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Statement of

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In Response to

Hearing: Oversight of the U.S. Copyright Office  
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COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE INTERNET

Statement of Mary Rasenberger on Behalf of the Authors Guild

In Response to the September 18, 2014 Hearing on Oversight of the U.S. Copyright Office

The Authors Guild submits this statement in response to the recent Hearing on Oversight of the U.S. Copyright Office. The Guild and its predecessor organization, the Authors League of America, have been leading advocates for authors' copyright and contractual interests since the League's founding in 1912. We have a 100-year history of contributing to debates before Congress on the proper scope and function of copyright law.

The Copyright Office has been providing important, effective services with the resources it has, but its infrastructure, funding and status within the U.S. government are relics of the analog era. The digital disruption that has swept through the copyright system in recent years requires a reevaluation of the Office's resources and authority, as the Subcommittee has recognized.

The Copyright Office can no longer be treated as a sleepy bureau in the corner of the Library of Congress; copyright and the industries that depend on it represent an increasingly central part of our economy and culture. The political status and funding of the Copyright Office must reflect this reality if the Office is to best serve its stakeholders, which include nearly every U.S. citizen.

We submit this statement to support the testimony of the Register of Copyrights and Director of the United States Copyright Office, Maria Pallante, before the Subcommittee on September 18, 2014. We note that the needs of the Copyright Office fall into three general categories: (i) infrastructure improvement, (ii) securing the funds for that improvement, and (iii) obtaining independent agency status. As a society of authors whose livelihoods are secured by copyright and copyright only, it is in our best interest—as it is in the best interest of the creative community at large—that Congress act swiftly on these fronts to guarantee the Copyright Office's relevance and effectiveness in the years to come.

We are grateful to the Subcommittee for acknowledging the need to reexamine the position of the Copyright Office and for taking into consideration the perspective of the Authors Guild, this nation's largest and oldest society of professional authors.

## **1. Infrastructure**

The infrastructure of the Copyright Office has not kept pace with the times; it must be updated to serve the dynamic and sophisticated business models and needs of those who rely on it, both copyright owners and users—namely, the general public. This will entail the modernization of the registration and recordation systems, a staff that in quantity and expertise can execute the amount and complexity of work the Copyright Office performs on behalf of its stakeholders, and the independence and improvement of the Office's IT resources.

### **a. Registration, Recordation—and Integration**

It is widely acknowledged that the registration system must be updated to catch up with copyright-industry developments that have fundamentally transformed the way many works are delivered and received. The statutory provisions governing registration and deposit are a product of their time—a time when most copyrighted works were embodied in physical objects that were owned by their users. A registration and recordation system that is still largely paper-based simply cannot meet the needs of today's authors and businesses. The digital revolution's increase in the speed of commerce and in modes of distribution has ushered in a new normal: business is done more quickly and more efficiently—and Copyright Office customers expect as much.

A more robust and complete public copyright record is valuable for its own sake. But it would have added benefits. A completely reliable record system would increase commerce by removing uncertainty from corporate legal departments seeking to license works for downstream use. It would also substantially mitigate the problem of orphan works—copyright-protected works whose owners can't be tracked down—simply by minimizing the number of rightsholders who can't be found.

Further, “best edition” regulations must be updated to permit the deposit of electronic copies. The Copyright Office launched an electronic registration system in 2008, but to this day not all applications can be filed electronically. Many group registrations and other non-standard types of registration must still be filed on paper applications. Best edition deposit regulations require hard

copies of most published works to be deposited even when registered electronically—this includes purely digital works that are both created and distributed electronically. This causes great inconvenience and inefficiencies for registrants and for the Office.

If the Library of Congress' needs for its collections cannot be served by electronic copies, Congress should consider separating the mandatory deposit provisions of the Copyright Act (Section 407)—which require the deposit of published works with the Copyright Office for the Library's collections and use—from the deposits required for registration purposes (Section 408), as the two types of deposits serve very different needs. The latter are used by the Copyright Office for examination purposes and by owners and litigants for evidentiary purposes. The mandatory deposit copies, on the other hand, are intended to build the collections of the national library. In a paper-based world, the same copy easily served both purposes. As Register Pallante testified, that is no longer the case.

It is particularly important to authors and individual rightsholders generally that copyright documentation be processed more quickly and retrieved more easily. Moreover, it is essential that the information retrieved be more thorough and be accurate and reliable. Copyright holders and users alike will benefit from an authoritative, dependable, secure and *integrated* database containing all copyright information relating to a given work—both registration and recordation information—that is much like the USPTO's Trademark Electronic Search System.

Currently, the registration and recordation databases are not integrated. Registration documents may show the copyright's original registrant and perhaps a renewal interest. But in many cases a registration document alone presents an incomplete chain of title that can be determined only by consulting recordation documents for licensing information, security interests and other transfers of interest in the copyright. Even where the correct information was recorded with the Copyright Office, it will appear in a separate record, one that may not even contain the registration number, so there is no certain way to link the record with the registration. This is an impediment to businesses seeking to sell, buy or collateralize copyrights, as well as to users seeking permissions from current owners or trying to determine copyright status. The Copyright Office should have a fully integrated system like the USPTO's. A trademark search, for instance, will return all recorded information relating to a particular mark.

Where the registration database has an electronic interface based on a paper system, the recordation system is still wholly paper-based, requiring manual intake and data entry and putting an unnecessary burden on the existing Copyright Office staff. Currently, it takes an average of 17 months (and often longer) to examine and record documents containing essential information pertaining to transfers of interest. This can have serious business ramifications for authors and other copyright holders, such as delaying sales or distribution agreements in cases where a clean chain of title cannot be timely established.

The improvement and integration of the registration and recordation systems will obviously entail upgraded and independent IT capabilities—which this statement will address later—but a simpler issue to resolve is the understaffing of the registration and recordation programs. As Register Pallante described in her testimony, the Copyright Office’s authorized ceiling of 439 full time employees (FTEs) was reduced by approximately 100 FTEs in recent years, and of the remaining positions, almost 80 are vacant due to budget constraints. Of 180 positions in the registration division, 48 are vacant. Meanwhile, the recordation division, which receives annually about 12,000 new paper documents, has only nine employees. That recipe yields the average 17-month processing time. The 2013 budget sequestration severely affected the Copyright Office’s ability to hire and maintain a staff concomitant to its workload. If sequestration resumes in 2016, in the absence of Congressional action we’re bound to see more of the same.

#### **b. Digital Deposits and Digital Risks**

Currently, the Copyright Office uses the Library of Congress’ IT systems and services, which were built to serve different users with different needs. The Copyright Office needs its own, independent server for registration purposes. Of particular concern to authors and other copyright holders is the security of digital deposits of copyrighted works. In the analog era, it was fitting that the Copyright Office was housed in the Library of Congress and used the Library’s resources. When a prerequisite to copyright protection was the physical deposit of the work, the Copyright Office’s mission of examination and registration dovetailed nicely with the Library’s mission of collection, preservation and public access. Copies sent to the Office for registration could be easily passed to the Library for potential inclusion in the national collection. Today, the missions are not as symbiotic due to changes in technology.

The Copyright Office is essentially a customer service bureau; among its main clients are the nation's copyright holders, whose are concerned with the protection and security of their works. A key part of the Library's noble mission, in contrast, is to acquire, catalog, preserve, and make available written and other works for the public benefit. While the missions of the Copyright Office and Library of Congress are not inconsistent—both strive to further “the progress of knowledge and creativity for the benefit of the American people”—from an IT security perspective, the services they provide are fundamentally at odds when it comes to digital works, as will be discussed in greater depth later in this statement. The fact that the Copyright Office must process its digital deposits on a server operated by and shared with the Library of Congress, whose mission does not include the security and protection of copyrighted works, enhances apprehensions of a security breach. The Copyright Office should be entrusted with the responsibility of overseeing the security of digital works for the benefit of their copyright holders—and this should happen on its own dedicated and independent servers.

## **2. Funding**

Increased funding is the first and most obvious solution to the Office's need for infrastructure improvements. This lack of funding is complicated by the Librarian of Congress's control of the Copyright Office's purse strings. The Register noted this irony in the recent hearing: the Copyright Office is able to collect fees, but has no control over what happens to those fees. The bureau overseeing the copyright system that contributes over one trillion dollars to the U.S. economy needs increased funding, and it needs authority over its own allocation of funds.

Despite the success of the U.S. copyright industries, the Copyright office has seen a 7.2% *decrease* in funding since 2010—while its workload has increased over the same period. Its current budget is \$45 million: \$28 million from the fees it collects from its customers, \$17 million from appropriations. The fees it collects do not cover the costs of the services it provides, but raising fees for individual creators is not the solution because it will deter registration. The Copyright Office needs more and better resources.

From a creators' perspective, one of the Copyright Office's most essential endeavors is its support of the Subcommittee's ongoing review of U.S. copyright law, in preparation for what we hope will become, in the words of the Register, “the Next Great Copyright Act.” The Copyright Office is

uniquely situated to serve as the hub of the copyright community during this review process. Its admirable commitment to hearing from all stakeholders, including individual creators, at public roundtables and other events, and its related policy studies and reports, will help guarantee that the copyright law revisions are calibrated to serve creators, other rightsholders and users alike in the coming decades. To this end, we ask the Subcommittee to ensure that the Office has the budget necessary to fulfill all of its registration, recordation and public policy functions.

### **3. Status and Authority of the Copyright Office**

As a society of writers, we are concerned that the rights of individual creators are being overlooked by the courts. Recent decisions concerning mass digitization and fair use underscore these worries. (We refer, of course, to the two related cases brought by the Authors Guild, *Authors Guild v. Google* and *Authors Guild v. HathiTrust*, both of which led to district court decisions holding that mass digitization of library holdings could be permitted under fair use.) The Copyright Office is the only agency in the U.S. government that specifically serves the interests of authors, among other stakeholders. Other federal agencies that address intellectual property rights are primarily focused on the interests of businesses. But copyrighted works are now a key part of our economy, and they would not exist if not for authors. As authors' rights and their ability to make a living increasingly come under attack from many directions, they are in greater need than ever of representation within the federal government—for the benefit of the nation as a whole.

#### **a. Copyright Office Independence**

The position of the Copyright Office within the Library of Congress served both bureaus well at the Office's inception nearly 120 years ago. Originally, and for much of the duration of the arrangement, there was a symbiotic relationship between the entities. But that is no longer the case; and the growing importance of the copyright industries to our nation's economy, as well as the increasing complexities of copyright law, require Copyright Office independence.

Technologies have moved faster than legislation. It may not be practical for Congress to legislate effectively for the long term on technology-specific matters, such as the safe harbors for online service providers, mass digitization and other mass uses, orphan works, digital first sale, updating library and archives exceptions, small claims, and determining when a work is published, and when it is performed or distributed, or otherwise made available. As we have seen again and again, as soon

as technology-related laws are adopted, technology changes, and how the law should be applied to those new technologies is not always clear. The Copyright Office could play an important role in interpreting the law and creating guidelines. Accordingly, the Copyright Office should be given independent agency status with the authority of an expert agency to provide guidance on complex copyright issues.

Moreover, the political status and power of the Copyright Office should reflect the importance of the copyright system to the U.S. economy. As discussed above, the Copyright Office is not an independent government agency and is not considered part of the executive branch. This creates some redundancy in the government and complicates federal copyright policy. Further, none of the other agencies that have the ability to affect copyright policy, including the U.S. Patent and Trademark Office, an agency of the Department of Commerce, or the office of the Intellectual Property Enforcement Coordinator, created in 2008, specialize in the copyright system and how it serves individual creators, to the potential detriment of the copyright system at large.

Last, one of the more important policy functions of the Copyright Office is the promulgation of copyright regulations. Yet, oddly, these remain subject to the approval of the Librarian of Congress, who is not required to have any copyright expertise. On certain bedrock contemporary issues such as mass digitization and security protocols, the digital era has driven a wedge between the interests of libraries and rightsholders, as recent cases and controversies about mass digitization, library preservation and orphan works have shown. The Copyright Office is in part a customer service bureau; its clients are the nation's copyright holders, whose main concerns are the protection and security of their works, and users of those works. Libraries, on the other hand, are interested in inexpensive access to works and ease of distribution as a way to fulfill their own noble mission of preservation and public access. Although we are not aware of any conflict to date, the divergence of missions argues against keeping the power to set copyright policy with the Librarian of Congress.

## **Conclusion**

For the reasons above, the Authors Guild recommends that Congress act to establish the Copyright Office as a independent government agency and that the Register be given two years to solicit recommendations as to its most fitting place in the government structure. In the meantime, we ask that the Subcommittee do its best to secure in the federal budget the funds necessary for the Office

to perform its statutory duties with the authority and efficiency its customers expect, including the necessary technological upgrades and independence, so that our copyright laws continue to fulfill their function: to incentivize and reward creative achievement.