



The Register of Copyrights of the United States of America

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May 9, 2016

The Honorable Tom Graves
Chairman, Subcommittee on Legislative Branch
Committee on Appropriations
U.S. House of Representatives
HT-2 Capitol Bldg.
Washington, DC 20515

Re: Funding strategy and timeline for implementing February 29, 2016
Provisional Information Technology Modernization Plan and Cost Analysis

Dear Chairman Graves:

As required by the Consolidated Appropriations Act of 2016 (the "Act"), I am pleased to provide you with further information regarding a funding strategy and timeline for the technology modernization goals of the United States Copyright Office. As the Committee is aware, the Copyright Office released its *Provisional Information Technology Modernization Plan and Cost Analysis* (the "IT Modernization Plan") to the public on February 29, 2016, and provided a copy to the Chairman and Ranking Member in advance of the March 2, 2016 Library of Congress appropriations hearing.

Background

The IT Modernization Plan was a requirement of the House Report accompanying the Act, directing the Register of Copyrights to deliver "a detailed plan on necessary IT upgrades, with a cost estimate, that are required for a 21st century copyright organization" and to seek public comments regarding the timeline for completion and the funding strategy for implementation.¹ The Report specified that the cost estimate should be submitted within "180 days of enactment of this Act" (June 15, 2016) and the funding strategy should be submitted within "45 days after public comments are received" (May 15, 2016).² Accordingly, immediately after completing the

¹ H.R. REP. NO. 114-110, at 17 (2015). The Report states, "The Committee fully understands the importance of the Copyright Office as it relates to creativity and commercial artistic activity not only within the United States but also on a world-wide basis. In order to serve the copyright owners and the copyright community in the 21st century, a robust modern information technology (IT) operation will be necessary."

² *Id.*

plan, the Copyright Office conducted a public comment period from March 1, 2016 to March 31, 2016.³

Since completing the plan, the Copyright Office also has discussed costing and execution strategies with the Library, including, especially, the Library's CIO and CFO. These discussions will be ongoing as the Library determines the kinds of services or shared services it will be able to provide to the Copyright Office, and perhaps most importantly, determines the shared cost for such services to be charged to the Copyright Office as a client.

As addressed below, the Copyright Office will be making numerous decisions about service providers, vendors, and contractors on a rolling basis throughout the life of the IT Modernization Plan. Within this context, according to both the Library's CIO and the Copyright Office's CIO, the Library sometimes will be a service provider and at other times will offer advice or consultation (so-called "brokerage services"). Further still, there will be opportunities for the Library and the Copyright Office to engage in shared services with one another, and opportunities to engage in shared services across the government. Nonetheless, to remain flexible, and because technology will continue to advance over the course of the modernization effort, it is critical that such decisions be made only at the proper phase of development—they should not be locked in prematurely. The Copyright Office and the Library agree on this approach.

Indeed, from my perspective, the first step in employing shared services is ensuring that the dispersed divisions of the Copyright Office, each of which carries out specific and complex functions of the United States copyright law—and many of which collect fees for segregated services—work across the Copyright Office itself to leverage economies of scale wherever possible. We have taken steps to ensure this kind of coordination going forward, including standing up a Copyright Office-wide Modernization Oversight Committee and a streamlined IT investment process designed to maximize strategies across registration, recordation, statutory licensing, public education, and regulatory work prior to participation in larger Library of Congress processes.

Public comments have been overwhelmingly positive about the specifics of the IT Modernization Plan as well as the expert planning necessary for effective modernization.⁴ Commenters found the plan to be "both forward-thinking and pragmatic"⁵ and "impressive in its depth and breadth of analysis," stating that "it is clear that the Copyright Office engaged in extensive due diligence appropriate for an undertaking of this magnitude."⁶ In addition, there was recognition that "the plan is targeted to meet the current and future needs of creators and the general public by

³ U.S. Copyright Office, Information Technology Upgrades for a Twenty-First Century Copyright Office, Notice of Inquiry, 81 Fed. Reg. 10672 (March 1, 2016) (NOI). Summaries of the comments are enclosed with this funding strategy.

⁴ For example, the Internet Association explained that "[a] 21st century Copyright Office is central to the maintenance and operations of our nation's copyright laws" and "applaud[ed] the Office for taking steps to move registration and recordation practices into the digital age." Internet Ass'n Comments Submitted in Response to NOI at 1-2.

⁵ Nat'l Press Photographers Ass'n Comments Submitted in Response NOI (NPPA Comments) at 2.

⁶ Motion Picture Ass'n of Am. Comments Submitted in Response to NOI (MPPA Comments) at 3.

minimizing costly infrastructure needs, embracing cloud services, and utilizing mobile technologies.”⁷ The Library’s CIO has also praised the plan.

For the benefit of the Committee, we have described the public comments in further detail in the sections below, and included copies in the form of attachments.

U.S. Copyright Office Timeline

The Copyright Office’s IT structure is crucial to the nation’s copyright system and must be modernized as soon as possible. As the public comments noted, modernization of Copyright Office services is urgent and critical.⁸

Modernization largely can be accomplished in a five- to six-year time frame, with additional improvements executed on an ongoing basis. The Copyright Office initially recommended that this time frame begin in FY2018, both to align with congressional budgetary planning cycles and to allow the Copyright Office to complete certain necessary foundational work, such as hiring staff and contractors critical to year-zero activities in FY2017. However, both Members of Congress and Copyright Office customers have asked that the Copyright Office expedite implementation of the IT Modernization Plan because of the urgency of the task at hand, and because it (and the companion document, *Strategic Plan 2016-2020: Positioning the United States Copyright Office for the Future* (“Strategic Plan”)) already reflects several years of Copyright Office public engagement on technology and business standards in the copyright marketplace.

The Copyright Office appreciates this enthusiasm and is eager to begin comprehensive modernization as soon as possible. The Copyright Office can, if requested, accelerate some FY2018 activities into FY2017, but still will have to execute certain year-zero activities, such as hiring appropriate staff, before undertaking the entirety of FY2018 development plans. The Copyright Office thus, with appropriate support and clarity, could make significant headway in developing modern systems within five to six years. This aligns with the public comments, which generally appreciated the five-year timeline, but also urged that, if possible, the Copyright Office should expedite the timeline and not hold back any new developments until the end of the time frame or use the time frame as a constraint to slow down progress.

In light of the desire to expedite modernization, the Copyright Office will need to be extremely focused on whether and how quickly it has authority to onboard needed staff, award contracts, and approve IT goals that would have to be implemented over multiple years. Moreover, IT Modernization Plan implementation will not happen in a vacuum. At the same time, the Copyright Office will engage its customers about regulations and practices pertaining to dozens of categories of creative works, from entertainment software to digital films to musical works to

⁷ Intellectual Property Owners Ass’n Comments Submitted in Response to NOI (IPO Comments) at 2.

⁸ See, e.g., Ass’n of Am. Publishers Comments Submitted in Response to NOI (AAP Comments) at 2 (“modernizing the registration and recordation systems of the Copyright Office is an urgent priority to realize the full potential of a fair, efficient and effective implementation of a statute that benefits American society as a whole”); Prof’l Photographers of Am. Comments Submitted in Response to NOI (PPA Comments) at 2 (“modernizing the U.S. Copyright Office. . . is an urgent and critical undertaking”).

photographs. This interrelated work, all of which is outlined in the Strategic Plan, is essential to achieving technical upgrades that are targeted to the ways in which the Copyright Office examines works for *prima facie* evidence, certifies copyright ownership, protects copyrighted works, and provides access to copyright data.

U.S. Copyright Office Funding Strategy

A strategy that empowers the Copyright Office to collect and apply fees with more flexibility should be a large part of funding modernization and operating costs, but modernization also will require taxpayer support over the next five years to defray capital expenses. The Copyright Office thus is recommending a 50/50 taxpayer appropriations/fee mix for modernization, a mix of 2/3 fees and 1/3 appropriations for ongoing operations, and updated authority to manage and spend its reserve fund across fiscal years.

Sound administration is essential to protecting the intellectual property rights authorized by the U.S. Constitution and enacted by Congress. Historically, Congress has provided taxpayer appropriations to fund a significant percentage of the Copyright Office budget because, as one public comment noted, “[a] fully searchable database populated with complete copyright and ownership information, as well as timely, easy access to deposit copies, will benefit and assist not just creators, but all users of copyrighted content—including litigants and businesses and individuals seeking to make informed decisions regarding works and material they may wish to consider licensing.”⁹ A robust Copyright Office record fuels both creativity and innovation, and thus taxpayer support has an important role in modernizing the Copyright Office IT system.

Fees are also a central part of the funding equation.¹⁰ Determining the correct balance of appropriations and fees requires consideration not only of the public benefits of the national copyright system, but also how to ensure that copyright owners register and record their works, because doing so is voluntary in the United States.¹¹ While fees thus are an important component of the funding balance, there was no suggestion in the public comments that implementation of the IT Modernization Plan be fully fee-funded.¹² In fact, many noted that it is premature to determine a fee ratio.¹³

⁹ Am. Intellectual Property Law Ass’n Comments Submitted in Response to NOI (AIPLA Comments) at 2.

¹⁰ Some of the public comments supported the idea that Library itself should contribute to modernization costs because it is a beneficiary of the copyright system (receiving phonorecords and published works valued at approximately \$30 to \$32 million annually in recent years) and “[a]s a result of increased registrations that will likely occur with the modernization of the Copyright Office’s IT infrastructure, the Library of Congress is likely to receive a significantly higher number of deposits.” AAP Comments at 3-4. Another comment suggest that some Library IT money should instead go to the Copyright Office because the Library receives IT funding to support the Copyright Office IT system, and suggests continuing to provide that portion of funding to the Library would be a “windfall” because, under the IT Modernization Plan, the Copyright Office would control its IT systems. Copyright Alliance Comments Submitted in Response to NOI (Copyright Alliance Comments) at 4.

¹¹ As one comment explained, “relying too heavily on increases to registration and recordation fees for rights holders will not serve the purposes of the [Copyright] Act because steep fee increases will discourage voluntary registration and recordation, with the former also having a significant adverse impact on the important related program of securing deposit copies for the Library of Congress.” AAP Comments at 2.

¹² In fact, multiple comments recommended that no fees should be used for IT modernization at all, at least in the initial phase of modernization and for capital expenses, and instead asserted that funding should come only from appropriations. See, e.g., Am. Bar Ass’n Section of Intellectual Property Rights Comments Submitted in Response

Nevertheless, the Copyright Office recommends amending Section 708 of the Copyright Act, which governs the Copyright Office's fee-setting authority, to at the very least provide more flexibility. This is because Section 708 closely ties fees to actual costs for specific services, and thus does not provide sufficient room for the Copyright Office to consider innovative fees such as to allow for potential subscription fees, fee differentiation, to support capital expenditures, or to consider additional fees for high-volume access to improved and modernized data.¹⁴

The Copyright Office also would benefit from a stable and dedicated reserve fund for use with multi-year costs like capital expenditures.¹⁵ This would be an important change for the Copyright Office, as it would allow for the build-up of needed funds for expensive projects such as large IT upgrades in the future. It also would allow the Copyright Office to plan over multiple budget cycles, which is crucial when planning contracts and executing projects that span fiscal

to NOI (ABA-IPL Comments) at 2 (initial appropriation should be sufficient to cover cost of modernization); Am. Soc'y of Media Photographers Comments Submitted in Response to NOI (ASMP Comments) at 3 ("In the early stages of the IT Plan federal funding must play an especially critical role"); Authors Guild Comments Submitted in Response to NOI (Authors Guild Comments) at 2 ("Ideally, we would like to see the IT modernization funded with appropriated dollars since copyright owners and potential users now includes almost all tax payers, and the copyright industries are now one of the most important sectors in our country. Copyright registrants should not bear the brunt of the years of underfunding and overdue upgrade to the Copyright Office . . . Upgrading the Copyright Office's IT is a one-time capital expenditure, and it serves the public broadly"); Digital Media Licensing Ass'n Comments Submitted in Response to NOI (DMLA Comments) at 2 (Congress should provide an initial appropriation to cover development of the IT Modernization Plan's modernized systems); Am. Ass'n of Indep. Music, Am. Soc'y of Composers, Authors and Publishers, Broadcast Music, Inc., Nat'l Music Publishers' Ass'n, Recording Industry Ass'n of Am., Inc., and SESAC Holdings, Inc. Comments Submitted in Response to NOI (collectively, Music Community Comments) at 4 (appropriations only for modernization).

¹³ A middle ground among the positions in the public comments would seem to be a 50-50 split for modernization costs and slightly more in fees down the road. Suggestions ranged from using 100% taxpayer appropriations to arguing that the amount of taxpayer appropriations remain at least as high, if not higher than, the current ratio of roughly 60% fees to 40% taxpayer dollars for ongoing operations. *See, e.g.*, Copyright Alliance Comments at 3-4 (use combination of appropriations and fees; appropriations should not fall below 40%, and some funding should come from Library resources); IPO Comments at 2 (continued mix of 2/3 fees, 1/3 appropriations); MPAA Comments at 4 (premature to name exact ratio of appropriations versus fees but "it would be proper for appropriated dollars to comprise at least an equal amount of the funding burden along with fees derived from users of the Copyright Office").

¹⁴ The public comments support amending Section 708 to provide such services. *See, e.g.*, ABA-IPL Comments at 3-4 (subscription rates for high-volume creators; "it is proper to grant the Office authority to determine appropriate fees for such high-volume use that can fund the maintenance and further modernization efforts"); AIPLA Comments at 2 (amend Section 708 to allow the Copyright Office to collect fees to cover capital and operating expenses); ASMP Comments at 4 (favoring the ability to structure pricing formulas based on different authors / types of materials, and the possibility of a subscription fee model); Authors Guild Comments at 3 (favoring "tiered fee schedule under which corporate copyright holders (who use the Copyright Office's services in much greater volume than individuals) might pay a higher fee rate than independent creators"); DMLA Comments at 4 (allow the Copyright Office to recover reasonable costs incurred for services as well as development and maintenance of IT systems); NPPA Comments at 5 ("Congress should permit the Copyright Office to consider flexible pricing and alternatives to registration fees based on individual applications and consider the different needs of registrants, such as entity size or type of work"). It is important, however, to be careful in fee differentiation because "[w]hile distinctions among types of works are real, fees differentiated on the nature of the applicant is a nuanced subject and deserves careful consideration and consultation before the adoption of such an approach." MPPA Comments at 5.

¹⁵ *See, e.g.*, AIPLA Comments at 2 (allow appropriated money to stay available to spend on multi-year projects); Copyright Alliance Comments at 5 (Copyright Office should build reserve account from fees); Music Community Comments at 8-9 (fee overages should be placed in a special reserve fund under control of appropriators).

years. If such a fund were protected against being used as an offset for future taxpayer appropriations, the Copyright Office would have more confidence in its ability to make sound long-term policies.

To this end, the Office has reviewed its authority to set and assess fees under Section 708 of the Copyright Act and will work with its authorizers on specific statutory revisions. The main points for proposed amendment to Section 708 are:

- Revisions track to the U.S. Patent and Trademark Office funding and fee setting provisions.
- Fees would be set through a rulemaking process, to occur at least every four years. The Register would notify Congress of proposed fees, and Congress would have an opportunity to review as part of the process. For new services, the Register would have authority to set interim fees pending the periodic fee setting process.
- Fees would be based on the aggregate costs of operating the Copyright Office, rather than specific services. Fees could be used to fund both short- and long-term projects, including IT investments. This would enable more flexibility in setting and developing new fee structures, including potentially innovative models involving differentiation based on type of claimant or flat fees as suggested by public comment.
- Would establish a reserve fund for fees in excess of appropriated thresholds that would be available for use by the Copyright Office, subject to congressional approval.
- The Register would submit spending plans, including estimates for multi-year projects, to Congress each year.

As these statutory changes are addressed, customers will want greater clarity and greater assurances as to the services they are receiving in exchange. Some Copyright Office customers have made clear that they will accept additional fees if the Copyright Office controls IT investment decisions and implementation. Underlying this concern is the important interplay between the Copyright Office's legal duties and the intricacies of copyright law. Many have noted the "vast differences in both mission and daily operation of the Copyright Office specially compared to the Library of Congress overall," making it "imperative that the Office have an independent IT system."¹⁶ Some noted that Copyright Office authority over its IT should "be managed from within the Copyright Office, utilizing individuals who work alongside of, and are fully accountable to, the Office's legal and business experts [and] modernization requires, and will receive, singular attention and around-the-clock dedication."¹⁷

Relatedly, the Copyright Office understands that it is imperative to minimize costs where possible and to move forward in a fiscally responsible manner. It should be noted that automation does not necessarily equal cost savings, and in fact many times costs rise after automation is implemented. The primary advantage of automation comes as a result of improved

¹⁶ PPA Comments at 4; *see also* Authors Guild Comments at 4 (stating that "the services the Copyright Office and Library of Congress provide are fundamentally at odds when it comes to digital works.").

¹⁷ MPAA Comments at 3.

information and improved efficiency; in other words, increased participation in the national copyright system. The IT Modernization Plan sought to address these cost efficiencies throughout its analysis and requires the Copyright Office to leverage economies of scale in several ways. Within this framework, the Library and the Copyright Office will assess, on an ongoing basis, how best to collaborate.

One thing we would like to stress is that, due to the legal nature of the Copyright Office's work, there must be rulemakings with public input regarding practice changes that permeate the way the Copyright Office examines, stores, and provides access to copyrighted works (*e.g.*, video games, movies, photographs, books, websites) before IT modernization can begin. For example, updated intake, examination, or storage practices for online newspapers would require the Copyright Office to *first* draft regulations, engage in a period of notice and comment, and *then*, correspondingly select IT strategies and vendor services. It is the Copyright Act that controls decisions about IT, not vice-versa.

As the Copyright Office has discussed these issues and its "clean slate" approach with the Library, a few areas of collaboration are apparent already. For example, the Copyright Office shares interests in storage, security, and disaster recovery investments, and the Copyright Office remains interested in continuing its participation, as part of the Library, in the private legislative branch network CAPNET. Moreover, the IT Modernization Plan assumes the Library's CIO will set overall policies and standards for many protocols, taking into account the expressed needs and expertise of the Copyright Office.

Although the IT Modernization Plan calls for leveraging commodity IT, it also suggests that this and other options be weighed in connection with timing, expense, and effectiveness for the copyright system. For example, Library-related services (including shared services) may not be free of cost to the Copyright Office and may, in fact, be more expensive or more tailored towards other business units of the Library. Additionally, it is important to consider how time sensitive and critical the Copyright Office's needs are and the degree of involvement the Library is prepared to expend at any given time. What we would urge is that the Copyright Office and Library be given the flexibility to proceed with stated goals in tandem, working together to determine the appropriate execution.

As noted above, and as the Library agrees, particular services will need to be assessed on a rolling basis and it would be premature to prejudge these in advance. The Library has embarked on a major transformation, but the Copyright Office must have more authority to weigh in on central decisions and to depart from them if they are not in the best interest of the national copyright system. This approach ensures that there is necessary transparency when it comes to the expenditure of both customers' fees and taxpayer dollars, and it protects the Register's statutory authority to administer the law as an expert officer of the United States.

In closing, I want to thank the Committee for its ongoing interest in and support of the Copyright Office's IT and funding needs, as we craft a path forward to a twenty-first century Copyright Office. Please do not hesitate to call if you have any questions or concerns.

Sincerely yours,



Maria A. Pallante
United States Register of Copyrights

Enclosures

Copies:

The Honorable Debbie Wasserman-Schultz, Ranking Member
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The Honorable Shelley Moore Capito, Chairman
Subcommittee on Legislative Branch, Committee on Appropriations
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The Honorable Brian Schatz, Ranking Member
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The Honorable Bob Goodlatte, Chairman
Committee on the Judiciary
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The Honorable John Conyers, Jr., Ranking Member
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The Honorable Chuck Grassley, Chairman
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The Honorable Patrick Leahy, Ranking Member
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The Honorable Roy Blunt, Chairman
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The Honorable Charles E. Schumer, Ranking Member
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