dedicated funding from Congress. It was designed to transpose the paper-based systems of the Office into an electronic interface, allowing copyright owners to register their claims using the Internet. The project was executed with fiscal responsibility in mind. It was developed from off-the-shelf software and, after some discussion, placed under the Library's enterprise systems.

It is worth noting that the funding received from Congress was meant to cover a broad range of activities, including the renovation of the Copyright Office spaces in the Madison building (which required renovation to accommodate the re-engineered workflow) and the relocation of the vast majority of Copyright Office staff to temporary office space in Arlington, VA and then back to Capitol Hill. In fact, these projects were the lion's share of the \$50 million budget—accounting for \$28.4 million. The amount allocated to developing new technology systems was approximately \$15.6 million.

The transition to electronic registration was successful in that it migrated registration processes to the online world. Today approximately 90% of claimants submit applications electronically. Of these, about half mail a physical deposit for examination purposes and half upload a digital copy (representing a limited cross section of categories). As to claims submitted fully electronically, the Office issues a registration or refusal within a period that is under five months. Paper claims require more time, but are generally under ten months, because the Office must translate the application into its electronic system. Many claims fall somewhere in the middle. Public comments submitted to the Copyright Office last year represent a range of views about current operations. For example, they want user-friendly web interfaces, instructional wizards, the ability to see all completed registrations as well as the status of claims within the processing system, granulated identification systems (works within works), image recognition capabilities or partnerships with those who do, business to business applications (for batch submissions and to ensure interoperable Meta data standards), the facilitation of APIs to connect private databases, compatibility with mobile devices, and swifter and easier processes. As one

patron said to me recently, we appreciate that it is no longer a paper system but it shouldn't take 45 minutes to complete a copyright application.

Registration volume has generally remained steady over the past several decades, with inclines or declines from time to time, primarily because registration carries certain legal benefits when exercised in a timely manner (as set forth in the Copyright Act). Nonetheless, registration does not come close to encompassing most works of authorship and it is unknown, but must be presumed, that it does not encompass all of the most culturally or commercially important ones. In short, if the registration system is going to play a vital role within the copyright law of the twenty-first century, we have to make it lighter, swifter and more reflective of the digital era. Certainly the electronic registration system we have in 2014 reflects a major achievement. It does not, however, offer the level of service that would truly facilitate a twenty-first century law.

The registration system is one part of the 1976 Copyright Act and, like other chapters, it reflects an era in which businesses distributed physical copies of works and consumers felt the need to own them. Today, businesses offer many works by streaming or displaying them via an array of technologies, and consumers watch sports programming, read books, and listen to musical performances through mobile devices. Frequently this content is licensed, rather than bought and sold, and copies may or may not be offered for downloading. Because of a vast increase in Internet piracy, many copyright owners choose to keep tight controls on digital formats, including encryption and other copying controls. These kinds of realities will be a focus of the Register's office for the next few years, because they need to be evaluated against the purpose and efficacy of the law, more generally, and the degree to which the Copyright Office is keeping pace. As part of this process, the Office will continue to engage all stakeholders. In addition, it will work with the Library's collection and preservation experts, as to the Library's interest in acquiring registered works for its collection and the terms by which it might provide access to the public.

In summary, the Copyright Office is comprehensively engaged at this time in reviewing the copyright law as well as its own strengths and weaknesses as an institution. I addressed these efforts further in my budget testimony. We continue to install software updates and make necessary improvements where possible, for example, developing custom features to make the online system more efficient for both our customers and registration staff. These kinds of improvements are important, but they will not address the more systemic issues discussed above.

I am grateful for the attention and interest of Congress in this regard.

How does recordation fit into this process?

Recording transfers, licenses and other copyright documentation is a key responsibility of the Register, and like registration, it bestows some legal presumptions and benefits. It is potentially more important to the legal framework than ever before, because more and more people interact with copyrighted works than at any time in history (creating greater demand for information), and because a variety of new businesses are tasked with assessing or licensing copyrights in their work (creating frustration and gridlock). Recordation is potentially more

useful than registration because unlike registration it can present an ongoing record of who has acquired what in the way of exclusive rights. Registration, by contrast, presents an important record of copyrightability but a limited and static record of ownership.

Was it not part of the original re-engineering project? Because clearly it was our understanding that it was.

The recordation program was part of the original re-engineering project but was ultimately delayed. I understand the following were the primary reasons: (1) converting the registration system proved more costly than anticipated; and (2) a significant backlog of registration claims required the Office's full attention as to operations.

Today recordation remains the same paper submission process it always was, although Copyright Office staff transpose the documentation into electronic indexes. Among other problems with this process, it is accomplished using legacy software that is no longer supported by the Library's technology staff because it does not meet current security requirements. To address this immediate crisis, the Copyright Office is in the process of migrating the recordation system to a new set of software. This migration is not a systemic fix. It will leave the paper-based system intact. It is merely an interim step until a new system can be built that incorporates electronic submission and other business requirements informed by the intensive public process the Office has engaged in over the past two years.

Although the recordation system is rightly a major priority today, I believe that, on balance, I am pleased that it did not go forward as originally planned 10 years ago. If it had, we would not have had the benefit of the larger review that is underway in copyright law, as well as conversations in both the United States and foreign countries as to the need for interoperable copyright information. I believe we have an opportunity now to recalibrate the recordation system and make it immeasurably more useful to the digital marketplace than it is in its 20th century incarnation. We have done quite a lot of groundwork on this front in the past couple of years. In addition to the special projects on technology matters described above, we are in the middle of a targeted public discussion regarding recordation particularly. We recently solicited written comments from the public and, later this month, are conducting three public hearings. The hearings will focus on five questions that will further refine our recommendations to Congress and our strategies for administrative improvements.

Finally, I am concerned that the registration and recordation databases, as currently populated and presented, do not produce adequate information about registered claims or their owners. This is unfortunate for many reasons, but the primary reason is that in the case of a timely claim, a copyright owner may elect statutory damages, which can be considerable, against an infringer. While the policy is reasonably sound, it quickly becomes problematic if the state of the Copyright Office's database prevents a good-faith actor from locating or interpreting the chain of title or the scope of the registration. These issues were a focus of Congressional deliberations in recent years regarding the problem of so-called "orphan works" (missing copyright owners) and the requirement that would-be users conduct a diligent search of copyright records.

What is your estimate of the cost and time frame for automating recordation?

Revising and administering the recordation process will be a primary duty of the Office of Public Records and Repositories, a new department designed to ensure accountability to the law and to our customers. To commence a re-engineering effort in FY 2015 (following the preparatory work and forthcoming conclusions of 2014 described immediately above) would cost approximately \$1.5 million to cover the essentials of year-one planning and requirements gathering.

The full costs of a system build-out are not yet known but could be prepared in the months ahead, as soon as we conclude the public hearings and complete initial requirements gathering. As with registration, some of the reengineering efforts may need to occur in phases to ensure maximum improvements. For example, we may be able to vastly change the interface and procedures for prospective customers in a first generation effort, leaving room to implement greater improvements thereafter and taking care not to build anything that creates inflexibility as to future improvements that may be desirable. We will also need strategies to integrate the limited information of historic records into new databases. In any event, it is clear that the long-term success of a recordation project will depend upon the quality and flexibility of technology infrastructure. It may also require retraining staff or recalibrating their roles over time.

The Copyright Office has other funding needs that are related to recordation, as recordation is part of the chain of title that derives from registration and which should be available as a seamless part of the public record. These are the costs of creating secure repositories (\$3 million for analysis and requirements gathering) and costs to establish an application development environment (\$2.4 million). These are initial costs only and do not reflect the kind of capital funding that will be necessary to truly remake the Copyright Office functions in the long-term.

What other parts of the automated “re-engineering” project, if any, were not completed and why?

The final re-engineering plan did not include dedicated repositories for digital works, for reasons that are unclear to me. I mention them here because my staff tells me they were initially contemplated and then removed. Today, a digital deposit that is submitted by a copyright owner to the Copyright Office via registration is stored on a server, in some instances alongside files from other parts of the Library. This has worked more or less without incident during the past years, but is unsustainable as a business model and insufficient as to the Register’s custodial duties under the Copyright Act.

The Copyright Office’s needs in this area are a priority for me. As discussed above, the Office has just begun to consider a number of new registration paradigms, to better align registration practices to the digital marketplace, including the formats of creative works. While it is certainly possible that the Office may cease to require the submission of physical copies in some instances, it is also true that the Office may increase or strengthen its requirements for digital works, for example, thumbnail images or digital film. In any case, where the Office

requires a digital copy of a work as a condition of granting a copyright registration, it has a legal duty to treat that work securely. In my view, this includes providing dedicated and discrete storage, file protection, and other security measures that meet the expectations of our customers and the law.

As a foundation for this work, my team and I created a new senior level position, the Director of Public Records and Repositories as part of a 2013 reorganization request submitted to the Librarian. The reorganization is designed to update the functions of the Copyright Office and reallocate resources to critical areas. Likewise, we created the position of Chief Information Officer, to advise the Register on information technology matters that increasingly affect the full spectrum of Copyright Office activities. This position will supervise the day-to-day technology maintenance that is already in place, and for the first time ensures the Office has a dedicated focus on future technology needs. Both positions were effective March 10, 2014. (For more information, see www.copyright.gov/newsnet.) Finally, as noted above, the Copyright Office conducted an extensive public discussion regarding its state of technology and future needs from 2011-2013. Per the conclusions of that process, the Copyright Office must make significant improvements to its technology and related business practices in order to carry out its statutory responsibilities effectively.

QUESTIONS FOR THE RECORD FROM RANKING MEMBER WASSERMAN SCHULTZ

The U.S. is currently engaged in important negotiations with other countries that have substantive copyright components. As the federal entity with particular expertise in U.S. copyright law, the Copyright Office has an important role to serve in these negotiations.

Does the office have the resources necessary to fully, effectively and consistently participate in these negotiations?

No it does not. The Copyright Office is short on both staff and travel funds. As a result we participate in bilateral and multilateral negotiations, as well as important intergovernmental meetings, only on a case-by-case basis. For example, the Office has been unable to attend all of the relevant meetings of the Standing Committee on Copyright at the World Intellectual Property Organization in Geneva and has been unable to attend all of the trade negotiations pertaining to intellectual property in the Pacific Rim. This is unfortunate because the framework for copyright law has become largely if not primarily international in recent years and, in any case, the United States is in the midst of an extremely busy period of negotiations involving trade and treaty obligations. Other agencies rely upon the Copyright Office for its expertise in all areas of copyright law—the interpretation of domestic provisions and jurisprudence, foreign copyright laws, and international obligations.

I should clarify that the staffing shortage has affected a number of areas, including the ability to replace vacancies in our registration program and public information department. That said we have an especially acute shortage of seasoned lawyers—that is, the experienced legal experts who can participate in or lead complex discussions. This is doubly problematic now because the Congress is so substantively involved in domestic copyright policy (in a manner that

has not been the case in many years) and is thus drawing heavily (and appropriately) on Copyright Office lawyers for studies, preparatory work and leadership. To this end, the ability to hire even a few additional lawyers would make a significant difference at this time.

Because of staffing shortages, the Register relies on a small group of people to carry out its law and policy activities. While dedicated, these lawyers are in an impossible situation trying to balance the Office's service to Congress, its service to the U.S. Trade Representative, Department of Commerce (and USPTO), and Department of Justice, and support of the many statutory and regulatory questions that stem from administering copyright registration and recordation, for example. Much of this legal work is time-sensitive or, in the case of negotiations, carries expectations of dedicated support and overseas travel.

Separate from staffing shortages, I would also note that the portfolios of Copyright Office lawyers have grown increasingly complex in recent years. Many lawyers are handling work that is exceedingly important to the United States and which requires significant investments of time and effort over weekends and evenings. We also rely upon them to mentor and review the work of junior staff on a consistent basis. While this kind of work ethic is natural at the top of any legal organization, it is my view that the Copyright Office needs more senior level positions, both to attract qualified attorneys and to reflect the actual complexity and importance of the work being asked. I have discussed this observation with the Library and will continue to assess the situation.

Related to the staffing deficits described above, the Copyright Office is short on travel funds. Most copyright issues today involve international relations, not only in the context of formal negotiations but also for important meetings and professional conferences that require a United States presence. However, this is not only an international issue. The Office has many domestic duties, speaking to legal associations, state bars, and stakeholders and attending major conferences and meetings. Where possible, the Office seeks external funding to offset costs, but for ethics reasons this is not normally an option.