LIBRARY COPYRIGHT ALLIANCE POSITION ON PROPOSED U.S. INTELLECTUAL PROPERTY OFFICE

The Library Copyright Alliance ("LCA") opposes the creation of a single executive branch intellectual property office that includes the Copyright Office, the Patent and Trademark Office, and the IP Enforcement Coordinator. LCA has long opposed the removal of the Copyright Office from the Library of Congress. The Copyright Office manages the deposit of copies of works under 17 U.S.C. § 407 "for the use or disposition of the Library of Congress." This deposit requirement has contributed significantly to the Library of Congress becoming the world's greatest library. Removal of the Copyright Office from the Library of Congress could interfere with the smooth operation of the deposit requirement, to the detriment of the Library of Congress and the general public.

Moreover, the creation of an independent unified intellectual property office runs the risk of upsetting the delicate balance of interests envisioned in the Constitution's IP Clause. This balance has resulted in the Unites States' global leadership in innovation and creativity. Currently, the Director of the Patent and Trademark Office serves as the Undersecretary of Commerce for Intellectual Property, and acts as the President's chief advisor on intellectual property policy matters. However, the Undersecretary provides this advice through the Secretary of Commerce. The Department of Commerce includes two other agencies central to the U.S. Government's function of promoting innovation: the National Institute of Standards and Technology and the National Telecommunications and Information Administration. The placement of PTO, NIST, and NTIA in a single department reflects Congress's awareness that innovation requires the balance of competing interests; that while the economic incentive provided by intellectual property rights is important to innovation, too much intellectual property can stifle innovation.

The Department of Commerce's Internet Policy Task Force ("IPTF"), consisting of personnel from the PTO and the NTIA, produced two important and well regarded reports concerning copyright in the digital environment: the Green Paper on Copyright, Creativity, and Innovation in the Digital Economy (2013); and the White Paper on Remixes, First Sale, and Statutory Damages (2016). The IPTF also conducted a series of public meetings on a variety of topics, including the facilitation of the digital marketplace for copyrighted works. The cooperation between these two agencies within the Department of Commerce ensured inclusive processes

and balanced outcomes.[1] A standalone IP agency would be less likely to cooperate with other agencies on issues of IP policy, and would be more likely to skew towards a maximalist position on protection.

Likewise, a unified IP agency probably would produce even narrower exemptions in the triennial section 1201 rulemaking. Currently, the exemptions are issued by the Librarian of Congress, upon the recommendation of the Register of Copyrights (after consultation with NTIA). It is safe to assume that if the ultimate decision maker is the USIPO Director rather than the Librarian of Congress, the Register of Copyrights will recommend fewer and narrower exemptions. Under the proposed statute, the qualifications of the USIPO Director include "a professional background and experience in patent, copyright, or trademark law." As evidenced by the individuals who thus far have served as Register of Copyrights or PTO Director, an individual with a professional background in patent, copyright, or trademark law tends to favor expansive application of the IP laws, even if she genuinely attempts to perform her duties "in a fair, impartial, and equitable manner."

Subsuming the Copyright Office within an agency that handles "industrial property" such as patents and trademarks could have an adverse impact on the Copyright Office's mission. In 1996, then-Register of Copyright Marybeth Peters expressed strong opposition to legislation that would have merged the PTO and the Copyright Office into a single government corporation. In addition to concern with the potential politicization of the Copyright Office, she noted the difference between copyright and other forms of intellectual property, highlighting its "unique influence on culture, education, and the dissemination of knowledge."[2] Further, in recent years the Copyright Office's modernization efforts have benefited greatly from the technological

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[1] Similarly, the Copyright Office just announced that it would invite NIST, NTIA, and PTO to participate in its upcoming consultations concerning technical measures to identify and protect copyrighted works online.

[2] The Omnibus Patent Act of 1996: Hearing before the Committee on the Judiciary, United States Senate, 104th Cong. 17–33 (1996) (statement of Marybeth Peters, Register of Copyrights). https://hdl.handle.net/2027/pst.000031035118?urlappend=%3Bseq=21. ASCAP, the American Society of Journalists and Authors, and the Authors Guild also expressed serious concerns about the proposed move.

expertise of the Library of Congress. The Office would lose access to this expertise if it were separated from the Library.

The institutional bias of any IP agency tends to favor expansive protection of intellectual property. Currently, the IP agencies' impulse towards overprotection is held in check by their placement in larger organizations with more diverse interests. Consolidation of these separate IP agencies within one standalone IP agency would eliminate the structural checks that keep our IP system in balance. For this reason, LCA opposes the creation of a USIPO.