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**By electronic submission**

September 21, 2018

Karyn A. Temple  
Acting Register of Copyrights  
U.S. Copyright Office  
101 Independence Ave. S.E.  
Washington, D.C. 20559-6000

**Re:** New Fee Schedule for Copyright Office

Dear Ms. Temple:

I am writing on behalf of the law firm Larson Skinner PLLC in response to the request for comment regarding the proposed fee schedule for the Copyright Office (“Office”). Our firm’s practice provides copyright, trademark, technology, and licensing counsel to individuals, trade organizations, standards settings bodies, and small, growing, and large companies. Our firm represents a significant number of Multiple Listing Services (“MLS”) in the United States.

Specifically, I am writing in opposition to the increase fee for group registration of updates and revisions to non-photographic databases (“GRNPD”) from \$85 to \$500. For the reasons set-forth below, we believe the proposed increase in the fee for GRNPD is against public policy and reducing the cost of examining GRNPD would better be accomplished by allowing electronic filings.

We have reviewed the proposed changes to the fee schedule, the notice of proposed rulemaking, and the 2017 Fee Study Report conducted by Booz Allen Hamilton. As a result of our review, we have the following objections to the proposed new fee schedule to the extent it drastically raises the cost of registering GRNPD.

**I. THE PROPOSED FEE INCREASE IS AGAINST PUBLIC POLICY**

The proposed increase, with respect to GRNPD is against public policy for two reasons. First, the proposed increase is against public policy because it impermissibly disincentivizes registration of copyrightable databases. Second, the proposed increase is against public policy because disincentivizing registration of copyright databases would leave MLSs vulnerable to copyright infringers.

**A. The Proposed Fee Increase Disincentives Registration of Databases**

When assessing whether to increase the fee schedule for copyright registration, the Copyright Office (“Office”) must consider the public importance of registrations and the copyright owner’s access to



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legal protections.<sup>1</sup> In determining the appropriate fee, the public importance of registration, access to legal protections, and provision of materials to the Library of Congress must be accounted for.<sup>2</sup>

The proposed increase for both GRNPD and the group registration of photographic databases appears to be based on a desire to process fewer applications to register group databases, rather than recover costs of processing such claims.

First, the proposed fee increases for registering databases are disproportionately large. The proposed increase from \$85 to \$500 to register GRNPD is a 488.24% increase. The increase of \$65 to \$250 to file a paper application to register a photographic database is a 284.62% increase. The increase of \$55 to \$250 to file an electronic application to register a photographic database is a 354.55% increase. By contrast the proposed increase in fees for electronic group registration for newspapers/newsletters from \$80 to \$95 represents only an 18.75% increase. On its face, the proposed increase for databases seems disproportionate, even considering the antiquated, paper examination of database applications. Furthermore, the proposed 488% increase is well beyond the Booz Allen Study's recommended increase of only 38%.<sup>3</sup>

Second, the justification for this drastic increase is based (at least in part) on a desire to process fewer applications. The Office and the Booz Allen Study expresses a desire to process fewer applications in two ways. First, the Office notes the work that examination of GRNPD creates for the Office.<sup>4</sup> Secondly, the Booz Allen Study inexplicably singles out GRNPD from other group registrations by labeling demand for GRNPD as inelastic, while admitting that demand for all other group registrations, including photographic databases, is elastic.<sup>5</sup> While it is appreciated that examining and processing applications to register copyrights in databases creates unique challenges, that does not justify such a drastic price increase relative to other group registrations. The Copyright Act specifically authorizes group registrations of databases.<sup>6</sup> The purpose of the Copyright Act is to provide motivation and rewards to authors.<sup>7</sup> As long as databases are protectable under U.S. Copyright law, it is inappropriate for the Office to increase the fees to disincentivize registration of copyrights.

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<sup>1</sup> U.S. Copyright Office, *Fee Study – Policy Considerations*. (Washington, D.C.: U.S. Copyright Office, September 2017). 1-2.

<sup>2</sup> Booz Allen Hamilton, *2017 Fee Study Report* (Dec. 2017), available at <https://www.copyright.gov/policy/feestudy2018> (“Booz Allen Study”), 2.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> Copyright Office; Copyright Office Fees, 83 Fed. Reg. 24059 (May 24, 2018) (noting that a single database provider registered 57,040 photographs between 2012 and 2016).

<sup>5</sup> Booz Allen Study at 24-25.

<sup>6</sup> 17 U.S.C. § 408(c)(1)(2).

<sup>7</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 712, 432 (1984) (“The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor.”).



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**B. The Proposed Fee Increase For GRNPD Would Encourage Infringement of MLS Databases**

MLSs create valuable copyrightable databases of real estate listing and sales information and content. These databases enable real estate professionals to help their clients buy and sell property.<sup>8</sup> MLSs aggregate and distribute listing information regarding both currently for sale and off-market listings. MLSs are the single most important tool used by real estate professionals to find property for the buyers they help. “Managing and protecting listing content is a paramount concern to real estate professionals and the multiple listing services in which they participate.”<sup>9</sup>

The proposed fee increase would create a financial barrier to registration of MLS databases. Authors and corporate entities have varying budgets for protecting their works.<sup>10</sup> Setting fees too high naturally discourages users from registering their works.<sup>11</sup> Each price increase for copyright registration fees of 10% decreases demand by 3.2% if demand is elastic.<sup>12</sup> Likewise, if demand is inelastic, each price increase of 10% decreases demand by 1.6%.<sup>13</sup>

The Office asserts that demand for GRNPD to be inelastic.<sup>14</sup> However, this assumption is not supported by facts or evidence. As discussed above, the Booz Allen Study arbitrarily declares demand for GRNPD to be inelastic, but demand for all other group registrations, including photographic databases, to be elastic.<sup>15</sup> The experience of the U.S. Patent and Trademark Office fee structure demonstrates that demand for front-end services are always elastic, and that increasing fees results in a decrease in applications.<sup>16</sup> Therefore, assuming demand for GRNPD is elastic, the Office can expect a 1562.37% decrease in demand for GRNPD.

Decreasing registrations by 1562.37% would leave MLS databases vulnerable to infringement. Like all copyrighted works, copyright registrations of MLS databases are an essential tool in protecting the database from infringers. Copyright owners are required to secure a registration for their works prior to

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<sup>8</sup> Multiple Listing Service (MLS): What Is It, [www.nar.realtor](http://www.nar.realtor), <https://www.nar.realtor/nar-doj-settlement/multiple-listing-service-mls-what-is-it> (last visited Sep 13, 2018).

<sup>9</sup> Managing Listing Content, [www.nar.realtor](http://www.nar.realtor), <https://www.nar.realtor/legal/copyright/managing-listing-content> (last visited Sep 13, 2018).

<sup>10</sup> Booz Allen Study at 6.

<sup>11</sup> *Id.*

<sup>12</sup> Booz Allen Study at 8.

<sup>13</sup> *Id.*

<sup>14</sup> Copyright Office; 83 Fed. Reg. 24059.

<sup>15</sup> *Supra* at fn 5.

<sup>16</sup> Brauneis, Robert, Properly Funding the Copyright Office: The Case for Significantly Differentiated Fees (July 4, 2017). GWU Law School Public Law Research Paper No. 2017-58; GWU Legal Studies Research Paper No. 2017-58. Available at SSRN: <https://ssrn.com/abstract=2997192> or <http://dx.doi.org/10.2139/ssrn.2997192>.



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enforcing their copyrights in court.<sup>17</sup> Without a registration, or at least a refusal to register, a copyright owner cannot get into court to enforce their copyrights.<sup>18</sup>

Further, the registration gives copyright owners a number of valuable assets in enforcing their copyrights. Registrations are prima facie evidence of the facts in the registration certificate.<sup>19</sup> Periodic registration of copyrights makes the owner eligible to recover costs and attorneys' fees and statutory damages.<sup>20</sup> If an organization adopts a system of regular, systematic registrations of its copyrights, it will be prepared for a lawsuit should infringement arise.<sup>21</sup>

However, a decrease in registrations will leave MLSs vulnerable to infringement. MLS databases are a prime target for would-be infringers because MLS databases provide a wealth of information.<sup>22</sup> MLSs have already successfully enforced their copyrights in listing databases against infringers.<sup>23</sup> It is important to consumers that MLSs be able to enforce their copyrights because, unlike infringers, MLS and real estate brokers are subject to rules and regulations that protect consumers.<sup>24</sup>

## II. AUTOMATING EXAMINATION OF GRNPD IS A BETTER SOLUTION TO THE COSTS OF EXAMINING DATABASES

### A. Examination of GRNPDs are Unnecessarily Antiquated

The Office requires applications seeking to register GRNPD to submit a paper application by mail.<sup>25</sup> The Office justifies the increased fee for GRNPD, in part, because such applications are “are quite costly to process because there is no limit on the number of works that may be included in each submission.”<sup>26</sup> If registration is too cumbersome or expensive, the proper solution is for the Office to accept more efficient deposits.<sup>27</sup>

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<sup>17</sup> 17 U.S.C. §411(a).

<sup>18</sup> *Id.*

<sup>19</sup> 17 U.S.C. §410(c).

<sup>20</sup> 17 U.S.C. §§ 505, and 504(c)(1).

<sup>21</sup> Brian N. Larson and Mitchell A. Skinner, *Real Estate Listings & Copyright* (2016) at 72.

<sup>22</sup> See Kathryn S. Robinson, *Providing Copyright Protection to Real Estate Listings: Protecting Brokers, Sellers, and Consumers*, 15 J. MARSHALL REV. INTELL. PROP. L. 318, 326 (2016).

<sup>23</sup> See, e.g., *Key West Association of Realtors®, Inc. v. Allen et al.*, No. 11-CV-10084-JLK at 2 (S.D. Fla. May 22, 2013); *Metro Reg'l Info Sys, Inc. v. Am. Home Realty Network, Inc.*, 722 F.3d 591 592-93 (4th Cir. 2013); *Reg'l Multiple Listing Serv. Of Minnesota v. Am. Home Realty Network, Inc.* 960 F Supp. 2d 988 (D. Minn. 2013).

<sup>24</sup> Robinson at 325.

<sup>25</sup> U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 204.1(B) (3d ed. 2017).

<sup>26</sup> Copyright Office, 83 Fed. Reg. 24058.

<sup>27</sup> See Pallante. “The Next Generation Copyright Office: What It Means and Why It Matters.” 61 H. Copyright Soc.y 213, 226 (2014).



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## B. Electronic Examination of GRNPDs would Improve Examination

Just as the Office has allowed for electronic filing of photographic databases, it could also allow electronic filing of non-photographic databases. Online applications result in lower filing fees, faster processing, easier submission of deposit copies, and the ability to track the status of an application.<sup>28</sup> The Office typically processes an electronic claim three to six months faster than a paper claim.<sup>29</sup>

Electronic, online applications for GRNPD are empirically feasible. The Office accepts electronic claims for photographic databases.<sup>30</sup> Further, the Office already accepts electronic filings of database files such as Microsoft Access database files, Microsoft Excel spreadsheets, and musical digital interface files.<sup>31</sup> Even though there is no limit on the number of registered works that may be included in a submission, the deposit does not need to be a complete copy of the database.<sup>32</sup> Updates and revisions can be from a representative date and be either a 50 page portion or 50 data records that appear in the database on that date.<sup>33</sup> Local government offices that record real property documents have adopted self-examining electronic documents.<sup>34</sup> Certainly, the Office can start to accept electronic filings for examination of GRNPD. Doing so will reduce the costs and labor in examining GRNPD, without exposing database copyright owners, like MLSs, to infringement of their copyrights.

## Conclusion

For these and other reasons, Larson Skinner PLLC respectfully urges the Office not to adopt the proposed fee schedule for the Copyright Office. Specifically, we ask the Office to consider electronic submissions of GRNPDs and a lower fee increase for GRNPDs that will not result in a substantial reduction on registrations of databases.

LARSON SKINNER PLLC

By Mitchell A. Skinner, attorney at law

<sup>28</sup> *Compendium (Third)* §204.1(A).

<sup>29</sup> *Id.*

<sup>30</sup> *Compendium (Third)* § 1117.4.

<sup>31</sup> U.S. Copyright Office, eCO Acceptable File Types Copyright, <http://www.copyright.gov/eco/help-file-types.html> (last visited Sep 13, 2018).

<sup>32</sup> See *Compendium (Third)* § 1117.6(A).

<sup>33</sup> 37 CFR § 202.20(c)(2)(vii)(D)(5).

<sup>34</sup> Pallante at 230.