

ICLE Response to the Library of Congress Survey Requesting Input on Expertise Needed by the Register of Copyrights

What are the knowledge, skills, and abilities you believe are the most important for the Register of Copyrights?

While undoubtedly this is a restatement of the obvious, the Register should, first and foremost, have a background that demonstrates his or her understanding of the importance of modern and effective copyright protection and its critical role in the economic and cultural health of this nation.

In 2015 (the most recent year comprehensively analyzed),¹ the value added to U.S. GDP by the core copyright industries was more than \$1.2 trillion dollars, amounting to 6.88% of the U.S. economy; the value added by *all* copyright industries approached \$2.1 trillion, amounting to 11.69% of the U.S. economy. In addition, core copyright industries employed over 5.5 million workers in 2015, or 3.87% of the entire U.S. workforce, whose average annual 2015 compensation of \$93,221 far exceeded (by 38%) the U.S. average. Taken together, all copyright industries employed more than 11.4 million workers in 2015, or 7.95% of the U.S. workforce.

But copyright has more than just economic value. The empowerment of creators through copyright reflects the core principles of individuality, self-reliance, freedom of expression, cultural diversity and experimentation upon which this republic was founded. The right to determine the uses of one's creative work is a fundamental right recognized by Article 27 of the Universal Declaration of Human Rights and other instruments. Moreover, society gains when it creates sufficient incentives to authors to create original works and to voluntarily share them with the public.

The Register should seek to ensure that all creators are able to choose the manner in which their creations are used. An effective and functional copyright environ-

¹ The following data are from STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2016 REPORT, *available at* <http://www.iipawebsite.com/pdf/2016CpyrtRptFull.PDF>.

ment is not a panacea; it does not on its own create global parity in the marketplace of ideas. But it does give individual creators a fighting chance, and an opportunity to compete. The ability to generate revenue from one's creativity — to earn a living as a creator by determining how and when to license the use of one's creative works — is fundamental to a society's ability to foster cultural production. The moral and economic aspects of this equation are inseparable.

It is also important for the Register to fully grasp that systems of copyright replaced private patronage as the mechanism for enabling creators to be self-sustaining. When creativity is fueled by market forces, the cultural power and potential of individuals is unleashed and society benefits. While copyright may be inadequate on its own to create optimal market conditions, it remains by far the most effective tool for fostering creativity and democratizing culture.

As the Librarian surely knows, defending the right of creators to determine the uses of their works in the present technological universe isn't always popular. Many argue that copyright is outdated, that it conflicts with freedom of expression and the ability to innovate, and that it should therefore be replaced by broad exceptions and/or compulsory licenses. In an era that trumpets the value of "permissionless innovation," the right of an individual to say no to the proposed use of his or her works strikes some as antediluvian. But, properly understood, permissionless innovation can't mean that property and contracts are irrelevant; such a view undermines the "fuel of interest" that is essential to maintaining "the fire of genius," in Abraham Lincoln's memorable language. It will be up to the next Register to properly contextualize copyright so that its importance as an exclusive property interest is understood, to ensure that permissionless innovation refers to a *regulatory* environment and not to the erosion of commercial agreements rooted in fundamental property interests, and to vigorously challenge the notion that protection of original expression through the copyright law is a form of restriction on freedom of expression.

In short, the next Register must be prepared to take positions that may be unpopular with certain parties in order to advance modern and effective copyright protection. He or she must work with Congress to adapt copyright to the digital age in order to provide creators with an effective means of expanding their ability to determine the uses of their works. Digital technologies provide unprecedented opportunities for creators to make their works available, and can contribute greatly to the country's economic and cultural health. But the potential of the internet and other technologies to expand markets for creators has been stifled by the piracy and sub-market licensing resulting from negotiating asymmetries, in turn caused by the mismatch between technology and the law protecting creators'

rights. The next Register should have a vision for addressing this imbalance, and for fulfilling the promise of the digital age.

Some organizations have suggested that the role of the Copyright Office is to be a neutral party serving as a referee between competing interests. The new Register must soundly reject that view, and reject the very notion that the interests of creators and the public interest are in tension. Rather, the Register must fully comprehend and act on the necessity of leadership in advancing a sound understanding of copyright policies for the digital age.

Leadership requires patience, vision and fortitude. And of course there are times to listen — but there are also times to act. In handling our cultural legacy and our future, we can ill afford neutrality from the top copyright official in the government.

What should be the top three priorities for the Register of Copyrights?

Priority #1: The most important and overarching priority is constant engagement in an evolving technological landscape that creates risks and opportunities for creators as well as distributors. We agree with the proposal from the House Judiciary Committee recommending the addition of a Chief Economist and Chief Technologist to the Office, and the formation of diverse advisory committees to ensure that the Register has the best information possible. But we also highlight that the Register must lead, and not wait for consensus to develop — particularly where consensus is unlikely. The Register has an obligation to present and future Americans to ensure that copyright is fit for purpose in the digital age, and to work closely with Congress in securing necessary adaptations and/or enforcement.

Priority #2: While aspects of the copyright law — and Section 512 in particular — are showing their age and should be amended to provide greater incentives for intermediaries to address infringing conduct on their platforms, the new Register can take steps even without new legislation that could play a significant role in modernizing copyright protection.

Section 512(i) is particularly interesting. Unlike other conditions on safe harbors, 512(i) requires *accommodation* of certain technical measures (referred to as *standard technical measures*) rather than merely passive non-interference. Standard technical measures are defined in Section 512(i) as

technical measures that are used by copyright owners to identify or protect copyrighted works and —

- (A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;
- (B) are available to any person on reasonable and nondiscriminatory terms; and
- (C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

The development and deployment of standard technical measures could address many of the issues that presently undermine the copyright system, potentially preventing infringement through more effective and nuanced tools than are presently employed. Identifiers and content protection technologies that are pervasive and not platform-dependent could greatly facilitate both licensing and the identification and prevention of infringement.

Unlike inflexible technologies employed only at the content level (which would generally either permit or deny uses of works at the network or equipment level), standard technical measures could be implemented with much finer granularity, allowing greater interdiction but also greater permissiveness and an enhanced ability to discern between infringing and non-infringing uses of protected subject matter. The development and accommodation of standard technical measures was a key part of the DMCA deal fashioned by Congress, and reflects Congress' belief that technologies, rather than legal norms, would be the key component in managing copyright protection in the digital realm. Sadly, 512(i) has been an effective dead letter given the reluctance by those who would need to accommodate such measures to engage in developing mandatory standards. One of the first priorities of the Register should be to create technical working groups to develop such measures.

Priority #3: There has been much discussion of Copyright Office modernization, and one of the key priorities for the new Register will be to implement the Copyright Office's IT modernization plan, including making the registration and recordation process easier and more affordable. For the new Register to be effective, the Copyright Office itself must be properly structured and staffed.

Respectfully Submitted,

INTERNATIONAL CENTER FOR
LAW & ECONOMICS
3333 NE Sandy Blvd., Suite 207
Portland, OR 97232
(503) 770-0076
icle@laweconcenter.org