

Lessons from History

The Copyright Office Belongs in the Library of Congress

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Some commentators have described the placement of the U.S. Copyright Office in the Library of Congress as primarily an accident of history.¹ They argue that the Copyright Office never needed to be in the Library of Congress in the first place and should be moved out now. In fact, the centralization of copyright administration in the Library of Congress in 1870 was a logical, considered decision made not only to benefit the Library of Congress through the deposit system, but also to streamline the copyright registration process by centralizing its activities. While the U.S. Congress has made a number of revisions to copyright law since 1870, including establishment of the Copyright Office in 1897,² it has preserved copyright's original connection to the Library of Congress. The progress that has been made by the Library of Congress in modernizing its information technology systems demonstrates that this special relationship can prosper in the digital age.

Consolidation of Copyright at the Library of Congress

All copyright activities were placed in the Library of Congress in 1870 under an act revising the patent and copyright statutes.³ Immediately prior to that time, responsibility for copyright administration was shared among three entities. The federal district courts were responsible for copyright registration, and the Patent Office (then in the U.S. Department of the Interior) and the Library of Congress each received a deposit copy of copyrighted publications.⁴ Under this system, the Library only received at most 80 percent of required deposits.⁵ The passage of the 1870 Act was the result of advocacy by Librarian of Congress Ainsworth Rand Spofford, who believed that the best way for the Library to build a comprehensive collection was by increasing the number of deposits it received.⁶

Certainly, the benefits of the 1870 Act to the Library, and consequently to nation as a whole, were considerable. The increase in deposits allowed the Library of Congress to become the largest library in the country and worthy of serving as the nation's library.⁷ However, the reasoning behind the move was not limited to helping the Library build its collection. The change vastly simplified the copyright registration and deposit process by consolidating copyright into one organization.⁸ Librarian of Congress Spofford himself recognized the benefits of such a change to users of the copyright system. He observed that by centralizing copyright at the Library of Congress, "an infinitude of expense, trouble, and insecurity would be saved to the proprietors of Copyrights and to

the legal profession.”⁹ Further, Representative Thomas A. Jenckes, a proponent of the 1870 Act, stressed in a speech to the House that copyright deposits were currently inaccessible at the Department of the Interior and that they should instead “be so arranged and catalogued as to be accessible to all.”¹⁰

Past Rejected Proposals to Move the Copyright Office

Since copyright was first centralized in the Library of Congress in 1870, copyright law has undergone multiple revisions. Yet despite making numerous other changes to the law over time, including major revisions in 1909 and 1976, Congress has preserved copyright’s consolidation in the Library of Congress. An examination of legislative history confirms that Congress has on multiple occasions considered the question of where the Copyright Office should be located and has rejected proposals to move it or to change its relationship to the Library of Congress.

In 1975, during the revision efforts that led to the Copyright Act of 1976, Congress considered a claim that the location of the Copyright Office within the Library of Congress was unconstitutional. The argument was that the Copyright Office, an office within the legislative branch, was performing executive functions that violated the separation of powers doctrine embodied in the Constitution.¹¹ This claim was refuted in a detailed report submitted to Congress by the Register of Copyrights,¹² and the Copyright Act of 1976 left the placement of the Copyright Office in the Library of Congress unchanged. The constitutional question was directly addressed by the Fourth Circuit in the 1978 case *Eltra Corp. v. Ringer*, in which the court stated that the Office permissibly engaged in administrative functions because it operated under the direction of the Librarian of Congress, who was appointed by the President.¹³

The organization of the Copyright Office was again challenged by the Copyright Reform Act of 1993. The Act was introduced in the House as H. R. 897 and in the Senate as S. 373. It proposed that the President appoint the Register of Copyrights. Additionally, it would have given the Register of Copyrights independent control over the activities of the Copyright Office.¹⁴ The Librarian of Congress at the time, James H. Billington, expressed strong opposition to making the Register of Copyrights a presidential appointee and changing the relationship between the Library and the Copyright Office. He noted the importance of the Library’s collaboration with the Copyright Office and stated that his responsibilities as Librarian of Congress were “of fundamental importance in advancing the constitutional principle on which copyright is based, the promotion of the arts and sciences.”¹⁵ S. 373 died in the Senate.¹⁶ In H. R. 897, the changes to the Copyright Office were removed in the first revision. This bill passed in the House but not the Senate.¹⁷

The Omnibus Patent Act of 1996 (S. 1961) proposed that copyright, patent, and trademark exist under a single government corporation.¹⁸ In a hearing, then-Register of Copyrights Marybeth Peters expressed strong opposition to the proposed move of the Copyright Office. She was profoundly concerned about the possibility that registration costs would rise as a result of the move, as well as with the potential politicization of the Copyright Office. She also noted the difference between copyright and other forms of intellectual property, highlighting its “unique influence on culture, education, and the dissemination of knowledge.”¹⁹ Librarian of Congress James H. Billington

likewise firmly opposed the proposition, pointing to the Copyright Office's rich history at the Library of Congress and the important contribution the Copyright Office had made to the Library through the deposit system, which he believed functioned best when all copyright activities were located at the Library.²⁰ Organizations and communities including the American Society of Composers, Authors, and Publishers; the American Society of Journalists and Authors; members of the library, book publishing, and scholarly communities; and the Authors Guild also expressed serious concerns about the proposed move.²¹ Ultimately, Congress declined to enact the Omnibus Patent Act of 1996.²²

Renewed Efforts to Move the Copyright Office

Recently, there have been renewed efforts to move the Copyright Office from the Library of Congress and to change the Library's relationship to the Copyright Office. These proposals have been offered in the context of the House Judiciary Committee's comprehensive review of copyright, which began in 2013.²³ The 2017 Copyright Office for the Digital Economy (CODE) Act (H. R. 890) proposes making the Copyright Office an independent agency in the legislative branch.²⁴ Additionally, the Register of Copyrights Selection and Accountability Act of 2017 (H. R. 1695) passed the House on April 26, 2017. It would transfer the power to select the Register of Copyrights from the Librarian of Congress to the President with the advice and consent of the Senate. The appointment would be based on recommendations made by a panel consisting of members of Congress as well as the Librarian of Congress.²⁵ A version of the bill (S. 1010) has also been introduced in the Senate.²⁶

There is widespread agreement that the Copyright Office requires increased funding, with some also arguing for more funding autonomy.²⁷ However, the Copyright Office does not need to move in order for these changes to be made. In fact, doing so would likely increase costs because the Copyright Office receives important benefits from its connection with the Library. In 1996, a U.S. General Accounting Office study found that while transferring the Copyright Office out of the Library might not negatively impact Office operations, "the benefits of such a move were unknown and might cause significant disruption." The contractor conducting the study determined that the Copyright Office did not need to be located at the Library, but it also identified significant cost savings from the arrangement. In particular, it concluded that physically moving the Office could cost \$800,000 annually for space that it currently received at no cost.²⁸ That is equivalent to more than a million dollars today.²⁹ Further, the study found that transferring and coordinating the continuation of the deposit system would likely result in additional costs.³⁰ No estimate of the actual, and likely considerable, cost of any physical move itself was made.

There is also broad consensus that the Copyright Office must improve and update its information technology capabilities.³¹ Previously, this result was impeded by the Copyright Office's reliance on the Library of Congress, whose IT systems the Government Accountability Office found to be outdated and whose lack of coordination with the Copyright Office was determined to impede the Office's ability to serve its customers.³² That study was published two years ago, however, and the Library of Congress, under current Librarian Dr. Carla Hayden, is making significant progress in

addressing these issues. At a recent hearing, Library of Congress Chief Information Officer Bernard Barton reported that he was working with the Acting Register of Copyrights to further the modernization process. As Mr. Barton explained, the Library provides all of its service areas with umbrella IT support. The Office thus can focus on its mission-specific needs rather than worrying about general systems issues, such as staff computer problems or server maintenance. The Copyright Office also is revising its own IT modernization plan to incorporate and leverage the modernization process taking place in the Library as whole, which Mr. Barton testified he believes will save the Copyright Office both time and money.³³

Conclusion

The Copyright Office can benefit enormously from the support of a modern, efficient, and mission-responsive IT system at the Library of Congress, particularly when the Office is empowered to collaborate with the Library's IT department. Congress's rejection of multiple prior proposals to move the Copyright Office indicates that it recognized the important benefits of the Office's location within the Library of Congress and the significant costs of severing that socially and economically valuable relationship.

This remains the case today. Little would be gained by moving the Office, and a great deal would be lost, particularly in terms cost savings and coordinating the modernization process. The progress toward critically needed modernization that has been made so far could be erased, and future such efforts would likely be stalled, slower, less efficient, and more expensive. Further, maintaining the traditional connection between the Library of Congress and the Copyright Office is important both because it honors a cherished relationship of more than a century and because it recognizes the special role copyright plays in promoting the creation and dissemination of knowledge for all: the Library's own most fundamental mission. ■

NOTES

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ACKNOWLEDGEMENTS

The author would like to thank Alan S. Inouye, Adam Eisgrau, Carrie Russell, and Kara Malenfant at the American Library Association and technology law and policy attorney Jonathan Band for their editorial advice. The author would also like to thank graphic designer Karen Sheets de Gracia for her work on the report design.

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