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Modernizing the Copyright Office for the Digital Age Economy

by

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Introduction and Summary

In Federalist No. 27, Alexander Hamilton wrote: “I believe it may be laid down as a general rule that their confidence in and obedience to a government will commonly be proportioned to the goodness or badness of its administration.”* Indeed, it may also be laid down as a general rule that confidence and obedience to the protections of copyrights will commonly be proportioned to the goodness or badness of copyright administration. Put simply, efficient and proper implementation of copyright law is essential to securing the rights of creative artists to the fruits of their labors.

A well-administered system of copyrights is also a critical driver of value in the Digital Age economy. According to “Copyright Industries in the U.S. Economy,” a December 2016 report published by the International Intellectual Property Alliance, the “core copyright industries” generated \$1.2 trillion in U.S. economic activity in 2015. That same year, copyright industries employed 5.5 million U.S. workers, or 3.87% of the nation’s workforce. A system providing secure and ascertainable legal title to copyrighted works encourages creative production and enhances their value as exchangeable goods.

* References to the principal authorities upon which we rely are at the end of the paper.

The Constitution's Intellectual Property Clause, contained in the Article I, Section 8, Clause 8 empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Congress created the U.S. Copyright Office in 1897 and entrusted it with the responsibility of administering federal copyright law. However, at present, the Copyright Office is not structurally or technologically positioned to administer copyright law in a manner that will help maximize the potential value of copyrighted works in the Digital Age.

The Copyright Office's registration and transfer recordation processes are outdated and underdeveloped. And importantly, the Office lacks the autonomy necessary to make and implement long overdue upgrades to its technological capabilities and capacities. Absent changes, the lost opportunity costs to creative artists that result from the Office's structural and technological impediments can be expected to increase as the economic importance of copyrights and other intellectual property rights continues to grow.

So, the Copyright Office needs to be modernized in order to improve the performance of its administrative functions. Congress should restructure the Copyright Office by making it autonomous from the Library of Congress. As a standalone agency independent of the Library of Congress, the Copyright Office would be better positioned to make necessary technological and other infrastructure upgrades, including a comprehensive searchable database of copyright registration and transfer records.

Importantly, removing the Copyright Office from the Library of Congress will pose no harm to the Library's continued functioning. As the record of history reveals, administration of copyright protections under the Constitution and laws of the United States long predated establishment of the copyright registration duties within the Library of Congress. Section 3 of the Copyright Act of 1790 required authors and other creators to register their works with federal district court clerks and deposit a copy of their works with the clerks. Moreover, the early Congresses drew no connection between the Library and copyright administration.

History does reveal an operational connection between the Library of Congress's functions and registration requirements for the deposit of copyrighted books and other creative works. The Library began to receive copyright deposits in 1846. However, the Supreme Court and lower courts determined that delivery of deposit copies to the Library was separate from the copyright registration process. And the Library did not perform any copyright registration functions until the Copyright Act of 1870 centralized all registration and deposit activities within the Library. Looking forward, the requirement that copyright "deposit books" be delivered to the Library can be retained even if the Copyright Office is granted autonomy from the Library.

In 1897, when Congress established the Copyright Office within the Library of Congress, it created the position of Register of Copyrights to direct the Office. The 1897 Act required that the Librarian of Congress receive Senate confirmation, and it also assigned the Librarian responsibility to appoint the Register and to remove the Register at will. Placement of the Copyright Office within the Library was against the expressed preferences of Ainsworth R. Spofford, the Librarian of Congress who initiated the Library's transition to a national cultural

institution. Nonetheless, the unusual structure established in 1897 gave the Librarian ultimate authority over copyright administration.

Unfortunately, especially today, the Copyright Office's functionality and efficiency increasingly are strained under the structural arrangements of 1897. The Librarian of Congress's ultimate authority over the Register of Copyrights as well as the Copyright Office's functions and budget resources structurally diminishes the Office's stature. The Library's collections and research-related priorities differ significantly from copyright registration and transfer recordation priorities of the Copyright Office. Moreover, the Office's budget is evaluated by the Librarian in light of the Library's other budget priorities. Budget figures reflect the Office's diminished stature. For fiscal year 2016, Congress provided base funding appropriations for Library of Congress salaries of nearly \$418.5 million. That same fiscal year, base funding for the Office was about \$53.3 million. In recent years, between 58% and 67% of the Office's budget is obtained through fees.

As currently structured, the Copyright Office lacks the autonomy to make strategic decisions about its communications and information technology infrastructure capabilities and to implement needed upgrades. A 2015 Technical Upgrades Report prepared by Office observed that "the Copyright Office does not have a fully-resourced technology shop" and that "[a]ll administrative control over the infrastructure, operating systems, data base systems, storage systems, telecommunications systems, legacy systems, and other common IT resources are controlled by the Library." Similarly, a 2015 report by the Government Accountability Office (GAO) found that the Office's primary registration processing system "has had significant technical issues, both with the system itself – managed by the Copyright Office – and with its underlying infrastructure, managed by the Library's central IT office." Further, the GAO report found that "the Library has serious weaknesses in its IT management, which have also hindered the ability of the Library and the Copyright Office to meet mission requirements."

By providing the Copyright Office with autonomy, the Register would enjoy elevated stature within the government that is needed to carry out its important functions in an effective and efficient manner. A restructured Copyright Office that is autonomous from the Library of Congress and that has authority over its own budget would be better positioned to make necessary upgrades, including a comprehensive searchable database of copyright registration and transfer records. Streamlined processes and searchable databases will facilitate the kinds of voluntary exchanges that are significant drivers of economic value in copyrighted works. Technology-enabled reductions in registration burdens would benefit creators of copyrightable works. And would-be purchasers of copyrighted works would benefit from more reliable and less costly searches for current owners.

Restructuring of the Copyright Office is also needed to ensure the Office's operations more clearly align with separation of powers principles. Congress's placement of the Office within the Library of Congress is incongruous with the executive nature of the Offices' core administrative functions. Congress's long-standing identification of the Office as a legislative agency is contradicted by the reasoning of Supreme Court and lower court decisions involving the Constitution's Appointments Clause, contained in Article II, Section 2, Clause 2. The Clause is intended to ensure that administrative agencies performing executive functions be accountable to

the President through the process of appointment. In particular, two federal appeals court decisions have concluded that the Librarian is an “Officer” and the “Head of a Department” in the Executive Branch and that the Register is an “inferior Officer” in the Executive Branch.

Notably, in *Eltra Corporation v. Ringer* (1978), the Court of Appeals for the Fourth Circuit recognized: “The operations of the Office of the Register are administrative and the Register must accordingly owe his appointment, as he does, to appointment by one who is in turn appointed by the President in accordance with the Appointments Clause.” The Fourth Circuit added: “[I]t would appear indisputable that the operations of the Office of Copyright are executive. . . . It is irrelevant that the Office of the Librarian of Congress is codified under the legislative branch or that it receives its appropriation as a part of the legislative appropriation.”

The executive branch status of the Library of Congress and the Copyright Office appears to have been further affirmed by the D.C. Circuit in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board* (2012). In *IBS*, the Court of Appeals for the D.C. Circuit analyzed Copyright Office functions of the Register and the Copyright Royalty Board and stated: “[T]he powers in the Library and the Board to promulgate copyright regulations, to apply the statute to affected parties, and to set rates and terms case by case are ones generally associated in modern times with executive agencies rather than legislators.” The D.C. Circuit’s reasoning applies even more clearly to the Register, because that position exercises executive functions that are far more wide-ranging than setting royalty rates.

There are three main options for restructuring the Copyright Office that are generally consistent with the Appointments Clause and separation of powers constitutional principles. The first option involves Congress making the Office an autonomous executive agency headed by the Register of Copyrights. A second option involves Congress making the Office an autonomous independent executive agency headed by the Register. A third option involves Congress making the Office autonomous from the Library of Congress but continuing to deem it a legislative agency for congressional oversight and appropriations purposes. Each option would promote the Register to the status of a principal “Officer” under the Constitution. This is important because such an elevated status befits an official charged with administering laws passed by Congress to secure constitutionally recognized copyright protection and upon which billions of dollars in economic value depends.

Importantly, each of these three reform options could be implemented while maintaining the requirement that the Copyright Office deliver all deposit copies to the Library. And by making the Copyright Office autonomous, thereby removing its associated executive functions from the supervision of the Librarian, the Library of Congress would be rendered a truly legislative agency. Such reforms would also enable Congress to consider alternative modes of selecting the Librarian to make the Office more accountable to Congress rather than to the President. For example, the Librarian could be nominated by the Joint Committee on the Library and be subject to Senate confirmation. If the Copyright Office is made autonomous from the Library, then Congress could adopt structural reforms for the Library without jeopardizing Copyright Office functions or copyright protections.

Pending in Congress are bills that would restructure the Copyright Office in a manner largely in line with the third reform proposal listed above. In April 2017, the U.S. House of Representatives passed House Resolution 1695, the “Register of Copyrights Selection and Accountability Act.” The bill, which enjoys bipartisan support, is sponsored by House Judiciary Chairman Bob Goodlatte, and co-sponsored by Ranking Member John Conyers.

If the bill were enacted, the Copyright Office would be separated from the Library of Congress. Hence, the Register’s authority as the Director of the Copyright Office would no longer be subject to the Librarian’s supervision. HR 1695 expressly requires that the Register “shall be capable of identifying and supervising a Chief Information Officer or other similar official responsible for managing modern information technology systems.” And the bill expressly states that it may not be construed to impact the mandatory deposit requirements under federal copyright law. Under HR 1695, the Register would be subject to a nomination and Senate consent process with a 10-year term limit, subject to potential re-nomination by the President.

In most respects, HR 1695 reflects Congress’s longstanding institutional practice of regarding the Copyright Office as a legislative agency. The House Judiciary Committee’s report for HR 1695 described the Register as “a legislative branch official.” Nonetheless, HR 1695’s changes to the selection process for the Register do reflect the executive nature of the Copyright Office’s functions and the Constitution’s underlying structural requirements for an officer entrusted with such duties. As the D.C. Circuit’s *Intercollegiate Broadcasting System* opinion suggests, despite whatever descriptive language Congress may use regarding branch designation, the actual executive functions performed by the Register in carrying out his or her responsibilities most likely would support the restructuring of the Office with the Register’s appointment by the President.

If HR 1695 or a similar reform bill is enacted, the Copyright Office would obtain a measure of independent authority and be repositioned to more easily acquire the property, personnel, supplies, and technology needed to carry out its mission in the Digital Age. While other restructuring options should not be foreclosed at this stage, the need for Copyright Office autonomy from the Librarian and for a modernized Office is clear. Such restructuring and modernizing is essential to the good administration of the system and to the achievement of its important purposes of protecting authors’ and other creators’ rights to earn a return on their labor and to promote “the Progress of Science and useful Arts.”

History Provides Context for Considering Restructuring of Copyright Office

The history of federal copyright administration and of the Library of Congress provides critical context for understanding the merits of restructuring and modernizing the Copyright Office. A historical perspective reveals that administration of copyright protections under the Constitution and laws of the United States did not originate with the Library of Congress. The Copyright Office was not established within the Library until federal copyright laws had been in operation for over a century. Even then, the placement of the Copyright Office within the Library in 1897 was at odds with the considered judgment of the Librarian. Further, a historical perspective reflects the fact that there is no necessary operational connection between the Library and the registration, transfer, and recordation functions of the Copyright Office. Rather, the Library only

has a close operational connection to copyright deposits. Such deposits have been crucial to building up the Library's collections. And the record of history reveals that the Library can benefit from copyright deposits without the need for core copyright administrative functions to be subject to the Library's own authority.

Copyright Administration and the Library of Congress in Early Congresses

The First Congress established the initial administrative process for implementing the Article I, Section 8, Clause 8's provision "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." One of the landmark accomplishments of the First Congress was the passage of the Judiciary Act of 1789, which created the federal court system. Undoubtedly, the First Congress expected that federal courts would provide a venue where authors and other creators could seek to enforce their copyrights. Accordingly, Section 3 of the Copyright Act of 1790, signed by President George Washington, required authors and other creators to register their works with federal district court clerks, deposit a copy of their works with the clerks, and procure newspaper announcements of copyright recordation. Authors and other creators were also required to send a copy of their works for deposit to the U.S. Secretary of State's office within six months of publication. Minor revisions made to the Copyright Act in 1802 required authors to affix a copyright notice on the title page inside every printed book copy. And several years later, in *Wheaton v. Peters* (1834), the Supreme Court's majority concluded that the 1790 and 1802 Acts' requirements for newspaper publication of copyright records obtained at district court clerks' offices and deposits of book copies to the Secretary of State were necessary prerequisites to the vesting of title to the copyright.

Meanwhile, the First Congress rejected a proposal by Representative Elbridge Gerry of Massachusetts to form a committee that would compile a list of desired volumes and estimated costs for the establishment of a small library to be used by members of the legislative and executive branches. The early Congresses that met in New York and Philadelphia were given access to local private libraries. Then, in April 1800, Congress established the Library of Congress as part of an act providing for the removal of the capital from Philadelphia to Washington, D.C. President John Adams signed the legislation, which provided "for the purchase of such books as may be necessary for the use of Congress at the said city of Washington, and for fitting up a suitable apartment for containing them and placing them therein." The clerk of the House of Representatives and the Secretary of the Senate were jointly responsible for the Library. In 1802, Congress passed, and President Thomas Jefferson signed, an act making the position of librarian subject to Presidential appointment and establishing a Joint Committee of Congress on the Library to direct library activities and spending of library appropriations.

Although the Massachusetts 1783 copyright law required authors to submit to Harvard College's library a copy of their work as a condition for receiving protection under state copyright law, the First Congress did not follow Massachusetts' example. The early Congresses drew no connection between the Library and copyright registration or deposits. Rather, for the first several decades, the Library of Congress relied exclusively on appropriations or donations to increase its collections. Nor did Congress pursue copyright deposits as a means of enhancing its resources

after most of the Library's collection and records were destroyed in a fire set by British soldiers in 1814. Congress restored the library by purchasing Thomas Jefferson's private library of over six thousand volumes. And for the three decades that followed, the reconstituted Library of Congress continued to rely upon acquisitions by purchase as directed by the Librarian or by the Joint Committee on the Library. Throughout its first century of operation, the Library's collection was strongest in subjects most sought after by members of Congress for carrying out their legislative duties, including geography, history, and the law of nature and nations.

The Copyright Act of 1831 revised the recordation process by requiring a copy of the book or other copyrighted work to be submitted to the clerk of the federal district court where the proprietor resided prior to publication, and within three months of publication to deliver that copy to the district court's clerk. District court clerks were required to transmit, at least once per year, a certified list of all copyright records and deposit copies to the Secretary of State for preservation. The 1831 Act also provided for recordation of copyright renewals with clerks of the federal district courts. And an 1834 amendment likewise required that transfers of copyrights be recorded with clerks of the federal district courts.

Copyright Deposit Requirements and the Library of Congress

Relying on the late British national James Smithson's bequest to the United States, Congress established the Smithsonian Institution in 1846. A section of the act required "the author or proprietor of any book, map, chart, musical composition, &c., for which a copy-right shall be secured under the existing acts of congress, or those which shall hereafter be enacted respecting copy-rights" to send "one copy of the same to the librarian of the Smithsonian Institution, and one copy to the librarian of congress library, for use of the said libraries." However, Congress did not attach any enforcement provisions to the 1846 dual deposit duty. In *Jollie v. Jacques* (1850), a circuit court decision, Justice Samuel Nelson concluded that failure to comply with the 1846 Act's dual deposit duty did not void the copyright protections that an author or creative artist already secured by complying with the terms of the 1831 Act. Between 1846 and 1859, copyright registrants often neglected to send deposit copies to the Smithsonian library and to the Library of Congress. An 1855 law that provided free mail service for delivery of copyright deposits to the two libraries apparently did little to improve compliance. Due to continuing lack of compliance, and to complaints that the deposited copies actually delivered were often of poor quality and administratively costly to sort and store, in 1859 Congress eliminated the dual deposit duty for authors who had secured copyright protections. The 1859 Act also transferred all of the State Department's copyright deposits to the Patent Office in the Interior Department.

An 1865 copyright amendment restored copyright deposits for the Library of Congress's collection. It required a copy of the work be deposited with the Librarian within one month of publication, with the penalty of forfeiture. An amendment passed by Congress in 1867 imposed a \$25 fine for failure to comply with the Library deposit requirement and also established free mail service to the Library for "copyright matter." However, registration records were located in federal district court clerks' offices throughout the nation, necessitating numerous visits to inspect records and to obtain transcripts of those records. And compliance demands could not be issued because such records lacked address information for non-complying copyright holders. According to Librarian of Congress Ainsworth Rand Spofford, whose lobbying of Congress

helped secure passage of the 1865 Act, “no complete, nor even approximate compliance with the law was secured and after five years’ trial, the Librarian was obliged to bring before the committees of Congress the plan of a copyright registry at the seat of government.”

Spofford, who resided in Ohio from the 1840s to the early 1860s, had been a bookseller, journalist, and author. A pre-Civil War opponent of slavery, one of Spofford’s many publications was the then-anonymous essay *The Higher Law Tried By Reason and Authority* (1851), which was occasioned by the Fugitive Slave Act of 1850. The book analyzed man’s rights and duties in light of natural law precepts and unjust laws of the state. Spofford’s journalistic career also included the publication of articles on aspects of copyright law. In early 1861, Spofford accepted a position as Assistant Librarian of Congress, and in 1865 President Abraham Lincoln appointed him to the position of Librarian. Spofford is widely regarded as initiating the Library’s expansion from a resource for legislators into a nationwide cultural institution.

The Copyright Act of 1870 centralized all federal copyright registration and deposit activities in the Library of Congress. Federal district court clerk’s offices were thereby relieved of administrative duties relating to copyright, and the Patent Office was relieved of copyright deposit responsibilities. The 1870 Act transferred to the Library all copyright records and deposits previously retained by the Patent Office, including those originally received by the State Department. The Smithsonian’s library collection was likewise transferred to the Library.

Spofford was also an aggressive advocate before Congress on behalf of the 1870 Act, which became the second major overhaul of copyright law. In his advocacy, Spofford was supported by Patent Commissioner Samuel D. Fisher, his friend and fellow Ohioan. As Spofford later explained: “The transfer of the copyright records to Washington it was foreseen would concentrate and simplify the business, and this was a cardinal point.” Regarding copyrighted works as literary contributions, Spofford reasonably concluded they fit within the scope of a national library system rather than any other department of the federal government. He also regarded copyright deposits as an advantageous means for procuring a comprehensive collection of copyrighted books in order to “to build up at Washington a truly national library, approximately complete and available to all the people.”

Implementation of the 1870 Act meant that the Library of Congress handled copyright registration directly. Following the 1870 Act’s adoption, the Library was inundated with copyright registration applications for product advertisements and labels. It was not long before the Librarian began urging Congress to move copyright administrative functions outside the Library. At Spofford’s urging, Congress passed the 1874 Print and Notice Act, which made the Patent Office responsible for receiving such applications and issuing certificates of copyright for print ads and labels. Also, the extensive amount of book deposits and copyright-related materials transferred to the Library as a result of the 1870 Act prompted Congress to appropriate money for a new library building in 1886.

Congress’s passage of the International Copyright Act of 1891 further increased the volume of copyright registration activity for which the Library was responsible. As described in our *Perspectives from FSF Scholars* paper, “[The Logic of International Intellectual Property Protection](#),” the 1891 Act provided copyright protections to authors from foreign nations that

provide similar copyright protections to American authors. According to Congressional testimony delivered by Spofford in November 1896, copyright administration consumed over 75% of the Library staff's time, with much of the increasing volume of administrative work resulting from the 1891 Act.

Establishment of the Copyright Office and Register of Copyrights

In February 1897, Congress passed an appropriations act that expressly established the Copyright Department (as it was then known) within the Library of Congress. The 1897 Act created the position of Register of Copyrights to direct the Copyright Department. The Librarian of Congress was assigned responsibility to appoint the Register and to remove the Register at will. Also, the 1897 Act changed the mode of selection for the Librarian from mere Presidential appointment to Presidential nomination and Senate confirmation. Thus, by virtue of the Librarian's power to appoint or remove the Register, the Library retained authority over copyright administration.

Significant debate about the mode of selecting the Register preceded adoption of the 1897 Act. Legislation reported out of the Joint Committee on the Library and debated in Congress in 1896 would have given the Library Committee responsibility for appointing the Register of Copyrights. Members of both houses strongly objected to the constitutionality of placing such powers of appointment with the Library Committee, and the bill reported by the Library Committee was rejected. Another foregone approach was reflected in legislation introduced in 1895, which would have established a Copyright Department headed by a Register of Copyrights subject to nomination by the President and confirmation by the Senate.

Also significant is Spofford's support for separating copyright functions from the Library's functions. Before a House Committee, Spofford recommended Congress place copyright administration "in charge to a separate responsible and competent officer, who might be called the registrar of copyrights." And in floor debate in 1896, Representative Amos Cummings from New York reminded members of Spofford's preference that the Copyright Office not be placed within the Library of Congress. At the same, Spofford remained steadfast in his support for requiring that copyright deposits be delivered to the Library. He testified to a House committee: "[I]t would be eminently proper that the Registrar of Copyrights, when appointed, should hand over to the Librarian all publications received by him that have gone through the necessary process, so as to form part of the Library collections."

Following Spofford's resignation as Librarian, President William McKinley nominated his friend James Russell Young to be the new Librarian. In June 1897, Young became the first Librarian to be confirmed by Congress. The day after his confirmation, Young appointed Spofford as Chief Assistant Librarian. Spofford held that post until his death in 1908. Young previously toured the world with former President Ulysses S. Grant in 1877-1879 and published a widely read account, *Around the World with General Grant* (1879). Young died in Office in 1899. On April 5, 1899, McKinley nominated Herbert Putnam, and he was confirmed on December 12, 1899. Putnam served as Librarian from 1889 to 1939, the longest tenure of any Librarian of Congress. To date, there have been fourteen Librarians to serve in the position.

In July 1897, Librarian of Congress Young appointed Thorvald Solberg as the first Register of Copyrights and Director of the Copyright Office. Solberg previously worked on the staff of the Library of Congress from 1876 to 1889. He served as Register from 1897 until 1930, and remains the longest-serving Register of Copyrights. During his tenure, Solberg authored numerous publications on U.S. and international copyright law and helped conduct a series of conference meetings that preceded the drafting and adoption of the Copyright Act of 1909. Solberg also oversaw the significant administrative growth and development of the Copyright Office – as it came to be known by 1900. According to Register Solberg’s “Report of Copyright Department for Fiscal Year 1898-1899” (July 1, 1899 to June 30, 1899): “The total number of entries of title during the year was 80,968.” During that period, 1,218 assignments of copyright were recorded and certified. The Copyright Office’s net receipts received from fees totaled \$57,858.10. The number of copyright deposits received numbered 120,143. Also, the Office received 67,666 letters and dispatched 98,729 pieces of mail.

Including Solberg, a total of 12 Registers have served in the Copyright Office, in addition to several acting Registers. And over the course of 120 years, the volume and scope of the Copyright Office’s administrative operations have grown dramatically. During fiscal year 2016, the Copyright Office received 533,606 registration claims and processed 469,455. The Office recorded 10,865 documents containing titles of more than 197,000 works. The Office received \$29.6 million in receipts from copyright registration and \$2.6 million in receipts from document recordation. Further, in fiscal year 2016 the Office collected nearly \$242 million in copyright royalty fees for retransmission of broadcast TV programming and distributed \$208.8 million from prior years to copyright owners whose works were used under these licenses. Additionally, Copyright Office staff answered more than 193,600 inquiries by phone, email, and regular mail, and retrieved and copied thousands of copyright deposit records for parties involved in litigation. Also, the Office assisted nearly 2,000 in-person visitors.

The vastly increased scope and volume of Copyright Office workload reflects the increased importance of copyrights to the digital economy. A December 2016 report published by the International Intellectual Property Alliance, titled “Copyright Industries in the U.S. Economy,” found that the “core copyright industries,” generated \$1.2 trillion in U.S. economic activity in 2015. That same year, copyright industries employed 5.5 million U.S. workers, or 3.87% of the nation’s workforce.

As the history of federal copyright administration and the Library of Congress reveal, the Copyright Office and the Library of Congress have different core functions. The point of intersection between the distinct functions of those two institutions rests solely with copyright deposit requirements. The task for Congress will be to restructure the Copyright Office so as to give it authority over its own core functions and thereby enable it to address those obstacles. This task can readily be accomplished while ensuring that the Library continues to benefit from copyright deposit requirements.

The Copyright Office Should Be Restructured and Made Autonomous from the Library of Congress

The Librarian of Congress's ultimate authority over the Register of Copyrights as well as the Copyright Office's functions and budget resources structurally deprioritizes the Office. Existing structural arrangements render the Register an "inferior Officer" under the Constitution, despite the Constitution's express recognition of copyright protection.

The Librarian has an array of responsibilities focused principally on developing and preserving its collections, which document the history of the American people and their contributions to the advancement of knowledge. According to its current mission statement: "The Library's mission is to support the Congress in fulfilling its constitutional duties and to further the progress of knowledge and creativity for the benefit of the American people." As a storehouse of knowledge and creativity, the Library's responsibilities are focused principally on acquiring, cataloging, circulating, and preserving its collections of books, maps, and audio and visual materials. In fiscal year 2015, the Library "responded to more than 1 million reference requests from Congress, the public and other federal agencies and delivered approximately 20,500 volumes from the Library's collection to congressional offices." The Library welcomed close to 1.6 million onsite visitors during that fiscal year. Among its other operations, the Library circulates books to the blind and physical handicapped.

The Congressional Research Service (CRS), which is a legislative branch agency within the Library, also performs information-providing functions. According to its Mission Statement, "CRS serves the Congress throughout the legislative process by providing comprehensive and reliable legislative research and analysis that are timely, objective, authoritative and confidential, thereby contributing to an informed national legislature." In fiscal year 2016, "CRS received 563,000 requests for products and services from Members and committees, including approximately 62,000 requests for custom analysis and research."

The Library of Congress's materials collections and research-related functional priorities differ significantly from copyright registration and transfer recordation functional priorities of the Copyright Office. The deprioritized status of the Copyright Office is reflected in budget appropriations. For fiscal year 2016, Congress provided base funding appropriations for Library of Congress salaries of nearly \$418.5 million. That same fiscal year the base funding for the Copyright Office was about \$53.3 million. And in recent years, between 58% and 67% of the Copyright Office's budget is obtained through fees. Moreover, as of September 2015, the Library had 3,094 permanent employees compared to 387 permanent employees in the Copyright Office.

In 2015, former Register of Copyrights Maria Pallante expressed to Congress her support for restructuring the Copyright Office as a necessity for modernizing its operations and enabling it to effectively function in the digital economy – a viewpoint that was endorsed by former Register Marybeth Peters. Describing Copyright Office appropriations before a congressional committee that year, then-Register Pallante testified that "its budget is part of the Library's budget, is presented to Congress by the Library, and is weighted and prioritized by the Library alongside other needs of the Library." As Register Pallante explained, this budgetary arrangement

“generally has not served the copyright system well,” particularly because “the Copyright Office’s resources are inadequate to support the digital economy it serves.”

The inadequacy of the Copyright Office’s response to the digital economy is also described in [“A 21st Century Copyright Office: The Conservative Case for Reform,”](#) a white paper by former Register of Copyrights Ralph Oman and Steven Tepp. The authors explain that the Copyright Office’s registration database is “woefully unsuited” to its task of providing a public record of published, copyrightable works. Online searching of registration records from 1978 to present is available “only in limited fields (e.g., author, title) and with limited functionality.” Also: “Not only are the recorded transfers not searchable online, the application process itself remains entirely paper-based, as it was when the Library took over that function in 1870.” The outdated state of the Copyright Office’s technological capabilities are also examined by Professor Robert Brauneis in his 2014 report, “Transforming Document Recordation at the United States Copyright Office”:

In 1870, the full texts of documents submitted for recordation were transcribed in handwriting into bound volumes, and index entries were made in handwriting in the front of each of the volumes. In 2014, digital images are made of remitted documents, and the document index is maintained in a computer database available on the Internet. In other respects, however, document recordation at the Copyright Office has changed little since 1870. As they were in 1870, documents are still only accepted on paper, and Copyright Office recordation specialists create the index of recorded documents by reading each document and manually transcribing selected information from it.

Unfortunately, the Copyright Office lacks the autonomy to make strategic decisions about its communications and data processing infrastructure capabilities and to commit to implementing needed upgrades. A 2015 Technical Upgrades Report prepared by the Copyright Office’s Chief Information Officer and project team observed that “the Copyright Office does not have a fully-resourced technology shop” and “[a]ll administrative control over the infrastructure, operating systems, data base systems, storage systems, telecommunications systems, legacy systems, and other common IT resources are controlled by the Library.” The Report also recognized that “in some cases, the Library’s needs in relation to copyright works – which revolve around acquisition, preservation, and access – may compete with those of copyright owners, who are most concerned with legal protection and security.”

Autonomy from the Library of Congress Will Best Enable Copyright Office Modernization

By providing the Copyright Office with autonomy, the Register would enjoy elevated stature within the government and possess the authority needed to carry out his or her constitutionally-recognized functions in an effective and efficient manner. At a time when copyright law and copyright protection is becoming ever more crucial to growing jobs and our nation’s economy, such elevation in status likely will give the Copyright Office more sway in formulating and coordinating copyright policy across the government. The Register should have control over the Office’s budget and, within the bounds of Congress’s delegation of authority, the ability to set the Office’s policies and priorities and to execute them.

A restructured Copyright Office that is autonomous from the Library of Congress would be better positioned to make necessary information technology and other upgrades, including a comprehensive searchable database of copyright registration and transfer records. “It would seem that confidence in Copyright Office records is directly related to confidence in copyright protection,” observed the Office’s 2015 Technical Upgrades Report. Streamlined processes and searchable databases would facilitate the kinds of voluntary exchanges that are the significant drivers of economic value in copyrighted works.

Use of advanced technologies to improve the Copyright Office’s capabilities and performance of core functions could simplify and ease the registration process. Reduced registration burdens would benefit creators of copyrightable works. And would-be purchasers of copyrighted works would benefit from more reliable and less costly searches for current owners. As we explained in our *Perspectives from FSF Scholars*, “[Liberty of Contract and the Free Market Foundations of Intellectual Property](#),” liberty of contract is been indispensable to maximizing the enjoyment and value of intellectual property rights. Accurate and user-friendly systems for recording transfers of copyright ownership would better enable commercial transactions between owners and purchasers, thereby promoting more economically efficient outcomes.

Making the Copyright Office institutionally autonomous from the Library of Congress and giving the Register control over the Office’s budget would enable the Office to make much-needed upgrades in its underlying information technology capabilities and thereby enhance its core registration, transfer, and recordation functions. A Register with authority over a restructured Copyright Office would be better positioned to advocate for budget needs and priorities to Congress, including for additional resources that may likely be necessary for the Office to develop its own information technology facilities and applications.

A March 2015 report by the Government Accountability Office (GAO) on the Copyright Office’s information technology found that “its IT environment faces many technical and organizational challenges, which ultimately may affect the office’s ability to meet its legal mission.” The Office’s primary registration processing system – known as “eCO” or “the Electronic Copyright Office” – “has had significant technical issues, both with the system itself – managed by the Copyright Office – and with its underlying infrastructure, managed by the Library’s central IT office.” The GAO report concluded: “[T]he Library has serious weaknesses in its IT management, which have also hindered the ability of the Library and the Copyright Office to meet mission requirements.” Among the problems resulting from the Office’s structural relationship to the Library, the GAO report cited the following example:

According to the Copyright Office’s General Counsel, as a result of its subordinate status within the Library of Congress, the Copyright Office lacks adequate control over mission-critical IT resources and decisions, thus frustrating its basic statutory purpose of creating, maintaining, and making available to the public an authoritative record of copyright ownership and transactions. For example, Copyright Office staff expressed concerns regarding ITS’s [the Library’s Office of Information Technology Services] control of servers containing its deposit files. Specifically, the Copyright CIO noted that ITS employees recently moved Copyright Office deposits from the existing storage

server without the permission of the office, raising concerns about the integrity and security of these files.

Similarly, the Office's 2015 Technology Upgrades Report identified the need for the Copyright Office to launch a website that is fully under the control of the Office – not the Library of Congress – to process copyright applications and title transfers as well as to conduct title searches. Acquisition of its own servers and a data warehouse and ability to leverage interactive, mobile, and other applications are also among the upgrades that have been identified as necessary to Copyright Office modernization. Autonomy from the Library would enable the Copyright Office to pursue these technological transitions without interference from an agency with a different set of priorities. And to the extent a future cost-benefit analysis sheds light on whether the likely benefits of deploying infrastructure dedicated to the Office using existing information technology facilities operated by the Library or other agencies outweighs costs of deployment of the Copyright Office's own infrastructure, the Register of Copyrights should have ultimate authority to determine the manner in which to proceed and thereby best meet the Copyright Office's needs.

Technology upgrades needed to modernize the Office will also require corresponding changes in the makeup of Office personnel. As the Office's 2015 Technical Upgrades Report concluded:

[T]he goal should be to evolve the Copyright Office's technology department from a small liaison staff that relies on and is required to advocate to the Library's technology office, to a fully-empowered operation in which technology decisions are measured against the singular goal of furthering the objectives of the copyright law and meeting the needs of the copyright community, including the content and technology sectors that are the Office's customers.

An autonomous Copyright Office would be better able to make such changes more promptly and effectively.

The Copyright Office Should Be Restructured to Better Align with Constitutional Principles

Restructuring of the Copyright Office is also needed in order to ensure the Office's operations more clearly conform to the Appointments Clause and to separation of powers principles. Congress's self-identification of the Office as a legislative agency is at odds with the executive nature of the Copyright Office's core administrative functions and also at odds with jurisprudential reasoning about the appointment of the Register and supervision of the Office's activities. As will be seen, based on the Register's executive responsibilities and the Librarian of Congress's power to appoint and supervise the Register, two circuit courts have concluded that, at present, the Librarian is an Officer and the Head of a Department in the Executive Branch, and that the Register is an inferior Officer in the Executive Branch.

The first part of Article II, Section 2, Clause 2 of the U.S. Constitution – commonly referred to as the Appointments Clause – ensures that agencies that perform executive functions are accountable to the President. Such accountability is partially provided through the designated

process of Presidential nomination and Senate confirmation of principal officers performing executive functions:

[The President] shall have Power, by and with the Advice and Consent of the Senate... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law...

The Supreme Court has concluded that “Officers” are appointees that are entrusted with “exercising significant authority pursuant to the laws of the United States.” Therefore, relatively few government employees are subject to the Appointments Clause.

The second part of Article II, Section 2, Clause 2 – sometimes referred to as the Excepting Clause – permits Congress to establish alternative modes of appointment, without Senate confirmation, for lower-ranking government officials: “[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”

Although the Constitution distinguishes between principal and inferior Officers, it does not define the difference. But as Supreme Court explained in *Edmond v. U.S.* (1997), “[w]hether one is an ‘inferior’ officer depends on whether he has a superior,” and “‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.” Also, while the Constitution does not specifically define “Heads of Departments,” in *Freytag v. Commissioner* (1991), the Supreme Court construed the term to encompass the head of any “freestanding component of the Executive Branch, not subordinate to or contained within any other such component.” As the Supreme Court recognized in *Free Enterprise Fund v. Public Accounting Company Oversight Board* (2010), the First Congress treated the Postmaster General a Department Head by conferring on him power to appoint an assistant and Deputy Postmasters, but without conferring on the Postmaster General the title of Secretary or a Cabinet role. The Court’s own precedents consistently have upheld similar appointments by heads of agencies. Similarly, the Court concluded that the SEC constitutes a “Department” under the Appointments Clause in *Free Enterprise Fund*.

Beginning with the Act of 1802, the position of Librarian of Congress was appointed by the President alone. The Act of 1897 changed the method of selection by requiring Senate confirmation for the position. (In 2015, the term for Librarian of Congress was prospectively limited to ten years, with a sitting Librarian eligible for re-nomination at the end of a term.) As described earlier, the mode of selecting the Register was the subject of heated debate in Congress in 1896. That debate, which resulted in rejecting placing the power of appointment in the Joint Committee on the Library later, led to placing the power in the Librarian of Congress.

The same 1897 Act created the Copyright Bureau (later the Copyright Office) within the Library of Congress and established the Register of Copyrights as the Office’s head. The 1897 Act also provided: “The Register of Copyrights, together with the subordinate officers and employees of

the Copyright Office, shall be appointed by the Librarian of Congress, and shall act under the Librarian's general direction and supervision." Those structural relationships between the Librarian and Register remain unchanged to this day.

In *Eltra Corporation v. Ringer* (1978), the Copyright Office's discretionary authority to reject copyright registration applications for non-compliance with the law was challenged on the grounds that the Office is a legislative agency and its powers were strictly limited to receipt of registration applications, deposit of copies, and issuance of registration certificates. The Fourth Circuit sustained the constitutional authority of the Register, concluding: "The Supreme Court has properly assumed over the decades since 1909 that the Copyright Office is an executive office, operating under the direction of an Officer of the United States and as such is operating in conformity with the Appointments Clause." In *Eltra*, the Fourth Circuit reasoned that the mode of the Register's appointment and nature of the Copyright Office's functions determined which branch of government the Office belonged to – not Congress's own designation:

The registration of copyrights cannot be likened to the gathering of information "relevant to the legislative process" nor does the Register perform a function "which Congress might delegate to one of its own committee[s]." The operations of the Office of the Register are administrative and the Register must accordingly owe his appointment, as he does, to appointment by one who is in turn appointed by the President in accordance with the Appointments Clause. It is irrelevant that the Office of the Librarian of Congress is codified under the legislative branch or that it receives its appropriation as a part of the legislative appropriation. The Librarian performs certain functions which may be regarded as legislative (i. e., Congressional Research Service) and other functions (such as the Copyright Office) which are executive or administrative. Because of its hybrid character, it could have been grouped code-wise under either the legislative or executive department. But such code-grouping cannot determine whether a given function is executive or legislative.

However, the Fourth Circuit's decision in *Eltra* was by no means conclusive regarding the branch of government to which the Library of Congress and Copyright Office belong. A dissenting opinion by Justice Byron White in *Mills Music v. Snyder* (1985), and a handful of Circuit Courts of Appeal and District Court decisions issued over a twenty-five year span following *Eltra*, characterized the Library of Congress an arm of Congress and the Copyright Office as a legislative agency. Yet such characterizations were made almost entirely in passing and did not determine the outcome of the cases being decided. Members of Congress and successive Librarians of Congress have continued to regard the Library as part of the legislative branch. The websites and official publications of the Library and Office have also consistently described both institutions as legislative agencies.

From a judicial standpoint, the executive branch status of the Library of Congress and the Copyright Office appears to have been confirmed somewhat by the D.C. Circuit in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board* (2012). In *IBS*, the D.C. Circuit analyzed Copyright Office functions of the Register and the Copyright Royalty Board. Established in 2004, the Board is comprised of three Copyright Royalty Judges appointed to

staggered six-year terms by the Librarian of Congress. The Copyright Royalty Judges are authorized to make royalty rate-setting determinations for reproductions of copyrighted sound recordings in a fixed medium, such as CDs or vinyl records, for public performances of copyrighted sound recordings via satellite radio or webcasting, and direct broadcast satellite and cable retransmissions of copyrighted broadcast content.

The D.C. Circuit examined the Copyright Royalty Board's structure and authority in light of the Supreme Court's decision in *Edmond*. Taking into account: (1) the Copyright Royalty Judges' broad discretion in setting copyright royalty rates and terms; (2) the inability of the Librarian to remove the Copyright Royalty Judges except for cause; and (3) the authority of CRJs to "issue decisions that are final for the executive branch, subject to reversal or change only when challenged in an Article III court," the D.C. Circuit concluded that the authority conferred on Copyright Royalty Judges under the Copyright Act "renders them principal officers – but obviously ones not appointed in the manner constitutionally required for such officers."

To alleviate that constitutional infirmity in the Copyright Act, the D.C. Circuit invalidated the "for cause" removal provision, thereby making Copyright Royalty Judges – like the Register of Copyrights – removable at will by the Librarian. By thus rendering the Copyright Royalty Judges inferior officers, the D.C. Circuit reaffirmed that the Librarian of Congress is a Head of a Department. Relying on the reasoning of *Free Enterprise Fund* and citing *Eltra*, the D.C. Circuit observed:

[T]he Library of Congress is a freestanding entity that clearly meets the definition of "Department."... To be sure, it performs a range of different functions, including some, such as the Congressional Research Service, that are exercised primarily for legislative purposes. But as we have mentioned, the Librarian is appointed by the President with advice and consent of the Senate... and is subject to unrestricted removal by the President... Further, the powers in the Library and the Board to promulgate copyright regulations, to apply the statute to affected parties, and to set rates and terms case by case are ones generally associated in modern times with executive agencies rather than legislators. In this role the Library is undoubtedly a "component of the Executive Branch." It was on this basis that the Fourth Circuit rejected a similar charge that the Librarian was not a "Head of Department" for purposes of appointing the Register. We too hold that the Librarian is a Head of Department who may permissibly appoint the Copyright Royalty Judges.

Of course, the executive functions performed by the Register are far broader than those performed by the Copyright Royalty Judges. As described in *Eltra*, the Register has authority to interpret provisions the Copyright Act and adopt regulations to implement them. The Supreme Court and lower courts have acknowledged this authority and accorded weight to the Register's rules and actions. The Register performs an essentially executive function, for instance, in conducting triennial rulemakings under the Digital Millennium Copyright Act to recommend exemptions from the Act's prohibition on technological measures that circumvent copyright protection systems. (Upon the recommendation of the Register, the Librarian of Congress makes the final exemption determinations.) Further, the Register exercises judgment in carrying out its

core copyright registration functions under the Copyright Act. The Register is responsible for examining copyright registration applications, and for registering those claims it determines involve copyrightable subject matter and comply with other legal formalities. And when it rejects applications, the Register must provide the applicants with written notice containing “the reasons for such refusal.”

Additionally, the Register exercises executive authority when issuing written opinions to the Copyright Royalty Judges that involve a “novel material question of law” and reviewing and correcting Copyright Royalty Board determinations containing legal errors. Not only are these functions of the Register executive in nature, they are also substantial. Copyright holders’ full enjoyment of the law’s protections as well as the value or potential value of hundreds of millions of dollars worth of copyrightable material are impacted by the Register’s actions. Thus, the position of Register is today even more clearly subject to the Appointments Clause principles identified by the Fourth Circuit in *Eltra* and reaffirmed by the D.C. Circuit in *IBS*.

When it comes to the current structure of the Copyright Office and its relationship to the Library of Congress, the view of the judicial branch is at odds with the view of the legislative branch. By the reasoning of the Supreme Court and lower courts, the Register is an inferior officer who is accountable to the Librarian of Congress, a Head of a Department that is part of the Executive Branch. But for purposes of appropriations and oversight, Congress considers the Library of Congress to be an arm of Congress and the Copyright Office a legislative agency within the Library.

At the very least, consideration of the Appointments Clause and separation of powers principles should prompt members of Congress to seek ways to restructure the Copyright Office to bring the institutional arrangements more in line with a proper constitutional understanding. Indeed, consideration of the Appointments Clause and separation of powers principles reinforce obvious but perhaps overlooked differences between Library of Congress activities that involve the Copyright Office and Library activities that do not. Except for the Librarian’s responsibilities regarding the officers, employees, and activities of the Copyright Office, the administrative functions of the Librarian are non-executive in nature. These responsibilities of the Librarian of Congress are directed principally toward the acquisition and preservation of books, films and other materials. Administering access to the Library’s collections by Congress, other officials, and the general public does not involve regulatory or other discretionary activities upon which the validity of legal title to private property or the values of such property rights depend. Indeed, the activities of the Congressional Research Service – a legislative agency within the Library of Congress – fit more much closely with the Library’s purpose in furnishing requested information to Congress than the Copyright Office.

Congress Should Restructure the Copyright Office

Restructuring the Copyright Office would resolve the constitutional and institutional conundrum that results from the Office’s placement within the Library of Congress. There are three main options for reform that Congress could pursue to place the Copyright Office on more secure constitutional footing. The first option for reform involves making the Copyright Office an autonomous executive agency headed by the Register of Copyrights. Under this approach, the

Register would be subject to nomination by the President and confirmation by the Senate. Like other executive Heads of Departments, the Register would be removable at will by the President.

A second option for reform involves making the Copyright Office an autonomous independent executive agency headed by the Register of Copyrights. Under this approach, the Register would be subject to nomination by the President and confirmation by the Senate. Like the heads of other independent agencies, the Register would serve for a specific term of years and could only be removed for good cause.

A third option involves making the Copyright Office autonomous from the Library of Congress but continuing to deem it a legislative agency for Congressional oversight and appropriations purposes. Under this approach, the Copyright Office would be headed by the Register, who would be subject to Presidential nomination and Senate confirmation.

By making the Copyright Office autonomous and thereby removing its associated executive functions from the Librarian's supervision, each of these three options would elevate the Register to the status of a principal "Officer" under the Constitution, a status befitting an official charged with laws passed by Congress to secure copyright protections expressly recognized by the IP Clause.

Each of these three options would also render the Library of Congress a truly legislative agency. Such reforms would also enable Congress to consider alternative modes of selection and appointment of the Librarian that would make it – from a constitutional standpoint – accountable to Congress rather than to the President. For example, the Librarian could be nominated by the Joint Committee on the Library and be subject to Senate confirmation, as was originally proposed in 1896. If the Copyright Office is made autonomous from the Library then Congress could adopt structural reforms for the Library without jeopardizing Copyright Office functions or copyright protections for individuals. Importantly, each of these three reform options could be implemented while maintaining the requirement that the Copyright Office deliver all deposit copies to the Library.

Making the Copyright Office an autonomous executive agency – the first reform option – offers the clearest alignment with the Appointments Clause and separation of powers principles. As previously described, the President has possessed only indirect authority over the Register through appointment of the Librarian of Congress since 1897. Indeed, the October 2016 removal of Register of Copyrights Maria Pallante by Librarian of Congress Carla Hayden constitutes a vivid reminder of the reality of the line of structural authority that runs from the President, to the Librarian, and to the Register. (This paper does not express views on the substance of the Librarian's personnel decision.)

It is highly unlikely that formal recognition of the reality of these structural relationships in statute would aggrandize Presidential influence over the Copyright Office. The administrative functions of the Copyright Office are narrowly focused in keeping with the Office's limited delegation of authority to secure federal copyright protections for authors and other creative artists. To the extent Congress, for whatever reason, wants to receive expert advice on copyright-related issues from a source independent of the Executive Branch, it could establish its own

advisory office or advisory committee to provide such advice. Or Congress could assign such informational legislative functions to the Congressional Research Service.

Pending Legislation in Congress Would Restructure the Copyright Office

Pending in Congress are bills that would restructure the Copyright Office along the lines of the third reform proposal listed above. On April 26, 2017, the U.S. House of Representatives passed House Resolution 1695, the “Register of Copyrights Selection and Accountability Act,” sponsored by House Judiciary Chairman Bob Goodlatte and co-sponsored by Ranking Member John Conyers.

If the bill were enacted, the Copyright Office would be separated from the Library of Congress. Hence, the Register’s authority as the Director of the Copyright Office would no longer be subject to the Librarian’s supervision. HR 1695 expressly states that the Register “shall be capable of identifying and supervising a Chief Information Officer or other similar official responsible for managing modern information technology systems.” And the bill states that it may not be construed to impact the mandatory deposit requirements under federal copyright law. Under HR 1695, the Register would be subject to a nomination and consent process with a 10-year term limit, subject to potential re-nomination by the President. The President’s initial nomination of a Register would be from a list of three candidates selected by a panel consisting of the Speaker of the House of Representatives, the President pro tempore of the Senate, the majority and minority leaders of the House and Senate, and the Librarian. The bill also provides that the President would have the power to remove the Register.

In most respects, HR 1695 reflects Congress’s longstanding institutional practice of regarding the Copyright Office as a legislative agency. The House Judiciary Committee’s Bill Report for HR 1695 described the Register as “a legislative branch official” and states that many members of Congress “believe the register of Copyrights should be more accountable to Congress.” The nominee selection process contemplated by the bill also resembles the process for the Comptroller of the GAO. Nonetheless, HR 1695’s changes to the selection process for the Register do reflect the executive nature of the Copyright Office’s functions and the Constitution’s underlying structural requirements for an officer entrusted with such duties. As the legislative report states, a primary purpose of the legislation is to address concerns and lawsuits “challenging authority of the Register of Copyrights to issue rules because the position is not presidentially-appointed.”

HR 1695 is similar to legislation that has previously been introduced in the House by Representatives Tom Marino, Judy Chu, and Barbara Comstock. HR 890, the “Copyright Office for the Digital Economy Act,” was re-introduced in February 2017. The bill would restructure the Copyright Office as a stand-alone agency in the legislative branch and establish a selection process for the Register equivalent to the process set forth in HR 1695.

Certainly, HR 1695 is meritorious in proposing a structure that provides needed autonomy from the Librarian of Congress. If HR 1695 or a similar reform bill is enacted, the Copyright Office would obtain at least some measure of independent authority and be repositioned more easily to acquire property, personnel, supplies, and communications and information processing

technology needed to better fulfill its mission in the Digital Age. While other restructuring options should not be foreclosed at this stage, the need for Copyright Office autonomy from the Librarian and for a modernized Office is clear. Such restructuring and modernizing is essential for our copyright system to achieve its important purposes of protecting authors' and other creators' rights to earn a return on their labor and to facilitate market transactions in copyrights in a way that promotes "the Progress of Science and useful Arts."

Conclusion

The proper administration of copyright laws is essential to securing the rights of creative artists to the fruits of their labor. And so a well-administered system of copyrights is a critical driver of value in the Digital Age economy. Unfortunately, the Copyright Office's functionality and efficiency increasingly are strained under the structural arrangements established back in 1897 that limit the Office's ability to implement improvements. The Librarian of Congress's ultimate authority over the Register of Copyrights as well as the Copyright Office's functions and budget resources structurally diminishes the Office's stature and relegates the Register to an "inferior Officer."

Thus, the Copyright Office needs to be modernized in order to improve the performance of its administrative functions. Congress should restructure the Copyright Office by making it autonomous from the Library of Congress. As a standalone agency, the Copyright Office would be better positioned to make necessary upgrades, including a comprehensive searchable database of copyright registration and transfer records. Importantly, removing the Copyright Office from the Library of Congress will pose no harm to the Library's continued functioning.

There are three main options for restructuring the Copyright Office that are generally consistent with the Appointments Clause and separation of powers constitutional principles. The first option involves Congress making the Office an autonomous executive agency headed by the Register of Copyrights. A second option involves Congress making the Office an autonomous independent executive agency headed by the Register. A third option involves Congress making the Office autonomous from the Library of Congress but continuing to deem it a legislative agency for Congressional oversight and appropriations purposes. Each option would elevate the Register to the status of a principal "Officer" under the Constitution, a status that befits an official charged with laws passed by Congress to secure constitutionally recognized copyright protections.

On April 26, 2017, the U.S. House of Representatives passed House Resolution 1695, the "Register of Copyrights Selection and Accountability Act." If HR 1695 or a similar reform bill is enacted, the Copyright Office would obtain at least some measure of independent authority and be repositioned to more easily acquire property, personnel, supplies, and communications and information processing technology needed to better fulfill its mission in the Digital Age. The need for Copyright Office restructuring and modernizing is essential to the protection of the rights of creative artists to the fruits of their labors. Such restructuring and modernizing would further the good administration of our copyright system and thereby promote "the Progress of Science and useful Arts."

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Sources

Edmond v. U.S. (1997).

Eltra Corporation v. Ringer (1978).

Free Enterprise Fund v. Public Accounting Company Oversight Board (2010).

Freytag v. Commissioner (1991).

Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board (2012).

Jollie v. Jacques (1850).

Mills Music v. Snyder (1985).

Wheaton v. Peters (1834).

Federalist No. 27 (1788).

H.R. 1695, the Register of Copyrights Selection and Accountability Act (2017).

H.R. 890, the Copyright Office for the Digital Economy Act (2017).

H.R. Rep. No. 115-91 (2017).

*

*

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Robert Brauneis, “Transforming Document Recordation at the United States Copyright Office: A Report to the Register of Copyrights,” U.S. Copyright Office (December 2014).

John Y. Cole, *A Chronological History of the Library of Congress* (1979).

John Y. Cole, “Of Copyright, Men & A National Library,” *The Quarterly Journal of the Library of Congress*, Vol. 28 (April 1971).

Library of Congress, “Annual Report of the Librarian of Congress: For the Fiscal Year Ending September 30, 2015” (2016).

Government Accountability Office, “Information Technology: Copyright Office Needs to Develop Plans that Address Technical and Organizational Challenges,” GAO-15-338 (March 31, 2015).

Office of the Chief Information Officer, U.S. Copyright Office, “Report and Recommendations of the Technical Upgrades Special Project Team” (February 2015).

Carl Ostrowski, *Books, Maps, and Politics: A Cultural History of the Library of Congress, 1783-1861* (2004).

Maria A. Pallante, Register of Copyrights, U.S. Copyright Office, “The Register’s Perspective on Copyright Review,” Committee on the Judiciary, U.S. House of Representatives (April 29, 2015).

Stephen E. Siwek, “Copyright Industries in the U.S. Economy: The 2016 Report,” International Intellectual Property Alliance (December 2016).

Ainsworth R. Spofford, *A Book For All Readers* (1900).

Steven Tepp & Ralph Oman, “A 21st Century Copyright Office: The Conservative Case for Reform,” *Hudson Institute White Paper* (October 2015).

U.S. Copyright Department, “Report of Copyright Department for Fiscal Year 1898-1899,” from “Report of the Librarian of Congress for the Fiscal Year Ended June 30, 1899” (1899).

U.S. Copyright Office, “Fiscal 2016 Annual Report” (2016).

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