

**Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of)	Docket No. 2016-2
Information Technology Upgrades for a)	
Twenty-First Century Copyright)	
Office)	Submitted March 31, 2016

**COMMENTS OF THE
MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

I. Introduction

The Motion Picture Association of America, Inc. (“MPAA”) is a not-for-profit trade association founded in 1922 to address issues of concern to the U.S. motion picture industry. Its members are: Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. MPAA’s members and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home entertainment markets. MPAA’s members distribute copies of those works on DVDs and Blu-ray discs and increasingly offer their works online as well, including through digital downloads and streaming, thus making those works more readily available to consumers and businesses than ever before.

The MPAA’s members utilize the full range of Copyright Office services. They register thousands of works per year, ranging from audiovisual works (including feature-length motion pictures and episodes of television programs), to works of the performing arts such as screenplays, to literary works that often serve as the underlying source material for films and television programs. They record transfers of rights, and routinely search existing records. And they utilize a number of the Office’s special services, including preregistration, special handling, and expedited retrieval of deposit copies in support of litigation.

Despite the valiant efforts of the Copyright Office leadership and staff, as both the Office and Congress have recognized,¹ the services of the Copyright Office do not achieve the reasonable expectations of its users, including MPAA's members. The Office's online search functionality is limited and unstable, many older records remain searchable only through manual inspection of paper records at the Copyright Office in Washington, and the recordation system remains entirely paper-based. These shortcomings affect not only copyright owners including the MPAA's members, but also potential licensees and other users of works.

MPAA enthusiastically supports the Copyright Office's candid assessment of the shortcomings of its systems and the forward-looking approach demonstrated by its new Strategic Plan² and the IT implementation plan³ that is the subject of this comment. The plans are impressive and ambitious. Many aspects of the IT plan would provide enhanced services from which MPAA members and the public at large would benefit. These include increased efficiency through a modern intake system for registration and recordation applications; reduced information costs (facilitating copyright licensing transactions) from the improved search functionality; systems that are internally interoperable and utilize application programming interfaces ("APIs") to facilitate interoperability with private sector platforms; and improved reliability from modern systems for storage and processing.

The MPAA recognizes the tremendous work the Copyright Office has performed over the past several years. Through the challenges of budget cuts, staff reductions, and unreliable support from the Library of Congress ("LoC"), the Copyright Office has kept up with its business functions as best it can, produced numerous policy analyses and reports to Congress, achieved a major and much-needed update of the *Compendium of Copyright Office Practices*, and produced a Strategic Plan and IT implementation plan that are the most advanced and forward-looking in the history of the U.S. Copyright Office. This is a record of accomplishment that deserves to be recognized.

II. Responses to Questions in the Notice of Inquiry

a. Please comment on the proposed five-year timeline for IT modernization based on the phases set forth in detail in the IT plan, which incorporate best practices of the federal government.

The MPAA believes that the IT plan begins from the right premise: "the Copyright Office of the twenty-first century to be lean, nimble, results-driven, and future-

¹ 81 Fed. Reg. 10672-73 (March 1, 2016) ("NOI").

² "Positioning the United States Copyright Office for the Future," United States Copyright Office (Dec. 1, 2015)(available at <http://copyright.gov/reports/strategic-plan/USCO-strategic.pdf>).

³"Provisional Information Technology Modernization Plan and Cost Analysis," United States Copyright Office (Feb. 29, 2016)("IT plan")(available at <http://copyright.gov/reports/itplan/technology-report.pdf>).

focused....”⁴ As noted above, we also agree with the Office’s general approach. The IT plan is impressive in its depth and breadth of analysis, and it is clear that the Office has engaged in extensive due diligence appropriate for an undertaking of this magnitude.

The project is ambitious, and the five-year timeline even more so. While we do not have sufficient knowledge to determine whether this timeline is realistic, if the Office believes it is achievable, we support it. In so doing, we note the two pivotal assumptions upon which the IT plan is based:

(1) modernization must 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 (2) modernization requires, and will receive, singular attention and around-the-clock dedication.⁵

The second of those is most directly relevant to the five-year timeline. We understand that to mean that five years is the Copyright Office’s best-case scenario. Of course, prudence would dictate that contingency plans should be made in the eventuality that timeline is exceeded.

The first assumption is at least as important as the second. If the Office is required to work though or is subject to review by officials who are not accountable to the Copyright Office, it will foreseeably find itself mired in bureaucracy, which in turn will likely result in increased costs and lengthier implementation times. Such an undesirable construct could also introduce considerations not native to the Copyright Office or its customers, which could change the course of the IT plan to the detriment of the Office’s constituents. This is a singular opportunity to create Copyright Office systems for the next generation; it should be driven exclusively by what is best for the Office in its ability to serve its customers. And, as discussed further below, if MPAA members are asked to pay extra fees in order to help fund the implementation of the IT plan, we would insist that resultant funds be spent on improving the Copyright Office in the way we expect.

b. Should the modernization be funded from fees, appropriated dollars, or a combination of both, and, if both, is there an ideal formula or ratio?

Historically, Copyright Office operations have been funded at a ratio of two-thirds from user fees and one-third from appropriations from general tax revenue.⁶ This reflects the wisdom that while users of the Copyright Office benefit most directly from its

⁴ *Id.* at 1.

⁵ *Id.* at 2.

⁶ NOI at 10674.

services, the general public benefits as well.⁷ The public benefits from the availability of more copyrighted works from a greater number of licensed sources, all of which are enhanced by a well-functioning copyright system and Copyright Office.

There is a reasonable expectation that when an agency of the federal government undertakes capital improvements, general tax revenues should fund that upgrade. However, in light of the history of sharing the burden of funding the Copyright Office, and that a modernized Copyright Office would benefit direct users of the Office as well as the public, the MPAA is willing to entertain the notion that some of the cost of modernization be borne more directly by the direct users of the Copyright Office's services.

Although it is premature to engage in an extensive discussion about the exact ratio of fees and appropriated dollars, we believe the outer limit should be the historic two-thirds/one-third ratio that has existed for ordinary annual appropriations. Given that the modernization project would be a one-time capital expenditure, the MPAA believes 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.

c. What authorities or flexibilities, if any, should be included in 17 U.S.C. 708 regarding whether and how the Office may recover its reasonable costs of operation (including in the aggregate as opposed to based upon individual services), differentiate between customers or users, and/or fund future investments, not only as to the five-year plan but on an ongoing basis?

The current tying of Copyright Office fees to the reasonable costs incurred for the individual service to which the fee corresponds was a well-intentioned attempt to keep fees low. It is important to keep fees at reasonable levels so as not to discourage use of Copyright Office services, most notably registration and recordation, which could lead to a degradation in the quality and comprehensiveness of the public record of copyright ownership. In recognition of this principle, the Copyright Office has historically sought to keep fees for basic registration and recordation services as reasonable as possible. However, the current statutory language has left the Office with insufficient flexibility to set fees at levels that truly reflect its overall operating costs, maintenance, and the need for routine, periodic upgrades. The MPAA supports a statutory amendment providing a more flexible approach to fees that would allow such elements to be factored into the fee setting process, while still keeping fees manageable for the Office's users.

As to funding implementation of the IT plan, to the extent that some of the burden of funding modernization falls on users of the Copyright Office, fees for the Office's services will likely have to increase. While MPAA believes that all users of the Copyright Office should share this responsibility to some degree, we are also aware that the Copyright Office has sought to implement practices that accommodate the widely varied nature of creative works and how such works are often prepared and registered.

⁷ *Id.*

For example, the Office implemented a “group registration” option for published photographs,⁸ and left the cost for such registrations unchanged in its last fee adjustment,⁹ recognizing that the practicality of registration differs among various registrants, and that the fee structure should aim to encourage – not discourage – registration. While 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.

The MPAA’s members are willing to pay their fair share to help fund Copyright Office modernization. We believe that one way to raise a significant amount of funds without unduly increasing registration costs is to consider reasonable increases to fees for some of the special services provided by the Copyright Office. For example, special handling and other expedited services are second only to basic registration fees as the greatest category of revenue for the Copyright Office.¹⁰ These services are entirely optional at the discretion of the applicant, and, we believe, are typically used by larger copyright owners, including the MPAA’s members, who are better positioned to bear such costs. Increasing fees associated with those services would not deter registration applications, and applicants will be able to make an informed decision about whether to choose the service in light of the higher fee.

Another service worthy of consideration to contribute to funding modernization is the fee associated with litigation statements. The cost of reviewing a deposit to assess litigation risks pales in comparison to the cost of the litigation itself. Parties preparing to enter into litigation are necessarily prepared to face very significant costs. A reasonable increase in such fees would generate revenue to help fund the modernization without altering the fundamental cost-benefit calculus undertaken by potential litigants. Because litigation statements are entirely unrelated to the registration process, fee changes in this area would have no effect on registrations.

Likewise, pre-registration is a special service, although it does not account for a significant portion of revenue at this time. The same is true for searches, certifications, and other services that are likely undertaken primarily by larger rights owners, or those who are already prepared to shoulder significant cost burdens associated with the underlying endeavor for which such services are required.

To the extent the Copyright Office considers increasing registration fees for the modernization project, we stress our view that discriminating by the nature of the applicant may raise concerns. Some level of across-the-board increase seems both fair and inevitable. The Office might also consider different fee levels for registration of different categories of works, but that is a blunt instrument and likely to increase fees in

⁸ See 37 C.F.R. § 202.3(b)(10).

⁹ U.S. Copyright Office, *Proposed Schedule and Analysis of Copyright Fees to go Into Effect on or About April 1, 2014* (November 2013) at 18.

¹⁰ “*Fiscal 2014 Annual Report*,” United States Copyright Office, p. 20 (available at <http://www.copyright.gov/reports/annual/2014/ar2014.pdf>).

ways that will discourage at least some copyright owners from registration. In any event, this comment is not meant to suggest any particular approach be ruled in or out at this time, and the MPAA will be happy to work with the Office to find a reasonable and practical outcome.

MPAA makes these suggestions in good faith and in a willingness of its members to bear a fair share of the cost of modernizing the Copyright Office. We would hope that others do the same, and that no particular users of Copyright Office services are subjected to unreasonable or unfair fee increases.

d. Should the Copyright Office fund capital and operating expenses differently? If so, how?

One of the questions not answered by the NOI or the underlying IT plan is whether, to the extent that user fees represent some portion of the funding source, the fees would have to be high enough to cover modernization costs in the same year they are incurred. If so, it would be difficult to raise the needed funds without substantially discouraging use of Copyright Office services – a result that, for reasons previously discussed, must be avoided. Instead, it would be preferable if the federal government covered costs up front. Copyright Office fees could then be raised less drastically, and the government’s initial outlays could be paid back through Copyright Office surpluses over a longer period of time.

In either case, ultimately the time for paying for this upgrade will end, and the Copyright Office will resume a regular budget cycle. However, the IT plan predicts that annual operating costs will be approximately \$25 million greater than current costs,¹¹ an increase of over 50% compared to the current Copyright Office budget. The MPAA believes that the regular annual operating costs should continue to be paid consistent with the historic practice of two-thirds from fees and one-third from appropriated funds. As noted above, the basis for this position is that the public, as well as the direct users of the Copyright Office, enjoy a benefit from a properly functioning national copyright system. The increased annual operating costs should be borne across all users of Copyright Office services.

e. Is there anything else the Copyright Office should consider?

The Copyright Office and its users are in the situation they are today due to the LoC’s failed stewardship and general lack of support for the Copyright Office and its mission. The Government Accountability Office has articulated the shortcomings of the LoC’s IT system and set forth numerous recommendations,¹² which have yet to be implemented. The Copyright Office’s IT plan is expressly based on the assumption that

¹¹ IT plan at 46-47.

¹² GAO 15-315, “*Library of Congress: Strong Leadership Needed to Address Serious Information Technology Management Weaknesses*,” Government Accountability Office (March 2015)(available at <http://www.gao.gov/assets/670/669367.pdf>).

the Copyright Office has the authority to manage its implementation, consistent with its expert understanding of the law, its systems, and the needs of its users. This submission makes clear our willingness to help pay for a modern Copyright Office, but let there be no mistake: these comments are contingent on the Copyright Office having the discretion to implement the IT plan as it sees fit without bureaucratic interference or the introduction of considerations outside the Copyright Office and the copyright system it administers.

The MPAA also offers several additional observations about the particulars of the IT plan. First, we highly commend the Copyright Office for its attention to APIs as a key tool for efficiency and effectiveness of modernized IT systems. Providing the ability for our members' computer systems to communicate directly with the Copyright Office's electronic registration and (one day) recordation systems would reduce the need for redundant human data entry, thereby increasing efficiency, reducing costs, and eliminating a source of potential errors.

Second, the IT plan suggests that deposits may be stored on cloud-based services. Although there is already significant discussion in the IT plan of security issues, which is appropriate, we must again emphasize our concerns. A breach of the security protecting the MPAA members' works could have a devastating economic impact on MPAA members, and might even discourage or delay the future registration of the highest-value works, such as major motion pictures early in their release cycle. It is critical to the future of the registration system and the success of modernization that copyright owners have confidence in the security of Copyright Office IT systems. We look forward to working towards that mutual goal with the Office's experts as the modernization process progresses.

Third, while the cost savings of cloud-based services over proprietary, owned computing facilities is clearly laid out in the IT plan, MPAA is concerned about the long-term cost increases. Over time, as the volume of registrations grows, the Copyright Office's computing needs will grow as well. We are concerned about the sustainability of those costs in light of the need to keep registration affordable. There may come a time when appropriated dollars will need to play a larger role in Copyright Office funding in order to sustain low registration fees. Of course, MPAA and its members also recognize that as a modernized Copyright Office IT system begins to realize the promised gains in efficiency, costs associated with delivering the Office's services should begin to fall. As that happens, it would be appropriate to re-evaluate the Office's funding – the mix of appropriations versus user fees, as well as the fees themselves – to ensure they continue to appropriately serve the Copyright Office's needs, and advance the objectives of the national copyright system.

III. Conclusion

MPAA appreciates the impressive work of the Copyright Office and this opportunity to provide our comments. We share the Office's vision of a modern, twenty-first century Copyright Office and look forward to working with it to help achieve that goal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ben Sheffner', with a long horizontal stroke extending to the right.

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