THE REGISTER'S CALL FOR UPDATES TO U.S. COPYRIGHT LAW

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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THE REGISTER'S CALL FOR UPDATES TO U.S. COPYRIGHT LAW

WEDNESDAY, MARCH 20, 2013

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 3:30 p.m., in room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Goodlatte, Marino, Smith, Chabot, Poe, Chaffetz, Holding, Collins, DeSantis, Rothfus, Watt, Conyers, Johnson, Chu, Deutch, Bass, DelBene, Jeffries, Lofgren, and Jackson Lee.

Staff Present: (Majority) Joe Keeley, Chief Counsel; Olivia Lee, Clerk; and (Minority) Stephanie Moore, Minority Counsel.

Mr. COBLE. Good afternoon, ladies and gentlemen. The Subcommittee on Courts, Intellectual Property, and the Internet will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time. We welcome all of our witnesses today.

The bad news is we are going to have two different series of votes imminently. One will start in about 15 or 20 minutes. But I would like to get the opening statements out of the way early if we could, and I will start with mine.

Today's oversight hearing on the United States Register of Copyrights' call for updates to our copyright law will come to order. Oftentimes friends back home tell me that intellectual property induces sleep, when they read about it, they fall asleep. It is only for rich people they say.

Well, both are wrong. The falling asleep might be right, because sometimes the law does get a little heavy. But we are here for a very important hearing today, and I appreciate you all being here.

It is my pleasure to welcome Madam Register Pallante. Throughout my career and my tenure in Congress on this Subcommittee, the Copyright Office has served as a wellspring of sound advice and counsel. Ironically, most of that advice and counsel came from Ms. Pallante before she ascended to her current position.

Approximately 2 weeks ago, Register Pallante participated in the Horace S. Manges Lecture at the Columbia School of Law in New

York. Her remarks, which are posted on the Committee's website, cover a wide range of issues challenging our copyright laws, as she proposes what could be a blueprint for the next generation of our next Copyright Act. Her prepared testimony today also aptly notes that Congress must ultimately consider what does and does not belong under a copyright owner's control in this digital age.

Much of my career has been dedicated to developing our intellectual property laws. Issues relating to the digital platform have been the most difficult to resolve. And I welcome the Register's thoughts on how we can best address today's conflicts so that our copyright laws will benefit generations to come.

I have no doubt that the digital revolution has taken hold, and in order to continue to foster creativity and growth, our intellectual property laws should facilitate an environment for creativity and innovation. Register Pallante, what you suggest will take some time, and there is no guarantee this Subcommittee will agree to undertake such a big step. But if we do, I assure you that you will be a key part of the effort.

One aspect of your testimony that I found most interesting are your thoughts on the role of authors and their interests with respect to the public's interests. I hope you have the opportunity today to explain how these two interests can be mutually inclusive in the digital age. I also hope you have an opportunity to clarify to whom you are referring when you mention authors and the public, and how other copyright stakeholders fit into this puzzle. These clarifications are critical if we truly intend to move this discussion forward.

Register Pallante, thank you again for your work to enhance intellectual property rights in America. I appreciate your effort to participate in today's hearing, and look forward to your testimony, and reserve the balance of my time. And I am now pleased to recognize the distinguished gentleman from North Carolina, the Ranking Member of this Subcommittee, Mr. Mel Watt.

Mr. WATT. Thank you, Mr. Chairman.

And thank you for convening this hearing.

I want to begin by thanking our witness, Maria Pallante, for her service to date. She and her staff have been invaluable resources to the Subcommittee and are to be commended for their expertise, professionalism, and impartiality.

The world is changing. Remarkable developments in technology and the Internet have enabled society to change at an unprecedented pace. But these efficiencies have called into question the effectiveness of our laws, both in protecting cherished values and in promoting continued innovation.

As a Nation, we are reevaluating laws in a number of areas. For example, we are reevaluating laws to ensure that top, current, and former U.S. officials, including the Vice President, First Lady, Secretary Clinton, and, most recently, former President George W. Bush, do not have their private information obtained and disseminated without authorization.

We are reevaluating laws to prevent foreign hackers from infiltrating our news rooms, and to balance law enforcement needs with the sanctity of stored communications, and to determine whether computer fraud laws are unacceptably vague.

And we are reevaluating to shore up the security of our critical infrastructure against cyber attacks.

Each of these reevaluations is compelled by innovations which, when misused, can lead to unintended, even devastating consequences. Copyright law and policy is no different. The digital era has introduced some unique challenges for copyright owners and users, and exacerbated some preexisting ones.

Even the rulemaking process, designed to balance the intersecting interests of copyright law with technological advances and public access, have come under attack. Most recently, Chairman Goodlatte and Ranking Member Conyers introduced the Unlocking Consumer Choice and Wireless Competition Act, which I was pleased to co-sponsor. In the aftermath, calls for an upheaval of copyright law began appearing in the press and in the blogosphere. Although those calls for widespread copyright reform coincided with the call to action by the Register of Copyright, they should not be driving us to action because I do not believe that policies should be dictated by polls and petitions.

Although valuable and important to help create a climate for political action, polls and petitions should not determine the substance of the changes we make but should be considered along with a multitude of other factors and voices and accorded appropriate weight.

While I agree with Ms. Pallante's central premise that it is time to deliberatively update our copyright regime to meet the challenges of the 21st century, I also strongly believe that there are some things that both Congress and the relevant industries can and should do sooner to address some of the imbalances that have developed in the digital environment.

First, I think we must redouble our effort to ensure, whether through legislation, public education, or stakeholder negotiations, that the core purpose of copyright, which is to promote the public interest by ensuring creators have the incentive to create, is reinforced by enabling all artists, whether photographers, musicians, composers, performers, lyricists, actors, or other segments of the creative community, to be able to forge a livelihood from the new distribution channels through which consumers increasingly enjoy their creations. Copyright law should not stifle innovation, but it must stimulate the creativity upon which innovation depends.

It is no accident that new modernized platforms and technologies seek to exploit artistic work. At root, a Kindle is useless without the literary works of authors. The iPod would be worthless, and Pandora would not exist without the musical works they deliver. And Netflix would not continue to thrive without the catalogue of films in its reservoir. In short, consumers crave content, and to continue providing quality content, the creative community must enjoy the just rewards contemplated by our Constitution.

Second, I think it is time, and the time is long overdue, for Congress to recognize a performance right in sound recordings. To do so requires no further study. To not do so just prolongs this longstanding inequity and keeps us out of pace with the international community.

Similarly, I think we have a sufficient body of evidence on which to craft a legislative solution to the orphan works problem. Ad-

dressing this problem will give users comfort that they will not face infringement claims from unknown, unidentified rights holders, despite diligent efforts to locate them.

Mr. Chairman, there may be some other specific areas in which Congress can or should take more immediate action because either the record is sufficiently complete or the stakes are too high to do nothing, or to delay needlessly. But I will stop here so that we can hear our Register express her views and recommendations on the content and process for the next great Copyright Act.

And so, with that, Mr. Chairman, I yield back.

Mr. COBLE. I thank the gentleman.

Without objection, other Members' opening statements will be made a part of the record.

We have a very distinguished guest and witness today.

I will begin by swearing in our witness before introducing her.

[Witness sworn.]

Mr. COBLE. Let the record reflect that the witness answered in the affirmative. And you may be seated. Most of you know our witness today.

But for the benefit of the uninformed, I will bring you up to speed. Maria Pallante has served as the Register of Copyright since June 2011. Prior to her appointment as Register, Ms. Pallante served in the Copyright Office in a variety of roles for a total of 7 years. Ms. Pallante has also worked in a leading position for the Guggenheim Museum in New York City, the National Writers Union, and the Authors Guild.

Register Pallante is a 1990 graduate of the George Washington University School of Law, and she earned her bachelor's degree in history from the Misericordia University.

Madam Register, we are delighted to have you with us today. And if you could limit your comments to on or about 5 minutes in view of our hectic schedule that is forthcoming, we would be appreciative. If you violate the 5-minute rule you won't be keelhauled, but we will be patient with you. So we are glad to have you with us.

TESTIMONY OF THE HONORABLE MARIA A. PALLANTE, REGISTER OF COPYRIGHTS, UNITED STATES COPYRIGHT OFFICE

Ms. PALLANTE. Thank you so much, Mr. Coble, Ranking Member Watt.

Welcome, to the Members of the Subcommittee.

And thank you so much for the invitation to appear before you today. And on behalf of the staff of the Copyright Office, thank you for focusing on copyright. We greatly appreciate it. And although we do work with you on many discrete issues, and have for 100 years, more than 100 years, it is a great privilege today—to be here today—to think about the big picture of copyright and how we might begin a conversation about a forward-thinking framework for the next several decades. At least that is what I would like to talk about.

As the Chairman mentioned, the U.S. Copyright Office administers many important provisions of the law. We also have a statutory role to advise Congress on domestic and international copy-

right issues. We also have a statutory role to work with and assist executive branch agencies in their discrete statutory roles, whether that be trade or treaty making, for example.

Congress has before enacted general revisions of the law, with varying degrees of pain, and sometimes over many, many years. The last time you did that was in 1976. The process started in the 1950's. It took over 20 years. It is widely regarded as the most balanced copyright act in the world, lots of compromise, lots of consensus building. If it has a fault, it is that because it took so long, it was nearly outdated by the time it was implemented, meaning that you were legislating behind the blade of technology, not doing anything too dramatic, but certainly bringing the United States up to par with the rest of the world. Even those who worked very closely and were very invested in the process, like former Register of Copyrights Barbara Ringer, when it was all over, said that is a good 1950 law. So we may not even be dealing with the 1970's at this point is really my point. We may be going back further in time than we realize.

And then, of course, there was the DMCA, which implemented two Internet treaties in the late 1990's. And that was more comprehensive, but it was not the entire statute. And so we have a mix of provisions that were designed to target Internet activity, and we are now 15 years later in that process. And I think it is fair to say that 15 years in terms of Internet time is a long time.

So we have these two statutes, so to speak, before us today. And my goal is to figure out how to work with all of you, so many of whom have come to us and said this is a concern for me, or this is a concern for me. And the way we see it from the Copyright Office is that they all belong on the table at the same time because so many of them are interrelated. And ultimately, it is not a discussion about profits for one sector or another, but as the Chairman noted, it is about the constitutional purpose of copyright, how we can make sure we prioritize authors, who, as James Madison said, their interests coincide with the interests of the public, how do we get back to that kind of equation. Also providing a blueprint for new companies, especially in the online world, good faith companies to know what they are allowed to do with content and what they are not.

Finally, I would just say that the public is very confused. Many of you have told me that your constituents have no idea what to do with copyright, whether they are teachers, private citizens in their homes, higher education institutions. And I can tell you that we have a public office across the street that takes phone calls all day every day, and it is very difficult to advise people as to the state of the law when essentially you are relegated to telling them, well, in the Ninth Circuit here is the view, and in the Second Circuit, here is the view. And the Supreme Court is looking at this issue now, but maybe not opining on the whole picture.

So I think that there are a lot of people who like to say that copyright is broken. What I would say is that good faith people really want know what the rules of the road are. And so my office is prepared to help you in any way we can. We always have been in that role. We take great pride in it. And with that, I am happy to answer any questions that you have.

[The prepared statement of Ms. Pallante follows:]

UNITED STATES COPYRIGHT OFFICE

Statement of Maria A. Pallante

Register of Copyrights of the United States

Subcommittee on Courts, Intellectual Property and the Internet

Committee on the Judiciary

United States House of Representatives 113th Congress, 1st Session

March 20, 2013

"The Register's Call for Updates to U.S. Copyright Law"[1]

Thank you for the opportunity to appear before you today to discuss the state of our copyright law. My message is simple. The law is showing the strain of its age and requires your attention. As many have noted, authors do not have effective protections, good faith businesses do not have clear roadmaps, courts do not have sufficient direction, and consumers and other private citizens are increasingly frustrated. The issues are numerous, complex, and interrelated, and they affect every part of the copyright ecosystem, including the public at large. For reasons that I will explain, Congress should approach the issues comprehensively over the next few years as part of a more general revision of the statute. A comprehensive effort would offer an occasion to step back and consider issues both large and small, as well as whether and how they relate to the equities of the statute as a whole. This Subcommittee in particular has an opportunity to do what it has done in the past, not merely to update particular provisions of copyright law, but to put forth a forward-thinking framework for the benefit of both culture and commerce alike.

It has been fifteen years since Congress acted expansively in the copyright space. During that period, Congress was able to leave a very visible and far-reaching imprint on the development of both law and commerce. It enacted the Digital Millennium Copyright Act ("DMCA"), which created rules of the road for online intermediaries (*e.g.*, Internet service providers) and a general prohibition on the circumvention of technological protection measures (so-called "TPMs") employed by copyright owners to protect their content. The DMCA also created a rulemaking mechanism by which proponents could make the case for temporary exemptions to the TPM provisions in order to facilitate fair use or other noninfringing uses (the "section 1201 rulemaking").

Nonetheless, a major portion of the current copyright statute was enacted in 1976. It took over two decades to negotiate, and was drafted to address analog issues and to bring the United States into better harmony with international standards, namely the Berne Convention. Moreover, although the Act is rightly hailed by many as an accomplishment in balance and compromise, its long trajectory defeated any hope that it could be effective into the 21st century.

[1] For a more extensive discussion of these issues, *see* Maria A. Pallante, *The Next Great Copyright Act*, 37 COLUM.

In fact, former Register of Copyrights Barbara Ringer, who had worked closely with Congress for much of the 1976 revision process, later called it a "good 1950 copyright law."

I think it is time for Congress to think about the next great copyright act, which will need to be more forward thinking and flexible than before. Because the dissemination of content is so pervasive to life in the 21st century, the law also should be less technical and more helpful to those who need to navigate it. Certainly some guidance could be given through regulations and education. But my point is, if one needs an army of lawyers to understand the basic precepts of the law, then it is time for a new law.

A central equation for Congress to consider is what *does* and *does not* belong under a copyright owner's control in the digital age. I do not believe that the control of copyright owners should be absolute, but it needs to be meaningful. People around the world increasingly are accessing content on mobile devices and fewer and fewer of them will need or desire the physical copies that were so central to the 19th and 20th century copyright laws.

Moreover, while philosophical discussions have a place in policy debates, amending the law eventually comes down to the negotiation of complex and sometimes arcane provisions of the statute, requiring leadership from Congress and assistance from expert agencies like mine. The list of issues is long: clarifying the scope of exclusive rights, revising exceptions and limitations for libraries and archives, addressing orphan works, accommodating persons who have print disabilities, providing guidance to educational institutions, exempting incidental copies in appropriate instances, updating enforcement provisions, providing guidance on statutory damages, reviewing the efficacy of the DMCA, assisting with small copyright claims, reforming the music marketplace, updating the framework for cable and satellite transmissions, encouraging new licensing regimes, and improving the systems of copyright registration and recordation.

That said, Congress does not need to start from scratch, as it has already laid the groundwork for many core issues. For example, Congress already has had more than a decade of debate on the public performance right for sound recordings, and has given serious consideration to improving the way in which musical works are licensed in the marketplace. These issues are ripe for resolution.

Likewise, Congress has requested a number of studies from the Copyright Office in recent years, on a variety of timely topics, including the first sale doctrine, orphan works, library exceptions, statutory licensing reform, federalization of pre-72 sound recordings, and mass digitization of books. Additionally, we have reports in progress on small copyright claims and resale royalties for visual artists.

Congress also may need to apply fresh eyes to the next great copyright act to ensure that the copyright law remains relevant and functional. This may require some bold adjustments to the general framework. You may want to consider alleviating some of the pressure and gridlock brought about by the long copyright term — for example, by reverting works to the public domain after a period of life plus fifty years unless heirs or successors register their interests with the Copyright Office. And in compelling circumstances, you may wish to reverse the general

principle of copyright law that copyright owners should grant prior approval for the reproduction and dissemination of their works — for example, by requiring copyright owners to object or "opt out" in order to prevent certain uses, whether paid or unpaid, by educational institutions or libraries.

If Congress considers copyright revision, a primary challenge will be keeping the public interest at the forefront, including how to define the public interest and who may speak for it. Any number of organizations may feel justified in this role, and on many issues there may in fact be many voices, but there is no singular party or proxy. In revising the law, Congress should look to the equities of the statute as a whole, and strive for balance in the overall framework. It is both possible and necessary to have a copyright law that combines safeguards for free expression, guarantees of due process, mechanisms for access, and respect for intellectual property.

To this end, I would like to state something that I hope is uncontroversial. The issues of authors are intertwined with the interests of the public. As the first beneficiaries of the copyright law, they are not a counterweight to the public interest but instead are at the very center of the equation. In the words of the Supreme Court, "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[2] Congress has a duty to keep authors in its mind's eye, including songwriters, book authors, filmmakers, photographers, and visual artists. A law that does not provide for authors would be illogical — hardly a copyright law at all.

Finally, evolving the Copyright Office should be a major goal of the next great copyright act. In short, it is difficult to see how a 21st century copyright law could function well without a 21st century agency. The expertise of the Office is reflected in countless contributions over the last hundred years, including official studies, congressional hearings, treaty negotiations, trade agreements, policy recommendations, and legal interpretations, not to mention in the statute and its legislative history, and in opinions of the courts. But today, many constituents want the Copyright Office to do better the things it already does, and to do a host of new things to help make the copyright law more functional — from administering a small copyright claims tribunal to offering arbitration or mediation services to issuing advisory opinions. Moreover, as others have noted, the statute has become too detailed and less nimble, and could be more useful and flexible if certain aspects were handled administratively.

In closing I would like to express my gratitude to the members of the Subcommittee for your interest in and commitment to copyright policy, and encourage you to think big. The next great copyright act is possible if you approach it comprehensively, and as always, the staff of the U.S. Copyright Office is at your disposal.

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[2] *Twentieth Century Music Corp. v. Aiken*, 422 US 151, 156 (1975).

ATTACHMENT

THE NEXT GREAT COPYRIGHT ACT

Twenty-Sixth Horace S. Manges Lecture
by
Maria A. Pallante[1]

I. INTRODUCTION

Tonight my topic is the next great copyright act, but before I speak about the future, I would like to talk a little about the past, including the role of the Copyright Office in past revision activities. In my remarks, I will address the need for comprehensive review and revision of U.S. copyright law, identify the most significant issues, and suggest a framework by which Congress should weigh the public interest, which includes the interests of authors. I also will address the necessary evolution of the Copyright Office itself.

Those of you who have been to our offices in Washington know that we have a conference room featuring portraits of the former Registers of Copyright dating back to 1897.[2] When guests are seated at our table, the former Registers preside on high, wearing a variety of expressions and overseeing complex conversations about copyright law in the digital age. Sometimes I think they would be startled by the discussions we have, but then again it might all sound familiar.

Solberg (1887-1933)

Thorvald Solberg was the first and longest-serving Register of Copyrights. He seems inspired in his portrait, and for good reason. Solberg was a visionary leader, a champion of authors' rights, and an early advocate for the United States' adherence to the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention").[3] Under his care, the Copyright Office grew from a handful of employees to more than a hundred professional staff, and took on the many assorted roles that are still critical to the mission of the Office today. Solberg and his team administered the copyright registration system, managed the public records of copyright information, facilitated the delivery of books and other copyright deposits to the Library of Congress (the "Library"), served as substantive experts within the U.S. government, provided

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[1] Maria A. Pallante is Register of Copyrights of the United States and Director of the U.S Copyright Office. This is an extended version of the lecture delivered on March 4, 2013 at Columbia University. *See* 37 COLUM. J.L. & ARTS (forthcoming Spring 2013). The author would like to recognize the dedicated public service of the past and present staff of the U.S. Copyright Office.

[2] The U.S. Copyright Office is located on Capitol Hill in the James Madison Memorial Building of the Library of Congress, Washington, DC. Images of the portraits described herein are available for viewing at http://www.copyright.gov/docs/2013MangesLectureSlides.pdf.

[3] The Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, *as revised* at Paris on July 24, 1971 *and as amended* Sept. 28, 1979, 102 Stat. 2853, 1161 U.N.T.S. 3 (entered into force in the United States March 1, 1989).

policy advice to Congress, and represented the United States at international meetings.[4] He was Register during the revision process that led to the 1909 Act, in which copyright term was extended to a total period of fifty-six years subject to renewal registration, but he began broaching the subject of automatic protection as early as the 1920's.[5]

Kaminstein (1960-1971)

Abraham (Abe) Kaminstein was Register during another key period for copyright revision. In his portrait, he stands in front of his law books, looking knowledgeable and perhaps a little impatient. He spent eleven years working with Congress and with stakeholders on revision issues, presiding over roundtables and legal studies and helping to mold many of the provisions that were enacted in the Copyright Act of 1976 ("1976 Act" or "Copyright Act"). In fact, the revision process began in the 1950's,[6] during Arthur Fisher's tenure as Register, and did not conclude until five years after Kaminstein's departure, when Barbara Ringer was Register.

What might be obvious today, but nonetheless is instructive, is that the long revision process that led to the 1976 Act reflected a spectrum of issues, from small or technical fixes to wholly new or controversial provisions. Small decisions were important then, as they can be now, because they added a degree of certainty to the statute, making it more user-friendly for those who need to interpret and rely upon its provisions. An example is the decision in 1976 to set the end of the copyright term on the last day of the calendar year.[7]

More tedious were the issues where policy consensus was achieved in principle, but later compromised or undermined by over-negotiation. A good example here is termination.[8] In copyright, the concept of termination is rooted in the equitable principle that authors should share in the long-term value of their works. The policy is sound, but the provisions as enacted are almost incomprehensible on their face, particularly for the authors, widows, widowers, children, and other heirs who need to navigate them.

The termination provisions are important for another reason, however. They show that Congress sometimes will migrate policy principles into a new context. In the 1976 Act, Congress was moving to a singular and significantly longer term of protection, and phasing out the renewal periods and renewal registration requirement in the law. At the same time, Congress recognized that the renewal period had provided authors with a

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[4] *See generally* 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE § 1.41 (2000); *see also*, John Y. Cole, *Of Copyright, Men & A National Library*, 28 QUARTERLY JOURNAL OF THE LIBRARY OF CONGRESS 114, 134 (1971).

[5] *See* Thorvald Solberg, *The Present Copyright Situation*, 40 YALE L.J. 184, 195 (1930).

[6] *See* PATRY, *supra* note 4, § 1.72.

[7] Under the 1909 Copyright Act, a copyright expired twenty-eight years (or fifty-six years if the copyright was renewed) after the date of first publication with notice or after the date of registration (in the case of unpublished works). *See* 1909 Act, 17 U.S.C. § 24 (repealed 1978). Under the current statute, copyright expires at the end of the calendar year in the year of expiration. *See* 17 U.S.C. § 305.

[8] 17 U.S.C §§ 203, 304.

legal trigger to renegotiate problematic licensing terms with their publishers and producers.[9] Thus, in crafting the termination provisions, Congress was acknowledging the need for a new legal framework, but also was carrying over and reinventing a compelling policy objective.[10]

Of course, the 1976 Act generated many discussions about exceptions and limitations, and if today's climate is any indication, they were not without complexity or controversy. Questions before Congress included whether and how to incorporate significant judicial doctrines into the statute and whether and how to provide special treatment and specific guidance to discrete communities. Congress would codify the fair use doctrine, reaffirm the first sale doctrine, and create specific exceptions for libraries and archives,[11] but would choose to defer any specific exceptions for educational use, concluding that such a treatment "is not justified."[12] These decisions reflect the work ethic of Congress when legislating copyright law for a new era. Congress looks to the equities of the statute as a whole and not just to the immediate interests before it.

Finally, and again instructive, there were deliberations on an array of topics that shifted and departed from the previous legal framework and therefore were at the more challenging end of the revision spectrum. In the end, Congress would codify divisibility, extend the copyright term[13] (a policy change strongly supported by Horace Manges,[14] incidentally), and relax formalities.[15] In doing so, Congress was adapting the law to the times. It was not exactly fashioning solutions out of whole cloth, but it did a tremendous job in blending the world standards and pressures of global copyright law with the particular principles and practices of American democracy.

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[9] This was more theoretical than practical, as many authors bargained away the renewal interest in advance. *But see Stewart v. Abend*, 495 U.S. 207, 235-36 (1990) (holding that derivative work rights for renewal terms did not belong to assignees with which the author had earlier contracted because the author died before the renewal date).

[10] Congress also considered restricting the duration of licenses, for example, by limiting an author's license to periods of no more than ten years at a time. *See* U.S. COPYRIGHT OFFICE, STUDY NO. 31, RENEWAL OF COPYRIGHT, at 209 (1961) ("U.S. COPYRIGHT OFFICE, STUDY NO. 31").

[11] *See* 17 U.S.C. §§ 107-109.

[12] H.R. REP. NO. 94-1476, at 66-67 (1976).

[13] Article 7 of the Berne Convention requires a minimum term of protection of fifty years following the death of the author. The United States' term extension put the country more on par with the sixty-four countries that were already Berne members in 1976. *See* World Intellectual Property Organization, Contracting Parties, Berne Convention, *available at* http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf.

[14] U.S. COPYRIGHT OFFICE, COPYRIGHT LAW REVISION, STUDY NO. 30, DURATION OF COPYRIGHT, at 93 (1961) ("The most important improvement would be a single term of copyright. Life of the author plus a 50 year term would have certain advantages, among them that the whole body of an author's work (including revisions) would go out of copyright at the same time and that there would be a uniformity with the system utilized in leading European countries.") (statement of Horace Manges).

[15] *See, e.g.*, 17 U.S.C. §§ 405, 406 (providing that errors in a copyright notice or the omission of a copyright notice would not necessarily invalidate the copyright in a published work).

Ringer (Register 1973-1980 / Acting Register 1993-1994)

In 1973, Barbara Ringer, a Copyright Office lawyer who was already heavily involved in the revision process, became Register. Like Kaminstein, she worked closely with congressional leadership, including long-time copyright steward Robert Kastenmeier, who was deeply involved in much of the 1976 revision process while he was Chairman of the House Subcommittee on Courts, Intellectual Property and the Administration of Justice, and Senator John McClellan who also was very involved in all aspects of the reform effort as Chairman of the Senate Judiciary Committee.[16] Ringer and her team were involved in resolving last minute negotiations of the new law, documenting the significant legislative history, and implementing sweeping changes to the registration practices and related operations of the Copyright Office.

Ringer's portrait is very formal. Staring into the distance, she looks elegant but pensive, and perhaps a little concerned. Ringer was a staunch protector of authors and their role in a civilized society, and she began to worry about the future of the law, including what she saw as a growing effort by some to erode the copyright system by attempting to cast it as an obstacle rather than as a means to the dissemination of knowledge. She wrote passionately about this in her well-known article entitled *The Demonology of Copyright.*[17]

Peters (1994-2010)

Ringer was not wrong that copyright discussions were changing, both in complexity and tone, and she was not wrong to be uneasy. By the time my predecessor Marybeth Peters became Register in 1994, the world was well on its way to unprecedented technological change and therefore dramatic upheaval for copyright markets and copyright law. The times required Congress to act more boldly than before, not only to affirm core principles of copyright protection but also to provide guidance and direction to good faith intermediaries. The Digital Millennium Copyright Act ("DMCA"),[18] enacted in 1998, was innovative in this regard. Among other things, it created a notice-and-takedown procedure for copyright owners and online intermediaries, a corresponding safe harbor from liability,[19] and legal protection for technological protection measures.[20]

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[16] Rep. Kastenmeier served in the House of Representatives from January 3, 1959 to January 3, 1991 and was Chairman of the Subcommittee on Courts, Intellectual Property, and the Administration of Justice from 1969 to 1990. Senator McClellan represented the State of Arkansas in the Senate from 1942 until his death in 1977. He served on a number of committees and his greatest contribution arguably is his work on the Judiciary Committee, which included a complete overhaul of the criminal code (in addition to comprehensive copyright reform).

[17] *See* BARBARA A. RINGER, THE DEMONOLOGY OF COPYRIGHT: SECOND OF THE R.R. BOWKER MEMORIAL LECTURES (R.R. Bowker Co. 1974).

[18] Pub. L. No. 105–304, 112 Stat. 2860 (1998).

[19] 17 U.S.C. § 512.

[20] 17 U.S.C. § 1201.

As is the case today in matters of complex copyright policy, passage of the DMCA harnessed expertise from throughout the government.[21] The Clinton Administration negotiated the Internet treaties and released a series of papers for public discussion, Congress negotiated their implementation into U.S. law, and a number of amendments were entrusted to the Copyright Office to administer, including a rulemaking procedure to address the intersection of the anticircumvention provisions and noninfringing uses.

By the way, Peters is fittingly optimistic in her portrait.

II. WHY IT IS TIME FOR REVISION

In American copyright law, there have been revisions and then there have been revisions. As a general matter, Congress introduces bills, directs studies, conducts hearings, and discusses copyright policy on a fairly regular basis, and has done so for two centuries. But revision of the comprehensive sort is an entirely different matter. It requires a clear and forward-thinking set of goals and a sustained commitment from Congress, most certainly over multiple sessions. As Solberg observed in 1926, there comes a time when the "subject ought to be dealt with as a whole, and not by further merely partial or temporizing amendments."[22]

In general, major copyright revisions require Members of Congress, including especially the committee leaders who are responsible for the governance of intellectual property, and their staffs, to have a meaningful degree of fluency in the substance of copyright law. While high level or even philosophical discussions do have a place in policy discussions, amending the law eventually comes down to the negotiation of complex and sometimes arcane provisions of the statute. Some of these provisions are challenging for copyright experts, let alone for elected officials who have a multitude of other national and international responsibilities. Add to this the intensity with which interested parties across the copyright spectrum sometimes make their views known, and the public's confusion if not aversion when it comes to copyright issues,[23] and it is little wonder that Congress has moved slowly in the copyright space.

Recent Years

In terms of enacted legislation, Congress primarily has made minor adjustments or technical corrections in recent years. Consider, for example, the Copyright Cleanup,

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[21] *See* Information Infrastructure Task Force, Working Group on Intellectual Property Rights, *Intellectual Property and the National Information Infrastructure: A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights* (1994); Information Infrastructure Task Force, *Global Information Infrastructure: Agenda for Cooperation* (1995).

[22] Thorvald Solberg, *Copyright Law Reform*, 35 YALE L.J. 48, 62 (1926).

[23] *See* Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J. & ARTS 61, 61-62 (2002) ("I have a theory about how copyright got a bad name for itself, and I can summarize it in one word: Greed. Corporate greed and consumer greed.").

Clarification, and Corrections Act of 2010,[24] the Satellite Television Extension and Localism Act of 2010,[25] the Temporary Extension Act of 2010,[26] followed by the Continuing Extension Act of 2010,[27] and three webcaster settlement acts in 2002, 2008, and 2009.[28]

Where Congress was able to act more substantively, its focus was directed at the growing problem of piracy in the digital environment — for example the ART Act of 2005,[29] which addressed camcording in movie theatres, and the PRO-IP Act of 2008,[30] which enhanced certain civil remedies and criminal sanctions, improved funding and resources for several federal enforcement programs, and created the position of the Intellectual Property Enforcement Coordinator ("IPEC").

Certainly, Congress is acting responsibly when it makes discrete adjustments to the copyright law from time to time, but its more valuable role always has come from reviewing, and addressing as appropriate, the larger policy themes and developments that require attention. In this regard, the last sustained period of copyright activity was fifteen years ago, a period that produced the DMCA and the Copyright Term Extension Act,[31] as well as concomitant changes to the library and archives exception. During this time, Congress, though legislating in a charged atmosphere, acted on copyright policy with authority, leaving a very visible and very far-reaching imprint on the development of both law and commerce. In the age of the Internet, where technology can so quickly affect the creation and communication of creative materials, these global reviews may need to happen more frequently.

Preparatory Work

The next great copyright act would not require Congress to start from scratch because, since 1998, it has put in motion a steady stream of preparatory work on core issues. For example, Congress has had more than a decade of debate on the public performance right for sound recordings,[32] and given serious consideration to improving

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[24] Pub. L. No. 111-295, 124 Stat. 3180 (2010).

[25] Pub. L. No. 111-175, 124 Stat. 1218 (2010).

[26] Pub. L. No. 111-144, 124 Stat. 42 (2010).

[27] Pub. L. No. 111-157, 124 Stat. 1116 (2010).

[28] Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (2002), Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (2008); and Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926 (2009).

[29] Pub. L. No. 109-9, 119 Stat. 218 (2005).

[30] Prioritizing Resources and Organization for Intellectual Property Act of 2008 ("PRO-IP Act"), Pub. L. No. 110-403, 122 Stat. 4256 (2008).

[31] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

[32] *See, e.g., Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary,* 110th Cong. (2007) (statement of Marybeth Peters, Register of Copyrights); *The Performance Rights Act and Parity among Music Delivery Platforms: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Marybeth Peters, Register of Copyrights); and *Internet*

the way in which musical works are licensed in the marketplace.[33] These issues are ripe for resolution.

Similarly, Congress has requested that the Copyright Office prepare a number of formal studies and analyses and conduct public inquiries and roundtables on important issues. Although none of these were undertaken for the purpose of a comprehensive revision, they provide Congress with a fair amount of background on issues that would be relevant to the next great copyright act. Consider the following Copyright Office studies, for example:

- An early report on the issue of digital first sale;[34]
- A major study and ongoing recommendations on orphan works solutions;[35]
- Multiple reports on reforming or possibly eliminating the statutory licenses for cable and satellite retransmission under sections 111, 119, and 122;[36]
- An analysis of termination provisions in the context of pre-1978 contracts;[37]
- An analysis of the legal and business issues relating to mass digitization;[38]

Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners with those of Broadcasters, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 108th Cong. (2004) (statement of Marybeth Peters, Register of Copyrights).

[33] Congress has introduced legislation and held multiple hearings on reforming the statutory license for reproducing and distributing musical works under section 115. *See Section 115 Reform Act (SIRA) of 2006, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. (2006).

[34] U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT: A REPORT OF THE REGISTER OF COPYRIGHTS PURSUANT TO § 104 OF THE DIGITAL MILLENNIUM COPYRIGHT Act (2001) (the "SECTION 104 REPORT"), *available at* http://www.copyright.gov/reports/studies/dmca/dmca_study.html.

[35] U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006) (the "ORPHAN WORKS REPORT"), *available at* http://www.copyright.gov/orphan/orphan-report-full.pdf.

[36] U.S. COPYRIGHT OFFICE, SATELLITE TELEVISION AND LOCALISM ACT, § 302 REPORT (2011) (the "SECTION 302 REPORT"), *available at* http://www.copyright.gov/reports/section302-report.pdf; U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT (2008), *available at* http://www.copyright.gov/reports/section109-final-report.pdf, and U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT § 110 REPORT (2006), *available at* http://www.copyright.gov/reports/satellite-report.pdf.

[37] U.S. COPYRIGHT OFFICE, ANALYSIS OF GAP GRANTS UNDER THE TERMINATION PROVISIONS OF TITLE 17 (2010), *available at* http://www.copyright.gov/reports/gap-grant-analysis.pdf.

- A report on the federalization of protection for pre-1972 sound recordings;[39]
- A pending analysis on the propriety of a resale royalty for visual artists;[40] and
- A pending study on solutions for enforcement of small copyright claims.[41]

Finally, Congress has introduced a number of bills that have not moved much over the years, on a variety of issues that it may or may not wish to consider further. For example, in the past ten years, bills have been introduced that would extend copyright-like protection to fashion designs,[42] exempt churches from infringement liability for showing football games,[43] add a fair use exemption to section 1201,[44] require a nominal fee to retain copyright protection after fifty years,[45] and require new standards for Copyright Royalty Judges with regard to webcasting.[46] A general revision effort would offer everyone the opportunity to step back and consider issues both large and small, as well as the relationship of these issues to the larger statute and the importance or unimportance of international developments.

The Courts

It should come as no surprise that courts also are reflecting the wear and tear of the statute. In some areas, courts have picked up where Congress left off. Thus in the context of peer-to-peer networks, courts have fashioned the concept of inducement as part of the secondary liability analysis, and in the context of the DMCA, courts have interpreted section 512's knowledge standards.[47] In other areas, courts appear to be struggling with existing statutory language. Consider the Second Circuit's 2008

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[38] U.S. COPYRIGHT OFFICE, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT (2011) (the "MASS DIGITIZATION REPORT"), *available at* http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf.

[39] U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS (2011), *available at* http://www.copyright.gov/docs/sound/pre-72-report.pdf.

[40] *See* Resale Royalty Right: Notice of Inquiry, 77 Fed. Reg. 58,175 (Sept. 19, 2012).

[41] *See* Remedies for Small Copyright Claims: Notice of Inquiry, 76 Fed. Reg. 66,758 (Oct. 27, 2011).

[42] H.R. 5055, 109th Cong. (2006); H.R. 2033, 110th Cong. (2007); S. 1957, 110th Cong. (2007); H.R. 2196, 111th Cong. (2009).

[43] S. 2591, 110th Cong. (2008).

[44] H.R. 107, 108th Cong. (2003).

[45] H.R. 2601, 108th Cong. (2003).

[46] H.R. 6480, 112th Cong. (2012); S. 3609, 112th Cong. (2012).

[47] *See, e.g., Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012); *Columbia Pictures Indus., Inc. v. Fung*, 2009 U.S. Dist. LEXIS 122661 (C.D. Cal. 2009).

Cablevision holding on public performances,[48] which indicates that a performance is not made "to the public" unless more than one person is capable of receiving a *particular* transmission (*i.e.*, a transmission made using a unique copy of a given work). As the Solicitor General's Office noted, "[s]uch a construction could threaten to undermine copyright protection in circumstances far beyond those presented."[49] Moreover, this comes at the very time that copyrighted works are increasingly disseminated via streaming, thus making the public performance right more important than ever.

In some cases, courts have expressed their opinions about the statute directly in their decisions. For example, in *Authors Guild v. Google Inc.*, the Southern District of New York stated that "[t]he questions of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more appropriately decided by Congress than through an agreement among private, self-interested parties."[50] In *Sony BMG Music Entertainment v. Tenenbaum*, the First Circuit observed that Congress might wish to examine the application of the Copyright Act regarding statutory damages.[51] In a case involving streaming video, the Seventh Circuit noted the difficulty of determining when a public performance begins and stated that "[l]egislative clarification of the public-performance provision of the Copyright Act would therefore be most welcome."[52] And in *Golan v. Holder*, the Supreme Court observed that Congress may need to consider legislative solutions to offset "[o]ur unstinting adherence to Berne."[53]

Readability

Finally, we need a clearer copyright act for a rather simple reason: more and more people are affected by it. Because the dissemination of content is so pervasive to life in the 21st century, copyright issues are necessarily pervasive as well — from fair use in education to statutory licenses for new businesses, to the parameters of liability and enforcement online and in the home. Regulations and education could certainly help in some instances. However, if one needs an army of lawyers to understand the basic precepts of the law, then it is time for a new law.

III. REVISION ISSUES

The next great copyright act must be forward thinking but flexible. It should not attempt to answer the entire universe of possible questions, but, no matter what, it must

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[48] *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

[49] Brief of the United States as *Amicus Curiae* at 20-21, *Cable News Network, Inc. v. CSC Holdings, Inc.*, No. 08-448 (U.S. 2009).

[50] 770 F. Supp. 2d 666, 677 (S.D.N.Y. 2011).

[51] 660 F.3d 487, 490 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 2431 (2012).

[52] *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 761 (7th Cir. 2012).

[53] *Golan v. Holder*, 132 S. Ct. 873, 894 (2012) (noting the long term of copyright term as a factor in current problems like orphan works).

serve the public interest. Thus, it must confirm and rationalize certain fundamental aspects of the law, including the ability of authors and their licensees to control and exploit their creative works, whether content is distributed on the street or streamed from the cloud.

This control cannot be absolute, but it needs to be meaningful. After all, people around the world increasingly are accessing content on mobile devices[54] and fewer and fewer of them will need or desire the physical copies that were so central to the 19th and 20th century copyright laws. Thus, Congress has a central equation to consider today: what does and does not belong under a copyright owner's control. Congress also will want to consider the exceptions and limitations, enforcement tools, licensing schemes, and the registration system it wants for the 21st century.

Major Issues

Exclusive Rights

Among the specific issues at play are the application of longstanding but evolving exclusive rights, such as reproduction and distribution, as well as the application and evolution of the public performance right on the Internet (for example, to authorize the streaming of music, movies, television shows, or sporting events).[55]

Starting with the latter, I would be remiss if I did not underscore the Copyright Office's long history of supporting a more complete right of public performance for sound recordings, commensurate with the rights afforded to other classes of works in U.S. law and provided for in virtually all industrialized countries around the globe.[56] As noted above, this is an issue on which Congress has spent many years deliberating. Owners of sound recordings are disadvantaged under current law in that they enjoy an

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[54] *See, e.g.*, International Telecommunications Union, *ITU releases latest global technology development figures* (Feb. 27, 2013) ("ICT Facts and Figures report predicts that there will soon be as many mobile-cellular subscriptions as people inhabiting the planet, with the figure set to nudge past the seven billion mark early in 2014. More than half of all mobile subscriptions are now in Asia, which remains the powerhouse of market growth, and by the end of 2013 overall mobile penetration rates will have reached 96% globally, 128% in the developed world, and 89% in developing countries"), *available at* http://www.itu.int/net/pressoffice/press_releases/2013/05.aspx.

[55] The 1976 Act's exclusive rights are set forth in 17 U.S.C. § 106. Also at play may be the distinction between commercial and noncommercial activities or some reasonable definition thereof, and the distinction between published and unpublished works, which continues to affect the operation of core provisions.

[56] "Many countries of the world, and virtually all industrialized countries, recognize performance rights for sound recordings, including performances made by means of broadcast transmissions. . . . These countries recognize the incredible value of a recording artist's interpretation of a musical composition or other artistic work." *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Marybeth Peters, Register of Copyrights), *available at* http://www.copyright.gov/docs/regstat073107.html.

exclusive right of reproduction and distribution but not public performance.[57] Moreover, because of the disparity in royalty obligations, there is an increasingly stark economic disadvantage for businesses that offer sound recordings over the Internet. Congress has done quite a lot of thinking on this already. How to craft a final resolution should be squarely on the table of comprehensive revision.

The scope of the distribution right also is a central theme today, as courts work through whether and how it may be implicated and enforced in relation to use of works over the Internet.[58] One key issue in the courts is the degree to which a claimed violation of the exclusive right to authorize distribution of a work requires a showing of actual dissemination of a work or whether the act of making the work available online is sufficient.[59]

Incidental Copies

The reproduction right could also use a makeover, but for a different reason. The reproduction right has been a valuable tool in enforcement proceedings, helping to ameliorate the confusion or inadequacies of other provisions, particularly in the context of peer-to-peer file sharing or illegal streaming.[60] However, new technologies have made it increasingly apparent that not all reproductions are equal in the digital age. Some copies are merely incidental to an intended primary use of a work, including where

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[57] In 1995, a limited right to perform a sound recording publicly by means of a digital audio transmission was added at 17 U.S.C. § 106(6) in order for the United States to comply with Article 15 of the WIPO Performances and Phonograms Treaty, but no comparable right exists with respect to the public performances of sound recordings over the air by traditional broadcasters.

[58] *See* Peter Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. OF THE COPYRIGHT SOC. OF THE U.S.A. 1, 6 (2011); David O. Carson, *Making the Making Available Right Available 22nd Annual Horace S. Manges Lecture*, 33 COLUM. J.L. & ARTS 135, 150 (2010); Robert Kasunic, *Making Circumstantial Proof of Distribution Available*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1145 (2008).

[59] *See, e.g.*, *Universal City Studios Prods. LLP v. Bigwood*, 441 F. Supp. 2d 185 (D. Me. 2006) (holding that defendants violated plaintiff's exclusive right to distribute copyrighted works "by using KaZaA to make copies of the Motion Pictures available to thousands of people over the internet"); *Interscope Records v. Duty*, 2006 WL 988086, at *2 (D. Ariz. Apr. 14, 2006) (holding that the "mere presence of copyrighted [works] in [defendant's] share file may constitute copyright infringement"); *Motown Record Co. v. DePietro*, 2007 WL 576284, at *3 (E.D. Pa. Feb. 16, 2007) (finding that infringement of the distribution right can be based on actual distribution or by an offer to distribute, *i.e.* , proof that the work was "made available" by the defendant); *Atlantic Recording Corp. v. Anderson*, 2008 WL 2316551, at *7 (S.D. Tex. Mar. 12, 2008) (holding that making copyrighted works available for download via a peer-to-peer network contemplates "further distribution," which is a violation of the distribution right); *Elektra Entm't Group, Inc. v. Barker*, 551 F. Supp. 2d 234 (S.D.N.Y. 2008) (stopping short of endorsing a full "making available" right, but accepting that an offer to distribute a work for the purpose of its further distribution or public performance constitutes an infringement of the distribution right). *But see London-Sire Records, Inc. v. Doe*, 542 F. Supp. 2d 153 (D. Mass. 2008) (concluding that "defendants cannot be liable for violating the plaintiffs' distribution right unless a 'distribution' actually occurred"); *Atlantic Recording Corp. v. Howell*, 554 F.Supp.2d 976 (D. Ariz. 2008) (concluding that "[m]erely making an unauthorized copy of a copyrighted work available to the public does not violate a copyright holder's exclusive right of distribution").

[60] *See* Carson, *supra* note 58 at 150.

primary uses are licensed, and these incidental copies should not necessarily be treated as infringing.

The 1976 Act recognized and addressed the incidental nature of certain copies by providing fact-specific exceptions and limitations in sections 112 (for making ephemeral recordings of certain works in order to facilitate broadcast transmissions) and 117 (for making a copy of a computer program – such as a "read-only" copy – that is essential for the utilization of that work). The DMCA did the same in section 512 (for the intermediate and temporary storage of copyrighted material in the course of transitory digital network communications and system caching) and in section 117 (for making an incidental copy of a computer program when maintaining or repairing a machine that contains an authorized copy of that program).[61]

In 2001, the Copyright Office examined the issue in a report known as the Section 104 Report. There, the Office noted the uncertainty around temporary copies of works in the context of digital commerce, and the fact that "courts had strayed away from formulating a general rule defining how long a reproduction must endure to be 'fixed,' deciding instead on a case-by-case basis whether the particular reproduction at issue sufficed."[62] The Section 104 Report recommended the enactment of several additional exemptions for the creation of copies that are incidental to licensed use.[63]

Because incidental or transient copies are made by consumers on a daily basis and in a variety of otherwise lawful activities involving consumer electronics and computer programs, there may be room for yet further discussion of this issue.[64] In any event, as the confusion over incidental copies has persisted, this is an area where Congress could provide a voice of reason.

Enforcement

A 21st century copyright act requires 21st century enforcement strategies. These must respect the technical integrity and expressive capabilities of the Internet as well as the rule of law. It is possible and necessary to combine safeguards for free expression, guarantees of due process, and respect for intellectual property in the copyright law. As the Supreme Court recognized, "the Framers intended copyright itself to be the engine of free expression."[65]

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[61] In 1998, the Computer Maintenance Competition Assurance Act amended section 117 by inserting headings for subsections (a) and (b) and by adding subsections (c) and (d). Pub. L. No. 105-304, 112 Stat. 2860, 2887.

[62] SECTION 104 REPORT, *supra* note 34 at 111.

[63] *See id.* at 141.

[64] *See e.g.*, Samuelson Law, Technology & Public Policy Clinic at U.C. Berkeley School of Law and the Stanford Cyberlaw Clinic on behalf of Public Knowledge, *Copyright Reform Act: Providing an Incidental Copies Exemption for Service Providers and End-Users* (March 31, 2011), *available at*: http://www.publicknowledge.org/files/docs/craincidentalcopies.pdf.

[65] *Harper & Row Pubs., Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

In short, the next great copyright act presents an opportunity. All members of the online ecosystem should have a role, including payment processors, advertising networks, search engines, Internet service providers, and copyright owners. These strategies can be a mix of legislative solutions and complementary voluntary initiatives,[66] but where gaps in the law exist Congress should not be absent.[67]

One critical issue is the ability of law enforcement to prosecute the rising tide of illegal streaming in the criminal context.[68] Streaming implicates the copyright owner's exclusive right of public performance: it is a major means by which copyright owners license their rights in sporting events, television programs, movies, and music to customers, who in turn access the content on their televisions, smart phones, tablets, or video consoles.[69] Under current law there is a disparity that may have once been of little consequence but is today a major problem: prosecutors may pursue felony charges in the case of illegal reproductions or distributions, but are limited to misdemeanor charges when the work is streamed, even where such conduct is large scale, willful and undertaken for a profit motive.[70] As a practical matter, prosecutors have little incentive to file charges at all, or to pursue only those cases where the rights of reproduction and distribution are also at issue. This lack of parity neither reflects nor serves the digital marketplace.[71]

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[66] For example, a number of rights holders and service providers recently announced a voluntary "Copyright Alert System" that will help educate the public and address online infringing occurring on certain networks. *See* http://www.copyrightinformation.org/.

[67] For example, Congress has looked at the sufficiency of enforcement mechanisms in cases where bad faith actors are offering infringing content to U.S. consumers from websites controlled outside of the United States, a situation where the proposed solutions have generated a great deal of controversy and which are, at very least, as complex as the problem itself. *See, e.g., Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Parasites, Part 1, Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. (2011); *Targeting Websites Dedicated to Stealing American Intellectual Property, Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011).

[68] *See* OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, SPECIAL 301 REPORT, 11 (2011) (noting the problem of illegal streaming and linking sites); and ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PIRACY OF DIGITAL CONTENT, CASE STUDY: THE SPORTS OWNERS SECTOR, 90 (2009) (discussing streaming of sporting events).

[69] According to one recent study, video streaming traffic alone now accounts for more than one quarter of all Internet traffic and is among the fastest growing areas of the Internet. *See* Envisional, *Technical Report: An Estimate of Infringing Use of the Internet* 3, 19 (2011).

[70] *See* 18 U.S.C. § 2319(b)(1).

[71] *See Promoting Investment and Protecting Commerce Online: The ART Act, The NET Act and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. (2011); *see also* Administration's White Paper on Intellectual Property Enforcement Legislative Recommendations at 10 (March 2011), *available at* http://www.whitehouse.gov/sites/default/files/ip_white_paper.pdf ("To ensure that Federal copyright law keeps pace with infringers, and to ensure that DOJ and U.S. law enforcement agencies are able to effectively combat infringement involving new technology, the Administration recommends that Congress clarify that infringement by streaming, or by means of other similar new technology, is a felony in appropriate circumstances.").

Mechanisms for small copyright claims are also an active topic and the current focus of a Copyright Office study.[72] Under current law, copyright lawsuits are reserved to the federal courts. While this ensures consistency in the treatment of federal subject matter, it can also be quite costly and time consuming, effectively preventing the enforcement of many infringement claims of authors and others who do not have or cannot justify expending the resources. The question is whether Congress should create a streamlined adjudicative process to assist copyright owners with claims of small economic value.[73]

This brings me to statutory damages. Some would eliminate the precondition in section 412 of the Copyright Act that limits the availability of statutory damages to those who register with the Copyright Office in a timely manner.[74] They believe that it places an undue burden on the people who need statutory damages the most but are least likely to be aware of the condition, namely authors. Cost is also an issue, particularly for prolific creators like photographers, who may be unable to register each and every work under a separate application and have for years enjoyed a reduced rate through a group registration option. This gives photographers the ability to claim statutory damages, but often without providing effective public disclosure of what the group registration covers. Section 412 also acts as a filter, reducing the number of claims from copyright owners and the level of exposure for infringers. Unfortunately, it does this for bad faith actors and good faith actors alike.

Section 412 was designed as a precaution and an incentive in 1976 — a time when the law was moving to automatic protection and many were worried about the ramifications for authors, the public record and the Library of Congress' collection. Section 412 thus creates a bargain: the copyright owner preserves his ability to elect statutory damages in exchange for registering, thereby ensuring a more complete public record of copyright information and a better collection for the Library of Congress.

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[72] *See* http://www.copyright.gov/docs/smallclaims/. Congress has asked the Copyright Office to study the challenges of the current system for resolving small copyright claim disputes, as well as possible alternative systems, and to report back by the end of September 2013.

[73] The Copyright Office is not the only government agency investigating the issue of smaller-value intellectual property claims. The U.S. Patent and Trademark Office is conducting a review of small patent claims. *See* Request for Comments on Patent Small Claims Proceedings in the United States, 77 Fed. Reg. 74,830 (Dec. 18, 2012). The issue is also not limited to the United States; the United Kingdom has instituted a special track for smaller-value intellectual property claims. *See New small claims track for businesses with IP disputes*, http://www.ipo.gov.uk/about/press/press-release/press-release-2012/press-release-20121001.htm.

[74] Section 412 provides that, with certain exceptions, statutory damages and awards of attorney's fees are not available to the copyright owner when: (1) infringement of copyright in an unpublished work commenced before the effective date of its registration; or (2) infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration was made within three months after the first publication of the work. *See* 17 U.S.C. § 412.

Whether and how section 412 has achieved these goals may be ripe for review again.[75] Certainly, the public database is important and the Library's collection is critical. However, if statutory damages are to remain tethered to registration, then the public record will need to be much more useful to prospective licensees than it is now. To this end, one professor has suggested that the recordation function in the law could be improved by requiring exclusive licensees to record their licenses promptly or risk their rights defaulting back to the grantor.[76]

More globally, arguments abound on the subject of statutory damages, suggesting that they are either too high, too low, too easy, or too hard to pursue. Statutory damages have long been an important part of copyright law to ensure that copyright owners are compensated for infringement, at least where actual damages are unworkable. The Copyright Act of 1790 included a provision awarding the copyright owner fifty cents for every sheet of an unauthorized copy that was printed, published, or imported or exposed to sale.[77] Statutory damages should remain squarely in the next great copyright act irrespective of section 412. However, there may be plenty to do on the edges, including providing guidance to the courts (*e.g.*, in considering whether exponential awards against individuals for the infringement of large numbers of works should bear a relationship to the actual harm or profit involved), and finding new ways to improve the public record of copyright ownership.

The Digital Millennium Copyright Act

A general review of copyright issues in the 21st century would be incomplete without a review of the DMCA. On the one hand, it is our best model of future-leaning legislation. On the other hand, fifteen years have passed and the world – including most notably the Internet – has evolved. Thus, if only for the exercise of establishing how the DMCA is working, including how affected parties have implemented its provisions and courts across the country have applied it, Congress should take stock of the last decade and a half.

The section 512 safe harbors in particular have generated more than their fair share of litigation on issues such as eligibility for the safe harbor, inducement, and monitoring.[78] Some of these issues were imaginable at the time at the time of their

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[75] *See* THE LIBRARY OF CONGRESS, ADVISORY COMMITTEE ON REGISTRATION AND DEPOSIT, REPORT OF THE CO-CHAIRS, ROBERT WEDGEWORTH AND BARBARA RINGER, at 6 (1993) ("ACCORD REPORT").

[76] Jane C. Ginsburg, *The U.S. Experience with Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J. L. & ARTS 311, 345-46 (2010); *see also* Directive 2006/116/EC of the European Parliament and of the Council of 12 Dec. 2006, at 1 (offering a longer term of protection where the author is identified).

[77] *See* U.S. Copyright Act of 1790, 1 Stat. 124 (1970).

[78] *See, e.g.*, *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, Case No. 09-55902, at 33 (9th Cir. Mar. 14, 2013) (concluding that "merely hosting a category of copyrightable content, such as music videos, with the general knowledge that one's services could be used to share infringing material, is insufficient" to prove that a website had actual knowledge of infringing activity); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir 2012) (distinguishing actual knowledge – or subjective awareness of specific infringing acts – from "red flag" knowledge, which the court described as an objective standard turning on whether the service provider was aware of facts from which a reasonable person would infer the existence of

enactment, and others were not. There are other concerns that go more generally to the question of whether the burdens of notice and takedown are fairly shared between copyright owners and intermediaries.

The DMCA also created legal protections for the technological protection measures used by copyright owners, as well as a triennial rulemaking process by which proponents could make the case for temporary exemptions to such measures, to allow circumvention in certain cases where it is necessary to permit noninfringing activity.[79] The Copyright Office has conducted five rulemakings since 1998.[80] Each rulemaking is conducted *de novo* and includes an evidentiary record developed during the proceedings. Congress intended the rulemaking to provide "a fail-safe mechanism"[81] for noninfringing uses, including fair uses. Like much of Title 17, the mechanisms of the rulemaking may benefit from congressional review at this time, but it generally has served the Nation well.

During the last proceeding, concluded in 2012, the Copyright Office recommended, and the Librarian granted, six exemptions that ran the gamut of technological issues. These included exemptions for persons with print disabilities using assistive technologies like screen readers, as well as exemptions for teachers and documentary filmmakers accessing protected motion pictures in the course of their work.

When the Copyright Office has not recommended exemptions, it has been because the balancing of the factors set forth in section 1201 did not favor doing so – that is, because the legal or evidentiary standards (or both) had not been met. In the most recent rulemaking, the Office recommended against granting an exemption to permit "jailbreaking" of videogame consoles because the proponents did not establish that there were adverse effects stemming from the prohibition – namely because the record revealed myriad alternatives to achieve the proponents' intended purpose which did not require circumvention. In the context of unlocking cell phones, the Copyright Office was again asked to consider the exemption that it had crafted in two of the previous four

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specific infringing acts); *Columbia Pictures Indus., Inc. v. Fung*, 2009 U.S. Dist. LEXIS 122661 (C.D. Cal. 2009) (concluding that a file-sharing service that actively induced infringement was ineligible for the safe harbors because the safe harbors are intended to protect passive good faith conduct).

[79] *See* 17 U.S.C. § 1201.

[80] The Conference Report on the DMCA states:

> [T]he determination will be made in a rulemaking proceeding on the record. It is the intention of the conferees that, as is typical with other rulemaking under title 17, and in recognition of the expertise of the Copyright Office, the Register of Copyrights will conduct the rulemaking, including providing notice of the rulemaking, seeking comments from the public, consulting with the Assistant Secretary for Communications and Information of the Department of Commerce and any other agencies that are deemed appropriate, and recommending final regulations in the report to the Librarian.

H.R. REP. NO. 105-796 at 64 (1998); *see also* http://www.copyright.gov/1201.

[81] H.R. REP. NO. 105-551, Pt. 2, at 36 (1998).

rulemakings. It concluded that the exemption should continue for "legacy" phones, *i.e.*, phones already purchased by consumers on or before January 26, 2013, but was unable to extend the recommendation to new phones in light of the evidentiary record, which demonstrated that carriers were offering unlocked cell phones in the marketplace, and that consumers could therefore choose to purchase them over the next three years.[82] While the rulemaking process is necessarily narrow, it sits at a dynamic intersection of technology, emerging markets, the protection of intellectual property, fair use, and other nonfringing activities. It therefore often serves as a barometer for policy concerns and policy action beyond the confines of the statute.[83]

Digital First Sale

The doctrine of first sale has been a part of the copyright law for more than one hundred years, but it could benefit from congressional attention at this time, at least with respect to digital copies but also possibly with respect to the importation and exportation of physical copies in certain circumstances. First sale is rooted in the common law rule against restraints on the alienation of tangible property and is codified in section 109 of the 1976 Act. It provides that "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."[84]

As for its role in the digital realm, the Copyright Office conducted an early study for Congress in 2001.[85] In part, the Office addressed the question of whether the first sale doctrine should be modified to allow users to transmit digital copies of creative works without the consent of copyright owners. At that time, the Office recommended against doing so, noting that transmission of works interfered with the copyright owners' control,

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[82] *See* U.S. COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: FIFTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS, at 45-47, 79 (Oct. 2012) ("RECOMMENDATION OF THE REGISTER OF COPYRIGHTS"), *available at* http://www.copyright.gov/1201/2012/Section_1201_Rulemaking_2012_Recommendation.pdf.

[83] *See, e.g.*, Official White House Response, It's Time to Legalize Cell Phone Unlocking (March 4, 2013), *available at* https://petitions.whitehouse.gov/response/its-time-legalize-cell-phone-unlocking; and Statement from the Library of Congress (March 4, 2013), *available at* http://www.loc.gov/today/pr/2013/13-041.html. As of this writing, several bills are pending. The Copyright Office has also from time to time noted other issues of public policy in the context of the rulemaking analysis, including most recently the need to update provisions for persons who are blind or have other print disabilities or for security research or preservation. *See, e.g.*, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS, *supra* note 82 at 24,

[84] 17 U.S.C. § 109(a). There are also some issues in the physical world involving importation, geographical licensing, and the segmentation of international markets. In *Kirtsaeng v. John Wiley & Sons*, 654 F.3d 210 (2d Cir. 2011), now before the Supreme Court, the Second Circuit held that a U.S. publisher can prevent an importer from bringing foreign-made textbooks into the United States for resale in this country. Some stakeholders, including libraries, charities, and commercial resellers have suggested they would benefit from greater certainty in this area (regardless of how the Supreme Court rules in *Kirtsaeng*).

[85] *See* SECTION 104 REPORT, *supra* note 34.

but acknowledged that the issues may require further consideration at some point in the future.[86] The report explained:

> In order to recommend a change in the law, there should be a demonstrated need for the change that outweighs the negative aspects of the proposal. The Copyright Office does not believe that this is the case with the proposal to expand the scope of section 109 to include digital transmissions. The time may come when Congress may wish to address these concerns should they materialize.[87]

More than a decade later, the doctrine of first sale may be difficult to rationalize in the digital context, but Congress nonetheless could choose to review it. On the one hand, Congress may believe that in a digital marketplace, the copyright owner should control all copies of his work, particularly because digital copies are perfect copies (not dog-eared copies of lesser value) or because in online commerce the migration from the sale of copies to the proffering of licenses has negated the issue. On the other hand, Congress may find that the general principle of first sale has ongoing merit in the digital age and can be adequately policed through technology — for example, measures that would prevent or destroy duplicative copies. Or, more simply, Congress may not want a copyright law where everything is licensed and nothing is owned.

Exceptions and Limitations

There are many discussions to be had about exceptions and limitations and their place in the next great copyright act. These include updating baseline standards for libraries and archives, crafting a digital age Chafee Amendment (for print disabilities), addressing the ecosystem of higher education institutions and markets, and possibly considering clarity in personal use activities. These issues should be viewed as complements to the fair use provision.[88]

The Copyright Office has been focused on library exceptions for several years, and its work on orphan works generated several hearings in past sessions of Congress and ongoing interest in the intellectual property community.[89] These issues are the subjects of ongoing public inquiries, symposia, and recommendations. Likewise, the question of special provisions for persons who are blind or have other print disabilities has been front

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[86] *See id.* at 73.

[87] *Id.* at xx.

[88] Section 108(f)(4) includes an express savings clause for fair use, stating that "[n]othing in this section . . . in any way affects the right of fair use as provided by section 107."

[89] *See* Letter from David J. Kappos, Under Secretary of Commerce for Intellectual Property, to Maria A. Pallante, Register of Copyrights (Jan. 2013) (expressing his support for the "work that the U.S. Copyright Office is doing to examine the problem of orphan works" and noting that "it is in the leadership interests of the United States to explore solutions"), to be reprinted in U.S. COPYRIGHT OFFICE, ORPHAN WORKS ANALYSIS, Part II (forthcoming 2013).

and center over the past few years, including in Geneva, in the courts, in the 1201 rulemaking, and in a government study, and is ripe for review.[90]

Higher education activities could also benefit from congressional direction. As I noted in my introduction, Congress deferred the option of a general education exception in 1976. However, it did enact a special exception for distance education in 2002,[91] following a study from the Copyright Office.[92] Unfortunately, the complexity of the provision, as enacted, has largely undermined its usefulness in the eyes of many educators. Congressional review of higher education – which is so dynamic – would be beneficial, especially because the legal framework must ultimately support and encourage a variety of copyright objectives, including: markets that produce quality educational materials; affordable licensing schemes; open source materials; the reasonable application of fair use; library exceptions; academic freedom, including the freedom of faculty to disclaim copyright in their own works; and formats that are accessible to persons with print disabilities.

Licensing

That brings me to licensing. Congress is aware that the development of newer and more efficient licensing models is essential to the digital marketplace and the many submarkets that comprise it. Some of this does not require legislation and should merely be encouraged, *i.e.* by reviewing the growth of direct licensing, microlicensing, voluntary collective licensing, and private and public registries.[93] In other instances, Congress may need to consider legislating new forms of licensing regimes as appropriate, for example, by updating or in some cases repealing compulsory licenses or perhaps enacting extended collective licensing models.[94]

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[90] *See* RECOMMENDATION OF THE REGISTER OF COPYRIGHTS, *supra* note 82, at 16; SCCR 25/2/Rev (Feb. 22, 2013), Draft Text of an International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities, *available at* http://www.wipo.int/edocs/mdocs/copyright/en/sccr_25/sccr_25_2_rev.doc (text of draft instrument currently in negotiation at the World Intellectual Property Organization); Report of the Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities (December 2011), *available at* www2.ed.gov/about/bdscomm/list/aim/meeting/aim-report.doc.

[91] *See* 17 U.S.C. § 110(2).

[92] *See* U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DISTANCE EDUCATION (1999), *available at* http://www.copyright.gov/reports/dc_rprt.pdf.

[93] In 2011, the Copyright Office, at the direction of Congress, explored in public hearings whether, after more than thirty-five years of experience with statutory licenses facilitating the retransmission of broadcast signals by cable and satellite providers, the time had come to eliminate the licenses in favor of one or more marketplace licensing mechanisms. The Office concluded that, while business models based on sublicensing, collective licensing, and/or direct licensing may be relatively undeveloped in this context, they are feasible alternatives to secure the public performance rights necessary to retransmit copyrighted content in most instances. *See* SECTION 302 REPORT, *supra* note 36.

[94] Extended collective licensing would require Congress to enact a framework by which works are made available for certain purposes without the need for case by case or prior permission, but in which representatives of the various stakeholder negotiate fees, mechanisms for opting out, and other key terms. For more information, *see* MASS DIGITIZATION REPORT, *supra* note 38.

Music reform is a particularly important licensing topic. The mechanical license for musical works – over a century old and currently embodied in section 115 of the Act – was established by Congress out of a concern that a single entity might monopolize the piano roll market by buying up exclusive rights. Over time, this compulsory license – with its government-established rate – has become deeply embedded in the music industry. In the deliberations leading to the adoption of the 1976 Act, then-Register Kaminstein suggested that monopoly was no longer much of a concern and the license should perhaps be repealed.[95] But music publishers did not ultimately pursue that possibility (opting instead for an adjustment to the two-cent rate to two and three-quarters), and the license remains with us today.

Although amended in 1995 to clarify that it covers digital phonorecord deliveries as well as physical formats, the basic song-by-song licensing mechanism of the mechanical license has remained unchanged for over one hundred years. But because digital service providers have varying business models ranging from on-demand streaming services to permanent downloads to music bundled with other products, the rates adopted under section 115 have become increasingly complex. In recent years, some music publishers – especially larger ones – are choosing to license their reproduction and distribution rights, and even their public performance rights, directly to digital services instead of through third-party administrators such as The Harry Fox Agency, ASCAP, BMI, or SESAC. Meanwhile music services tell us that it is essential to have the full repertoire of musical works available to be a viable player in the digital marketplace.[96]

In 2006, Congress considered legislation, the Section 115 Reform Act (or "SIRA"), that would have changed the section 115 licensing structure to a blanket-style system for digital uses, but it was not enacted. It may be time for Congress to take another look.

Congress is already taking another look at section 114, the statutory licensing provisions for webcasters, satellite radio, and others seeking to engage in the digital performance of sound recordings.[97] As the November 2012 hearing before the House

[95] *See* U.S. COPYRIGHT OFFICE, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, at 32-36 (1961), *available at* http://www.copyright.gov/reports/annual/archive/ar-1961.pdf.

[96] Even this abbreviated overview points to some significant questions about the section 115 license in the digital age. The questions span a wide range of issues, from the workability of a song-by-song licensing framework to the desirability of one-stop licensing options for both reproduction and public performance, among many others. *See Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Marybeth Peters, Register of Copyrights); *Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Marybeth Peters, Register of Copyrights).

[97] *See* Internet Radio Fairness Act of 2012 ("IRFA"), H.R. 6480, 112th Cong. (2012). Proponents of IRFA argue that Internet radio is disadvantaged under the current Copyright Royalty Board system and urge that what they perceive as the more flexible factors set forth in 17 U.S.C. § 801(b) for satellite radio and other digital users be substituted for the "willing buyer/willing seller" standard currently applicable to webcasters. The legislation has drawn substantial opposition, including from the artist community, who

Subcommittee on Intellectual Property, Competition and the Internet made abundantly clear, the rate setting concerns of the webcasting community cannot be viewed in isolation; they are tied to the overall statutory licensing structure and even the scope of exclusive rights afforded for sound recordings under the Copyright Act.

To make a long story short, Congress could make a real difference regarding gridlock in the music marketplace and viewing the issues comprehensively, in the context of the next great copyright act, may be most productive.

Deposits for the Library of Congress

The Library of Congress receives books, films, music, and other copyright deposits through two separate provisions of the Copyright Act: 1) section 407 deposits, which are the works copyright owners submit to the Copyright Office for purposes of copyright registration; and 2) section 408 deposits, which are those that the copyright owners of published works are required to submit for the national collection within three months of publication and which the Copyright Office has legal authority to demand in instances of noncompliance. The provisions complement each other and both should remain in some form in the next great copyright act. They may, however, require some fresh thinking, particularly as to the evolving state of the Library's collection needs.

With respect to the registration system, the Library enjoys a unique place in the copyright law, as it has been both the custodian and a key beneficiary of the system since 1870.[98] However, its ability to evolve in the 21st century is directly tied to its ability to collect and preserve a variety of content, including digital content. In the past, in some instances, the Copyright Office was able to align the format requirements for copyright deposits with the specific needs of the Library. For example, under the discretionary authority granted to the Register of Copyrights, the Office created special group options for newspapers in 1992, making it easier for newspapers to register but also facilitating the formats the Library desired for preservation (in this example microfilm) and would have had to otherwise purchase.[99]

As a matter of law, copyright registration predates the Library, of course, and has other longstanding functions. Registration is *prima facie* evidence of copyrightability and copyright ownership, a condition of the availability of statutory damages, and a catalyst for the public record of copyright information. The authoritative determination of copyrightability provides guidance to the courts in a number of areas, including questions related to the scope of protection and any limitations or presumptions reflected

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have emphasized the lack of a terrestrial performance right for radio. Both sides, in other words, are arguing for parity in the royalty rate structure across different platforms.

[98] Congress transferred responsibility for registration to the Library in 1870, following eighty years in the district courts, and in doing so turned copyright deposits into a national collection. The Copyright Office was created within the Library in 1897, leading to the appointment of Thorvald Solberg as Register.

[99] Activities like this largely are carried out by the Register in accordance with the statute, except in instances where regulations are finally promulgated, in which case the Librarian, as head of the agency for purposes of the Constitution and reflected in the statutory framework, signs the final rule. *See* 17 U.S.C. § 702.

in the certificate. Registration certificates are frequently required by businesses to conclude intellectual property transactions, secure insurance policies, and settle matters of litigation, not only within the United States but also in deal making and litigation around the globe. It therefore must be evaluated broadly, against the objectives of the greater copyright law. In the words of one study group, while important, "[l]ibrary acquisitions policy should not drive copyright registration policy."[100]

In fact, as the Library seeks to acquire and preserve websites, electronic serials, and the other kinds of 21st century authorship, registration may not be enough of a tool. Instead, the mandatory deposit provisions may need to play a greater role generally, and may need granular adjustments to make them viable in the digital environment. For example, many digital works may not be "published" within the meaning of the "best edition" requirements of current law, placing them outside the parameters of the mandatory deposit provisions. It is also true that the formats required by the Library may not be the formats that actually are published by the copyright owner, and it is further true that the Library's collection of digital deposits may require clearer rules regarding the security of files and the conditions for making them available. In any event, the next great copyright act should ensure that the mandatory deposit provisions are flexible enough to support the needs of the national collection.

Thinking a Little More Boldly

As with previous revisions, Congress may need to apply fresh eyes to the next great copyright act to ensure that the copyright law remains functional, credible, and relevant for the future. This does not require it to abandon core principles of the copyright system, but it may require some recalibrations as appropriate and workable in the greater legal framework.

Offsetting Copyright Term

Copyright term is a global issue and any discussion of U.S. term therefore should acknowledge international norms. Nonetheless, the current length of the term – the life of the author plus seventy years in most circumstances – is long and the length has consequences.[101] One has to assume that *Eldred v. Ashcroft*[102] is the last word as to whether life-plus-seventy is a constitutionally permissible term, however, from a policy perspective that is no longer the relevant question. The question now is how to make the long term more functional.

[100] ACCORD REPORT, *supra* note 75.

[101] 17 U.S.C. § 302 (setting forth general term, including a term for works made for hire and pseudonymous and anonymous works of ninety-five years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first). An informal count shows that approximately eighty countries (and probably more) have adopted life plus seventy years as the standard for works of authors and it is incorporated in 17 free trade agreements of the United States.

[102] 537 U.S. 186 (2003).

The Copyright Office is interested in pragmatic solutions in the next great copyright act. Thus the Office's 2006 orphan works proposal suggested limiting remedies when copyright owners are unlocatable — effectively freeing many works from the long tail of time.[103] Similarly, the Office appreciates section 108(h), which allows libraries and archives to copy, distribute, display, or perform any published work in its last twenty years of protection, for purposes of preservation, scholarship, or research. Of course, other limitations on the law, including fair use, effectively offset term as well, albeit in limited circumstances.

Perhaps the next great copyright act could take a new approach to term, not for the purpose of amending it downward, but for the purpose of injecting some balance into the equation. More specifically, perhaps the law could shift the burden of the last twenty years from the user to the copyright owner, so that at least in some instances, copyright owners would have to assert their continued interest in exploiting the work by registering with the Copyright Office in a timely manner.[104] And if they did not, the works would enter the public domain.[105]

Making Room for Opt Outs

The United States has long had opt-in licensing schemes that permit authors to license their exclusive rights by voluntarily opting into a collective management organization. Thus, we have the examples of ASCAP, BMI,[106] and SESAC in the music industry and the Copyright Clearance Center in the literary space. In the words of one professor, speaking here at Columbia just a couple of years ago, collective management organizations can be attractive because they "can put [the] Humpty Dumpty of rights back together again by allowing users to obtain all the rights necessary for a particular use."[107]

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[103] *See* ORPHAN WORKS REPORT, *supra* note 35.

[104] As an aside, if U.S. history with respect to renewal registration of copyright is any indication, very few copyright owners – in this context, heirs and successors in interest not the author herself – will actually do so. *See* U.S. COPYRIGHT OFFICE, STUDY NO. 31 at 220, *supra* note 10. We believe further consideration of this proposal (and the various implementation issues it raises) would serve to improve the functioning of our copyright system.

[105] This should not, as far as I can see, present insurmountable problems under international law. The Berne Convention requires a minimum term of life-plus-fifty years, defers to member states as to the treatment of their own citizens, and provides the term of protection of the country of origin for the works of foreign nationals. *See* Berne Convention, Art. 7. At the same time, copyright owners who choose to assert their continued interests would have the full benefit of the additional twenty years, subject to the requirement of additional registration.

[106] Some collective management frameworks raise competition issues that would need to be reviewed and reconciled if collective licensing is part of the answer for consumers and market gridlock in the digital age. For example, both ASCAP and BMI operate under consent decrees with the U.S. Department of Justice designed to protect licensees from price discrimination or other anticompetitive behavior. *See United States v. Am. Soc'y of Composers, Authors and Publishers*, 2001 U.S. Dist. LEXIS 23707, 2001-2 Trade Cas. (CCH) ¶ 73,474 (S.D.N.Y. 2001); *United States v. Broadcast Music, Inc.*, 1994 U.S. Dist. LEXIS 21476, 1996-1 Trade Cas. (CCH) ¶ 71,378 (S.D.N.Y. 1994).

[107] Daniel J. Gervais, *Keynote: The Landscape of Collective Management Schemes*, 34 COLUM. J.L. & ARTS 591, 599 (2011); *see also* MASS DIGITIZATION REPORT, *supra* note 38.

By contrast, opt-out systems reverse the general principle of copyright law that copyrighted works should be reproduced or disseminated only with the prior approval of the copyright owner. It has become clear, however, that opt-out systems might serve the objectives of copyright law in some compelling circumstances if appropriately tailored and fairly administered, and if created with oversight from Congress. One potential opt-out system is a form of licensing known as extended collective licensing. Extended collective licensing allows representatives of copyright owners and users to mutually agree to negotiate on a collective basis and then to negotiate terms that are binding on all members of the group by operation of law. It has the potential to provide certainty for users and remuneration for copyright owners (for example in mass digitization activities) but would provide some control to copyright owners wanting to opt out of the arrangement.

Courts have affirmed the fact that fundamental changes like this are the domain of Congress because Congress is designed to weigh the equities of the public interest and to craft broadly applicable policies. A court, by contrast, must apply the facts and law as it finds them. This is why the Supreme Court noted in *Eldred v. Ashcroft* that "it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives,"[108] and why Judge Chin, in rejecting the proposed settlement between Google and a class of authors and publishers, said that "the establishment of a mechanism for exploiting unclaimed books is a matter more suited for Congress" than the courts.[109] Among the questions Congress could consider are what kinds of uses might benefit from opt-out regimes (*e.g.*, certain kinds of uses in higher education, certain kinds of library access), and what the actual terms and opt-out mechanisms should entail.[110]

Making the Law More Accessible

Finally, as noted earlier, the copyright law has become progressively unreadable during the very time it has become increasingly pervasive.

When the Copyright Act was enacted, it contained seventy-three sections and the entire statute was fifty-seven pages long. Today, it contains 137 sections and is 280 pages long, nearly five times the size of the original. As former Register Marybeth Peters observed in 2007, the current "copyright law reads like the tax code, and there are sections that are incomprehensible to most people and difficult to me."[111]

This is not merely a paradox; it is damaging to the rule of law.[112] The next great copyright act should be as accessible as possible.

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[108] 537 U.S. 186, 212 (2003).

[109] *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 677 (S.D.N.Y. 2011).

[110] *See generally* MASS DIGITIZATION REPORT, *supra* note 38.

[111] Rob Pegoraro, *Debating the Future of Music*, WASH. POST (Sept. 18, 2007), *available at* http://voices.washingtonpost.com/fasterforward/2007/09/debating_the_future_of_music.html.

[112] The Section 108 Study Group found that many practitioners are confused by the basic organization of the library exception. *See* THE SECTION 108 STUDY GROUP REPORT at ix-x, 93-94 (2008). The same is true

IV. THE POLICY PROCESS

As Congress considers copyright revision, its primary challenge will be keeping the public interest in the forefront of its thoughts, including how to define the public interest and who may speak for it. Any number of organizations may feel justified in this role, and on many issues there may in fact be many voices, but there is no singular party or proxy.

Because there are many more stakeholders than in previous revisions, it will be both harder and easier for Congress to weigh the issues. Why revision will be difficult is obvious. Not since the industrial revolution has there been a force like the Internet, and it has changed both the creation and dissemination of authorship. The copyright world, which once had predictable and even pristine demarcations, has morphed dramatically.[113]

It is also difficult to separate the medium from the message. As one journalist has observed, "[t]echnology executives like to suggest that media companies are selling buggy whips in the age of the automobile, but that doesn't hold up . . . So far, content generated by online businesses can't compete with that from traditional media companies."[114]

And then there is the common refrain that information wants to be free. Free information is good for the Internet and serves legitimate and important free speech principles. But in order to have a robust knowledge economy, we need content that is both professional and informal; we need content that consists of information, commentary, and entertainment, or sometimes all of these combined into one; and we need content that is licensed, content that is free, or in some cases, content that is licensed for free.

Although challenging, it is possible that Congress may actually find a world order like this to be more manageable in the long run. If the lines of special interests have blurred, if many actors have interrelated objectives, if many revenue models are decentralized, and if many advocacy or consumer groups are tied to one special interest or another, then the sum of these concerns may well approximate the greater goals of copyright law.

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in the world of musical works and compulsory licenses, which are supposed to replace a dysfunctional market, but not at the expense of usability. Sections 114 and 115 are highly technical and confusing: new business entrants and even established users struggle with interpreting the language, which is perhaps appropriately the subject of criticism. And then there is the *Kirtsaeng* case, in which the Supreme Court has been asked to interpret the phrase "lawfully made under this title" – five words that appear in five different sections of the Copyright Act – which have sparked intense debate over the first sale doctrine, importation, and geographical licensing.

[113] *See* Leyland Pitt et al., *Changing Channels: The Impact of the Internet on Distribution Strategy*, 42 BUS. HORIZONS 19 (1999).

[114] ROBERT LEVINE, FREE RIDE: HOW DIGITAL PARASITES ARE DESTROYING THE CULTURE BUSINESS, AND HOW THE CULTURE BUSINESS CAN FIGHT BACK 9 (2012).

Of course, government actors also have equities in copyright law and would be essential to the deliberation process of a general revision. As discussed above, the Copyright Office has a long history and deep expertise in the copyright law, has a direct advisory relationship with Congress, and has responsibilities for administering many copyright provisions.[115] The Office also interacts with many other agencies on a daily basis, which in turn have specific perspectives and statutory roles. This is how U.S. intellectual property policy works at the government level, and it is another reflection of the public interest.[116]

I would like to leave the topic of process by stating something that I hope is uncontroversial. The issues of authors are intertwined with the interests of the public. As the first beneficiaries of the copyright law, authors are not a counterweight to the public interest but are instead at the very center of the equation. In the words of the Supreme Court, "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[117]

Congress has a duty to keep authors in its mind's eye, including songwriters, book authors, filmmakers, photographers, and visual artists. This is because "[a] rich culture demands contributions from authors and artists who devote thousands of hours to a work and a lifetime to their craft."[118] A law that does not provide for authors would be illogical — hardly a copyright law at all. And it would not deserve the respect of the public.

This does not mean that all authors want the identical legal treatment. On the contrary, the diversity of authorship is part of the fun when it comes to copyright law and the law should be accommodating. For example, some authors prefer receiving credit to receiving payment, and some embrace the philosophy and methodology of Creative Commons,[119] where authors may provide advance permission to users or even divest themselves of rights. The law must be flexible enough to accommodate these decisions.

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[115] *See* 17 U.S.C. § 701.

[116] The U.S. Patent and Trademark Office conducted a "listening tour" in 2008 and, with the greater Department of Commerce, is preparing a comprehensive discussion document (a green paper) on copyright issues in the digital environment. The National Academy of Sciences is preparing a report that examines research methodology in the context of copyright policy. *See* National Academy of Sciences, Board on Science, Technology, and Economic Policy (STEP), The Impact of Copyright Policy on Innovation in the Digital Era, project description *available at* http://sites.nationalacademies.org/PGA/step/copyrightpolicy/index.htm. The Department of Justice, the State Department, the Intellectual Property Enforcement Coordinator and other parts of the White House, and the Office of the United States Trade Representative also interact with the copyright system and the Copyright Office in one way or another and should be consulted.

[117] *Twentieth Century Music Corp. v. Aiken*, 422 US 151, 156 (1975).

[118] Scott Turow, Paul Aiken, and James Shapiro, *Would the Bard Have Survived the Web?*, N.Y. TIMES at A29 (Feb. 14, 2012).

[119] *See* http://creativecommons.org/.

V. EVOLUTION OF THE COPYRIGHT OFFICE

Before I conclude, I would like to turn back to the Copyright Office itself. The Office has been at the epicenter of both the policy and the administration of copyright law since 1897 by virtue of its statutory duties, its close relationship with Congress, and its placement and origins in the national library. The Office has grown organically, meaning its functions today were no more planned or imaginable at the turn of the 20th century than was the explosion of the copyright system itself. Congress simply handed the Office things over time, both by design and by default.

The expertise of the Office is reflected in countless contributions over the last hundred years, including official studies, congressional hearings, treaty negotiations, trade agreements, policy recommendations, and legal interpretations, not to mention in the Copyright Act and its legislative history and in opinions of the courts.

Of course there is always more to do, and although Congress has long relied upon the expertise of the Copyright Office, it has been slow to increase the Office's regulatory role.[120] In fact, from 1897 to 1998, the role was largely, though not entirely, administrative, meaning most regulations addressed administrative questions, *i.e.*, rules pertaining to the registration process, the collection of fees, and the administration of certain aspects of compulsory licenses.[121] As more than one professor has noted, the Office has had very little opportunity to apply its expertise, leading Congress to write too much detail into the code on matters that are constantly changing, such as economic conditions and technology.[122]

Evolving the Copyright Office should be a major goal of the next great copyright act. In short, it is difficult to see how a 21st century copyright law could function well without a 21st century agency.[123] To the extent patent law offers any guidance, it is

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[120] *See* Terry Hart, *Copyright Reform Step Zero*, 19 INFO. AND COMMN'S TECH. L. (2010) (noting that copyright law will continue to become increasingly unable to keep up with technological and other challenges while also becoming increasingly resistant to reform efforts).

[121] Some aspects of regulating compulsory licenses and registration have substantive impact, *e.g.* provisions relating to the application of section 115 to online streaming. *See* Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 73 Fed. Reg. 66,173 (Nov. 7, 2008).

[122] *See* Joseph Liu, *Regulatory Copyright*, 83 N.C.L. REV. 87, 93, 95-99 (2004) (suggesting that one of the reasons copyright provisions became obsolete is the lack of regulatory power in the Copyright Office); *see also* Elizabeth Townsend Gard, *Conversations with Renowned Professors on the Future of Copyright*, 12 TUL. J. TECH. & INTELL. PROP. 35, 65 (Fall 2009) (noting that "the Copyright Office is a rather unique entity because historically, it has not had much rulemaking or regulatory power") (quoting Professor Diane Zimmerman).

[123] The Constitution permits Congress to delegate certain activities to agencies under certain circumstances, provided that the delegation is not an end run around the distinct roles of the legislative and executive branches when it comes to deliberating upon and signing new laws. As Justice Blackmun explained:

> [I]n our increasingly complex society, replete with ever-changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. . . . Accordingly, this Court has deemed it constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to

notable that the importance of the legal and business functions of the U.S. Patent and Trademark Office have been acknowledged over time, most recently through the amendments of the America Invents Act of 2011.[124]

In truth, many constituents want the Copyright Office to do better the things it already does, and to do a host of new things to help make the copyright law more functional.[125] For example, some people would like the Office to administer enforcement proceedings (such as a small copyright claims tribunal), offer arbitration or mediation services to resolve questions of law or fact (for example, where rights are murky or a license is unclear), issue advisory opinions (for example, on questions of fair use),[126] and engage in educational activities (like promulgating best practices or providing copyright guidance to teachers). The Office might also play a role in ensuring the governance or transparency of critical 21st century actors, such as content registries or collective licensing organizations.

There are some practical obstacles. Although migrating the Copyright Office to the next generation of services is a primary focus of Office staff at this time,[127] much will depend on technical capacity and resources.[128] Moreover, not everyone is optimistic

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apply it, and the boundaries of this delegated authority.

Mistretta v. United States, 488 U.S. 361, 372-73, 378 (1989) (internal citation omitted). The Justices have made it clear that in applying such authority, an agency may "exercise judgment on matters of policy," including "the determination of facts and the inferences to be drawn from them in the light of the statutory standards" as well as "the formulation of subsidiary administrative policy within the prescribed statutory framework." *Id.* at 378-79 (internal citation omitted); *see also Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 684 F.3d 1332 (D.C. Cir. 2012), *petition for cert. filed* (Jan. 25, 2013) (concluding that the Library "is a freestanding entity that clearly meets the definition of 'Department'" for purposes of the Appointments Clause and that the Library and the Copyright Royalty Board have the power to promulgate copyright regulations, to apply the statute to affected parties, and to set rates and terms on a case by case basis).

[124] For example, the statute authorizes the U.S. Patent and Trademark Office to deposit patent and trademark fees in excess of its annual appropriations into a reserve fund, from which the Office may access and spend said fees as needed to run its operations, irrespective of its annual appropriations from Congress. *See* Leahy-Smith America Invents Act, 112 Pub. L. No. 29 (2011).

[125] *See, e.g.*, Public Knowledge, A Copyright Office for the 21st Century: Recommendations to the New Register of Copyrights (Dec. 2010), *available at* http://www.publicknowledge.org/files/docs/ACopyrightOfficeforthe21stCentury.pdf.

[126] Some communities have begun to create and adopt fair use practices independently. *See, e.g.*, American University, Center for Social Media, http://www.centerforsocialmedia.org/fair-use.

[127] The Office is in the process of evaluating potential improvements and technical enhancements to the information technology platforms that support its registration and recordation functions, including its online registration system. The Office has identified a number of key focus areas, including improved system navigation and user interface, application of mobile technologies, improved process tracking, enhanced search capabilities, and bulk data transfer (often called "business-to-business" or "system-to-system") capabilities. *See* U.S. Copyright Office, Notice of Inquiry (forthcoming March 2013).

[128] As an agency that supports both the marketplace and the nation's cultural heritage, the Copyright Office is a bargain. However, it will need more resources to support the needs of the 21st century. Currently, two-thirds of the Office's budget, less than $40 million dollars, comes directly from spending authority, *i.e.*, congressional approval to spend the fees the Office collects for registration and other services for copyright

about the future of the Copyright Office. As recently as 2010, a group known as the Copyright Principles Project discussed the Office in meetings it held in Berkeley. They wrote:

> The information that the Office currently collects and administers as part of the registration system is the kind that everyone expects to be accessible through something like a simple web search. More importantly, transactions involving copyrighted works often take place in the same hyper-efficient environment, and the parties to those transactions require access to copyright information at a speed and in a format that matches that efficiency. While the Office has observed and anticipated these developments and moved many of its functions and services online, the reality is that the functionality of the registry remains woefully behind what leading-edge search and database technologies permit.[129]

The Copyright Office agrees that a 21st century copyright law requires a 21st century agency.

VI. CONCLUSION

It is a point of pride for the United States that our past great copyright laws have served the Nation so well. American experts are fond of pointing out that we have the most balanced copyright law in the world, as well as a robust environment of free expression and an equally robust copyright economy.[130]

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owners. These revenues are nowhere near the revenues generated by the patent system, but they reflect the fact that registration is optional. One-third of the budget, approximately $15 to $18 million dollars, comes from appropriated monies, and helps fund public services that are for the benefit of the public at large — for example the public records of copyright ownership, expiration, and transfers. These appropriated dollars should be further reviewed against another public benefit, the hundreds of thousands of deposits provided to the Library's collection at a value of $30 million dollars a year.

[129] Pamela Samuelson et al., *Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1203 (2010). The Project also queried whether registration should be decentralized and delegated to a series of private sector registries, with the Copyright Office moving to a new role of setting standards, both technical and legal.

[130] *See* Stephen E. Siwek, International Intellectual Property Alliance, Copyright Industries in the U.S. Economy: The 2011 Report, at 4 (Nov. 2, 2011) (reporting that core copyright industries contributed $1.627 trillion to the U.S. economy in 2010, which accounted for 11.10% of total GDP), *available at* http://www.iipa.com/pdf/2011CopyrightIndustriesReport.PDF; Thomas Rogers & Andrew Szamosszegi, Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use, at 6 (CCIA 2011) (reporting that industries relying on fair use contributed an average of $2.4 trillion to the U.S. economy in 2009 and 2009, which accounted for approximately 17% of total U.S. GDP), *available at* http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000526/CCIA-FairUseintheUSEconomy-2011.pdf.

Still, no law is perfect. The 1976 Act, which was a fair and remarkable achievement by many accounts, did not come close to the bleeding edge of technology. When all was said and done, Barbara Ringer acknowledged the shortcomings of the new law, calling it "a good 1950 copyright law."[131] "It may be resilient enough to serve the public interest for some time to come," she said, "[b]ut some of its inadequacies are already becoming apparent, and no prophet is needed to foretell the need for substantial restructuring of our copyright system before the end of this century."[132]

Unfinished business may be difficult for policy experts but it is not always a terrible thing. In a framework as dynamic as copyright, it is not unreasonable and probably prudent for Members of Congress to legislate carefully in response to technological innovation rather than in real time. Congress needs to see the evolution of technology and related businesses with some objectivity, and to consider, as appropriate, the rulings and the frustrations of the courts, before it can move forward. When it *is* ready to move, however, Congress should do so with both great deference to the principles of the past and great vision for the future.

In closing, I would like to encourage Congress not only to think about copyright law but to think big. The next great copyright act is as exciting as it is possible. Most importantly, it is a matter of public interest.

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[131] Barbara Ringer, *Authors' Rights in the Electronic Age: Beyond the Copyright Act of 1976*, 1 LOY. L.A. ENT. L.J. 1, 4 (1981).

[132] *Id.*

Mr. COBLE. Madam Register, you will be rewarded. You beat the illuminating red light. Thank you for that.

Folks, there is a vote on now. And we are going to depart to vote. We will stand in recess upon our return.

[Recess.]

Mr. COBLE. I will begin my questioning with the Register. And we will try to limit our questions to 5 minutes as well because of the schedule on the floor. There will be another imminent vote I am told.

Thank you again, Madam Register, for your testimony. What do you mean, Madam Register, when you say that copyright law must serve the public interest? And how does one measure whether it does so?

Ms. PALLANTE. I really appreciate that question, Mr. Coble. Copyright is ultimately about the public interest. And as I said in my opening remarks, James Madison said, the authors' interests coincide with the interests of the public. In the office where I work, where everybody loves copyright more than anything else in the world, we sometimes get a little dismayed because we see the interests of authors being set up as a counterweight to the public interest and sometimes as an obstacle to the dissemination of knowledge.

But the Constitution is very clear on this, that authors are part of the public interest equation and a means to creating, incentivizing, and disseminating knowledge. Trying to evaluate the public interest is a big challenge for us, and I am sure for you, because so many would like to speak for it. And so we like to go back to basics in our office and try to remember that although many of the media wars are about the profits or special interests of one intermediary or another, whether it is the tech sector or the content industry, ultimately if the law does not serve authors, it is not working and it also doesn't deserve the respect of the public.

Mr. COBLE. I thank you for that.

You mentioned earlier that our copyright law is probably the best in the world, and I am glad to hear you say that. Our copyright law contains enforcement protections that are balanced with important exceptions and limitations. How does the American copyright system compare to others around the world in striking a balance?

Ms. PALLANTE. Well, I think in terms of the balance to date, it is a model. Many look to it. But like other countries, our law is showing its age. And it won't surprise you to know that many countries are therefore looking at revision, either because they are becoming global citizens and entering treaties, treaties that we are already members of, for example, or because like us, they are trying to apply digital age fact patterns to an aging statute. So I think, you know, if we are to be true to our leadership role, as we have always been in the copyright space, we should proceed in terms of what is good for this country. And I think, you know, we have always done a very good job, Congress has always done an exceptional job of balancing what the global situation requires and what are the unique American principles that need to be intertwined.

One very easy example of that is fair use. Fair use for us is one of the safety valves for free expression. The Supreme Court has

confirmed that. Fair use is not a doctrine that you will see elsewhere in the world.

Mr. COBLE. I thank you for that.

I still have some time, but in the interest of time I want to recognize the gentleman from North Carolina.

Mr. WATT. And Mr. Chairman, as has been my practice, especially since we are having a series of votes, some of my colleagues may not be able to come back after the votes, so I am going to defer to Ms. Chu to ask questions first.

Mr. COBLE. Very well. Without objection.

Ms. CHU. Thank you so much.

Well, first let me ask about how the Copyright Act affects the music industry. I know that every time I hear music, I am hearing a performance of two copyrighted works, the musical composition written by songwriter and the sound recording made by reporting artists. Without both copyrighted works, composition and sound recording, the music just wouldn't exist. So it seems to me when establishing royalty rates for the performances of musical compositions by web casters, the royalty rates paid for the performance of sound recordings would be directly relevant. However, I understand that the Copyright Act specifically prohibits the rate court that establishes performance royalties for songwriters from considering the rates paid to recording artists for the exact same Web casting performance.

Ms. Pallante, what are your thoughts on having the rate court consider all relevant evidence, including royalties Web casters pay for sound recordings, when establishing royalty rates for performances of musical compositions?

Ms. PALLANTE. That is a fantastic question, a very difficult question. And my first answer would be it is exactly the kind of question that compels me to think we need to put all those issues on the table and figure out what we need to make music work within the copyright framework. So, you know, on the one hand, we do not have a full public performance rate for sound recordings. We are quite alone in the world in that regard. And from a copyright policy perspective, it is indefensible. It is really indefensible.

When you look at Internet radio, where royalties are paid, and the players that you want to encourage to come into that space, equity becomes a driving force. But from where we sit, we would like to figure out first what are the exclusive rights that artists, authors, and labels should have. And then, from there, figure out what part of that should be legislated, what part should be administrative, and what the guideposts should be to keep it flexible and nimble.

Ms. CHU. Well, thank you for that. And I would like to also ask about the film industry, and the fact that it has found creative ways to protect copyrights while expanding access in this new digital age. These are the digital rights management tools that incentivize businesses to develop new and innovative models to distribute high-quality content across multiple forms, such as UltraViolet, which allows ownerships to be portable. So thanks to copyright protections, companies are encouraged to invest in these new online platforms and allow users to access content legitimately. And ultimately, they are also able to protect creative rights.

So Ms. Pallante, what are your thoughts about digital rights management tools and their role in fostering innovation for distributing high quality content across many platforms?

Ms. PALLANTE. Uh-huh. Thank you for the question, Congresswoman.

I think it is ultimately a balance, but there is no question that DRM, as you reference, is critical to the equation. It is a way of combining law and technology to protect the content that others have invested in. And the high level question is, who should have the right to reap the benefit of the investment, those who created it and invested in it, or others who have perhaps an interest in aggregating it and distributing it? And ultimately, exclusive rights cannot be absolute, but they have to be meaningful. And I think the job that is so difficult in this copyright policy world right now is trying to get that equation right. So how do you incentivize the market to continue to offer innovative products like you described? Because consumers want them and because we want content industries to adapt and evolve. On the other hand, if they are too slow, or if others can step into the space, what part of the law should just stop that and what part should strike a balance?

Ms. CHU. And finally, let me ask about enforcement. A 2011 study found that almost 25 percent of all Internet traffic had copyright infringement, and yet only a small number of these infringements have ever faced any consequences. With this massive ecosystem of obvious infringement on the Internet, it is obvious that we have to do a better job of enforcement. How can we improve the current law to better provide enforcement tools for copyright protection?

Ms. PALLANTE. Well, thank you for raising enforcement. I don't think we can have a conversation about a 21st century copyright law without talking about enforcement, although I think there are some that would prefer that that be left off the table. So again, exclusive rights just will not be meaningful if there is no way to enforce them. So that could be updating illegal streaming so that one can go after it with not just a misdemeanor but criminal penalties, just like the law says for reproduction and distribution. For smaller artists, it may be a small claims process of some sort where if the harm is worth $2,500, yes, Federal court is an option, but it is not really an option at an economic level. It just doesn't really make sense. But for that artist, it might be everything to them to control that kind of use.

So enforcement is critical. I think it has to be on the table going forward. It can be a mix of legislative and private sector voluntary, regulatory packages. I think that is probably the innovative thing to do to keep it flexible and nimble. But I appreciate your raising it.

Ms. CHU. Thank you.

I yield back.

Mr. COBLE. Thank the gentlelady.

The Chair recognizes the distinguished gentleman from Pennsylvania for 5 minutes, Mr. Marino.

Mr. MARINO. Thank you, Chairman.

Good afternoon. How are you?

Ms. PALLANTE. Hello.

Mr. MARINO. You mentioned in your opening statement that there were quite a few issues that are ripe to be reviewed. Can you narrow that down to let's say the three most important ones to you?

Ms. PALLANTE. You want me to pick my top three favorite?

Mr. MARINO. Top three.

Ms. PALLANTE. I think the public performance right for sound recordings is ripe. You have been deliberating on that for more than a decade.

Mr. MARINO. Yeah.

Ms. PALLANTE. We have done many, you know, pieces of research for you on it.

I think orphan works is ripe. I think that the public is so frustrated by the long copyright term, that it is not really the term itself but what to do when the rights holder goes missing. And again, we have studied that, and there have been multiple hearings. And we are actually yet in the middle another public inquiry at the request of Congress on that.

And I think, as I mentioned, illegal streaming is ripe. I think for me it is a parity issue. And if you have that for the reproduction right and the distribution right, but you don't have it for the public performance right, and yet we know that streaming is the way of the future for delivering content, it just makes sense.

Mr. MARINO. I had the opportunity recently to visit China, and Russia before that, and I brought these issues up. I may have set diplomatic ties back a decade or so, but I was rather insistent about it. But both countries blew it off; both the ministers and deputies just blew it off as it being nonexistent. And we all know how much money that is costing us in the U.S. and other countries doing business legitimately, but how much money is being made in Russia and in China. And my question then, what are other countries doing to bring up to date that term, if I may use it, their copyright laws?

Ms. PALLANTE. Well, it depends on the country. And I would say that we interact with foreign countries in the copyright space in a number of different ways, at international meetings like at the World Intellectual Property Organization, where there is a rather slow process I would say rather slow where many different countries at very many different economic levels talk about IP. And that is where treaty making often happens.

Then there are bilateral trade agreements. And the U.S., through USTR and others in the Administration, do a very good job of trying to make sure that those who are interested in trading with us have sufficient levels of protection. But at a very specific level, you will find that some countries are behind us and some are ahead of us. So for example, there are countries that are doing Web blocking as a last resort. And as you well know, that was the discussion for quite a while in this Congress. But it really depends on the situation.

Mr. MARINO. I was a prosecutor, so I prosecuted these cases, both at the State and the Federal level. But an overwhelming number of these cases start outside the country. And it has been very difficult on dealing with countries like Russia and China. Any suggestions?

Ms. PALLANTE. Well, I think everybody knows here that I testified three times on enforcement in 2011. And the approach that I thought was a very innovative approach, and which I was happy to support, was a follow-the-money approach. And I still think that that is something that, you know, whether slowly, deliberatively, differently, innovatively, you should continue to look at. Because there is just a loophole there. But I think what you are raising is the fact pattern that we are very well aware of in the Copyright Office, which is if one leaves the country but then directs a website of infringing content back to our citizens, how does one get at them under U.S. law?

Mr. MARINO. I will leave you with this thought. My daughter and son and I, we download music all the time. We pay for it. And I said to my daughter not too long ago, I found this real neat website where we can download. And she says, Dad, you are on Judiciary, you are on Intellectual Property, that is a bad site, I would stay away from it if I were you. So I followed her advice. And thank you, I yield back.

Ms. PALLANTE. Thank you.

Mr. COBLE. Thank the gentleman.

The Chair recognizes the distinguished gentleman from Michigan, Mr. Conyers, for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

I join us in welcoming our guest, the Register. And I would like to talk about whether you feel that performance and sound people should have a right provided in a comprehensive overhaul of the Copyright Act. How can we get it passed?

Ms. PALLANTE. Thank you, sir. I do. The Copyright Office has been on record on that issue for a very long time. And I think now, because of the promise of Internet radio, the disparity has become even greater.

Mr. CONYERS. That is great. Do you agree that more should be done in the area of privacy to protect the intellectual property that is being frequently the object of illegal activity, namely theft?

Ms. PALLANTE. I do. I regrettably am not an expert in privacy law. But I can tell you we worry about it even in the Copyright Office, because we are an office of public record, and we put up people's applications, and sometimes that includes private data. And we have to, like everybody else, figure out what the right balance is.

Mr. CONYERS. Now, in the area of copyright piracy, we, I think, all know that the economy loses about $58 billion annually, and maybe over 300,000 jobs. Are there some ideas you would like to leave this Committee with in terms of how we deal with this hugely important sector of our economy?

Ms. PALLANTE. Well, the easy answer is there is no easy answer. So enforcement provisions are critical. You can't have a 21st century copyright act that has 19th century, or 20th century for that matter, enforcement provisions. But I think there is also just a general cultural issue that we can play a role in and you can play a role in fostering respect for intellectual property. Piracy should not mean a teenager downloading music—not in your home but in my home—it really should be about trying to make sure the law can respond to the great pirates out there who are, with abandon, re-

producing, distributing, and making otherwise making available copyrighted works.

Mr. CONYERS. Well, I thank you very much.

And I would like the gentleman from Pennsylvania to know that we are happy to work with him in the performance rights area.

And Mr. Chairman, I yield back the balance of my time.

Mr. COBLE. I thank the gentleman.

The gentleman from Utah is recognized for—I stand corrected. The gentleman from Virginia is recognized for 5 minutes, the Chairman of the full Committee.

Mr. GOODLATTE. Well, thank you, Mr. Chairman. And thank you for holding this hearing. And I would ask unanimous consent that my opening statement be made a part of the record.

[The prepared statement of Mr. Goodlatte follows:]

Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary

Statement of Judiciary Committee Chairman Bob Goodlatte Subcommittee on Courts, Intellectual Property and the Internet Hearing on "The Register's Call for Updates to U.S. Copyright Law" March 20, 2013 Statement Submitted for the Record

This afternoon, we hear from the Register of Copyrights about her ideas for updating U.S. Copyright law.

Based upon Article One, Section Eight of the U.S. Constitution, our nation's intellectual property laws strive to balance the rights of creators to protect their works with promoting the progress of science and the useful arts. Given the importance of intellectual property to our nation's economy, it is critical that our copyright laws reflect the modern economy. The software developer in Silicon Valley, the songwriter in Nashville, and the documentary film maker in Los Angeles all rely upon such laws as do those who use copyrighted works for personal, scholarly, or educational use.

Few would doubt that keeping U.S. copyright law current is complicated by rapidly changing technology. The last major revision to the Copyright Act occurred in 1976 when the more advanced 8-track tape was pushing aside the less advanced reel-to-reel tapes in the audio marketplace. The mid-1970's were also the time that cutting edge VHS and Betamax videotapes were introduced. Good luck finding any of those videotapes today. Since the 1976 Act was in fact developed over a number of years in the 1960's and 1970's, it was truly a copyright law written for the analog era.

The world has obviously changed a great deal since 1976. Consumers now routinely acquire intellectual property only in digital formats. They purchase apps and music files on their phones, and watch streamed videos on their laptops and tablets. The notion of acquiring content on a physical item like a disk is rapidly becoming as outdated as an 8-track tape.

Just over two weeks ago, the Register of Copyrights gave a lengthy lecture at Columbia Law School entitled "The Next Great Copyright Act." In her lecture, she called upon Congress to consider making a large number of changes to U.S. copyright law as part of a wholesale revision of the 1976 Act.

I have been personally involved in several updates to copyright law since 1976 and understand the importance of keeping our copyright laws current.

Clearly, the Register's call to revise, rather than update, the Copyright Act is one that is certain to hearten some and, quite frankly, scare others. However, my views on the merits, or lack thereof, of a major overhaul depend not upon the scale of the effort required, but upon the merits of doing so. I welcome the Register's thoughts into which she has clearly put a great deal of effort. I also welcome the thoughts of other Members of this Committee, as well as the thoughts of the copyright world—many of whom I do not expect to be shy with their views.

Ultimately, however, the Committee will look to the words of the Constitution to weigh any proposed changes to our nation's copyright laws—"Congress shall have the power to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Mr. GOODLATTE. And I would welcome, Ms. Pallante, and thank her for her initiative here, which we heard about. And we are enthusiastic about having you come here and share it with the Committee. And I thank you for doing that.

You know, we have been through a lot of copyright debates and attempts to do things here in this Committee in recent years. And the tone of recent copyright debates has often been one that pits one or more stakeholder groups against others, as opposed to trying to find areas of compromise or consensus. Why do you think that the tone of copyrights and debates in our society has become so polarized and hostile? And how do recent debates differ from the past, if you know?

Ms. PALLANTE. Right. I wasn't there for the 1976 revision. But I was a younger lawyer during the DMCA. And so those are my guideposts.

Mr. GOODLATTE. Me, too.

Ms. PALLANTE. You know, we hate, in the Copyright Office, that copyright has gotten a bad name. We suspect it is because of money. And we suspect that—well, we know from the many authors, who call us on a daily basis, whether they call the lawyers or the help line, that they are feeling like they are on the edge of a precipice. But yet the public, I think if you were to poll them randomly, would think copyright is really about a bunch of giant corporations with one perspective or another.

So I think there is a lot of leadership opportunity in that debate. And we would really like, and I think one of my goals, if you were to consider a broad conversation about copyright, would be to be able to get the respect of the public back into the equation by having a law that actually is a little more intuitive than it is now.

Mr. GOODLATTE. Well, thank you. And that was really our objective in inviting you here today. What do you see as your role, the role of the Copyright Office, in any effort to update the Copyright Act over the next few years?

Ms. PALLANTE. Well, Mr. Chairman, we would take our cue from you and the Subcommittee here. But historically, the office has had a very close and supportive role with Congress, particularly with the Subcommittees that govern intellectual property. And we are at your disposal, whether that is for roundtables, advisory committees, red lines of the statute, revisions, studies, whatever it is that you might need. But we are poised and ready to help.

Mr. GOODLATTE. And how about looking forward for the office itself? In 2011, you published a list of priorities and special projects for the office that were designed to ensure that our copyright system is updated in the digital area. In your view, what specific improvements or authorities does the office need in order to make itself into a 21st century agency?

Ms. PALLANTE. Thank you so much for that question. I will separate it into operations and policy, although my staff will tell you that I am constantly saying you cannot separate those two things. But on the operations side at a high level, we need better technology. We have both a user community and a copyright owner community frustrated by the interface that they interact with when they come to our office. So whether they are trying to register, say they are uploading a film, they don't expect the system to crash as

they are trying to deposit their film. Our own staff is frustrated by the kind of inadequacies of the technology. We don't have enough staff. But we, I think more importantly, are looking at how to retrain and redirect the staff we do have.

So I am, for example, trying to do a reorganization of the entire place because I have found that the departments that I oversee are dated themselves. They date back, frankly, to the 1970's and 1980's. So there is much that we can do coloring within the lines. But I think, at some point, we just need more support, and we need to know what Congress wants the office to be.

On the policy side, the question I think, again, for Congress is do you want us to help fill in the blanks where the statute ends by having perhaps more rulemaking authority? And I would add to that maybe a little more control over our budget in terms of the fees that come in that we would like to turn back into the system of technology, or resources generally, but are often offset against our appropriations. In other words, we are a business. And I don't think ever in the history of the office, we have really operated like a business. And we would like to do that. The staff I have now is very business-oriented.

Mr. GOODLATTE. Well, thank you.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Chairman.

The Chair recognizes the gentlelady from Washington, Ms. DelBene, for 5 minutes.

Ms. DELBENE. Thank you, Mr. Chair.

And thank you for being here and for spending the time with us. I really appreciate it.

I am an old tech person, and so you talked about how our law from 1976 wasn't even really about 1976 by the time we got it implemented. And clearly, we could be at risk of doing that all over again. And, you know, I am a new Member of Congress, but you talked a lot about how we have had hearings and hearings on many of these issues before. So how do we—or what are your recommendations on how we—get ahead, or stay ahead so that we aren't guilty of doing the same thing all over again and implementing a law that is 10 years old and are starting out behind?

Ms. PALLANTE. That is such a great question. Thank you. I will say two things just right off the bat. One is I have no interest in sticking around for 21 years to talk about the law what we should have in 2013. So we, again, will take our cues from you, but we think, you know, a few years of very solid drafting and revision is probably what you are looking at if you really want to do something broader. And then the other thing that I would say is something that I just referenced briefly, which is how much of the law—how much detail do you want to be in the law? And how much do you want to put into regs, into rulemakings, practices, reward voluntary behavior? How much of it has to actually be in the code? And I would say particularly for economic issues and technology issues.

Ms. DELBENE. And so do you feel like you have more flexibility to keep it up to date if the statute is more broad is basically what you are saying?

Ms. PALLANTE. That is what I am saying.

Ms. DELBENE. Okay. Then you also talked about your technology being out-of-date and kind of struggling to keep up with folks who are trying to get you information, et cetera. Are you talking about something that would be a very significant change in what you have right now or——

Ms. PALLANTE. I don't know. I think, you know, I have only been the Register for 22 months. And I know that when the paper system was updated to electronic, it was in 2007. There was an enormous backlog that occurred right after that. There was a lot of support from the Library to try to get the backlog down. When I first became Register, I got nothing but backlog questions. And I was saying, but that is not the right question. The question is how is my technology, and how many staff do I have. And I realized it had become kind of an institutional question. But from where I sit, of course we should not have a backlog. But if we are only registering a small amount of things with a small staff and we are not doing it that well, we have bigger issues to figure out.

Ms. DELBENE. So how long is the backlog?

Ms. PALLANTE. We, thanks to the great dedication of the registration staff, we don't really have a backlog. We have a 2- to 4-month wait for electronic applications, which is quite reasonable. I talk to copyright stakeholders all over the country all the time, and they tell me that that is a reasonable amount of time to wait for a certificate. You know, the obvious question is, do you want it overnight? Is that the expectation in a world of technology? And I think you will find that they are reasonable when dealing with government actors. And of course, we would like to get it to be as good as possible. But that is really not my primary concern right now. It is not the thing that wakes me up at 3 in the morning, because the backlog is relatively stable.

Ms. DELBENE. So what does wake you up at 3 in the morning?

Ms. PALLANTE. The technology wakes me up, and just, you know, this is a blessing and a curse. So many people want the office to be so many things. You know, could you give me the answer? Is this fair use or not? Can you help me with curricula for my schools? Can you not just tell me what the courts are saying but tell us, you know, whether we can do this or not? Those kinds of things. And could you connect your database to my database? And could you do more public-private partnerships? And some of that is a security issue, because our offices are on Capitol Hill, and there is only so much connecting to private databases that I think we will be permitted to do. But we haven't—we are just now exploring those things. We have had hundreds of meetings in the last year and a half with stakeholders. My staff would tell you that we had some rules that we will talk to lawyers, but when we are talking about technology, we really want to talk to technology people. So not, you know, what are the legal rights that you are administering, but how does your database work? How do you sort the financial data? How do you present it?

We have databases that are online in the office, but they are very siloed and very dated. They have been the same four fields for 30 years. And copyright is now life-plus 70. So one example might be should we have the database of death certificates for authors? Who

knows when copyright expires? Where are they going to get that information? That is just a small example.

Ms. DELBENE. Thank you very much. I appreciate it.

Thank you, Mr. Chair.

Mr. COBLE. I thank the lady.

The gentleman from Utah, Mr. Chaffetz, is recognized for 5 minutes.

Mr. CHAFFETZ. Thank the Chairman.

And thank you for being here and the good work that you do. I appreciate it. There have been three different Web casting rate setting proceedings under the so-called willing buyer-willing seller standard, and yet there has never been a time when any significant percentage of the Internet radio royalties paid to SoundExchange have been paid pursuant to the rates established by one of the proceedings. Congress has had to repeatedly intervene, and three different laws have had to be passed to allow fixes to the rates established by these proceedings.

So my question is twofold. Why has the process for setting Internet radio rates have been so ineffective? And would you consider changes to the current CRB proceedings and rate structure that could better incentivize growth in Web casting and allow it to succeed?

Ms. PALLANTE. Thank you, sir.

I think what I would say at a high level is music licensing is so complicated and so broken that if we can get that right, I will be very optimistic about getting the entire statute right. And of course, we are more than willing to look at that very specific issue that you just raised. I think that is the kind of issue that we should fold into the next great copyright act. How do we get that right? Because if licensing isn't working, then copyright is not working.

Mr. CHAFFETZ. The recent cell phone unlocking controversy has revealed a deeper problem. Right now, it is impossible to add permanent exceptions to section 1201 because doing so violates obligations of the Korean Free Trade Agreement, among others. And similar problems arise at the Berne Convention, when people propose shortening length of copyright protection or reintroducing some of the formalities. Does it make sense for Congress' hands to be tied in such a way? And how can we enact necessary reforms without waiting for multiple renegotiations with disparate trading partners? What do we do there?

Ms. PALLANTE. That is the circle of life question, right? So we in the U.S. enact certain provisions. We then ask trading partners to do the same. And then they say, okay, but don't change your law, and we say, okay. Then we are all stuck. Right? But I think, obviously, trade is important. Obviously, we are a global citizen. We could just do whatever you want to do. You could decide that copyright should be 25 years.

What will happen if you do that, though, is that our own authors and corporations who invest in copyright, and for whom, you know, the economy has rewarded us and them, would be disadvantaged just by virtue of the operation of the treaties. I know you know all this, but those are the kinds of issues.

But I think the Congress should lead on these issues and do what it has done in the past. Because in the past it has often said, we are a global citizen, and we are going to do what we think is best, but we also have our own unique history. So, for example, you didn't do away completely with formalities when we entered the Berne Convention. You have residues of formalities in the law. You have to register before you get into court to see if it is in fact copyrightable. There are small things that you can do to leave the American imprint I think. I don't know how to help you with the bigger question.

Mr. CHAFFETZ. And Mr. Chairman, I guess part of what I highlight in this question is the need to address these as we do free trade agreements. I have one more question as I conclude here. You had recently brought up the issue of digital first-sale and seemed to express some concern about living in a world where more and more we no longer actually own things in the traditional sense of the word, but where we rather just license things, thing after thing. Can you go a little deeper on that? And what are some of the potentially negative consequences of living in a world where we merely license things as opposed to own things?

Ms. PALLANTE. Well, I think it needs more deliberation. But thank you for raising it, because I think it is one of the significant issues that will have to be resolved. I think, on the one hand, the first-sale doctrine comes out of real property. If you own something, you should be able to dispose of it, that particular tangible property. But if, in fact, the world of copyright isn't really about disposing of copies but endless consumer licenses, the question is does Congress want to do some version not really of first-sale doctrine, because again you are not dealing with a tangible copy, but do you want to mirror some policy point like that in the law?

In my lecture at Columbia, I gave an example where Congress had migrated a concept and applied it in a completely new context. So, in the old law, the very old law, the 1909 law, there was a renewal of copyright necessary as a condition of continued protection. And in the new law, the 1976 law, which is not so new, you went to automatic protection. But authors they, or at least ostensibly had had, a trigger for renegotiating their bad contracts at that renewal juncture with the people that they had, you know, licensed their song or their book. And so what Congress said is, we like that, that is a good policy point. We are going to create a termination provision where authors can renegotiate at some point later in the future. So it is just that kind of issue I think. Do you want to create something in the digital world so that the world of copyright is not just about licenses? And I don't actually have a solid view on this. I am going to keep looking at it. I think it is not really a digital first sale, it is something like that.

Mr. CHAFFETZ. A big issue.

Thank you, Mr. Chairman. Yield back.

And I would note for the record, by the way, I was 9 years old in 1976.

Mr. COBLE. Quit bragging.

I thank the gentleman from Utah.

The distinguished gentleman from Florida, Mr. Deutch, is recognized for 5 minutes.

Mr. DEUTCH. Thank you, Mr. Chairman.

Ms. Pallante, I am sure you agree, almost every aspect of American society has benefited from our robust copyright protection. We should all be proud that America entertains, America educates, America informs the world, and in doing so, five percent of the workforce is employed as the world's largest exporter of creative works. It should be self-evident, therefore, that we have got to ensure that our creators are protected and fairly compensated. Now, I applaud you for your recognition that while we have to continue to strengthen protections for artists, innovators, and entrepreneurs, we are truly living in a new world thanks to new technologies that have moved the arcane subject of copyright law to a breathtakingly large new group of engaged stakeholders on the Internet social media platforms. When my teenage daughters are talking to their classmates about copyright law, when the world is tweeting about copyright law, something that many of my colleagues on this Committee learned a great deal about, we have truly crossed into a new era.

And I agree that we have to take a serious look at the Copyright Act, we have to examine what is working and what is not for creators and for all of the stakeholders, whether they are victims of piracy or whether they are victims of antiquated laws that made sense at a moment in time. This Subcommittee has to ensure that our laws work in the digital age. But the enormous obstacle that I think we face is how to open up that dialogue to the new universe of people who care about copyright law in a way that inspires them to actually care about copyright. That is not necessarily obvious that that connection exists.

The basic premise of our copyright law is that we are all enriched when creators create, and that creators must be able to earn a fair return on their ingenuity. But for a generation growing up on the Internet, the perception too often is that anything that comes on your computer is free, and copyright simply means all the things that keep you from doing what you think you should be able to do at any time, at no cost. So what I would like you to speak to are some of the concrete steps that this comprehensive review that you proposed can do to make copyright relevant and inclusive in a way that doesn't water down the reasons that we have it in the first place.

Ms. PALLANTE. Thank you for that question. So we think about this all the time, 24-7, across the street in the Copyright Office. And I said earlier, we all love copyright so much; it is our chosen field of expertise. We see the beauty of the law. We see the innovation of the law. And nobody is more pained than us to see the disrespect for the law, especially among young people. And nobody is more unhappy to live in the home of a copyright lawyer than my children. So I know where you are coming from. I would say that——

Mr. DEUTCH. Our kids should talk, I think.

Ms. PALLANTE. Yeah. I think even getting to the universe of issues is going to require a strategy. So if you were to go down this road of broadly looking at the new framework, I have laid out quite a lot of issues in my Manges Lecture at Columbia, but that is not the whole universe. There are more. And you would have to

prioritize them. I think you have to figure out what the exclusive rights of authors are first. What should they be in the 21st century? For example, obviously the public performance right is becoming increasingly important because works are now being streamed, not necessarily reproduced and distributed. So we have to get that right.

At the same time, there are incidental copies. And we should probably exempt certain incidental copies just because not doing so is going to just ruin the perception and the workability of copyright law. We have made recommendations along those lines before. Not every reproduction is a reproduction with a capital R is what I would say.

I think although we love the trade associations that visit us on a daily basis, getting around them sometimes and getting to other kinds of creators, other kinds of users, people who are struggling in schools and higher ed and other places, would really be instructional. So I would also probably recommend that we, if we were to have roundtables, get out of Washington a little bit. Go somewhere like Nashville, where people make a living from writing songs at their kitchen table, or New Orleans. Go to, you know, schools, that kind of thing.

Mr. DEUTCH. I think that is a fantastic idea. I just would have one other quick question, if I may. Consumers today can access copyrighted content and TV programming, films, music, books, magazines, on a whole array of devices. Interactive TVs, Blu-ray, Roku, Xboxes, Netflix, iTunes, Hulu, C.R.A.C.K., I mean, we can go on and on and on. And clearly, and it is a rhetorical question I think, this whole array of legitimate services that exists, these platforms, could they have flourished without strong U.S. copyright protection in place?

Ms. PALLANTE. Have they flourished?

Mr. DEUTCH. Would they exist at all?

Ms. PALLANTE. No. I see. Could they exist without the copyright framework? No. Copyright is the lifeblood of those kinds of companies. And they take the creative work that we all love so much and that people spend a lifetime creating, in some instances, and give it to us, and make it possible, and make it lasting. And I think, you know, consumers, obviously, when they are purchasing a copy of something may think they are purchasing the entire work forever. But they are purchasing a copy. And I think what you are seeing is the market is trying to adjust and struggling to figure out price points. If people think they are buying a copy forever, should we be selling the Blu-ray for $2,500? Or should we continue to sell it for $30, knowing that they are going to come back and think that they bought it forever? Those are market questions.

Mr. DEUTCH. I appreciate the discussion. Thank you.

Thank you, Mr. Chairman.

Mr. COBLE. The distinguished gentleman from North Carolina, Mr. Holding, is recognized for 5 minutes.

Mr. HOLDING. Good afternoon.

Ms. PALLANTE. Hello.

Mr. HOLDING. Sticking with the trade issue for a minute, writing in dissent in yesterday's Supreme Court case on the first-sale doctrine and the importation right, Justices Ginsburg, Scalia, and

Kennedy expressed grave concerns that the majority opinion in that case places our law squarely at odds with the stance the United States has taken in international trade negotiations. And they note that, quote, "Our government reached the conclusion that widespread adoption of the international exhaustion framework would be inconsistent with the long term economic interests of the United States." And that has consistently been advocated against such a policy in international trade negotiations. But they note that this is exactly the framework adopted by the Supreme Court in yesterday's opinion.

You know, is this a significant issue? Is this an issue of significance that the Supreme Court Justices are suggesting? It appears to be both a matter of substantive law as well as a matter of U.S. credibility on the international trade negotiation front. If you could run through that a bit and give us your comments.

Ms. PALLANTE. Right. Well, and we could talk for days probably about that issue.

Mr. HOLDING. Just 4 minutes.

Ms. PALLANTE. Just 4 minutes. I understand the reasoning of the Supreme Court in reaching the decision that they did. They were looking at competing provisions in an aging statute, right, which is my theme. The statute is getting harder and harder for courts to apply. But what they were looking at was, does the first-sale doctrine limit the distribution right? And they decided, yes, it does. That doesn't mean that the importation right isn't important now or shouldn't be more important in the future.

The question for Congress on this, just to keep it short, as you suggested, is, again, what are the rights that authors and creators need in the 21st century? Are geographical considerations among them? Not just because they now and always have actually under copyright segmented markets and controlled their business strategies in that way—I am going to market X at X price point in the U.S., and Y in the EU at a different price point, and then Thailand altogether different strategy—so do you want them to be able to continue to do that because that has served the U.S. economy extraordinarily well, provided incentives to the creators? But also as a copyright lawyer, I would say it gets more basic than that.

It goes back to the divisibility of copyright. So divisibility on one level can be I can carve up my pie of copyright in terms of distribution right, reproduction right, public performance right. I am going to write a book. It is going to be made into a film. Then there is going to be a Kindle adaptation.

I think——

Mr. HOLDING. And don't forget the video game.

Ms. PALLANTE. Don't forget the video game and then the theme park like in Harry Potter World, my favorite park. I think they also go a level deeper than that and unless you are in copyright transactions, unless you are familiar with them, that is not necessarily as evident, that it is not just the reproduction right, but it is the reproduction right in different parts of the world for different purposes, for different durations sometimes.

Mr. HOLDING. Justice Kagan writing with Alito in concurrence suggests that a way to give effect to the intent—Congress' intent—in providing a meaningful importation right without the unin-

tended consequences raised in a briefing before the Court would be overturning the 1998 *Quality King* case and held the importation right to be properly limited by the first-sale doctrine. What is your review on that proposed solution?

Ms. PALLANTE. Well, I think you can make the importation right meaningful if you want to do so, which is another way of saying if you believe that market segmentation is important in copyright, whether because you believe in divisibility of copyrights and that has worked well for us or you just believe in the economy, they are intertwined, there is no reason that you can't look at the importation right. Again, I think it goes to what are the rights of authors in the 21st century.

Mr. HOLDING. Thank you.

Mr. Chairman, I yield back.

Mr. COBLE. I thank the gentleman from North Carolina.

The distinguished gentleman from Georgia, Mr. Johnson, is recognized for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman.

I want to focus on one issue, Ms. Pallante, that has caused considerable distress to institutions of higher learning located near my district in Georgia, and this is a problem that has affected universities across the world—excuse me, across the Nation. In a recent example of the uncertain copyright challenges facing educators, staff members at Georgia State University were named as defendants in a lawsuit brought by Cambridge University Press and other publishers. And the key issue in that case was whether the faculty's use of e-reserves was fair. Are you familiar with that case, *Cambridge Press v. Patton*.

Ms. PALLANTE. Yes, sir, I am.

Mr. JOHNSON. Can you comment on what role fair use and licensing should play in higher education?

Ms. PALLANTE. Yes, and the short answer is they both have to play a role, which I think is probably what you are getting at in your question. So fair use is a critical part of U.S. copyright law. It is what makes our law American. It is tied up in freedom of expression. But it also has been applied to certain kinds of uses and certain kinds of contexts, for example, in education. However, higher ed has also been very well served by the market. So you don't want publishers of all kinds, serial publishers, textbook publishers, publishers of novels, literary works, coming out of that market because, in my opinion, it will affect the quality of the curricula materials that are available.

So what I would want to see in an ecosystem like higher ed is a robust mix of all of those things coming together. So you want micro-licensing. You want it to be easy. You almost want it to be invisible. For example, we talk a lot about collective licensing in the copyright office. The reason that that is attractive, whether it is voluntary or legislative—you can have both kinds—is that it can be done almost at the top of the institution, the students could pay a fee, bingo, their academic materials are paid for through a license, it doesn't have to be a lot.

At the same time, not everything should be licensed, and that's I think where you are seeing tension in higher ed. I would say, at

a more basic level, higher ed people who have to apply copyright are confused and rightly so.

Mr. JOHNSON. Well, that's something that we definitely need to clear up. Professors across the country utilize e-reserves to make limited copies of articles for students. Although Georgia State faculty prevailed on most of the infringement claims, the case is still troubling because—can you imagine the difficulty of educators when quoting a text, or showing images, or distributing handouts, surely these should be non-infringing uses? Is there anything that you can give us some guidance about on that issue?

Ms. PALLANTE. I can.

So, in 1976, Congress looked at an outright education exemption and decided no, we are not going to do an outright exemption for education. I think in part if you look at the legislative history, because it is so complex, some stuff is fair use, some stuff is not fair use. It depends on the work. It depends on context. It depends if it is commercially available. It depends if higher ed is the point of the market. Lots of factors.

Later, after a report from the copyright office at Congress' direction, Congress enacted a distance ed exemption that was negotiated so much, so well negotiated that it is almost useless. And it is part of the stress I think—of dealing I think—with education in the digital world. So I am not advocating for an exemption for higher ed, but I am quite sympathetic to the fact that ordinary lay people who are not copyright experts cannot navigate the copyright law. And so if we can put together a forward-thinking—with appropriate guidance from expert agencies like mine and room for regulations and best practices, some of which is happening in the private sector—then that would be great for those who want to get on with teaching.

Mr. JOHNSON. Great. With respect to K through 12 education the increasing costs of textbooks in the face of decreasing budgets, are there ways that educators can use technology to deliver text to students without infringing works or being hauled into court?

Mr. COBLE. Madam Register, the time has expired, be very brief in your answer.

Ms. PALLANTE. Yes, there's a way to help teachers understand the law and navigate the law. And I think the price of textbooks is again a market issue. And I am not a market expert, but I think the markets are evolving, maybe not fast enough.

Mr. JOHNSON. Thank you.

Mr. COBLE. I thank the gentlemen.

Thank you, Madam. I am going to recognize one more witness, and we will go vote, and then we will return because some witnesses have not yet been heard.

The gentleman from Florida, Mr. DeSantis, is recognized for 5 minutes.

Mr. DESANTIS. Thank you, Mr. Chairman.

Thank you for coming, and I read your paper and your testimony, and I really appreciate you making an issue that this stuff needs to be more accessible and readable for the average person.

When I was running, I made an issue of saying, I am going to read every law before I vote on it; I am not going to pass the bill to find out what is in it. Although people appreciated that, but then

I got up here and I started actually reading the bills and, you know, it is not always all that helpful. I need to do a lot more than that. So you have to read the bill, then you have to read other statutes and this and this and whatever.

I think it really undermines the rule of law if this is not in any way accessible to the average person, and this is something that the Founding Fathers talked about. I mean James Madison said in the Federalist Papers, that if the law is too voluminous to be understood or voluminous to be read or too incomprehensible to be understood, you are really poisoning the blessings of liberty. So thank you for that. I think that that applies across the board with the things that we are doing here but certainly for this.

Just a couple quick questions. The good thing about copyright is it is actually envisioned by the Constitution, it is something that is in there. I think, as I read the Founding Fathers, that they really believe that the public good coincided with giving inventors and writers a property right in what they were doing. I think that they thought that that was just right anyway, but they also thought that that would incentivize, you know, more of that and more inventiveness in the future. So they viewed them as kind of going hand in hand. Do you agree with that, or do you, because I notice in part of your testimony, you had talked about how we have to kind of define the public interest? And I wasn't sure if you were maybe saying that in this day and age, that that kind of harmony isn't quite the same as it was back then. I just wanted to give you a chance to respond.

Ms. PALLANTE. Thank you. I absolutely think that the constitutional clause is our guiding force on copyright law. I think it served the Nation extraordinarily well for two centuries. I think the problem we have today in terms of the imbalance that we might feel in the copyright statute is that we have gotten away from that equation that puts the authors as the primary beneficiaries, followed by the public good. There is a lot of "we would like immediate access" and "we would like broader fair use." We believe in all of those principles, access and fair use, but it is not supposed to be at the expense of the creators. The law is pretty clear on that, and the Supreme Court has upheld that many times.

Mr. DESANTIS. I noticed with kind of the streaming—stuff that's illegally streamed on the Internet—that the White House I guess has asked for clarification, because—does the statute have a loophole to where it is either copies or, I guess, it is envisioning like a physical document? So is that something in the law that you think should be addressed?

Ms. PALLANTE. I think that's one of the first things that I would advise if you wanted me to pick. That would be one of the top things on the list, because what you are alluding to is that there are criminal penalties—and this is in the criminal context, not civil—egregious criminal infringement, piracy at the worst purposeful levels, right? So law enforcement can go after the reproduction or the distribution, and they can go after that in a meaningful way because those are felonies, not misdemeanors.

The public performance right, which is another enumerated right, which is implicated by streaming, performing the work, not

necessarily downloading and distributing a copy, streaming, whether it is a football game or music, is a misdemeanor.

Mr. DESANTIS. In your testimony, you talked about updating enforcement provisions I guess more generally than this particular instance. Can you give me some other examples of areas that you think may need updating?

Ms. PALLANTE. Sure. We are doing a study for actually this Subcommittee on small claims mechanisms, just because of the sheer expense of Federal court for some of the smaller actors in the space. And it goes to your earlier theme of remembering that authors are kind of the point, the primary—first beneficiaries of copyright law, and so do they need some kind of quick and dirty way to get quick results without—because otherwise, they don't have any enforcement at all. So we are looking at it. It is constitutionally very complex; it is complex in general.

There are other issues that this Committee has looked at in the past when it comes to offshore websites run by pirates, out of our jurisdiction but directing infringing activity at our people, what do we do with that? I think over time, you will have to look at that; the whole world is looking at that issue.

Mr. DESANTIS. Great. Time is about to expire, we will go vote.

Thank you, Mr. Chairman and I yield back the balance of my time.

Mr. COBLE. I thank the gentleman, we will stand in recess, and we will return imminently.

[Recess.]

Mr. MARINO [presiding]. We're going to call the hearing to order.

And I believe the next Congressman to ask questions is Mr. Jeffries from New York.

Thank you.

Mr. JEFFRIES. Thank you, Mr. Chair.

I thank you and the Ranking Member.

And I thank you, Ms. Pallante, for your testimony and for your service.

You referenced earlier the view that copyright law exists or should exist to serve the public interest, which I think is an assessment that all of us on this Committee share within the Congress; certainly it is a Constitutional prerogative that we have been charged with in that regard.

Is it fair to say that in the context of promoting the public interest through the vehicle of copyright law, that one of the greatest threats—or something that should be evaluated—is the ability for the creative community to have its work respected and protected?

Ms. PALLANTE. Yes, thank you so much for that question, Congressman.

In other words, the other side of that eloquent statement is that people do not have a right to have whatever they want when they want it for free if it is the intellectual property of someone else. There was a beautiful quote last year in the New York Times by some book authors and journalists, who said that the reality is that it takes sometimes a lifetime of perfecting one's craft to create that great work that others come to cherish and find meaning from. And so we have to have a long view of culture, and that's one of the great things about copyright law, is it has a long view of

incentivizing authors, letting them benefit from their works, letting others invest in those, and so that ultimately, we're all better off.

Mr. JEFFRIES. Now, in the past, piracy, or Internet piracy, or piracy as it relates to the work of the creative community, has been centered on unauthorized, illegal, unlawful reproduction and distribution; is that correct?

Ms. PALLANTE. Yes, that's correct.

Mr. JEFFRIES. Now, in recent times, that shifted as it relates to Internet piracy to illegal streaming; is that correct?

Ms. PALLANTE. Yes, that is correct.

Mr. JEFFRIES. In your view, did the current copyright laws and the criminal penalties that are attendant to those laws, are they sufficient to deal with the shift in piracy that has taken place from reproduction and distribution to unlawful streaming? And if they are not, what suggestions would you have for this Subcommittee and for the Congress as to what we should be thinking about moving forward to address that shift?

Ms. PALLANTE. Thank you so much for the question. So there is a gap in the current law, there are many gaps all over the law on different issues. But on enforcement, it is clear that the public performance right has come into its own as a primary way to disseminate copyrighted work. So whether you are streaming the Super Bowl, whether you are streaming music or a movie the point is, you don't always need to have a copy and the consumer may not want a copy. Sometimes you may want to download your favorite movie and watch it 30 times, but with all due respect to the motion picture industry, sometimes you just want to stream it once and watch it. And so, in that case, if there is a legal streaming happening, especially in an egregious willful, profit-driven kind of way how do you get at that activity if the best you can do is go after them for a misdemeanor?

Mr. JEFFRIES. Now, another vehicle to deal with sort of the illegal highjacking of creative content is the notice and take-down process. What is your take on how successful that process is as of this moment and what are some of the things that we should be thinking about moving forward to make sure that we have the proper mechanisms in place moving forward to deal with this issue?

Ms. PALLANTE. Well, that is a huge question. I would say that if you go down the road of looking at the next great copyright act and revising the statute in a more comprehensive way, you should look at the DMCA, you should look at the efficacy of the DMCA. And 15 years, that is a very long time in Internet years. How is it working? What have the courts done with it? Who is it affecting in what way? So there are many, many players in the ecosystem on the Internet, and I think you will hear gripes from both sides.

You will hear from copyright owners, particularly small ones, that there's no way they can keep up with the infringement happening on the Web by sending notice after notice after notice, sometimes only to find that they pop up again. They are supposed to be creating, how could they possibly deal in that kind of environment? Did we have any concept 15 years ago that there would be this many notices and this kind of burden?

However, on the other side, the DMCA was meant to be flexible and to provided rules of road so that the Internet could flourish. And I think you will find that Internet actors will say there are abuses in both directions. They don't know how to deal with the notices that may not be correct.

Mr. JEFFRIES. Thank you for your testimony.

Thank you, Mr. Chair.

Mr. COBLE [presiding]. The gentleman's time has expired.

The distinguished gentleman from Georgia, Mr. Collins, recognized for 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman, I appreciate it.

It has been a long day this afternoon. Yesterday's decision by the Supreme Court regarding first-sale doctrine raises some concerns. And while the first-sale doctrine is important to copyright law, especially for businesses that resell products, such as Goodwill—majority. The majority's opinion to me raises some questions and issues of concern that I believe have implications beyond the scope of the first-sale doctrine. It is my hope that we are going to move deliberately, as you have said, to make this readable, something the average person can understand.

I think there are two things that the average person away from the Beltway does not understand: one, why it takes us so long to do anything, and number two, why we can't read it once we're done. And this is something that I'm focused on here, and when you look at the breakdown of the Justices here, this is a different ideological breakdown. And I think even the Court sort of made light of itself when it said, having once written tomato is a vegetable, are we bound to always call it a fruit—not be able to call it a fruit after that?

This is where I'm getting; this is an important topic. It is an important topic when we deal with what protections are involved. I want to ask this first question, and then I have got one on licensing in just a minute that I want to get your comment on. The majority wrote in this, the Court decision yesterday was regarding first sale, and the majority in—as Justice Breyer seemed to be very focused on a list of problems that would ensue if the Court adopted the nongeographic interpretation offered by Wiley.

Do you believe that there is sufficient statutory protection in current law such as exists in 602(a)(3)(C) that provides ample protection against the supposed consequences that came up by the Court, because if potential consequences are posed are real or done, this would be very troubling. What is your take on that?

Ms. PALLANTE. It goes to the question of how important do you want the importation and exportation provisions to be in the next great copyright act. So they have never been part of the bundle of exclusive rights in section 106, which is the primary list of rights of creators, and they have now been interpreted in the way that they interact with the first-sale doctrine, the case you just described. That doesn't mean that Congress can't decide that segmentation of markets is important.

It would probably also, if it went down that road, decide that there should be some exceptions. There is an exception in current law, for example, for libraries to import certain kinds of works and for people to bring in their suitcase from their vacation certain

numbers of works. Those provisions are now meaningless in the wake of Kirtsaeng decision, so do you want to recalibrate that? Do you want market segmentation?

I could read you a very important quote. It will just take a second. There is a long list of cases that we track where the courts say very politely, you know, it would really be great if Congress looked at this. Here is one from yesterday: Whether copyright owners should, or should not, have more than ordinary commercial power to divide international markets is a matter for Congress to decide.

Mr. COLLINS. And I think that throws it back, there is also something else in the majority opinion, and I think this is something we look at, where they did spend time on the Constitution promoting progress of science and arts—and useful arts, and they talked about being able to disseminate these creative works. To me—and that's a laudable end. The other problem, though, is there seems to be an issue here, and was sort of silent on, is that they seem to be more silent on promoting the protection of the creative works that went into those issues. So my question here, and it is a short one because I do want to get to the licensing part, taking, if you go from a purely geographical interpretation, does that present problems in doing what we're talking about, especially when it gets to the bundle of sticks, so to speak, of the property rights and taking into the dissemination issue as well?

Ms. PALLANTE. Well, you have two competing equally important issues. You have one, consumers have expectations, and there are companies that have been built around that. So if something has been sold in China, I have a way to deliver that to you in the U.S. Why isn't that the way the market works? Then you have copyright owners saying, but we have the right to divide our copyrights; that is basic to copyright law. And we do that in different kinds of ways.

Mr. COLLINS. And this goes back to a statement that was made earlier in a line of questioning, in licensing, isn't there also an underlying determination if there is ownership somewhere?

Ms. PALLANTE. Yes.

Mr. COLLINS. We can't just have a licensed world. Licensing in and of itself assumes ownership. Is that something, in this next, quote, as you say, "great copyright act," we've got to deal with the fact there is an ownership issue, and then we have licensing as well, and this is something I would hope all sides could come together on and look at? I would like your thoughts on that.

Ms. PALLANTE. I think you're right. I think that's how the first-sale doctrine would apply in a world of licensing, particularly online, is a complicated question, but ultimately, Congress should make a decision about it. Do you want a world of licensing only? Will the *Kirtsaeng* decision drive copyright owners to do more licensing online and less physical copies?

Mr. COLLINS. Well, but I think the other issue here, though, is driving toward licensing is fine. However, at a certain point in time, you have a right, or a start, that is there to begin with.

Thank you, ma'am, I yield back.

Mr. COBLE. I thank the gentleman from Georgia.

The gentlelady from California, Ms. Bass, is recognized for 5 minutes.

Ms. BASS. Thank you very much, Mr. Chair.

And excuse me if these questions have come up before, it is kind of a crazy day, as I know you know. But I wanted to ask questions to really understand part of the debate. And I know there is a lot of debate around First Amendment and whether copyright helps or inhibits the First Amendment. And I wanted to ask you if you could give me your opinions on that. Does it promote expression and free speech? Does it inhibit it?

Ms. PALLANTE. My personal opinion is it absolutely does, but you don't have to take that for an answer, the Supreme Court has confirmed it more than once in *Harper & Row v. The Nation*, Sandra Day O'Connor said, in fact, it is the engine of creativity. And I think, more recently, the Supreme Court has said that fair use is in fact a safety valve in the construct of copyright, but they are both equally important.

Ms. BASS. Well, maybe you could explain in your opinion how you think it does help.

Ms. PALLANTE. How do I think the——

Ms. BASS. The copyright helps.

Ms. PALLANTE. I'll take Sandra Day O'Connor's quote, but it is the engine of free expression. It is an incentive for people to create. We don't decide what people can and can't express. But if they are going to do it in a meaningful way and make a living from it, then copyright becomes the means by which they can do that.

Ms. BASS. And I certainly understand the individual interests that it protects, the individual artists create or whatever, but I don't know how that helps, and maybe you can elaborate on your own opinion about how that helps the public interest.

Ms. PALLANTE. Well, I think the constitutional equation is so elegant because it has a two-step process that authors are incentivized to create because they get a copyright that they can then license. And then we are richer as a Nation, maybe not immediately but over time because of the great, rich, robust mix of works that we get out of copyrights. So the reason that copyright lawyers love copyrights so much is because they were English majors or poets or film students or something at some point in time that the content is just so important.

And there's a place for free content. There's a place for content where people don't want to sell it, but they just want credit. But there's also a place for content where people think that their copyright should be meaningful.

Ms. BASS. Well, there is content, and then there is technology, so part of the debate is over the technological aspect of it, right?

Ms. PALLANTE. That's right.

Ms. BASS. And some people believe that copyright inhibits innovation and all the different devices that have been created. I would like to know your thoughts on that.

Ms. PALLANTE. I have never thought that copyright inhibits innovation. I have always seen it and I have learned it in this way, but I think it has been true in my 23 years as a copyright lawyer, it is an innovative law. It, itself, has adapted to all kinds of technology over time, from maps to iPads, so that the format is not so important, it's the ability of the law to continue to protect, and that's why we are, I think, having the conversation today. How do

I get that right for the next great copyright act? That's the right equation, I agree.

Ms. BASS. Thank you.

I yield back.

Mr. COBLE. I thank the lady.

The Chair recognizes the gentlelady from Texas, Ms. Sheila Jackson Lee, for 5 minutes.

Ms. JACKSON LEE. You may be seeing the rainbow at the end of the tunnel here.

Let me thank the Chairman and the Ranking Member for this.

Mr. WATT. Actually, the Ranking Member is the rainbow because I deferred to everybody.

Ms. JACKSON LEE. Oh, you haven't done your questions? The rainbow is yet to come.

Mr. COBLE. Hopefully within 5 minutes.

Ms. JACKSON LEE. The Chairman has spoken, but he is also very gracious.

First, I'm glad that we are creating a record for something that I believe is enormously important. And that is to protect our greatest asset: creativity and the genius of the American People. And I know that you have done this well. Thank you for your service.

I'm going to try and have some rapid-fire questions, and I thank you for bearing with me. On the sequester, can you give any quick, quick answer as to whether or not, and in what, you will be facing will impact your work?

Ms. PALLANTE. So we're worried about creating a backlog, where we have now cleaned that out. But more importantly, I think we are hitting the sequestration at a time when we are actually under pressure to do more things, and those are the not things that necessarily will be fundable from our fee schedule. In other words, if you want us to fund everything that we do, including databases for the public, and we have to put that on the backs of songwriters and poets, copyright registration is going to go from $30 to $50 to hundreds and hundreds of dollars. And it is a voluntary system. So we're trying to work in the mix——

Ms. JACKSON LEE. So there will be an impact, and particularly as it relates to backlog for those who least might be able to.

Ms. PALLANTE. And the ability of the office to modernize.

Ms. JACKSON LEE. Let me then now proceed with a series of questions. You have recommended to move from a 50-plus to a—50-plus from its current term life of 70 years that relates to copyright as relates to authors. Can you just quickly comment on that?

Ms. PALLANTE. Why would I do that? So it is life plus 70 now, and what I am suggesting is that the burden is always on the user to find the copyright owner and get permission, but in a life plus 70 scenario, which is becoming the global standard, what ends up happening is that copyright owners go missing, and the objectives of the copyright system get a little bit weaker, or they are a little out of focus. In a life plus 70 scenario, you're not talking about the creator anymore; you're talking about an heir or a successor downstream. Because the Berne Convention standard is life plus 50, and we are Berne-plus, as many countries are, we have the ability to say, we're going to give you that extra 20 years, but you have to assert your interest at some point.

Ms. JACKSON LEE. So you want to keep the vitality in the privilege.

Ms. PALLANTE. I think that the burden could shift to the user at the very end.

Ms. JACKSON LEE. And my only concern——

Ms. PALLANTE. I'm sorry, to the owner.

Ms. JACKSON LEE. And my only concern is I want to make sure to protect—writers may not be the most prosperous—we always view them as being prosperous, so make sure that person is disconnected, is not biased——

Ms. PALLANTE. Right.

Ms. JACKSON LEE [continuing]. In this process. But let me, because I have a short period of time. I will think about your answer and I understand the answer.

Can you tell me—you asked us to look at the big picture, in the course of looking at that—and I tend to agree with that. It is a big picture and big work. Where, in your perspective, report, or thinking do you help the little guys, who I think, again, are a vital part of our economy?

Ms. PALLANTE. Thank you so much for that question. They are my entire impetus for my recommendation to this Subcommittee. They have been lost in the conversation. We hear from them all the time. We need them to make a living out of creativity. So they should be the focus.

Ms. JACKSON LEE. Okay. And may I build on that by saying you mention orphan works? And where do you think Congress needs to go on that issue?

Ms. PALLANTE. I think that needs a legislative solution. And this Committee has been very active on that issue, and that is one of the things I think is more ripe than others.

Ms. JACKSON LEE. Would you give us a hook on specifically what you think is one of the issues that we need to be looking at in that overall issue?

Ms. PALLANTE. In orphan works?

Ms. JACKSON LEE. Yes.

Ms. PALLANTE. Well, again, it doesn't serve the objectives of the copyright system if a good-faith user has come forward trying to do everything possible to use the work but cannot find the copyright owner because they don't exist anymore, or they just have disappeared, often because they are not the actual creator, but they are an heir or a successor to a company. So you need to alleviate some of the pressure that has built up in the copyright system, the gridlock in the marketplace, and provide a solution that will let people move forward narrowly, while protecting, for example, the situation where the creator suddenly does show up. And maybe they showed up because somebody has now used their work; how do you make sure they are paid?

Ms. JACKSON LEE. Let me thank you for your work and your responses, thank you.

Ms. PALLANTE. My pleasure.

Mr. COBLE. I thank the gentlelady.

We save the best for last, the Ranking Member, the gentleman from North Carolina, is recognized.

Mr. WATT. Thank you, thank you, and I thank all my colleagues for all the wonderful questions that they have already asked, and I'll try to wrap it up quickly because I know you've been here for a long time, given all the breaks and all of the Members who had to ask questions.

I was wondering whether there is anybody who is tracking the money that is offshore as a result of the United States not having a performance right. Do we know how much money is still offshore that U.S. artists are not able to import?

Ms. PALLANTE. Actually, thank you so much, because we have not talked about that enough. Our performers get hit twice. They don't get the full public performance right here, and then they don't get to collect the money that other countries collect who do have a public performance rate that is more full than ours, because they say, we don't have to distribute it, because we don't have to recognize you because your country doesn't have reciprocity on this issue. I don't know the dollar amount. I'm sure that the industry tracks it.

Mr. WATT. You think the industry is tracking it, okay.

In your testimony, you mentioned certain preconditions, such as registration, that limit remedies available to aggrieved creators and how this potentially places an undue burden on the individuals in most need who are least likely to be aware of those preconditions, especially authors and photographers. Can you just expand on how you would address that?

Ms. PALLANTE. Well, I would like to have a conversation about it with this Committee because it's a very nuanced issue. Essentially what the law requires, in order to have statutory—in order to be able to elect statutory damages, you must register in a timely way. Those who don't know about the provision do not do so; therefore, they are limited to actual damages, which is another way of saying that the very people who need statutory damages the most probably don't have access to them. And is that equation meaningful? How do we fix—do we recalibrate that?

Mr. WATT. So, I mean, are you advocating doing away with the registration requirement? How can you address that?

Ms. PALLANTE. I didn't go that far, but it has been studied before, and I think the other side of that issue is that by requiring registration as a condition of statutory damages, you essentially have put in place a filter limiting the number of lawsuits that will come forward. What has happened over time is that the corporations who know to register can use that statutory damage provision as a club to get the kinds of settlements that they want, but again, what do we do about the authors who need help the most? If they need statutory damages, why do we have a condition?

Mr. WATT. So that relates to another issue: individual artists, authors, small folks really not that active in these debates. What do you see as their main concerns? And is there some way to bring those smaller people to the debate, or do we have enough horses to make it too complicated already?

Ms. PALLANTE. Well, I think, in a way, what you're asking me is do the associations who visit us here in Washington speak for everybody? They speak for a lot of people, but I know, for example, when I travel and I go to smaller cities, like Nashville or New Orle-

ans, I meet creators, the entire town is based around spending your life creating. And they just see us as a proxy for everything that's wrong with copyright, so could you do this? Could you do that? Could you wave a magic wand? But they just want to be able to make a living, and I think the public interest part of that is we want them to do that. So if people aren't making a living from their creativity, we're going to suffer as a country. That's the beauty of copyright law, that it allows that kind of culture.

Mr. WATT. That's probably a good statement to end this hearing on, Mr. Chairman. I know I've got a little bit more time, but I don't think anybody could say it more eloquently than she just said it, so I'm going to yield back.

Mr. COBLE. Thank you.

I want to express my thanks to two entities: number one, the Register, for your very vital testimony, and number two, I want to thank those in the audience, who spent most of the afternoon with us.

Your presence indicates to us that you have more than a casual interest in this very significant issue.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing stands adjourned.

[Whereupon, at 5:50 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

THE HONORABLE HOWARD COBLE
OPENING STATEMENT

HOUSE COMMITTEE ON THE JUDICIARY
CHAIRMAN, SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE INTERNET

OVERSIGHT HEARING: THE REGISTER'S CALL FOR UPDATES TO U.S. COPYRIGHT LAW

MARCH 20, 2013
2141 RAYBURN

***** 3:30 P.M. *****

Good afternoon and welcome to the Subcommittee on Courts, Intellectual Property and Internet. Today's oversight hearing on the United States Register of Copyrights' call for updates to our copyright laws will come to order.

It is my pleasure to welcome Register Pallante. Throughout my tenure in Congress and on this subcommittee, the Copyright Office has served as a wellspring of sound advice and counsel. Ironically, much of that advice and counsel came from Mrs. Pallante before she ascended to her current position.

Approximately two weeks ago, Register Pallante participated in the Horace S. Manges Lecture at the Columbia Law School in New York. Her remarks, which are posted on the committee's website, cover a wide range of issues challenging our copyright laws, and she proposes what could be a blueprint for our next great copyright act. Her prepared testimony today also aptly notes that Congress must ultimately consider what does and does not belong under a copyright owner's control in the digital age.

Much of my career has been dedicated to developing our intellectual property laws. Issues related to the digital platform have been the most difficult to resolve, and I welcome the Register's thoughts on how we can best address today's conflicts so that our copyright laws will benefit generations to come. I have no doubt that the digital revolution has taken hold and in order to continue to foster creativity and growth our intellectual property laws should facilitate an environment for creativity and innovation.

Register Pallante, what you suggest will take some time and there is no guarantee the Subcommittee will agree to undertake such a big

step, but if we do, I can assure you that you will be a key part of the effort.

One aspect of your testimony that I found most interesting are your thoughts on the role of authors and their interests with respect to the public's interests. I hope you have the opportunity today to explain how those two interests can be mutually inclusive in the digital age. I also hope you have an opportunity to clarify to whom you are referring when you mention authors and the public, and how other copyright stakeholders fit into this puzzle. These clarifications are critical if we truly intend to move this discussion forward.

Register Pallante, thank you again for your work to enhance intellectual property rights in America. I appreciate your effort to participate in today's hearing, and I look forward your testimony.

I reserve the balance of my time.

Statement of Ranking Member Melvin Watt

Subcommittee on Courts, Intellectual Property and the Internet

Hearing on

The Register's Call for Updates to U.S. Copyright Law

March 20, 2013

Thank you, Mr. Chairman.

I want to begin by thanking our witness, Maria Pallante, for her service to date. She and her staff have been invaluable resources to the Subcommittee and are to be commended for their expertise, professionalism and impartiality.

The world is changing. Remarkable developments in technology and the Internet have enabled society to change at an unprecedented pace. But these efficiencies have called into question the effectiveness of our laws both in protecting cherished values and in promoting continued innovation. As a nation, we are re-evaluating laws in a number of areas. For example, we are re-evaluating laws:

- to ensure that top current and former U.S. officials (including the Vice President, the First Lady, Secretary Clinton, and most recently, former President George W. Bush) do not have their private information obtained and disseminated without authorization;
- to prevent foreign hackers from infiltrating our newsrooms;
- to balance law enforcement needs with the sanctity of stored communications;
- to determine whether computer fraud laws are unacceptably vague, and
- to shore up the security of our critical infrastructures against cyber-attack.

Each of these reevaluations is compelled by innovations which, when misused, can lead to unintended (even devastating) consequences.

Copyright law and policy is no different. The digital era has introduced some unique challenges for copyright owners and users, and exacerbated some pre-existing ones. Even the rulemaking process

designed to balance the intersecting interests of copyright law with technological advances and public access has come under attack. Most recently, for example, Chairman Goodlatte and Ranking Member Conyers, introduced the "Unlocking Consumer Choice and Wireless Competition Act," which I was pleased to cosponsor. In the aftermath, calls for an upheaval of copyright law began appearing in the press and the blogosphere. Although those calls for widespread copyright reform coincided with the call to action of the Register of Copyright, they should not be driving us to action because I do not believe that policy should be dictated by polls and petitions. Although valuable and important to help create a climate for political action, polls and petitions should not determine the substance of the changes we make, but should considered along with a multitude of other factors and voices and accorded appropriate weight.

While I agree with Ms. Pallante's central premise that it's time to deliberatively update our copyright regime to meet the challenges of the 21st Century, I also strongly believe that there are some things both

Congress and the relevant industries can and should do sooner to address some of the imbalances that have developed in the digital environment. First, I think we must redouble our efforts to ensure, whether through legislation, public education, or stakeholder negotiations, that the core purpose of copyright—which is to promote the public interest by ensuring creators have the incentive to create – is reinforced by enabling all artists (whether photographers, musicians, composers, performers, lyricists, actors or other segments of the creative community) to be able to forge a livelihood from the new distribution channels through which consumers increasingly enjoy their creations.

Copyright law should not stifle innovation, but it MUST stimulate the creativity upon which innovation depends. It is no accident that new, modernized platforms and technologies seek to exploit artistic works. At root, a Kindle is useless without the literary works of authors; the I-Pod would be worthless and Pandora would not exist without the musical works they deliver; and Netflix would not continue to thrive without the catalogue of films in its reservoir. In short, consumers crave

content. And, to continue providing quality content the creative community must enjoy the just rewards contemplated by the Constitution.

Second, I think the time is long overdue for Congress to recognize a performance right in sound recordings. To do so requires no further study. To not do so, just prolongs this longstanding inequity and keeps us out of pace with the international community. Similarly, I think we have a sufficient body of evidence on which to craft a legislative solution to the "orphan works" problem. Addressing this problem will give users comfort that they will not face infringement claims from unknown, unidentified rights holders despite diligent efforts to locate them.

Mr. Chairman, there may be some other specific areas on which Congress can or should take immediate action because either the record is sufficiently complete or the stakes are too high to do nothing or to delay needlessly. But I will stop here so that we can hear from our

Register her views and recommendations on the content and process for the "Next Great Copyright Act."

I yield back.

Response to Questions for the Record from the Honorable Maria A. Pallante, Register of Copyrights, United States Copyright Office

The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8359

June 25, 2013

The Honorable Bob Goodlatte
U.S. House of Representatives
2309 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Goodlatte:

Thank you for inviting me to testify on March 20, 2013 before the Committee on the Judiciary, Subcommittee on Courts, Intellectual Property and the Internet on "The Register's Call for Updates to U.S. Copyright Law." I was extremely pleased to appear at the hearing and provide an overview of the state of our copyright law and the need for a comprehensive review.

This letter responds to the Subcommittee's June 11, 2013 formal written questions for the record, the answers to which are provided below.

Question Offered by Representative Mark Amodei

In November 2009, the full House Judiciary Committee held a hearing titled: Piracy of Live Sports Broadcasting Over the Internet. The Committee listened to testimony about how some individuals upload the live sports event and stream it over any number of websites, often making thousands of dollars in advertising or subscriptions. Today, over three years after that hearing, with HD quality internet ready TVs, the problem is worse and I'm hearing from the sports leagues, including Nevada-based UFC, about the significant economic damage that results. This conduct is already illegal, but it is only a misdemeanor. Do you agree that streaming of copyright-protected works is doing economic damage and what do you suggest be done about it? Do you support, as does the Obama Administration, making this conduct subject to felony penalties?

In my view, illegal streaming of copyrighted works on a commercial scale has the potential to cause substantial economic damage to the growing digital marketplace for online content. For this reason, I fully support efforts to update criminal penalties for illegal streaming. I testified on this issue twice during the 112th Congress, and I encourage you to review that testimony for further detail.[1]

[1] *See* Promoting Investment and Protecting Commerce Online: The ART Act, the NET Act and Illegal Streaming, Before the Subcomm. on Intellectual Prop., Competition, and the Internet of the H. Comm. on the Judiciary, 112th Cong. (2011) (statement of Maria Pallante, Reg. of Copyrights and Dir. of U.S. Copyright Office) *available at* http://www.copyright.gov/docs/regstat060111.html; *see also* The Stop Online Piracy Act: Hearing

Over the past several years, streaming of copyrighted works has become a major means by which copyright owners provide online access to sporting events, television programs, movies and music. Customers now have multiple ways to legally access copyrighted content from streaming websites such as Hulu or Spotify, whether through their televisions, smart phones, tablets or video consoles. Indeed, video streaming traffic is among the fastest growing areas of the Internet and according to some estimates now accounts for more than one-quarter of all Internet traffic.[2] To put this growth into context, the popular video streaming site YouTube recently announced that its more than 1 billion unique users watch over six billion hours of video each month, which according to the site, "is almost an hour for every person on earth."[3] Clearly, as technology and computer bandwidth increase, streaming of copyrighted works will only continue to grow as a critical component of the online digital marketplace.

Unfortunately, there is a disparity in the way in which our current criminal copyright law penalizes violations of the public performance right (implicated by streaming activities) and violations of the distribution and reproduction rights. This disparity may have once been of less consequence but is today a major problem. Under current law, prosecutors may pursue felony charges in the case of illegal reproductions or distributions of copyrighted works by willful infringers for profit, but are generally limited only to misdemeanor charges when those same works are illegally streamed, even where such conduct is large scale, willful and commercially motivated.[4] As a result, prosecutors have little incentive to file charges for illegal streaming, or they have reason to pursue only those cases where the rights of reproduction and distribution are also at issue. This lack of parity neither reflects nor serves the developing marketplace for streamed copyrighted content.

I therefore fully support efforts to update penalties for illegal streaming so that prosecutors will have more effective options available in cases of willful, criminal infringement. To the extent there is any lingering confusion as to the importance of

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on H.R. 3261Before the H. Comm. on the Judiciary, 112th Congress (2011) (statement of Maria Pallante, Reg. of Copyrights and Dir. of U.S. Copyright Office), *available at* http://www.copyright.gov/docs/regstat111611.html.

[2] Envisional, *Technical Report: An Estimate of Infringing Use of the Internet* 3, 19 (2011) ("Every recent report which examines the recent past and immediate future of internet usage . . . identifies streaming video as the fastest growing segment of bandwidth consumption worldwide.").

[3] YouTube Statistics, *available at* http://www.youtube.com/yt/press/statistics.html (last visited June 21, 2013).

[4] *See* 17 U.S.C. § 506(a); 18 U.S.C. § 2319.

this issue in the public's mind, Congress might want to clarify the nature of the conduct that elevates illegal streaming to a criminal context.

Thank you for the opportunity to respond to this question. As always, the Copyright Office stands ready to assist you in your work.

Respectfully submitted,

Maria A. Pallante

Maria A. Pallante
Register of Copyrights

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