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Suzanne Wilson
General Counsel and Associate Register of Copyrights
United States Copyright Office
101 Independence Ave. S.E.
Washington, D.C.
20559-6000

Via Online Submission

RE: Notice of Proposed Rulemaking on Ex Parte Communications, Docket No. 2023-1

Dear Ms. Wilson:

We are writing to express our support for the Copyright Office's proposed rule governing ex parte communications in the context of informal rulemakings under the APA,¹ and commend the Office for its attention to this matter. We also write to offer suggestions on how the proposed rule can be improved and expanded to cover other types of ex parte communications in which the Office is involved.

Authors Alliance has a mission of advancing the interests of authors who write for the public benefit by sharing their work broadly.² Because copyright law has a significant impact on authors' ability to share their work, Authors Alliance has responded to a wide variety of Copyright Office inquiries that may affect the scope of authors' rights under the law. This includes, for example, petitions under the Office's triennial DMCA rulemaking process,³ responses to proposed rules for the Copyright Claims Board,⁴ as well as many contributions to the Office's various policy studies.⁵

¹ Library of Congress, Copyright Office, Ex Parte Communications, 88 Fed. Reg. 10248, Feb. 17, 2023.

² You can read more about our mission and policy positions at <https://www.authorsalliance.org/our-issues/>.

³ See, e.g., Authors Alliance et al, Section 1201 Petition, Dec. 14, 2020, https://www.authorsalliance.org/wp-content/uploads/2020/12/2020-12-14_AuthorsAlliance_et_al_RoundOneComment.pdf.

⁴ See, e.g., Authors Alliance, Comments RE: Copyright Alternative in Small-Claims Enforcement Act Regulations, April 26, 2021, https://www.authorsalliance.org/wp-content/uploads/2021/04/20210426_CASEActRegulations_AuthsAll.docx.pdf.

⁵ See, e.g., Authors Alliance, Publishers' Protection Study, Request for Additional Comments, January 5, 2022, https://www.authorsalliance.org/wp-content/uploads/2022/01/Authors-Alliance_Press-Publishers-Right-Comment.pdf.

Authors Alliance has also engaged in ex parte communications with the Office,⁶ and, particularly in the context of rulemaking proceedings, we have found these ex parte communications to be an effective and efficient means of addressing concerns and open questions following more official hearings and meetings. As copyright law and policy grows more complex in the digital age, ex parte communications can help interested parties and the Office better understand one another as the Office makes important policy decisions. This is true especially as the Office’s regulatory authority has expanded, for example under the DMCA and more recently through the Music Modernization Act and the CASE Act. We believe it is important that the Office exercises its authority in a way that exhibits fairness and fosters public trust in its operations. Enhancing transparency in ex parte communications is one way that this can be accomplished.

Our suggestions regarding the proposed rule are as follows:

- 1) Strengthen the enforcement mechanism.** The rule as currently proposed provides only modest incentives for parties to comply with the requirements around ex parte communications, such as contacting appropriate Copyright Office staff and promptly providing summaries of ex parte meetings. The proposed rule merely provides that “no prohibited ex parte communication shall be considered as part of the rulemaking record, unless it has been introduced into the rulemaking record through a permitted method.”⁷ This provides no additional negative effect on parties making prohibited ex parte communications, which may fail to deter such behavior. These consequences could include sanctions and/or public notification to other parties about any impermissible ex parte communication. As currently written, the rule may do little to incentivize parties to avoid impermissible ex parte communications, and consequently may not do enough to foster public trust that the process is fair.

We suggest that at a minimum, in cases of violations of the proposed ex parte rule, the Office should communicate the violation both to other parties who have already participated in the rulemaking and to the public through a posting on its website. Such a notice should include the name of the party who violated the rule, the fact that they violated the rule, as well as the contents of their ex parte communication or, if not in written form, a summary of the contents of that communication.

⁶ See Letter from Erik Stallman and Catherine Crump on behalf of the Authors Alliance, Re: Docket No. 2020-11 Exemptions to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works Class 7(a) & (b), Aug. 9, 2021, <https://www.copyright.gov/1201/2021/ex-parte/Authors%20Alliance%20Class%207%20Ex%20Parte%20Summary.pdf>.

⁷ Library of Congress, Copyright Office, Ex Parte Communications, 88 Fed. Reg. 10253 (Feb. 14, 2023) (amending 37 C.F.R. § 205.24(f)).

- 2) Clarify the status of communications made outside of prescribed channels.** The current rule proposes that all ex parte communications should be made through either the listed contact person in the relevant Federal Register notice, or to the Office’s Assistant to the General Counsel. We are aware that many organizations and individuals have preexisting working relationships with Copyright Office staff with whom they may regularly communicate, which in many cases would be the most natural point of contact to initiate an ex parte communication. In many cases, because of these existing relationships, those staff members may be more familiar with the background and concerns of parties who contact them directly. We propose that the Office amend the proposed rule to address the status of such communications—either explicitly disallowing them, or providing a mechanism to manage and disclose such communications. On balance, we believe that in the interests of efficiency as well as well-informed rulemaking, ex parte communication with other staff members should be allowed as long as the parties and that staff member a) promptly notify the appropriate contact person listed on the Federal Register Notice, and b) follow all disclosure requirements.
- 3) Strengthen ex parte meeting summary requirement.** The ex parte meeting summary letter requirement is a strong step towards ensuring transparency in ex parte communications, as these summaries will inform interested parties and the public about the existence and nature of ex parte meetings. But the rule as currently written does not include a penalty for a party that fails to send a summary letter. We suggest strengthening this requirement in order to ensure that those parties are aware of any actual or attempted ex parte communications. For example, the rule should make clear that if a party fails to send a summary letter of a meeting altogether, the contents of that meeting will not be part of the rulemaking record. We further suggest that the enforcement mechanisms proposed above be employed to ensure summaries are promptly made available, and parties are disincentivized from failing to comply with the requirement.

Finally, the Copyright Office has significant responsibility beyond those areas in which it might conduct rulemaking. Historically, the Office has played a significant role in shaping copyright policy in the United States by conducting and publishing important studies on copyright policy,⁸ and by giving its public opinion about the legality of private actions,⁹ current or pending legislation,¹⁰ and interpretation of existing regulations.¹¹ We propose that the Office consider

⁸ See <https://copyright.gov/policy/> (documenting nearly 30 policy studies over the last twelve years).

⁹ See, e.g., Letter of Shira Perlmutter, Register of Copyrights and Director, U.S. Copyright Office, in response to Senator Thom Tillis, regarding Maryland’s Ebook legislation, August 31, 2021, https://www.publishersweekly.com/binary-data/ARTICLE_ATTACHMENT/file/000/004/4768-1.pdf

¹⁰ See, e.g., Letter of Maria Strong, Acting Register of Copyrights and Director, U.S. Copyright Office, in response to Senator Udall, regarding the National Emergency Library, May 15, 2020, <https://www.copyright.gov/laws/hearings/Sen-Udall-Response-National-Emergency-Library.pdf>.

expanding this ex parte rule to those other situations in which transparency and public trust are important. We suggest that the Office consider applying this or a similar rule to the following situations:

- ex parte communications related to a policy matter for which the Office has announced a formal study;
- ex parte communications from parties asking to the Office to intervene directly or to persuade the Solicitor General to file amicus briefs in copyright litigation;
- ex parte communications related to any request the Office has received to give its opinion on the legality of actions by private individuals or organizations, where the office intends to publish its opinion; and
- ex parte communications related to current or proposed legislation, or rulemakings initiated by other agencies in which the Copyright Office is involved.

We recognize that these situations likely cover a large number of communications with the Office. However, we believe that the relatively straightforward nature of the Office's proposed rules should make compliance a low barrier for any parties who seek to speak with the Office about these issues in an ex parte communication. Moreover, those burdens would be far outweighed by the benefits of increased transparency and ultimately, enhanced public trust in the fairness and impartiality of the Copyright Office across a wide scope of its operations.

Sincerely,

¹¹ See, e.g., *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 156–57 (2d Cir. 2009) (explaining that a significant conclusion of an already-published Copyright Office letter on the interpretation of a regulation was apparently changed by the Office after a call from an attorney with the RIAA).



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