

Stenographic Transcript
Before the

COMMITTEE ON
RULES AND ADMINISTRATION

UNITED STATES SENATE

REGISTER OF COPYRIGHTS SELECTION AND
ACCOUNTABILITY ACT

Wednesday, September 26, 2018

Washington, D.C.

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1 REGISTER OF COPYRIGHTS SELECTION AND ACCOUNTABILITY ACT

2

3 Wednesday, September 26, 2018

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5 U.S. Senate

6 Committee on Rules and Administration

7 Washington, D.C.

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9 The committee met, pursuant to notice, at 2:38 p.m.,
10 in Room SR-301, Russell Senate Office building, Hon. Roy
11 Blunt, chairman of the committee, presiding.

12 Present: Senators Blunt [presiding], Fischer, Wicker,
13 Klobuchar, and King.

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1 OPENING STATEMENT OF SENATOR BLUNT

2 The Chairman. The Committee on Rules and
3 Administration will come to order.

4 Good afternoon. Glad to have all of you here this
5 afternoon. Senator Klobuchar and I are pleased to begin to
6 get some more information on this topic, and the topic
7 today is on the Register of Copyrights Selection and
8 Accountability Act.

9 H.R. 1695 passed the House in April of 2017 by a vote
10 of 378 to 48. Its Senate companion, Senate bill 1010,
11 sponsored by Senators Grassley, Hatch, Feinstein, and
12 Leahy, have -- would change the way the Register of
13 Copyrights is selected and appointed.

14 Currently, the Register of Copyrights is appointed by
15 the Librarian of Congress. The proposed legislation would
16 give Congress a greater role in selecting the Register and
17 making the position a presidential appointment, subject to
18 confirmation by the Senate.

19 During the nomination hearing of Dr. Hayden in this
20 room in 2016, many of -- on this committee asked questions
21 and raised issues about the Copyright Office, and I think
22 rightly so. Every day, people across the world enjoy the
23 creations of our authors, our photographers, bloggers,
24 artists, and others. These creations have significant
25 impact on our economy, to our trade balance, and to our

1 culture. The Copyright Office plays a crucial role in
2 serving both users and creators.

3 I think all of us would have to agree that the
4 Copyright Office would benefit from some modernization, and
5 some of that is already happening. Since being sworn in in
6 2016, Dr. Hayden; her CIO, Bud Barton; and the Acting
7 Register of Copyrights, Karen Temple Claggett, have taken
8 steps to improve the Copyright Office, especially its
9 information technology systems. This is a long-term
10 project that will take many years to accomplish, but
11 Dr. Hayden and her team are continuing to head in the right
12 direction.

13 The legislative branch agencies this committee
14 oversees -- the Library of Congress, the Architect of the
15 Capitol, the Government Printing Office -- serve the
16 Congress and the Nation. They are led by agency heads who
17 exercise significant authority, pursuant to the laws of the
18 United States. These agency heads are nominated by the
19 President and confirmed by the Senate.

20 The legislation we are considering today would treat
21 the Register of Copyrights in a similar manner, while
22 maintaining the Copyright Office within the Library of
23 Congress, which I believe is exactly where it should be
24 physically located and where it would remain located.

25 When it comes to legislative branch agencies, Congress

1 should play a significant role beyond the Senate's
2 traditional advice and consent role even in the selection
3 process of those who head agencies and those who will serve
4 in other significant positions. The Register of Copyrights
5 is one of these positions.

6 Ensuring that legislative branch officials have been
7 selected by a transparent, bicameral, bipartisan process
8 like what would be proposed in the Register of Copyrights
9 Selection and Accountability Act, it is an important
10 addition to the system based on the view of the sponsors of
11 this legislation.

12 So I am glad to be here. I am glad to be joined by
13 the ranking member of the committee, Senator Klobuchar.
14 And Senator Klobuchar, I would turn to you for any opening
15 statements you might have.

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1 STATEMENT OF SENATOR KLOBUCHAR

2 Senator Klobuchar. Well, thank you very much. Thank
3 you, Senator Blunt, Mr. Chairman, for holding this hearing.

4 And I want to thank you for doing this because this is
5 such an important topic on the Register of Copyrights
6 Selection and Accountability Act. I join you in welcoming
7 our two witnesses, and I look forward to hearing their
8 testimony.

9 Today's hearing is about the Register of Copyrights at
10 the U.S. Copyright Office. This is a position that most
11 people have never heard of before. It is possible people
12 are focused on another hearing and other work going on this
13 week, but it is very important that we continue on because
14 this important job affects our lives every single day.

15 Whether you are listening to music, reading a novel,
16 or watching your favorite show, you are consuming work that
17 is protected by copyright. If you are an inventor, author,
18 scientist, musician, filmmaker, or any one of the millions
19 of Americans who create original work, the Copyright Office
20 is the place you go to safeguard your work.

21 This is important in my State. We are the home of
22 Prince, who we miss. We are the home of Bob Dylan. We are
23 fiercely protective of copyrights, I would say, and of
24 musicians' rights to their work. And my own dad wrote for
25 many, many years -- he is now 90 -- and wrote a bunch of

1 books. So I am well aware of these issues and was at a
2 private law firm for 14 years, and I have handled some of
3 these cases peripherally myself.

4 Ensuring that creators can protect their original
5 works is one of the hallmarks of our free market system,
6 and it fosters competition, creativity, and
7 entrepreneurship. Copyrighted work is fundamental to our
8 economy. Last year, copyrighted industries contributed
9 more than \$1 trillion to our economy. That translates to
10 about 7 percent of the total U.S. GDP and 5.5 million jobs.

11 In other words, copyrighted work doesn't just
12 entertain and inspire us, it drives economic activity and
13 translates into jobs for millions of Americans. We need to
14 keep this area of our economy strong because, now more than
15 ever, innovation will be the key to moving our economy
16 forward in the United States. We need to be a country that
17 invents, that makes stuff, that exports to the world, and
18 promotes ingenuity.

19 Continuing to foster an environment of innovation
20 requires us to be adaptable and forward-thinking. In the
21 21st century, we need a modern Copyright Office that is
22 secure, efficient, and accessible to all.

23 To achieve the goal of a modern Copyright Office, the
24 next Register of Copyrights must continue the critical work
25 being done today to upgrade and update the infrastructure

1 in the Copyright Office. Meeting the IT needs of the
2 copyright community won't happen overnight. It will take a
3 commitment from Congress, the Copyright Office, and the
4 Library of Congress.

5 The appropriations legislation for 2019, which was
6 signed into law last Friday, will allow the progress made
7 on IT modernization to continue in the coming year. The
8 bill includes funding for important priorities like
9 continuing investment in the next-generation registration
10 system, rebuilding the capacity of registration examiners
11 by adding 15 new positions, digitizing copyright records
12 dating back to 1870 -- that sounds like a lot of records --
13 in a searchable format, advancing the design of the
14 Copyright Office's first-ever automated recording system,
15 and continuing support of the Copyright Modernization
16 Office.

17 The legislation that we are considering today will
18 complement the work already underway towards modernization.
19 The bill would change the process for selecting a Register
20 of Copyrights by making it a presidentially nominated,
21 Senate-confirmed position for a term of 10 years. The
22 Register of Copyrights would have the same stature as the
23 Under Secretary of Commerce for Intellectual Property and
24 Director of the U.S. Patent and Trademark Office. Senate
25 confirmation of the nominee would enhance the relationship

1 between the Register and Congress, give Congress a direct
2 role in the process to select our chief copyright policy
3 adviser, and strengthen accountability.

4 The portfolio of responsibilities of the Copyright
5 Office is just as diverse as the creative community that it
6 serves. Copyright policy promises to get more complex in
7 the digital age, and as innovation continues, we must
8 ensure that we have a transparent selection process in
9 place to select the most qualified candidate to lead the
10 Copyright Office on behalf of the American people.

11 Mr. Chairman, I look forward to working with you to
12 advance the legislation to the full Senate.

13 Thank you very much.

14 The Chairman. Thank you, Senator Klobuchar.

15 We are pleased to have our two witnesses today. Keith
16 Kupferschmid is the chief executive officer of the
17 Copyright Alliance. Before that job, he served as the
18 general counsel and senior vice president for intellectual
19 property for the Software and Information Industry
20 Association.

21 And Jonathan Band not only is an adjunct professor at
22 Georgetown University, but an expert on these issues. In
23 2017, he received the American Library Association's L. Ray
24 Patterson Copyright Award, which recognizes an individual
25 who has supported the constitutional purpose of the

1 copyright law, fair use, and public domain.

2 We are pleased you are both here, and

3 Mr. Kupferschmid, if you would like to go first, and then

4 Mr. Band, and then we will have some questions.

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1 STATEMENT OF KEITH KUPFERSCHMID, CEO, COPYRIGHT ALLIANCE

2 Mr. Kupferschmid. Well, thank you.

3 Chairman Blunt, Ranking Member Klobuchar, and members
4 of the committee, thank you for the opportunity to testify
5 before you today to discuss the importance of the Register
6 of Copyrights Selection and Accountability Act, H.R. 1695
7 and S. 1010.

8 I am Keith Kupferschmid, the CEO of the Copyright
9 Alliance, a nonprofit, nonpartisan organization dedicated
10 to advocating policies that promote and preserve the value
11 of copyright. I testify here today in support of H.R. 1695
12 and S. 1010.

13 There are several reasons why making the Register of
14 Copyrights a presidential appointee confirmed by the Senate
15 makes good sense. Copyright is critical to the United
16 States economy. The core copyright industries contribute
17 over \$1.2 trillion to the U.S. GDP and employ more than
18 5.5 million U.S. workers. As the Government agency
19 responsible for administering the copyright system, as well
20 as providing expert advice to Congress on copyright policy
21 issues, it should, therefore, come as no surprise that few
22 Government offices are more important to the U.S. economy,
23 to jobs, and to creativity than the U.S. Copyright Office.

24 And the Register, who heads the Copyright Office and
25 serves as Congress' statutorily designated copyright

1 expert, is a large component of that. Making the Register
2 a presidential appointee confirmed by the Senate would
3 reflect the growing importance of copyright to our economy
4 and our culture. It would show our international trading
5 partners how much we value copyright and the importance of
6 protecting the fruits of America's creators.

7 Second, making the Register a presidential appointee
8 would ensure that she is treated like other officials with
9 oversight over similar organizations. For example, the
10 Patent and Trademark Office is led by a presidential
11 appointee. Similarly, chairs of the NEA and NEH and the
12 Director of the Institute of Museum and Library Services
13 are all presidential appointees. In short, there is simply
14 no reason for Copyright to be treated with less
15 significance, especially when one considers its importance
16 to the U.S. economy and culture.

17 Third, making the Register a presidential appointee
18 ensures a more transparent, a more balanced, and a more
19 neutral selection process compared to the existing process.
20 The existing process does not require any direct input from
21 the administration or from Congress. Today, the Register
22 is chosen by the Librarian without any input.

23 This bill would change that by allowing the President
24 to nominate the Register from a slate of candidates and the
25 Senate to give its advice and consent. Through this

1 process, if there are concerns about a nominee for the
2 registration position, the bill would allow those concerns
3 to be voiced to Congress prior to confirmation. That
4 opportunity does not exist today.

5 Fourth, Congress has historically enjoyed a direct
6 line of communication with the Copyright Office for expert
7 impartial advice on copyright law and policy. But recent
8 changes to the organizational structure of the Library of
9 Congress have disrupted that direct line. The bills ensure
10 that Congress will continue to receive this expert
11 impartial advice.

12 Fifth, enacting these bills will provide the Copyright
13 Office with a greater say in how it operates and enable it
14 to improve its operations. Of course, Copyright Office
15 modernization is an issue that requires much more than
16 increasing the accountability of the Register selection
17 process, but changing the appointment process and providing
18 the Register with the ability to discharge her duties
19 effectively is an important component for modernization of
20 the Copyright Office. It will help ensure that the
21 Register has the voice and the resources needed to
22 implement policy, to manage its operations, and to organize
23 its information technology in a way that brings the
24 Copyright Office into the 21st century.

25 Equally important to what the bills do is what they

1 don't do. H.R. 1695 and S. 1010 largely do not alter the
2 existing statutory relationship between the Copyright
3 Office and the Library or the Register's statutory
4 responsibilities.

5 While the urgency to address the appointment of the
6 Register is new, the recognition that this change is needed
7 is not. We have long advocated and supported the Register
8 being presidentially appointed with the advice and consent
9 in the Senate well before Dr. Hayden became the Librarian,
10 well before Donald Trump became President. With the
11 position now vacant, the time is now to make that change.

12 The modest approach outlined in H.R. 1695 and S. 1010
13 enjoys widespread bipartisan, bicameral, and stakeholder
14 support. We respectfully ask that the committee vote in
15 favor of H.R. 1695 and S. 1010. We look forward to
16 continuing to work with this committee as the bill moves
17 forward, and I am happy to answer any questions.

18 [The prepared statement of Mr. Kupferschmid follows:]

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1 The Chairman. Thank you.

2 Mr. Band?

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1 STATEMENT OF JONATHAN BAND, ADJUNCT PROFESSOR OF LAW,
2 GEORGETOWN UNIVERSITY

3 Mr. Band. Chairman Blunt, Ranking Member Klobuchar,
4 members of the committee, I am an adjunct professor at
5 Georgetown University Law Center. I also serve as counsel
6 to the Library Copyright Alliance, which consists of three
7 major library associations. I note that the Library of
8 Congress is a member of one of LCA's associations, but it
9 did not participate in the preparation of this testimony.

10 I appreciate this opportunity to express our
11 opposition to the Register of Copyrights Selection and
12 Accountability Act, S. 1010. As explained in detail in a
13 report attached to my testimony, Congress has repeatedly
14 considered the best location for the Copyright Office and
15 has consistently reaffirmed that the Library of Congress is
16 its most effective and efficient home.

17 While S. 1010 would not technically remove the
18 Copyright Office from the Library, it would effectively
19 achieve this result by ceding to the President the power to
20 select the head of the office. The rationale for S. 1010
21 is elusive. It is hard to comprehend why Congress would
22 voluntarily cede to the executive branch the authority of
23 its own Librarian to select a key congressional adviser.

24 Recognizing the illogic of this legislation, the House
25 amended the companion bill to require the President to

1 appoint the Register from three candidates recommended by a
2 panel consisting of the congressional leadership and the
3 Librarian. This structure obviously increases
4 congressional oversight, but limiting the President's
5 authority in this manner raises serious separation of
6 powers questions.

7 Moreover, it is difficult to understand how the public
8 or Congress itself would benefit from politicization of the
9 Register's position by making it subject to presidential
10 appointment and Senate confirmation. Such politicization
11 of the position necessarily would result in a Register more
12 politically -- more actively engaged in policy development
13 than in competent management and modernization.

14 Additionally, a politicized selection process likely
15 would result in a Register who does not balance the
16 competing interests of all stakeholders in the copyright
17 system. Further, politicizing the process of appointing
18 the next Register would severely delay his or her
19 installation. Indeed, the introduction of this
20 legislation, as a practical matter, has already prevented
21 the appointment of a Register for over a year and a half.

22 S. 1010's 10-year term for the Register would also
23 lead to less accountability to Congress and the public.
24 This contradicts the stated intent of the bill made plain
25 in its title.

1 Finally, one of the claimed rationales for this
2 legislation is that more autonomy from the Library would
3 enhance the Copyright Office's ability to modernize its
4 technology. In fact, the technology-related progress made
5 jointly by the Library of Congress and the office over the
6 past 18 months proves that this legislation is not needed,
7 and this is, as Chairman Blunt has recognized, under
8 Dr. Hayden, the Library has made significant advances in
9 addressing the issues that were identified in the 2015 GAO
10 report.

11 There is no question that there is broad consensus
12 that the Copyright Office must improve its IT capabilities,
13 but the point is that process of improvement is already
14 well underway. This past May, Acting Register Karen Temple
15 testified in the Senate Appropriations Committee that the
16 Copyright Office and the Library's chief information
17 officer jointly developed the new Copyright Office IT
18 modernization plan that focuses on leveraging resources
19 within the Library to take full advantage of possible
20 economies of scale.

21 In her testimony, the Acting Register explained that
22 in accordance with the plan, the Copyright Office
23 established the Copyright Modernization Office, which
24 complements the Library's technical support by providing
25 necessary business direction. Also consistent with that

1 plan, the Acting Register and the Library's CEO jointly
2 chair a Copyright Office Modernization Governance Board.

3 Numerous projects are already underway under the
4 supervision of the CMO and the governance board, including
5 preliminary work on a new automated recordation system, a
6 next-generation registration system, a virtual card
7 catalogue, and an integrated data management model. All
8 these improvements are occurring without the legislation.
9 Accordingly, the legislation simply isn't necessary.

10 For all these reasons, we oppose the Register of
11 Copyrights Selection and Accountability Act and urge the
12 committee to do the same. I am happy to answer any
13 questions the committee may have.

14 [The prepared statement of Mr. Band follows:]

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1 The Chairman. Well, thank you, Mr. Band and
2 Mr. Kupferschmid.

3 Mr. Band, as you pointed out, I think one of your
4 observations was why would the -- why would the Congress
5 want the President to be more involved in appointing
6 someone who works at its Library, the Library of Congress?
7 Of course, the President appoints the Librarian of
8 Congress, who then becomes the only person who chooses at
9 this point the copy -- the person who runs the office of
10 copyrights.

11 And by the way, as I mentioned before, this is a topic
12 that came up when Dr. Hayden was confirmed. She has
13 appointed the current person in an acting capacity as
14 Congress looks at an issue we told Dr. Hayden we would be
15 looking at in the future, and we are doing that now. But
16 your views here are well thought out, I know, and important
17 to us.

18 How is it better that one person appoints someone who
19 works at the Library of Congress in an area that relates,
20 but certainly the same skills that the Librarian of
21 Congress has would not necessarily be the right skill set
22 for the Director of Copyrights. What is your view of why,
23 in that case, the one-person selection is better than
24 congressional input and confirmation by this committee?

25 Mr. Band. Thank you very much for the question, Mr.

1 Chairman.

2 I guess part of it is a recognition or an
3 understanding of what the proper role of the Register is,
4 and you know, we see that the -- although the Register
5 certainly does give advice, and that is part of the
6 statutory role, to give advice to Congress, in large
7 measure, it is a -- as indicated by the title, it is the
8 Register of Copyrights. And so the focus of the job really
9 is on the nuts and bolts of administering the copyright
10 system, the registration, recordation, and now, you know,
11 there are other functions relating to that.

12 So a lot of these are very technical functions, and so
13 in many respects, having someone with that technical
14 expertise of not just IT technical, but copyright technical
15 is important. And so, for example, the last three
16 Registers, including the Acting Register, have all been
17 people who have been, in essence, elevated from within.
18 They have been internal promotions.

19 So the Acting Register, Karen Temple, I mean, she was
20 at the Copyright Office prior to her elevation. Prior to
21 that, Maria Pallante, even though I think at the exact time
22 that she became Register she was working elsewhere within
23 the Library, but she had come out of the Copyright Office.
24 And Marybeth Peters, before that, also was working in the
25 Copyright Office. And I think that that -- having that

1 sense of internal promotion is terrific and I think for
2 this kind of technical position is appropriate.

3 Whereas, if it becomes a more political position, it
4 is, you know, you are going to get someone -- you are much
5 more likely to get someone from the outside who doesn't
6 have the experience working in the Copyright Office. They
7 will come in. The first 2 years are going to be spent
8 trying to figure out how the place operates, and I just
9 don't think that that is what best serves the nature of
10 this position.

11 Also to the extent that this notion of sort of this
12 equivalence to other agencies, the Patent -- the Director
13 of Patents and Trademarks is the Under Secretary not of
14 Patents and Trademarks but is the Under Secretary of
15 Intellectual Property and is the chief spokesperson for the
16 executive branch with respect to all forms of intellectual
17 property, including copyright. And they have -- you know,
18 currently, they have terrific people in the PTO with great
19 expertise in copyright.

20 So there is no -- copyright is not getting short
21 shrift by leaving things the way they are.

22 The Chairman. Thank you.

23 Mr. Kupferschmid, I think I will get you in my second
24 5 minutes since the answers here may be long.

25 Senator Klobuchar?

1 Senator Klobuchar. Thank you very much, Mr. Chairman.

2 The Chairman. And helpfully long, too, by the way. I
3 didn't mean that to be a pejorative description of that
4 answer.

5 Senator Klobuchar. Mr. Kupferschmid, in the
6 21st century, we need a modern Copyright Office. In your
7 testimony, you note that the office has been in dire need
8 of a more modern IT infrastructure. What is your
9 assessment of the modernization effort right now?

10 Mr. Kupferschmid. So it certainly seems like the
11 office is on the cusp of a significant modernization of the
12 office. I think that ultimately is why we need to pass
13 this bill. We need to get a Register in place,
14 presidentially appointed Register in place, who can show
15 the leadership, who understands the specialized needs of
16 the Copyright Office when it comes to IT.

17 But it is also very important to understand that when
18 we talk about modernizing the Copyright Office, we are not
19 just talking about IT modernization. That is one aspect.
20 But the other aspect of modernizing the office is
21 modernizing copyright registration policy, and those two
22 need to go hand in hand.

23 And to the best of my knowledge, nothing has happened
24 in that regard, and the Library doesn't have the experience
25 to do that. You need somebody heading the office, not in

1 an acting capacity, but you need somebody heading the
2 office who can -- who can take that lead and have the
3 vision to know where the law needs to be tweaked and the
4 regulations need to be tweaked.

5 Senator Klobuchar. Okay. Thanks.

6 Mr. Band, as you know, the Copyright Office exists
7 within the Library of Congress. How are the IT needs of
8 the Copyright Office different than the IT needs of the
9 Library of Congress?

10 Mr. Band. Well, obviously, they do have different
11 functions. But the key under the current system is that,
12 first of all, you have the right personnel supervising the
13 process, both at the -- at the Library level with the new
14 CEO, as well as with the Copyright Modernization Office.
15 And so, even though the functions are a little different,
16 you know, the Library oversees many different functions, it
17 is -- on the one hand, it is a library, but it also has
18 CRS. It has the Copyright Office and so forth. And so the
19 expertise that they have allows them to manage systems,
20 different kinds of IT systems effectively.

21 Senator Klobuchar. One of the threats we are seeing
22 is cybersecurity threats, and do you believe the
23 modernization plans -- either of you, both of you -- at the
24 Copyright Office appropriately consider these threats?
25 Just briefly.

1 Mr. Kupferschmid. Yes. So that is a significant
2 concern for the creative and copyright communities. This
3 is an area where the Library has a very different mission
4 than the Copyright Office. The Library, any library,
5 really is about access and providing access to different
6 works.

7 The Copyright Office is going to be much more
8 concerned about security. Because if they cannot guarantee
9 security for copyrighted works and somebody hacks into that
10 system, people are going to stop registering their works,
11 and that hurts everyone. That hurts the Copyright Office
12 because they don't get collections. It hurts the public
13 and archivists and historians who won't be able to rely on
14 a comprehensive database, copyright ownership database.
15 And of course, it hurts the creative community
16 tremendously.

17 Senator Klobuchar. Why don't -- do you mind if I just
18 move on and then to a question key here, I think, for me?
19 And that is the public interest and how we meet the public
20 interest.

21 And Mr. Band, I know that you disagree with making the
22 Register of Copyrights a presidentially appointed position.
23 What other ways, if we don't do that, can we work to
24 address the needs of the Copyright Office and ensure that
25 the Register of Copyrights balances the interests and needs

1 of all stakeholders?

2 Mr. Band. Well, it is -- I think one of the things
3 that could be done is the legislation could be amended so
4 that it provides criteria for the Register -- for the
5 Librarian to use when selecting the Register. So right
6 now, there are no criteria. So that would be a
7 constructive amendment.

8 I think, at the end of the day, it is with -- like
9 with anything else, it always matters who you select, not
10 so much the structure of the selection.

11 Senator Klobuchar. Right.

12 Mr. Band. And as -- and so you do, you want to make
13 sure you don't have structures that create impediments, and
14 I think this structure that is proposed in the legislation
15 of having this commission that needs to make a
16 recommendation, and then that is binding on the President
17 and so forth, I think that structure is going to get in the
18 way rather than improve the process of getting the best
19 person to that job.

20 Senator Klobuchar. Just one last question,
21 Mr. Chairman. Mr. Kupferschmid, what would you do, along
22 the lines of what Mr. Band was referring to, to ensure a
23 fair selection process, if we were to pass this bill, that
24 results in a Register as not beholden to any particular
25 interest, but instead prioritizes the public interest?

1 Mr. Kupferschmid. I think the bill accomplishes that
2 actually quite well. It not only gives the -- gives the
3 Senate the ability to confirm, go through the confirmation
4 process, and therefore, the public has a voice in whether
5 the right candidate is chosen or not and confirmed. But
6 more -- also importantly is that the President just doesn't
7 get to select someone. The President must choose off of a
8 slate of individuals that is created by leadership from
9 both the Democratic and the Republican Party and the
10 Librarian, who gets to participate.

11 I think the bill reaches that compromise in a very
12 good way.

13 Senator Klobuchar. Okay, last question. Just because
14 we have had an acting person, and she is doing a good job,
15 excellent work, but she has been in this acting role for
16 nearly 2 years. Some rightly argue that when an agency is
17 led by an acting designee instead of a permanent leader, it
18 can hinder the agency's work.

19 How does having an Acting Register instead of a
20 permanent Register affect the operations of the Copyright
21 Office?

22 Mr. Kupferschmid. So I think that is right, what you
23 said, in terms of I think Karen Temple has done a fabulous
24 job as the Acting Register, but there are certain
25 limitations on any person who is in an acting position.

1 And we are at, like I said, the cusp of modernization. Not
2 only IT modernization, but modernizing the laws and having
3 to do with -- and regulations having to do with
4 registration, copyright registration policy.

5 So it is important that we have somebody who is in a
6 permanent position in that capacity rather than just an
7 acting.

8 Mr. Band. And I would agree that it would be better
9 to have someone in a permanent position, and that is why
10 this legislation is always going to make it slower to get
11 someone permanent in that job.

12 Senator Klobuchar. Thank you very much, both of you.

13 The Chairman. Senator King?

14 Senator King. Thank you, Mr. Chairman.

15 First, I have to say I published a book this summer,
16 and when I opened the cover, I didn't expect to be so
17 thrilled by seeing the little "c" and my name next to it.
18 That was -- that was an unexpected treat.

19 Mr. Kupferschmid, after this change, and what is not
20 apparent in the language of the legislation, what will be
21 the relationship, the structure, the organizational chart,
22 if you will, between this new presidentially appointed
23 position and the Librarian of Congress?

24 Mr. Kupferschmid. So really the only thing that
25 changes is the process for selecting the Register.

1 Everything else stays the same. Right now --

2 Senator King. But does that mean that you have got
3 two presidentially appointed people, one who works for the
4 other? I mean, I am --

5 Mr. Kupferschmid. Correct. Correct. That is not
6 unique in the Government. Look, for instance, at the
7 Patent and Trademark Office, you have the Secretary of
8 Commerce, who is a presidential appointee confirmed by the
9 Senate or the -- and you have got the Director, rather, who
10 is --

11 Senator King. So you are not really separating the
12 functions of the office from the Library of Congress. You
13 are simply changing the appointment of this one official.

14 Mr. Kupferschmid. Because that --

15 Senator King. It doesn't change the organizational
16 order?

17 Mr. Kupferschmid. That is correct. It will remain in
18 the Library, and the Library will continue to supervise and
19 manage, as it says in the statute.

20 Senator King. Let me follow up on your -- I think you
21 are creative to try to have this list of the three that
22 have to -- the President has to submit -- has to choose
23 from the list. Is that constitutional? Is there any
24 precedent for that? Do you have any opinion?

25 It strikes me that is -- might be a violation of

1 separation of powers? The President either gets to
2 appoint, or he or she doesn't.

3 Mr. Kupferschmid. Yes. So, first of all, I am not a
4 constitutional expert. So I will say that. And I am sure
5 we can find some additional information here, but there are
6 currently statutes that provide similar selection panels.
7 For instance, the selection of the Comptroller General in
8 GAO, and of course, ultimately, the President is free to
9 interpret the bill in a way that is consistent with the
10 appointments clause and can say so in the signing
11 statement, and that has been done in the past.

12 Senator King. But in the GAO case, there is the
13 President has to choose from a finite list?

14 Mr. Kupferschmid. From a slate of -- yes, a slate of
15 possibilities.

16 Senator King. Do you know if that has ever been
17 tested?

18 Mr. Kupferschmid. I do not know the answer to that.

19 Senator King. If you could supply the committee for
20 the record some background on this issue, I think it is of
21 some concern that we need to take seriously.

22 Mr. Kupferschmid. I am happy to do that.

23 Senator King. Thank you.

24 Mr. Band. If I may, Senator King? The wording of the
25 statute involved with the Comptroller General is different.

1 So while with the Comptroller General, there is a
2 commission that makes a recommendation, the President is
3 not obligated to choose from that slate.

4 Senator King. From the slate.

5 Mr. Band. Now, of course, if the President doesn't
6 choose from the slate of recommended people, you know, the
7 Senate might not confirm the person.

8 Senator King. But it is a different structure than
9 what is suggested here?

10 Mr. Band. It is worded differently, yes. Here, it
11 says, S. 1010 says, you know, that the Register shall be
12 appointed by the President from the individuals recommended
13 under the paragraph.

14 Senator King. I appreciate that.

15 Mr. Band. So that is -- that is --

16 Senator King. Well, if you would like to supply
17 something for the record on the constitutional issue, that
18 would be helpful as well because I know you have a
19 different view.

20 Mr. Band, the Librarian is already appointed by the
21 President, why not have another -- I mean, don't give me
22 your whole testimony again. But succinctly, what is the
23 big deal here? You have already got one presidential
24 appointment, and what we are trying to do here is to
25 elevate and underline the significance of the importance of

1 this job. Why does it matter if you have a second position
2 that is presidentially appointed?

3 Mr. Band. Well, first, as I mentioned, because of the
4 structure, it would take a long time. I think it would
5 take a long time --

6 Senator King. You are suggesting that we don't act
7 with total efficiently and alacrity around here?

8 Mr. Band. You said that. You said that, not me.
9 Also, and I think that this is important, you know, to
10 realize that this is part of a much bigger picture. Of
11 course, we are looking at this one bill, and which is
12 relatively narrow and technical at this point.

13 But as Mr. Kupferschmid has indicated, I mean, this
14 is-- you know, this is something that the content folks
15 have been seeking for a while, but it is apart of a bigger
16 objective, I think --

17 Senator King. Why isn't -- that was going to be final
18 question. Why isn't the fact that the content folks, who
19 are the people most concerned with this, are supporting
20 this change, it seems to me that that bears a lot of
21 consideration. They are the ones who are going to have to
22 live with this change. They are the ones who are
23 advocating it. They are the most intimately involved with
24 it.

25 Why should we -- why should we second-guess the

1 constituents of this office if they think this would be a
2 beneficial change?

3 Mr. Band. Well, the first point is, is that we are
4 all constituents. Meaning everyone is part of this
5 copyright system. Meaning it is not only the creators, but
6 also the users. But also in the 21st century, all users
7 are also creators. Meaning, so there is this line, the
8 sort of the distinctions are gone.

9 And therefore, it is important -- you know, the
10 importance of having balance in the office is perhaps more
11 critical than ever. But also, as I was saying, there has
12 been a degree over the past 20, 30 years, a certain mission
13 creep at the Copyright Office, and there are some who want
14 the Copyright Office to be an independent agency, and there
15 are always more functions being inserted into the Copyright
16 Office.

17 In fact, Mr. Kupferschmid tomorrow is testifying in
18 support of a bill that would create a small claims court in
19 the Copyright Office, and the Copyright Office has over --

20 Senator King. Well, that might -- might that not
21 simply reflect the growth of the importance of this sector
22 of the economy? I mean, it seems to me the fact that it
23 is-- you would call it mission creep, I might call it
24 growth to reflect the current -- the 21st century creative
25 economy.

1 Mr. Band. Well --

2 Senator King. I have run out of time, but if you have
3 thoughts on that, please supply them for the record.

4 Mr. Band. I would be happy to.

5 Senator King. Thank you, Mr. Chairman.

6 The Chairman. Senator King, I think you and I can
7 take extra time if we want to since it is down to the two
8 of us. But let me ask a couple of questions while --

9 Senator King. We can do anything we want to.

10 [Laughter.]

11 The Chairman. We may vote something out here. We may
12 just decide we are the committee.

13 So, Mr. Band, on the topic, you know, it was very
14 unclear for a long time how long the term of the Librarian
15 would be, to the point that it almost drifted into some
16 area where it might be permanent. Before the current
17 Librarian was named, before any name was mentioned, Senator
18 Schumer and I introduced legislation, we created a 10-year
19 term.

20 This also produces - provides a term for the Director
21 of the Copyright. Do you see any advantage to the person
22 having that office having both the confirmed responsibility
23 and the 10-year window to know that, barring some
24 inappropriate action on their part, they have that job for
25 10 years. They are not -- the Librarian can't decide they

1 don't like the way the space is being used, or do you see
2 any advantage to a copyright person running that office
3 that knows they have a 10-year window and they are
4 answerable to this committee and the Congress beyond their
5 answer to any -- their landlord, the Librarian?

6 Mr. Band. To be sure, there are advantages to having
7 a set term, provided that it is the right person. And so
8 that is why, you know, conceivably, if there was the
9 legislation that again simply identified the qualities, the
10 qualifications for the office as well as a term, that might
11 be acceptable for our point of view.

12 But I think it is sort of the combination of the 10-
13 year term and this process, which, again, I think it is
14 going to result in a politicized process, and you could end
15 up with someone who really doesn't have the right -- the
16 right level of expertise and technical expertise that we
17 have seen in recent Registers. And so that is why, again,
18 getting the wrong person in for 10 years is a problem.

19 The Chairman. I suppose it would be an equal problem
20 if we get the wrong person in as the Librarian for
21 10 years.

22 Senator King. Or the Secretary of Defense.

23 The Chairman. Or the Secretary of Defense. Though
24 that term is not as specific. I would say that the process
25 here is almost a replica with a slightly different

1 membership of the process that was put in place in the not-
2 too-distant past to select the Architect of the Capitol.
3 The same process, the same three names to be submitted.
4 The President makes that, and we will be exercising that
5 process very quickly.

6 The Architect of the Capitol has resigned, effective
7 November of this year. And so a very similar committee
8 with a very similar process will hopefully produce a
9 presidential nominee that is back before this committee not
10 too far into next year or maybe even late this year. But
11 that is where the model for this, the three names, the
12 congressional input, but with somebody else to make that
13 final decision about the names.

14 So, Mr. Kupferschmid, Mr. Band has pointed out that
15 the Director of Patents and Trademark Policy is a
16 presidentially appointed individual. How would the
17 creators and users of copyright material benefit from
18 having that, the copyright Register, the Director of
19 Copyrights to have the same standing in this process as the
20 Patent Office does?

21 Mr. Kupferschmid. I think it is important --

22 The Chairman. Patent and Trademark Office does.

23 Mr. Kupferschmid. I think it is important, and it
24 would certainly benefit creators and users by showing and
25 demonstrating the importance of intellectual property.

1 More specifically, the copyright to the economy, how
2 important it is to jobs, to the economy, to our culture,
3 and to show that to our international trading partners.

4 Right now, the Register of Copyrights is not -- is
5 just selected by the Librarian, and that sends a certain
6 message that about the importance of copyright. It is a
7 message that we don't want to be sending. And hopefully,
8 the way the creators and users can benefit is this will
9 lead to perhaps improved IP protections, more respect for
10 intellectual property, whether it is global or certainly
11 domestic here.

12 And perhaps, most importantly, it gives these creators
13 and users a voice in selecting the Register. Very much
14 like the PTO Director, there would be a transparent
15 process, as opposed to the Librarian just potentially
16 picking someone behind closed doors without any
17 consultation. Under the process envisioned by this bill,
18 it would be very open, very transparent. It would make the
19 Register accountable.

20 And so, right now, the President can simply knock on
21 the door of the Librarian and say, "This is the person I
22 want to be the Register." And bypass Congress and the
23 Senate entirely. And if the Librarian decides not to do
24 it, well, he can fire the Librarian because he has that
25 power and hire a new Librarian that will do it.

1 What we are looking for is a transparent process here,
2 and we think this bill does that, and it does it in a very
3 balanced and neutral way.

4 The Chairman. I think you may have misstated there.
5 I don't think the President can fire the Librarian, but the
6 Librarian could fire the Copyright Director.

7 Mr. Kupferschmid. Yes.

8 The Chairman. The Librarian has a 10-year term and
9 would -- this committee could act and make recommendations
10 and other things.

11 So we just passed the Music Modernization Act, the
12 Orrin Hatch Music Modernization Act that is at the White
13 House now awaiting the President's signature.

14 Mr. Kupferschmid, what advantages would a permanent
15 person in this job with the new standing have in
16 implementing that act? And then we will go back to my
17 friend, Mr. King.

18 Mr. Kupferschmid. So before I answer your question, I
19 would like to thank this committee, the members of the
20 committee, and the full Senate for their support of the
21 Music Modernization Act, I guess, the Orrin Hatch and Bob
22 Goodlatte Music Modernization Act, as it is called now.
23 And we look forward to it being signed by the President.

24 The MMA gives the Register new rulemaking authority
25 that is necessary for both creators and digital services to

1 engage in effective licensing. And the Register
2 appointment by the President will address any outstanding
3 appointment clause issues, like were mentioned earlier,
4 since the soon-to-be new law hopefully vests authority in
5 the Register itself.

6 Right now, the Register sort of sits in this cloudy
7 zone, and this bill would make the role more parallel with
8 other agency heads who have similar roles in Government.
9 But at the same token, it leaves the position, leaves the
10 entire office within the Library of Congress. We think it
11 is a very good compromise because that it takes a very
12 targeted, very modest approach, and we think it would
13 certainly be a benefit to the Music Modernization Act,
14 which this entire Senate really supported unanimously.

15 The Chairman. Senator King?

16 Senator King. I still want to -- I still would hope
17 for the record that you could give us some thoughts about
18 the -- it seems to me we are doing sort of a half way. I
19 mean, we are upgrading the status of this office, but it is
20 still under the Librarian of Congress. And just some
21 thoughts about whether that creates administrative
22 awkwardness.

23 But my other question is, we have got two -- we are
24 now talking about two 10-year terms. Is it the concept of
25 this bill that that -- those 10 years would be coterminous

1 with the Librarian of Congress, or would there be an
2 overlap?

3 Any --

4 Mr. Kupferschmid. Yes, I don't think they would be
5 coterminous. I think it all is just a matter of when the
6 Librarian position needs to be filled and when the Register
7 position needs to be filled. And in terms of, like I said,
8 the inconsistencies, there are other -- many other areas of
9 Government where you have one presidential appointee
10 reporting to another presidential appointee, and those work
11 very well, but we are happy to provide you additional
12 information about that.

13 Senator King. Appreciate that.

14 And do I take it from your presence here that the --
15 your organization represents the community of authors,
16 musicians, and those who are interested in this topic? Is
17 that correct?

18 Mr. Kupferschmid. Oh, absolutely. I mean, we
19 represent about 13,000 different organizations and about
20 1.8 million individual creators across the country that
21 rely on copyright for their careers, for their livelihoods,
22 and they are -- every single one of them, they are
23 supportive of this bill.

24 Senator King. Thank you.

25 Thank you, Mr. Chairman.

1 The Chairman. Thank you, Senator King.

2 Any concluding thoughts from either of you as we wrap
3 up here? Mr. Band?

4 Mr. Band. No. Just I would just amplify the point
5 that I was making before, that the -- one should view this
6 legislation in its broader context, and we started to talk
7 about that, and you, Senator King, as you alluded to, there
8 is this conceivable awkwardness. And then I think maybe
9 the next step is to say, well, we now need to make it an
10 independent agency, and as it grows, I mean, we are going
11 to have this bigger and bigger agency, and then it will be
12 in conflict with the Patent and Trademark Office.

13 So we want to -- I think the goal is to avoid sort of
14 a "Washington solution." A Washington solution to a
15 problem is just to sort of rearrange the deck chairs
16 instead of saying what is the real problem? Let us find a
17 solution. Let us not just do a reorganization for the sake
18 of doing a reorganization.

19 And I think at some level, this legislation, this is a
20 solution in search of a problem.

21 The Chairman. Mr. Kupferschmid?

22 Mr. Kupferschmid. Yes, I would have to very much
23 disagree with that. I mean, at the heart of it, we are
24 supporting a more transparent process here, one that would
25 increase the accountability of the Register. It just

1 doesn't exist today.

2 I mean, it is, frankly, hard to oppose something like
3 that, or when you add up the fact that the Library of
4 Congress has a different mission, is a stakeholder in a lot
5 of these issues, could have conflicts of interest issues,
6 when you add up the fact that there are other similarly
7 situated agency heads that are presidential appointees,
8 when you add up the fact that right now is the perfect time
9 to do this, there is a window of opportunity because there
10 is a vacancy in the position, not hurting any feelings or
11 going after anyone, and you look at the fact that the
12 Copyright Office is on the cusp of modernizing and they
13 need -- you know, they need leadership to help that, this
14 is the perfect bill at the perfect time.

15 It doesn't do any of the parade of horrors that
16 Jonathan just mentioned. It simply doesn't do that. We
17 have a very narrowly targeted, modest approach to make the
18 Register a presidential appointee confirmed by the Senate.

19 We hope you will support the bill.

20 The Chairman. Well, thank you both. We have been
21 looking for the perfect bill at the perfect time. I have
22 never voted on a --

23 [Laughter.]

24 The Chairman. I have never voted for a perfect bill
25 before. I have introduced a couple of perfect bills, but

1 I--

2 [Laughter.]

3 The Chairman. I have never voted on one of them, and
4 that may be the reason to do this.

5 Very helpful for both of you to be here. We
6 appreciate it.

7 There may be some additional questions for the record
8 from others who couldn't attend or from those of us who
9 did. The record will remain open for 1 week from today.

10 [The information referred to follows:]

11 [COMMITTEE INSERT]

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1 The Chairman. And the committee is adjourned.

2 [Whereupon, at 3:27 p.m., the hearing was adjourned.]

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