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January 31, 2017

The Honorable Bob Goodlatte
The Honorable John Conyers, Jr.
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

RE: House Judiciary Committee's Proposal on Copyright Office Reform

Dear Chairman Goodlatte and Ranking Member Conyers:

We are writing in response to your request for comments on the House Judiciary Committee proposal for reforms to ensure the Copyright Office keeps pace in the Digital Age. This letter expresses the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Senior Fellow. The Free State Foundation is an independent, nonpartisan free market-oriented think tank that focuses primarily on communications and Internet policy, administrative and constitutional law, and intellectual property issues. We are the co-authors of *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective* (2015), published by Carolina Academic Press. Our book explores the historical and jurisprudential underpinnings of copyright and patent rights in American constitutionalism and explains why the Founders thought securing copyright and patent protection should be included in the Constitution.

We welcome the Committee's forward-looking proposal to reform the Copyright Office, especially the proposal to provide the Office with autonomy through structural changes. Such structural reform is critical to overcoming administrative and technological obstacles that now keep the Office from carrying out its key registration and recordation functions as efficiently and effectively as it should. Modernizing the Copyright Office and improving its capabilities to perform its core functions will reduce compliance costs and enhance the economic value of copyrighted works. Modernizing the Copyright Office and restructuring it to provide sufficient autonomy is necessary to fulfilling the purpose of the Constitution and laws of the United States to secure for creators and their assigns the exclusive right to proceeds from their copyrighted works.

The Committee's reform proposal provides a sensible starting point for Congress to consider legislation to bring the Copyright Office into the 21st Century.

A Free Market Think Tank.....Because Ideas Matter

I. The Copyright Office Should Be Restructured and Made Autonomous

The Copyright Office has been under the authority of the Library of Congress since 1870. The Librarian of Congress appoints the Register of Copyrights. That means the Librarian possesses ultimate decisionmaking authority over the Copyright Office's budget and the establishment and execution of the Office's priorities, not the Register of Copyrights. The Librarian has an array of responsibilities focused mostly on developing and preserving its collections, which document the history of the American people and their contributions to the advancement of knowledge. The Copyright Office is structurally deprioritized by this arrangement.

Importantly, the Committee's proposal would restructure the Copyright Office to give it a large measure of autonomy. Under the proposal, the Copyright Office would be separate from the Library of Congress and become a standalone entity within the Legislative Branch. The proposal says the Register should be subject to a nomination and consent process with a 10-year term limit, subject to potential re-nomination. Although the proposal doesn't state this explicitly, presumably the Register would be nominated by the President and confirmed by the Senate. This may be inferred from the proposal's reference to "the same nomination and consent process as other senior government officials."

While potentially there may be other structural ways to provide the Copyright Office the autonomy and authority it needs to carry out its important functions in an effective and efficient manner, including upgrading its technology, the Committee's proposal certainly is meritorious in formulating a structure that provides needed autonomy and independence from the Librarian of Congress. Simply put, the Register needs to have control over the Office's budget and, within the bounds of Congress's delegation of authority, the ability to set the Office's priorities and to execute them. And if the Register is nominated by the President and subject to Senate confirmation, the status of the Register within the government will be elevated. At a time when all recognize that copyright law and copyright protection is becoming ever more crucial to growing jobs and our nation's economy, such elevation in status likely will give the Copyright Office more sway in formulating and coordinating copyright policy across the government.

While other options should not be foreclosed at this stage, the need for Copyright Office autonomy from the Librarian of Congress is clear. Thus, the direction of the restructuring in the proposal provides a very useful focus in furthering the deliberations that now should follow.

II. Advisory Committees Could Provide the Copyright Office with Useful Feedback

In addition, the proposal contemplates the establishment of copyright advisory committees that would provide the Copyright Office with valuable information and

insight. The proposal envisions the committees addressing subjects such as registration, recordation, public outreach, and access for persons with disabilities. Advisory committee members would represent a diversity of viewpoints. This idea has some merit, as the information and insight of such advisory committees, if properly constructed, potentially could improve the Office's performance of administrative functions. Advisory committees' input would not restrict the Copyright Office's decisionmaking ability but, potentially, could heighten Office responsiveness to market developments and technological advancements.

If there are advisory committees, it is very important that they operate in an efficient manner and that they not be used in a way that unduly slows down the important work of the Office. Advisory committees in some agencies have this effect without providing concomitant benefits. It is also crucial that any advisory committee be comprised in a manner that ensures the expertise and experience of copyright holders is fairly taken into account.

III. The Copyright Office Should Be Given Authority to Modernize Its Technologies to Improve Its Efficiency and Effectiveness

Further, the proposal would authorize the Copyright Office to make much-needed upgrades to its information technology. Indeed, the autonomy to be given to the Copyright Office under the proposal will enable implementation of technological upgrades to be carried out more promptly and effectively. Certainly, the Register of Copyrights should have authority to determine whether use of the data center being built by the Library of Congress would best meet the Copyright Office's needs or if other IT options should be pursued instead.

According to former Registers of Copyrights Ralph Oman and Steven Tepp, the Copyright Office's registration database is "woefully unsuited" to its task of providing a public record of published, copyrightable works. As Messrs. Oman and Tepp wrote in their October 2015 White Paper, "[A 21st Century Copyright Office: The Conservative Case for Reform](#)," online searching of registration records from 1978 to present is available "only in limited fields (e.g., author, title) and with limited functionality." Also: "Not only are the recorded transfers not searchable online, the application process itself remains entirely paper-based, as it was when the Library took over that function in 1870." A more searchable, accurate, and inexpensive system for recording transfers of copyrights is needed.

The proposal would authorize the Copyright Office to make necessary upgrades, including a searchable database of copyright records. Streamlined processes and searchable databases will facilitate the kinds of voluntary exchanges that are the significant drivers of economic value in copyrighted works. Use of advanced technologies to improve the Copyright Office's capabilities and performance of core functions could simplify and ease the registration process. Reduced registration burdens would benefit creators of copyrightable works. And would-be purchasers of copyrighted works would benefit from more reliable and less costly searches for current owners.

Accurate and user-friendly systems for recording transfers of copyright ownership would better enable commercial transactions between owners and purchasers, thereby promoting more economically efficient outcomes.

IV. Establishing Small Claims Authority Within the Copyright Office Would Help Address Takedown Claims and Reduce Burdens for Small Creators

Finally, the proposal would establish within the Copyright Office a small claims system for low value copyright infringement. The small claims system would also address certain takedown notice claims. Granting the Copyright Office authority to establish a small claims system is a constructive idea that the Committee should pursue.

Under Section 512 of the Digital Millennium Copyright Act (DMCA), copyright holders are entitled to give notice to an online service provider when infringing content is posted to its website. An online service provider receives legal immunity if it responds expeditiously to remove or disable access to the infringing content.

Nearly 20 years of advancements in Internet technology and online user habits have made the DMCA's "notice and takedown" process for removing infringing music and other media content from the Internet unduly burdensome for many copyright holders. This is especially true for smaller copyright holders, who are less able to expend time or money patrolling websites for infringement and issuing numerous notices. Under DMCA, if an online user objects to the removal of the infringing content, online service providers must repost the content and copyright holders must hire a lawyer and file a lawsuit in federal court within 10 days. For smaller creators, the economics of such litigation are forbidding.

A small claims system, along the lines set forth in the proposal, may provide a more efficient means for copyright holders, including those with modest financial resources, to pursue their rights under the law.

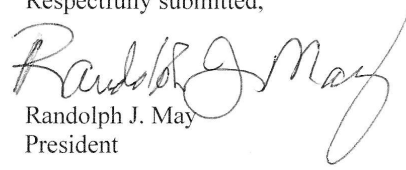
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The Committee's proposal offers worthwhile reforms that would restructure and modernize the Copyright Office. Such restructuring and modernizing would improve the Copyright Office's functioning, enhance the economic value of copyrighted works, and provide cost-effective means for smaller creators to legally enforce their copyrights.

We commend the Committee for the efforts thus far. We hope these efforts will lead to a legislative proposal to reform the Copyright Office and that such legislation will be given

prompt consideration in this Congress. Of course, the Committee should continue to work on reforming other aspects of copyright policy, such as music licensing, as part of its review of U.S. Copyright Law.

Respectfully submitted,

A handwritten signature in cursive script that reads "Randolph J. May". The signature is written in black ink and is positioned above the printed name and title.

Randolph J. May
President

Seth L. Cooper
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