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Description of document:	Reports produced for Congress by the Copyright Office not posted on the Copyright Office website, 2007-2009
Requested date:	11-November-2009
Released date:	30-September-2010
Posted date:	01-November-2010
Date/date range of documents:	12-March-2001 – 23-November-2009
Source of document:	Freedom of Information Act Request FOIA Requester Service Center Copyright Office GC/I&R P.O. Box 70400 Washington, DC 20024

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From: "Coe, Renee" <acoe@loc.gov>
Date: Thu, 30 Sep 2010 19:01:33 -0400
Conversation: FOIA Request (Docket No. 08/2010)
Subject: FOIA Request (Docket No. 08/2010)

Attached is the Copyright Office response to your FOIA request dated November 11, 2009, Docket No. 08/10. The documents you requested are being provided to you electronically as pdf documents.

Renee

A. Renee Coe
Senior Attorney
Office of the General Counsel
U.S. Copyright Office
202/707-8380



United States Copyright Office

Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

FOIA Docket No. 08/10

September 30, 2010

I am writing in response to your letter dated November 11, 2009 that was received for processing by the FOIA Requester Service Center on November 12, 2009. You requested copies of each "report produced for Congress by the Copyright Office" during the past three years that are not posted on the Copyright Office website. We are releasing approximately 113 pages of digital copies to you in pdf format.

As you requested, we searched records for the prior three years which we calculated based on November 12, 2009, the date your request was received. As agreed, we have not included any responses to constituent inquiries from Congressional offices.

We are not withholding any responsive records. Based on the privacy exemption, 17 USC §552(b)(6), we redacted personally identifying information that is contained in the email dated May 29, 2009. The redaction is indicated on that document at the location where the redaction was done, as required by statute.

Fees

FOIA fees & rates, generally. You are subject to the fees applicable to noncommercial requesters. The FOIA statute and Copyright Office FOIA regulations require noncommercial requesters to pay both search and copying fees. 5 U.S.C. §552(a)(4)(A)(ii)(I). 37 CFR §203.6(b). Copyright Office

FOIA regulations at 37 CFR §203.6(b)(2) and (3) provide the rates. The minimum search fee is \$65 per hour or fraction thereof. For copying, the fee is \$15 for up to 15 pages, after that, the fee is fifty cents per page. Also, the first two hours of search time and the first 100 pages of copying are free. 5 U.S.C. §552(a)(4)(A)(iv)(II).

No fees assessed. Due to the minimal search time and resources required to provide you with electronic copies, there are no fees for your request.

Administrative Procedures

File closed if no response in 30 days. The Copyright Office is sending you this letter because processing for your FOIA request is complete or because a response from you is necessary either to comply with legal requirements, such as paying fees, or because additional information is required or both. Therefore, for administrative reasons, the file for this FOIA request will be closed as of the date of this letter, if you do not choose to respond or otherwise contact our office within thirty business days after that date.

If you do contact us about this request, please reference Docket No. 08/10 or provide a copy of this letter. You may call the FOIA Requester Service Center at (202) 707-6800 or write to this address: Copyright Office, FOIA Requester Service Center, GC/I&R, P.O. Box 70400, Washington, D.C. 20024. You may also send an e-mail through the Copyright Office website at www.copyright.gov. On the home page for the website, use the link "Contact Us" that is located in the margin at the bottom, left side of the screen.

Right to appeal. In addition, should you believe that this response to your FOIA request constitutes an improper denial of a valid FOIA request, you may file a written appeal within thirty (30) calendar days of the date of this letter. Write "APPEAL" on the envelope in a prominently visible manner and send it to this address: Office of the General Counsel, Copyright GC/I&R, P.O. Box 70400, Washington, D.C. 20024. Your letter should explain your arguments and any legal basis for your objection to a refusal to

September 30, 2010

release the records you requested or other basis for disagreement. Also, please reference Docket No. 08/10 for this FOIA request or provide a copy of this letter.

Sincerely,

A handwritten signature in cursive script that reads "A. Renée Coe".

A. Renée Coe
Senior Attorney

Enclosures



United States
Patent and
Trademark Office

United States
Copyright
Office



MAR 12 2007

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

The Honorable Arlen Specter
Ranking Republican Member
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Mr. Chairman and Senator Specter:

Thank you for your letter regarding discussions in the World Intellectual Property Organization (WIPO) on the latest Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations (the "Revised Draft Broadcasting Treaty"). We appreciate your sharing your concerns with us.

Like you, we believe that the scope of rights granted to broadcasters under the Revised Draft Broadcasting Treaty should provide broadcasters what they need to protect against signal piracy while not clashing with the rights of the underlying content holders or the public interest, and thus, we also favor a treaty limited to signal protection. As you may know, it was at the urging of the U.S. Government that the WIPO General Assembly, at its September 2006 session, instructed the member States of WIPO to focus on a more limited and narrow signal-based approach to the Revised Draft Broadcasting Treaty. We believe that the General Assembly decision mandated that the Revised Draft Broadcasting Treaty be limited to this scope if we are to proceed to a Diplomatic Conference in 2007.

In developing the U.S. Government position with regard to the Revised Draft Broadcasting Treaty, and in cooperation with the U.S. Department of State, we have engaged in broad-based consultations and held numerous public roundtables. We have held or attended several meetings with broadcasters, webcasters, telecom companies, Internet Service Providers, copyright content industries, consumer and public interest groups, as well as with Congressional staff, in order to help us better understand and address concerns about the impact of a possible treaty.

As discussions on the Revised Draft Broadcasting Treaty proceed, we will continue to consult with all interested parties, and we will remain open to input from those who wish to voice concerns or share ideas.

We appreciate your sharing your concerns with us.

Sincerely,

A handwritten signature in black ink, appearing to read "Jon W. Dudas". The signature is stylized with a large, sweeping "J" and "D".

JON W. DUDAS
Under Secretary of Commerce for Intellectual
Property and Director of the United States
Patent and Trademark Office

A handwritten signature in black ink, appearing to read "Marybeth Peters". The signature is written in a cursive style.

MARYBETH PETERS
Register of Copyrights
United States Copyright Office



United States Copyright Office

Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

To: Matt Sandgren, Counsel to Senator Orrin G. Hatch
From: Maria Pallante, Deputy General Counsel, U.S. Copyright Office
Date: November 19, 2007
Re: Technology and Orphan Works

Thank you for asking us to comment on the role of technology within an orphan works regime. We have learned in past months that there are numerous private sector companies working on databases for copyrighted works, each with the goal of having some mechanism by which a prospective user of content can search for a copyright owner. As you know, we are working on a technology demonstration event for you and your colleagues, but in the meantime we have summarized here some of the technology issues.

The State of Technology

With respect to photographs and other images, we have learned that, as a matter of technology, image recognition already exists and is rather exciting. For now, some copyright owners (primarily corporate copyright owners) use image recognition technology to locate or block infringing content on the web, utilizing web crawling or filtering functions. Content is uploaded by copyright owners into secure databases and translated into various formats, then web crawlers compare the content with content on the Web for the purpose of finding infringers. The databases are not yet available in reverse: they are not accessible by copyright users for the purpose of matching content to copyright owners. Although the necessary technology exists, and continues to improve, viable business models are still developing. Technology companies are willing and able to provide an image recognition service to users, but they need help from content owners to do so. Among the outstanding business issues are database security, population fees, and allocation of user fees or subscriptions, if any.

As a general premise, we agree that image-searchable databases are a means by which some copyright owners, such as photographers or graphic artists, can make themselves known to a potential user. We understand the policy rationale of tying the enactment of an orphan works bill to a confirmation that such technology exists. We would be more troubled by a premise that would tie enactment to a date on which a particular subset of copyright owners are willing to populate a database or otherwise conduct business with a technology company. We are unable to predict, for example, if particular photographer trade associations will offer services to their members to assist with database population. But we do expect individual photographers to begin to work with respective databases as the database companies begin to offer appealing services. Ultimately, there will be numerous databases populated by some copyright owners but not by others. There will be competing business models. This is an acceptable result in our view.

We are confident that the marketplace offers, and will continue to offer, an array of databases and search technologies, which will result in more choices for the copyright

owner and more aids for the prospective user. Databases with significant content and a track record of matching users to owners will fill an important need and will likely be successful. Some databases will be free; others will not. Users will consult various databases as they develop and when it is reasonable to do so. For their part, the technology companies and copyright owners will need to ascertain the needs of the user market and how best to provide service. This is a process that is already underway but, certainly, an orphan works amendment would provide additional incentives for copyright owners and database companies to work together.

Technology and Industry Practices

In our view, the content owners and users in the respective copyright industries will be the parties most knowledgeable about whether a particular image recognition database or other electronic product is a viable search tool. If copyright owners or users are aware of a database or tool that is helpful, they will direct users to that tool in their formulation of “best practices.” As you know, the orphan works regime will strongly encourage users to employ industry best practices when searching for an owner. The Office is willing to collect and formulate such best practices in a manner that ensures consistency and fairness across owner and user groups, and makes them most useful to the public. A description of available databases and other search tools will be a critical part of the best practices of every industry. Since technology will evolve over time, perhaps rapidly (and perhaps differently in different segments of the copyright industry), we think that the industry groups and the Office should have the opportunity to update the best practices from time to time, a task that is infinitely more flexible than updating regulations or certifications.

No Need for Government Certification

We do not think that the Copyright Office should have a role in evaluating databases or related technology, other than in the context of reviewing best practices that are submitted to us. For example, we do not believe the Office is well suited to certify or accredit databases or technology of any kind. We lack experience with the task of accreditation and are uncertain that we have the technical expertise to undertake such a task, to the extent it involves the evaluation of technologies. Moreover, we are not persuaded that certification should be a central concern. A user should take advantage of all tools likely to lead him to the copyright owner, regardless of whether the government has blessed that tool. But a user should not be forced to check a particular database (especially if there are fees involved) simply because it is certified. To require otherwise could lead to odd results: a good faith user who performed an exhaustive search could nonetheless be denied orphan works protection because he did not search a particular certified database— even though that particular database did not contain the image and would not have yielded a match.

No Need for Government Database

There are related questions, raised by some, as to whether the Copyright Office should have its own searchable database of visual images and whether the existence of such a government database should be a condition precedent for orphan works legislation. Given the numerous private sector companies that are working to bring technology to the

orphan works problem, we think such a database could be wasteful and ineffective. There are literally millions of photographs in archives, museum collections, local historical societies and private hands for which there are no locatable copyright owners. Many of them are unpublished or of foreign origin, and are historically and culturally important. Such photographs would not be registered with the Copyright Office and the existence of a Copyright Office image bank would not change the fact that they are orphaned. As for those that are registered, works of visual art make up the smallest percentage of all works submitted for registration and, thus, it cannot reasonably be assumed that a Copyright Office image bank would impact the orphan works problem to a meaningful degree. We have yet to see, in our experience, a meaningful correlation between actual orphan works and the works submitted to the Copyright Office for registration.

The purpose of a Copyright Office database seems to be to offer comfort to certain living authors, by providing a service that will help make them identifiable to potential users. Moreover, since statutory damages are not available to an owner who emerges after a use has commenced under the orphan works regime, it has been suggested that the availability of a visually-searchable database within the Copyright Office is necessary to prevent the instance in which a user cannot find an owner who has registered his copyright with the Office. We disagree. Databases will work best if copyright owners can control both the nature of the content and the manner in which it is made available. Most of the industries have long recognized this fact and have proactively embraced partnerships with technology companies. To the extent copyright owners want to make themselves locatable, they will have multiple choices available to them through the commercial marketplace. But it is to their advantage to participate in, and help shape, the products, services and business models that are possible.

It is difficult to imagine how the Copyright Office or any government office could ever keep pace with the image technology world that exists outside our doors and beyond our budget. In reality, the Copyright Office does not have and is not likely to obtain the resources that would be necessary to compile a database of works that are searchable by image, even if there are some copyright owners who would be amenable to such an undertaking. Experience and common sense tell us that government agencies are not well equipped to develop or deploy cutting edge technologies. Even if the Office were able to launch a database with image-recognition capabilities, by the time it is implemented it would be several generations behind the products and services available in the commercial marketplace. (For example, the operating system for most Copyright Office computers is Windows 2000.)

Copyright Registration Records

As a side bar, we should note here, as we noted in the Report on Orphan Works, that the Copyright Office already offers copyright registration records (as distinguished from deposits of actual works) through the Internet.¹ Registrations made under the 1976 Copyright Act (for works created on or after January 1, 1978) are on-line through the Copyright Office. Certain renewal records (for works created under the 1909 Copyright

¹ <http://www.copyright.gov/records>.

Act) are becoming accessible through the private sector. For example, Stanford University, with its access to significant, private resources, recently announced that it had digitized (and is offering for free over the Internet) the renewal registration records of the Copyright Office for books that were published in the United States between 1923 and 1963, basing its project on the copies of records which the Copyright Office sent to the Stanford Library and other libraries over a period of many years. This is a good example of the private sector filling a need.² And while the Copyright Office system and the Stanford project are not image recognition services, they are nonetheless important resources that assist some users in finding some copyright owners.

Transfer of Deposits to the Library of Congress

By way of background, the mission of the Copyright Office is to promote creativity by administering and sustaining an effective national copyright system.³ The Office examines all applications and deposits presented for the registration of copyright claims to determine their acceptability for registration under the provisions of the copyright law and Copyright Office regulations.⁴ The registration system, in turn, feeds the Library of Congress, which may select the deposits of certain published works for its collection (including books, films, photographs, sound recordings and other creative works) or for exchange or transfer to any other library.

As a practical matter, the Office is in the midst of a business-reengineering plan that will allow applicants to submit copyright registration forms and certain deposits electronically, including works that are “born-digital,” or created digitally and disseminated only on-line. The acquisition of born-digital works is a key goal of the Library of Congress, because such works reflect an important, current category of American creativity.

It is important to consider that registration is not a condition of copyright protection. Because of this fact, the law provides several inducements to, or advantages of, registration, including the ability to collect statutory damages and attorneys fees if registration is timely.⁵ Such measures were incorporated into the 1976 Copyright Act with

² See: <http://collections.stanford.edu/copyrightrenewals/bin/page?forward=home>.

³ In addition to administering the U.S. copyright system, the Copyright Office is responsible for advising agencies and offices of the U.S. government (including the U.S. Congress, the Departments of Justice, State, and Commerce, respectively, and the Office of the U.S. Trade Representative) on domestic and international copyright matters, including on a highly sensitive or confidential basis. It undertakes legal analysis of both domestic and foreign copyright laws, and prepares or advises on regulations, legislation, treaty language and obligations, and industry practices.

⁴ For certain works, including certain pictorial, graphic and sculptural works, the Copyright Office permits the applicant to submit identifying information in lieu of a copy of the work. See 37 C.F.R. § 202.20(c)(2)(iv).

⁵ See 17 U.S.C. §412. In any action under this title...no award of statutory damages or of attorney’s fees, as provided by sections 504 and 505, shall be made for---

(1) the infringement of copyright in an unpublished work commenced before the effective date of registration; or

(2) any infringement of copyright commenced after first publication of the work before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

the Library of Congress in mind --- Congress wanted to ensure that under a system where copyright registration was clearly voluntary, the Library would have access to copyrightable works in as expedient a manner as possible. As a safeguard, the law also includes separate, “mandatory deposit” provisions which allow the Library of Congress to procure, upon its demand, any works published within the United States.

Copyright Deposits Should Not Be Available to the General Public

Even if the government had immediate resources to create a visual database, we think the undertaking would generate strong opposition, especially given the questionable connection to the actual orphan works problem. We do not believe that most copyright owners want the Copyright Office to make copies of the works that they provide to us for purposes of registration, and it is questionable whether they would want or permit the Office to provide access to images of those works on the Internet. In fact, we fear that forced digitization would have a chilling effect on registration. Why would applicants want the government to take their work, including works that have never existed in digital format, works that are highly sensitive, and works that are unpublished or narrowly circulated, and make digital copies available to the world? In the many decades since we have had a copyright registration system, the Office has never systematically made copies of copyright deposits as part of the general public record. On the contrary, absent the copyright owner’s permission, we have not made copies of deposits available to third parties except in connection with litigation, and only then under stringent regulations.⁶

We cannot digitize deposits retroactively, as some have suggested, because to do so would require us to make copies, as well as display copies, without permission of the copyright owners. This would be especially problematic for unpublished works, with respect to both copyright law and --- in some cases --- privacy law. But even as to published works, there are many questions, including database security (how could we provide public access and also guard against downloading and piracy) and privacy (how could we protect the subjects of portrait photography, such as images of school children). In the private marketplace, these issues will work themselves out, as the content owners

⁶ See 37 C.F.R. § 201.2(d)(2). “Requests for certified or uncertified reproductions of the copies, phonorecords, or identifying material deposited in connection with a copyright registration of published or unpublished works in the custody of the Copyright Office will be granted only when one of the following three conditions has been met:

(i) The Copyright Office receives written authorization from the copyright claimant of record or his or her designated agent, or from the owner of any of the exclusive rights in the copyright as long as this ownership can be demonstrated by written documentation of the transfer of ownership.

(ii) The Copyright Office receives a written request from an attorney on behalf of either the plaintiff or defendant in connection with litigation, actual or prospective, involving the copyrighted work. The following information must be included in such a request:

- (A) The names of all the parties involved and the nature of the controversy;
- (B) The name of the court in which the actual case is pending or, in the case of a prospective proceeding, a full statement of the facts of the controversy in which the copyrighted work is involved; and
- (C) Satisfactory assurance that the requested reproduction will be used only in connection with the specified litigation.

(iii) The Copyright Office receives a court order for reproduction of the deposited copies, phonorecords, or identifying material of a registered work which is the subject of litigation. The order must be issued by a court having jurisdiction of the case in which the reproduction is to be submitted as evidence.”

populate databases, and ancillary protections such as privacy laws converge to provide extra protections where needed. The private sector is in a far better position than the government when it comes to providing the necessary safeguards, including security against commercial pirates and other bad faith infringers.

Retention and Retrieval of Deposits

Assuming for the sake of argument that the Copyright Office was legally able to make copies of deposits from past registrations and had immeasurable resources, the task would be extremely difficult as a practical matter. The Office retains deposits of published works for only a limited time, and most deposits received since 1978 but not selected by the Library have almost certainly been discarded by now. For those still in the possession of the Office, the acts of finding, collecting, and scanning the deposits, accurately matching them with the registration records (including records of copyright ownership) and organizing them into a database would involve stupendous effort and funding far beyond what could reasonably be expected to be available to us. Our deposits are warehoused and indexed in ways that permit retrieval on an individual basis, as needed - i.e., when a particular deposit is needed, it can be located and retrieved, generally from an off-site warehouse. But the Office's deposit storage and retention system is ill suited for any large-scale project involving the mass-retrieval and organization of deposits and ownership information.

Summary

In summary, the Copyright Office is impressed by the technology that is available or coming soon to copyright owners, including image recognition products and services. We are confident that copyright owners will continue to work with technology companies as the marketplace continues to evolve, and that technology will play an increasingly relevant role in assisting users to find copyright owners. We note that business models are developing and will likely develop differently for different kinds of content. However, we do not see a meaningful correlation between orphan works and copyright registration records. Nor do we see the need for an image-searchable government database, which would take many years to develop and be under-resourced and duplicative of the private sector, in our view. We note that millions of orphan works reside in archives, museum collections, local historical societies and private hands for which copyright owners will never be found, regardless of the existence of any particular database. We are thus eager to see orphan works legislation enacted as soon as possible.

Thank you again for engaging the Copyright Office on this issue. We look forward to seeing you at the technology demonstration event and to working with you on orphan works legislation.



The Register of Copyrights of the United States of America

United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

Marybeth Peters, Register of Copyright:
Responses to questions from Representative Sheila Jackson Lee

(1) Why should we be concerned with orphan works? If a person is truly concerned about protecting their copyright, shouldn't they be vigilant in making sure that there is no unauthorized use of their copyrighted work? Why should a user who uses copyrighted material in good faith be subject to damages for something that he/she used in good faith? There seems to be a fairness problem where the copyright holders can sleep on their rights? Is there a laches doctrine in copyright law? Should there be?

Fairness: Your question raises several of the most fundamental issues in the orphan works problem. While we have no doubt that the situation in which an owner “sleeps on her rights” can be frustrating to many prospective users, we also believe it is important not to lose sight of the fact that the owner of a copyright has never been obligated to exploit her copyrighted work, and copyright protection has never been subject to a “use it or lose it” rule. Our view is that this should not change. The history of copyright law in this country demonstrates that, in general, deference to owners’ decisions on when and how to exploit works has promoted creative industries and the public good. However, copyright has also long been subject to exceptions and statutory licenses, many of which try to correct situations in which the cost of a willing buyer and willing seller finding each other and negotiating a license fee exceeds the fee itself. In such situations, the transaction never occurs even though both parties would have preferred for the transaction to occur. In our proposals related to orphan works (and in the current House bill), this general framework is retained: the user is entitled to use the work only if a market-based license is not otherwise available (e.g. from a performing rights organization or through a statutory license), and when the owner isn’t available to say “yes” or “no” to a license. We believe this strikes the fairest balance.

Good Faith: Liability for infringement of copyright has always been “strict,” meaning that a person who reproduces, publicly performs etc. a copyrighted work without permission incurs liability even if the person had no idea that the work was protected by copyright. Under current copyright law, the fact that a user, prior to infringing the work, conducted in good faith a search for the owner that was diligent but unsuccessful will not reduce the infringer’s liability: the person is in same position as if he or she had conducted no search at all. The Copyright Act does provide that a judge may reduce an award of statutory damages down to \$200 per work when the infringer “was not aware and had no reason to believe that his or her acts constituted an infringement of copyright.” See 17 U.S.C. § 504(c). However, this provision will usually not be relevant to the orphan work user: the very fact that a potential user conducted a search for the

owner of the work will, ordinarily, reveal that the user *was* aware that her contemplated use would constitute infringement. More fundamentally, statutory damages will not even be available for many owners because statutory damages are only available when the work was registered with the Copyright Office prior to the infringement or when the work was registered within three months of first publication. The reduction in statutory damages is also discretionary, and applies on a per-work basis, so if the user used 10 works, the minimum would be \$200 x 10, or \$2000. Finally, the owner can elect not to receive statutory damages at all, and instead to receive awards of actual damages and profits; these awards might exceed \$200 by a great deal and there is no comparable reduction available for “innocent” infringers in the calculation of actual damages and profits.

Laches: The question of whether the equitable doctrine of laches applies in copyright cases is unsettled at best, but in any event it would not be helpful in the orphan work context because it ordinarily requires that the copyright owner have notice of the infringement. That would not be the case in the orphan work scenario.

(2) The orphan works situation seems to inhibit users from engaging in historic preservation of sound recordings and duplications of photographs, which are often of great historical and educational significance. Is there a way that amendments could be developed to the existing or proposed legal regimes to allow the suspension of orphan works for educational and historical preservation?

First, if a nonprofit institution is engaging purely in preservation activities (e.g. making preservation copies for archival purposes but not disseminating the copies or otherwise making them available), it is very possible that the activity may qualify as fair use. This said, in general, we agree that preservation projects are excellent examples of the beneficial uses that a properly crafted orphan works bill will encourage. If a nonprofit institution wants to make further use of preservation copies or make such copies available to others for further use, or if a private party wants to invest in activities that would result in valuable circulation of older works, the orphan works proposal could prove to be invaluable. The legislative language proposed at the end of our *Report on Orphan Works* (in 2006) provided a safe harbor from monetary damages for infringements that are ceased expeditiously and performed without a purpose of commercial advantage. A similar, but not identical, safe harbor concept has been incorporated into H.R. 5889 (see proposed § 514(c) (1)(B)). We also proposed some conditions for injunctive relief, including a provision that would require a judge to consider the user’s reliance on the apparent orphan works status of a work and the availability of orphan works limitations under the law. This reliance qualification is not currently expressed in H.R. 5889.

(3) Why do we bend over backwards to protect a copyright owner who is missing? There’s a definite imbalance in the protections afforded to the copyright owner and the user/public.

Our view is that a properly crafted orphan works law will indeed improve the balance between copyright owners and the public. While it may be a fair characterization of

existing law to say that it “bends over backwards to protect a copyright owner who is missing,” the proposed orphan works legislation would go far to correct that imbalance. A combination of factors has caused the orphan works problem, including the fact that works are under copyright for a longer period of time than they were under previous copyright laws and that copyright notice is no longer required on published works. Some of the changes in the law that have contributed to the orphan works problem have been enacted in order to comply with treaty obligations. The fact that some owners will become identifiable or unlocatable over time is logical but should be addressed, and the orphan works legislation is an attempt to address that phenomenon. This said, as we noted in response to Question (1), it is also important not to lose sight of the fact that a system of private rights, including a right to exclude, has proven over the past two centuries to be an excellent promoter of expression in this country.

(4) How do other nations treat orphan works and are there lessons that can be applied in the United States?

We considered this question in our study of the orphan works problem, but found few examples of statutory schemes that addressed orphan works. There is an orphan works statute in Canada that is very different from the one we ultimately recommended for the United States. That statute requires that the prospective user pay into an escrow account maintained by the government; the government also issues a license that sets out the permitted uses. Here is our discussion of the issue in the *Report*, which includes the reasons we rejected (and continue to reject) such a system:

The other mechanism proposed by some commenters is a requirement that orphan works users pay into an escrow before commencing use. The amount collected in the escrow would be paid out to copyright owners if they resurface. This proposal is similar to the system in Canada that was mentioned in the Notice of Inquiry. The proponents of an escrow requirement, mostly individual authors like illustrators, recording artists and photographers, argue that it would prevent abuse of the orphan works system and create a practical way for individual copyright owners to obtain compensation for the use of their works, which according to them is currently impractical due to the high cost of litigation. Most other commenters strongly disfavored the Canadian approach, and also opposed an escrow system of any kind.

In our view, an escrow requirement in an “ad hoc” reasonable search system like we recommend would be highly inefficient. Every user would be required to make payment, but in the vast majority of cases, no copyright owner would resurface to claim the funds. Thus, most if not all of the funds collected would not be distributed to the authors, and thus the system would not actually facilitate payments between users and owners of orphan works. Also, establishing the amount to be paid would be a difficult and time-consuming task. Moreover, the escrow requirement might needlessly discourage legitimate orphan works users from making use of works simply because of the administrative cost

or the volume of works they wish to use, as in the case with a notice of intent to use registry.

(5) Would creating a government-managed compulsory license regime help combat orphan works?

No, we think not. Please see the answer to Question (4), above.

(6) Is orphan works a problem in other countries? Is it harder to find copyright holders in foreign countries?

As discussed in Question (4), above, we did not find many examples of orphan works legislation in other countries. It may be that orphan works are less of a problem in some other countries because in many instances collecting societies (organizations that collect royalties on behalf of copyright owners) in those countries are empowered to collect for all owners within a given class of copyrighted works (for example, all owners of musical works)—even for any owners who have gone missing. A reappearing owner can collect her fees from the society. The United States has collecting societies in fewer copyright industries than some other countries, and generally does not permit the collection of royalties without the authorization of the owner.

Even with the more expansive role of collecting societies, it appears that other countries consider orphan works to be a significant problem. For example, the E.U. (and U.K. specifically) have recently been studying ways to solve the problem and are very interested in monitoring the progress of the United States in this regard.

(7) Under the current IP laws, are damages mitigated if a user can demonstrate that he/she made reasonable efforts to search and find the copyright holder?

As noted in the answer to Question (1), above, the fact that a user, prior to infringing the work, conducted a good faith, diligent search for the owner, and was unsuccessful will not reduce the infringer's liability under current law. Subject to certain requirements related to registration of the work, willfulness can cause an infringer to be subject to an increase in the available statutory damages: the maximum will be increased from \$30,000 to \$150,000.

(8) Under the existing statutory scheme, how are damages established for willful infringement? How are these damages reasonable?

As noted above, willfulness can in some cases cause an infringer to be subject to an increase in the available statutory damages: the maximum will be increased from \$30,000 to \$150,000. *See* 17 U.S.C. § 504(c). (The minimum remains the same, at \$750.

See id.) It should be noted that statutory damages (whether for willful or nonwillful infringement) may be awarded *only* when the infringed work had been registered prior to the infringement or registered within three months of first publication. *See* 17 U.S.C. § 412. The statute does not address willfulness in the context of actual damages and profits.

It is important to keep in mind that the statute establishes *ranges* of statutory damages, and it is up to a judge or jury to determine the precise award within that range. It is also important to remember that statutory damages are awarded on a per-work basis (not, for example, on a per-copy basis), which means that if the infringer made 100,000 infringing copies of the same musical work, the infringer is still only subject to one award of statutory damages within the proper range. For that reason, it can be reasonable for a court to award \$100,000 in statutory damages for infringement of one work, for example in a case where the defendant made 100,000 copies of a song willfully for commercial purposes. Conversely, there may be cases in which an award of statutory damages in the amount of \$750 is reasonable, perhaps in the case of a photograph that has no market history or market comparables, even when the infringement was willful.

(9) Do you have any statistics to show how many orphan works claimant[s] come forward to argue that their work has been infringed and the claimant did not have a valid copyright claim?

We do not have any information that would be helpful here. This was not a focus of our orphan works study.

(10) The Copyright Office's Report on Orphan Works notes that because they are protected only by state law, pre-1972 recordings are outside the scope of your study. There are tens of thousands of pre-1972 recordings and I would assume that among them, there are many which might be considered orphan works. Is that something we should look at in the longer term?

Yes. The Copyright Office agrees that study of this issue would be beneficial.

Substantive Amendments

1. Amendment to 17 U.S.C. §512 - Directory of Agents

Section 512, the provision limiting the liability of online service providers, requires service providers wishing to enjoy some of the limitations on liability to submit to the Copyright Office information identifying their agents to receive notifications of claims of infringement. Section 512(c)(2) requires the Copyright Office to maintain “a current directory of agents available to the public for inspection, including through the Internet, *in both electronic and hard copy formats*,”

The Copyright Office recommends that the words “in both electronic and hard copy formats,” be deleted. This is probably the only provision in Title 17 that expressly requires that the Office make any records available to the public in hard copy. It is rather ironic that a directory that relates exclusively to activity on the Internet is required to be maintained and updated in hard copy format.

The Office’s directory of agents is created electronically by scanning the service providers’ designations of agents and putting pdf images of those designations in an online directory, available at <http://www.copyright.gov/onlinesp/list/index.html>. The process for maintaining this directory is relatively simple and efficient. [We anticipate that in the next couple of years, we will switch over to a purely electronic system in which designations of agents are submitted electronically and in which the directory of agents is created automatically from those submissions.] However, in order to maintain a hard copy directory, it has been necessary to photocopy each designation and place it in alphabetical order in a set of 3-inch binders (now numbering 33, and taking up almost 9 feet of precious shelf space in the foyer of our Public Information Office). We do not believe any anyone ever consults the hard copy directory because it is so much easier to use the online directory. Moreover, if anyone were to come into the Office wishing to use the directory (something that we do not believe has ever happened in the almost-ten years of its existence), our Public Information Office Staff could offer assistance in searching the online directory.

Because there is no need to maintain a hard copy directory and because of the expense, time and inefficiency involved in maintaining a hard copy directory (which will only increase when we move to an entirely automated process) , the requirement to maintain a hard copy directory should be removed.

2. Legislative Response to *Gardner v. Nike*

In *Gardner v. Nike*, 279 F.3d 774 (9th Cir. 2002), the Ninth Circuit held that an assignee of any of the exclusive rights of a copyright owner does not have the power to reassign those rights unless the copyright owner has expressly granted the assignee the right to reassign the rights. This ruling was contrary to settled law and should be overturned. The 1976 Copyright Act overturned the old doctrine of indivisibility of copyright, permitting

the unbundling of the copyright owner's rights and making those rights freely assignable. To correct the erroneous Ninth Circuit ruling, the law should be amended to clarify that an assignment of exclusive rights may be reassigned in the absence of an agreement to the contrary.

3. **Legislative Response to *Davis v. Blige***

Last fall, in *Davis v. Blige*, 505 F.3d 90 (2d Cir. 2007), the Second Circuit misinterpreted fundamental principles of copyright law by holding that a joint owner of a copyright may not retroactively transfer his ownership interest in the copyright. While the court's motivation in so ruling was understandable (to undo a collusive transfer of rights by a co-owner of a copyright to someone being sued for copyright infringement by the other co-owner), the court created new law in the Second Circuit that is flatly inconsistent with settled law. The law should be amended to provide that a co-owner of a copyright may transfer his or her interest in that copyright to a third party, and that such a transfer may be retroactive in effect.

4. **Criminal penalties for rental rights**

Article 61 of TRIPS provides that members shall provide for criminal procedures and penalties in cases of "copyright piracy on a commercial scale." Yet, although 17 U.S.C. §109(b)(4) provides that the rental, lease or lending of phonorecords or computer software constitutes infringement, it also provides that such conduct is not a criminal offense.

While it is probably true that in the United States, the rental, lease or lending of computer software and phonorecords does not take place on a scale that would be likely to justify criminal prosecution (were it permitted), that is not true elsewhere. For example, there is a major problem in China involving unauthorized rentals.

The United States would be in a much better position to complain about such practices abroad if it were to remove its own provision that violation of the rental right is not a criminal offense. Indeed, given our current law we could be subject to accusations of hypocrisy when we chastise other countries for failing to criminalize conduct which we do not criminalize. The fact that such activity does not appear to have occurred on a commercial scale in the United States may explain why we have not seen a need to amend our law, but it nevertheless weakens our bargaining position and could undermine our case if we were to initiate proceedings before, for example, a WTO dispute resolution body complaining about another country's failure to criminalize such conduct.

5. **Amendment of 17 U.S.C. §1101 and 18 U.S.C. §2319A**

These provisions provide for civil (§1101) and criminal (§2319A) liability for the recording of a live musical performance without the consent of the performer or performers. It also makes it unlawful to transmit or otherwise communicate to the public

the sounds or sounds and images of a live musical performance; or to distribute or offer to distribute, sell or offer to sell, rent or offer to rent, or traffic in any copy or phonorecord made of a live musical performance without the consent of the performer or performers.

In 2004, in *United States v. Martignon*, 346 F.Supp.2d 413 (S.D.N.Y. 2004), the United States District Court for the Southern District of New York held that 18 U.S.C. §2319A is unconstitutional because (1) Congress did not have the power to enact laws against unauthorized fixation of a performance because the Copyright Clause empowers Congress only to protect already-fixed works of authors, and (2) §2319A criminalizes distribution of such unauthorized fixations without any limitation of time, in violate of the “limited times” provision in the Copyright Clause. Shortly thereafter, in *Kiss Catalog, Ltd. v. Passport International Productions, Inc.*, the United States District Court for the Central District of California came to a similar conclusion with respect to §1101. Several months later, on reconsideration, the court reversed itself in the *Kiss* case.

In 2007, the U.S. Court of Appeals reversed the district court’s ruling in *Martignon*. *United States v. Martignon*, 492 F.3d 140 (2d Cir. 2007). However, the Court’s rationale was based on its conclusion that the criminal bootlegging statute was not inconsistent with the Copyright Clause because it did not grant property rights in expression. The strong implication was that the civil provision might not pass muster because it does grant property rights in expression.

The court of appeals also remanded the proceeding to the district court to consider a First Amendment challenge that had been raised but not decided below. The case is still pending in the district court.

In order to insulate both §1101 and §2319A from further constitutional challenges, Copyright Office recommends amending them to provide that the prohibitions on distribution and transmission or communication to the public be limited to a period of 50 years from the time of the performance, which is the period of protection required by our treaty obligations.¹ We recommend this both because it would neutralize the Copyright Clause arguments based on the lack of any term limits in §1101 and §2319A and because, as a matter of policy, it is a bad idea to have an unlimited duration for the protections of §1101 and §2319A.

Also, in order to insulate §1101 from further constitutional challenges based on the Second Circuit’s analysis that a statute granting property rights in unfixed expression might violate the Copyright clause, the Copyright Office recommends that §1101 be amended to provide that the rights conferred therein are not assignable. Such an amendment would make the performer’s right under §1101 less akin to a property right.

¹ To the extent that there might still be some force to the lower court’s ruling in *Martignon*’s that §2319A was unconstitutional based on the fixation requirement of the Copyright Clause, we have not been able to think of a legislative means to overcome that alleged defect.

It may also be worth considering replacing the remedy provision in §1101, which simply incorporates by reference the remedies provided under copyright law, with a provision that does not refer to copyright law, but simply enumerates the various remedies the performer may obtain.

Finally, in light of the remand to the district court to determine whether §2319A violates Martignon's First Amendment rights, and in light of the fact that neither §2319A nor §1101 include any limitations such as fair use, we recommend that both provisions be amended to include a fair use or fair use-like defense. In the wake of *Eldred v. Ashcroft*, there are reasonable arguments that the absence of a defense similar to fair use in §2319A and §1101 renders them unconstitutional since a fair use defense is required by the First Amendment.

6. **Amendment to §1101(a)(1)**

Amend §1101(a)(1) by striking all occurrences of the word "musical." Currently, §1101 applies only to live musical performances. But our treaty obligations go beyond protection of *musical* performances. The WPPT requires protection for "performers," defined as "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore." TRIPS also provides, "Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance."

Note that amending and broadening this provision might create some difficulties, since it would make it unlawful to film a mime on the street and would expand the prohibition on unauthorized fixation to all kinds of performances. But adoption of fair use-like exemptions, as suggested above in Section 5, would mitigate these problems.

Still, this proposal might well be controversial.

7. **Fixing the "La Cienega Fix"**

In 1997, 17 U.S.C. §303 was amended by adding a new subsection (b), which provides that "The distribution before January 1, 1978, of a phonorecord shall not, for any purpose, constitute a publication of the musical work embodied therein." Pub. L. No. 105-80, 111 Stat. 1529, 1534. This provision was enacted in response to a decision (the *La Cienega* case) by the U.S. Court of Appeals for the Ninth Circuit that had upset settled expectations by holding that prior to 1978 (i.e., under the Copyright Act of 1909), distribution of a phonorecord published any works recorded in the phonorecord. The effect was to put potentially all (or almost all) musical compositions that were recorded before 1978 into the public domain, since the common understanding had been that the recording of a work on a phonorecord which was then distributed to the public did not constitute publication of the recorded work. Because of that understanding, publicly

distributed phonorecords typically; did not bear copyright notices for the works recorded on the phonorecords. The result of the Ninth Circuit ruling (at least in the Ninth Circuit) was to thrust such works into the public domain due to publication without notice.

The amendment to section 303 resolved this issue, but only with respect to musical works. The drafters of this provision (supported by the Copyright Office) had not considered the fact that not only musical works, but also other kinds of works (*e.g.*, literary and dramatic works) have been recorded on phonorecords and would be adversely affected by the *La Cienega* ruling. Indeed, disputes have subsequently arisen over the copyright status of audiobooks recorded before 1978.

In order to address this oversight, section 303(b) should be amended to replace “the musical work” with “any musical, dramatic or literary works.”

8. Signatures on Documents Submitted for Recordation

17 U.S.C. § 205(a) provides that “Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office if the document filed for recordation *bears the actual signature* of the person who executed it, *or* if it is *accompanied by a sworn or official certification* that it is a true copy of the original, signed document.

Recommendation: Amend §204(a) to permit the submission of copies of documents, with copies of the signatures. As the Office is moving into an era of electronic submissions and electronic processing, the current provision is an impediment to electronic submission of documents of transfer for recordation. An original document cannot be submitted electronically. Nor are we aware of a way in which a sworn or official certification can be submitted electronically. [Perhaps §205 could be amended by permitting submission of a copy of a sworn or official certification, but if we’re going to accept a copy of the certification, why not just accept a copy of the document bearing the signature?] Alternatively, §204(a) could be amended to authorize the Register of Copyrights to establish regulations providing for a means by which a sworn certification may be submitted electronically.

9. Funding for Copyright Office Travel.

Amend §701 (b) by inserting at the end, “Notwithstanding any other provision of law, the Register may accept funding from foreign governments for travel and related expenses where the Register finds that such funding is exclusively for the purpose of Copyright Office performance of the functions described in this paragraph.”

The purpose of this proposed amendment is to permit the Copyright Office to accept funds from foreign governments to fund the costs of travel to, *e.g.*, seminars and other programs abroad in which it is in the interests of the United States to have Copyright Office representation but for which the Office does not have sufficient funds to pay the

costs of travel. We have recently had to decline to participate in programs abroad in which it would have been useful, for purposes of U.S. copyright policy, to have representation, because we are not permitted to accept funding from foreign governments for travel from the United States to foreign destinations. It has been difficult to explain to foreign governments why we have not been able to accept such funding.

10. CRJ Authority to Appoint Collective for §114 License

There has been some question whether the CRJs actually have the necessary authority to appoint SoundExchange, or any other agent, to collect and distribute the section 114 royalties. A simple fix would be to amend the language in sections 114(f)(1)(A) and (f)(2)(A) to expressly give the CRJs this authority.

Suggested amendment to section 114(f)(1)(A):

Such rates and terms shall distinguish among the different types of digital audio transmission services then in operation and may include the appointment of one or more agents to receive and distribute the royalties collected under this section.

Suggested amendment to section 114(f)(2)(A):

Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services and new subscription services then in operation and may include the appointment of one or more agents to receive and distribute the royalties collected under this section.

11. Amendment of Sections 112 and 114 relating to apportionment of statutory royalties.

In May 2007, the Copyright Royalty Judges established rates and terms for the digital public performance of sound recordings by means of eligible nonsubscription transmissions under section 114 of the Copyright Act, and for the making of ephemeral copies in furtherance of these digital public performances under section 112. However, contrary to the statutory requirement to set separate rates for the section 112 license and the section 114 license, the CRJs set a single rate and expressly declined to state what part of the license fee, if any, is to be allocated to the section 112 license. This is of more than academic interest since royalties under section 114 are to be distributed to the copyright owners of the sound recordings (50%), to nonfeatured musicians (2.5%), to nonfeatured vocalists (2.5%), and to featured recording artists (45%), while royalties under section 112 are to be distributed only to the copyright owners of the sound recordings.

Subsequently, on January 24, 2008, in a proceeding to set rates and terms under §114 for transmissions made by preexisting subscription services and satellite digital audio radio

services, the CRJs repeated the same error.

The Register of copyrights caught the error in the second proceeding and, pursuant to 17 U.S.C. §802(f)(1)(D), issued a determination correcting that error. However, the Register had not noticed the error in the May 2007 determination and did not issue a determination correcting that error within the statutory time frame. As a result, SoundExchange presumably will be unable to payout any of the royalties collected for nonsubscription services because it has no guidance as to how to divide up the §112 and §114 royalties. Moreover, even with respect to the royalties for preexisting subscription services and satellite digital audio radio services, the Register did not have the authority to remand the proceeding to the CRJs; therefore, their erroneous ruling stands and SoundExchange has no guidance as to how to divide up the 112 and 114 royalties.

At this point, at least with respect to nonsubscription services and possibly (depending upon whether the DC Circuit hears and decides the issue on appeal) with respect to preexisting subscription services and satellite digital audio radio services, it appears that the only way to resolve the issue is by legislation. That legislation might direct that §112 royalties be divided up in the same way as §114 royalties.² Different parties may have sharply divided opinions as to whether this would be the proper resolution of the issue. Another alternative might be legislation authorizing and directing the CRJs to revive the two proceedings and to expressly make separate determinations with respect to §112 and §114 royalties.³

12. Copyright Notice and Statutory Damages & Attorney's Fees

When we implemented the Berne Convention, we prospectively repealed the copyright notice requirement for published works. While this was necessary in order to comply with our treaty obligations, it also created problems in that it made it more likely that works would be published without any indication as to who owned the copyright, contributing to the orphan works problem.

At the same time, we retained the requirement that in order to obtain an award of statutory damages or an award of attorney's fees, a copyright owner must register the

² Moreover, a legislative solution would also have to fix the rates for use of the Section 112 license applicable to new subscription services, see 72 FR 72253 (Dec. 20, 2007) and for preexisting subscription services, see 72 FR 71795 (Dec. 19, 2007), since the single Section 114 rate for the new license period applicable to these services was adopted by the Copyright Royalty Judges based upon negotiated settlements submitted by the parties.

³ From the record, it appears that the CRJs likely concluded that there was insufficient evidence to determine any value for the §112 license in these 2 cases. Therefore, one option would be for the CRJs to conclude that the royalty fee for §112 in these cases is \$0.00. One possible complication: Section 112 requires the CRJs to set a minimum fee, and arguably that implies a fee of at least 1 cent. But assuming that such a fee must be greater than \$0.00, another alternative might be to set a fee of \$1.00..

work prior to the commencement of the infringement (or alternatively, for published works, within 3 months after first publication). This complies with the Berne Conventions proscription against formalities because registration is not a condition of protection, but only a condition for obtaining certain special remedies.

By the same token, the copyright notice provision should be prospectively (i.e., with respect to all works first published after the effective date of the revision, or perhaps more broadly with respect to all works published (whether it is the first publication or not) after the effective date) revived to the extent that statutory damages or attorney's fees would not be available for infringement of any work published without a copyright notice.

13. “Dastar Fix”

Since joining the Berne Convention, the United States has argued that one of the key ways in which it complies with the requirement recognize moral rights is found in section 43(a) of the Lanham Act (false designation of origin). However, in 2003, in *Dastar Corp. v. Twentieth Century Fox*, the Supreme Court interpreted section 43(a) in a way that makes it impossible to rely on section 43(a) as a source of a right of attribution, because the court conclude that the author of a work cannot be construed to be the “origin” of the “goods” (i.e., the media) in which the work is embodied. [“The phrase “origin of goods” in the Lanham Act is incapable of connoting the person or entity that originated the ideas that “goods” embody or contain.”]

Section 43(a) should be revised to permit what had been, prior to *Dastar*, the prevailing interpretation that the author can indeed be considered the source of the “good” when the “good” is a work of authorship (or a copy of a work of authorship).

14. Amendment of 17 U.S.C. §1202

Section 1202 makes it unlawful to, knowingly and with the intent to induce, enable, facilitate, or conceal infringement, provide false copyright management information (CMI) or remove copyright management information from copies of a work.

Copyright management information is defined as

any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, except that such term does not include any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work:

(1) The title and other information identifying the work, including the information set forth on a notice of copyright.

(2) The name of, and other identifying information about, the author of a work.

- (3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.
- (4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.
- (5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.
- (6) Terms and conditions for use of the work.
- (7) Identifying numbers or symbols referring to such information or links to such information.
- (8) Such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.

While, on the face of the statute, CMI would appear to include identifying information placed on hard copies of works, two courts (out of three to have addressed the issue) have fairly recently concluded that CMI covered by §1202 is limited to CMI on works in digital or electronic form. *Textile Secrets Intl v. Ya-Ya Brand, Inc.*, 524 F. Supp. 2d 1184 (C.D. Cal. 2007); *IQ Group, Ltd. v. Wiesner Publishing, LLC*, 409 F.Supp.2d 587 (D.N.J. 2006). Another court, in *McClatchey v. Associated Press*, 82 U.S.P.Q.2d 1190, 83 U.S.P.Q.2d 1095, 83 U.S.P.Q.2d 1103 (W.D. Pa. 2007), concluded (correctly, in our view) that since Section 1202(c) defines the CMI broadly to include “any” of the information set forth in the eight categories, “including in digital form,” then to avoid rendering those terms superfluous, the statute must also protect non-digital information.

It would be helpful to amend §1202 to clarify that the *McClatchey* court’s interpretation is correct and that CMI can include information on non-digital copies.

15. Pre-1972 Sound Recordings

When Congress first brought sound recordings into the federal statutory copyright scheme in 1972, it excluded all pre-1972 sound recordings from the federal scheme, leaving them to existing state statutory and common law protection.

In the 1976 Copyright Act, most common law copyrights were converted to federal statutory copyrights, but sound recordings were excluded. 17 U.S.C. §301(c) provides:

- (c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of

any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

The justification for continuing to exclude pre-1972 sound recordings from federal copyright protection appears to have been rather flimsy. As Nimmer relates,

Why this particular exclusion? It seems to have occurred almost inadvertently, and as a result of a misconception upon the part of the Department of Justice. The bill for general revision of the Copyright Act, as introduced in the Senate at the beginning of the 94th Congress, was substantially identical to S. 1361, which during the 93d Congress had been passed by the Senate, but not by the House of Representatives. Section 301, the pre-emption provision, in that bill did not exclude from the thrust of federal pre-emption sound recordings fixed prior to February 15, 1972. The Department of Justice expressed the fear that unless state law protection for such pre-1972 recordings were exempted from federal pre-emption, the result would be an "immediate resurgence of piracy of pre-February 15, 1972, sound recordings." The Senate accepted this argument, and in order to meet it, added a new Section 301(b)(4), which expressly excluded from federal pre-emption, state laws with respect to "sound recordings fixed prior to February 15, 1972." What both the Justice Department and the Senate overlooked was the fact that a resurgence of record piracy would not have resulted, even if state record piracy laws were pre-empted for the reason that Section 303 of the bill in the form adopted by the Senate would have conferred statutory copyright upon all sound recordings (as well as other works of authorship) that had not theretofore entered the public domain. As indicated above, under the holding in *Goldstein*, pre-1972 sound recordings had not entered the public domain. Therefore, the Senate bill would have conferred statutory copyright on pre- as well as post-1972 sound recordings. Thus, even if record piracy of pre-1972 sound recordings would no longer be prohibited by state law, it would have been prohibited by federal law. Although the stated reason for preservation of state record piracy laws as applied to pre-1972 recordings was erroneous, when the House came to consider the Senate bill, it retained this provision. But because state law protection for pre-1972 sound recordings was preserved,

it became unnecessary also to confer federal statutory copyright protection for such recordings. Therefore, the House added a further amendment, which appears in the final Act, whereby pre-1972 sound recordings are excluded from coverage of statutory copyright. In this manner, the Justice Department's mistaken belief that pre-1972 sound recordings were excluded from statutory copyright under the general revision bill led to an amendment that validated that belief.

Now more than ever, it makes sense to bring pre-1972 sound recordings into the federal statutory scheme. The scope and, in theory at least (with respect to some states), even the existence of state law protection for sound recordings is unclear. Copyright owners would gain in certainty with respect to their rights if pre-1972 sound recordings enjoyed statutory copyright protection. Users, too, would benefit from the certainty, including the knowledge that fair use and other exemptions in the statutory copyright scheme are available and the ability to use the §114 statutory license for webcasting and other transmission services with respect to pre-1972 sound recordings. As a practical matter, we believe licensees under the section 114 statutory license and copyright owners treat pre-1972 sound recordings as being subject to that statutory license, but there is no basis in law for such treatment.

The Section 108 Study Group convened by the Library of Congress and the Copyright Office to study possible amendments to copyright exemptions for libraries, concluded in its recent report

The Study Group observes that, in principle, pre-1972 U.S. sound recordings should be subject to the same kind of preservation-related activities as permitted under section 108 for federally copyrighted sound recordings. The Study Group questioned whether it is feasible to amend the Copyright Act without addressing the larger issue of the exclusion of pre-1972 sound recordings from federal copyright law.

Section 108 Report 129 (March 2008).

We believe that the time has come to remove pre-1972 sound recordings from state law protection and give them statutory copyright protection.

Technical Amendments

1. Remove § 601 from Title 17.

Section 601 is the old manufacturing clause, which was phased out in 1986. By its very terms, it is a prohibition on importation and distribution of copies of works manufactured abroad that applies only to importation and distribution “Prior to July 1, 1986.” There is no reason for this provision to remain in Title 17. In fact, its retention in Title 17 is confusing.

For the same reason, Chapter 6 should be renamed, from “Manufacturing Requirements and Importation” to “Importation.”

2. Amendments to the Copyright Royalty and Distribution Reform Act of 2004.

These were first suggested to David Whitney in August 2006. We continue to believe they should be enacted.

- A. When "Copyright Royalty Judges" was substituted for copyright arbitration royalty panel," in the last sentence of the first paragraph of Sec. 114(f)(2)(B), just before Sec. 114(f)(2)(B)(I), "its decision" was not changed to "their decision." (The Copyright Royalty and Distribution Reform Act, PL 108-419, 118 Stat. 2341, 2362-63.) Amendment: change "its" to "their".
- B. We've discovered 3 cases in which definitions in §101 are out of order. Section 101 is arranged in alphabetical order, but two statutes enacted last year and one enacted in 1998 inserted some definitions in the wrong places:
 - I. The definition of "Copyright Royalty Judge" was inserted in §101 after "copies," instead of after "copyright owner." (The Copyright Royalty and Distribution Reform Act, PL 108-419, 118 Stat. 2341, 2361.)
 - ii. The definition of "motion picture exhibition facility" was inserted after "motion pictures," instead of before it. (Artists' Rights and Theft Prevention Act, Title I of the Family Entertainment and Copyright Act of 2005, PL 109-9, 119 Stat. 218, 220.)
 - iii. The definition of "food service or drinking establishment" was inserted before "financial gain". (Fairness in Music Licensing Act of 1998., PL 105-298, 112 Stat. 2827, 2833.).

Amendment: Move the definition of "food service or drinking establishment" to between "fixed" and "Geneva Phonogram Convention" to conform to the alphabetical listing convention used in this section. [Note: Section 205 of PL 205-298 inserted two definitions into §101 after "display" and before "financial gain": "establishment" and "food service establishment." While there is some logic to having the definition of "food service establishment" follow the definition of "establishment," it departs from the alphabetical organization of §101. Section 101 contains a number of definitions that are related to each other but that are nevertheless organized in purely alphabetical order.]

3. **Amendment to § 114**

Need for a technical amendment in Section 114:

114(f)(1)(c) prescribes the time frame for rates and terms for new types of preexisting subscription services and new types of preexisting satellite digital audio services.

The time frame for the rates and terms is correctly set as follows:

“for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for subscription digital audio transmission services most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.”

114(f)(2)(c) prescribes the time frame for rates and terms for new types of eligible nonsubscription services and new subscription services.

The time frame for the rates and terms is incorrectly set as follows:

“for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for preexisting subscription digital audio transmission services or preexisting satellite digital radio audio services, as the case may be, most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.”

114(f)(2)(c), which addresses new types of eligible nonsubscription services and new subscription services, incorrectly ties the period of coverage for rates and terms to the expiration of rates and terms for preexisting services. The period of coverage should be tied to the expiration of rates and terms for eligible nonsubscription transmission services and new subscription services.

The mistaken drafting in 114(f)(2)(c) is also apparent in that “royalty rates and terms for preexisting subscription digital audio transmission services or preexisting satellite digital

radio audio services” are not determined under subparagraphs (A) or (B). Subparagraphs (A) or (B) [of 114(f)(2)] do not address preexisting services but rather address eligible nonsubscription services and new subscription services.

Responses to inquiry from Eric Guarduño
Counsel, House Judiciary Committee

1. Did the Congress dictate the funding level for reengineering?

No. The Congress directed the Copyright Office to use a commercial off-the-shelf software package, considered a best practice for projects of this nature and scope, in the development of the online registration system. Funding for the reengineering project came from the Office's base appropriation and no year account (\$28,660,750 total) plus several net appropriation increases (\$14,370,000 total), and funding from other Library of Congress appropriations (\$8,936,884 total). The total cost of the reengineering project was \$51.9 million including approximately \$15 million for the IT system.

2. Before reengineering were fees calculated to provide for full or partial cost recovery? Were fees associated with for e-service registrations calculated to provide for full or partial cost recovery?

The Register is directed to set fees that are "fair and equitable and give due consideration to the objectives of the copyright system." 17 U.S.C. §708(b)(4). It is important to note that registration is voluntary in the U.S. and experience demonstrates that when fees are raised the number of registrations filed goes down. When registrations decline, the Library and the public lose because the Library's collections and the public record are adversely affected. Accordingly, fees for registration of claims to copyright have traditionally been kept artificially low and not fully recoverable.

The Register of Copyrights set the fee for e-service registrations at \$35 (the fee for registering claims using paper forms is \$45) to provide an incentive to file electronically. The Copyright Office is currently conducting a cost study for the purpose of reviewing and possibly establishing a new fee schedule, and our preliminary analysis indicates that the fee established for e-service submissions is within reason for direct expenses. It should be noted that in addition to a variety of fee-based services (e.g., registering claims to copyright, renewing copyright claims, recording documents, conducting searches of copyright records, etc.) the Copyright Office also provides many important services that do not carry a fee (e.g., assisting DOJ in copyright-related cases, providing information to the public, representing the U.S. at international conventions, providing advice to the Congress on copyright matters, etc.)

3. Is the Office currently processing the new Form CO with 2D barcode technology?

No, although implementation of Form CO processing is imminent. Adobe is finalizing the product and Copyright Technology Office staff is testing live data in the production server environment. Test results have been positive and only minor errors in data migration have been detected. However, we feel that it is very important to ensure complete accuracy since the migrated data feeds directly into the public registration record. Creating and maintaining public registration records are core functions of the Copyright Office.

4. How has the volume of paper versus e-service claims received changed since October 2007

See Attachment A: eCO Mail & Web Claims entered Weekly

5. For claims filed on paper, what is the percentage of hand-written versus typed applications received?

See Attachment B: Handwritten vs. Typed Copyright Registration Applications FY 2006

6. Does the Office intend to completely phase out paper applications in the future?

No. We will always make paper applications available, although we expect the volume of paper applications received to become negligible through time. The Register's statement that "the transition period is drawing to a close" was in reference to the period following the implementation of reengineering in August 2007, when close to 100 percent of registrations received were filed on paper applications, to some point in the future when close to 100 percent of registrations received will be filed electronically. Given the rapid rise in the volume of e-service registrations received since the release of eCO on July 1 (last week over 50 percent of all registrations received were filed via eCO), we believe that the transition period is indeed drawing to a close.

7. Of claims received and claims closed thus far in FY2008, what were the percentages filed online with electronic deposit, filed online with hard copy deposit, and filed with paper applications?

Application Method	Received¹	Closed
Paper applications	424,218 (89%)	106,998 (25%) ²
E-service with physical deposit	33,290 (5%)	6,716 (20%)
E-service with e-deposit	47,905 (6%)	32,786 (68%)
TOTAL	505,413 (100%)	146,490 (29%)

It should be noted that eCO just moved from beta test to widespread release on July 1, 2008, so we only recently began receiving significant volumes of e-service claims.

8. What classes of works may be registered with electronic deposit copies?

The following classes of works may be registered with electronic deposit copies:

- Unpublished works;

¹ Prior to July 1, 2008 the eCO system did not distinguish between e-service deposit types for reporting purposes, so the figures in the Received column for "E-service with physical deposit" and "E-service with e-deposit" were extrapolated from post July 1 data. These counts include only those processed into and closed in eCO. A few thousand claims are still in categories that cannot yet be processed in eCO.

² Percentages in the Closed column indicate the percentage of claims closed for each corresponding category of claims received. For example, 68% of the 47,905 e-service with e-deposit submissions have been closed to date.

- Works published only electronically;
- Published works for which the deposit requirement is ID material;
- Published works for which there are special agreements requiring the hard copy deposits to be sent separately to the Library of Congress.

In addition, the Copyright Office published a Notice of Proposed Rulemaking in April 2008 that would require submitters of group registrations (e.g., daily newspapers, periodicals that publish more than four times per year, collections of published photographs, etc.) to file claims via eCO with e-deposits. All other classes of works may be registered via eCO (application and fee payment) but require hard copies of the work(s) being registered.

9. Why is it taking so long to open vacancy announcements for Registration Specialists? When will the positions be filled?

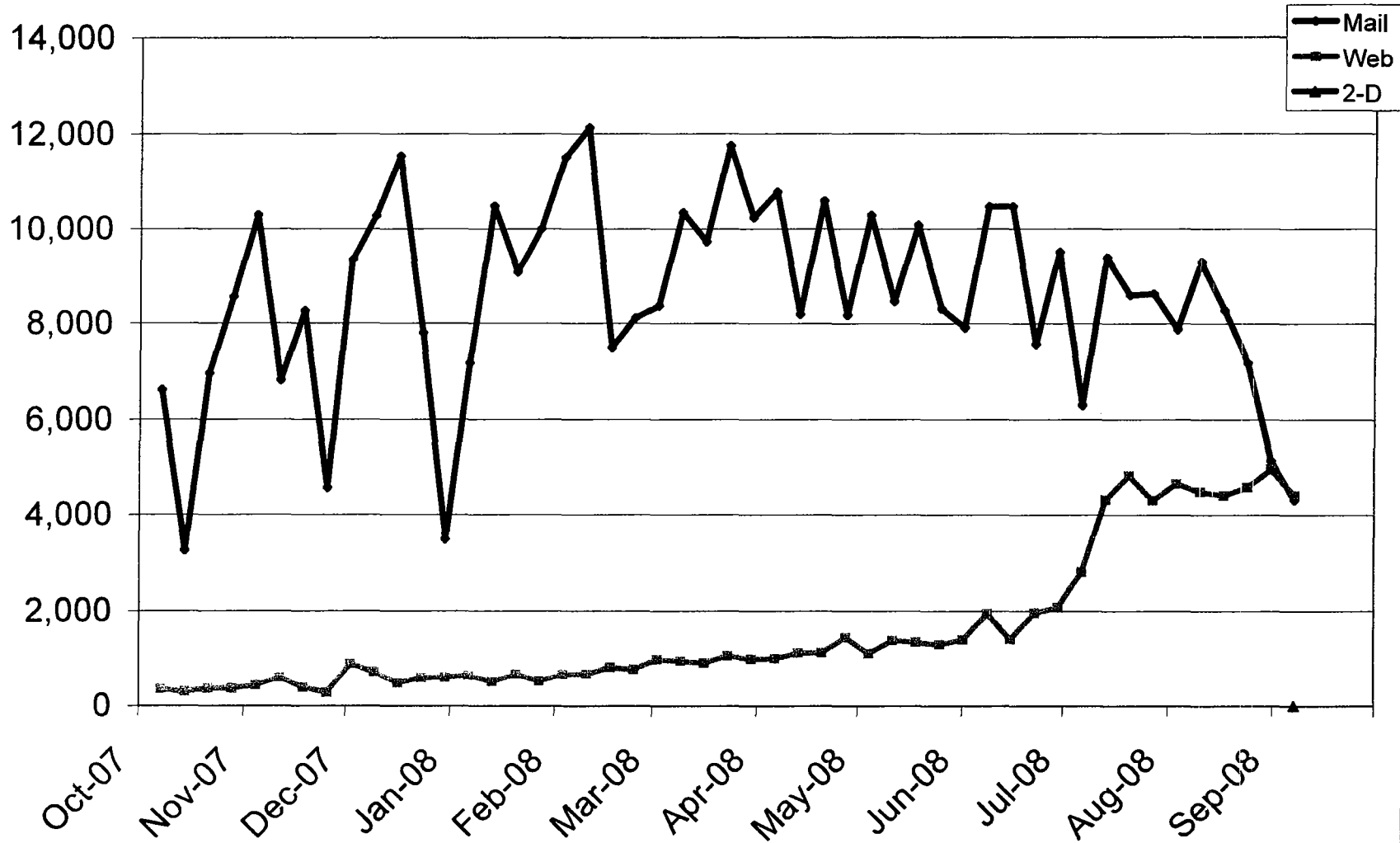
In June we put forth a proposal to the Library's HR office to hire Registration Specialists under a continuous and open vacancy announcement (rather than a vacancy announcement with a specific open-close period). Using this method will provide for a continuous stream of pre-qualified applicants and will greatly enhance our ability to bring people on board quickly in the coming months and years. Having this flexibility is critical since we are entering a phase in which the changing mix of electronic versus paper filings will require us to transfer resources from our front end operation (mail sort, ingestion of paper claims, check batch processing, etc.) to our back end operation (examination of claims and creation of the registration record) through time. While continuous and open vacancy announcements are commonly used at many federal agencies, the Library has rarely if ever used such a method for filing vacancies. We believe that the lag time in getting the vacancy announcement open is due to the HR's unfamiliarity with how such a vacancy announcement is to be managed in accordance with the Library's merit selection program.

10. What has been the monthly productivity of Registration Specialists during fiscal 2008?

See Attachment C: Weekly Average Opened By Specialists Per Hour in eCO by Division, and Attachment D: Weekly Average Specialist Final Actions Per Hour in eCO by Division

It should be noted that we have productivity data for all Registration Specialists dating only from January 2008, since groups of Registration Specialists moved back to the Madison Building from temporary swing space in Crystal City, VA in several waves in 2007. The final group of Registration Specialists moved back in October 2007 and engaged in training until January 2008.

eCO Mail & Web Claims entered Weekly

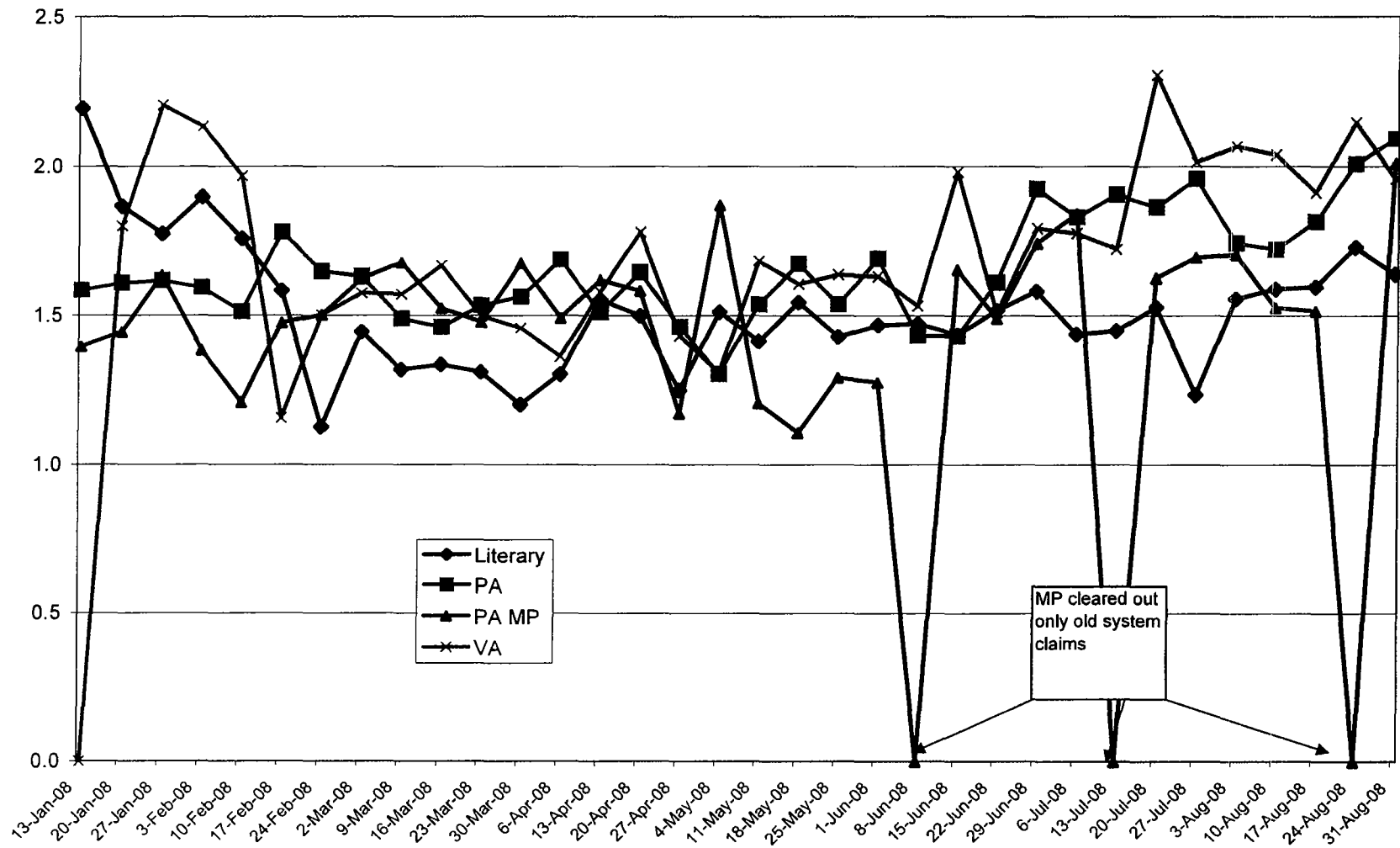


Handwritten vs. Typed Copyright Registration Applications FY 2006

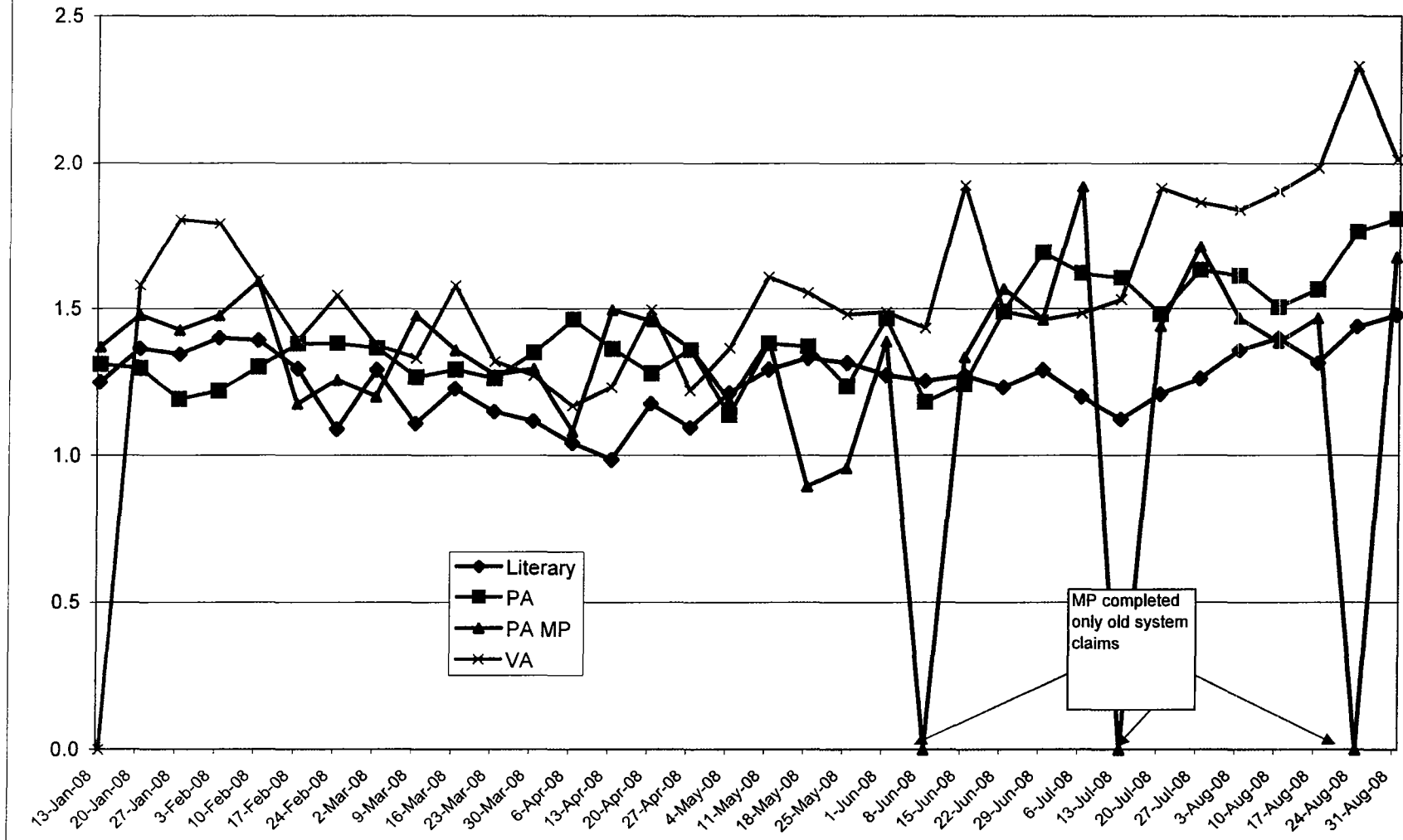
	Handwritten	FY06	Typed	FY06
TX	22%	26,928	78%	95,468
Txu	64%	38,607	36%	21,717
PA	27%	10,555	73%	28,539
Pau	62%	52,896	38%	32,420
VA	32%	15,729	68%	33,423
Vau	57%	23,710	43%	17,887
SR	45%	7,355	55%	8,989
SRU	72%	24,815	28%	9,650
TOTALS	44.7%	200,595	55.3%	248,093

This percentage is typical of the past decade or more of claims.

Weekly Average Opened By Specialists Per Hour in eCO by Division



Weekly Average Specialist Final Actions Per Hour in eCO by Division



U.S. COPYRIGHT OFFICE

A Timeline of Continuous Improvement and Related Actions

eCO eService, the public facing portal for on-line filing of claims and other service requests, was released under a limited beta test in July 2007 and Copyright Office staff began processing all claims in eCO in August 2007. Most staff began formal training in the reengineered environment (i.e., performing new tasks and using the eCO system) in August 2007.¹

Action	Timeframe
Begin quality assurance program for “tagging” work, targeting both incoming claims to be tagged as well as claims previously tagged and currently in the registration queue	March 2008
Begin routing claims with fee problems to Accounts Section for correspondence, targeting both incoming claims as well as claims with fee problems currently in the registration queue	May 2008
Move eCO eService from beta test to production	July 2008
Release Form CO with 2-D barcode technology	July 2008
Establish an eCO Performance Improvement Project team (eCO PIP) tasked with analyzing the eCO system (application, database and network) and provide recommendations for improving system stability and performance	July 2008
Post vacancy announcement for Problem Resolution Specialists (6 vacancies)	September 2008
Post vacancy announcement for Registration Specialists (10 vacancies)	September 2008
Issue a new regulation requiring deposit account holders to file electronically via eCO ²	FY2009
Issue a new regulation requiring group registrations to be filed electronically via eCO ³	FY2009
Issue a new three-tiered fee schedule that raises the fee for registrations filed on paper forms while maintaining the current Form CO and eService registration fees	FY2009
Upgrade to the newest version of the application that drives eCO ⁴	FY2009

¹ Although formal training continues for staff who need it, roughly half of all Registration Specialists have achieved independent status to date. As more staff are deemed independent (i.e., as formal training is completed), Supervisory Registration Specialists spend less time training and performing quality assurance reviews and spend more time processing claims. Productivity across the three registration divisions increases accordingly.

² Notice of Proposed Rulemaking to be published in October 2008; Final Ruling to be published sometime in FY2009.

³ Notice of Proposed Rulemaking published in the Federal Register in April 2008; Final Ruling to be published in FY2009.

⁴ Siebel 8.1 is being prepared for release, and the upgrade from the current version running eCO (Siebel 7.7) is being planned.

Responses to inquiry from Eric Guarduño
Counsel, House Judiciary Committee

1. Why did the Copyright Office elect to use a commercial off-the-shelf software package in the development of the online registration system?

In deciding whether to develop the electronic Copyright Office (eCO) using a customized commercial off-the-shelf (COTS) product versus building the system from the ground up in-house, the Copyright Office followed the general direction of the Congress (see the Information Technology Management Reform Act of 1996, also known as the Clinger-Cohen Act of 1996 (Pub. L. 104-106, Division E, codified at 40 U.S.C. Chapter 25)) and the Office of Management and Budget (see OMB Memoranda M-96-20, "Implementation of the Information Technology Management Reform Act of 1996" subsequently incorporated within OMB Circular A-130, "Management of Federal Information Resources"). The decision was bolstered by the findings of a study commissioned by the Copyright Office and conducted by IBM Consulting which emphasized the use of COTS software wherever appropriate.

TO: David Whitney, Counsel
House Judiciary Subcommittee on Courts, the
Internet, and Intellectual Property

DATE: October 3, 2008

FROM: Marybeth Peters *Marybeth Peters*
Register of Copyrights

SUBJECT: Delay in opening Registration Specialist vacancy announcement

In June we put forth a proposal to the Library's Human Resources (HR) office to hire Registration Specialists under a continuous and open vacancy announcement (rather than a vacancy announcement with a specified closing date). Using this method will provide for a continuous stream of pre-qualified applicants and will greatly enhance our ability to bring people on board quickly in the coming months and years. Having this flexibility is critical since we are entering a phase in which the changing mix of electronic versus paper filings will require us to transfer resources from our front end operation (mail sort, ingestion of paper claims, check batch processing, etc.) to our back end operation (examination of claims and creation of the registration record) through time. While continuous and open vacancy announcements are commonly used at many federal agencies, the Library has rarely if ever used such a method for filing vacancies. Indeed, we were told by the Library's HR office that this was a novel request. Unfortunately, the HR Specialist assigned to manage the vacancy announcement, uncertain about how to proceed, held the request for a lengthy period. The Registration Specialist vacancy announcements opened on Friday, October 3rd, and we anticipate that many of the candidates selected will report for duty by the end of the calendar year.

cc: Dennis Hanratty

Response to Eric Garduño inquiry

1. How many Examiners were on staff at the time of the transition to the Registration Specialist position in August 2007?
2. How many Catalogers were on staff at the time of the transition to the Registration Specialist position in August 2007?
3. How many Registration Specialists are currently on staff?

Position	GS-7	GS-9	GS-11	GS-12	Total
Examiner ¹	NA	8	50	12	70
Cataloger	0	0	48	4	52
Total					122
Registration Specialist ²	NA	0	75	30	105

¹ Examiner and Cataloger figures from pay period 14 in FY07, the last full pay period prior to 8/1/07.

² Registration Specialist figures from pay period 20 in FY08, which ended 10/11/08.

1. How many copyright registration applications did the Office receive in FY 2008? How many copyright registration applications were fully disposed of- or "closed" - in FY 2008? How does this number compare to the number of applications received and closed in each of the previous three fiscal years?

Response:

	CARRYOVER	RECEIVED	CLOSED	
FY	Carryover from Previous Year	Claims Rec'd	Processed Claims Registered	Percent of Processed Claims not Registered ¹
2006	160,736 (FY05)	594,125	520,906	6.9%
2007	188,236 (FY06)	541,212	526,378	4.0%
2008	129,116 (FY07)	561,428	232,907	6.2%

1. Includes rejected, no reply, withdrawn, etc.

2. How many copyright registration applications are currently in process? How does this number compare with the average number of applications in process in each of the previous three fiscal years?

Response:

FY Average Claims in Process	
2006	163,545
2007	171,923
2008	317,546
Current Claims in Process (11/30/08)	
492,941	
Breakdown:	
440,761 eCO	
14,325 uningested	
2,958 old system misc. & examining	
34,325 old system cataloging ¹	

FY 2006 data represents old processes only, carried out in the Copyright Office In-Process System (COINS), the Copyright Office Publication and Interactive Cataloging System (COPICS), and the Copyright Imaging System (CIS)².

FY 2007 represents mostly old system but some in the new eCO system

FY 2008-2009 represents mostly new system and approximately 35,000 using the old system.

¹ The totals for materials processed in the old system include claims for which a certificate has been issued but the registration record has not been completed, currently amounting to 34,325 claims. Two retired catalogers are working under contract along with two registration specialists who requested reassignment to complete registration records and close out this backlog of old system claims by the end of FY 2009.

² COINS, COPICS, and CIS are legacy IT systems that will be phased out as the capability to process additional claim types and service requests (i.e., group registrations, renewals, vessel hull designs, etc.) is built into eCO. An eCO group registration pilot is scheduled to begin in January 2009.

3. On March 5, 2008, in **written** testimony to Congress, you stated there were 279,000 claims in process and **that steps** would be taken to reduce that number. (A.) What **steps** did the Office **implement after the March hearing**? (B.) In light of these steps, why **do** you believe the number of claims in process has continued to increase? (C.) What is the Office now doing to **increase** production in order to materially reduce the backlog? (D.) What steps is the Office **taking** to ensure that the quality of processed applications is not compromised by efforts to **increase** productivity?

Response:

- (A.) In March we **implemented** a quality assurance program for the “tagging” process, the keyboarding **process** used to enter data from scanned applications into eCO, targeting both **incoming** claims to be tagged as well as claims previously tagged and currently in **the registration** queue. This action was taken to reduce the **time** spent by registration specialists correcting tagging errors thereby freeing them to devote more time to **processing** claims. In May we began routing claims with fee problems to the Accounts Section for resolution, targeting both incoming claims as well as claims **with fee** problems currently in the registration queue. This action was taken to **reduce** the considerable amount of correspondence registration specialists were required to generate in response to short fees and other fee-related **problems** so that they could devote more time to processing claims.

On July 1 we **released** eCO eService³ and the new Form CO with 2D barcode technology to the **public**. Later in July, in conjunction with the Library’s Information Technology Services (ITS), we established an eCO Performance Improvement **Project team** (eCO PIP) tasked with analyzing the eCO system (application, **database** and network) and providing recommendations for improving system **stability** and performance. These actions were taken to (1) provide methods of registration that could be processed more quickly and efficiently than **claims** filed on paper forms, and (2) enable registration specialists to increase **productivity** by improving eCO system response time. The work of the eCO PIP team is **part** of an ongoing continuous improvement program.

- (B.) The actions **taken to date** resulted in incremental improvements in productivity, and the cumulative **effects** of those incremental improvements are now apparent. In March the number of registration decisions⁴ taken by registration specialists each week averaged **around 4,000**; the number is now averaging above 6,000 per week (6,629 in the **most recent** full week)—a greater than 50 percent increase in

³ It should be noted that both **the tagging** and fee problems previously noted are associated **only** with claims filed on paper applications and **accompanied** by check or money order. The eCO system will not allow users to submit registrations **until the correct** fee has been paid and e-service claims do not require tagging. Following the release of eCO in **July** the volume of claims with tagging and fee problems has declined, and the volume will continue to **decline** as the ratio of e-service to paper claims increases.

⁴ The term “registration decisions”, which replaces “final actions”, refers to the point at which a specialist has made a decision to **approve, reject**, etc. a claim to copyright. See responses to 7. (A.) and 8. (A.), below.

productivity. Consequently the volume of new claims being added to the volume of unprocessed claims each week has decreased significantly.

(C.) Our experience has proven the concept that drove the business process reengineering effort, i.e., claims filed electronically can be processed much more quickly and efficiently than claims filed on paper. The surest way that we can increase productivity is to encourage remitters to file electronically. In early 2009 we plan to introduce two regulatory changes and a new fee schedule, each of which is designed to achieve this objective.

- Remitters who file group registrations will be required to file electronically via eCO. (see 37 CFR Part 202, Registration of Claims to Copyright, Group Registration Options at <http://www.copyright.gov/fedreg/2008/73fr23390.html>)
- Remitters who use Copyright Office deposit accounts to pay for services will be required to file claims electronically via eCO. Deposit account holders submit over 30 percent of all registrations received annually.
- The Office plans to submit to Congress a new fee schedule that would hold the fee for eCO submissions at the current rate of \$35, raise the fee for registering with Form CO slightly from \$45 to \$50, and raise the fee for registering with traditional paper forms considerably from \$45 to \$65. The new fee schedule derives from an activity based cost study that clearly demonstrates the efficiency gains from processing claims electronically.

(D.) Since the transition to the online processing environment in August 2007, registration specialists have been trained to process various categories of work in stages. Until a registration specialist is deemed independent to process a particular category of work, all of his/her work undergoes a quality review. Eventually the registration specialist gains full independence to process all categories of work handled within his/her division. This process of gaining independence in stages requires senior registration specialists—some of the Office’s most productive employees—to spend the majority of their time performing quality reviews and serving as trainers rather than processing claims. The decision to perform quality reviews of 100 percent of the work produced by every single registration specialist, which continues to hamper production significantly, was required in order to ensure the high standard of quality of work the Office is expected to deliver. To date, 64% of all registration specialists have achieved full independence. The breakdown by division is as follows:

- Performing Arts: 86.5%
- Literary: 50%
- Visual Arts and Recordation: 55%

4. (A.) Has the Office experienced significant application backlogs in the past? Please describe the extent of any significant backlogs, the conditions that led to their development and the steps the Office implemented to alleviate and reduce any previous backlogs. (B.) In your judgment, does the Office have the resources and authorities needed to address the current backlog? If not, please describe what further resources and authorities may be required as well as your analysis of how their availability would contribute to the resolution of the current backlog.

Response:

- (A.) As presented in question #1, the Copyright office always carries a significant workload of claims in various stages of processing. This processing workload—referred to as the work-on-hand or backlog—has typically been above 100,000 at most times during the past two decades and averaged over 159,000 for the three years prior to the release of eCO.

The Office has amassed larger volumes of work-on-hand than usual at times in the past (Attachment A). The most recent occurrence followed the disruption in mail delivery to the Capitol Hill complex that resulted from the anthrax attacks of late 2001. By mid-2002, the volume of claims waiting processing approached 300,000. Prior to that the volume of claims waiting processing peaked at over 350,000 in January 2001 as a result of a hiring freeze that left the Examining Division short staffed. According to anecdotal accounts, a tremendous backlog of unprocessed claims accrued following the implementation of the Copyright Act of 1976 on January 1, 1978. In each instance the Office took a variety of approaches to reduce the workload, such as authorizing overtime work, shuffling staff between divisions, and giving supervisors and staff the flexibility to develop their own creative solutions (e.g., allowing staff to organize into teams and break up work into simple tasks assigned to team members in an assembly-line fashion, allowing staff to focus on clearable claims only and then conducting periodic “blitzes” of claims requiring correspondence, etc.)

- (B.) Yes, the Office has the authorities necessary to work down the volume of unprocessed claims on hand. During the transition to the new processing environment, the Office decided not to hire new staff into the Registration and Recordation Program (RRP) so that more resources could be focused on training current staff in the new processes and systems. Normal attrition and in-house transfers during the period resulted in a shortage of registration specialists. We will soon bring on board a cadre of 13 or more new registration specialists to address the short-staffing situations⁵ in the three divisions that constitute the RRP (Performing Arts, Literary and Visual Arts and Recordation), and we have sufficient funding to purchase and install the newest version of the Commercial Off-the-Shelf (COTS) application upon which eCO is built (Oracle/Siebel). The planned Oracle/Siebel upgrade will result in a more stable and user-friendly processing system.

⁵ The Office is also in the process of hiring two new Copyright Technicians to process registrations of single serials. Since the work involved with processing single serials is less complex than processing other categories of work, Copyright Technicians rather than Registration Specialists are tasked with the job.

5. In your September 5, 2008 response to the Librarian of Congress, you wrote "the transition period is now drawing to a close." (A.) What was meant by this statement? Did you mean that the vast majority of registrations would soon be filed electronically? If yes, then how do you account for the fact that electronically-filed claims appear to have leveled off to about 5000 per week? (B.) What steps is the Office taking to further increase the number of registrations filed electronically? How does the Office expect each of these steps to contribute to an increase in electronically-filed applications?

Response:

- (A.) The "transition period" referred to is that period during which the Copyright Office moved from a primarily paper-based processing operation to a primarily web-based processing operation. Drawing on the Office's late 1970's experience implementing wholesale changes to business operations as a result of the Copyright Act of 1976, we recognized that at least a one-year transition period would be needed following reengineering implementation to retrain staff to learn new duties and to master the new IT system. Our current experience with eService claims is discussed in question #3. (B.)
- (B.) See question #3. (C.) for a detailed list of actions the Office is taking to increase the number of registrations filed electronically.

6. In the September 3, 2008 memorandum from the Library of Congress Office of the Inspector General, it was stated that registration specialists were processing 1.7 claims per hour. In the Office's September 5, 2008 response, it was noted that average per hour productivity of registration specialists was 2.0. (A.) How does the Office account for this apparent discrepancy? (B.) How do these estimates of productivity compare with the productivity of examiners under the previous paper-based registration system?

Response:

- (A.) The rates derive from registration specialists self-reporting the number of claims they opened from the respective mail and web registration queues. In his memorandum⁶, the Inspector General quoted an average rate for opening claims for the entire period from January to early September 2008, which rendered current productivity artificially low since it encompassed the period during which most registration specialists were still being trained in how to perform new duties and how to use the new IT system. The Office's response quoted the average rate of opening claims for the most recent week, which was a more accurate reflection of productivity at that point since all registration specialists had been working in their new positions for at least six months by September 2008. Throughout the period from January 2008 through the present, the hourly average rate has been increasing (Attachment B). In the most current full week reported, ending November 23, the average rate is up to 2.5 claims opened per hour across all divisions. This increase appears to correlate both with incremental process and eCO system improvements and with the establishment of written performance requirements.
- (B.) There is no one-to-one comparison of the work of the former examiner position to that of the registration specialist position. Like former examiners, registration specialists examine claims to copyright to ensure that all legal and procedural requirements have been met. However, registration specialists also create and edit the registration record associated with each approved claim, the task performed by former catalogers, and they also make routine selections of copyright deposits to be added to Library of Congress collections, formerly a task performed by Library of Congress acquisition specialists.

⁶ See Attachment C regarding the Inspector General's memorandum of September 3, 2008.

7. (A.) Please describe the methods (i.e., claims opened, final actions, etc.) the Office uses to measure registration specialist productivity, and describe the advantages and disadvantages of each. (B.) Which manner of measuring productivity was used in arriving at the 2.0 figure cited in question 6 above? (C.) Please provide underlying data that supports the Office's calculation of the 2.0 figure.

Response:

- (A.) There are two ways of understanding registration specialist productivity. (1) "Claims opened" refers to the number of claims per hour each registration specialist retrieves from one of the three registration queues in eCO. The figures are currently self-reported by registration specialists, although we have plans in FY2009 to implement a software package (Oracle/Siebel Analytics), which will provide sophisticated eCO system reporting functionality. (2) "Registration decisions"⁷ refers to the point at which a specialist has made a decision to approve, reject, etc. a claim to copyright. This is the most meaningful measure of actual work accomplished by the registration specialist.

The number of "claims opened" per hour is more than the number of "registration decisions" per hour because a percentage of "claims opened" have problems that must be handled or passed to others for resolution.

In the old system, examiner work was counted by the number of "claims opened." In negotiations with AFSCME Local 2910 over the implementation of written performance requirements, "claims opened" per actual eCO hour worked was the official productivity measurement agreed to by management and labor.

For the purposes of estimating the theoretical break-even point where the processing workload would stop growing, "claims opened" and "registration decisions" must both reach an hourly minimum that is the same for both measures. From management's perspective, the rate of "registration decisions" would be the better measure of work completed.

- (B.) The 2.0 per hour figure cited in question 6 above was for "claims opened" per hour.

- (C.) See Attachment D.

⁷ In earlier communications, we referred to these as "final actions," but this phrase conveyed the incorrect impression that the Office had finished all work on the claims once this point was reached.

8. (A.) How many final actions do registration specialists currently average per hour? (B.) How many final actions per hour do registration specialists need to issue to keep pace with the average number of registrations the Office receives each month? (C.) Is this second number reasonable given current and projected productivity rates?

Response:

- (A.) The phrase “final actions” gives the impression that the last steps in Office processing have been completed, which is not the case. These are better defined as “registration decisions,” because quality assurance and certificate printing steps follow. The average number of registration decisions in the most recent six weeks ranged averaged 2.1 per actual hour worked in eCO. This includes approximately 0.1 claims per hour that are rejected, withdrawn, or otherwise not registered.
- (B.) With full staffing levels, registration specialists would need to average 3.5 registration decisions per hour worked in eCO to keep pace with average receipts of the past year and the mix of paper and web claims. Our experience proves that electronic claims are processed significantly faster than paper claims, and increased eCO eService use should improve the average production cycle.
- (C.) Current trend lines indicate that it could take between one and two years to reach an average of 3.5 registration decisions per hour. While registration specialists will naturally continue to become more productive as they gain experience in the new position, we are focusing on two activities to bring the needed productivity rate down to a more quickly achievable level:
- (a.) Hire Registration Specialists: We are in the process of hiring a cadre of thirteen or more registration specialists, and we plan to have them on board in early 2009. They will begin training immediately, and we expect the average number of registration decisions per hour needed to achieve equilibrium to decrease as they become productive.
 - (b.) eCO System Improvements: As noted in 3. (A.) above, we recently established an eCO Performance Improvement Project team (eCO PIP) tasked with analyzing the eCO system (application, database and network) and providing recommendations for improving system stability and performance. The team has already implemented short-term enhancements that have improved the eCO application response time by 50 percent, and they are currently analyzing and will develop recommendations to improve database and network performance as well. In addition, the Office plans to upgrade to the newest version of the COTS application upon which eCO is built (Oracle/Siebel) in CY 2009, which will offer greater functionality while reducing the amount of custom code built for eCO. Taken together, these enhancements will result in a better performing, more stable, and more user friendly processing system that will ultimately lead to increased production.

9. Increased productivity is critical to addressing the backlog but goals must be premised upon realistic and attainable standards. According to the current collective bargaining agreement with the Library of Congress Professional Guild, 2.5 registrations per hour are the minimum production goal a registration specialist must satisfy to receive a satisfactory review. (A.) Which measure of productivity is used in this calculation? (B.) What data supports this figure as the minimum performance goal? (C.) What percent of registration specialists now meet this goal? (D.) How has that percentage changed in recent months? Has the percentage reached a plateau?

Response:

- (A.) The measure used in the agreement is "claims opened," which is calculated from self-reported actual hours worked in eCO.
- (B.) The pre-negotiation review of registration specialists' per hour averages indicated low production (between 1 and 1.5 per hour). We reviewed the issues that were slowing specialists down and calculated that with each of the three registration divisions fully staffed, a rate of 2.5 registrations per hour would be possible after taking the following steps to increase productivity: (a) increase of electronic submissions to more than 25% of all claims received; (b) remove fee and tagging problems from registration specialists; (c) resolve deposit upload problems; (d) complete eCO training and allow for practical experience with the system to be gained; and (e) resolve system performance and usability issues. A rate of 2.5 "registration decisions" per hour calculated across 40 hours would have been a breakeven point (approximately 100 claims per week per registration specialist). However, in the negotiations, the parties agreed to 2.5 "claims opened" per eCO hour worked (expected to be around 27 hours per week per specialist). The 2.5 per hour is therefore an incremental step towards higher productivity levels that will reduce the processing workload.
- (C.) As of November 23, 41% of registration specialists were at or above 2.5 per hour; 23% were between 2 and 2.5 per hour.
- (D.) We do not believe the percentage has reached a plateau. The number of specialists reaching the target hourly rate has increased from 17 to more than 40 during the past two months. We expect this trend to continue (Attachment E). Current review of the general trends of the rate for "claims opened" indicates an average hourly rate of at least 2.5 appears achievable and sustainable in the January-May 2009 period. The productivity increases correlate with both the systemic changes described in question 38, and the establishment of written performance requirements negotiated with AFSCME Local 2910.

10. (A.) We understand the 2.5 registrations per hour productivity goal will not become effective until January 2009. What percent of registration specialists does the Office expect will satisfy the minimum goal when it becomes effective? On what basis does the Office arrive at this conclusion? (B.) What is the contingency plan if a significant percentage of registration specialists fail to meet this goal in January 2009? (C.) What percentage of registration specialists are now considered fully trained in the new system? What percentage do you anticipate being classified as fully trained in January 2009?

Response:

- (A.) Per the agreement reached with AFSCME Local 2910, the written performance requirements were implemented on October 1, 2008, for registration specialists whose training in eCO began October 1, 2007, or earlier. However, the implementation included a 90-day grace period (January 1, 2009), and the sum total of days each registration specialist spent on assigned duties outside of the eCO system is factored individually to establish the effective date of the written performance requirements for each registration specialist. For those whose training started October 1, 2007, the written performance requirements become effective on the one-year anniversary of the start of their training plus the 90-day grace period plus the sum total of days spent on assigned duties outside of the eCO system.

For example, John Doe began working in eCO on October 1, 2007 but has been assigned to process non-eCO work one entire day each week. The written performance requirements will take effect on John Doe as follows:

Implementation date: October 1, 2008
Plus 90-day grace period: January 1, 2009
Plus 1 day/week x 64 weeks = 64 days: **March 5, 2009**

As discussed in question #9, currently 41% of registration specialists were at or above 2.5 per hour; 23% were between 2 and 2.5 per hour; 36% were under 2 per hour. If present trends continue, 50% of registration specialists will be producing at or above 2.5 per hour and 75% at or above 2.0 per hour by February 2009.

- (B.) Registration specialists who are not opening 2.5 claims per hour after the written performance requirements become effective will continue to receive training in an effort to boost their production. As part of the Agreement, we also offered alternative positions for those who believed they could not meet the 2.5 claims per hour requirement. To date we have transferred four registration specialists who have accepted voluntary reassignments (two as public information specialists and two to complete the outstanding cataloging work discussed in question #2.)

It should be noted that the 2.5 claims per hour productivity goal is one in a whole range of performance requirements associated with the described duties that fall separately under the four major job elements that make up the registration specialist position. The job performance of each registration specialist will be evaluated against the full range of performance requirements rather than one particular requirement in the list.

(C.) In accordance with the negotiated agreement, the date that each registration specialist is considered fully trained in the new system will be calculated as noted in A. above. By that measure, each registration specialist will be fully trained by the time that the written performance requirements become effective for him/her.

11. At last report, the Office employed 106 copyright registration specialists who are responsible for, among other things, carrying out the examination function. We are informed the Copyright Office has advertised for and intends to hire additional registration specialists. (A.) What is the status of this recruitment effort? When does the Office anticipate these new hires commencing employment? (B.) Assuming that all registration specialists averaged 2.5 registrations per hour, including the new hires, how many claims does the Office expect to close during FY 2009? How does this number compare to the number of copyright registration applications the Office anticipates receiving this fiscal year?

Response:

- (A.) There are currently 105 registration specialists on staff, and we expect to hire 13 or more by early 2009, depending on un-announced retirements or resignations. Interviews have begun and will likely run through most of December, given the large number of applicants for the two vacancy announcements.⁸ We hope to have most if not all of the new hires on board in February 2009. Also, in November we transferred two existing Copyright Office employees from other positions to become registration specialists. Their familiarity with copyright law and regulations and with the new eCO system should lessen significantly the amount of formal training they will require before becoming productive registration specialists.
- (B.) At the current staffing level and if productivity rates for the first six weeks of FY09 remained level for the remainder of the fiscal year, the Office would complete 325,000 claims during FY09, about 65% of the claims we expect to receive. If an additional 13 registration specialists were added and began producing 2.5 per hour, we would be able to close approximately 400,000 during 2009 (80% of the claims we expect to receive).

Taking into account the time spent performing quality assurance reviews and leading or participating in training and other activities that do not directly process claims, the Office has the equivalent of about 70 of the registration specialists actually working on new claims.

Registration specialists report spending on average 60% of their time processing basic claims in eCO. A significant portion of their remaining time *currently* involves giving or receiving training, which will decrease over time. Other work and activities that are not reported as eCO claims processing hours include:

- quality assurance
- processing claims that must still be processed through the old system (e.g. supplementary registrations, group registrations, vessel hulls, mask works)
- pre-registrations
- preparing macros and manuals for processing claims in the Siebel system

⁸ Two separate vacancy announcements were posted because registration specialists in the Performing Arts Division are required to be able to read and analyze music. That requirement does not exist for registration specialists in the Literary and Visual Arts Divisions.

- working on special projects, such as Form CO
- staff meetings
- labor organization business

12. In your September 5, 2008 response to the Librarian of Congress, it was indicated that the pendency for electronically-filed claims is one to four months, depending on whether the deposit is made electronically or it is mailed. According to data the Office provided to the Subcommittee, the number of electronic registrations that await registration specialist review increased from 2000 in May 2008 to almost 13,000 by September 2008. (A.) Does the Office anticipate the backlog for electronically-filed registrations to continue to grow at this rate? (B.) Assuming yes, what impact would that growth have on the pendency of electronically-filed registration applications?

Response:

- (A.) We expected the workload of electronic registrations to increase as claimants moved from paper to electronic filing. The data on electronic filings cited counts only the submissions in which claimants filed the application, paid the fee, and submitted electronic deposit copies online. The number of these "pure eService" claims in process is currently over 25,000. There are also somewhat over 15,000 claims in which the application and payment were completed online, but a physical deposit copy is mailed separately to the Copyright Office. The total for both types of electronic submissions in the registration queues is currently over 40,000.
- (B.) Given current conditions, the volume of electronic claims (both electronic and physical deposit copies) in process is projected to grow to a total of some 65,000 by September 2009. However, electronic submissions overall take less than half the time to process as claims filed using paper forms, so while the pendency is expected to increase it will remain manageable. Importantly, the increase in faster-to-process electronic claims is effectively lowering the rate of increase in the number of paper submissions being added to the backlog of work on hand (See Attachment F).

13. In the September 3, 2008 memorandum from the Library of Congress Office of the Inspector General, it is asserted that the Office has a growing space and security of collections issue. The memo asserts that there are claims in storage that have not been opened and that some may contain payments that are susceptible to theft. (A.) What steps has the Office taken to securely store unopened and/or backlogged registration materials? (B.) Have any fee payments become stale before the Office cashed them? If so, to what extent does the resolution of such fee and payment issues contribute to increased pendency?

Response:

- (A.) The physical workload on hand consists of two parts, deposits for copyright claims that are in the eCO system and unopened, unprocessed mail. Physical deposits are stored in designated areas in the registration divisions and in two large storage areas in the Madison Building of the Library of Congress. Both areas are secure in that access is limited to those with coded ID badges, who can open doors equipped with card readers. Such coding is limited to those who manage the materials - adding new deposits, removing deposits for day-to-day processing, and searching for items that are needed out of date order.

The unopened mail backlog has dwindled significantly in recent months. At present, there are 49 3x5' hampers of mail receipts that may include payments. This represents slightly more than one week's average receipts. Total mail holdings, including a number of hampers containing deposits filed for electronic claims and hampers of deposits sent without a claim to copyright, equal about 2 to 3 weeks' worth of receipts. This mail is also stored in secure, card-reader equipped locations. Most unopened mail is in a locked area that requires a key for entry. Mail is transferred to the Copyright Office's In-Processing Section daily to be ingested by staff that day or the next. The In-Processing Section is also equipped with card reader access, limited to those who require entry.

- (B.) In recent vulnerability assessments, cash receipts (checks and money orders) have been found to be a medium level of risk. Checks and money orders are made payable to the Register of Copyrights and would not be easy to redeem. Currency receipts through the mail are rare and the public is told that currency is not an acceptable form of payment.

In the early months of the transition phase, some checks became stale while waiting for processing. The turnaround time for check processing is now less than one week and very few checks become stale. At present, as in the past, the Office requests a replacement check for any that do become stale and ensures that the effective date of registration is not adversely affected. In virtually every case, stale-dated checks have been replaced before the claim was available to a registration specialist for examination, so there was no increase in pendency time for the claim.

14. Please describe the involvement of the Office in advance of the issuance of the September 3, 2008 memorandum from the Library of Congress Office of the Inspector General. (A.) Specifically, was the Office consulted during the investigation? (B.) To what extent was the Office permitted an opportunity to review, inform and contribute to the report prior to its delivery to the Librarian?

Response:

- (A.) The Inspector General informed the Copyright Office during a meeting on July 31, 2008 that an audit would be conducted. Consistent with other Inspector General investigations, Copyright Office management requested an audit plan and scope. The Inspector General denied this request.
- (B.) None. A copy of the memorandum marked "For Public Distribution" was delivered to the Copyright Office the same day it was released (September 3, 2008.)

15. On May 7, 2008, in written testimony, the Library of Congress Professional Guild asserted that "design flaws" in the new electronic registration system were responsible for much of the backlog. These purported flaws include, *inter alia*, arduous navigation through more than a dozen applets and tabs, difficult to read and unchangeable fonts, and the absence of a global search and replace function. (A.) Does the Office agree with the Guild's characterizations and conclusions? (B.) To what extent does the Office believe these conditions contributed to the backlog? (C.) What changes to the electronic registration system, if any, does the Office plan to make to address these concerns?

Response:

- (A.) The Copyright Office believes that AFSCME Local 2910 leadership's limited exposure to the eCO system may have contributed to the assertions. As with the implementation of any new IT system, there is a learning curve that must be breached before users develop a reasonable level of comfort working in the system. As discussed in questions #6 and 11, the registration specialists' role is much broader than the roles of the former examiners and catalogers, incorporating in effect three discrete activities. The combination of duties required a more sophisticated IT system than the multiple, non-integrated, discrete systems used in the pre-reengineered Copyright Office.
- (B.) There are three key factors that contributed to the large volume of work on hand: (a.) the amount of required staff training; (b.) reengineered workflows that inadvertently burdened registration specialists with clerical tasks; and (c.) incremental systemic improvements. (Systemic improvements are discussed under (C.), below.)
- (a.) As discussed in questions #4, 6, and 11, the registration specialist position is an amalgamation of three distinctive functions: examining claims, creating registration records, and making routine selections of deposits for the Library's collections. To succeed, former examiners and catalogers needed to learn a completely new function; learn how to use a new information technology system; and master the Library's selection rules. These factors contributed to the large volume of unprocessed claims and acted as a barrier to the achievement of a 2.5 claims opened per hour average.
- (b.) As discussed in question #3, the Copyright Office launched a constant improvement program and shifted certain workflows from the registration specialists to more appropriate parts of the organization. This was done in part to both correct problems as soon as they were identified and also to reduce clerical burdens on registration specialists, allowing them to focus more on registering claims.
- (C.) As discussed in questions #3 and 8, the eCO PIP team continues to work toward short-, medium-, and long-term eCO system performance improvements, and the Copyright Technology Office continues to implement user-defined systemic enhancements designed to improve eCO functionality and usability. The planned upgrade to Oracle/Siebel version 8.1 with its substantially better interface should further improve eCO performance and operability.

16. (A.) Please describe any tests the Office performed of the new electronic system prior to beta testing in August 2007. To what extent did these tests assess the quality and efficiency of the new system? What were the metrics used to determine success? (B.) Were there indications a backlog would be created as a result of new inefficiencies in the system? What adjustments, if any, were made to alleviate or eliminate any projected backlogs as a result of these tests?

Response:

- (A.) Development and testing of eCO, the Copyright Office's new IT systems, should be considered in two phases: the development of the internal system for processing work, and the development of the eService component for external users to file electronic copyright claims.

In early 2005 the Copyright Office initiated two eCO pilots. The first began in February 2005 using motion picture (MP) claims. The MP pilot allowed component system testing including: the ingestion of registration forms and accompanying paperwork; "tagging" application forms using OCR software in conjunction with keyboarding; converting typed or handwritten text into electronic data; tracking of physical deposits; examination of claims; correspondence creation; routing approved claims for review; the creation of a certificate of registration, and creation of a record available to the public through the Copyright Office website.

Detailed testing by subject matter experts, Copyright Office staff and contracted developer staff was performed prior to and during the pilot period. Quality and efficiency were also assessed and integrated into the full production system. Participant feedback both in usability and reported problems also influenced changes. As a result of system modifications, registration screens providing full access to the application and the ability to review Copyright Certificates prior to completion were incorporated into eCO. Toward the end of the testing period, the focus moved to ensuring data integrity through the process, from receipt/ingestion through creation of the public record.

The second pilot focused on developing public electronic submissions through eCO eService. Specifically, the eDeposits pilot tested the submission and receipt of digital representations of published works. The pilot was conducted by agreements with volunteer participants as a means of testing the viability of off-the-shelf software for the secure transport of files and to establish benchmarks for size and time needed to receive the files. Refinements were then made to the software before its inclusion in eCO eService.

In the spring of 2005, legislation was passed to allow preregistration in certain circumstances and was to begin in the fall of 2005. The Copyright Office determined that this would be the first public use of eService. Beginning in November 2005, preregistrations were submitted using eCO eService. This provided an opportunity to validate the Pay.Gov online payment interface while

subsequently testing key elements of what would become our successful eCO eService implementation for basic claims.

The next phase in eCO development followed alpha testing of the eService for basic claims component. Beginning in July 2007, a small group of organizations and individual remitters began filing basic claims via eCO eService under a limited access beta test. Their experiences and feedback allowed the Copyright Office on July 1, 2008 to successfully open eCO eService to the public. eService submissions now account for over 50% of claims received each week.

Performance metrics developed in 2001 for the Copyright Office relied on a future vision where:

- the Office was fully staffed
- staff were fully trained
- copyright applications, payments and deposits were received electronically
- correspondence with remitters was negligible
- there was no processing workload

Under these admittedly unrealistic expectations, processing a claim in 18 working days was deemed a success. This metric was not updated during the Copyright Reengineering effort.

- (B.) Based on system testing as described in (A), there were no indications that there would be an increased production workload. As discussed in questions #4, 6, 11 and 15, staff retraining and unequally distributed workload were major contributors to the increased production workload.

17. Did the Library of Congress Information Technology Services comment on or review the Office's decision to purchase the Siebel software, which is used in the new electronic registration system? If yes, what comments or recommendations were provided?

Response:

The Library's Information Technology Services (ITS) was very much involved in the selection of Oracle/Siebel, the software proposed by SRA International, Inc. in their response to the RFP for development of eCO in 2003. The manager of the group in ITS that provided support to the Copyright Office was a member of the advisory panel and fully participated in the oral presentations and proposal reviews. A senior analyst in ITS who had led the development of the Copyright Office's COINS system (see response to question #2) served as a technical adviser and was assigned as a full-time liaison between ITS and Copyright. ITS was also involved in the definition of requirements in 2002 that was done by IBM (then PriceWaterhouseCoopers).

In addition to ITS's involvement and buy-in, from 2002 to 2006 the Copyright Technology Office convened meetings of the Information Technology Technical Review Board (ITTRB) which was made up of senior IT people from PTO, IRS, OMB, GAO, and The Privacy Associates. This was part of our seeking and following best practices. The ITTRB reviewed plans and progress and provided feedback and advice on a variety of issues including the selection of the COTS package for eCO development.

GSA/FEDSIM collected all of the notes and materials from the procurement process.

18. (A.) To what extent did the Office seek and incorporate examiner or cataloger input in the design of the new electronic system? (B.) What mechanisms are now in place to solicit registration specialist input on current performance and suggestions for potential improvements?

Response:

- (A.) For each of the seven business process areas identified during the Copyright Office's business process reengineering effort, at least one senior manager was selected to serve as Process Owner to take ownership of the process. In turn, the Process Owners appointed non-supervisory staff to serve as Process Administrators (PA) for each process area. The PAs served as the day-to-day champions for their respective process areas and worked with a core group of subject matter experts to discuss business and IT requirements and to channel input from staff in their respective divisions/sections. The PAs also provided feedback to staff on progress and decisions made.

In 2004 SRA International, Inc., the firm hired under contract to develop eCO, held a series of user reviews of eCO system design work to solicit feedback from staff involved in the system design efforts to date. The review sessions provided a full system demonstration of the work completed for the various process areas including Register Claim (i.e., the process area of most interest to former examiners and catalogers). Register Claim functions demonstrated during the sessions include: correspondence management, examining/cataloging processing, deposit tracking throughout the life cycle of the claim, and the electronic submission process to depict the automatic generation of a record in Oracle/Siebel from an online claim submission. Feedback/suggestions gathered from staff in attendance were incorporated into SRA's eCO design plans.

- (B.) Currently a selected group of registration specialists serves on an Advisory Committee that includes Copyright Office management, which is tasked with identifying and implementing operational improvements. In existence since early October, it has already implemented one major operational improvement to reduce the existing workload and is working with the CTO to speed up correspondence by developing standard e-mail letters.

19. We are told the Office plans to upgrade the Siebel software in 2009. What improvements does the Office expect the upgrade to provide? How does the Office expect these improvements to impact productivity and why? What direct and indirect costs are associated with this upgrade?

Response:

The Copyright Office intends to upgrade our existing Oracle/Siebel application from version 7.7.2.8 to Oracle/Siebel version 8.1 within FY09. The upgrade is driven by the following:

- Copyright Office Annual Program Performance Plan Strategy 15 Task Number 1 which calls for updating commercial off-the-shelf software packages for Office processing within two years of release of new versions. This will ensure that the Office benefits from improvements made by the supplier and will ensure continued support for maintenance and technical assistance.

Upgrading to the latest version also allows the Copyright Office to take advantage of the enhanced functionality of the latest Oracle/Siebel version including:

- Better eService Experience – Oracle/Siebel 8.1 includes improved self-service for the public including easier case searching, hyperlinks to open PDF forms (submitted through Adobe integration), and better case status information. Along with improved case status, public users will be better equipped in determining reasons for possible application rejection.
- Reduced Reliance on Custom Code - The latest version of Oracle/Siebel incorporates enhanced Haley Rules Engine integration which is a natural and declarative language and is easier to learn. Use of this technology will assist in developing out-of-the-box business process solutions to meet the needs of the Copyright Office. Certain business process rules can be developed at the user level requiring less dependency on the Copyright IT staff.
- Improved intake integration with Adobe Forms – Integration with Adobe Forms means data from forms is converted to Oracle/Siebel objects which translates into a reduction in data entry errors and helps to standardize the type of information captured. This will reduce the steps needed to file an electronic claim and therefore improve the customer productivity and satisfaction.
- Enhanced Search and Query – Allows Copyright internal and public users to stop long-running queries over 5 seconds, allows non-case sensitive querying and provides keyword highlighting.
- Better inquiry through Siebel Knowledge Base to support Frequently Asked Questions – Internal and external users will have the ability to query a knowledge base of Frequently Asked Questions which will allow them the capacity to resolve

issues prior to contacting the Copyright eCO Help Desk. This will provide faster issue resolution to users and will free up current Help Desk staff and allow them to focus energies elsewhere.

- New Investigative Information - Improved Audit Capabilities (Read Audit, Change Audit)

The direct costs of the upgrade include those associated with following full Systems Development Life Cycle processes which cover Requirements Gathering, Analysis, Design, Development, Test, and Integration & Implementation. Additional direct costs may be incurred if upgraded system hardware is required.

Oracle has indicated that the Library will not incur any additional software costs for the upgrade of the software since it is covered under our current maintenance agreement.

Updated training may be necessary for internal Copyright staff as new functionality is implemented within the system.

20. Substantial customization of commercial-off-the-shelf (COTS) software could be problematic for system stability and for system upgrades. To what extent has the Siebel system been customized? Did the Copyright Office undertake an analysis of the costs to customize COTS software versus developing a custom software package configured specifically for the needs of the Office? Has customization of the COTS software impacted system stability? What problems, if any, do you expect to result from an upgrade of the system? Has the software vendor provided assurances of system stability during and after the upgrade? What contingency plan, if any, does the Office have in the event the upgrade causes system instability?

Response:

Prior to reengineering, the Copyright Office considered transforming its existent systems into one integrated system using in-house IT expertise and Library of Congress software. However, the business process reengineering consultants who helped develop system requirements (IBM consulting) recommended the Copyright Office adopt a Commercial Off-the-Shelf (COTS) package. The decision to go with a COTS package also followed the general direction of the Congress (see the Information Technology Management Reform Act of 1996, also known as the Clinger-Cohen Act of 1996 (Pub. L. 104-106, Division E, codified at 40 U.S.C. Chapter 25)) and the Office of Management and Budget (see OMB Memoranda M-96-20, "Implementation of the Information Technology Management Reform Act of 1996" subsequently incorporated within OMB Circular A-130, "Management of Federal Information Resources"). A number of packages were reviewed, and Oracle/Siebel, a customer-focused resource management (CRM) using an Oracle database system was selected. Oracle/Siebel became the underlying system for eCO.

As with COTS packages typically, Oracle/Siebel "out of the box" did not fully meet the business process requirements of the reengineered Copyright Office. SRA International, Inc. developed custom code to create eCO. While it was known to both the Copyright Office and the developer that custom code has inherent risks, it was believed that the extent of custom code would remain manageable. In 2005 a decision was made to curtail further custom coding, sacrificing some usability refinements.

The upgrade of eCO planned in 2009 and detailed in question # 19, will require an analysis of existing custom code and thorough testing. This is part of the normal updating of COTS software and is well understood by the software vendor. We have been advised by Oracle that much of our existing custom code will be superseded by the 8.1 upgrade. We expect the replacement of custom code with a standardized, tested COTS package will improve system performance, stability and functionality.

21. In June 2008 the Office made available to the public Form CO, which uses a 2-D bar code to facilitate the processing of copyright registrations. We are told that the electronic infrastructure to read the bar codes became operational in October. (A.) Why did the Office release Form CO before the system to process these applications was operational? (B.) How accurate is Form CO in capturing and processing registration data? Is there any need to manually input data from Form CO?

Response:

- (A.) The Copyright Office contracted with Adobe Systems, Inc. to develop Form CO with 2-D barcode technology. Design and testing of the form were on track for completion in time to meet the scheduled release of both Form CO and eCO on July 1, with the Adobe interpretive processing software scheduled for release on July 15. During final testing several small data migration errors were identified and reported to Adobe for resolution. Adobe committed to fixing the errors but indicated that they could not complete the work and necessary testing prior to July 15. We made the decision to release Form CO on the scheduled date anyway since (1) we expected to receive a relatively low volume of Form COs in the first weeks after release, (2) we had prepared a coordinated outreach effort touting the simultaneous release of Form CO and eCO, and (3) a completed Form CO can be processed in the same manner that a hand-written paper application is processed if necessary. In fact a very manageable number of the forms had accumulated by the time the Office began processing Form CO on September 16.⁹
- (B.) Unless a 2-D barcode is compromised, data migrates from scanned Form COs into Oracle/Siebel with 100 percent accuracy. In the case of a compromised 2-D barcode, a Form CO must be processed in the same manner as a traditional paper application.

⁹ Eight mail hampers full of Form COs were received over the ten week period between July 1 and mid-September when processing commenced. By comparison, the Copyright Office receives on average 12 hampers full of mail daily.

22. Please provide any other information that the Office considers relevant to describe: 1) how the conditions that led to the current backlog developed; 2) how the Office has responded and plans to address these conditions in the future; and 3) the Office's best judgment as to when the Congress can expect the backlog to be eliminated.

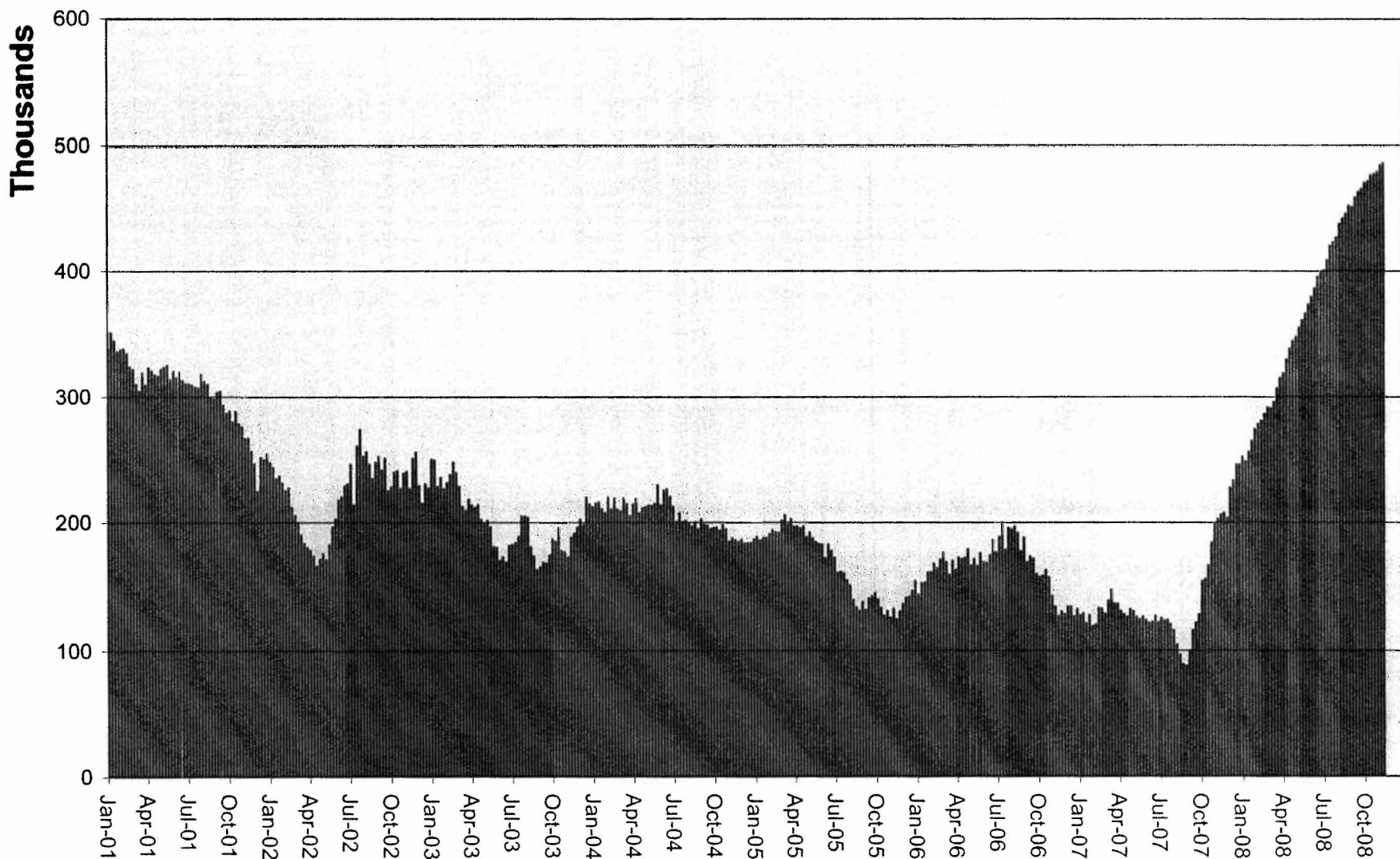
Response:

1) As discussed in question #15, there were three primary factors that led to the current situation: (a.) the amount of required staff training; (b.) reengineered workflows that inadvertently burdened registration specialists with clerical tasks; and (c.) incremental systemic improvements. As discussed in question #5, we are nearing the conclusion of the post-reengineering transition period and should be moving toward full production as staff move beyond the learning curve and as process and system improvements create the conditions for increased productivity.

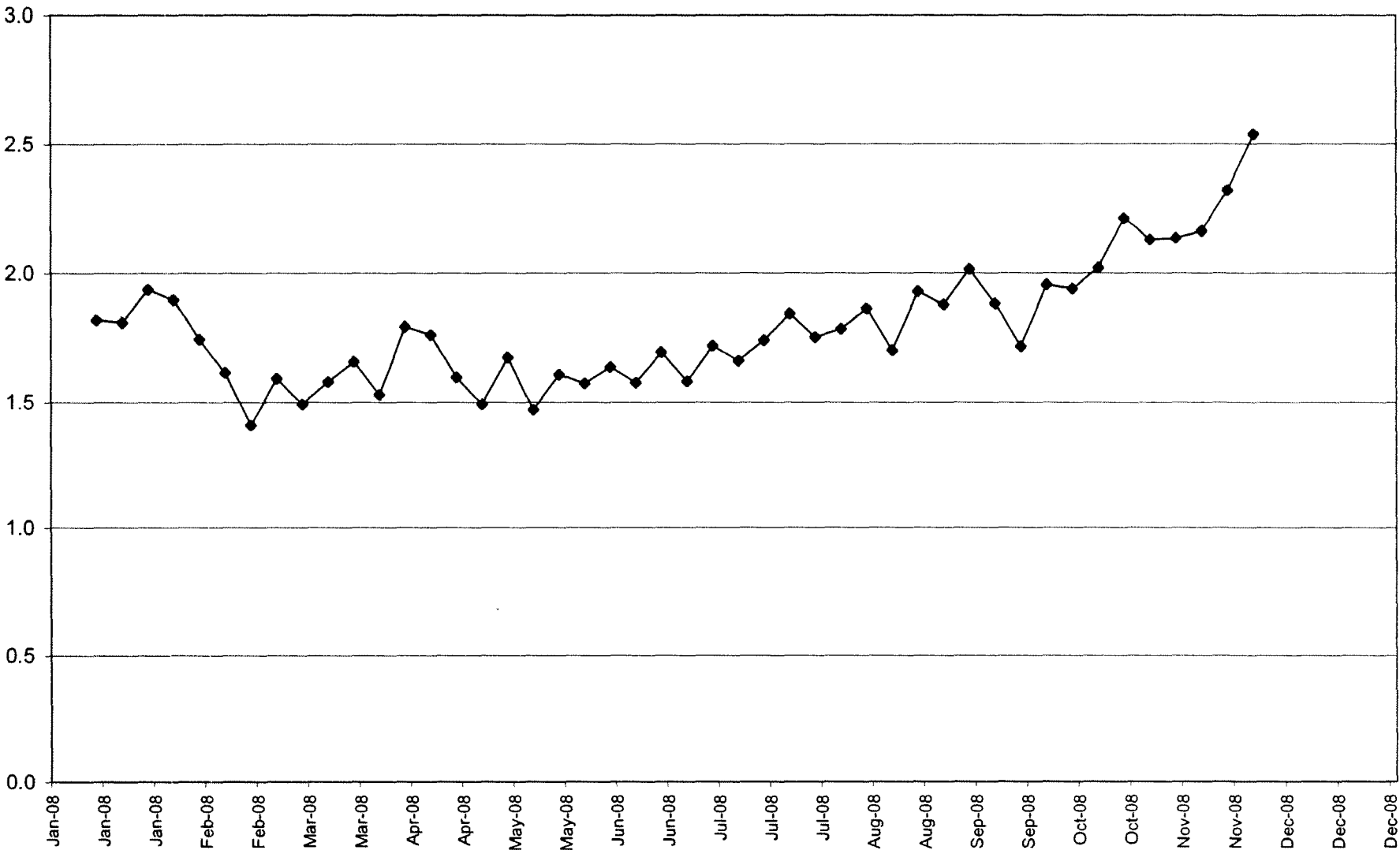
2) In the foreseeable future, the Copyright Office does not plan on undertaking a simultaneous operational reengineering, systemic upgrade and complete staff retraining. We are sure that future operational and systemic improvements will draw upon the lessons learned in this period and from benchmarking other current process improvement efforts to lead a complete reengineering of the United States' Copyright function.

3) As discussed in questions #1, 4, and 12 the Copyright Office consistently carries a workload level of over 100,000 from year to year (over 159,000 each of the previous three years). We estimate that the Office would achieve a workload level of approximately 159,000 claims on hand within twelve months if it had a full complement of fully trained specialists operating at a consistent average rate of 5.2 registration decisions per hour.

Copyright Office Claims-In-Process Workload 2001-2008



Average Opened Per Hour Per Specialist



Subject: Regarding the Inspector General's memorandum

Several questions in the Subcommittee's letter refer to points raised by the Inspector General (IG) in his memorandum dated September 3, 2008. The Copyright Office has previously expressed concerns related to the IG's method of inquiry and findings, which may be summarized as follows:

- The assertion that "Copyright management chose...the OCR process as its technology of choice" is grossly misleading. The Captiva software that provides for data migration using OCR technology is one of several peripheral applications attached to the eCO system¹ and which supports one specific function (i.e., capturing and converting data from scanned images into an electronic record) that is diminishing and will continue to diminish as the ratio of eService to paper-based applications increases.
- The assertion that the Office held "overly optimistic assumptions about the public's adoption of electronic claim filings" is simply not true. In fact the percentage of claims filed electronically compared to all claims filed in FY08 (16.7%) was slightly better than the goal set at the beginning of that fiscal year (15%) despite the fact that eCO remained under a limited access beta test for the first eight months of FY08. Following the release of eCO on July 1, 2008, the percentage of claims filed electronically quickly jumped to 50%. For the week ending November 28, 63 % of all claims received were filed electronically.
- The IG's memorandum did not note operational improvements that were having and continue to have positive impacts on productivity (e.g., a quality assurance program for the "tagging" function and routing claims with fee problems away from registration specialists.)
- The IG did not take into consideration the lengthy training period required to prepare registration specialists to perform new duties while using a new IT system.
- The IG focused exclusively on pendency for processing paper-based applications and did not note the dramatic improvement in processing times for claims filed via eCO.
- As noted in question 14, the IG did not consult with Copyright Office management or share a draft of the memorandum for comment prior to public release of the document.

¹ The eCO system itself is built on Oracle/Siebel case management software, which supports electronic submission and processing of copyright applications, payments, and e-deposit uploads. This is more accurately the Office's technology of choice.

OPENED TOTALS

Division 7-Sep-08

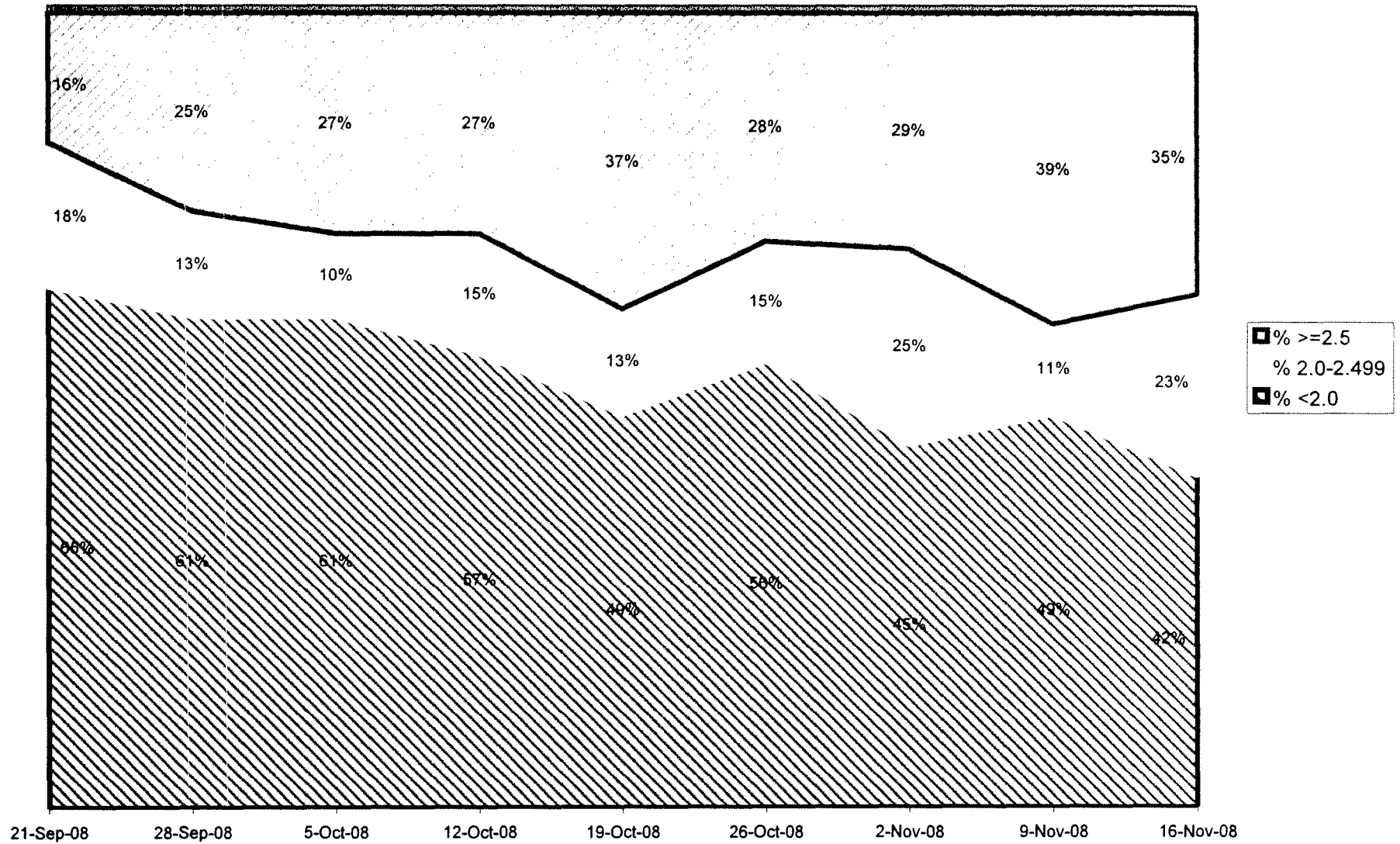
Overall Average	2.0
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LIT	1.5
LIT	1.5
LIT	1.7
LIT	0.6
LIT	2.1
LIT	2.1
LIT	1.9
LIT	0.8
LIT	1.4
LIT	1.4
LIT	0.7
LIT	0.9
LIT	1.3
LIT	0.5
LIT	1.2
LIT	1.6
LIT	1.0
LIT	1.6
LIT	0.8
LIT	0.6
LIT	1.3
PA	1.5
PA	1.0
PA	1.6
PA	1.1
VA	1.7
VA	1.5
VA	1.1
VA	1.5
VA	1.2
VA	0.2
VA	1.0
VA	1.6
VA	1.2
VA	1.2
LIT	2.1
LIT	2.7
LIT	1.0
LIT	2.2
LIT	0.5
LIT	0.4
LIT	0.6
LIT	0.2
LIT	2.1
LIT	2.5
LIT	1.9
LIT	1.3

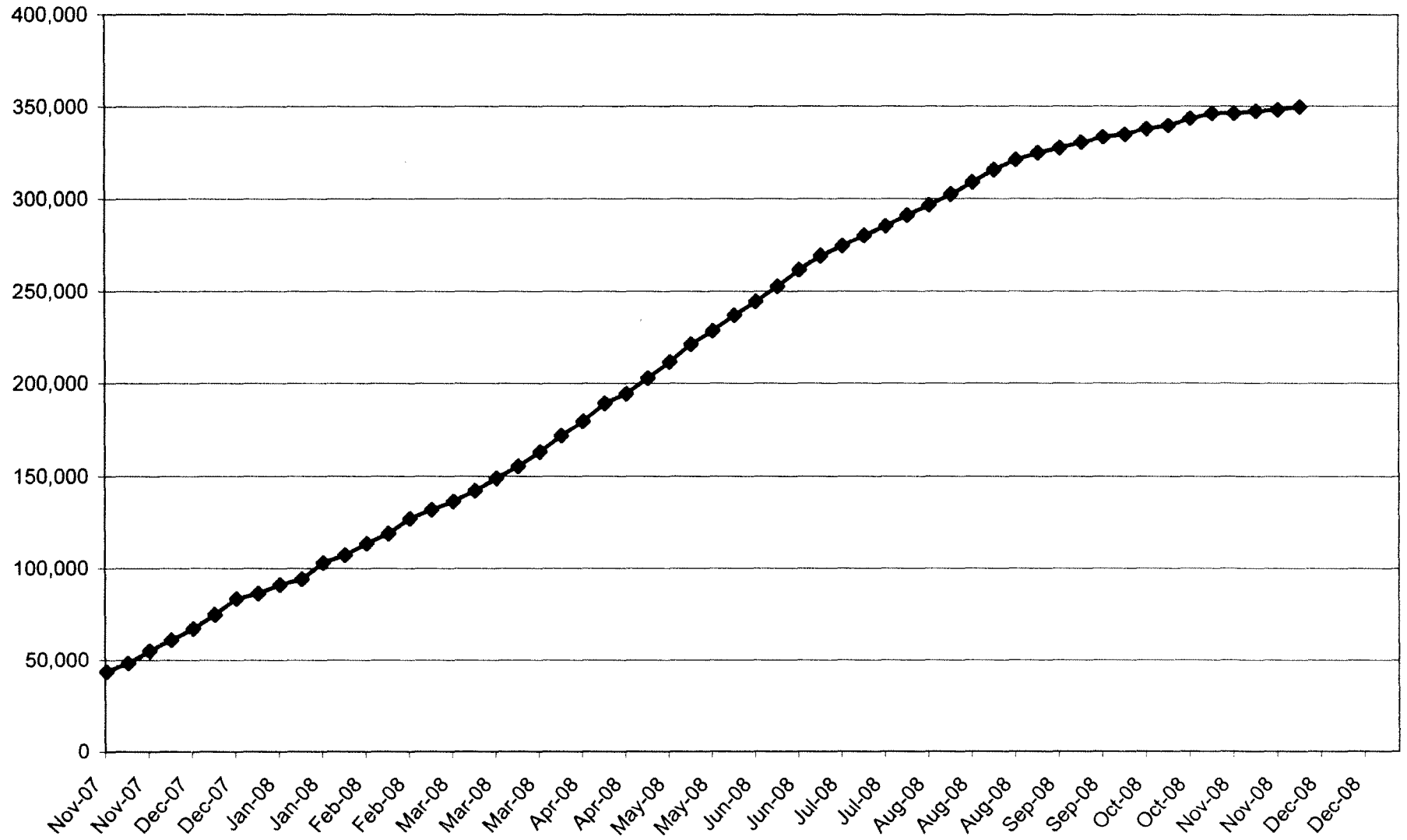
OPENED TOTALS

Division	7-Sep-08
LIT	
LIT	
LIT	
LIT	
LIT	
LIT	
LIT	
LIT	
PA	
PA	
PA	
PA	
PA	
PA	2.1
PA	
PA	
PA	
PA	2.0
PA	2.3
PA	
PA	2.4
PA	
PA	
PA	
PA	2.0
PA	
PA	
PA	2.2
PA/MP	
PA/MP	
PA/MP	
PA/MP	2.3
PA/MP	
PA/MP	
PA/MP	2.0
VA	
VA	
VA	
VA	
VA	
VA	
VA	
VA	
VA	2.3
VA	

% of Copyright Registration Specialists Reaching 2.5 Opened Per Hour



Total in Queue of Claims Rec'd by Mail Awaiting Specialist Retrieval



1. Productivity data of registration specialists examining all claims, measured in (1) average number of claims opened per hour and (2) average registration decisions per hour

Registration Specialists: Average Production

Action	Production (per hour)
Claims Opened	2.10
Registration Decisions	2.26

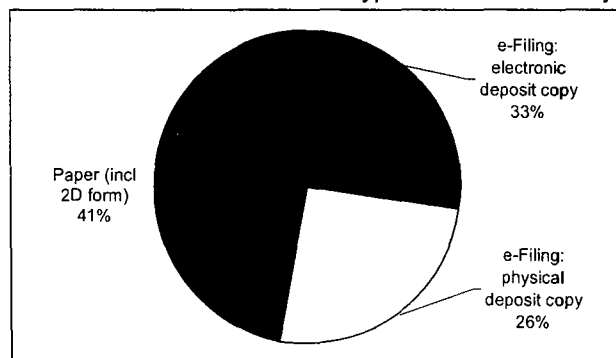
2. Productivity data for registration specialists in examining electronically filed claims per hour (1) with electronic deposits and (2) with physical deposits¹

Processing Time: e-Service vs. Paper Claims

Claim type	Processing time (months)
Paper and e-Service (incl. 2D)	16
e-Service \ e-deposit	<4
e-Service and physical deposit	6

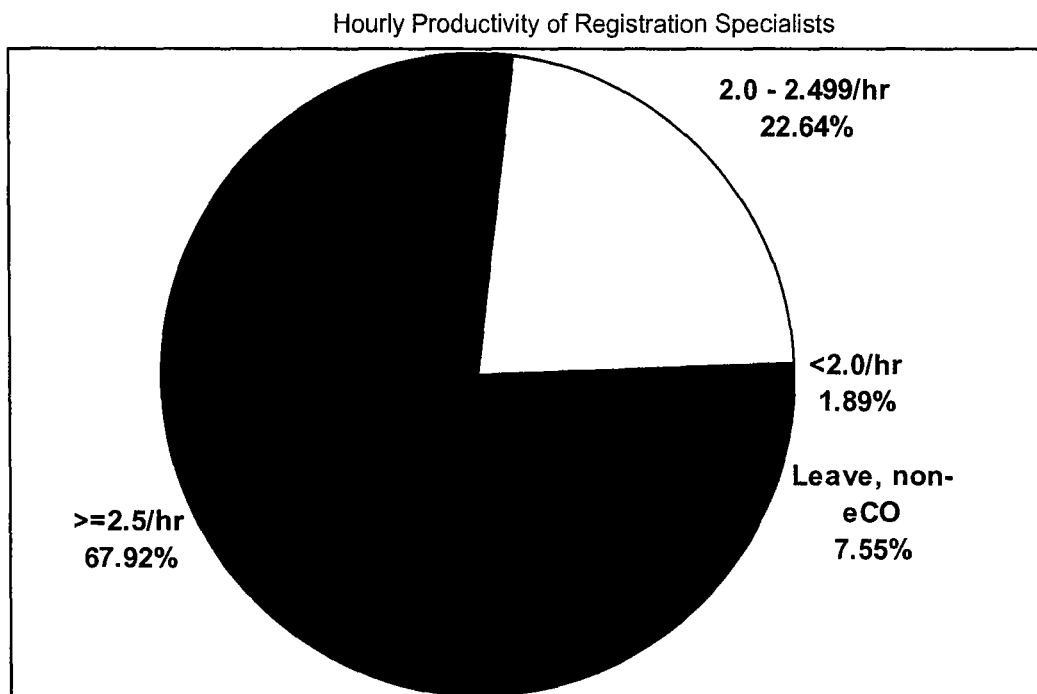
Ninety percent of claims received are processed within the times listed for each claim type. It should be noted that close to 60 percent of registrations received each week are filed electronically (See chart below) yet the average processing time for e-Service claims, both e-deposit and physical deposit claims, remains less than half that of claims filed on paper applications.

Current Distribution of Claim Types Received Weekly



¹ Since the eCO system does not report separate hourly productivity statistics for e-Service registrations with e-deposits versus e-Service registrations with physical deposits we chose to provide statistics that demonstrate average processing times for each type of claim. This serves as a rough approximation of registration specialists' productivity processing the various claim types.

3. Percentage of registration specialists that open 2.5 claims or more per hour



This chart shows productivity of Registration Specialists deemed fully trained and past the 90-day grace period (i.e., those Registration Specialists who are subject to the performance requirement of opening a minimum of 2.5 claims per hour.) Experience thus far shows a strong correlation between implementing written performance requirements and increased productivity.

4. Total number of claims in process, separated out by claims filed under the old system and under the new electronic system.

Claims in Process		
New System (eCO)	Awaiting in processing	22,275
	In eCO	483,445
Old System	In process	4,998
	Cataloging (post certificate)	23,889

The Copyright Office is watching the trend of incoming claims to determine if there is an impact from the economic downturn. During the October 2008 – January 2009 period, there was a drop-off in receipts of some 10%. With February's figures, it appears that the overall decline by the end of the year may be only 6%. We will continue to watch during the spring to see if the usual springtime activity compensates for this decline.



The Register of Copyrights of the United States of America

United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

March 24, 2009

Dear Chairman Conyers,

This letter is intended to answer the Committee's written inquiries of March 9, 2009. Thank you for permitting us to supplement the record with this reply. We will first address Congressman Boucher's inquiries and then turn to Congressman Goodlatte's question on digital television.

- Q1. The Section 119 distant signal license says that if local signals are offered in a given DMA, then distant signals cannot be imported into that DMA, with the exception of certain grandfathering situations. However, there are some DMAs that are extremely large and where the spot beams used by satellite carriers do not cover the entire DMA. In those instances, should those households that are not covered by the spot beam, and therefore cannot receive local-into-local service, be permitted to import distant signals, and should Congress amend the statute to permit that?

A1. The spot-beam issue was, in fact, raised by DirecTV in its comments filed in the Section 109 proceeding. DirecTV stated that if a satellite carrier provides local service in a particular market, it should be permitted to provide distant signals to "out-of-beam" subscribers in that market regardless of the out-of-market signals a customer might hypothetically be able to receive over-the-air. DirecTV noted that satellite subscribers in this situation find themselves "between a rock and a hard place;" they cannot receive local network programming because they are outside of the spot beam, and they cannot receive distant signals because they fall within the Grade B contour of affiliates outside their local market. DirecTV commented that its proposal, if it were to be enacted by Congress, should only be available if at least 90% of the households in a DMA are covered by the spot beam. DirecTV comments at 9-10.

In response, NAB argued that DirecTV had not provided adequate justification for its spot beam proposal. It asserted that to allow distant signals to be imported in areas not reached by local-into-local spot beams would create a disincentive for satellite carriers to maximize the geographic scope of in-market spot beams and provide local broadcast service to those residents. It also commented that satellite carriers treat the geographic limitations of their local spot beams as proprietary secrets. NAB stated it would be impossible to verify a satellite carrier's claim that a subscriber was located outside the spot beam. It also believed that a number of "out-of-beam subscribers" are actually within the Grade B contour of stations from neighboring markets, making them ineligible for distant signals. NAB reply comments at 18-19.

In our Report to Congress, we concluded that satellite carriers should not be permitted to provide distant network station signals to households outside the satellite carrier's spot beam or to households that cannot obtain a missing affiliate in the market when they are within the Grade B contour (or digital equivalent) of an out-of-the-market network signal. We found that DirecTV's suggestion, while well intentioned, would be difficult to effectuate under the existing Section 119 distant signal rubric, especially in light of the "if local-no distant" mandate. We also stated that a spot beam exemption, of the type

proposed by DirecTV, may dissuade satellite carriers from undertaking research and development to enhance their spot beam capabilities. We believed that capital improvements and investments in new satellite technology likely will address the needs of out-of-beam subscribers. *See* Section 109 Report at 171.

Q2. Is there any doubt in your mind about whether the telephone companies that are now seeking to offer multichannel video programming using an IP-based platform would be entitled to use the Section 111 license as presently configured to do that? If the statute is unclear in that regard, should Congress amend it to clarify that telephone companies that offer multichannel video programming using an IP-based platform are entitled to use the Section 111 license?

A2. AT&T and Verizon have built new video distribution platforms over the past five years. They each use a different type of technology to provide their customers with multichannel video, voice, and broadband services. AT&T has designed a system using Internet Protocol technology to deliver television services while Verizon has built a fiber-to-the-premises physical plant to do the same. However, they are both "national" in scope as each of their systems aggregates programming at different access points across many states and jurisdictions. Their systems are quite different from those used by traditional cable operators and satellite carriers in the past. As such, these telephone companies,

especially AT&T with its IP-based platform, were not the kind of entities Congress envisioned when it first drafted the cable system definition in 1976. In any event, in the Section 109 Report, we opined that both AT&T and Verizon's operations could be considered "cable systems" for Section 111 purposes and may use the license to retransmit broadcast signals, provided that they adhere to all of the FCC's broadcast signal carriage rules. This viewpoint is predicated on the understanding that neither AT&T nor Verizon is using the Section 111 license to retransmit broadcast programming over the Internet. However, it may be appropriate for Congress to explicitly state that this is indeed the case through an amendment to Section 111.

This is an important issue for Congress to address because AT&T has taken the position at the FCC that it is not a cable system for purposes of Title VI of the Communications Act. AT&T has been able to take advantage of the benefits of the statutory license but has avoided the access and service obligations under Title 47 that all incumbent cable operators must abide by. The FCC, as the steward of the Communications Act, should also be asked its opinion on this question.

Q3. Adjacent Markets

A3. Congressman Boucher also asked my opinion on whether Congress should amend the law to permit satellite carriers to retransmit distant broadcast signals from adjacent television markets to satellite subscribers that reside in a county assigned by Nielsen to a DMA outside their state borders. While this question was not part of your written inquiry, I nevertheless promised to respond to this matter during my testimony before the House Judiciary Committee on February 25, 2009. The relevant parts of our Section 109 Report that speak to this issue are provided below.

Echostar first raised this matter in its comments filed with the Office in the Section 109 proceeding. It asserted that real world conditions, such as the case when DMAs cross state lines, muddled the distinction between "local" and "distant" signals. To provide clarity, Echostar stated that the Office

should recommend to Congress that all MVPDs should have the ability to offer as “local:” (1) a full complement of network signals in each market,¹ (2) all signals receivable by an over-the-air antenna in a market, and (3) television stations that broadcast local in-state news, weather and entertainment.² Echostar admitted that there is no “elegant” legislative solution to specifically address its concerns about the current DMA structure and its failure to adequately serve the informational needs of all satellite subscribers. It stated that this is so because of the clear division in the law for satellite providers between distant and local stations. Echostar commented that “the most straight-forward means to accomplish true ‘local’ rules is within a broader overhaul of the compulsory license regime.” Echostar comments at 15, 16.

In response, NAB argued that Echostar's proposal was beyond the scope of the Section 109 inquiry and was, in any case, without merit. It specifically noted that Echostar's characterization of the current structure of the statutory license is incorrect. NAB first stated that much in-state news, sports, and informational programming is locally produced by local television stations who own the copyright in their programming. According to the broadcasters, these stations can grant licenses to cable systems desiring to distribute the programming outside of the station's market, but within the home state. NAB stated that Echostar could secure these same rights were it genuinely interested in providing such programming. Next, NAB stated that, even were it necessary to rely on a statutory license, many stations are significantly viewed outside their markets, and cable and satellite companies may, and do, export those significantly viewed signals into adjacent markets on a royalty-free basis. Finally, NAB stated that for those areas of a state that do not receive significantly viewed signals from an adjacent market and where it would be necessary to rely on a statutory license, cable operators may, and often do, use Section 111 to retransmit in-state news, sports, and informational programming to their subscribers. NAB concluded that the law did not need to be changed to assure viewer access by cable and satellite to in-state news and informational programming. NAB reply comments at 23.

In response to these comments, and the issues generally, we stated that Echostar's proposal to redefine the “local” concept for satellite statutory licensing purposes had merit, at least in the abstract. We noted that satellite subscribers should be able to have access to all television stations that broadcast national network content and local content of interest, especially those stations that are available over-the-air in a local community, but cannot be received via satellite because they are assigned to another DMA. However, we cautioned that reform of Section 119 and/or Section 122 to accommodate the proposed recommendation would require significant statutory adjustments. We stated that the practical difficulties associated with revising the existing regulatory structures negated the supposed benefits for subscribers and, therefore, the proposals cannot be recommended in the present licensing context. We instead proposed that the better approach was to create a new unified statutory license that would incorporate language akin to Echostar's recommendation.

¹ Echostar noted that there are over 20 rural DMAs in which broadcasters have not “invested in infrastructure,” so a full complement of national network affiliates does not exist. It stated that there are over 40 network stations that are “missing” and, in a number of short markets, only a single network affiliate operates today (e.g., Zanesville, OH, St. Joseph, MO, Mankato, MN). Echostar comments at 16.

² Echostar's recommendation referenced The Television Freedom Act, H.R. 2821 -- introduced by Rep. Mike Ross (D-Arkansas) in the House of Representatives in 2007.

We concluded that this would achieve the same intended result, but without the difficulty of untangling the thicket of exemptions, requirements, and prohibitions currently found in the existing licenses. *See* Section 109 Report at 177.

In our unified license model, we included the following proposal. Specifically, we suggested that Congress:

Permit licensees to provide their subscribers with network broadcast signals, on a royalty free basis, from adjacent in-state Designated Market Areas if they reside in a county assigned to an out-of-state market. For example, allow subscribers residing in Montezuma and La Plata counties, which are in Colorado but assigned by Nielsen to the Albuquerque-Santa Fe DMA, to receive distant network broadcast signals from the adjacent Denver DMA. *See* Section 109 Report at 206.

We must note that while we addressed the adjacent market matter in this fashion, we did not endorse any particular legislation nor did we address the multitude of questions that are associated with this issue. For example, we did not address whether there should be caps on the number of adjacent market signals that could be imported nor did we opine upon the question of which adjacent market signal may be provided under the scheme. In any instance, we did suggest that Congress, if it were to adopt our unified license recommendation, include the following provision:

Use of the license is conditioned upon adherence to all of the Communications Act's requirements regarding the carriage of broadcast signals, as well as the FCC's network nonduplication, syndicated exclusivity and sports blackout rules. *See* Section 109 Report at 209.

We believe that if Congress were to adopt an adjacent market construct, the inclusion of a provision modeled on the above language, may make it more palatable to parties that may oppose it.

Q4. In your opinion, what is the single most important challenge, or opportunity, for this reauthorization resulting from the mandated switch from analog to digital television, which is currently scheduled to occur on June 12, 2009, and how should we address it?

A4. The national transition to digital television is a game-changing event for broadcasters and multichannel video programmers alike. The technical abilities of digital television stations are more robust than analog television stations. For example, they can provide a mix of high definition ("HD") and standard definition ("SD") broadcast signals and may possibly offer new types of services in the future. More important, such stations are able to "multicast" by splitting their digital signals into smaller streams, each of which may be independently programmed. Further, a digital television station's coverage area may be bigger or smaller than its analog coverage area. For these reasons, the existing distant signal licenses, whose foundations were built upon analog broadcast technology, need to be changed to accommodate the new world of digital television.

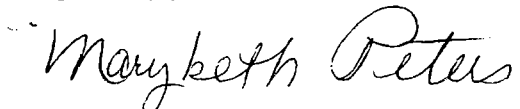
Recognizing the imminent transition to DTV, the Copyright Office has attempted to craft policies and rules to accommodate the retransmission of distant digital broadcast signals by cable operators under Section 111 of the Act. For example, the Copyright Office has proposed that cable operators pay

royalties for each and every multicast stream of one digital television station. The Copyright Office also proposed to eliminate reference to Grade B contours (an analog TV construct) in favor of reliance on noise limited protected contours (a DTV construct) when determining the local service area of a noncommercial digital television station. However, because of the complexities associated with the DTV transition, the material differences between analog and digital technologies, and the legal frailties inherent in the current statutory structure, we recommend that Congress legislate a comprehensive solution to the issues associated with the retransmission of digital television signals by cable operators. The single most important legislative change, among many that are necessary, would be to amend Section 111 to explicitly cover digital signals and set the appropriate royalties for the retransmission of multicast streams.

Section 119 must also be updated to accommodate digital television signals. The statute needs to be changed to include new constructs and language addressing digital signal intensity standards, digital predictive models, and digital signal testing procedures. These technological gauges are critical in determining whether a particular household is "unserved" and eligible for distant digital signal service. The current standards and models rely on old analog constructs that will be rendered moot when the transition ends on June 12, 2009.³ As the standards, models, and testing procedures are all part of a larger regulatory fabric, it is not possible to single out the "most important" element requiring triage treatment from Congress.

Thank you for your questions and your continuing work on the statutory licensing matters now pending before Congress. We look forward to working with you in the months ahead and my staff and I are always available to provide you with further guidance on these and other issues whenever you may need it.

Respectfully yours,

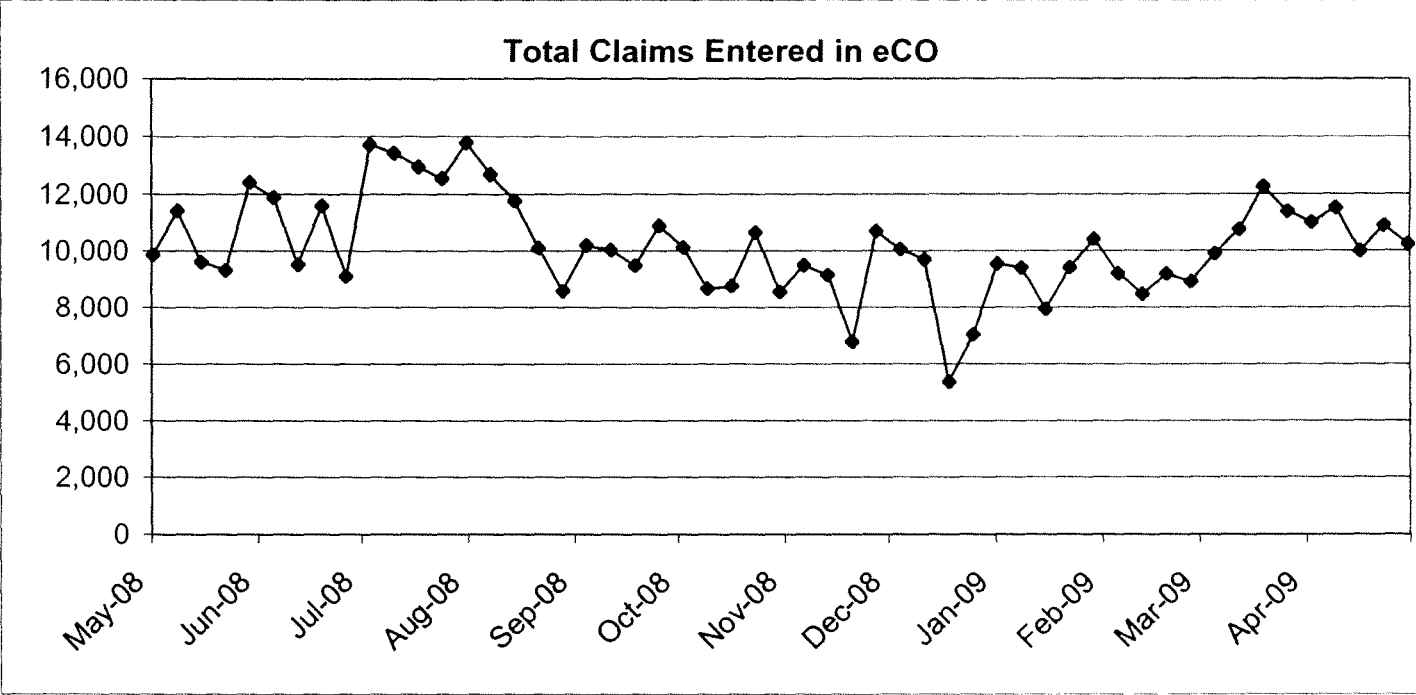

Marybeth Peters,
Register of Copyrights

The Hon. John Conyers
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

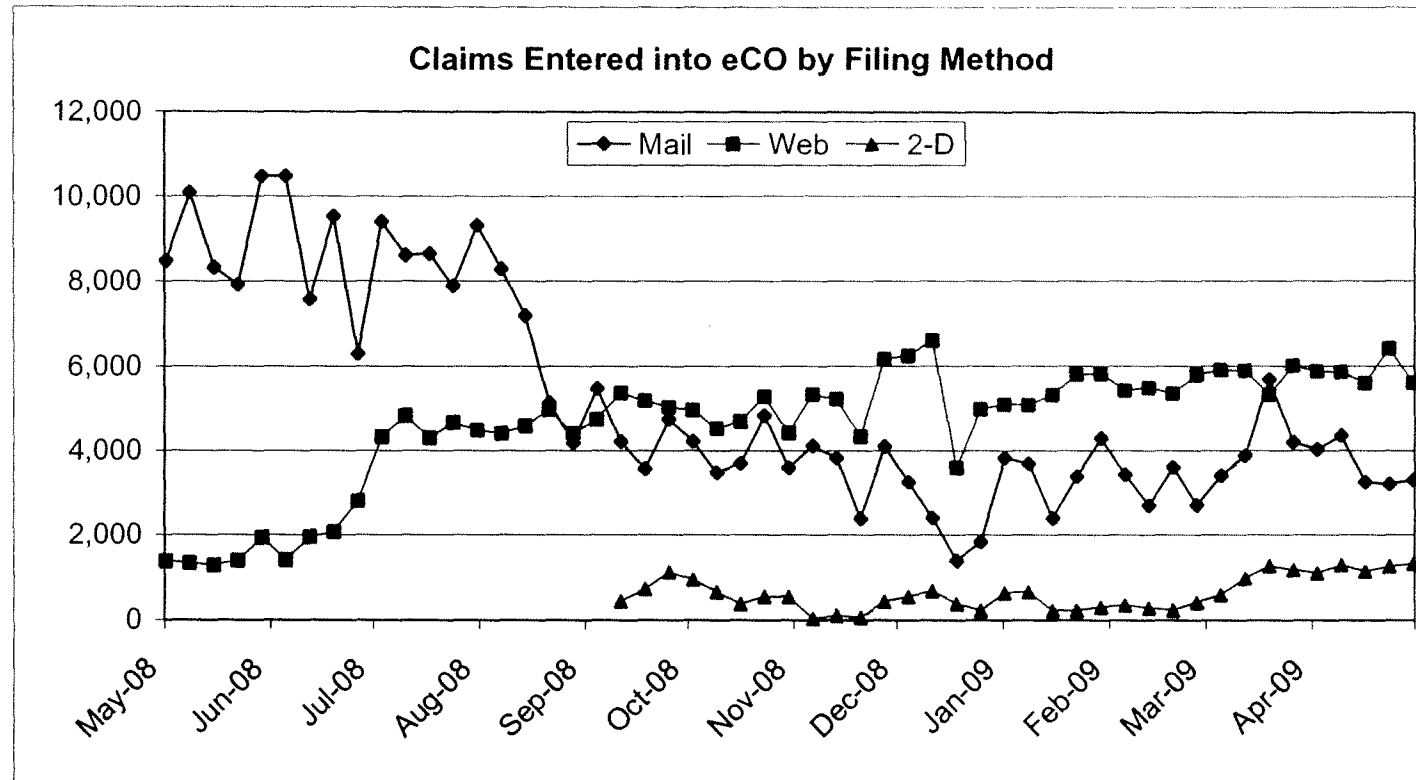
³ We note that the old constructs may still be applicable to low power television stations that are not required to transition to digital on this date.

Claims Entered into eCO (by Filing Me

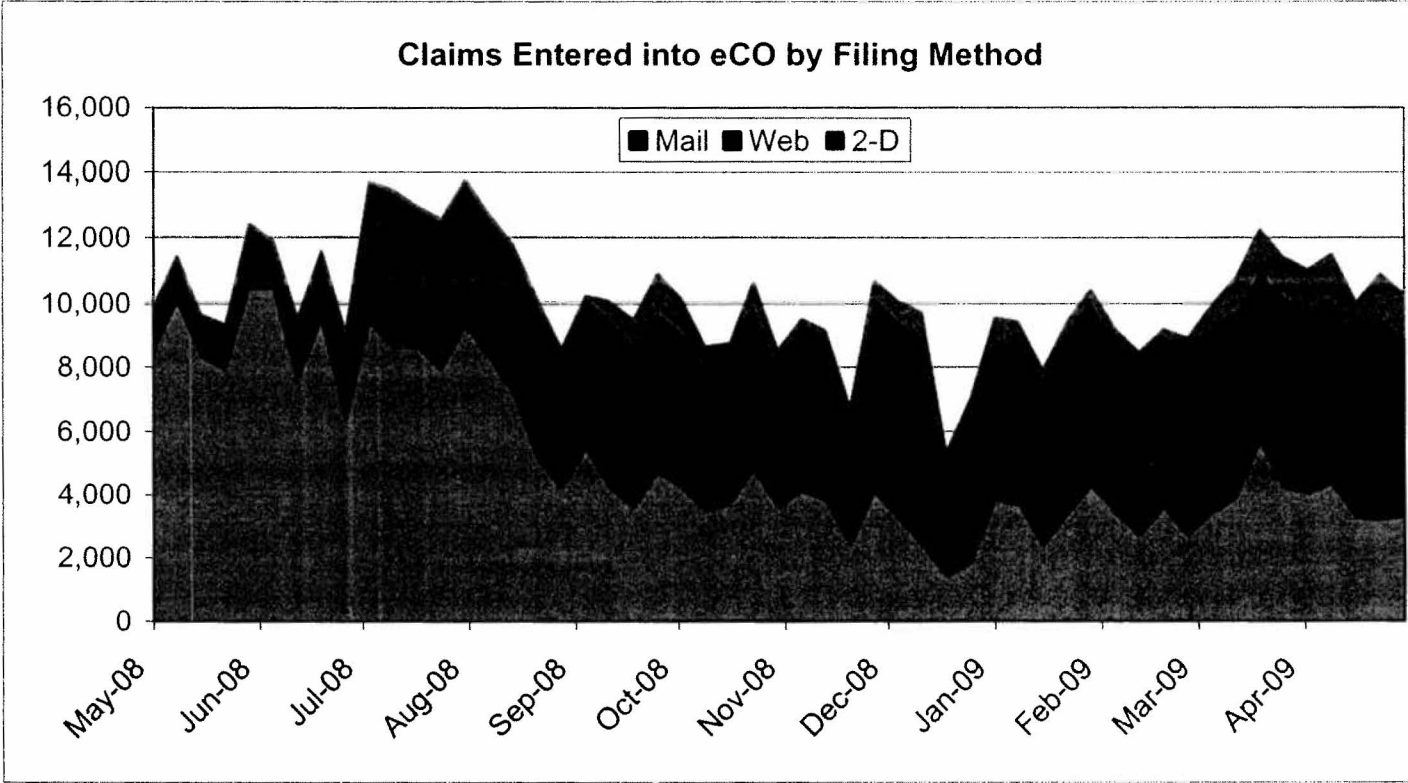
	Mail	Web	2-D	TOTAL
11-May-08	8,478	1,377		9,855
18-May-08	10,081	1,339		11,420
25-May-08	8,319	1,286		9,605
1-Jun-08	7,916	1,394		9,310
8-Jun-08	10,470	1,936		12,406
15-Jun-08	10,475	1,405		11,880
22-Jun-08	7,570	1,949		9,519
29-Jun-08	9,515	2,067		11,582
6-Jul-08	6,297	2,800		9,097
13-Jul-08	9,398	4,316		13,714
20-Jul-08	8,607	4,819		13,426
27-Jul-08	8,644	4,296		12,940
3-Aug-08	7,887	4,655		12,542
10-Aug-08	9,305	4,480		13,785
17-Aug-08	8,288	4,402		12,690
24-Aug-08	7,179	4,578		11,757
31-Aug-08	5,134	4,957		10,091
7-Sep-08	4,179	4,403		8,582
14-Sep-08	5,470	4,728		10,198
21-Sep-08	4,212	5,361	453	10,026
28-Sep-08	3,567	5,169	733	9,469
5-Oct-08	4,737	5,016	1,130	10,883



	Mail	Web	2-D	TOTAL
12-Oct-08	4,209	4,949	955	10,113
19-Oct-08	3,469	4,517	666	8,652
26-Oct-08	3,695	4,673	380	8,748
2-Nov-08	4,819	5,271	558	10,648
9-Nov-08	3,586	4,412	546	8,544
16-Nov-08	4,112	5,323	47	9,482
23-Nov-08	3,825	5,205	112	9,142
30-Nov-08	2,382	4,322	70	6,774
7-Dec-08	4,094	6,160	438	10,692
14-Dec-08	3,250	6,240	555	10,045
21-Dec-08	2,398	6,602	687	9,687
28-Dec-08	1,393	3,587	389	5,369
4-Jan-09	1,833	4,965	230	7,028
11-Jan-09	3,820	5,077	640	9,537
18-Jan-09	3,683	5,063	661	9,407
25-Jan-09	2,394	5,306	227	7,927
1-Feb-09	3,381	5,793	234	9,408
8-Feb-09	4,288	5,811	313	10,412
15-Feb-09	3,423	5,411	360	9,194
22-Feb-09	2,697	5,483	289	8,469
1-Mar-09	3,603	5,335	240	9,178
8-Mar-09	2,702	5,783	422	8,907
15-Mar-09	3,407	5,898	596	9,901
22-Mar-09	3,880	5,887	983	10,750
29-Mar-09	5,683	5,304	1,269	12,256



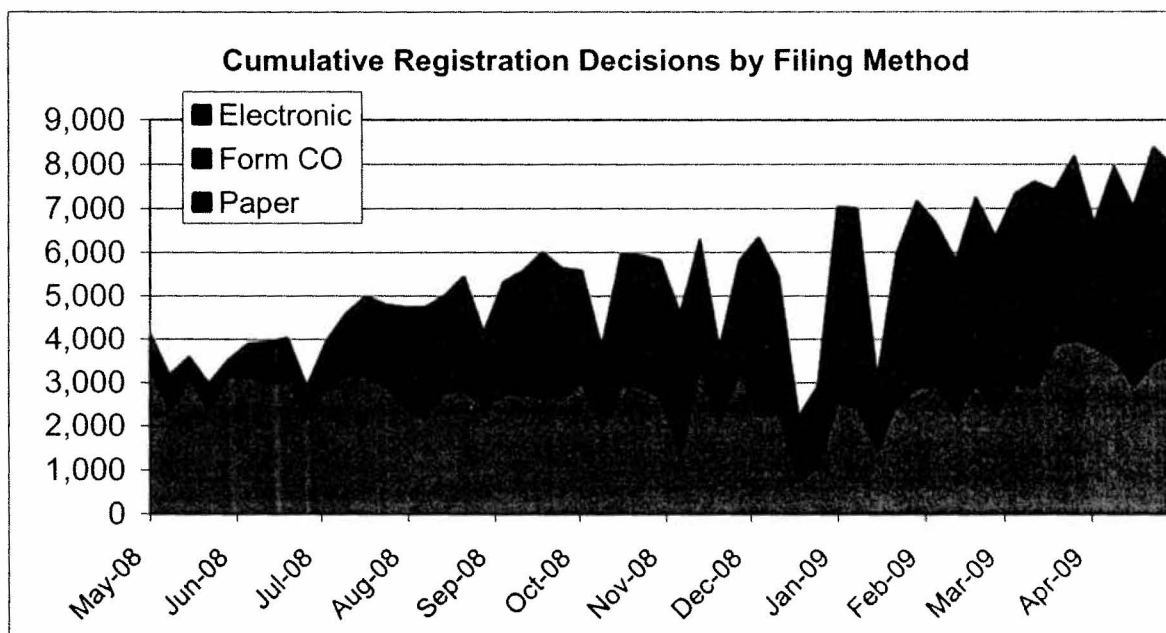
	Mail	Web	2-D	TOTAL
5-Apr-09	4,199	6,005	1,184	11,388
12-Apr-09	4,028	5,873	1,102	11,003
19-Apr-09	4,350	5,859	1,294	11,503
26-Apr-09	3,253	5,590	1,142	9,985
3-May-09	3,202	6,413	1,266	10,881
10-May-09	3,299	5,598	1,322	10,219



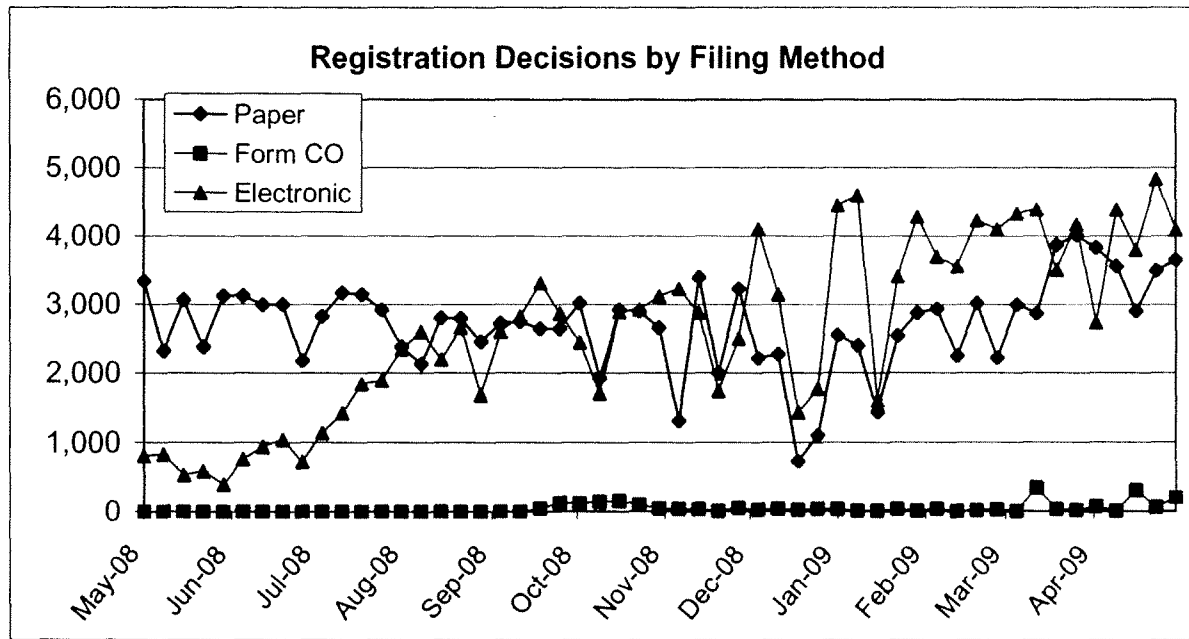
Specialist Registration Decisions (by Filing Method)

	<i>Paper</i>	<i>Form CO</i>	<i>Electronic</i>	TOTAL
11-May-08	3,340	0	814	4,154
18-May-08	2,330	0	841	3,171
25-May-08	3,067	0	537	3,604
1-Jun-08	2,384	0	597	2,981
8-Jun-08	3,127	0	401	3,528
15-Jun-08	3,127	0	768	3,895
22-Jun-08	2,993	0	948	3,941
29-Jun-08	3,002	0	1,044	4,046
6-Jul-08	2,185	0	732	2,917
13-Jul-08	2,828	0	1,142	3,970
20-Jul-08	3,171	0	1,435	4,606
27-Jul-08	3,147	0	1,851	4,998
3-Aug-08	2,921	0	1,899	4,820
10-Aug-08	2,388	0	2,359	4,747
17-Aug-08	2,137	0	2,605	4,742
24-Aug-08	2,803	0	2,204	5,007
31-Aug-08	2,799	0	2,666	5,465
7-Sep-08	2,462	0	1,698	4,160
14-Sep-08	2,727	0	2,610	5,337
21-Sep-08	2,751	0	2,828	5,579
28-Sep-08	2,650	50	3,316	6,016

Note: Hourly registration decision rates (individual or collective) by filing method cannot be calculated because hours worked have not been broken out by filing method



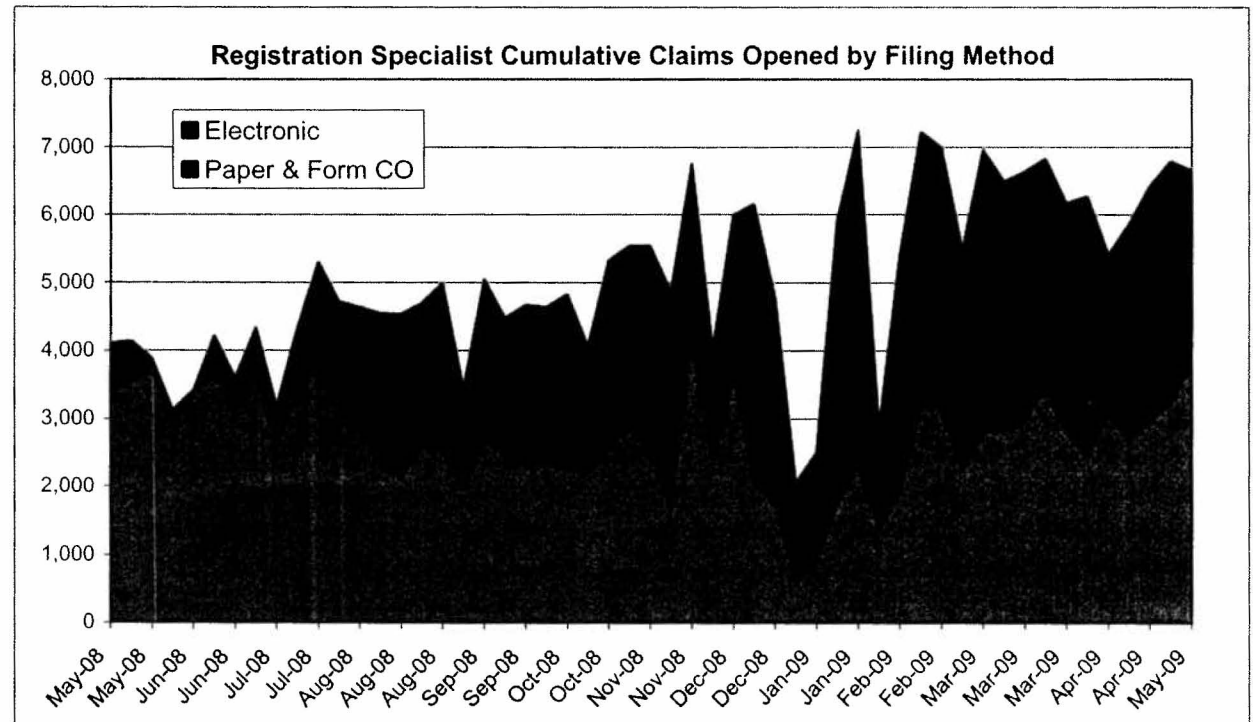
5-Oct-08	2,647	129	2,874	5,650
12-Oct-08	3,020	125	2,451	5,596
19-Oct-08	1,936	149	1,722	3,807
26-Oct-08	2,925	162	2,895	5,982
2-Nov-08	2,901	108	2,929	5,938
9-Nov-08	2,661	52	3,121	5,834
16-Nov-08	1,316	47	3,235	4,598
23-Nov-08	3,394	41	2,883	6,318
30-Nov-08	2,004	15	1,753	3,772
7-Dec-08	3,232	60	2,508	5,800
14-Dec-08	2,220	32	4,102	6,354
21-Dec-08	2,278	48	3,151	5,477
28-Dec-08	734	34	1,443	2,211
4-Jan-09	1,106	48	1,785	2,939
11-Jan-09	2,556	43	4,447	7,046
18-Jan-09	2,405	17	4,592	7,014
25-Jan-09	1,446	18	1,613	3,077
1-Feb-09	2,543	44	3,414	6,001
8-Feb-09	2,877	18	4,286	7,181
15-Feb-09	2,937	45	3,701	6,683
22-Feb-09	2,256	12	3,556	5,824
1-Mar-09	3,020	24	4,228	7,272
8-Mar-09	2,225	38	4,098	6,361
15-Mar-09	3,002	16	4,332	7,350
22-Mar-09	2,868	357	4,387	7,612
29-Mar-09	3,868	44	3,511	7,423
5-Apr-09	4,012	28	4,174	8,214
12-Apr-09	3,825	82	2,740	6,647
19-Apr-09	3,558	15	4,388	7,961
26-Apr-09	2,908	319	3,802	7,029
3-May-09	3,496	72	4,835	8,403
10-May-09	3,653	209	4,089	7,951



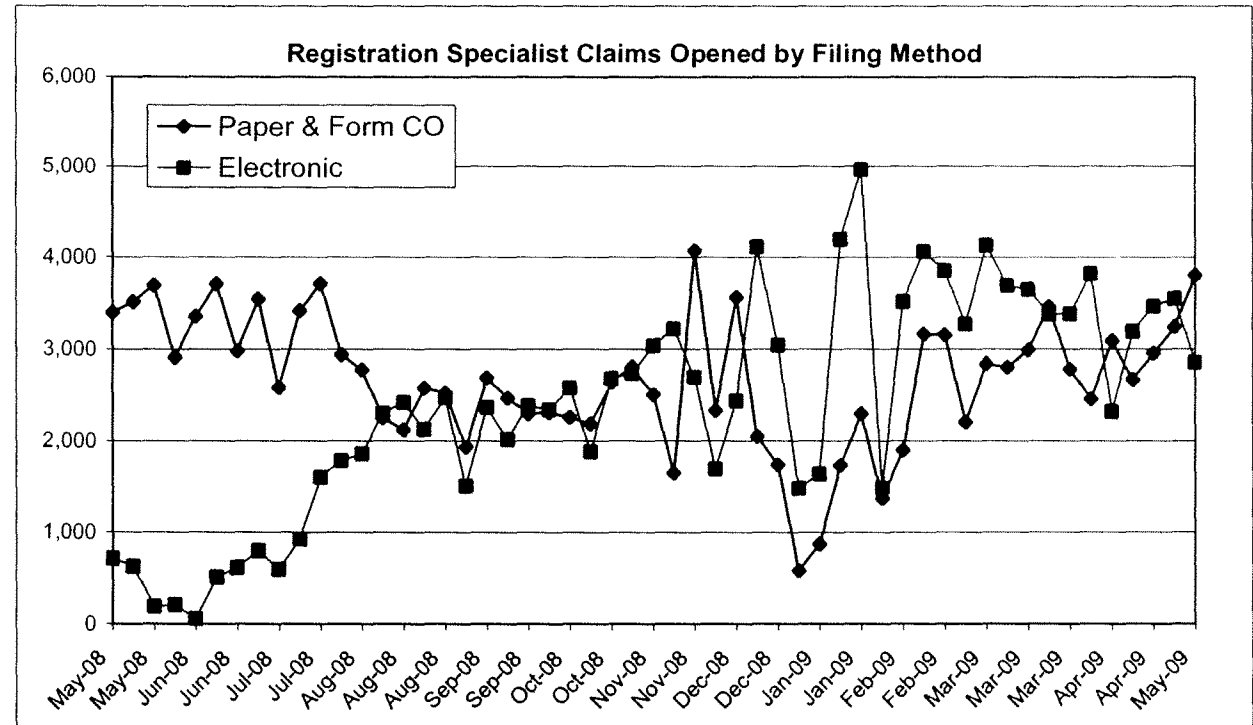
Specialist Total Copyright Claims Opened (by Filing Method)

	<i>Paper & Form CO</i>	<i>Electronic</i>
11-May-08	3,395	713
18-May-08	3,513	633
25-May-08	3,688	194
1-Jun-08	2,910	216
8-Jun-08	3,355	61
15-Jun-08	3,708	517
22-Jun-08	2,979	617
29-Jun-08	3,542	800
6-Jul-08	2,582	596
13-Jul-08	3,412	922
20-Jul-08	3,711	1,604
27-Jul-08	2,941	1,784
3-Aug-08	2,776	1,863
10-Aug-08	2,251	2,301
17-Aug-08	2,119	2,421
24-Aug-08	2,577	2,126
31-Aug-08	2,524	2,473
7-Sep-08	1,933	1,505
14-Sep-08	2,690	2,365
21-Sep-08	2,468	2,016
28-Sep-08	2,292	2,383
5-Oct-08	2,307	2,339
12-Oct-08	2,256	2,578
19-Oct-08	2,185	1,885
26-Oct-08	2,641	2,685
2-Nov-08	2,810	2,737

Note: Hourly rates (individual or collective) by source cannot be calculated because hours worked have not been broken out by source



9-Nov-08	2,504	3,040
16-Nov-08	1,648	3,223
23-Nov-08	4,069	2,701
30-Nov-08	2,328	1,691
7-Dec-08	3,561	2,438
14-Dec-08	2,050	4,115
21-Dec-08	1,737	3,046
28-Dec-08	583	1,481
4-Jan-09	868	1,640
11-Jan-09	1,733	4,197
18-Jan-09	2,292	4,968
25-Jan-09	1,366	1,485
1-Feb-09	1,897	3,520
8-Feb-09	3,164	4,068
15-Feb-09	3,152	3,854
22-Feb-09	2,204	3,274
1-Mar-09	2,840	4,135
8-Mar-09	2,804	3,697
15-Mar-09	2,992	3,654
22-Mar-09	3,459	3,382
29-Mar-09	2,785	3,390
5-Apr-09	2,455	3,823
12-Apr-09	3,092	2,323
19-Apr-09	2,669	3,196
26-Apr-09	2,959	3,471
3-May-09	3,241	3,556
10-May-09	3,802	2,860



Copyright Office response to Eric Guarduno re Updated Data on CO Productivity

Opened Per Hour and Registration Decisions Per Hour

The data includes: (1) average for all specialists across the past 12 months; (2) average across the past 12 months only for those specialists who were fully trained by May 10, 2009; and (3) average across 12 months for specialists currently being counseled regarding their performance. We have not included in these calculations the new hires, who are in early stages of training, and two specialists who are the President and Chief Steward of AFSCME 2910.

Opened (by Filing Method) and Registration Decisions (by Filing Method)

These are shown in aggregate numbers because division self-reported data does not distinguish how many hours were dedicated to claims by different filing methods. It is therefore impossible to figure an hourly rate by filing method.

Note that, in some instances, we have provided the same information in two types of graphs: line graphs showing each individual category, and area graphs to show how those categories total up.

Copyright Claims Opened by Specialists Per Hour in eCO

11-May-08 18-May-08 25-May-08 1-Jun-08 8-Jun-08 15-Jun-08 22-Jun-08 29-Jun-08 6-Jul-08 13-Jul-08 20-Jul-08 27-Jul-08 3-Aug-08

Average Opened Per
Hour for All
Specialists¹

1.5 1.6 1.6 1.6 1.6 1.7 1.6 1.7 1.7 1.7 1.8 1.8 1.8

Average Opened Per
Hour: Specialists who
have completed
training as of 5/10/09²

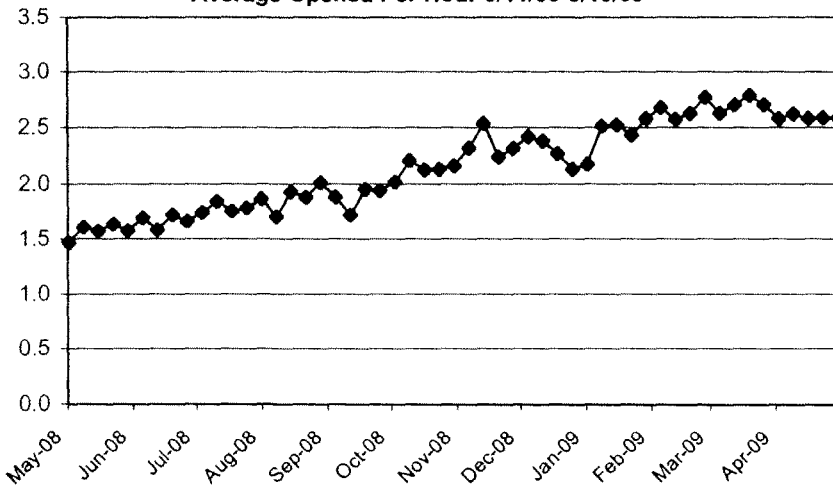
1.6 1.8 1.7 1.7 1.8 1.9 1.8 1.9 1.9 1.9 2.0 1.9 2.0

Average Opened Per
Hour: Specialists
currently being
counseled for
performance³

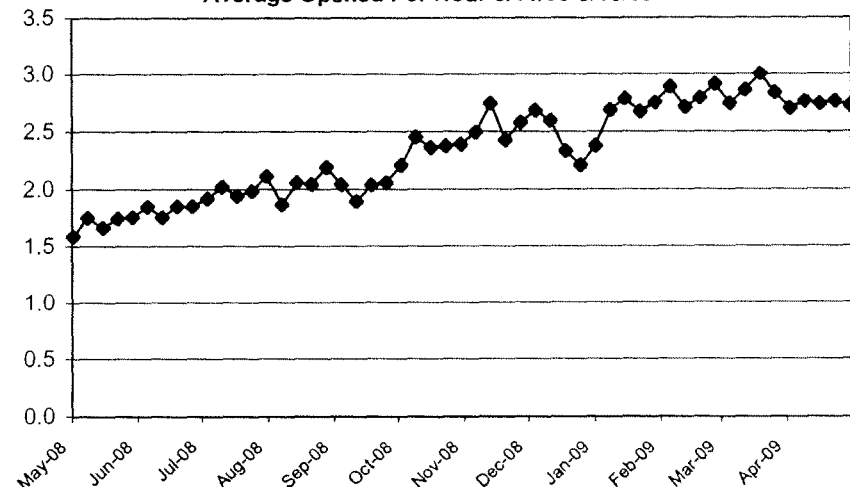
1.0 0.9 1.0 1.0 1.0 1.0 0.7 1.2 1.2 1.2 1.1 1.0 1.1

The above data includes: (1) average for all specialists across the past 12 months; (2) average across the past 12 months only for those specialists who were fully trained by May 10, 2009; and (3) average across 12 months for specialists currently being counseled regarding their performance. We have not included in these calculations the new hires, who are in early stages of training, and two specialists who are the President and Chief Steward of AFSCME 2910.

**Copyright Registration Specialists (All):
Average Opened Per Hour 5/11/08-5/10/09**



**Copyright Registration Specialists (Trained):
Average Opened Per Hour 5/11/08-5/10/09**



10-Aug-08	17-Aug-08	24-Aug-08	31-Aug-08	7-Sep-08	14-Sep-08	21-Sep-08	28-Sep-08	5-Oct-08	12-Oct-08	19-Oct-08	26-Oct-08	2-Nov-08	9-Nov-08
1.9	1.7	1.9	1.9	2.0	1.9	1.7	2.0	1.9	2.0	2.2	2.1	2.1	2.2
2.1	1.9	2.1	2.0	2.2	2.0	1.9	2.0	2.1	2.2	2.5	2.4	2.4	2.4
1.0	1.0	1.4	1.1	1.1	1.3	0.9	1.1	1.1	1.1	1.1	1.2	1.1	1.3

16-Nov-08	23-Nov-08	30-Nov-08	7-Dec-08	14-Dec-08	21-Dec-08	28-Dec-08	4-Jan-09	11-Jan-09	18-Jan-09	25-Jan-09	1-Feb-09	8-Feb-09	15-Feb-09
2.3	2.5	2.2	2.3	2.4	2.4	2.3	2.1	2.2	2.5	2.5	2.4	2.6	2.7
2.5	2.7	2.4	2.6	2.7	2.6	2.3	2.2	2.4	2.7	2.8	2.7	2.8	2.9
1.4	1.6	1.3	1.3	1.2	1.3	1.8	1.6	1.2	1.5	1.2	1.2	1.8	1.7

22-Feb-09	1-Mar-09	8-Mar-09	15-Mar-09	22-Mar-09	29-Mar-09	5-Apr-09	12-Apr-09	19-Apr-09	26-Apr-09	3-May-09	10-May-09
2.6	2.6	2.8	2.6	2.7	2.8	2.7	2.6	2.6	2.6	2.6	2.6
2.7	2.8	2.9	2.7	2.9	3.0	2.8	2.7	2.8	2.7	2.8	2.7
1.8	1.8	2.0	2.1	1.9	1.7	1.8	1.7	2.0	1.8	1.7	1.9

Registration Decisions Per Hour in eCO

11-May-08 18-May-08 25-May-08 1-Jun-08 8-Jun-08 15-Jun-08 22-Jun-08 29-Jun-08 6-Jul-08 13-Jul-08 20-Jul-08 27-Jul-08 3-Aug-08

Average Registration
Decisions Per Hour for
All Specialists¹

1.4 1.4 1.4 1.7 1.4 1.6 1.5 1.4 1.4 1.4 1.5 1.7 1.7

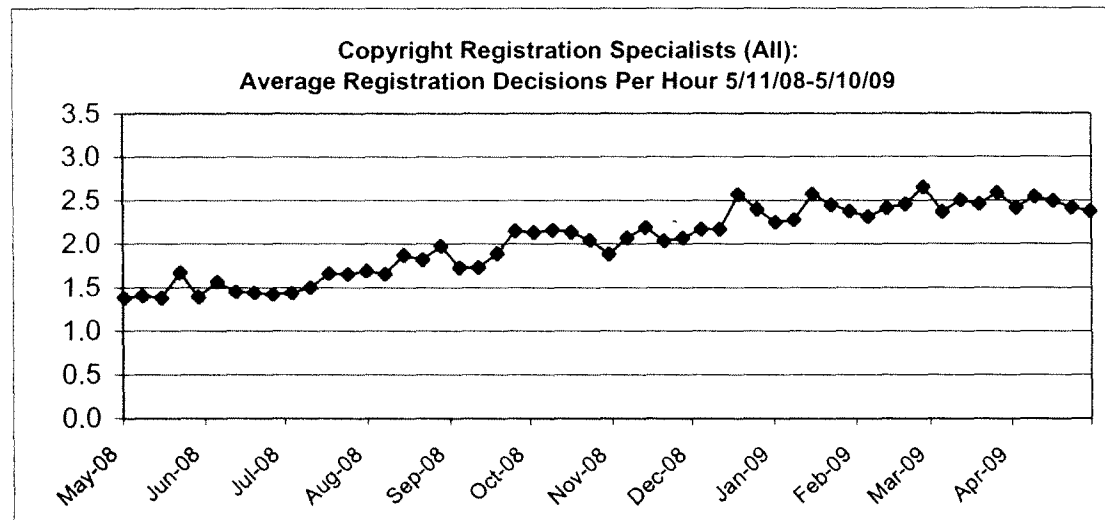
Average Registration
Decisions per Hour for
Specialists who have
completed training as
of 5/10/09²

1.5 1.6 1.5 1.9 1.5 1.8 1.6 1.6 1.6 1.6 1.6 1.8 1.9

Average for Specialists
currently being
counseled for
performance³

0.9 0.7 0.9 0.9 0.9 0.8 0.8 1.0 1.0 0.9 1.1 1.0 1.0

The above data includes: (1) average for all specialists across the past 12 months; (2) average across the past 12 months only for those specialists who were fully trained by May 10, 2009; and (3) average across 12 months for specialists currently being counseled regarding their performance. We have not included in these calculations the new hires, who are in early stages of training, and two specialists who are the President and Chief Steward of AFSCME 2910.

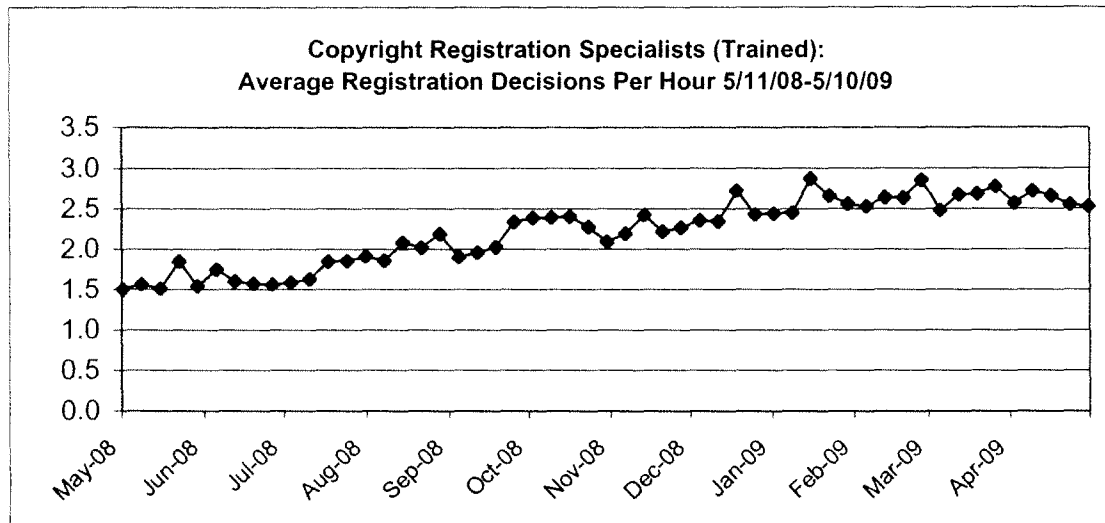


10-Aug-08 17-Aug-08 24-Aug-08 31-Aug-08 7-Sep-08 14-Sep-08 21-Sep-08 28-Sep-08 5-Oct-08 12-Oct-08 19-Oct-08 26-Oct-08 2-Nov-08 9-Nov-08

1.7 1.7 1.9 1.8 2.0 1.7 1.7 1.9 2.2 2.1 2.2 2.1 2.0 1.9

1.9 1.9 2.1 2.0 2.2 1.9 2.0 2.0 2.3 2.4 2.4 2.4 2.3 2.1

0.9 0.9 1.0 1.0 1.0 1.2 0.8 1.0 1.0 1.0 1.0 1.1 1.0 1.1



16-Nov-08 23-Nov-08 30-Nov-08 7-Dec-08 14-Dec-08 21-Dec-08 28-Dec-08 4-Jan-09 11-Jan-09 18-Jan-09 25-Jan-09 1-Feb-09 8-Feb-09 15-Feb-09

2.1 2.2 2.0 2.1 2.2 2.2 2.6 2.4 2.3 2.3 2.6 2.5 2.4 2.3

2.2 2.4 2.2 2.3 2.4 2.3 2.7 2.4 2.4 2.5 2.9 2.7 2.6 2.5

1.4 1.1 1.3 1.2 1.3 1.2 1.6 1.3 1.2 1.2 1.0 1.1 1.5 1.3

22-Feb-09 1-Mar-09 8-Mar-09 15-Mar-09 22-Mar-09 29-Mar-09 5-Apr-09 12-Apr-09 19-Apr-09 26-Apr-09 3-May-09 10-May-09

2.4 2.5 2.7 2.4 2.5 2.5 2.6 2.4 2.5 2.5 2.4 2.4

2.6 2.6 2.9 2.5 2.7 2.7 2.8 2.6 2.7 2.7 2.6 2.5

1.3 1.5 1.6 1.8 1.6 1.3 1.6 1.7 1.5 1.7 1.9 1.6

From: David Christopher
To: eric.garduno
Date: Fri, May 29, 2009 4:31 PM
Subject: Copyright Office processing

REDACTED EMAIL ADDRESS.
EXEMPTION 6-PRIVACY INTEREST

Eric,

I have attached several documents in response to your recent email requests. The flow charts document process steps of registrations filed by the various methods (e-service w/digital deposit, e-service with physical deposit, Form CO, and paper applications). The In-Processing Workflow documents processing steps from the point of receipt at the Capitol Heights facility, where all of our incoming mail goes through an irradiation screening process, through to the registration queue where works await examination by Registration Specialists. Registration Workflow (1) documents process steps from the point of retrieval from the registration queue through examination. Registration Workflow (2) documents process steps from the point of approval (for works that are approved for registration) through final disposition of the deposit copy. The average completion times listed at the bottom of Registration Workflow (2) are for works that do not require correspondence with the remitter. The correspondence rates for each type of filing are also listed. The flow charts demonstrate efficiency gains of processing e-service vs. paper claims, both during the in-processing phase but also in the registration phase.

You also asked about the relatively frequency of complaints the Office is currently receiving. The volume of status inquiries, i.e., requests from remitters for confirmation that their application/payment/deposit copies have been received and are in process, has jumped in recent months, has held steady as a percentage of all inquiries received in our Public Information Office over the course of the past 12 months (see attached Word doc). Also, the number of congressional inquiries received from April 2008 through April 2009 has held steady. Here are the numbers by month (it should be noted that congressional inquiries cover a range of issues, but some are essentially complaints from remitters):

April 2008 - 14
May 2008 - 15
June 2008 - 6
July 2008 - 13
August 2008 - 9
September 2008 - 11
October 2008 - 8
November 2008 - 2
December 2008 - 11
January 2009 - 15
February 2009 - 13
March 2009 - 15
April 2009 - 15

I hope you find this information helpful. As noted I will be out next week but will touch base with you after I return the week of June 9-12.

David

David J. Christopher
Associate Chief Operating Officer
Copyright Office
Library of Congress
202.707.8825
dchr@loc.gov

File Edit View Favorites Tools Help

Back Search Folders

Address C:\Documents and Settings\acoe\My Documents\MyFiles\FOIA\Requests 2009-2010\08-10 Ravnitzky Docs\RELEASED DOCS

File and Folder Tasks

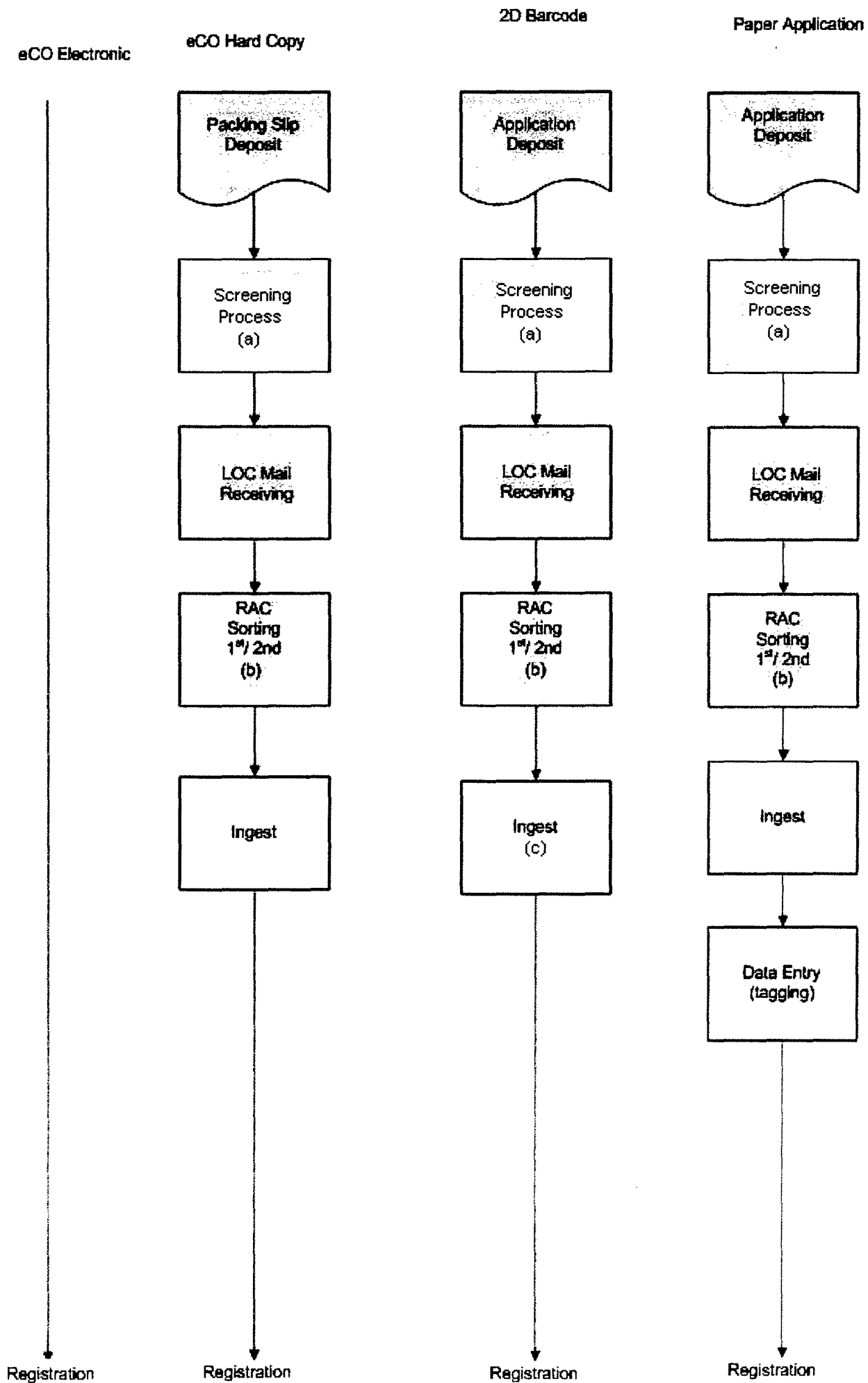
- Make a new folder
- Publish this folder to the Web

Other Places

- 08-10 Ravnitzky Docs
- My Documents
- My Computer
COPB5PRBC1
- My Network Places

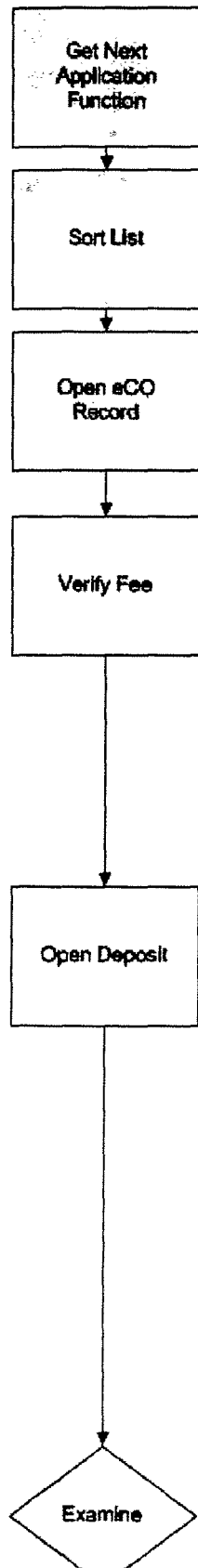
Details

Name	Size	Type
2007 03-March 12 Peters to Leahy & Specter	70 KB	Adobe Acrobat
2007 11-Nov 19 Pallante to Sandgren_OW and Technology	433 KB	Adobe Acrobat
2008 05-May 2 Peters_OW Responses	324 KB	Adobe Acrobat
2008 06-June 24 Legislative Recommendations	700 KB	Adobe Acrobat
2008 09-Sept 12 Response to Garduno	271 KB	Adobe Acrobat
2008 09-Sept 18 Christopher to Garduno	56 KB	Adobe Acrobat
2008 09-Sept 23 Christopher to Garduno	24 KB	Adobe Acrobat
2008 10-Oct 3 Peters to Whitney	376 KB	Adobe Acrobat
2008 10-Oct 24 Christopher to Garduno	18 KB	Adobe Acrobat
2008 12-Dec 5 Peters to Berman and Coble	1,441 KB	Adobe Acrobat
2009 02-Feb 24 Response to Garduno email of 2009 Feb 24 0718pm	92 KB	Adobe Acrobat
2009 03-March 24 Peters to Conyers Hearing Q&As Sec. 119	336 KB	Adobe Acrobat
2009 05-May 21 151pm Christopher to Garduno	113 KB	Adobe Acrobat
2009 05-May 21 1230pm Christopher to Garduno	234 KB	Adobe Acrobat
2009 05-May 29 Christopher to Garduno	153 KB	Adobe Acrobat
2009 07-July 20 Woods to Winters_Making Available	32 KB	Adobe Acrobat
2009 07-July 28 GBS and Foreign Rightsholders	119 KB	Adobe Acrobat
2009 09-Sept 18 Peters to Conyers and Lofgren	3,330 KB	Adobe Acrobat

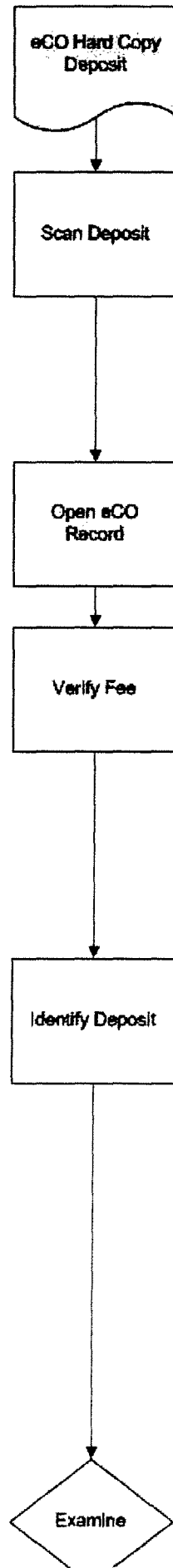


eCO Registration Process

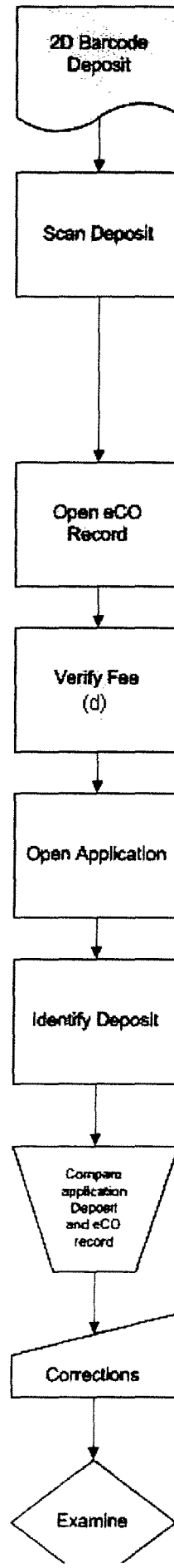
eCO Electronic



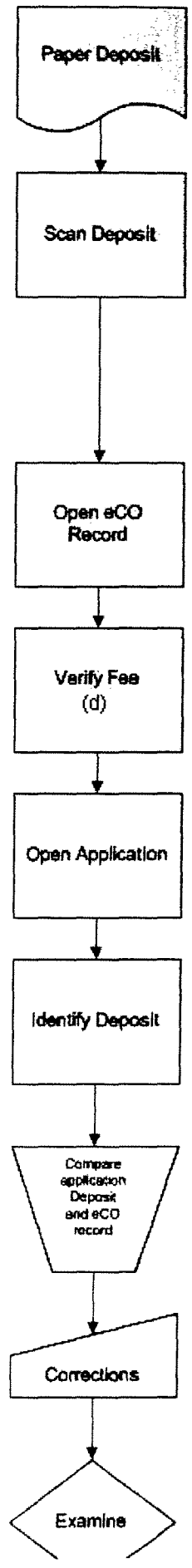
eCO Hard Copy



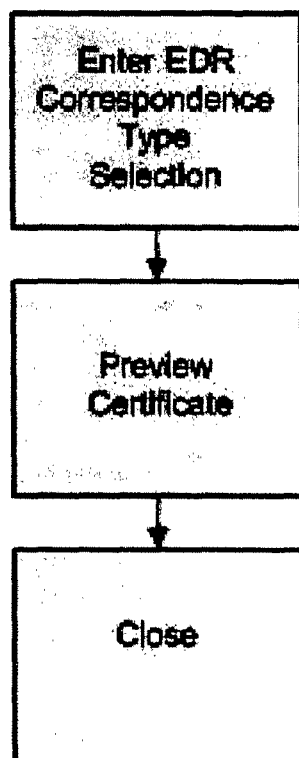
2D Barcode



Paper Application

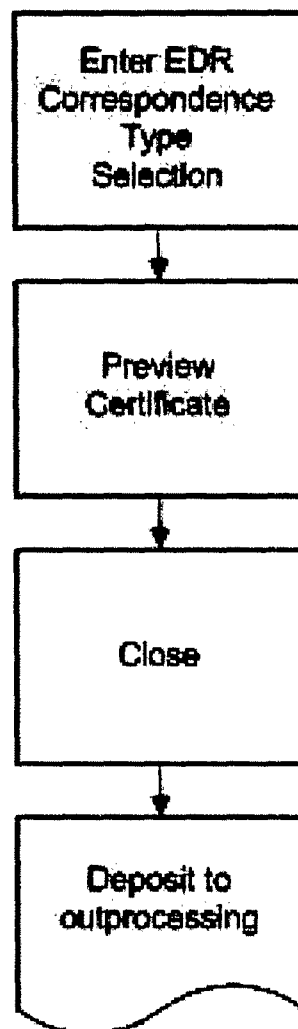


eCO Electronic



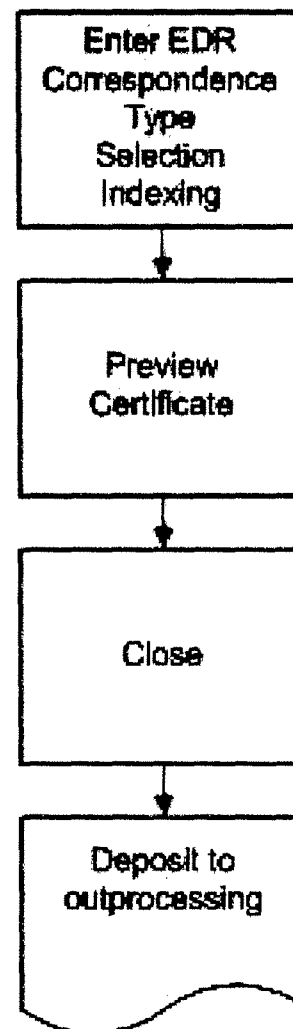
Time to complete-
3 min to 10 min
5-20%
correspondence

eCO Hard Copy



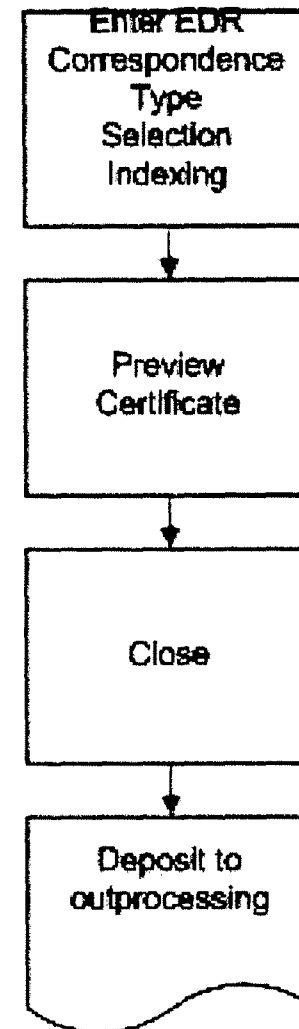
Time to complete
3 min to 10 min
5-20%
correspondence

2D Barcode



Time to complete
10-30 minutes
15-25%
correspondence

Paper Deposit



Time to complete
7-25 minutes
15-25%
correspondence

Footnotes

- (a) It typically takes two days from the point a package is received at the Capitol Heights screening facility until it arrives at the LOC loading dock. If there is a "false positive" reading during the screening (or some other reason for the package to be retested), it can take up to seven days. Irradiation during the screening process is damaging to deposit copies, particularly CD/DVDs, often requiring replacement copies to be mailed and the entire process to be repeated.
- (b) It typically takes 3-5 days for work to move from the LOC loading dock through the 1st sort in the basement of the Madison Building and then through the 2nd sort on the 4th floor of the Madison Building.
- (c) 5-6% of all 2D barcode claims are unscannable. These are transferred to the data entry queue for processing.
- (d) 15-20% of 2D barcode and paper claims require short/incorrect fee correspondence.

**STATUS INQUIRIES RECEIVED IN PIO
2008-2009**

	Total Received	Total Status	Percentage
<hr/>			
PHONE CALLS			
<u>2008</u>			
(Status calls not tracked before 5/08)			
May	9,131	2,441	27%
June	8,475	1,721	25%
July	8,287	2,012	24%
August	8,601	2,066	28%
September	8,368	2,020	30%
October	8,785	3,280	37%
November	6,354	2,016	32%
December	7,326	2,165	30%
 <u>2009</u>			
January	7,055	2,183	31%
February	8,894	3,198	36%
March	11,278	3,052	27%
April	11,394	3,721	33%
 EMAILS			
<u>2008</u>			
January	2,011	543	27%
February	3,771	943	25%
March	3,119	905	29%
April	4,735	1,515	32%
May	3,591	934	26%
June	2,993	928	31%
July	4,774	1,575	33%
August	4,081	1,347	33%
September	4,001	1,240	31%
October	4,109	1,644	40%
November	4,599	1,656	36%
December	4,372	1,312	30%
 <u>2009</u>			
January	3,596	1,402	39%
February	4,152	1,453	35%
March	4,189	1,466	35%
April	5,173	1,448	28%

**THE UNITED STATES IMPLEMENTATION OF
THE RIGHTS OF COMMUNICATION TO THE PUBLIC
AND MAKING AVAILABLE IN INTERNATIONAL TREATIES**

July 20, 2009

Legal Authority for the Rights of Communication to the Public and Making Available

The communication to the public and making available rights are addressed in the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”), collectively known as the WIPO Internet Treaties. These treaties were designed to update existing international copyright obligations to reflect the developments of the Internet era.

Article 8 of the WCT governs literary and artistic works as follows:

Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

The WPPT governs the rights of producers and performers with respect to phonograms. Articles 10 and 14 read, respectively:

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

WCT and WPPT Treaty Provisions

The WCT creates a new obligation for literary and artistic works, but it does not create an express making available right. Rather, it inserts the making available concept as a subset of the right of communication to the public. This was done because contracting parties could not agree on the appropriate right under which to protect an interactive transmission. During treaty negotiations, there were differences of opinion as to whether “making available” should be covered by the distribution right or by a right of

communication to the public.¹ Both approaches presented difficulties and gaps when applied to digital interactive transmissions. The solution adopted by the contracting parties, known as the “umbrella solution,” was to address all concerns through neutral language in Article 8. Contracting parties were given freedom to implement this right by providing either a general communication to the public right, other rights (i.e. distribution), or a combination thereof.²

The WPPT, in contrast, grants performers and producers of phonograms an express making available right. Articles 10 and 14 of the WPPT follow the rationale of the “umbrella solution” in that contracting parties are free to implement these provisions by either granting a separate making available right or through other rights.³ In the WPPT, the right of communication to the public is addressed only in Article 15, where performers and producers of phonograms are given a right of remuneration for the communication to the public of their works.⁴ The discrepancy arose because the contracting parties were unable to agree on an exclusive right of communication to the public for phonograms and the performances fixed therein, but needed to provide an exclusive right for the interactive transmission of those same phonograms and performances. Thus, the making available right for interactive transmissions is stated as an exclusive right, while the right of communication to the public is a right of remuneration.

U.S. Compliance with the WIPO Internet Treaties

The United States ratified the WCT and WPPT in 1998⁵ after the responsible agencies advised Congress that compliance could be achieved with minimal implementing

¹ The Berne Convention does not include a distribution right, and until recently the copyright laws of many countries did not include such a right. The WCT recognized a distribution right, but that right covers only the distribution of “fixed copies that can be put into circulation as tangible objects.” WCT, Art. 6 (Agreed Statement). While the United States has long had a distribution right and has interpreted this right as including distribution by means of electronic transmission, countries that have implemented the WCT distribution right typically have not extended that right to cover electronic transmissions.

² Mihály Ficsor, Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms 207-11 (World Intellectual Property Organization 2003).

³ *Id.* at 247-48, 250.

⁴ WPPT, Art. 15 (1) (“Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.”).

⁵ WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty (signed April 12, 1997), S. Treaty Doc. No. 105-17 (ratified October 21, 1998).

Instruments of ratification were deposited with WIPO in 1999. See WCT Notification No. 10 WIPO Copyright Treaty, http://www.wipo.int/edocs/notdocs/en/wct/treaty_wct_10.html (last visited July 14, 2009); WPPT Notification No. 8 WIPO Performances and Phonograms Treaty, http://www.wipo.int/edocs/notdocs/en/wppt/treaty_wppt_8.html (last visited July 20, 2009).

The WCT and WPPT came into force in 2002. See WIPO Administered Treaties Database, http://www.wipo.int/edocs/notdocs/en/wct/treaty_wct_32.html (last visited July 20, 2009) (noting that after

legislation. The Clinton Administration testified that only four technical amendments, none of them relating to substantive rights, were necessary in order to implement the treaties.⁶ The Register of Copyrights testified that the “nature and scope of copyright rights and exceptions would not be affected.”⁷

Congress implemented both treaties the same year the Senate ratified them, by passing the Digital Millennium Copyright Act.⁸ In doing so, the House Committee on the Judiciary stated that the DMCA would “bring the law into compliance with the treaties” and that “[t]he treaties do not require any change in the substance of copyright rights or exceptions in U.S. law.”⁹ The Senate Committee on the Judiciary stated that the legislation was designed to implement the WCT, including the provision “recogni[zing] . . . a broad right of communication to the public that includes the Internet.”¹⁰ Several years later, in response to a congressional inquiry, the Register explained that “the activities involved in making a work available are covered under the exclusive rights of reproduction, distribution, public display and/or public performance set out in Section 106” and that existing provisions of U.S. copyright law were sufficient to meet the making available obligation of the WCT.¹¹ The Register’s determination is consistent with the “umbrella” solution proposed and adopted during negotiation of the WIPO Internet Treaties.

Since 1998, the United States has consistently reaffirmed its compliance with the making available right, most notably in the context of the many Free Trade Agreements to which the U.S. is a party. Those agreements, each drafted and negotiated by the Executive

the deposit by thirty States of their instruments of accession or ratification, the WCT came into force for those States on March 6, 2002); http://www.wipo.int/edocs/notdocs/en/wppt/treaty_wppt_32.html (last visited July 20, 2009) (noting that through the deposit by thirty States of their instruments of accession or ratification, the WPPT came into force for those States on May 20, 2002).

⁶ *WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary*, 105th Cong. 37 (1997) (statement of Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks).

⁷ *WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary*, 105th Cong. 43 (1997) (statement of Marybeth Peters, Register of Copyrights).

⁸ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860, 2876 (1998) (“DMCA”).

⁹ H.R. Rep. No. 105-551, pt. 1, at 9 (1998).

¹⁰ S. Rep. No. 105-190, at 9-10 (1998).

¹¹ *Piracy of Intellectual Property on Peer-to-Peer Networks: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 107th Congress 114-15 (2002) (letter from Marybeth Peters, Register of Copyrights, to Rep. Howard Berman, Ranking Member, Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary).

Agencies and approved by Congress, include an explicit obligation to provide a making available right.¹²

Other Countries' Implementation of the Rights of Communication to the Public and Making Available

There is some variation in how other countries implemented the obligations of the WIPO Internet Treaties. Given the “umbrella solution,” contracting parties were free to address these obligations by explicit provision of the rights of communication to the public and making available or through a combination of existing exclusive rights. For example, while some European countries, like Germany and the UK, chose to implement the WIPO Internet Treaties and the 2001 European Union Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society (known as the EU Copyright Directive)¹³ by creating explicit rights of communication to the public and making available, other countries such as France chose to implement their obligations through existing laws.¹⁴

In implementing the WIPO Internet Treaties and the EU Copyright Directive, Germany added Section 19a to its Copyright Act to provide for an express making available right.¹⁵ The German Copyright Act already included a general right of communication to the public in Article 15, which was retained in the updated copyright law. Further clarification was necessary to ensure that the right applied to interactive transmissions.¹⁶

The United Kingdom chose to implement the WIPO Internet Treaties and EU Copyright Directive by amending the Copyright, Designs and Patents Act of 1988. The 2003 amendments provided an explicit right of communication to the public, including the “making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by

¹² Australia Free Trade Agreement at Art. 17.4(2); Bahrain Free Trade Agreement at Art. 14.4(2); Chile Free Trade Agreement at Art. 17.5(2) and (3); Morocco Free Trade Agreement at Art. 15.5(3); Oman Free Trade Agreement at Art. 15.4(2); Peru Trade Promotion Agreement at Art. 16.5(3); Singapore Free Trade Agreement at Art. 16.4(3).

¹³ Directive 2001/29/EC (May 22, 2001). *See* Articles 3 (right of communication to the public and right of making available) and 4 (distribution right).

¹⁴ Guido Westkamp, *The Implementation of Directive 2001/29/EC in the Member States* 4-5 (Queen Mary Intellectual Property Research Institute, Centre for Commercial Law Studies, 2007).

¹⁵ Article 19a of the Copyright Act of 9 September 1965, as amended in 2002, states: “The right of making available to the public is the right to make the work available to the public, by wire or wireless means, in such a way that it is accessible to members of the public from places and at times of their choice.”

¹⁶ Westkamp at 222.

them.”¹⁷ Performers are also granted an express making available right under section 182CA.¹⁸

The French Intellectual Property Code grants authors the rights of reproduction and public performance of their works.¹⁹ French legislators determined that the existing *droit de representation* was sufficiently broad to cover all aspects of the right of communication to the public, including making available.²⁰ Therefore, this right remained unchanged through the implementation of the WIPO Internet Treaties and the EU Copyright Directive. The French Intellectual Property Code also provides performers and producers of phonograms the right of communication to the public.²¹

Complexities of Applying International Obligations to Real-World Economic Scenarios

When looking at the question of how right holders in the United States fare compared to their counterparts in Europe, one must look not only to the nature of the different legal rights, but also to the amount of compensation paid to various right holders under each system and the manner in which that compensation is distributed among those right holders. Obtaining and interpreting all the information required to do a direct comparison would be quite complicated.

It is true that U.S. right holders (for example, songwriters) do not have an explicit making available right in the United States, as they do in European countries. Thus, in general when a song is downloaded in the United States, the songwriter will be compensated for the reproduction right and the distribution right (but not expressly for a making available right, since we have no such express right in the United States), whereas when a song is downloaded in Europe, the songwriter will be compensated for the reproduction right and the making available right (but not the distribution right). We do not yet have enough data to know whether the songwriter is collecting more in Europe or in the United States. But it should be noted that U.S. songwriters do not necessarily collect a market rate for exploitation of the reproduction and distribution rights – at least with respect to phonorecords – in part because Section 115 provides a compulsory license rate set based on criteria other than actual market value, and this rate in turn affects contracts and licensing arrangements for right holders. In other words, it is possible that if Section 115

¹⁷ Copyright, Designs and Patents Act of 1988, as amended through December 31, 2003, Article 20(2)(b).

¹⁸ Copyright, Designs and Patents Act of 1988, Article 191A(1).

¹⁹ Intellectual Property Code, Act No. 2006-236 as amended 1 March 2006, Article L122-1.

²⁰ Westkamp at 208. Article L122-1 of the French Intellectual Property Code grants authors the exclusive rights of performance and reproduction. Article L122-2 defines performance as “public recitation, lyrical performance, dramatic performance, public presentation, public projection and transmission in a public place of a telediffused work.”

²¹ The rights of performers are outlined in Article L212-3 of the French Intellectual Property Code, and the rights of producers of phonograms can be found in Article L213-1 of the same.

were revised to incorporate a market value standard, right holders would obtain greater compensation.

With respect to songs that are incorporated in movies or other audiovisual works, songwriters' contracts are an essential part of the equation. U.S. songwriters do not typically control the exploitation of the reproduction or distribution right for musical works, because their private contracts (and limited bargaining power) do not allow them to do so. However, they often get paid directly for the public performance right, which is licensed through the PROs.

As far as we are aware, at this point in the evolution of digital technologies the question of which rights are and will be more valuable in the marketplaces of today and the future remains unresolved. Resolution of these questions could vary for different types of works, and will likely be dependent on a number of factors including whether consumers choose to stream or download those works.

July 28, 2009

The Google Book Settlement (GBS) and Foreign Rights Holders

1. *The Effect of the GBS on Non-US Works and Foreign Rights Holders:*

- The GBS covers rightsholders who, as of January 5, 2009, own a U.S. copyright interest in one or more books or inserts (defined terms). Because the United States has reciprocal copyright relationships with most countries in the world, many works (if not the majority) within the class will be non-US works with foreign rights holders. *What is the reason for including non-U.S. works in the GBS?*
- It appears that books that are U.S. works (as defined under the U.S. Copyright Act) must have been registered with the U.S. Copyright Office on or before January 5, 2009 in order to be covered by the GBS. Registration is not a condition for non-U.S. works. *Does this mean that rights holders in foreign countries may be disproportionately affected by the GBS?*
- Questions have been raised by foreign rights holders who never made their works commercially available in the United States. For example, foreign-published books that were found in only a few university research libraries in the US are nonetheless within the scope of the GBS. *How does one explain this result to a foreign government or stakeholder?*
- Particular concerns have been raised by foreign rights holders who believe that the GBS will implicate their ability to license exclusive rights to their books. In other words, the GBS allows the Book Rights Registry to license certain uses of the books to Google; therefore the rights holder, as a practical matter, is left only with the ability to offer nonexclusive rights to others. *Is this accurate?*

2. *Use of the Class Action Mechanism to Settle the Lawsuit Against Google:*

- Foreign rights holders generally are not familiar with the US class action mechanism and cannot understand how they can be bound by a settlement when they had no role in either the litigation or the settlement negotiations. *Is there any reason to believe that the GBS might be an impermissible use of the class action mechanism, either because of its scope or practical effect?*
- Foreign rights holders have particular concerns with the forward-looking scope of the GBS. In addition to addressing past claims of infringement (i.e. the scanning), the GBS will allow Google to make many future uses of the works scanned, subject to cumbersome opt-out provisions. *Can you provide comparable examples of class action settlements that have addressed future rights as well as past harms?*

3. *Opt-Out Provisions:*

- Foreign rights holders have expressed concerns and confusion about the requirements that rights holders must actively “opt out” of the settlement in order to retain the legal right to challenge Google’s infringement.
- Complaints about the opt-out procedures include: 1) the short notice period provided for opting out (even after the deadline was extended to September), 2) the adequacy of the notice distribution, 3) the difficulties of participating in the US court system from abroad and in other languages, and 4) the potential expense of hiring US counsel to assist in the process, where warranted. Similar concerns have been raised about the difficulties of participating in the fairness hearing in New York on October 7th.
- For rights holders who do not opt out of the settlement itself, but wish to control the use of their works going forward, there are concerns about the significant burden of doing so. These logistical difficulties are exacerbated for foreign rights holders. *What exactly does a foreign rights holder need to do to either object to the GBS or control the use of their works?*
- Some have suggested limiting the scope of the GBS to US works only or reverting the GBS to an “opt in” structure for foreign rights holders. *Would Google object to this and, if so, on what basis?*

4. *Treatment of Works as Out-of-Print:*

- Under a key default provision of the GBS, Google may commercially exploit a work that is out of print, even if the work is not necessarily orphaned. *How did the parties arrive at the out of print standard?*
- Some works that are under copyright protection and considered “in print” in countries outside the United States will be considered “out of print” and not “commercially available” under the definitions used in the GBS. Google will be permitted to make commercial use of out of print works until and unless the rights holder emerges. *Why apply a U.S. standard to foreign works?*
- Under default rules of the GBS, Google is not required to search for rights holders before making certain commercial uses of out of print works, but the GBS places significant burdens on rights holders in order to opt out of uses that are otherwise permitted. *Why shouldn't Google conduct an active search for the rights holder, on a work by work basis, before commercially exploiting a copyrighted work?*

5. *Book Registry:*

- Concerns have been raised about the operation of the Book Rights Registry and how cumbersome it may be for foreign rights holders to interface with it, immediately and over time.
- Foreign rights holders (most recently some in Japan) have suggested that separate book registries might be needed in other countries whose rights holders are affected by the settlement. *How are foreign rights holders typically compensated by collecting societies in the United States?*

6. *Potential Implications for US Treaty Obligations:*

- Concerns have been raised that the GBS might put the US in the situation of not complying with its international treaty obligations (e.g. under TRIPS and the WTO) to grant copyright owners of other member countries whose works are still in copyright in their countries of origin the same rights granted to US works. This situation could arise when works under copyright in member countries are considered out of print in the GBS.
- The requirement that foreign rights holders join the Book Rights Registry could be construed as a formality that conditions their enjoyment and exercise of their exclusive copyright rights.
- The GBS has been characterized as the equivalent of a broad “compulsory license” that favors only one party. It thus appears to be inconsistent with the narrowly tailored compulsory licenses that would be consistent with international treaty obligations and would be enacted in the event of market failure.
- Even though the GBS is not legislation, it is likely that foreign governments and stakeholders will analyze it under international treaty obligations, from a practical and technical perspective. How does the GBS relate to the three-step test? *See TRIPS Article 13 - Limitations and Exceptions:*

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

- Unlike the orphan works bills introduced previously by Congress, the GBS caps the amount of compensation available to a rights holder who may emerge, thereby limiting Google’s out of pocket costs. *Why shouldn't Google pay a market rate to the rights holder for the particular work at issue, based in part on objective evidence put forth by the rights holder?*



The Register of Copyrights of the United States of America

United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

September 18, 2009

The Honorable John Conyers, Jr.
Chairman, House Committee on the Judiciary
2426 Rayburn House Office Building
United States House of Representatives
Washington, D.C. 20515

The Honorable Zoe Lofgren
House Committee on the Judiciary
102 Cannon House Office Building
United States House of Representatives
Washington, D.C. 20515

Re: Register of Copyrights' Google Book Search Settlement Testimony

Dear Chairman Conyers and Ms. Lofgren:

Thank you very much for your letter of September 15, 2009. I welcome the opportunity to respond to the concerns you have raised about my testimony at the House Committee on the Judiciary hearing on Competition and Commerce in Digital Books that was held on September 10, 2009.

First, however, I want to apologize once again for providing my testimony to the Committee less than twenty-four hours in advance of the hearing. I understand that the Committee must receive the testimony in advance, and I can assure you that such a delay will not occur again.

As a threshold point, my testimony reflects months of critical thinking about very complex copyright issues. I began raising these issues in public programs as early as last spring, including at Columbia Law School and the London Book Fair, and was appreciative of the opportunity to present my analysis to Congress.

With respect to the concerns you raise about the contents of my testimony, it may be that some of the points I attempted to make were not sufficiently clear. I do stand by the accuracy of the statements in my testimony, and I will try to clarify those points in this response. If questions remain, I would welcome the opportunity to meet with you and other members of the Committee to discuss my testimony.

In your letter, you suggest that my comparisons of the settlement to a compulsory license "stretch the meaning of 'compulsory license' beyond reason." I used the terms "tantamount to a compulsory license" and "similar to a compulsory license" to distinguish between the terms of the proposed settlement and an actual compulsory

license, while at the same time pointing out that the scope of the proposed settlement makes it operate very much like a compulsory license. It is true that some out-of-print rights holders were aware of their ability to opt out of the proposed settlement and were able to navigate the procedures in time to observe the September 8, 2009 deadline. It is also true that informed rights holders who did not opt out may in the future direct or stop Google from engaging in certain of the activities contemplated by the settlement. However, the fact remains that the proposed settlement allows Google automatically to exercise far-reaching rights to scan every book in the class, until and unless the copyright owner objects. Beyond the scanning, it is fair to say that the provisions of the proposed settlement that apply to out-of-print books also function in a compulsory, or at least involuntary, manner because Google is authorized to make new uses without the need for any affirmative consent from the rights holder.

As I testified, it is troubling that the proposed settlement has one of the fundamental characteristics of a compulsory license: it breaks from the traditional copyright licensing regime of individual contracts enforceable in individual lawsuits. Instead, as a result of the proposed settlement, Google will be granted what amounts to an effective license and release from liability and permission to reproduce by scanning entire libraries full of books and inserts that were published by January 5, 2009, without the consent of individual authors and publishers, or their heirs and successors, and without congressional consideration. The scope of the potential scanning permitted under the settlement will include tens of millions of additional books that were not yet scanned by the opt-out deadline, and whose rights holders thus will receive no monetary compensation for digitization. Millions of works and rights holders will be affected by the massive, ongoing scanning project. I continue to believe that this license to scan with impunity is both an encroachment on the legislative function and contrary to longstanding copyright policy based on respect for exclusive rights.

You acknowledge that under the proposed settlement out-of-print works (including orphan works) will be subject to default uses by Google. While you suggest that many rights holders will have good reasons to step forward and control these uses, I continue to believe that the preferred policy, consistent with existing copyright law, is to eliminate the default rules applicable to out-of-print works. As I testified, "the question of whether a work is in-print ... or out-of-print ... is completely inconsequential as to whether the work is entitled to copyright protection under the law." If the financial incentives and Book Rights Registry searches you reference are successful, there should be no need to reverse longstanding principles of copyright law for out-of-print books in order to encourage rights holders to register with the Book Rights Registry. Rather, if the Book Rights Registry prospers, Google should see its universe of works incrementally increased as rights holders come forward to participate voluntarily.

Your letter also expresses concerns about statements you believe I made regarding class action proceedings, specifically "that large classes of plaintiffs in copyright litigation are inherently problematic" and "that class action settlements cannot properly include agreements allowing for future uses of copyrighted works." However, I made neither of these statements in my testimony. I am puzzled as to how my testimony could be read to support these broad generalizations about class action proceedings in copyright litigation,

especially because I readily acknowledged that “[w]e are not experts on the proper scope of class action settlements.”

I want to clarify that my comments were specific to the copyright policy implications of the particular terms of the proposed settlement, especially as they relate to out-of-print (generally no longer commercially available) books. The large size of the class in this particular class action settlement is problematic because, as explained above and in my testimony, “the class is not anchored to past or imminent scanning, but instead turns on the much broader question of whether a work was *published* by January 5, 2009.”

Moreover, as your letter acknowledges, “the Settlement allows Google default uses of out-of print works,” uses which I testified “operate under reverse traditional principles of copyright law,” because they do not require Google to obtain prior consent. With respect to future uses of copyrighted works, my point was simply that for millions of out-of-print works this particular “settlement permit[s] extensive future uses of copyrighted products *that were not the subject of the original infringement action.*” (Emphasis added.) An equally important point I made was that unlike the digitization (including snippets) that was the subject of the original infringement action, and that could arguably be considered fair use, these new future uses, including on-line displays (up to 20% of a work), full-text purchases, and subscription products for institutional subscribers and library patrons, could not reasonably be asserted as fair use and therefore would clearly be infringements of exclusive rights. I do not believe that even the parties to the proposed settlement have suggested otherwise. It seems highly inappropriate to use the device of a class action lawsuit to permit the creation of an entirely new business model built upon copyright infringement, even if the defendant and the class representatives find it to be to their economic advantage.

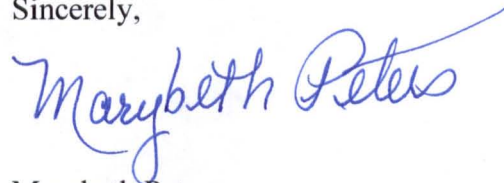
Your last point addressed my expressed concern that the proposed settlement “would interfere with the longstanding efforts of Congress and many other parties to address the issue of orphan works.” I continue to believe that the adoption of a proposed settlement that provides only Google with the ability to make commercial uses of orphan books, without a diligent search requirement and with a release from all liability, will make it difficult for Congress to adopt orphan works legislation that applies equally and fairly to all potential users and all types of works. While searches for rights holders by the Book Rights Registry would be useful, the searches should occur *before* the use of the works, not just afterwards for the purpose of distributing funds.

As you know, orphan works legislation as discussed to date by Congress has always included an obligation to undertake a search for the copyright owner that is reasonable for the circumstances. Indeed, the very definition of an orphan work is that the copyright owner could not be located despite such a search. Should the settlement go forward, I observe that only Google would be absolved from the obligation to seek the prior consent of rights holders. This would be the case despite the fact that Google offers an expert search engine and is well situated to seek rights holders, and even though books, unlike some other kinds of copyrighted works, offer so much information (title, authors, publisher, publication date) from which to construct a search.

The ability of Congress to consider all options and all points of view, and to adopt the best balance in orphan works legislation, could be constrained significantly by the provisions that already apply to Google through the proposed settlement. I expect that the settlement would fundamentally change the starting point for what might realistically be included in orphan works legislation because stakeholders will be unable to agree on search requirements while Google has none. Despite my concerns, I am very pleased to learn that Congress plans to move forward on legislation to address orphan works. My staff and I welcome the opportunity to work with you on this important initiative.

Once again, thank you for the opportunity to respond to your concerns about my testimony.

Sincerely,

A handwritten signature in blue ink that reads "Marybeth Peters". The signature is fluid and cursive, with a long horizontal stroke extending from the end of the name.

Marybeth Peters
Register of Copyrights