

Statement of
Robert Brauneis
Professor of Law,
Co-Director of the Intellectual Property Law Program
The George Washington University Law School

on “The U.S. Copyright Office: Its Functions and Resources”
Committee on the Judiciary, U.S. House of Representatives

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I. Introduction

Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee, my name is Robert Brauneis, and I am a Professor of Law at The George Washington University, where I also serve as Co-Director of the Intellectual Property Law Program. During the academic year 2013-2014, I was the inaugural Abraham L. Kaminstein Scholar in Residence at the United States Copyright Office. Over the course of a decade of teaching copyright law, and particularly during the year I spent at the Copyright Office, I have come to know and respect the work of that Office, and also to learn about some of its challenges and opportunities. I am honored to have this occasion to present some of my views.

I am sure that none of the Members of this Committee need to be convinced of the importance of the copyright industries, and of creative works, to the economy and the welfare of this country. In 2013, the core copyright industries contributed over a trillion dollars in value to the U.S. Gross Domestic Product, and employed nearly five-and-a-half million workers, whose average compensation was 34% more than the average compensation paid to all U.S. workers.¹ The copyright industries make a particular contribution to international trade, as the United States exports copyrighted works of far more value than those it imports.² And it should not be forgotten that the millions of works that are now in the public domain, or are freely licensed, or

¹ See Copyright Industries in the U.S. Economy: The 2013 Report, at 2, by Stephen E. Siwek of Economists Incorporated, prepared for the International Intellectual Property Alliance (IIPA), November 2013, available at http://www.iipa.com/pdf/2013_Copyright_Industries_Full_Report.PDF (last visited February 23, 2015).

² See *id.* at 15 (foreign sales of the core U.S. copyright industries in 2012 amounted to \$142 billion); World Bank, Charges for the use of intellectual property, receipts (BoP, current US\$), available at <http://data.worldbank.org/indicator/BX.GSR.ROYL.CD/countries> (last visited February 23, 2015); World Bank, Charges for the use of intellectual property, payments (BoP, current US\$), available at <http://data.worldbank.org/indicator/BM.GSR.ROYL.CD/countries> (last visited February 23, 2015) (in 2013, U.S. receipts for the use of intellectual property exceeded U.S. payments for the use of intellectual property by more than \$90 billion).

are used under privileges such as fair use, also contribute immeasurably to our economy, our culture, and our welfare.³

The Copyright Office supports the copyright ecosystem through a wide variety of activities, but perhaps the three most important are its administration of the registration and recordation systems, its advisory role with regard to copyright legislation and policy, and its role in providing expert interpretation of the Copyright Act both for Congress and for executive branch agencies such as the Department of Justice and the Office of the United States Trade Representative. In my comments, I will focus on the first two of these roles. I will argue that the central challenge with regard to registration and recordation is the funding and control of information technology, and I will make some recommendations about how to meet that challenge and to seize the opportunities of the information age. I will then argue that the Copyright Office has played a critical role in providing impartial advice on copyright legislation and policy for more than a century, and contend that this role is important to the future of copyright. Finally, I will provide an analysis of the constitutional challenges that the Copyright Office has recently faced, and suggest that Congress should consider reorganizing the Office as an independent agency.

II. The Registration and Recordation Functions in the Information Age: Properly Funding and Managing Capital-Intensive, Critical Operations

Ever since it was created as a separate department in 1897, the Copyright Office has been responsible for registering copyright claims in creative works and for recording documents concerning copyright transactions. These central functions of the Office have always occupied the majority of Copyright Office personnel. Registration and recordation have been crucial to providing reliable information about creative works. They help potential users of works learn whether those works are under copyright or in the public domain, and if they are under copyright, who created them and who owns them. They provide copyright owners with evidence that their works are indeed protected by copyright, and with evidence of valid transfers of ownership. Timely filings may offer certain remedial benefits such as the availability of statutory damages and attorney's fees, which may mean the difference between bringing or foregoing an infringement suit, or ensuring a fair settlement. That information and evidence in turn supports the financing, licensing, sale, and use of creative works, while protecting the interests of authors, intermediaries, users, and the public.

The increasing importance of information technology has created both serious challenges and significant opportunities for the registration and recordation functions of the Office. The two major challenges concern funding and management. In the era in which all registration and recordation business was handled on paper, registration and recordation systems had two

³ See, e.g., Creative Commons, State of the Commons, available at <https://stateof.creativecommons.org/report/> (last visited February 22, 2015) (stating that as of 2014, 882 million pieces of Creative-Commons-licensed content were available on the web).

important characteristics: They were labor-intensive, and they were self-contained. The costs of running those systems consisted almost entirely of the current operating costs of paying staff to process applications and documents. Once the staff were in place and supplied with paper, pens, and desks, they did not depend on any other personnel or tools to perform their work.

The rise of information technology, however, has fundamentally changed the nature of registration and recordation. In the new world in which most business is conducted electronically, the most efficient registration and recordation systems are capital-intensive. They require large investments in computer hardware, custom software, and security measures. Moreover, registration and recordation personnel can no longer be self-reliant. Rather, they need complex computer systems and a separate staff of information technology experts.

These changes have serious implications for models of funding and management. As for funding, it made sense in the paper era to calculate registration and recordation fees on the basis of current costs, and to provide for funding of Copyright Office operations on a year-to-year basis. Labor costs, after all, were incurred continuously, and there was little need to invest fees generated in one year on projects undertaken in another year. Unfortunately, the Copyright Office has remained constrained by those fee-setting and appropriations models as it has entered the capital-intensive information technology era. Section 708 of the Copyright Act still limits the Office “to adjust[ing] fees to not more than that necessary to cover the reasonable costs incurred by the Copyright Office for the services”⁴ it provides. There is no provision for accumulating funds to finance major computer system improvements that do not qualify as the costs of current services, but that are necessary to provide future, enhanced services. While the Office or the Library of Congress can ask Congress for appropriations to fund capital investments, those requests are as a practical matter weighed against other needs of the Library and of the nation.

The result is both predictable and regrettable: chronic underinvestment in the information technology necessary to support the current copyright marketplace. The recordation system, which the Register asked me to study independently during my year as the Kaminstein Scholar at the Copyright Office, is a prime example. In a world in which more and more copyright documents are electronic, such documents can still only be recorded if they are printed out, signed in ink, put in envelopes, and sent in the mail to the Copyright Office. While over a thousand counties that record deeds of interests in real property have moved to electronic recordation,⁵ the Copyright Office is still stuck in the paper era. Conversion to an electronic system has been repeatedly postponed due to lack of funding, as well as to control problems discussed below.

⁴ 17 U.S.C. § 708(b)(2).

⁵ See Property Records Industry Association, <http://www.pria.us> (last visited February 23, 2015) (stating that 1,229 counties in the United States now have electronic recording systems).

To give the Copyright Office any chance of solving the funding problems, Congress should grant more flexibility to the Copyright Office to set fees that would generate funds for capital improvements. The Patent and Trademark Office now has the authority to set fees at levels that cover all of its “processing, activities, services and materials relating to patents and trademarks.”⁶ The Copyright Office should at least be able to collect for necessary capital improvements. When it does so, it should also be empowered to build a reserve fund that is not depleted on an annual basis through an offsetting adjustment to the Office’s appropriation from taxpayer revenues. Only with such a reserve fund can the Copyright Office budget responsibly for multi-year projects, while at the same avoiding service quality degeneration or interruption when unpredictable fluctuations in incoming fee receipts impose funding constraints.⁷

Congress should also confirm that the Copyright Office has the authority to vary fees across types of claimants and works, in order to take into account the widely varying value of the works and the varying ability of the claimants to pay service fees. In April 2014, the Office for the first time set a discounted fee for registrations of copyright claims involving a single individual author who is also the claimant, following an extensive rulemaking process.⁸ That is a welcome development, and the Office should have clear authority to further differentiate fees. For decades, the Patent and Trademark Office has relied heavily and justifiably on differential fees,⁹ and the Copyright Office should be able to do so as well.¹⁰ Otherwise, its authority to

⁶ Leahy-Smith America Invents Act, Pub. L. 112-29, § 10, 125 Stat. 284 (September 16, 2011). The Patent and Trademark Office has taken the position that this “Section 10” fee-setting authority is independent of and parallel to its authority to set fees under § 41 of the Patent Act, 35 U.S.C. § 41. See Bernard J. Knight, Jr., General Counsel, United States Patent and Trademark Office, Memorandum on USPTO Patent Fee Setting, at 2 (February 10, 2012), available at http://www.uspto.gov/about/offices/ogc/Fee_Setting_Opinion.pdf (last visited February 23, 2015).

⁷ Section 708(d) of the Copyright Act seems to express the intention of Congress to create a reserve fund for the Copyright Office, because it provides that “[s]uch fees that are collected shall remain available until expended.” However, as Register of Copyrights Maria A. Pallante has explained, “in the practical context of the budget process, Congress has frequently required the Office to offset its request for appropriated dollars by the amount of reserve income it may have at the end of a fiscal year.” Maria A. Pallante, *The Next Generation Copyright Office: What It Means and Why It Matters*, 61 J. Copyright Soc’y 213, 232 n. 68 (2014).

⁸ United States Copyright Office, Proposed Schedule and Analysis of Copyright Fees to Go Into Effect On or About April 1, 2014, at 2 n.6 (hereinafter “Proposed Schedule of Copyright Fees”), available at <http://copyright.gov/docs/newfees/USCOFeeStudy-Nov13.pdf> (last visited February 23, 2015).

⁹ For example, the PTO now receives between 30% and 40% of its total revenue from patent maintenance fees. See United States Patent and Trademark Office, Fiscal Year 2014 Performance & Accountability Report 31-32, available at <http://www.uspto.gov/about/stratplan/ar/USPTOFY2014PAR.pdf> (last visited February 23, 2015) (stating that in Fiscal Year 2014, the USPTO earned 91.0% of its earned revenues from patent fees; 45.5% of patent fee revenue was derived from patent maintenance fees.)⁹ Patent maintenance fees are a means of obtaining a larger proportion of PTO funding from owners of particularly successful and valuable patents. They are set at levels far in excess of any cost that the PTO incurs in maintaining records of issued patents. See USPTO Fee Schedule, Effective January 1, 2014 (Last Revised on January 17, 2015), <http://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule> (last visited February 23, 2015) (Standard patent maintenance fees are currently set at \$1600 at three-and-a-half years after grant; \$3600 at seven-and-a-half years after grant; and \$7400 at eleven-and-a-half years after grant.).

¹⁰ Treaty obligations would prevent the Copyright Office from charging maintenance fees of the type charged by the PTO, see *supra* n. 4 (discussing those fees), at least during the minimum term of the life of the author plus 50 years. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, 828 U.N.T.S. 221, §§ 5(2) (prohibiting formalities as conditions of enjoying rights granted by the Convention);

raise fees may be hollow, as any increase in fees could be largely offset by a decrease in the number of users who pay those fees.

Of course if the Copyright Office is going to raise fees, those paying them have a reasonable expectation that the fees will be spent in a dedicated manner on the services they are seeking, and that the quality of those services will improve. This presents challenges in practice, however, because the Copyright Office does not currently control the computer systems on which its registration and recordation programs are run. Because the Library of Congress funds and controls these systems, and because the funding comes from the Library's agency-wide appropriation, the Copyright Office's fees do not fully reflect the cost of the information technology it uses. Although that might lead one to believe that the Copyright Office is receiving a welcome off-budget subsidy, in actuality it leads to a greater problem: All information technology support and development rely on the final management decisions and cooperation of outside staff not within or directly accountable to Copyright Office management. This structure may have worked at a time when the Copyright Office's information technology needs were modest, but it is clear by now that it no longer works. During my year at the Copyright Office as the Kaminstein Scholar, I observed firsthand the delays and difficulties that result from dependence on outside IT support.

Those difficulties are compounded by the different services that Library of Congress information technology supports inside and outside of the Copyright Office. The services provided by the Copyright Office are essential to fast-moving business transactions and litigation. Investors will not finance motion pictures, software, transactions in music catalogs, or other copyright-dependent projects unless copyrights are registered and transactions are recorded. Copyright owners cannot ask courts to stop infringement until they have registered their works. Thus, promptness and reliability of copyright services at a very high level are crucial. The Copyright Office also assists searchers in locating copyright information about works whose titles are not known, and for those purposes would ideally accept deposits in forms that would best aid those searches, rather than in forms that would be best for archival purposes.

Outside of the Copyright Office, the Library uses information technology to provide a number of important services, including bibliographic cataloging and electronic archiving of important historical works. None of those services, however, supports high-priority industry operations on a daily basis like copyright services do. Thus, it is also critical that the Copyright Office be able to gain more control over its own information technology. I am not in a position

7(1) (granting a basic term of copyright of the life of the author plus fifty years). However, in addition to explicitly authorizing differential service fees, Congress should consider other types of fees that could take into account the value of copyright registration and the copyright system to particular works. For example, claimants who believe that their works are of relatively modest value could pay a lower registration fee in exchange for a lower statutory damages cap, while retaining the right to recover all actual damages and any statutory damages up to the cap. Under another approach, those who wished to maintain the availability of statutory damages for more than a decade or two after initial registration of a work could be required to pay an additional fee.

to say whether that means complete separation of Copyright Office IT systems from other Library systems, but some marked transformation is necessary.

I should emphasize that information technology brings not only challenges but also major opportunities to the Copyright Office. Advanced electronic systems can make registration and recordation much easier and less costly. They can also provide potential users of copyrighted works with detailed, timely information about ownership and licensing, thus broadening the market for those works. Government and private computer systems can exchange information directly, reducing the need for costly hand-keying and enabling some transactions to take place automatically. Before that potential can be realized, however, the funding and control problems need to be solved.

III. The Impartial Legislative and Policy Advisory Function: A Valuable Tradition to Continue

The Copyright Office has also always played an important role in assisting Congress with its deliberations on whether copyright legislation is needed, and with the drafting of that legislation. As I have studied the history of the Office, the depth of its contributions to the legislative process has repeatedly impressed me. The Copyright Office has been able to offer independent and impartial advice based on its experience in administering the copyright laws, in part because of its position within the Library of Congress, an institution that until recently has been generally assumed to be part of the legislative branch. In the Part IV of this statement, I will discuss the change in assumptions about the Library's legislative branch status, and the associated challenge to the independence of the Copyright Office's legislative advisory function. In this part, I would like to bring the Committee's attention to some of the Office's most important contributions to copyright legislation. It should be noted that the discussion below does not include the enduring work of the Office in assisting Congress on a more routine basis with respect to questions, bills, and general support. And it does not address the Office's equally important role in assisting executive branch agencies with questions of domestic, bilateral, or multilateral priorities.

The Copyright Office has been centrally and intimately involved in the drafting of the last two major revisions to copyright law – the Copyright Acts of 1909 and 1976 – and of the incremental amendments to those Acts. The legislative process that led to the Copyright Act of 1909 began when Thorvald Solberg, the very first Register of Copyrights, convened a series of conferences with a wide variety of stakeholders and interested parties to discuss needed revisions to existing law.¹¹ Under Solberg's direction, the Copyright Office published comprehensive reference works on the history of U.S. copyright laws and legislation that provided important foundations for legislators, and that still stand as the finest record of copyright legislation and presidential proclamations from the founding of the United States to

¹¹ See "The Copyright Code: Its History and Features," 76 *The Publishers' Wkly* 19 (1909).

the Fifty-Eighth Congress.¹² Solberg then wrote and published a report that contained the Copyright Office's legislative recommendations,¹³ and wrote and published a first discussion draft of a copyright revision bill.¹⁴ After considering comments on that draft, he then wrote a second draft that was introduced as a bill in Congress in 1906 and became the basis for a series of Congressional hearings. That bill, as modified, became the Copyright Act of 1909.¹⁵

The legislative process that eventually culminated in the Copyright Act of 1976 featured even greater Copyright Office participation. It began with a series of 34 studies prepared by the Copyright Office over a five-year period addressing every corner of copyright law and of the economics of the copyright industries.¹⁶ Building on the insights of those studies, Register of Copyrights Abraham Kaminstein prepared in 1961 a comprehensive "Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law."¹⁷ Register Kaminstein then held a series of public meetings with copyright stakeholders to discuss the recommendations of that report, and gathered written comments as well.¹⁸ Having gathered that input, the Copyright Office then issued a "Preliminary Draft for Revised U.S. Copyright Law" in late 1962, and in 1963 held a series of public meetings discussing sections of that draft in detail.¹⁹ That led to the first bill introduced in Congress in 1964, which was used as the basis for another series of public meetings held by the Copyright Office.²⁰ Finally, after a second bill was introduced in 1965, Congress itself began to hold hearings on the proposed legislation.²¹

¹² See Thorvald Solberg, *Copyright enactments, 1783-1900: comprising the copyright resolutions of the Colonial Congress, 1783; the copyright laws of the original states, 1783-1786; the constitutional provision concerning copyright legislation, and the public and private copyright laws enacted by Congress from 1790 to 1900; together with the presidential proclamations regarding international copyright (1900); Thorvald Solberg, Copyright in Congress, 1789-1904: A bibliography, and chronological record of all proceedings in Congress in relation to copyright from April 15, 1789 to April 28, 1904, First Congress, 1st Session to Fifty-eighth Congress, 2d Session (1905).*

¹³ See Thorvald Solberg, *Report on Copyright Legislation by the Register of Copyrights (1904).*

¹⁴ *Memorandum Draft of a Bill to Amend and Consolidate to Acts Respecting Copyright, Copyright Office Bulletin No. 10 (1905).*

¹⁵ See Abe A. Goldman, "The History of U.S.A. Copyright Law Revision from 1901 to 1954," *Copyright Law Revision Study No. 1, Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, at 1-2 (1955; Committee Print 1960).*

¹⁶ These reports are available on a Copyright Office web page, <http://www.copyright.gov/history/studies.html> (last visited February 23, 2015).

¹⁷ See *Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, Printed for the Use of the House Committee on the Judiciary (July 1961).*

¹⁸ See *Copyright Law Revision Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, Printed for the Use of the House Committee on the Judiciary (February 1963).*

¹⁹ See *Copyright Law Revision Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft (1964); Copyright Law Revision Part 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law, Printed for the Use of the House Committee on the Judiciary (December 1964).*

²⁰ See *Copyright Law Revision Part 5: 1964 Revision Bill with Discussions and Comments, Printed for Use of the House Committee on the Judiciary (September 2, 1965).*

²¹ See, e.g., *Hearings Before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 89th Cong., 1st Sess., on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, Bills for the General Revision of the Copyright Law,*

Although a number of difficulties, particularly concerning cable television, would delay enactment of a comprehensive revision until 1976, the 1965 bill is in most respects identical to the legislation that became the Copyright Act of 1976 eleven years later. Indeed, the forward-looking nucleus of the 1976 Act, which still sounds fresh in 2015, comes straight from the original 1962 Copyright Office Preliminary Draft. Copyright protection, states that draft, “shall be available for an original work of authorship fixed in any tangible medium, now known or later developed, from which it can be . . . perceived, reproduced, performed, or represented, either directly or with the aid of a machine or device.”²²

Since 1976, the Copyright Office has continued to assist in the legislative process through reports, consultations, public meetings, and drafts of amendments both large and small. When the United States finally decided to become a party to the principal international copyright treaty, the Berne Convention, in 1989, the Copyright Office provided crucial support with the legislation necessary to join and implement the Convention. The Copyright Office was also centrally involved with the drafting of the Digital Millennium Copyright Act in 1998, and gained a new role in conducting triennial rulemaking proceedings to advise the Librarian on issuing exemptions from the anti-circumvention provisions of that Act. In the very recent past, the Office has continued this tradition by conducting meetings and issuing reports on topics such as Mass Digitization, Pre-1972 Sound Recordings, Copyright Small Claims, Resale Royalties, and The Music Marketplace, and a report that I coordinated on Document Recordation. And of course it advised and assisted this Committee with the twenty hearings that it held in the 113th Congress to review and assess copyright law for the digital age.

Although I have discussed the Copyright Office’s legislative advisory role separately from its role in administering the registration and recordation systems, in fact the two roles depend on each other. The Office gains much of the expertise that it provides Congress from its experience of administering the Copyright Act on a daily basis. Every day, for example, the Office must determine whether particular registration applications covering a wide variety of materials concern copyrightable subject matter. Those daily confrontations with submissions that are constantly changing as new technologies and practices develop lead to a deep, comprehensive, and current understanding of the contours of the issue of copyrightability, which in turn informs the Office’s advice to Congress and to other agencies.

In sum, the Office has for over a century provided extremely valuable assistance to Congress, and Congress has justifiably relied on and benefitted from that assistance. At a time

Title 17 of the United States Code, and for Other Purposes, May 26, 27, 28, June 2, 3, 4, 9, 10, 16, 17, 23, 24, 30, August 4, 5, 11, 12, 18, 19, 26, September 1 and 2, 1965, Serial No. 8, Part 1, Printed for the Use of the Committee on the Judiciary (1966).

²² See Copyright Law Revision Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, at 1 (1964); cf. Section 102(a) of the Copyright Act, 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”)

when we may be in the early stages of another comprehensive revision of the copyright laws,²³ the value of that assistance should be recognized and celebrated, and the Office's impartial advisory role should be supported and protected against challenges.

IV. The Structure of the Copyright Office within the Library of Congress: Constitutional Predicaments and Options

In 1897, Congress created and funded the Copyright Office as a separate department of the Library of Congress, and created the position of Register of Copyrights to head that department.²⁴ It vested important statutory duties with the Register, but directed that she work under the general supervision of the Librarian. Many Members of Congress consider the Library of Congress to be part of the legislative branch of government, and it is so treated both for appropriations purposes and for purposes of the Library oversight committees.²⁵ In a number of cases, litigants have raised constitutional challenges to this structure,²⁶ arguing that the Copyright Office performs executive functions that are incompatible with its being part of the legislative branch.²⁷ In the two cases in which courts have rendered a decision regarding those challenges, they have agreed that the Office performs executive functions. However, they have accommodated the Office's position within the Library of Congress by ensuring that the relevant Office appointees meet the requirements of the Constitution's Appointments Clause²⁸ and of related separation of powers principles.²⁹ These mandate that the President be able to

²³ See United States House of Representatives Judiciary Committee Press Releases, "Chairman Goodlatte Announces Comprehensive Review of Copyright Law" (April 24, 2013), available at <http://judiciary.house.gov/index.cfm/2013/4/chairmangoodlatteannouncescomprehensivereviewofcopyrightlaw> (last visited February 23, 2015); Maria A. Pallante, *The Next Great Copyright Act*, 36 Colum. J. L. & Arts 315 (2013).

²⁴ See Act of Feb. 19, 1897, ch. 265, 29 Stat. 544.

²⁵ See, e.g., Legislative Branch Appropriations Act, 2014, Division I of the Consolidated Appropriations Act, 2014, P.L. 113-76, 128 Stat. 5 (Jan. 17, 2014). The Library's Congressional oversight committees are the Committee on House Administration and the Committee on Senate Rules. However, the Judiciary Committees have long exercised oversight of the Copyright Office.

²⁶ In addition to the two cases cited below, see *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1226-27 (D.C. Cir. 2009) (Kavanaugh, J. concurring) (stating that the means by which Copyright Royalty Judges were appointed raised a "serious constitutional issue," but that the issue had not been timely raised); *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 574 F.3d 748, 755-56 (D.C. Cir. 2009) (declining to rule on the Appointments Clause challenge because it had not been timely raised).

²⁷ I use the term "executive function" here broadly, to include both core executive functions such as the prosecution of federal crimes, and functions that courts have sometimes called "quasi-judicial" or "quasi-legislative," such as the promulgation of regulations implementing federal law, and the decision of claims regarding federal benefits. Compare *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935) (distinguishing between "political and executive" powers, on the one hand, and "quasi judicial or quasi legislative" powers, on the other); with *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 684 F.3d 1332 (D.C. Cir. 2012) (noting that "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").

²⁸ U.S. Const. Art. II, § 2, cl. 2.

²⁹ Because the Appointments Clause does not explicitly address the removal of Officers of the United States, the Supreme Court has developed rules regarding removal of Principal Officers under general separation of powers principles. See *Bowsher v. Synar*, 478 U.S. 714, 721-26 (1986) (holding that under the constitutional principle of

exercise certain kinds of direct or indirect control over persons exercising executive authority. The clarification that the Library and the Copyright Office are subject to clear lines of executive control, however, may raise serious concerns for Congress. Thus, to preserve the valuable roles that both the Library and the Copyright Office continue to play, Congress may want to consider restructuring the Copyright Office as a separate agency, and, as I will suggest, as an independent agency.

In both the 1978 case of *Eltra Corporation v. Ringer*,³⁰ and the more recent 2012 case of *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board* (“IBS”),³¹ the courts held that the functions at issue, performed by the Copyright Office or Copyright Royalty Judges, involved exercises of executive authority. When the Register determines whether particular matter – in the case of *Eltra*, a typeface design – is eligible for the statutorily-granted benefits of registration, she is, in the formulation of the Supreme Court, taking “action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch,”³² and is thus applying or executing the law. Moreover, her registration determinations are not merely ministerial, but involve the exercise of significant discretion.³³ Accordingly, she is an “Officer of the United States” within the meaning of the Appointments Clause, and her appointment must meet the requirements set forth in that Clause.

Similarly, the Copyright Royalty Judges set statutory license rates that determine how much some private parties must pay other private parties to use works under copyright, and they have, in the words of the *IBS* court, “vast discretion over the rates and terms”³⁴ of those licenses. Thus they too are “Officers of the United States” and must meet Appointments Clause requirements. That these registration and ratemaking functions must be performed by validly appointed Officers of the United States does not seem open to question. Moreover, there are other Copyright Office functions, such as document recordation and rulemaking under the Digital Millennium Copyright Act, that must equally be performed by Officers of the United States.

The Register of Copyrights and the Copyright Royalty Judges are appointed by the Librarian of Congress. Under the rules established by the Appointments Clause, their appointments as Officers of the United States are valid only if the Librarian qualifies as a “Head

separation of powers, Congress cannot reserve for itself any power of removal of an officer charged with the execution of the laws other than impeachment).

³⁰ 579 F.2d 294 (4th Cir. 1978).

³¹ 684 F.3d 1332 (D.C. Cir. 2012).

³² *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 952 (1983).

³³ See *Freytag v. Commissioner*, 501 U.S. 868, 881-82 (1991) (holding that special trial judges of the United States Tax Court are Officers of the United States because they perform “more than ministerial tasks,” and “exercise significant discretion”).

³⁴ *Id.* at 1339.

of Department,” and if the Register and the Judges qualify as “Inferior Officers.”³⁵ In both *Eltra* and *IBS*, the courts held that the Librarian qualifies as a “Head of Department.”³⁶ The Librarian is appointed by the President with the advice and consent of the Senate, and is subject to unrestricted removal by the President, just as the President’s cabinet members are.³⁷ Although the Librarian is not the head of a traditional Department, such as the Department of Agriculture or the Department of the Treasury, the Supreme Court has confirmed that any “freestanding component of the Executive Branch, not subordinate to or contained within any other such component, . . . constitutes a ‘Departmen[t]’ for purposes of the Appointments Clause.”³⁸ Thus, held *IBS*, the Library of Congress qualifies as a Department, and the Librarian as a “Head of Department.”³⁹

The *Eltra* court also held that the Register qualified as an “Inferior Officer” who could be appointed by the Librarian as a Head of Department, because the Librarian sufficiently directed and supervised the Register’s work, and crucially, had the unrestricted power to remove her.⁴⁰ By contrast, the *IBS* court held that the Copyright Act as written did not subject the Copyright Royalty Judges to sufficient direction and supervision by the Librarian for them to qualify as Inferior Officers.⁴¹ However, the court cured that defect by severing and invalidating the statutory language that limited the Librarian’s power to remove the Judges, concluding that if the Librarian had the unrestricted power to remove the Judges, they would then qualify as Inferior Officers.⁴²

³⁵ See U.S. Const. Art. II, § 2, cl. 2 (stating that the President “shall nominate, and by and with the advice and consent of the Senate shall appoint . . . all other officers of the United States . . . but the Congress may by law vest the appointment of such inferior officers, as they think proper, . . . in the heads of departments.”).

³⁶ See *IBS*, 684 F.3d at 1341-42; *Eltra*, 579 F.2d at 300.

³⁷ See 2 U.S.C. § 136 (“The Librarian of Congress shall be appointed by the President, by and with the advice and consent of the Senate”).

³⁸ *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).

³⁹ See *IBS*, 684 F.3d at 1342.

⁴⁰ See *Eltra*, 579 F.2d at 300; *Edmond v. United States*, 520 U.S. 651, 663 (1997) (stating that an Officer is generally an Inferior Officer if his or her work is “directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate”); *id.* at 63 (noting that the unrestricted power to remove an Officer “is a powerful tool for control”). For the provisions governing the Librarian’s appointment of the Register, see 17 U.S.C. § 710(a) (“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.”).

⁴¹ See *IBS*, 684 F.3d at 1340-41. The Copyright Act provides that the Copyright Royalty Judges can be removed only for “misconduct, neglect of duty, or any disqualifying physical or mental disability,” 17 U.S.C. § 802(i), and “shall not receive performance appraisals” other than those related to removal for cause. 17 U.S.C. § 802(f)(2). It also provides that the Judges “shall have full independence in making determinations concerning adjustments and determinations of copyright royalty rates.” 17 U.S.C. § 802(f)(1)(A).

⁴² See *IBS*, 684 F.3d at 1340-41. The *IBS* court’s remedy of severing and invalidating limitations on removal followed the Supreme Court’s similar action in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 496-98 (2010) (holding that the members of the Public Company Accounting Oversight Board did not qualify as Inferior Officers because they were not subject to unrestricted removal by Commissioners of the Securities Exchange Commission, and severing and invalidating the language restricting removal to render those members Inferior Officers).

The *Eltra* and *IBS* cases have clarified the lines of executive control, and emphasized that the President can direct the Librarian of Congress just as he directs his cabinet members. That may alarm many Members of Congress, who view the Library as subject to Congressional control, and as providing services to Congress independent of executive control. Of course, the President has in fact had statutory appointment and removal power over the Librarian for over a century,⁴³ and yet generally has not intruded in the affairs of the Library or of the Copyright Office. Some might hope that he would continue to forbear from asserting any authority in that regard.

There are multiple signs, however, of increased executive assertiveness regarding the Library and the Copyright Office. In late 2011, for example, the President provided a statement to accompany his signing of the Consolidated Appropriations Act 2012. In that statement, he noted that the Act provided the Librarian of Congress with authority “to transfer funds between sections of the Library upon the approval of the Committee on Appropriations of the House of Representatives and the Senate.”⁴⁴ The President then took issue with that provision, and stated that he had “advised the Congress of [his] understanding that this provision does not apply to funds for the Copyright Office, which performs an executive function in administering the copyright laws.”⁴⁵

In connection with litigation of the *IBS* case, the Department of Justice has also now taken the position that Congress made a “purposeful and explicit decision to place the Library within the Executive Branch.”⁴⁶ Perhaps even more pointedly, it has asserted that the Librarian, in discharging his responsibility to “make rules and regulations for the government of the Library,’ . . . is accountable to the President alone.”⁴⁷

This constitutional predicament does not leave Congress without options. Supreme Court precedent makes clear that most functions of the Library of Congress – all those functions not involving the administration of copyright law – are not executive in nature. The Court has held that “powers [that] are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees,”⁴⁸ are not subject to Appointments Clause constraints. With respect to those functions, which would include both general Library services and the policy and legal analysis

⁴³ In the same Act that created the Copyright Office as a separate department of the Library of Congress in 1897, Congress provided that the position of Librarian of Congress would be thereafter subject to Senate confirmation. See Act of Feb. 19, 1897, ch. 265, 29 Stat. 544. That appointment provision, which qualifies the Librarian as a Principal Officer of the United States, has remained unchanged to the present day. See 2 U.S.C. § 136.

⁴⁴ Barack Obama, Statement by the President on H.R. 2055 (December 23, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/12/23/statement-president-hr-2055> (last visited February 23, 2015).

⁴⁵ *Id.*

⁴⁶ Brief for Appellees at 29, *Intercollegiate Broadcasting System v. Copyright Royalty Board*, No. 11-1083 (D.C. Cir. 2011).

⁴⁷ *Id.* (quoting 2 U.S.C. § 136).

⁴⁸ *Buckley v. Valeo*, 424 U.S. 1, 175 (1976).

performed by the Congressional Research Service, there would be no need for the Librarian to qualify as a Head of Department under the Constitution. Thus, if the Library performed only those functions, Congress could either continue to provide that the Librarian report to the President, or it could provide that the Librarian would be appointed by, say, the Joint Committee on the Library, or by some other Committee or Members of Congress. Each of those alternatives may have advantages and disadvantages, but the latter may be a better means of continuing Congress's traditional relationship with the Library.

The sticking points are the Copyright Office and the associated Copyright Royalty Board. They clearly perform executive functions, such as making registration determinations, promulgating regulations, and setting rates for statutory licenses. Thus, the question becomes, if Congress wants to reassert authority over most of the Library of Congress, what does it do with the Library's copyright administration functions?

There are a variety of alternatives available, and this Committee explored some of them in its oversight hearing on the Copyright Office last September.⁴⁹ Congress could combine copyright administration with the administration of patent and trademark law in a single Intellectual Property Office. One version of such a combined office, structured as a government corporation, was proposed in legislation introduced by Senator Hatch almost two decades ago, and may, in the long run, have benefits for the United States.⁵⁰ Congress could also reorganize the Copyright Office as a separate unit in a traditional Department, perhaps by making the Copyright Office a sister of the Patent and Trademark Office within the Commerce Department, under an Undersecretary of Copyright.

In my view, however, if Congress decides to restructure the Copyright Office, it should give serious consideration to the vehicle of an independent agency, for at least two reasons. First, copyright simply doesn't fit well with patent and trademark or with commerce more generally, which is probably one of the reasons why, when searching for a home for copyright over a century ago, Congress accepted then-Librarian Ainsworth Spofford's bid to house it in the Library of Congress. While for theoretical and curricular purposes copyright is often grouped with patent and trademark as "intellectual property," in practice copyright law touches different constituencies and reconciles different interests than patent or trademark law. Since the nineteenth century, patent and trademark have been grouped together as "industrial property," because they concern the rights that industrial enterprises need to flourish.⁵¹ While a wide

⁴⁹ See U.S. Copyright Office, Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary, House of Representatives, 113th Cong., 2d Sess, Serial No. 113-116 (September 18, 2014). For another thorough investigation of such alternatives, see Sandra M. Aistars, *The Next Great Copyright Act, or a New Copyright Agency?*, 38 Colum J. L. & Arts __ (forthcoming 2015).

⁵⁰ See United States Intellectual Property Organization Act of 1996,

⁵¹ For example, the principal international treaty regarding patent and trademark law is the Paris Convention for the Protection of Industrial Property, 828 U.N.T.S. 305, whereas the principal international treaty regarding copyright law is the Berne Convention for the Protection of Literary and Artistic Works, 1161 U.N.T.S. 30.

variety of businesses that benefit from trademark protection do not create or own patentable inventions, they are still all commercial enterprises.

By contrast, there are few individuals who do not create works protected by copyright, whether or not they are in business, and there are few if any individuals who do not use and enjoy such works. Although copyright has always been concerned with protecting the economic value of works of authorship, it has also always been concerned with protecting the privacy interests of individuals who do not want to market or share their works, and with ensuring that discourse about phenomena and events in the world – discourse about facts and ideas – is not hindered by private rights. To view copyright through the same lens as patents and trademarks would be to distort and limit its concerns, and an agency that was dominated by patents and trademarks, as a combined agency would likely be,⁵² would be in danger of taking such a skewed view. More generally, copyright is not just about commerce or commercial activity, and thus the Copyright Office is at best a Procrustean fit for the Department of Commerce.

Second, as I have argued above, Congress and many executive branch agencies have benefitted richly from the impartial expertise of the Copyright Office in its advisory role. An independent Copyright Office could continue to provide that benefit. Like many other independent agencies, it could be empowered to submit “legislative recommendations, . . . testimony, [and] comments on legislation” to Congress without having to clear them with any “officer or agency of the United States.”⁵³ That is the arrangement that has been functioning to the great benefit of U.S. copyright law for over century, and it should not be discarded lightly. Indeed, an independent agency would both honor and protect this role.

In establishing an independent Copyright Office, Congress could set qualifications for its head or heads,⁵⁴ and specify a term of office.⁵⁵ While a Commissioner of Copyright would be

⁵² Fiscal Year 2014 trademark program costs at the Patent and Trademark Office totaled \$225.6 million, over four times the budget of the Copyright Office; Fiscal Year patent program costs totaled \$2.5 billion, over forty times the Copyright Office’s budget. See United States Patent and Trademark Office, Fiscal Year 2014 Performance & Accountability Report 35, available at <http://www.uspto.gov/about/stratplan/ar/USPTOFY2014PAR.pdf> (last visited February 23, 2014).

⁵³ 12 U.S.C. § 250 (applying to the Securities and Exchange Commission, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the National Credit Union Administration). For similar provisions, see, e.g., 7 U.S.C. § 2(a)(10)(B) (applying to the Commodities Future Trading Commission); 52 U.S.C. § 30107(d)(2) (applying to the Federal Election Commission); 16 U.S.C. § 470r (applying to the Advisory Council on Historic Preservation). Another form of such a provision requires concurrent submission of recommendations on legislation to the President and Congress. See, e.g., 49 U.S.C. § 48109 (applying to the Federal Aviation Administration); 42 U.S.C. § 7171(j)(2) (applying to the Federal Energy Regulatory Commission).

⁵⁴ See, e.g., 15 U.S.C. § 41 (providing that no three of the five Federal Trade Commissioners shall be members of the same political party); *Humphrey’s Executor v. United States*, 295 U.S. 602, 620 (1935) (noting those qualifications, and upholding a limitation on the removal of those Commissioners); 19 U.S.C. § 1330(a) (providing that a person shall be eligible for appointment as a Commissioner of the United States International Trade Commission only if he or she “is a citizen of the United States, and, in the judgment of the President, is possessed of qualifications requisite

appointed by the President with advice and consent of the Senate, he or she could be made removable only for good cause.⁵⁶ The independent agency with which I am most familiar, the United States International Trade Commission, looks in many ways like an independent Copyright Office might. It has a staff and budget of a similar size.⁵⁷ It provides Congress, the President, and the Office of the United States Trade Representative with independent expert analysis in an important area of law and of the economy. At the same time, it also plays an important role in administering the law – in its case, by investigating the effect of dumped imports on domestic industries, and adjudicating disputes involving imports that allegedly infringe copyright, patent, or trademark rights. It is headed by six commissioners,⁵⁸ but of course there are other independent agencies, such as the Social Security Administration,⁵⁹ that are headed by a single commissioner. Thus, the independent agency is a model that Congress should keep in mind as it considers the future of the Copyright Office.

V. Conclusion

Before Congress decides precisely how to strengthen the Copyright Office, it will have to consider many alternatives and weigh many suggestions. Any improvement measures, however, should satisfy three criteria. They should give the Copyright Office the means to fund and manage necessary capital investments in information technology, at a time when that has become the central challenge and opportunity for the functions of registration and recordation. They should safeguard the Office's time-tested role in providing Congress and executive branch agencies with trusted advice on copyright legislation and policy. And they should address the constitutional issues that are looming over both the Library of Congress and the Copyright Office, and provide a solid foundation for continuing Office contributions to copyright law and administration.

for developing expert knowledge of international trade problems and efficiency in administering the duties and functions of the Commission.”).

⁵⁵ See, e.g., 15 U.S.C. § 41 (providing that Federal Trade Commissioners are to serve staggered six-year terms); 42 U.S.C. § 902(a)(3) (providing that the Commissioner of Social Security shall serve a six-year term); 26 U.S.C. § 7803(a)(1)(B) (providing that the Commissioner of International Revenue shall serve a five-year term).

⁵⁶ See *Humphrey's Executor v. United States*, 295 U.S. 602, 629-631 (holding that Congress could limit the President's power to remove Federal Trade Commissioners to cases of “inefficiency, neglect of duty, or malfeasance in office”); cf. *Morrison v. Olson*, 487 U.S. 654, 685-692 (1988) (holding that Congress could provide that the Attorney General could remove an Independent Counsel only “for good cause”).

⁵⁷ See United States International Trade Commission, Budget Justification Fiscal Year 2015, at 33, 42, available at http://www.usitc.gov/press_room/documents/budget_2015.pdf (last visited February 23, 2015) (the USITC had actual expenditures of \$79,517,000 in Fiscal Year 2013, and had 366 staff members on board on February 21, 2014 out of 419 positions in its Fiscal Year 2014 staffing plan).

⁵⁸ See 19 U.S.C. § 1330(a).

⁵⁹ See 42 U.S.C. § 902(a)(1).