REGISTER'S PERSPECTIVE ON COPYRIGHT REVIEW

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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APRIL 29, 2015

REGISTER'S PERSPECTIVE ON COPYRIGHT REVIEW

WEDNESDAY, APRIL 29, 2015

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Committee met, pursuant to call, at 10 a.m., in room 2141, Rayburn House Office Building, the Honorable Tom Marino presiding.

Present: Representatives Goodlatte, Smith, Chabot, Issa, King, Gohmert, Jordan, Poe, Marino, Labrador, Farenthold, Collins, Walters, Buck, Ratcliffe, Trott, Bishop, Conyers, Nadler, Lofgren, Jackson Lee, Chu, Deutch, Bass, DelBene, and Jeffries.

Staff Present: (Majority) Shelley Husband, Chief of Staff & General Counsel; Branden Ritchie, Deputy Chief of Staff & Chief Counsel; Allison Halataei, Parliamentarian & General Counsel; Joe Keeley, Chief Counsel, Subcommittee on Courts, Intellectual Property, and the Internet; Kelsey Williams, Clerk; (Minority) Perry Apelbaum, Staff Director & Chief Counsel; Danielle Brown, Parliamentarian; Norberto Salinas, Counsel; Jason Everett, Counsel; and Maggie Lopatin, Clerk.

Mr. MARINO. The Judiciary Committee will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone this morning to our hearing on the Register's Perspective on Copyright and Review. And I know we will get a very thorough, in-depth analysis of this.

I'm going to turn first now to Ranking Member Conyers for his statement.

And Chairman Goodlatte will arrive shortly to give his opening statement.

And, with that, Ranking Member Conyers.

Mr. CONYERS. Thank you, Chairman Marino.

And to the Committee that will be coming in soon and to all of our interested friends that are in the audience. You know, in the Declaration of Independence, our Founders—wait a minute—okay.

Today's hearing culminates the Committee's 2-year-long examination of the Copyright Act, a process that has involved 19 hearings and 99 witnesses. Our current Register of Copyrights here today makes 100 witnesses. It's a particularly fitting occasion that Ms. Maria Pallante, the Register of Copyrights, testifies at this final hearing, as she was the first witness to testify at the begin-

ning of the process. Over the course of this review, we've identified several priorities that I think we should consider. First, if our Nation is to have a strong copyright system, we, in Congress, must restructure the Copyright Office.

The Office examines the Register's copyright claims, records copyrighted documents, and administers statutory licenses. It provides expert copyright advice to Congress as well as various Federal agencies concerning trade agreements, treaty negotiations, and court proceedings. And the Office recommends much needed improvements to the copyright system.

Nevertheless, the existing Copyright Office is ill-equipped financially and structurally to handle certain challenges presented by technological developments and the growing demands of the copyright system. Essentially, the Office needs to modernize and become more user-friendly and efficient.

I thank Ms. Pallante for acknowledging the Office's limitations in her post-hearing response to my February request about her views on reorganizing the copyright letter. Her thorough response included different alternative proposals to help Congress determine how best to approach restructuring the Copyright Office. Now I welcome other stakeholders in the copyright community to submit to us their views and proposals to help bring the Copyright Office into the 21st century.

The 2-year review has highlighted several other areas where the copyright community can find common ground and which Congress should address promptly. A forum to resolve small claims should be established. Fortunately, the Office has already submitted a legislative proposal for addressing the need.

With respect to music licensing, the Office recently issued a report recommending reforms. For me, that's a very important area. Pending actions in the courts and by the Department of Justice will provide additional guidance to Congress as it considers reforming music licensing. The Fair Play Fair Pay Act, H.R. 1733, which I support, is one legislative proposal to address music licensing, the AM/FM royalties for musicians, which is not paid. The issue of orphan works must also be addressed. The Copyright Office will soon be issuing a report which will provide Congress a much needed framework for a legislative solution. As more copyrighted content continues to move to the Internet, current criminal enforcement laws must be updated to deter copyright infringement while encouraging new technological platforms which utilize the licensing copyright.

These are a few of the copyright-related issues that have come to our attention over the last 2 years that Congress should address without delay. For areas which are not ripe and need more detailed discussion, we should request that the Copyright Office issue reports and submit legislative proposals on which we can act in the near term.

And, finally, this review has confirmed that strong copyright protections are integral to a strong and vibrant copyright system. I've noted many times during this Committee's review that we must ensure that the copyright system treats creators fairly and fosters their continuing creativity. Whatever changes Congress makes to the Copyright Act must promote creation among artists and protect

their rights. Strong copyright protections will also foster a marketplace for content that consumers will enjoy as well as encourage technological innovation that can be used to watch the content. I thank the Chair for holding today's hearings.

And I welcome and look forward to hearing from Register Pallante.

Thank you, Mr. Chairman.

Mr. MARINO. Thank you, Congressman.

I want to welcome our distinguished witness here today.

And if you would please rise and raise your right hand, I will swear you in. Do you swear that the testimony you're about to give is the truth, the whole truth, and nothing but the truth so help you God?

Ms. PALLANTE. I do.

Mr. MARINO. Please let the record reflect the witness has answered in the affirmative. Please have a seat.

I'm going to begin by introducing the witness today. She has been to our Committee numerous times. And we look even more forward today to having her here, the Register of Copyrights, Ms. Maria Pallante.

And, in her role as Register, Ms. Pallante leads the legal policy and business activities of the United States Copyright Office. Prior to being named the 12th Register of Copyrights, Ms. Pallante served the Copyright Office in a variety of roles, including Deputy General Counsel, and then as Associate Register and Director of Policy and International Affairs.

During her career, she also spent several years as intellectual property counsel and director of licensing for the worldwide Guggenheim Museums. Register Pallante is a 1990 graduate of the George Washington University Law School and holds a bachelor's degree in history from Misericordia University.

Ms. Pallante, welcome back, and we are extremely pleased to have you here today. Your written statement will be entered into the record in its entirety. And I ask that you summarize your testimony in 5 minutes or less. To help you stay within the time limit, you're used to the lights in front of you. I'm not going to go through that ordeal.

And would you please begin.

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

Ms. PALLANTE. Thank you. Good morning. Vice Chairman Marino, Ranking Member Conyers, and Members of the Judiciary, it's a great honor to be appear before you again this morning to discuss the copyright law and copyright administration. I wish to thank this Committee for its work of the past 2 years. As I believe you know, the review process represents the most comprehensive focus on copyright issues in the United States in over four decades. I also want to thank the Committee's thoughtful policy and oversight counsel for the important and very helpful insights they have shared with my office in our work.

And I want to recognize my own staff for their dedication and enthusiasm at every turn, both in the complex portfolios that they

carry and the numerous and respectful interactions that they have on a daily basis with so many stakeholders. The Committee's review process was designed to sort through the many competing equities that make up the public interest in the digital age. Balancing these equities is more challenging than ever before. But it is tremendously important. In fact, Congress has amended the Copyright Act multiple times since 1790, each time ensuring that it is strong, flexible, and consistent with our cherished principles of freedom of expression. These are the themes that have come through in abundance this time as well, both from Members of this Committee and the many talented witnesses, all 98 of them, that have appeared before the Committee.

Before turning to the issues, I would like to highlight some of the recent efforts of my office. In the past 4 years, in support of the Committee's work, we have published seven policy studies, and we have two forthcoming. With respect to Copyright Office technology, we completed and published a proactive report and recommendations on current challenges and goals, drawing on public inquiries, stakeholder meetings, and expert research. In the area of copyright administration, we published a major overhaul of the Compendium of Copyright Office Practices, the first one since 1988, setting forth new legal guidance in the area of registering digital authorship.

And, on the subject of document recordation, we released a major report assessing how the Office records copyright transactions for the public. This report is the foundation for transforming the database that we have from a paper-based process to an innovative and interoperable platform for the digital economy. In all of this work, we solicited the participation of the public, including scholars, librarians, public interest organizations, bar associations, and the content and technology sectors. I am grateful to these important communities for participating in our work and for providing critical legal and practical perspectives.

I have been especially inspired by the stories of authors across the country, many of whom took time to talk with me personally, including songwriters, recording artists, producers, photographers, graphic artists, book authors, dramatists, and independent filmmakers, all of whom want to be credited and compensated for their work. As Register, it has become clear to me that the intelligent and connected world we live in depends heavily upon the creativity and discipline of authors.

My staff and I have reviewed all of the witness testimony of the last 2 years and we've divided our recommendations into four categories: Eight issues that are ripe for legislative action if the Committee so chooses; four issues that require foundational analysis and public study to assist you; a number of issues that are not as urgent; and overarching matters related to the Copyright Office itself. These are all further highlighted in my 32-page written statement. But I will highlight just a few of them here.

Starting with the first category, if the Committee is prepared to act, it is in a strong position to develop or advance legislation now or in the very near feature in these areas: One, overhauling the music licensing provisions of the Copyright Act; two, codifying a resale royalty act for visual art; three, creating a tribunal for small copyright claims; four, enacting felony streaming provisions; five,

updating the outdated exceptions that libraries, archives, and museums use; six, creating a framework to use orphan works; seven, updating the exceptions for persons who are blind or visually impaired; and, eight, shifting the regulatory presumption in the section 1201 rulemaking.

I will not go into detail about updating library exceptions or the exceptions for persons who are blind or visually impaired. But I will sum them up by saying that while some have opposed amending them because they would prefer to rely upon fair use, there is virtually no dispute that these sections are outdated to the point of being obsolete. Many individuals who need them do not have clear guidance about what they can and cannot copy, access, adapt, or share without permission. The provisions do not serve the public interest, and it is our view that it is untenable to leave them in their current state. We have studied them extensively, and we will be providing appropriate revisions to the Committee.

Likewise, it is clear that we have an orphan works problem and that most people want a framework that removes egregious damages for good-faith users but also establishes a reasonable payment mechanism for copyright owners who reappear. The Copyright Office has studied this issue for 10 years, and we will be releasing an updated proposal again soon.

Turning to music, we recently released a major study of the licensing landscape. Our music community is struggling, as the Committee knows, to apply outdated practices, many of which are government-mandated. We have proposed a series of balanced changes to promote more efficient licensing practices, greater parity among competing platforms, and fair compensation for creators, including greater latitude for rights holders to negotiate licenses in the free market. The groundwork has been laid for a follow-on process under the oversight of this Committee, and my office remains available to assist you.

With respect to small claims, we also believe the case has been made. In our 2013 report to the Committee, we noted the daunting challenges faced by copyright owners seeking to pursue small copyright claims through the Federal court process. And we recommended the creation of an alternative but voluntary tribunal for this purpose. Although modest in economic value, these claims are not small to the individual creators who are deprived of income or opportunities when their works are infringed.

Likewise, we think defendants should be able to raise appropriate defenses in the small claims context. I hope you will give serious consideration to our proposal.

And I want to discuss section 1201. This rulemaking is ripe for congressional attention and, in fact, is already receiving congressional attention. The anticircumvention provisions have played an important role in facilitating innovation and providing consumers with a wide range of content delivery options. At the same time, it has become obvious that the regulatory process can be burdensome for some proponents, especially when trying to renew the exemptions that we granted previously. We are therefore recommending a legislative change to provide a presumption in favor of renewal in cases where there is no opposition.

For other aspects of section 1201, we are recommending a comprehensive study, including the permanent exemptions for security, encryption, and privacy research. The rulemaking has always been a good barometer for public policy concerns. For example, in the 2010 rulemaking, my predecessor, Register Peters, observed that Congress did not anticipate the types of computer security concerns that have arisen since enactment of the DMCA and suggested that the 3-year exemption process is a poor substitute for what is needed in this area.

We are also recommending appropriate study of section 512 of the DMCA. These notice and take-down provisions were innovative in 1998, and they have largely served stakeholders well. But there are challenges now that warrant a granular review. Legitimate questions are coming from all quarters. However, a core question is how individual authors are faring under a system that requires sending notices of infringement over and over and over again without relief.

All other policy issues, those ripe for action and those ripe for study, are discussed at length in my written statement. However, I want to flag just two that we have reviewed extensively, the fair use doctrine and the "making available" right. In studying all the relevant scholarship, legislative history, and jurisprudence, we have concluded, as have others, that in each case, the best course of action would be to leave these provisions untouched.

I will end with Copyright Office modernization. We have greatly appreciated the Committee's deliberations and public discourse on this topic. We have worked to be transparent about systemic deficiencies and future expectations. It's an exciting opportunity to rethink the Copyright Office in the 21st Century. And at the request of Ranking Member Conyers, I have elaborated on these issues and my perspectives in a recent letter. I believe the Office requires more secure legal footing and greater operational independence in order to carry out its duties effectively and to reflect the incredible significance of the copyright system in the digital age. Thank you, Mr. Vice Chairman for the privilege of testifying.

[The prepared statement of Ms. Pallante follows:]

Statement of

MARIA A. PALLANTE

UNITED STATES REGISTER OF COPYRIGHTS AND DIRECTOR OF THE U.S. COPYRIGHT OFFICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
United States House of Representatives

"THE REGISTER'S PERSPECTIVE ON COPYRIGHT REVIEW"

April 29, 2015

Chairman Goodlatte, Ranking Member Conyers, and Members of the Judiciary Committee:

It is a great honor to appear before you again to discuss issues of copyright law and copyright administration. My staff and I wish to thank you for the attention this Committee has invested in reviewing the Copyright Act and related provisions of Title 17 during the past two years. During this time, you convened twenty hearings and traversed the formidable span of Title 17. This represents the most comprehensive focus on copyright issues in over four decades.

I. BACKGROUND AND THEMES

Although copyright law has grown more legally complex and economically important in recent years, Congress is uniquely positioned to sort through the many competing equities that comprise the public interest in this modern era.[1] Questions include: how best to secure for authors the exclusive rights to their creative works; how to ensure a robust copyright marketplace; how to craft essential exceptions, safe harbors, and limitations; and how to provide appropriate direction, oversight, and regulation. This balancing act is not

[1]The United States Congress is not alone in this undertaking. In the past few years, the European Commission and numerous countries have turned to questions of copyright policy, and several countries, including Canada, India, Malaysia, Taiwan, and the United Kingdom, have enacted amendments. *See, e.g.*, Copyright Modernization Act, S.C. 2012, c. 20 (Can.); The Copyright (Amendment) Act, 2012, No. 27, Acts of Parliament, 2012 (India); Copyright (Amendment) Act 2012, Act A1420 (2012) (Malay.); Copyright Act (2014) (Republic of China); Enterprise and Regulatory Reform Act, 2013, c. 24 (U.K.).

easy,[2] but, as the Supreme Court has stated, it is critical: "[T]he Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause."[3]

Many of the Committee's hearings touched upon not only policy matters but also the operational and organizational challenges of the Copyright Office in recent years. Thus we are especially grateful that the Committee chose to hold two hearings on the Office itself, specifically a September 2014 oversight hearing, at which I testified, and a February 2015 review hearing, at which both copyright association representatives and legal experts testified. We very much appreciate the Committee's open and deliberative leadership on questions regarding the role and goals of a twenty-first century Copyright Office. As former Subcommittee Chairman Howard Coble observed, these matters merit a robust public discourse.[4]

Themes

Some general themes have emerged from the Committee's outstanding copyright review process:

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[2] For some perspective on this point, see the Copyright Revision Roundtable of 1961, during which Cyril Brickfield, Counsel to the House Judiciary Committee, spoke with Ahraham Kaminstein, Register of Copyrights:

> Mr. Brickfield: The House Judiciary Committee is 100 percent behind the Copyright Office in its revision of the copyright law. . . . Now, the legislative road ahead may he long and it may be hard, and it may be bumpy in spots, and somewhere along the way there may be a detour or two—
>
> Mr. Kaminstein: And blood.
>
> Mr. Brickfield: And blood, too. But in the end this present endeavor will give us all a feeling of accomplishment and a sense of being proud that we played a part in the promulgation of a statute that will have become the supreme law of the land.

STAFF OF H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 2: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 44 (Comm. Print 1963).

[3] *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003).

[4] *See Oversight of the U.S. Copyright Office: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 2 (2014) (statement of Rep. Howard Coble, Chairman, Subcomm. on Courts, Intellectual Prop., & the Internet) ("This discussion needs to be a public one, and it needs to be approached with an open mind, with the clear objective of building a 21st century digital Copyright Office"); *A Case Study for Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 8 (2013) (statement of Rep. Boh Goodlatte, Chairman, H. Comm. on the Judiciary) ("It is my intention to conduct this broad overview by hearing from everyone interested in copyright law, as we begin by holding hearings on important fundamentals before we begin to look at more specific issues.").

(1) The constitutional purpose of copyright law informs all aspects of the debate.[5] In announcing the review process in 2013, the Chairman said that copyright law "is a fundamental economic principle enshrined in our Constitution. It has become a core part of our economy and society in ways the framers of our Constitution could never have imagined."[6]

(2) To support this purpose, it is essential that authors are incentivized to contribute to our culture and society at large, and that they be appropriately credited and compensated for the music, art, movies, literature, theater, photography, art, news, commentary, and computer code that we so appreciate and enthusiastically monetize as a nation. The point is that a connected and intelligent world depends heavily upon authors and their creative disciplines.[7]

(3) Likewise, a sound copyright law must recognize and promote the many businesses that identify, license, and disseminate creative works. These sectors are the heart of copyright commerce. The law should provide the flexibility they require to innovate and the certainty they need to protect and enforce their investments.[8] An investment in copyright law is an investment in the global marketplace.

(4) But of course the ultimate beneficiary of copyright law is the public at large, from individuals who are captivated by a book or film to libraries that collect and provide access to our cultural heritage for communities around the country. Thus, while the rights of authors largely coincide with the interests of the public, a sound copyright law will balance the application of exclusive rights with the availability of necessary and reasonable exceptions, and it will ensure the ongoing availability of a flexible fair use defense.[9]

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[5] U.S. CONST. art. I, § 8, cl. 8 (the full reads "The Congress shall have 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.").

[6] Press Release, House Comm. on the Judiciary, Judiciary Committee Announces Next Round of Copyright Review Hearings (Nov. 13, 2013), *available at* http://judiciary.house.gov/index.cfm/2013/11/judiciary-committee-announces-next-round-of-copyright-review-hearings.

[7] *See, e.g., Innovation in America; The Role of Copyrights: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 2 (2013) (statement of Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary) ("U.S. copyright owners have created millions of high-skilled, high-paying U.S. jobs, have contributed billions to our economy, and have led to a better quality of life with rich entertainment and cultural experiences for citizens.").

[8] *See, e.g., id.* at 5 (statement of Sandra Aistars, Executive Director, Copyright Alliance) ("[T]he creative community does not view copyright and technology as warring concepts in need of balancing. To the contrary, we are partners and collaborators with the technology community.").

[9] *See, e.g., A Case Study for Consensus Building: The Copyright Principles Project* at 22 (prepared statement of Daniel Gervais, Professor of Law, Vanderbilt University Law School) ("Modernizing copyright law should not involve just trade-offs between those who want more rights and those who want more exceptions. Today's copyright system should create benefits for *all* stakeholders."); *id.* at 76 (statement of Pamela Samuelson, Richard M. Sherman Distinguished Professor of Law, Berkeley Law School, Faculty Director, Berkeley Center

(5) In general, a balanced copyright law can be achieved through a mix of meaningful exclusive rights and necessary exceptions. However, where the law is silent or non-specific, interested parties may at times bridge the gaps in limited ways by undertaking best practices or voluntary solutions to defined problems.[10] Such work supports the role of Congress in crafting a functional law, but does not remove its legislative or oversight powers.

(6) To properly administer the copyright laws in the digital era, facilitate the marketplace, and serve the Nation, the United States Copyright Office must be appropriately positioned for success. As stated by one Member of this Committee, "it is time to enact a restructured, empowered, and more autonomous Copyright Office that's genuinely capable of allowing America to compete and to protect our citizen's property in a global marketplace."[11]

Copyright Office Policy Studies and Reports

As always, the Copyright Office has been active in studying and discussing these broad themes and fine points of law. Since the most recent Copyright Act was enacted in 1976, the Office has issued more than thirty reports and studies on various aspects of the law (sixteen since the passage of the Digital Millennium Copyright Act ("DMCA") in 1998), and engaged in countless rulemakings and public discussions. Policy studies have examined such diverse issues as works of architecture, rental of computer software, waiver of moral rights in visual artworks, legal protections for computer databases, distance education, and treatment of orphan works.

During my tenure of the past four years, Copyright Office experts have:

- Worked with the public on nine policy studies (seven of which are complete);

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for Law & Technology) ("I think something that came out of our deliherations which I think is something that can carry forward is a notion that if we find a way to articulate what the right balance is and we identify exclusive rights and some exceptions to those rights that become comprehensible, that become predictable, that they can, in fact, advance over time and get applied to new things."); *Innovation in America (Part II): The Role of Technology: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 155 (2013) (statement of Jim Fruchterman, CEO/Founder, Benetech) ("intellectual property laws at their hest can encourage technological advances, reward creativity, and bring benefits to society. To make this possible, we must keep the halance in copyright. We need to defend fair use as a laboratory for creativity . . . .").

[10] *See, e.g.*, *The Role of Voluntary Agreements in the U.S. Intellectual Property System: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (reviewing voluntary initiatives).

[11] *U.S. Copyright Office: Its Functions and Resources: Hearing Before the Suhcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 98 (2015) (statement of Rep. Ted Deutch, Member, Subcomm. on Courts, Intellectual Prop., & the Internet).

- Completed a multi-year technology report;
- Published and implemented a new schedule of fees for services;
- Completed and implemented a wholly revised *Compendium of U.S. Copyright Office Practices*, including registration practices for digital authorship, for the benefit of our examiners, copyright owners, the general public, and the courts; and
- Completed a free, user-friendly database of major fair use holdings.[12]

In this work, Copyright Office lawyers have sought and obtained input from broad swaths of the public, holding multiple public roundtables in Washington, D.C., New York, Nashville, Los Angeles, and Palo Alto, and speaking with or addressing a diversity of stakeholders in countless meetings in these same cities as well as in Berkeley, Redmond, Chicago, Mountain View, and several international locations.

My Office has provided expert staff to the United States treaty delegations for the Beijing Treaty on Audiovisual Performances and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. Additionally, we have supported the trade agenda of the United States, serving as part of the negotiating team on intellectual property issues for the Trans-Pacific Partnership and the Trans-Atlantic Trade and Investment Partnership. And, as always, we have assisted the work of the Department of Justice, including in *American Broadcasting Companies, Inc. v. Aereo, Inc.*,[13] *Petrella v. Metro-Goldwyn-Mayer, Inc.*,[14] and *Golan v. Holder*.[15]

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[12] The seven completed policy studies and publication dates are as follows: (1) Copyright and the Music Marketplace (2015); (2) Transforming Document Recordation at the U.S. Copyright Office (2014); (3) Resale Royalties: An Updated Analysis (2013); (4) Copyright Small Claims (2013); (5) Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document (2011); (6) Federal Copyright Protection for Pre-1972 Sound Recordings (2011) (commenced by former Register Peters); and (7) Satellite Television Extension and Localism Act (2011) (commenced by former Register Peters). These are available under "Policy Reports" at http://copyright.gov/policy/policy-reports.html.

The two forthcoming studies are: (1) Making Available Right Under U.S. Law (forthcoming 2015); and (2) Updated Solutions for Orphan Works and Mass Digitization (forthcoming 2015). Information regarding these is available under "Active Policy Studies" at http://copyright.gov/policy.

The Report and Recommendations of the Technical Upgrades Special Project Team is available under "Technology Reports" at http://copyright.gov/technology-reports/. (The Reports of the Government Accountability Office and the Responses of the Librarian of Congress and Register of Copyrights, respectively, are also available here).

The Schedule of Fees is available under "About Us" at http://copyright.gov/docs/fees.html, and the Public Study is available at http://copyright.gov/docs/newfees/USCOFeeStudy-Nov13.pdf.

The *Compendium of U.S. Copyright Office Practices* is available at http://copyright.gov/comp3/comp-index.html.

The Copyright Office commenced its fair use database in support of the Joint Strategic Plan of the Office of the Intellectual Property Enforcement Coordinator. *See* U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR, 2013 JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT 18 (2013), *available at* https://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipec-joint-strategic-plan.pdf.

[13] 134 S. Ct. 2498 (2014).

II. COPYRIGHT OFFICE MODERNIZATION

Through its oversight powers, and during the course of hearings over the past two years, the House Judiciary Committee has explored a number of questions relating to the Copyright Office's governance and operations, including the scope of statutory functions, constitutional organization, staffing, regulatory authorities, accountability, funding, and technology.[16] Members of Congress on the House and Senate Appropriations Committees (the Subcommittees on Legislative Branch Appropriations) have also identified pertinent issues in recent months.[17] Among other matters, Congress is examining the relationship of the Copyright Office to the Library of Congress.

Congress created the Copyright Office and the position of Register of Copyrights just before the dawn of the 20th century.[18] By statute, the Register and all Copyright Office employees are appointed by and accountable to the Librarian, working under the Librarian's general direction and supervision.[19] As with the Copyright Royalty Judges, the Register serves at the Librarian's pleasure and may be removed without cause. At the same time, the law vests statutory and regulatory responsibilities specifically with the Register, including registering copyrights, recording copyright documents, administering statutory licenses, providing legal and policy advice, and reviewing the determinations of the Copyright Royalty Judges for legal error.[20]

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[14] 134 S. Ct. 1962 (2014).

[15] 132 S. Ct. 873 (2012).

[16] As I mentioned during the September 2014 Copyright Office oversight hearing, and as highlighted by witnesses at the February 2015 hearing, the constitutional placement of the Copyright Office within the Library presents a complex set of challenges. *See Oversight of the U.S. Copyright Office* at 54 (statement of Maria A. Pallante, Register of Copyrights and Director of the U.S. Copyright Office); *U.S. Copyright Office: Its Functions and Resources* at 52 (statement of Robert Brauneis, Professor, George Washington University Law School). These constitutional issues have arisen in the courts as well. *See Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1341-42 (D.C. Cir. 2012) (discussing the Library's functions vis-à-vis the copyright system, and concluding that "[i]n this role the Library is undoubtedly a 'component of the Executive Branch'") (quoting *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3163 (2010)).

[17] *See, e.g., Fiscal Year 2016 Budget Hearing on the Architect of the Capitol and Library of Congress Before the H. Subcomm. on Legis. Branch of the H. Comm. on Appropriations*, 114th Cong. (2015), oral testimony at 1:15:04, *available at* http://appropriations.house.gov/calendar/eventsingle.aspx?EventID=393997 (statement of Maria A. Pallante, Register of Copyrights and Director of the U.S. Copyright Office) (responding affirmatively to Ranking Member Wasserman Schultz that it would be beneficial for the Copyright Office to separate out its budget from the Library of Congress and submit it directly to Congress).

[18] This followed a brief period, from 1870-1896, during which the Library administered copyright registration services directly. Before this, from 1790 to 1870, registration was handled by the disparate federal courts.

[19] 17 U.S.C. § 701(a).

[20] *See, e.g., id.* §§ 203(a)(4)(B), 408, 701, 802(f)(1)(D).

The Copyright Office also serves the broader government, that is, not only Congress but also the Department of Justice, the Department of State, the Office of the United States Trade Representative, and other federal agencies. As intellectual property has grown more and more important to the Nation, Congress has been consistently mindful of the Copyright Office's longstanding role. For example, when it converted the director of the U.S. Patent and Trademark Office into an Undersecretary position in 1999, Congress provided that "nothing shall derogate from the duties and functions of the Register of Copyrights," and required the Director to "consult with the Register of Copyrights on all copyright and related matters."[21] The courts have long cited and deferred to the work of the Copyright Office on substantive as well as administrative issues.

Notwithstanding its growing mission, the Copyright Office has one of the smallest staffs within the government generally or the Library specifically. The Library is currently operating with or seeking approximately 3400 full-time employees ("FTEs") overall. Of these, 1371 are allocated to staff carrying out functions of the national library and 622 are allocated to the Congressional Research Service. The Copyright Office will have 411 FTEs to carry out its basic mission in Fiscal Year 2016, reduced from 439 last year.[22] Since 2007, the Office's FTE ceiling has dropped precipitously.

Although the Copyright Office has a separate line appropriation, its budget is part of the Library's budget, is presented to Congress by the Library, and is weighed and prioritized by the Library alongside other needs of the Library. This is a standard means of budget formulation for many agencies, but it generally has not served the copyright system well. The Copyright Office budget is consistently in the neighborhood of $50 million, of which $30 million is derived from fees paid by customers for registration and other services.[23] The Library's overall budget for 2015 is approximately $630 million, inclusive of the Copyright Office.[24] Without taking anything away from the important duties or funding deficiencies in the rest of the Library, the Copyright Office's resources are inadequate to support the digital economy it serves. Some but not all of this situation may be remedied through future fee schedules or by permitting the Office to assess future capital costs. Although the Copyright Act currently limits the Office in this regard, I have suggested

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[21] *See* 35 U.S.C. § 2(c)(3), (5); *see also* 15 U.S.C. § 8111(b)(3)(A)(ii) (creating the position of Intellectual Property Enforcement Coordinator in 2008 and making the Register of Copyrights a member of the advisory committee).

[22] LIBRARY OF CONGRESS, LIBRARY OF CONGRESS FISCAL 2016 BUDGET JUSTIFICATION 7 (2015) (referencing staffing over past couple of years), *available at* http://copyright.gov/about/budget/2015/loc-fy2016-budget-justification.pdf.

[23] For a more detailed discussion, *see* Statement of Maria A. Pallante, United States Register of Copyrights, Before the Subcommittee on Legislative Branch Appropriations, United States Senate, Fiscal 2016 Budget Request 4 (Mar. 17, 2015), *available at* http://copyright.gov/about/budget/2015/budget-senate-fy16.pdf.

[24] LIBRARY OF CONGRESS FISCAL 2016 BUDGET JUSTIFICATION at 1.

previously, as have others, that it may be prudent to review this issue, particularly through discussions with larger copyright owners.[25]

The Office's current organizational structure is under strain because the copyright system has evolved and because digital advancements have changed the expectations of the public. The Committee explored these themes at its February 2015 hearing, and at the request of the Ranking Member, I provided my views regarding the hearing testimony, specifically whether and how the Office might be modernized to operate with greater legal and operational independence.[26] There, I explained that the Office serves an economically significant marketplace, requires a sophisticated technology enterprise, has funding needs that are distinct from the Library's, and would benefit from the kind of management authority that would allow an expert staff to adapt nimbly and responsibly to the changing landscape. A new structure must be consistent with the constitutional requirements that have been identified by Members of Congress, the courts, and legal experts, and it should respect the century-old tradition of the Office providing expert legal interpretation and impartial policy advice to both Congress and federal agencies.[27]

Difficulties have been most pronounced in the area of information technology. Witnesses have stressed the importance of technology to the proper administration of the copyright law, points well known to myself and my staff.[28] As mentioned above, I prioritized technology concerns early in my tenure and commissioned stakeholder feedback and a major report on these issues. Moreover, consistent with the advice we received from users as well as public interest organizations,[29] I created and filled the position of Chief

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[25] *FY16 Library of Congress & Architect of the Capitol Budget: Hearing Before the Subcomm. on the Legis. Branch of the S. Comm. on Appropriations*, 114th Cong. (prepared statement of Maria A. Pallante, Register of Copyrights and Director of the U.S. Copyright Office), *available at* http://www.appropriations.senate.gov/sites/default/files/hearings/031715%20LOC%20Register%20of%20Copyrights%20Testimony%20-%20LegBranch.pdf (at 11) (concluding that the Copyright Office would benefit from more flexibility in both its retention and spending of fee revenues, particularly in relation to longer-term capital improvements); *U.S. Copyright Office: Its Functions and Resources* at 52 (2015) (testimony of Robert Brauneis, Professor, George Washington University Law School) (recommending that "Congress explicitly authorize the Copyright Office to collect fees that cover capital investments and to build a reserve fund that is not depleted annually by an adjustment to the Office's appropriation").

[26] *See* Letter from Maria A. Pallante, Register of Copyrights and Director of the U.S. Copyright Office, to Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary (Mar. 23, 2015), *available at* http://copyright.gov/laws/testimonies/022615-testimony-pallante.pdf (discussing benefits of an independent agency structure for copyright functions).

[27] *See id.*

[28] *See, e.g., U.S. Copyright Office: Its Functions and Resources* at 24 (statement of Lisa A. Dunner, Partner, Dunner Law PLLC, on behalf of the Section of Intellectual Property Law of the American Bar Association) ("The Copyright Office needs a sophisticated, efficient IT system responsive to its needs and those of its users.").

[29] *See, e.g.*, MICHAEL WEINBERG ET AL., PUBLIC KNOWLEDGE, A COPYRIGHT OFFICE FOR THE 21ST CENTURY: RECOMMENDATIONS TO THE NEW REGISTER OF COPYRIGHTS (2010), *available at* https://www.publicknowledge.org/files/docs/ACopyrightOfficeforthe21stCentury.pdf; Pamela Samuelson & Members of the Copyright Principles Project, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1205 (2010)

Information Officer within the Copyright Office, not merely to better coordinate with the Library's central IT department, but to ensure that the Office plays more of a direct role in the targeted planning and development that is necessary. My goal is to empower the Copyright Office CIO to build a professional team that is both fully conversant in up-to-date technology and standards, and fully integrated into the actual business of the Copyright Office. I believe that the Copyright Office can and should operate leanly, but at least a third of the Register's future staff should be experts in technology, data standards, and information management concerns.

Notwithstanding the logic of building a tech-savvy copyright staff, and the loud support of copyright stakeholders for this vision, auditors have advised the Library to move in the opposite direction, *i.e.*, to correct general weaknesses in its core operations, it should exert more direct control and decision making over its departments, including with respect to technology.[30] The impact of this strategy on the Register's statutory authority is unknown, but requires serious analysis to avoid diluting or compromising the singular goals of the copyright system.

Moreover, the Library's technology governance and capabilities are seriously and systematically deficient.[31] And though the Library may well make incremental improvements, it is difficult to see how further centralization of the Copyright Office needs will facilitate the flexible and efficient copyright system we urgently need to create.[32] The mission of the Copyright Office is fundamentally different from the mission of the Library, and I believe that the Copyright Office must have its own CIO, technology staff, and management autonomy, including the ability to implement IT investment and planning practices that focus not on agency-wide goals but on its own specific mission.[33] As noted in

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(recommending that the Office develop additional policy expertise and research capabilities in the areas of economics and technology).

[30] *See, e.g.*, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, LIBRARY OF CONGRESS: STRONG LEADERSHIP NEEDED TO ADDRESS SERIOUS INFORMATION TECHNOLOGY MANAGEMENT WEAKNESSES 96-100 (2015), *available at* http://copyright.gov/technology-reports/reports/gao-lc-report-2015.pdf (recommending that the Library hire a permanent CIO responsible for the Library's information technology agency-wide).

[31] *See generally id.*

[32] *See U.S. Copyright Office: Its Functions and Resources* at 43 (statement of Nancy J. Mertzel, Schoeman Updike Kaufman & Stern LLP, on behalf of the American Intellectual Property Law Association) ("As the [Copyright Office's] technical upgrades report explains, '[t]he Office's technology infrastructure impacts all of the Office's key services and is the single greatest factor in its ability to administer copyright registration, recordation services, and statutory licenses effectively.' Yet, the Copyright Office does not control its technology. Rather, it is controlled by the Library of Congress, and housed on the Library's servers. In fact, even equipment purchased by the Copyright Office with its appropriated funds, is controlled by the Library. Additionally, the Office is dependent upon the Library's IT staff. However, the Library IT staff has other responsibilities, and is not well-versed in the needs of the copyright community. AIPLA urges this Committee to explore ways to give the Copyright Office greater autonomy over its IT infrastructure and services." (citations omitted)).

[33] In completing the Technical Upgrades Report mentioned previously, the Copyright Office CIO and project team recommended, among other things, that the Office have a separate enterprise architecture and technological infrastructure. *See* U.S. COPYRIGHT OFFICE, REPORT AND RECOMMENDATIONS OF THE TECHNICAL

my prior testimony to this committee, the Copyright Office sits at the center of a dynamic marketplace in which creative content drives a sophisticated chain of business in the information and entertainment sectors.

A faster and more nimble Copyright Office must be a priority.

III. POLICY ISSUES THAT ARE READY FOR LEGISLATIVE PROCESS

Based upon the past two years of congressional review, as well as the extensive research and study of my own staff, I believe the following issues are ripe for action, meaning that Congress has at its disposal the necessary legal analysis and a clear public record. If the Committee is prepared to act, it is in a strong position to develop legislation.

Music Licensing

The United States has the most innovative and influential music culture in the world. But music creators and users are struggling with outmoded licensing practices—many of them government-mandated—that have not kept step with the digital age. As is recognized by industry participants on all sides, we need to fix this broken system.

This Committee has long recognized the need to update the copyright laws governing the music marketplace. Nearly a decade ago, Representative Smith, then-Chairman of the Subcommittee on Courts, the Internet, and Intellectual Property, observed: "The laws that set out the framework for the licensing of musical rights in [the music] industry are outdated, and some say beyond repair."[34] Similar views have been expressed by many other Members during the current copyright review.[35]

UPGRADES SPECIAL PROJECT TEAM (2015), *available at* http://copyright.gov/docs/technical_upgrades/usco-technicalupgrades.pdf. When the Senate Legislative Branch Appropriations Committee requested the Government Accountability Office to review the Library's technology, it referenced the Office's request for public comments on technology. *See* S. REP. NO. 113-196, at 40 (2014), *available at* https://www.congress.gov/113/crpt/srpt196/CRPT-113srpt196.pdf.

[34] *Copyright Office Views on Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 1 (2005) (statement of Rep. Lamar Smith, Chairman, Subcomm. on Courts, the Internet, & Intellectual Prop.).

[35] *See, e.g.*, *Music Licensing Under Title 17 (Part I & II): Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 1 (2014) (statement of Rep. Howard Cohle, Chairman, Subcomm. on Courts, Intellectual Prop., & the Internet) ("[T]he current licensing system hasn't changed. Many feel that our music licensing laws were designed for a world that existed decades ago and have become outdated."); *id.* at 3 (statement of Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary) ("Interested parties from across the spectrum have recognized a need for changes in how our nation's copyright laws, as they pertain to music, are structured."); *id.* at 4 (statement of Rep. Jerrold Nadler, Ranking Member, Subcomm. on Courts, Intellectual Prop., & the Internet) ("Unfortunately, the existing landscape is marred hy inconsistent rules that place new technologies at a disadvantage against their competitors and inequities that deny fair compensation to music creators.").

Last year, the Copyright Office undertook a comprehensive study to assess the impact of copyright law on the music marketplace. The Office's resulting report[36] is very highly regarded, and has been characterized in the media as "a rare instance of a government agency getting out in front of moving technology."[37] Stakeholders across the spectrum have been similarly impressed.[38] While there is probably no single constituent that agrees with every conclusion of the report, it is widely viewed as an enormous step forward toward a more equitable and rational system.

In the report, the Office suggests a series of balanced changes to our government processes to promote more efficient licensing practices, greater parity among competing platforms, and fair compensation for creators.[39] We recommended greater free market activity while preserving the benefits of collective licensing for those smaller actors who may still need to rely upon it. The report also reflects the Office's longstanding view that the United States must join other developed nations in recognizing a full public performance right for sound recordings. In addition, consistent with our earlier report to Congress on pre-1972 recordings, it affirms that we should bring pre-1972 sound recordings under federal copyright protection.[40] The groundwork has thus been laid for a follow-on process, under the oversight of this Committee, to develop comprehensive legislation to modernize our music licensing laws.

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[36] U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE (2015), *available at* http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf.

[37] Miles Raymer, *The U.S. Copyright Office Wants to Update Our Music Licensing Laws*, ENTERTAINMENT WEEKLY (Feb. 5, 2015).

[38] For example, Pandora applauded the Office's call for transparency, SAG-AFTRA commended the Office's "call for broad reform to make music licensing work better for everyone," and SoundExchange remarked that, "the report contains a wealth of ideas and proposals, all of which will surely help spur discussion and hopefully inspire movement towards a better path forward for the entire industry." Glenn Peoples, *'A Lot to Digest': The Industry Reacts to Proposed Music Copyright Changes*, BILLBOARD (Feb. 6, 2015), http://www.billboard.com/articles/6465427/industry-reactions-copyright-music (reflecting statement of Dave Grimaldi, Pandora Director of Puhlic Affairs); Press Release, SAG-AFTRA, SAG-AFTRA Statement on the Release of the Report "Copyrights and the Music Marketplace" (Feb. 4, 2015), *available at* http://www.sagaftra.org/press-releases/fehruary-05-2015/sag-aftra-statement-release-report-%E2%80%9Ccopyrights-and-music-marketplace; Press Release, SoundExchange, SoundExchange Response to U.S. Copyright Office Proposed Reforms to Music Licensing System (Feb. 5, 2015), *available at* http://www.soundexchange.com/pr/soundexchange-response-to-u-s-copyright-office-proposed-reforms-to-music-licensing-system/.

[39] COPYRIGHT AND THE MUSIC MARKETPLACE at 1-11.

[40] *See Music Licensing Under Title 17* at 247 (statement of Cary Sherman, Chairman and CEO, Recording Industry Association of America) (calling on Congress to "make sure artists who are recorded before 1972 are paid"); *id.* at 344 (statement of Michael Huppe, President and CEO, SoundExchange Inc.) ("Congress must address the current royalty crisis facing legacy artists with recordings made before 1972."); *id.* at 390 (statement of David J. Frear, Chief Financial Officer, SiriusXM Holdings Inc.) ("I would be supportive of closing the loophole that Mr. Conyers referred to. That loophole includes terrestrial radio, as well as pre-72."); *id.* at 407 (statement of Chris Harrison, Vice President, Business Affairs, Pandora Media Inc.) ("Pandora would be in favor of following the Copyright Office's recommendation, which is fully federalizing pre-72 recordings to allow both consumers to benefit from the protections, like fair use under the Copyright Act, allow recording artists to exercise their rights to terminate their transfers.").

Meanwhile, the Department of Justice continues to review one aspect of the music landscape, namely, the judicially-imposed consent decrees that govern the authority and licensing practices of the two largest performing rights societies, ASCAP and BMI. By all accounts, the DOJ process could continue for several months or longer and even then will face a process of judicial review. While the DOJ's input is critical, it is this Committee that enjoys plenary responsibility for music copyright issues. The Committee may have its own views on how best to address issues relating to the consent decrees, which are intertwined with many other music licensing concerns that are not before the DOJ. While the ongoing DOJ process—and any eventual outcome of that process—are certainly relevant to the discussion, legislative work to modernize our music licensing system should be on the very near horizon.

Small Claims

The problem of copyright small claims is ready for a legislative solution. As Representative Coble noted in the July 2014 hearing, "[a]s much as larger copyright owners find the civil litigation system expensive, smaller copyright owners find it not worth their time or money" to pursue infringement remedies through litigation.[41] As a result, "[h]aving to choose to go out and earn income by working or staying home to consider contracting an attorney to file a lawsuit on their behalf that they cannot afford in the first place is not much of a choice at all."[42] And as Representative Chu noted, "[A]lthough we use the term 'small claims,' often, really, these claims are not small to the individual creator whose livelihood is being threatened by the theft of their work and property."[43]

The Committee identified the problem of small copyright claims as far back as 2006, holding a hearing focused on the possible alternative dispute resolution systems such as a copyright "small claims court."[44] Then, in 2011, the Committee asked the Copyright Office to conduct a detailed study of the problem of small copyright claims, and recommend appropriate legal changes to improve the adjudication of such claims.

The Copyright Office's 2013 report to this Committee highlighted the daunting challenges faced by copyright owners seeking to pursue small copyright claims through the federal court process, and recommended the creation of an alternative, administrative tribunal.[45]

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[41] *See Copyright Remedies: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 2 (2014) (statement of Rep. Howard Coble, Chairman, Subcomm. on Courts, Intellectual Prop., & the Internet).

[42] *Id.*

[43] *Id.* at 98 (statement of Rep. Judy Chu).

[44] *See Remedies for Small Copyright Claims: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. (2006).

[45] U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS 4 (2013), *available at* http://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf.

As reflected in the draft legislation appended to our report, the tribunal would be a wholly voluntary alternative to federal court, focused on small infringement cases valued at no more than $30,000, and it would award damages in non-precedential decisions, with no injunctive powers.[46] Like the Register of Copyrights and Copyright Royalty Judges, the small claims adjudicators would be inferior officers and would therefore need to be appointed by, and operate under the supervision of, the Librarian of Congress, who is a principal officer of the United States accountable to the President of the United States.[47]

Felony Streaming

It is time for Congress to bring the criminal penalties for unlawful streaming in line with those for other criminal acts of copyright infringement, an issue that has been emphasized by those responsible for enforcement of our laws.

The Department of Justice has stressed that "[t]o deter pirate streaming websites from illegally profiting from others' efforts and creativity, the Administration recommends that Congress amend the law to create a felony penalty for unauthorized Internet streaming."[48] The Copyright Office also has testified as to the importance of this issue[49] and the U.S. Intellectual Property Enforcement Coordinator agrees.[50]

Currently, criminals who engage in unlawful internet streaming can only be charged with a misdemeanor, even though those who unlawfully reproduce and distribute copyrighted material can be charged with a felony. This distinction makes no sense. As streaming becomes a dominant method of obtaining content online, unlawful streaming has no less of an adverse impact on the rights of copyright owners than unlawful distribution.

While Congress should carefully consider the operation of this amendment to ensure appropriate legal processes, there is no question that the change is warranted and overdue.

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[46] *See id.* at 133-54.

[47] *See generally Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012).

[48] *Copyright Remedies* at 24 (statement of David Bitkower, Acting Deputy Assistant Att'y Gen., Crim. Div., U.S. Dep't of Justice).

[49] *See generally Promoting Investment and Protecting Commerce Online: The ART Act, the NET Act and Illegal Streaming: Hearing Before the H. Subcomm. on Intellectual Prop., Competition, & the Internet of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Maria A. Pallante, Register of Copyrights and Director of the U.S. Copyright Office).

[50] INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR, ADMINISTRATION'S WHITE PAPER ON INTELLECTUAL PROPERTY ENFORCEMENT LEGISLATIVE RECOMMENDATIONS 2 (2011), *available at* https://www.whitehouse.gov/sites/default/files/ip_white_paper.pdf ("The Administration recommends three legislative changes to give enforcement agencies the tools they need to combat infringement [including to] [c]larify that, in appropriate circumstances, infringement by streaming, or by means of other similar new technology, is a felony").

Section 108 (Library Exceptions)

We are ready to update the exception that provides a safe harbor for libraries and archives.

Section 108 was enacted in 1976, and tweaked in 1998. Efforts to recalibrate it have been ongoing over the past ten years. In 2005, the Copyright Office and the National Digital Information Infrastructure and Preservation Program of the Library of Congress co-sponsored an independent study group that met for nearly three years and examined every aspect of the provision, from legislative history to shortcomings and solutions for the next era. The Group published its extremely comprehensive analysis and a list of partial recommendations in 2008 during the tenure of my predecessor.[51] In 2012, I reconvened the group for a day-long meeting to review the recommendations and to discuss intervening litigation involving libraries.[52] In 2013, the Office partnered with Columbia Law School to present a public symposium on Section 108 reform.[53]

In its current state, Section 108 is replete with references to analog works and fails to address the ways in which libraries really function in the digital era, including the copies they must make to properly preserve a work and the manner in which they share or seek to share works with other libraries. Witnesses last year testified about both the importance and the deficiencies of this exception.[54] A former publisher told the Subcommittee that Section 108 "is so outdated and inadequate as to no longer serve its function."[55] A former

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[51] SECTION 108 STUDY GROUP, THE SECTION 108 STUDY GROUP REPORT (2008). The Study Group included a cross-section of experts and representatives. *See* MEMBERS OF THE SECTION 108 STUDY GROUP, THE SECTION 108 STUDY GROUP, http://www.section108.gov/members.html.

[52] *See, e.g.*, *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *Authors Guild, Inc. v. Google, Inc.* 721 F.3d 132 (2d Cir. 2013), *on remand*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013), *appeal docketed*, No. 13-4829 (2d Cir. Dec. 23, 2013).

[53] *See* Symposium, *Copyright Exceptions for Libraries in the Digital Age: Section 108 Reform*, Kernochan Center for Law, Media, and the Arts, Columbia Law School (Feb. 8, 2013), http://web.law.columbia.edu/kernochan/symposia/section-108-reform.

[54] *See, e.g.*, *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 28 (2014) (statement of Richard S. Rudick, Co-Chair, Section 108 Study Group) ("[O]ur mission was to re-examine Section 108 (enacted in 1976 to deal with the then new technology of the photocopying machine); to define what it would take to make its provisions useful and fair in light of the evolving impact of digital technologies . . . ."); *id.* at 6 (statement of Rep. Boh Goodlatte, Chairman, H. Comm. on the Judiciary) ("[L]ike many of the 1976 provisions, section 108 is woefully outdated for the digital age."); *id.* at 8 (statement of Gregory Lukow, Chief, Packard Campus for Audio Visual Conservation, Library of Congress) ("Section 108 needs to be updated for the digital age with language applicable to all formats.").

[55] *Id.* at 30 (statement of Richard S. Rudick, Co-Chair, Section 108 Study Group); *see also, e.g.*, THE SECTION 108 STUDY GROUP REPORT at 28 ("Section 108 is out of date and in many respects unworkable in the digital environment.").

librarian observed that the absence of an adequate exception has led libraries to rely too heavily on the fair use doctrine.[56]

Section 108 has always had a savings clause for fair use, ensuring that both would be available as appropriate to the libraries and courts that must apply them. The point of Section 108 is not to negate fair use but rather to provide greater statutory guidance to those who need it most in the ordinary course of business. As stated by the Chairman of this Committee, "it is probably true that there are clear-cut cases in which fair use would apply to preservation activities, [but] fair use is not always easy to determine, even to those with large legal budgets. Those with smaller legal budgets or a simple desire to focus their limited resources on preservation may prefer to have better statutory guidance than exists today."[57]

Based on the entirety of the record to date, the Office has concluded that Section 108 must be completely overhauled. One enduring complaint is that it is difficult to understand and needlessly convoluted in its organization.[58] The Office agrees that the provisions should be comprehensible and should relate logically to one another, and we are currently preparing a discussion draft. This draft will also introduce several substantive changes, in part based upon the recommendations of the Study Group's 2008 report. It will address museums,[59] preservation exceptions[60] and the importance of "web harvesting" activities.[61]

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[56] *See, e.g.*, *A Case Study for Consensus Building: The Copyright Principles Project* at 15 (statement of Lolly Gasaway, Co-Chair, Section 108 Study Group) ("Sometimes I think academic law librarians and academic librarians at large institutions, which have legal counsel to advise them, would like to rely solely on fair use .... If only copyright lawyers can understand and apply the Act, something is fundamentally wrong."). *But see Preservation and Reuse of Copyrighted Works* at 32 (statement of James G. Neal, Vice President for Information Services and University Librarian, Columbia University) ("My overarching point is that the existing statutory framework, which combines the specific library exceptions in section 108 with the flexible fair use right, works well for libraries and does not require amendment.").

[57] *See Preservation and Reuse of Copyrighted Works* at 6 (statement of Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary).

[58] *See, e.g.*, THE SECTION 108 STUDY GROUP REPORT at ix ("Many practitioners find section 108's organization confusing and are not always certain of the relationship among its provisions."); *A Case Study for Consensus Building: The Copyright Principles Project* at 15 (Lolly Gasaway, Co-Chair, Section 108 Study Group) ("The current act is bewildering, to say the least, often even to copyright lawyers.").

[59] *See* THE SECTION 108 STUDY GROUP REPORT at 31-33 (recommending that museums be eligible for the Section 108 exceptions).

[60] *See id.* at 69-79 (recommending that certain libraries, archives, and museums be permitted to make a reasonable number of preservation copies of published and publicly disseminated works).

[61] *See id.* at 80-87 (recommending that libraries, archives, and museums be permitted to capture and preserve "publicly available" online works); *see also id.* at 85-87 (explaining how rightsholders can opt out of having their online works captured and/or preserved, under the Study Group's recommendation).

Orphan Works

Orphan works is ripe for a legislative solution.

The United States has studied and debated both the problem of orphan works and a variety of potential solutions for more than a decade, starting with a 2005 request from Senate and House Judiciary Leadership for a formal Copyright Office study. This study led to a Report we published in 2006.[62] In October 2012, we reopened our study of orphan works, to assess changes in the business and legal landscapes, this time pairing it with an equally complex study of mass digitization, fair use, and licensing. In addition to our own research into domestic and foreign developments, we solicited several rounds of comments over a two-year period, and held two days of public hearings in 2014.[63]

As before, the Copyright Office favors a legislative framework in which liability is limited or eliminated for a user who conducts a good-faith, diligent search for the copyright owner, similar to the approach set out in the Shawn Bentley Orphan Works Act passed by the Senate in 2008. We also have considered recent technological changes that provide some additional online tools in the quest to find owners, as well as legal issues regarding how to best make a record of orphan uses.

The public dialogue on orphan works over many years has confirmed that too many works languish in legal uncertainty. Moreover, this kind of marketplace gridlock—the kind caused by an absent or nonexistent copyright owner—does not serve the overall objectives of the copyright law. Indeed the public record has shown that many good-faith users will choose to forgo use of an orphaned work entirely rather than face the prospect of costly litigation.[64] As in the case of filmmakers, they are unable to risk "lawsuits, injunctions, and

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[62] *See* UNITED STATES COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006), *available at* http://www.copyright.gov/orphan/orphan-report.pdf; *see also Promoting the Use of Orphan Works: Balancing the Interests of Copyright Owners and Users: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. (2008); Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008).

[63] For the complete docket of the current Copyright Office study on Orphan Works, including written comments, hearing transcripts, proposed legislation, and written testimony, *see* http://copyright.gov/orphan/.

[64] *See, e.g.*, *Preservation and Reuse of Copyrighted Works* at 81 (statement of Michael C. Donaldson, International Documentary Association and Film Independent) ("Donaldson Statement") ("[N]arrative filmmakers often seek to use orphan works to create adaptations, sequels, or remakes. That's not a fair use. Filmmakers must license such third party materials, but are unable to do so when the rightsholder to those materials cannot be identified or located. Filmmakers cannot even begin their projects because no rights can be obtained."); *Promoting the Use of Orphan Works: Balancing the Interests of Copyright Owners and Users* at 33 (written statement of Allan Adler, Vice President for Legal & Government Affairs, Association of American Publishers) ("... book publishers fully understand the frustration that can arise when the desire to incorporate a third-party work as part of a new work being prepared for publication is thwarted by a concern over potential infringement liability based not on the copyright owner's refusal to authorize such use of the third-party work but on the inability of the publisher—or author—of the new work to identify or locate that copyright owner in order to request the permission that is necessary to legally make the intended use.").

catastrophic damages."[65] The orphans problem is of paramount concern for the libraries, archives, and museums that collect and preserve critically important works.[66] A significant part of the world's cultural heritage may be falling into a "20th-century black hole,"[67] unavailable to the public for enjoyment or social utility.[68]

An issue as complex as orphan works requires congressional attention because there are numerous and competing equities at stake, equities that cannot be reconciled through litigation or voluntary measures. Although orphan works are a clear problem, it is also true that authors, copyright owners and their heirs enjoy exclusive rights under the Copyright Act. While we should be cautious when constraining these rights, good-faith users need some way to bridge the legal gaps that arise when dealing with orphan works so they can address the liability, indemnification, and insurance requirements upon which routine transactions depend. Multiple foreign jurisdictions,[69] and even U.S. courts, have made these observations.[70]

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[65] Donaldson Statement at 85.

[66] *See Preservation and Reuse of Copyrighted Works* at 11 (statement of Gregory Lukow, Chief, Packard Campus for Audio Visual Conservation, Library of Congress) ("The dilemma of orphan works plagues audiovisual collections daily."); *Promoting the Use of Orphan Works: Balancing the Interests of Copyright Owners and Users* at 66 (written statement of Karen Coe, Associate Legal Counsel, United States Holocaust Memorial Museum) ("If a work is historically or culturally unique, we might allow it to be used but in doing so we expose the Museum to an unknown liability. Even if the risk is minimal, we do have to account for the fact that only one lawsuit or one public allegation of infringement could have a permanent, negative impact on the institution. Thus even a minimal, unknown risk has a chilling effect on all our decisions regarding the use of orphan works.").

[67] MAURIZIO BORGHI AND STAVROULA KARAPAPA, COPYRIGHT AND MASS DIGITIZATION 70 (2013) (citing James Boyle, *A Copyright Black Hole Swallows our Culture*, FINANCIAL TIMES, (Sept. 6, 2009), *available at* http://www.ft.com/cms/s/0/6811a9d4-9h0f-11de-a3a1-00144feabdc0.html); *see also* Rebecca J. Rosen, *The Missing 20th Century: How Copyright Protection Makes Books Vanish*, THE ATLANTIC (Mar. 30, 2012), *available at* http://www.theatlantic.com/technology/archive/2012/03/the-missing-20th-century-how-copyright-protection-makes-books-vanish/255282/; Society of American Archivists, Comments Submitted in Response to U.S. Copyright Office's Oct. 22, 2012 Notice of Inquiry at 4, *available at* http://copyright.gov/orphan/comments/noi_10222012/Society-American-Archivists.pdf ("[T]he unfortunate result of [archivists'] caution is that the scope of online cultural resources that could be used for new studies and innovation is much smaller than it ought to he, and would be if an orphan works exception were recognized in the statute.").

[68] *See, e.g.*, Institute for Intellectual Property and Social Justice, Comments Submitted in Response to U.S. Copyright Office's Oct. 22, 2012 Notice of Inquiry at 1, *available at* http://copyright.gov/orphan/comments/noi_10222012/Institute-for-Intellectual-Property-and-Social-Justice.pdf ("many orphan works nevertheless remain out of print and largely unavailable to the public, manifesting the greatest ohstacle to copyright social utility in the developed world").

[69] *See, e.g.*, Directive 2012/28, of the European Parliament and of the Council of 25 Octoher 2012 on Certain Permitted Uses of Orphan Works, 2012 O.J. (L 299) 5; Copyright Act, R.S.C. 1985, c. C-42, § 77 (Can.); 1999. évi LXXVI. törvény a szerzői jogról (Act LXXVI of 1999 on Copyright), §§ 41/A – 41/K (Hung.) (translation unavailable); Chosakuken Hō [Copyright Law], Law No. 48 of 1970, *as amended up to* Law No. 43 of 2012, arts. 67–73 (Japan), *translated at* http://www.cric.or.jp/english/clj/doc/20130819_July,2013_Copyright_Law_of_Japan.pdf (unofficial translation); Jeojakkwonbeop [Copyright Act], Act No. 432, Jan. 28, 1957, *amended up to* Act No. 12137, Dec. 30, 2013, art. 50 (S. Kor.), *translated at* http://elaw.klri.re.kr/eng_service/lawView.do?hseq=32626&lang=ENG (unofficial translation); Copyright Law, Promulgated hy Royal Decree No. M/41 of 2

The Copyright Office continues to believe that an orphan works framework should be a supplement to other available provisions in the law that may be applicable, including the ability of a user to assert the doctrine of fair use as an affirmative defense in any given instance. However, fair use is not a complete solution in this context. It provides no industry-appropriate instruction as to how diligently a user must search for a copyright owner (*e.g.*, for a photographer, writer, or television producer) before declaring that person missing,[71] and it lacks a standard as well as a mechanism by which the user would have to pay the emerging copyright owner when such payment is legally appropriate. For all of these reasons, the Office believes the orphan works problem is a legislative priority.

Resale Royalty

The time is ripe for a legislative decision on the issue of resale royalties for visual artists.[72]

The Copyright Office first issued a report on the topic in 1992, and recommended against adopting a resale royalty right.[73] In 2013, however, the Office issued an updated analysis of resale royalty rights in the United States. As part of that update, the Copyright Office concluded that certain visual artists operate at a disadvantage under the copyright law

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Rajab, 1424, Aug. 30, 2003, art. 16 (Saudi Arabia), *translated at* http://www.wipo.int/wipolex/en/text.jsp?file_id=129516 (unofficial translation); Copyright and Rights in Performances (Licensing of Orphan Works) Regulations, 2014, S.I. 2014/2863 (U.K.).

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

[71] *See, e.g.*, *Preservation and Reuse of Copyrighted Works* at 3 (2014) (statement of Rep. Jerrold Nadler, Ranking Member, Subcomm. on Courts, Intellectual Prop., & the Internet) ("Ongoing uncertainty regarding how to deal with orphan works also played a part in a related case brought by the Authors Guild against HathiTrust where the inability of several universities to create a procedure that accurately identified orphan works resulted in suspension of efforts to digitize these works. This would seem to confirm that orphan works continue to be a problem in need of a solution, and I look forward to hearing from our witnesses on what we should do."); *id.* at 55 (testimony of Jan Constantine, General Counsel, The Authors Guild, Inc.) ("HathiTrust sidestepped Congress and started its own orphan works project . . . . Congress has carefully crafted rules for copying, including detailed rules for library copying. Ad hoc approaches to things as momentous as mass digitization of books or the distributing of so-called orphan books is wildly inappropriate."); Transcript, U.S. Copyright Office, Public Roundtable on Orphan Works and Mass Digitization 101:14-17 (Mar. 10, 2014), *available at* http://copyright.gov/orphan/transcript/0310LOC.pdf (statement of Sarah Michalak, HathiTrust Digital Library) (regarding the orphan works aspect of the HathiTrust Digital Library: "However, the process was—the project was curtailed because it was discovered to be an erroneous approach to finding—to identifying rights.").

[72] An artist resale royalty provides artists with an opportunity to benefit from the increased value of their works over time by granting them a percentage of the proceeds from the resale of their original works of art. U.S. COPYRIGHT OFFICE, RESALE ROYALTIES: AN UPDATED ANALYSIS 2 (2013), *available at* http://copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf.

[73] U.S. COPYRIGHT OFFICE, *DROIT DE SUITE*: THE ARTIST'S RESALE ROYALTY xv-xvi (1992), *available at* http://www.copyright.gov/history/droit_de_suite.pdf.

relative to authors of other types of creative works. Visual artists often do not share in the long-term financial success of their works because—unlike books, films, and songs, which frequently generate additional income through their reproduction and wide dissemination—works of visual art typically are valued for their singularity and scarcity.[74] Consequently, in many instances only the initial sale of a work of visual art inures to the benefit of the artist, and it is only collectors and other purchasers who reap any increase in that work's value over time. Thus, without a resale royalty, "many if not most visual artists will not realize a benefit proportional to the success of their work."[75] The Office also highlighted the fact that more than seventy foreign countries—twice as many as in 1992 when the Copyright Office issued its first report on the topic—have enacted a resale royalty provision of some sort.[76]

The Office's report concluded that there are sound policy reasons to address this inequity, but also noted that the administrative and enforcement costs of a resale right might be substantial. Thus, the Office suggested that, in addition to a resale royalty right, Congress may wish to consider a number of possible alternative or complementary options for supporting visual artists within the broader context of art industry norms, art market practices, and other pertinent data. In the report, and in subsequent testimony before the Subcommittee on Courts, Intellectual Property, and the Internet, the Office provided some specific recommendations for any legislation in this area.[77] Several of these recommendations have been included in a recent bill introduced by Representative Nadler.[78]

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[74] Due to a work of visual art's unique nature, "[f]or most visual artists . . . the opportunity to generate additional revenue from a work permanently ends, as a practical matter, with that first sale." RESALE ROYALTIES: AN UPDATED ANALYSIS at 36. In addition to selling copies and entering into licensing arrangements, non-visual artists enjoy a number of other ways to make profits. For instance, "[a] play will make a profit if many people come to see it, despite the fact that additional copies are not made for their enjoyment [and] . . . [p]erformers in a concert may play a work from memory without using any copies, yet the entire audience will buy tickets for the pleasure of hearing it." Shira Perlmutter, *Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report,* 16 COLUM.-VLA J.L. & ARTS 395, 405 (1991-1992).

[75] RESALE ROYALTIES: AN UPDATED ANALYSIS at 32. The Office noted that visual artists don't reap the same benefits from the exploitation of exclusive rights available to authors in general, and it pointed out that the Copyright Act does not specifically account for the difference between the market for works of visual art and markets for other artistic works.

[76] *See id.*, App. E: Selected Countries with Laws Containing Provisions on the Resale Right.

[77] The Office's legislative recommendations are meant to benefit the greatest number of artists with the least amount of disruption to the art market. The recommendations include: setting a minimum threshold value within the $1,000 and $5,000 range; applying the resale royalty to "work[s] of visual art" as currently defined in Section 101 of the Copyright Act; and creating a resale royalty rate that falls between 3 and 5%. *Id.* at 73-81; *see also Moral Rights, Termination Rights, Resale Royalty, and Copyright Term: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 16 (2014) (statement of Karyn Temple Claggett, Associate Register of Copyrights and Director of Policy and International Affairs, U.S. Copyright Office).

[78] American Royalties Too Act of 2015, H.R. 1881, 114th Cong. (2015). The legislation would estahlish a resale royalty for visual artworks sold at auction by a person other than the author for $5,000 or more, and

If the Committee is prepared to act on legislation in this area, the foundation is in place.

Improvements for Persons with Print Disabilities

The Office continues to support congressional attention aimed at crafting a digital age update to exceptions in copyright law for persons who are blind or visually impaired,[79] although the Office is not offering a specific legislative proposal at this time. It is our view that the Chafee Amendment, which was first adopted in 1996 and codified in Section 121 of the Act, would benefit from immediate attention through a legislative process. An update to these provisions would not only reduce the need for judicial intervention in this area,[80] but would better address the current needs of the visually impaired community and developments in the commercial marketplace.[81]

In addition, the Office fully supports swift ratification of the recent Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled,[82] and is currently working with the Administration to achieve that result.[83] Prompt treaty ratification will permit the United States to both send and receive accessible format copies of works worldwide, thereby harnessing the technological

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the royalty amount would be the lesser of 5% of the sale price or $35,000, plus cost-of-living adjustments. *Id.* § 3.

[79] The principal exception is found in 17 U.S.C. § 121, also known as the Chafee Amendment. *See* Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 332 (2013) (noting that future discussions on copyright exceptions and limitations must include "crafting a digital age Chafee Amendment (for print disabilities).").

[80] For example, the case of *Authors Guild Inc. v. HathiTrust* was driven in part by questions of whether the University of Michigan was an "authorized entity" under the Chafee amendment. The district court ruled that it was (*Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 465 (S.D.N.Y. 2012)), and the appeals court ruled that, because fair use covered the defendant's conduct, there was no need to determine if the Chafee Amendment applied (*Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 103 n.7 (2d. Cir. 2014)).

[81] *See, e.g.*, U.S. DEP'T OF EDUC., REPORT OF THE ADVISORY COMMISSION ON ACCESSIBLE INSTRUCTIONAL MATERIALS IN POSTSECONDARY EDUCATION FOR STUDENTS WITH DISABILITIES 27(2011); *Copyright Issues in Education and for the Visually Impaired: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 40 (2014) (statement of Scott C. LaBarre, State President, Colorado National Federation for the Blind) ("But we in this technical revolution have the opportunity to make every single published work accessible from the beginning. That is the promise that technology holds, and that is what the copyright system needs to support.").

[82] *See Copyright Issues in Education and for the Visually Impaired* at 40 (statement of Scott C. LaBarre, State President, Colorado National Federation for the Blind) ("We strongly urge the United States Senate and, if it comes as an executive agreement, this House to ratify and adopt the Marrakesh Treaty.").

[83] The Office is also working with the Administration for swift ratification of the Beijing Treaty on Audiovisual Performances.

advances of the digital age and providing huge benefits for visually impaired persons here and abroad.[84]

Section 1201 (Regulatory Presumption for Existing Exemptions)

The public record supports amending Section 1201 to make it easier to renew exemptions that have previously been adopted and are in force at the time of the triennial rulemaking proceeding.[85] As reflected in the September 2014 hearing before this Committee, a wide range of stakeholders have expressed frustration that the Section 1201 statutory framework requires that, to continue an existing exemption, proponents must bear the legal and evidentiary burden of justifying the exemption anew in each subsequent rulemaking proceeding.[86]

The Copyright Office agrees that the process of renewing existing exemptions should be adjusted to create a regulatory presumption in favor of renewal. Thus, it would be beneficial for Congress to amend Section 1201 to provide that existing exemptions will be presumptively renewed during the ensuing triennial period in cases where there is no opposition. Additionally, we believe that other aspects of Section 1201 warrant further study and analysis, and address these in the next section of this testimony.

IV. POLICY ISSUES THAT WARRANT NEAR-TERM STUDY AND ANALYSIS

In this section, we address those copyright issues that are important to a twenty-first century copyright system, but require more foundational study and analysis. These issues

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[84] "[T]he rapid entry into force of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (The Marrakesh VIP Treaty), concluded in June 2013, will affect the lives of [an estimated 6 million children around the globe with visual impairment] and generally improve equality of access to knowledge and information." Catherine Jewell, *Removing Barriers to Literacy: How the Marrakesh VIP Treaty Can Change Lives*, WIPO MAGAZINE at 16 (Feb. 2015), *available at* http://www.wipo.int/export/sites/www/wipo_magazine/en/pdf/2015/wipo_pub_121_2015_01.pdf.

[85] Legislation has recently been introduced on this issue. Breaking Down Barriers to Innovation Act of 2015, S. 990, 114th Cong. (2015); Breaking Down Barriers to Innovation Act of 2015, H.R. 1883, 114th Cong. (2015).

[86] *Chapter 12 of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 19-20 (2014) (statement of Mark Richert, Director of Public Policy, American Foundation for the Blind) ("[W]e we urge Congress to take action to relieve the burden of repeatedly seeking re-approval of uncontroversial exemptions like the one we must re-propose during each review."). Representatives of copyright owners likewise agreed that the process of renewing uncontroversial exemptions could be streamlined. *Id.* at 64 (statement of Christian Genetski, Senior Vice President and General Counsel, Entertainment Software Association) ("I think that we all share the frustration expressed by Mr. Richert in his testimony about the need to return repeatedly and use extensive resources to seek a renewal of an exemption where no one is opposing the exemption."); *id.* at 79 (statement of Jonathan Zuck, President, ACT | The App Association) ("I certainly think that the renewal process of an exemption is something that could be modified and streamlined especially when there are no objections to that renewal which is very often the case."); *id.* at 125 (written statement of Allen Adler, General Counsel & Vice President for Government Affairs, Association of American Publishers) (noting that "stakeholders broadly agree that reauthorization of non-controversial exemptions could be more efficient").

have been repeatedly referenced or addressed by Members of Congress, the Copyright Office, other agencies, academics, and stakeholders. In the view of the Copyright Office, it is time to study these issues to document technological and business developments, analyze court opinions, review stakeholder perspectives, and provide a sufficient foundation for Congress. The Copyright Office is available, as always, to assist Congress in this regard.

Section 1201 (Other Issues)

There are a number of Section 1201 issues that are not yet ripe for legislative action but would benefit from a focused legal and policy analysis at this time.

It should be recognized at the outset that the anticircumvention provisions in Section 1201 have played an important role in facilitating innovation and providing consumers with a wide range of content delivery options. As Representative Marino observed in the June 2014 hearing on chapter 12, "[t]he digital economy has enabled wide distribution of movies, music, eBooks and other digital content," and "[c]hapter 12 seems to have a lot to do with [that] economic growth."[87] Representative Nadler made the same point, noting that the anticircumvention provisions have "been successful by promoting the creation of many new legal online services in the United States that consumers use to access movies and TV shows."[88] A witness representing mobile app developers likewise remarked that "[t]he explosive growth in technological innovations and content delivery options prove that the DMCA has created an environment in which these things are possible."[89] Many of our free trade agreements also include anticircumvention provisions.[90]

But while Section 1201 has been a success in many respects, experience since its enactment in 1998 has revealed issues that call for examination. The Copyright Office has done what it can within the existing statutory framework to consider the frustrations of stakeholders and revise the triennial rulemaking process to make it more accessible and understandable to the public. I believe we have been successful in this effort. During the current Section 1201 rulemaking proceeding, we are considering twenty-seven proposed exemptions, with respect to which we have so far received almost 40,000 comments from the public.

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[87] *Id. at* 2 (statement of Rep. Tom Marino, Vice Chairman, Subcomm. on Courts, Intellectual Prop., & the Internet).

[88] *Id.* at 2 (statement of Rep. Jerrold Nadler, Ranking Member, Subcomm. on Courts, Intellectual Prop., & the Internet).

[89] *Id.* at. 21 (statement of Jonathan Zuck, President, ACT | The App Association).

[90] *See, e.g.*, United States-Korea Free Trade Agreement, U.S. Kor., art. 18.4, para. 7, Apr. 1, 2007, 46 I.L.M. 642 (May 2007) (entered into force Mar. 15, 2012), *available at* https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text; United States-Australia Free Trade Agreement, U.S.-Austl., art. 17.4, para. 7, May 18, 2004, 43 I.L.M. 1248 (2004) (entered into force Jan. 1, 2005), *available at* https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text; United States-Singapore Free Trade Agreement, U.S.-Sing., art. 16.4, para. 7, May 6, 2003, 42 I.L.M. 1026 (2003) (entered into force Jan. 1, 2004), *available at* https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text.

But the rulemaking process nonetheless merits congressional attention. The permanent exemptions in Section 1201 relating to reverse engineering, encryption research, and security testing are an ongoing issue, with some stakeholders suggesting that they are too narrow in scope[91] and others of the view that they strike an appropriate balance.[92] For its part, the Office has previously highlighted the limited nature of the existing security testing exemptions and supported congressional review of the problem.[93] We have also, in recent years, noted that some public policy issues are outside the reach of the rulemaking and can only be addressed by legislation.[94]

Some stakeholders are concerned that intended beneficiaries of exemptions lack the practical ability to engage in the permitted circumvention themselves.[95] Others suggest a disconnect between the original purpose of Section 1201—protecting access to creative works—and its effect on a wide range of consumer goods that today contain copyrighted software.[96]

Finally, consumers have voiced discomfort that Section 1201 prevents them from engaging in activities, such as the repair of their automobiles and farm equipment, which previously

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[91] *See, e.g.*, Erik Stallman, *The Current DMCA Exemption Process is a Computer Security Vulnerability*, CENTER FOR DEMOCRACY & TECHNOLOGY (Jan. 21, 2015), https://cdt.org/blog/the-current-dmca-exemption-process-is-a-computer-security-vulnerability/.

[92] *Chapter 12 of Title 17* at 66 (statement of Christian Genetski, Senior Vice President and General Counsel, Entertainment Software Association); *id.* at 81 (statement of Jonathan Zuck, President, ACT | The App Association).

[93] U.S. Copyright Office, Recommendation of the Register of Copyrights in RM 2008-8, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 205-06 (June 11, 2010), *available at* http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf.

[94] *See, e.g.*, U.S. Copyright Office, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 24 (Oct. 12, 2012), *available at* http://copyright.gov/1201/2012/Section_1201_Rulemaking_2012_Recommendation.pdf ("The Register notes that several provisions in Section 121 appear ill-suited to the digital world and could benefit from comprehensive review by Congress."); U.S. Copyright Office, Recommendation of the Register of Copyrights in RM 2002-4; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 84 (Oct. 27, 2003), *available at* http://copyright.gov/1201/docs/registers-recommendation.pdf (concluding that adoption of "use-based" or "user-based" exemptions, rather than exemptions focused on a class of works, required "Congressional action").

[95] *Chapter 12 of Title 17* at 19 (statement of Mark Richert, Director of Public Policy, American Foundation for the Blind) (noting that any exemption adopted after the triennial rulemaking "will only provide limited relief, as it leaves unaffected the DMCA's trafficking ban, which prevents us from creating and distributing advanced tools and services to people with disabilities who don't have the ability to circumvent DRM to make works accessible on their own.").

[96] *See, e.g.*, *id.* at 77 (statement of Rep. Blake Farenthold, Member, Subcomm. on Courts, Intellectual Prop., & the Internet) ("Traditionally, you have been able to buy a thing and do with it what you want, but with some of these licensing agreements you can't do with it what you want.").

had no implications under copyright law.[97] Various legislative proposals have been introduced in an effort to address a number of these concerns, and last year Congress passed the Unlocking Consumer Choice and Wireless Competition Act to broaden the exemption for cellphone unlocking.[98] It may be time for a broader review of the impact and efficacy of Section 1201 and its exemption process.

Section 512 (Notice and Takedown and Safe Harbor)

The scope and efficacy of the DMCA safe harbors embodied in Section 512 of the Copyright Act are an ongoing source of concern and consternation for copyright owners and online providers. In the nearly twenty years since Congress enacted the DMCA, courts have stepped in to fill perceived gaps in the statutory framework, often interpreting provisions in ways that some believe run counter to the very balance that the DMCA sought to achieve.[99] Accordingly, the Office believes a formal and comprehensive study—to consider what is working and what is not, along with potential legislative improvements—is advisable to assess the Section 512 system and ensure that it is properly calibrated for the internet as we know it today. The current online environment is vastly changed from the bulletin-board era in which Congress enacted the DMCA in 1998. [100]

Section 512 was designed to address the emerging threat of infringement on the internet, while at the same time providing appropriate safeguards and greater legal certainty for online service providers.[101] This balanced approach has served both copyright and

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[97] *Id.* at 44 (statement of Corynne McSherry, Intellectual Property Director, Electronic Frontier Foundation) ("From phones to cars to refrigerators to farm equipment, software is helping our stuff work better and smarter but, if that software is protected by TPMs, repair and recycling of those goods may require circumvention. Putting repair and recycling at risk is bad for consumers and it's bad for the environment.").

[98] *See* Unlocking Consumer Choice and Wireless Competition Act, Pub. L. No. 113–144, 128 Stat. 1751 (2014); Unlocking Technology Act of 2015, H.R. 1587, 114th Cong. (2015); You Own Devices Act, H.R. 862, 114th Cong. (2015); Breaking Down Barriers to Innovation Act of 2015, H.R. 1883, 114th Cong. (2015); Breaking Down Barriers to Innovation Act of 2015, S. 990, 114th Cong. (2015).

[99] *See, e.g.*, *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 524 (S.D.N.Y. 2010) (finding that "awareness of pervasive copyright-infringing, however flagrant and blatant, does not impose liability on the service provider"); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 718 F.3d 1006, 1022 (9th Cir. 2013) (holding 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 meet the actual knowledge requirement under §512(c)(1)(A)(i)"); *Disney Enters., Inc. v. Hotfile Corp.*, No. 11-20427-CIV-WILLIAMS, 2013 U.S. Dist. LEXIS 172339, at *26 (S.D. Fla. Aug. 28, 2013) ("[T]he statute does not focus on the general characteristics of the network, does not require affirmative action to police content, and does not preclude a grant of immunity even if the operator knew or should have known of infringement generally.").

[100] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

[101] *See* H.R. REP. NO. 105-551, pt. 2, at 49-50 (1998) (Section 512 "preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment. At the same time, it provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.").

technology stakeholders well during a time of dramatic change online.[102] As several witnesses and Committee Members observed, the safe harbors provided by Section 512 have done much to facilitate the development of the internet, including the creation of online platforms through which copyright owners can reach new audiences for their works.[103] And, as Ranking Member Nadler noted, "[t]he notice and takedown system has resulted in the quick removal of infringing content on countless occasions."[104]

Nevertheless, witnesses also identified a number of important challenges that seemingly call for more detailed discussion and consideration. Grammy-award-winning composer Maria Schneider highlighted the difficulties individual authors face when enforcing their rights under the current notice and takedown regime, stating that "my livelihood is threatened by illegal distribution of my work, and I cannot rein it in."[105] Witnesses described the mounting costs of sending millions of DMCA notices—costs that are borne both by the senders as well as the online providers who receive them.[106] Recently, the U.S.

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[102] *See, e.g.*, *Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 16 (2014) (statement of Annemarie Bridy, Alan G. Shepard Professor of Law, University of Idaho College of Law) ("Bridy Statement") ("[T]he balancing of interests struck in Section 512 is both sound copyright policy and sound innovation policy."); *id.* at 42 (statement of Katherine Oyama, Senior Copyright Policy Counsel, Google Inc.) ("Oyama Statement") ("Google's experience shows that the DMCA's notice and takedown system of shared responsibilities strikes the right balance in promoting innovation and protecting creators' rights online."); *id.* at 92 (statement of Rep. Ted Deutch) ("I agree with, I think, most of the witnesses that the balance struck by the DMCA to encourage cooperation and to preserve protections for technology companies acting in good faith is the right one.").

[103] *See, e.g.*, Bridy Statement at 16 ("As the Internet has grown and thrived, so too have the copyright industries, which have successfully adapted their business models to meet robust consumer demand for music and films distributed online at reasonable prices in digital formats."); Oyama Statement at 42 ("Online services have created new markets and generate billions of dollars for the content industry, and this has only been made possible because of the legal foundation that is provided by the DMCA."); *Section 512 of Title 17* at 109 (statement of Rep. Zoe Lofgren, Member, Subcomm. on Courts, Intellectual Prop., & the Internet) ("I am thinking back to when we crafted the DMCA, and clearly, without safe harbor notice and takedown, there would not be an Internet. It wouldn't exist. So I think it is important that we recognize that and, as with the doctors, first do no harm.").

[104] *Section 512 of Title 17* at 3 (statement of Rep. Jerrold Nadler, Ranking Member, Subcomm. on Courts, Intellectual Prop., & the Internet).

[105] *Id.* at 54 (statement of Maria Schneider, Grammy Award Winning Composer/Conductor/Producer, Member of the Board of Governors, New York Chapter of the Recording Academy); *see also id.* at 3 (statement of Rep. Jerrold Nadler, Ranking Member, Subcomm. on Courts, Intellectual Prop., & the Internet) ("Maria Schneider . . . has been unable to stop online infringement of her works. The resulting loss of income, combined with the cost of monitoring the Internet and sending takedown notices, threatens her ability to continue creating her award-winning music.").

[106] *See, e.g.*, *id.* at 88 (statement of Sandra Aistars, Chief Executive Officer, Copyright Alliance) ("For the hundreds of thousands of independent authors who lack the resources of corporate copyright owners, the situation is even more dire. These entrepreneurs cannot dream of the robust enforcement programs that larger companies can afford. Instead, they pursue issuing takedown notices themselves, taking time away from their creative pursuits, or give up enforcement efforts entirely."); Oyama Statement at 47 ("In 2013 . . . [Google] received takedown notices for approximately 230 million items."); *Section 512 of Title 17* at 224 (responses to questions for the record by Annemarie Bridy) ("Enforcing copyrights online is a significant

Department of Commerce Internet Policy Task Force has encouraged the development of additional voluntary practices to help streamline and improve the notice and takedown system.[107] While several witnesses before the Committee acknowledged the role that voluntary initiatives may play in helping to address some of the costs and burdens of the takedown process,[108] others observed that these solutions can only go so far.[109] It is time to take stock of Section 512.

Mass Digitization

Related to the problem of orphan works, the Office is completing its analysis of copyright issues inherent to mass digitization projects. In our study, witnesses have described some of the difficulties presented by mass digitization projects under current copyright law, and proposed specific statutory solutions.[110]

As hearing testimony indicated, the problem with respect to mass digitization is not so much a lack of information as a lack of efficiency in the licensing marketplace.[111] For a digitization project involving hundreds, thousands, or millions of copyrighted works, the costs of securing *ex ante* permissions from every rightsholder individually often will exceed the value of the use to the user. Thus, even where a library or other repository agrees that a use requires permission and would be willing to pay for a license (*e.g.*, to offer online access to a particular collection of copyrighted works), the burdens of rights clearance may effectively prevent it from doing so. To the extent that providing such access could serve valuable informational or educational purposes, this outcome is difficult to reconcile with the public interest.

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challenge for copyright owners of all sizes, particularly small copyright owners. It is also a significant challenge for OSPs of all sizes, particularly small OSPs.").

[107] Department of Commerce DMCA Multistakeholder Forum, *DMCA Notice-and-Takedown Processes: List of Good, Bad, and Situational Practices* (Apr. 7, 2015), *available at* http://www.ntia.doc.gov/files/ntia/publications/dmca_good_had_and_situational_practices_document.pdf.

[108] *See Section 512 of Title 17* at 261 (statement of the Association of American Publishers) ("AAP recognizes that voluntary 'best practices' and agreements among the key stakeholders in the online ecosystem are likely to be the most practical, effective and achievable ways to improve the daily operation of the notice-and-takedown system . . . .").

[109] *See id.* at 32 (statement of Paul F. Doda, Global Litigation Counsel, Elsevier, Inc.) ("Elsevier remains concerned, however, that notwithstanding a government-mandated process to create voluntary measures, some sites that need them the most will drag their feet.").

[110] *See Preservation and Reuse of Copyrighted Works* at 25-26 (statement of Richard S. Rudick, Co-Chair, Section 108 Study Group) ("Rudick Statement"); *id.* at 55-57 (statement of Jan Constantine, General Counsel, Authors Guild, Inc.) ("Constantine Statement").

[111] *See* Constantine Statement at 56 ("Collective licensing organizations such as ASCAP and BMI make sense when there is a limited set of rights to be licensed and it is too costly to ask individuals whether a use is okay. . . For mass digitization of books, one also needs a simple, one-stop shopping solution.").

While fair use may provide some support for limited mass digitization projects—up to a point—the complexity of the issue and the variety of factual circumstances that may arise compel a legislative solution.[112] In the Office's view, the legitimate goals of mass digitization cannot be accomplished or reconciled under existing law other than in extremely narrow circumstances. For example, access to copyrighted works, something many view as a fundamental benefit of such projects,[113] will likely be extremely circumscribed[114] or wholly unavailable.[115] For this reason, as part of its orphan works and mass digitization report, the Office will recommend a voluntary "pilot program" in the form of extended collective licensing ("ECL") that would enable full-text access to certain works for research and education purposes under a specific framework set forth by the Copyright Office, with further conditions to be developed through additional stakeholder dialogue and discussion. Such input is critical, we believe, because ECL is a market-based system intended to facilitate licensing negotiations between prospective users and collective management organizations representing copyright owners. Thus, the success of such a system depends on the voluntary participation of stakeholders.

Moral Rights

The issue of moral rights for authors was covered briefly in the recent hearings,[116] but is an essential consideration of copyright law. The Office believes that this issue is a critical

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[112] *See* Rudick Statement at 30 (arguing that "a provision so dependent on analyses of individual facts and circumstances is not well suited to major projects typical of Mass Digitization" and that "the doctrine of fair use as codified in Section 107 does not begin to address many of the content owners' concerns, such as security").

[113] *See, e.g.*, Constantine Statement at 56 (collective licensing proposal for mass digitization "is about providing access to . . . books at every college, university, community college, public school, and public library in the country so those institutions could provide access to the vital communities they serve"); *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 670 (S.D.N.Y. 2011) (benefits of Google Books program include the fact that "[b]ooks will become more accessible" and that "[l]ibraries, schools, researchers, and disadvantaged populations will gain access to far more books").

[114] *See Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 291 (S.D.N.Y. 2013) (finding Google Books' display of "snippets" to be transformative for purposes of fair use because "it is not a tool to be used to read books").

[115] *See Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014) (finding it "[i]mportant[]" for fair use analysis that digital library did "not allow users to view any portion of the books they are searching," but "simply permit[ted] users to 'word search'—that is, to locate where specific words or phrases appear in the digitized books").

[116] The Subcommittee on Courts, Intellectual Property, and the Internet examined moral rights, along with termination rights, resale royalty, and copyright term, during its July 15, 2014 hearing. In his opening statement, Representative Howard Coble, former chairman of the Subcommittee, asked witnesses "to examine whether the current approach to moral rights in the United States is sufficient." *Moral Rights, Termination Rights, Resale Royalty, and Copyright Term* at 2-3 (statement of Rep. Howard Coble, Chairman, Subcomm. on Courts, Intellectual Prop., & the Internet); *see also id.* at 3 (statement of Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary) (discussing the "patchwork approach to moral rights in the United States" and asking witnesses "whether they believe the [*Dastar Corp. v. Twentieth Century Fox Film*

topic for further analysis.[117] As I noted in the first copyright review hearing, in the past, the rights of individual authors "have been lost in the conversation. . . . [T]hey should be the focus."[118] Many members and witnesses throughout the hearings identified the issues of individual authors, including attribution and the ability to say no to specific uses, as some of the most important elements of a well-functioning copyright system.[119] While the United States is obligated to recognize the moral rights of authors under several existing treaties, recent case law in the U.S. Supreme Court has led some academics to question the strength of moral rights protection in the United States.[120]

In the Office's view, any comprehensive review of the functioning of the copyright system must give serious and sustained attention to the individual rights of authors—apart from corporate interests—and the need to ensure that those personal interests are adequately protected. For this reason, the Office believes that further formal study of moral rights in the United States is an appropriate next step in the congressional process.

V. ADDITIONAL POLICY ISSUES THAT WARRANT ATTENTION

This copyright review process has touched on almost every aspect of the Copyright Act and has included an impressive expression of perspectives and priorities. The fact that we have not addressed all of the issues here or positioned them for immediate legislative action does not mean that they are unimportant or that Congress cannot in its discretion decide to elevate them. Rather, these issues lack consensus as to the problem, require preliminary research or consultation to identify issues, or reflect agreement that a legislative solution is premature.

Indeed, certain issues are of paramount importance, but in our view should be left to the courts to develop. Fair use falls squarely into this category. First articulated by the courts

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Corp., 539 U.S. 23 (2003)] decision has weakened the United States' protection of moral rights, and if so, what we might need to do to address this potential challenge.").

[117] Moral rights generally refer to certain non-economic rights that are considered personal to an author, typically including rights of attribution or paternity (the right to be credited as the author of one's work), and the right of integrity (the right to prevent prejudicial distortions of one's work). *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.01[A] (2015).

[118] *The Register's Call For Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 62 (2013) (statement of Maria A. Pallante, Register of Copyrights and Director of the U.S. Copyright Office).

[119] *See, e.g.*, *Section 512 of Title 17* at 83 (statement of Rep. Judy Chu, Member, Subcomm. on Courts, Intellectual Prop., & the Internet) ("[H]ow do smaller and independent creators with limited resources expect to have any impact[?]"); *see also* Ali Qassim, *Authors Should Have Attribution Rights Columbia's Ginsburg Says*, BLOOMBERG BNA: PATENT, TRADEMARK & COPYRIGHT LAW DAILY (Apr. 14, 2015), http://news.bna.com/ptdm/PTDMWB/split_display.adp?fedfid=66988793&vname=ptdbulallissues&jd=a0g5c2y6v7&split=0.

[120] *See* Jane C. Ginshurg, *Moral Rights in the U.S.: Still in Need of a Guardian Ad Litem*, 30 CARDOZO ARTS & ENT L.J. 73 (2012) (noting that the Supreme Court's decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) "has probably left authors worse off").

in the nineteenth century,[121] and subsequently codified by Congress in 1976, fair use is a critical safeguard of the Copyright Act.[122] The United States has a rich and comprehensive body of jurisprudence in this area, which our courts continue to develop to respond to ever new fact patterns. Fair use is not a panacea or replacement for a properly balanced statute, but witnesses agree, as does the Copyright Office, that further codification of the doctrine is ill-advised at this time.[123] That said, fair use should be as accessible as possible to both good faith users and copyright owners and the government can play a role by providing resources or guidance. As noted above, the Copyright Office has recently completed a public database of fair use holdings with this in mind.

Similarly, the Copyright Office will release shortly a major report on the exclusive right of "making available."[124] This right, which is reflected in two treaties[125] and multiple free

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[121] *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901); *see also* Lloyd L. Weinreb, *Fair Use*, 67 FORDHAM L. REV. 1291 (1999) (revised version of the 1998 Donald C. Brace Memorial Lecture) ("our understanding of fair use has not progressed much beyond Justice Story's observation in *Folsom v. Marsh*, the case usually cited as the source of the doctrine in this country . . . ." (footnote omitted)).

[122] Act of Oct. 19, 1976, Pub. L. No. 94-553, § 107, 90 Stat. 2541, 2546 (1976) (codified at 17 U.S.C. § 107); S. REP. NO. 94-473, at 61 (1975) ("The judicial doctrine of fair use . . . would be given express statutory recognition for the first time in section 107").

[123] *See, e.g.*, *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 32 (2014) (statement of David Lowery, Singer/Songwriter and Lecturer, Terry College of Business, University of Georgia) ("As a professional singer-songwriter, I believe that fair use doctrine, as intended by Congress, is working in the music business and music industry and should not be expanded."); *id.* at 8 (prepared statement of Peter Jaszi, Professor, Faculty Director, Glushko-Samuelson Intellectual Property Clinic, Washington College of Law, American University) ("I've come to the conclusion that fair use is definitely alive and well in U.S. copyright law, and that, after a rocky start, the courts are doing an excellent joh implementing the congressional direction contained in Sec. 107. Fair use doesn't need legislative 'reform,' but . . . it might benefit from certain kinds of legislative support in years to come—especially relief from the operation of other statutory provisions (such as the current law of statutory damages) that have the unintended consequence of discouraging its legitimate exercise."); *id.* at 22 (prepared statement of June M. Besek, Executive Director, Kernochan Center for Law, Media and the Arts and Lecturer-in-Law, Columhia Law School) ("Despite the concerns just voiced, fair use remains a rule whose application is best made by judges, as Congress recognized in codifying the doctrine in section 107 . . . . Without altering the text of section 107, Congress might separately address the problems of mass digitization, including whether authors should be compensated for publicly beneficial uses . . . ."); *id.* at 40 (statement of Kurt Wimmer, General Counsel, Newspaper Association of America) ("[T]his is an issue that we think can be remedied by the courts rather than Congress. We believe the current state of the Copyright Act, including the formulation of fair use, strikes the right balance and should not be changed."); *id.* at 24 (statement of Naomi Novik, Author and Co-Founder, Organization for Transformative Works) ("In general, I strongly urge Congress to resist any suggestion of narrowing fair use, including by trying to replace it with licensing.").

[124] *See* Study on the Right of Making Available; Comments and Public Roundtable, 79 Fed. Reg. 10,571 (Feb. 25, 2014). Specifically, Representative Watt requested that the Office address: (1) how the existing bundle of exclusive rights under Title 17 covers the making availahle and communication to the puhlic rights in the on-demand digital environment (such as peer-to-peer networks, streaming services, and music downloads); (2) how foreign laws have interpreted and implemented relevant provisions of the World Intellectual Property Organization (WIPO) Internet Treaties, to which the United States is a party; and (3) whether (and if so, how) Congress should amend Title 17 to strengthen or clarify U.S. law in this area. *Id.* at 10,572.

trade agreements,[126] requires the United States to provide authors of works, producers of sound recordings, and performers whose performances are fixed in sound recordings with the exclusive right to authorize the transmission of their works and sound recordings. In the specific context of on-demand transmissions, the treaties provide members with flexibility in the manner in which they implement this right.[127]

Despite unanimous agreement across the U.S. government as to the scope and breadth of this right,[128] some courts in the United States have struggled to apply the right appropriately in the digital age.[129] Although participants in the Office's study, as well as witnesses at the hearing on this topic, generally agreed that the complexity of the issue has led to some contradictory court decisions,[130] most rejected any need for specific legislative

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[125] WIPO Copyright Treaty art. 8, Dec. 20, 1996, 36 I.L.M. 65; WIPO Performances and Phonograms Treaty arts. 10 & 14, Dec. 20, 1996, 36 I.L.M. 76.

[126] *See, e.g.*, U.S.-Austl. FTA arts. 17.4.1, 17.5 (May 18, 2004); U.S.-Bahr. FTA arts. 14.4.2, 14.5 (Sep. 14, 2004); U.S.-Chile FTA arts. 17.5.2, 17.5.3 (June 6, 2003); U.S.-Colom. TPA arts. 16.5.3, 16.5.4 (Nov. 22, 2006); U.S.-Dom. Rep.-Cent. Am. FTA (CAFTA-DR) arts. 15.5.2, 15.6 (Aug. 5, 2004); U.S.-Jordan FTA arts. 4(1)(c)-(d) (Oct., 24, 2000) (incorporating provisions of the WCT and WPPT); U.S.-Kor. FTA arts. 18.4.2, 18.5 (Feb. 10, 2011); U.S.-Morocco FTA arts. 15.5.3, 15.6 (June 15, 2004); U.S.-Oman FTA arts. 15.4.2, 15.5 (Nov. 15, 2004); U.S.-Pan. TPA arts. 15.5.2, 15.6 (June 28, 2007); U.S.-Peru TPA arts. 16.5.3, 16.5.4 (Apr. 12, 2006); U.S.-Sing. FTA arts. 16.4.2(a), 16.4.3 (May 6, 2003), *all available at* http://www.ustr.gov/trade-agreements/free-trade-agreements.

[127] This flexible approach is known as the "umbrella solution." *See* MIHÁLY FICSOR, WIPO, GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO AND GLOSSARY OF COPYRIGHT AND RELATED RIGHTS TERMS 209-10, 247-48 (2003), *available at* http://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf.

[128] *See, e.g.*, INTERNET POLICY TASK FORCE, U.S. DEP'T OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 15–16 (2013), *available at* http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf (stating that the distribution right provided in the U.S. Copyright Act was intended to include "the mere offering of copies to the public," which is considered to be part of making available); *Piracy of Intellectual Property on Peer-to-Peer Networks: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm. on the Judiciary*, 107th Cong. 114 (2002) (Letter from Marybeth Peters, Register of Copyrights, U.S. Copyright Office, to Rep. Howard Berman) ("While Section 106 of the U.S. Copyright Act does not specifically include anything called a 'making available' right, the activities involved in making a work available are covered under the exclusive rights of reproduction, distribution, public display and/or public performance . . . ."); H.R. REP. NO. 105-551, pt. 1, at 9 (1998) (concluding that the WIPO Internet Treaties "do not require any change in the substance of copyright rights or exceptions in U.S. law.").

[129] *Compare Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) ("When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public."), *and A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) ("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights."), *with London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 168 (D. Mass. 2008) ("Merely because the defendant has 'completed all the steps necessary for distribution' does not necessarily mean that a distribution has occurred." (citation omitted)), *and Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008) (holding that § 106(3) of the Copyright Act does not encompass mere offers to distribute).

[130] *See, e.g.*, Jane C. Ginsburg, Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia Law School, Comments Submitted in Response to U.S. Copyright Office's Feb. 25, 2014 Notice of Inquiry at 3-

action.[131] The Copyright Office trusts that our report will in and of itself provide useful guidance to the courts on the manner in which the making available right should be interpreted and recognized in the United States. However, we remain available to Congress should it wish to further consider the question.

Moving to topics of copyright administration, the Copyright Office has led active public discussions about the future evolution of both copyright registration[132] and copyright recordation.[133] In today's world, copyright owners want to register on mobile devices and assert their authorship and licensing information based upon data that is readily accessible to other actors around the globe. And companies who aggregate, disseminate, or otherwise use copyright data want the Copyright Office to supply timely and accurate information and facilitate interoperable applications. This is an appropriately exciting vision for the twenty-first century; as witnesses explained, robust information technology structures will support any number of new copyright transactions.[134] Thus, these sorts of paradigm shifts are necessarily tied to decisions regarding Copyright Office improvements generally.

The mandatory deposit provisions, which require publishers to submit copies of works in support of the national collection of the Library of Congress, are also out of date and require attention. Issues include the operation and relationship of mandatory deposit

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5, *available at* http://copyright.gov/docs/making_available/comments/docket2014_2/Jane_Ginsburg.pdf; *The Scope of Copyright Protection: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary* 10 (2014) (statement of David Nimmer, Professor from Practice, UCLA School of Law & Of Counsel, Irell & Manella, LLP); *The Scope of Copyright Protection* at 41 & n.15 (statement of Glynn S. Lunney, Jr., McGlinchey Stafford Professor of Law, Tulane University Law School).

[131] *See, e.g.*, Transcript, U.S. Copyright Office, Public Roundtable on the Right of Making Available 231:10-14 (May 5, 2014), *available at* http://copyright.gov/docs/making_available/public-roundtable/transcript.pdf (statement of Jonathan Band, Counsel, Library Copyright Alliance) ("[M]aybe there is some ambiguity, but we are probably better off letting the courts deal with the cases as they arise, as opposed to trying to deal with it legislatively . . . ."); *id.* at 235:13-15 (statement of Keith Kupferschmid, General Counsel & Senior Vice President for Intellectual Property, Software & Information Industry Association) ("[W]e do not think that any type of further clarification or amendment to the statute is necessary."). *But see, e.g.*, Peter S. Menell, Koret Professor of Law, University of California, Berkeley School of Law, Comments Submitted in Response to U.S. Copyright Office's Feb. 25, 2014 Notice of Inquiry at 2, *available at* http://copyright.gov/docs/making_available/comments/docket2014_2/Peter_Menell.pdf ("Congress should clarify the scope of the distribution right. The dissensus surrounding the 'making available' issue needlessly creates uncertainty and increases the costs of litigation.").

[132] *See* 17 U.S.C. § 408.

[133] *See* 17 U.S.C. §§ 203, 205, 304.

[134] *See U.S. Copyright Office: Its Functions and Resources* at 97 (statement of Robert Brauneis, Professor, George Washington University Law School & Abraham L. Kaminstein Scholar-in-Residence, U.S. Copyright Office) (noting that the Copyright Office "would see a large number of new copyright transactions, particularly smaller transactions"); Letter from Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office, to John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary 6 (Mar. 23, 2015), *available at* http://copyright.gov/laws/testimonies/022615-testimony-pallante.pdf (summarizing witness statements regarding the benefits of a well-functioning Copyright Office).

requirements to copyright registration requirements,[135] the viability of "best edition" requirements in the digital age,[136] security of electronic works, and consideration of the Library's stated goals.[137] We will need to meet with the Library and stakeholders regarding both the statute and applicable regulations before advising Congress further.

There are multiple other issues that will take time. For example, witnesses have offered opinions about statutory damages, the first sale doctrine, compulsory video licenses, term of protection, termination rights, and the copyrightability of public standards and codes. We have not prioritized these for either immediate legislative action or immediate study at this time. However, we agree that they are important issues and if the Committee desires further analysis, we are of course available to assist.

Finally, we have identified a list of corrections that we recommend the Committee adopt to address some technical concerns in the statute. That list is attached as a rider to my statement.

VI. Conclusion

As the Committee continues to assess not only themes and conclusions of the past twenty hearings, but the experiences of the past four decades, the Copyright Office is here to assist you. Thank you for your leadership on copyright policy.

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[135] *See* 17 U.S.C. §§ 407, 408.

[136] The "best edition" of a work is defined in the Copyright Act as "the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes." 17 U.S.C. § 101.

[137] *See generally* Letter from James H. Billington, Librarian of Congress, to Rep. Robert W. Goodlatte, Chairman, H. Comm. on the Judiciary 5 (Apr. 23, 2015) (in part discussing mandatory deposit provisions in relation to the national collection).

ATTACHMENT

1

Proposed Technical Amendments

- **§ 109(e)**
  This provision is an exception to the rights of public performance and public display for electronic audiovisual games intended for use in coin-operated equipment. It was added by the Computer Software Rental Amendments Act of 1990, which stated that the exception "shall not apply to public performances or displays that occur on or after October 1, 1995."[1] Although set forth in the Act as passed by Congress, the termination of the exception was not codified in section 109(e). Because this exception no longer applies, it should be repealed to avoid confusion.

- **§ 408(c)(3)**
  This provision allows a claimant to obtain a single renewal registration for certain groups of works by the same individual author that were in their first copyright term on January 1, 1978, provided that the claim is submitted within the last year of that term.[2] This provision can no longer be applied because the first term for all such works expired on or before December 31, 2005. It thus should be repealed.

- **§ 508**
  Section 508 requires United States court clerks to notify the Register of Copyrights when any action under Title 17 is filed.[3] When any final order or judgment is issued in such a case, the clerks must similarly notify the Register, as well as send a copy of the order or judgment, along with any written opinion.

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[1] Pub. L. No. 101-650, § 804(c), 104 Stat. 5089, 5135, *amended by* Uruguay Round Agreements Act, Pub. L. No. 103-465, § 511, 108 Stat. 4809, 4974 (1994).

[2] *See* 17 U.S.C. §408(c)(3)(C) (providing that "the renewal application and fee are received not more than twenty-eight or less than twenty-seven years after the thirty-first day of December of the calendar year in which all of the works were first published").

[3] Section 508 provides in full:

> Notification of filing and determination of actions
>
> (a) Within one month after the filing of any action under this title, the clerks of the courts of the United States shall send written notification to the Register of Copyrights setting forth, as far as is shown by the papers filed in the court, the names and addresses of the parties and the title, author, and registration number of each work involved in the action. If any other copyrighted work is later included in the action by amendment, answer, or other pleading, the clerk shall also send a notification concerning it to the Register within one month after the pleading is filed.
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> (b) Within one month after any final order or judgment is issued in the case, the clerk of the court shall notify the Register of it, sending with the notification a copy of the order or judgment together with the written opinion, if any, of the court.
>
> (c) Upon receiving the notifications specified in this section, the Register shall make them a part of the public records of the Copyright Office.

17 U.S.C. § 508.

Section 508 also requires the Register to make these filings part of the public record of the Copyright Office. This section should be eliminated because the paper-based Section 508 filing system has become obsolete in an era of electronic court information resources such as PACER, Lexis, and Westlaw. There is no efficient way to search the voluminous paper Section 508 filings and, perhaps not surprisingly, in recent years there has been virtually no demand to access them. In sum, the administrative costs to the courts of preparing and sending these notices, and the costs to the Office of receiving and maintaining these records, far outweigh any usefulness to the public.

- **§ 708(a), final paragraph, first sentence**
  This section sets forth the procedure for fixing various fees allowed to be charged by the Copyright Office. The sentence in question follows a list of specific fees that are proposed by the Register and submitted to Congress (Section 708(a)(1)-(9)) and the establishment of fees for the filing of cable and satellite statements of account (Section 708(a)(10)-(11)).[4] The sentence reads: "The Register is authorized to fix fees for other services, including the cost of preparing copies of Copyright Office records, whether or not such copies are certified, based on the cost of providing the service."[5] The Office proposes a technical change whereby the last phrase of the sentence would be amended to read "based on the costs of providing the services." The pluralization of "costs" and "services" would permit the Office greater flexibility in fixing its fees because it could consider the total costs of all of its "other" services in establishing its fee schedule for those services, thus permitting the Office to consider the public need for, and individual benefits of, particular services. This is the procedure for the fee schedule submitted to Congress for the fees enumerated in Section 708(a)(1)-(9).[6] The proposed technical change would thus eliminate a statutory discrepancy in the treatment of different categories of fees for fee-setting purposes.

- **§ 801(b)(2)(D)**
  The reference to "section 111(d)(1)(C) and (D)" in section 801(b)(2)(D) should instead be a reference to "section 111(d)(1)(E) and (F)" to reflect changes made by the Satellite Television Extension and Localism Act of 2010.[7]

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[4] *See* 17 U.S.C. § 708(a).

[5] *Id.*

[6] *See* 17 U.S.C. §§ 708(b)(2) ("the Register may, on the basis of the study under paragraph (1), and subject to paragraph (5), adjust fees to not more than that necessary to cover the reasonable costs incurred by the Copyright Office for the services described in paragraph (1), plus a reasonable inflation adjustment to account for any estimated increase in costs"); 708(b)(5).

[7] Pub. L. No. 111-175, § 104, 124 Stat. 1218, 1233 (setting forth gross receipts limitations in Section 111(d)(1)(E) and (F)).

- **§ 802(i)**
  Title 17 should be amended to reflect the Librarian of Congress's authority to remove Copyright Royalty Judges under the determination of the United States Court of Appeals for the District of Columbia in the 2012 case *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board* that "without the unrestricted ability to remove the Copyright Royalty Judges, Congress's vesting of their appointment in the Librarian rather than in the President violates the Appointments Clause."[8] In its opinion, the court of appeals expressly stated that it was "invalidat[ing] and sever[ing] the portion of [section 802] limiting the Librarian's ability to remove the Judges."[9] The Office is available to assist Congress with an appropriate conforming amendment.

- **Miscellaneous typographical errors**

  - Section 111(a): Paragraphs (a)(1) and (2) each have "or" after the semicolon at the end but (3) and (4) do not; the use of "or" in these paragraphs should be corrected.

  - Section 111(e): In paragraph (e)(1), delete the superfluous "the" in the first line before "subsection (f)(2)."

  - Section 119(d)(10)(A): Delete "of" at the end of subparagraph (d)(10)(A) introducing clauses (i) and (ii).

[8] 684 F.3d 1332, 1342 (D.C. Cir. 2012).

[9] *Id.*

Mr. MARINO. Thank you, Ms. Pallante.

We will now proceed under the 5-minute rule with questions for the witness. And I will be begin by recognizing myself for 5 minutes.

And, Ms. Pallante, I think you know where I'm coming from when I say this: If we could just take exactly what you said and not have a hearing and do it, we would be fine. But we have to have a hearing.

Ms. PALLANTE. I'm all for that.

Mr. MARINO. And we will proceed that way.

I first want to thank you for your diligent work in advising this Committee in our extensive oversight. Your insight is an invaluable process that helps us get through this. Your frameworking of the system the way it is and where it should be is very remarkable. And I've never heard such a precise, accurate, complete report to Congress done in less than 10 minutes. So I thank you for that.

As we move forward, wrapping up through this review, it is clear that several changes must be made to bring the Copyright Office and copyright law into the 21st century. And I know no one is going to do it better than you. We have to modernize the Copyright Office, being chiefly—that's the number one thing among what has to be done.

But, first, I would like to request that I be able to enter a statement from the U.S. Chamber of Commerce that outlines their views on copyright reform, which includes their echo of support for restructuring the Copyright Office. Do I hear any objection? Hearing none, then so ordered.

[The information referred to follows:]

The Register's Perspective on Copyright Review
U.S. House of Representatives
Judiciary Committee
April 29, 2015
Statement of the U.S. Chamber of Commerce for the Record

Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee, the U.S. Chamber of Commerce appreciates your leadership and thoughtful consideration through the copyright review process. The Chamber supports your efforts and desires to maintain the copyright system as an engine of economic growth and creativity. In particular, we support the growing momentum for restructuring of the Copyright Office to better serve consumers and the businesses that produce valuable copyrighted works and help deliver those works to the public.

The U.S. Chamber of Commerce is the world's largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions. Our members range from mom-and-pop shops and local chambers to leading industry associations and large corporations.

The Global Intellectual Property Center (GIPC) was established in 2007 as an affiliate of the U.S. Chamber of Commerce. Today, the GIPC is leading a worldwide effort to champion intellectual property rights and safeguard U.S. leadership in cutting-edge technologies as vital to creating jobs, saving lives, advancing global economic growth, and generating breakthrough solutions to global challenges.

I. Introduction

The Committee's copyright review process began with the common-sense notion that any responsible government must work to ensure its laws remain up to date. This was expressed clearly by Chairman Goodlatte in one of the earliest hearings in this process when he said in his opening statement, "we must undertake this review to ensure that copyright law continues to incentivize creativity and innovation in the digital age."[1] As the U.S. Commerce Department found, IP-intensive industries overall account for 40 million jobs, over a third of U.S. gross domestic product (GDP), and over 60% of U.S. exports.[2] Similarly, total copyright industries add almost $2 trillion to U.S. GDP, pay 34% higher wages over average U.S. wages, and employ over 11 million people.[3]

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[1] "*A Case Study for Consensus Building: The Copyright Principles Project*," Hearing before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary, House of Representatives, 113th Cong., 1st Sess., May 16, 2013 at 8 (Statement of The Honorable Bob Goodlatte).
[2] "*Intellectual Property and the U.S. Economy: Industries in Focus*," Economics and Statistics Administration and the U.S. Patent and Trademark Office (March 2012)(available at http://www.uspto.gov/sites/default/files/news/publications/IP_Report_March_2012.pdf.)
[3] "*Copyright Industries in the U.S. Economy*," Stephen E. Siwek (2014)(available at http://www.iipa.com/pdf/2014CpyrtRptFull.PDF.)

However, opponents of effective copyright must not ignore the reality that our copyright system has worked tremendously well and should not use this Committee's hearings as a platform to suggest far more than updates to the law, but wholesale policy changes to our copyright system.[4]

II. The Committee Should Reject Calls to Weaken Copyright

Throughout the copyright review process, there have been proposals that cannot be fairly characterized as updating or clarifying the law, or improving efficiency, but rather would constitute wholesale policy changes. These are well beyond the purpose of this review and would weaken the effectiveness and benefits of our copyright system.

A. Digital First Sale

To be clear, the First Sale doctrine already applies to copies in digital formats, including CDs, DVDs, etc. The proposals to transform the First Sale Doctrine into a permission for a "forward and delete" approach would depart from history by expanding the First Sale Doctrine to limit reproduction rights, would be dependent on the reliability of the obligation of the sender to delete, and even if that obligation were perfectly enforceable, would still harm the markets for works to a much greater degree than ever before. The Copyright Office's study of this issue reached the same conclusions in 2001 and they remain equally applicable in 2015, as the fundamental calculus has not changed.[5]

An even further departure from the historic role of the First Sale doctrine is the proposal to amend the Copyright Act to pre-empt contract terms that some commenters dislike in the name of allowing the resale of consumer products. However, there is no evidence to support the supposition that in fact the marketplace for such resale is inhibited. Rather, the reality of this proposal is that it is a drastic solution to a nonexistent problem.

B. Statutory Damages

Some have called for reducing the availability of statutory damages notwithstanding the fact that they are lower today than they were at the time of the 1909 Copyright Act and the 1976 Copyright Act, adjusted for inflation.[6] Statutory damages are a cornerstone of the U.S. copyright system that have been included in the Federal Copyright Act without interruption since its first enactment in 1790. In the midst of an age of unprecedented levels of piracy is exactly the wrong time to turn away from this time-honored aspect of our copyright law.

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[4] "*2013 in Review: The Next Great Copyright Act?*," Corynne McSherry, Electronic Frontier Foundation, Dec. 26, 2013 (describing the U.S. Copyright Act as "broken" and lacking "sanity")(available at https://www.eff.org/deeplinks/2013/12/next-great-copyright-act).

[5] "*DMCA Section 104 Report*," U.S. Copyright Office (August, 2001)(available at http://copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf.)

[6] "*Copyright Remedies*," Hearing before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary, House of Representatives, 113th Cong., 2nd Sess., July 24, 2014 at 29 (Statement of Steven Tepp).

C. Anti-Circumvention

The basic protection against the hacking of copyrighted works has long been understood to be a fundamental aspect of promoting licensed, lawful access to works online. Indeed, there has been an explosion of authorized services since the enactment of anti-circumvention provisions in the DMCA in 1998. Further, the evidence submitted to the Copyright Office throughout the five previous (and current ongoing) section 1201 rulemakings demonstrate only narrow incidences in which legitimate uses were inhibited, and those have been addressed. Notwithstanding this lack of evidence, some continue to make broad claims of a parade of horribles and seek to undermine the protection of section 1201 of the DMCA. The Committee should reference the facts more than the rhetoric and dismiss such proposals.

D. Term of Copyright

In 1998, the United States decided to match the term of copyright protection afforded by the European Union so that American creators and copyright owners would not be at a competitive disadvantage. Since then, the life plus 70 term has become a common standard around the world. The U.S. Supreme Court has affirmed the consistency of the life plus 70 term with the First Amendment and the Copyright Clause.[7] This is an appropriate standard that was adopted after due deliberation and debate. The continued objections from those who lost that debate have not become more persuasive and certainly have nothing to do with updating the Copyright Act.

III. **Restructuring the Copyright Office**

The Chamber is encouraged by the emergence of restructuring the Copyright Office as the keystone of the copyright review process. The current limitations on the utility of the registration and recordation databases underserve the public, as the Copyright Office itself has acknowledged.[8]

The placement of the Copyright Office within the Library of Congress is essentially an accident of history, driven by the desire of the Library in the 19th Century to be able to take copies of works submitted for copyright registration and add them to the Library's collection at no cost to the Library. However, this arrangement has evolved to produce real operational limitations on the Copyright Office that inhibit it from serving the public to its best ability.

Congress created a position of Register of Copyrights to lead the Copyright Office, and administer the copyright system, provide technical assistance to U.S. citizens and foreign officials, engage in international copyright matters, and offer policy counsel to Congress. But the Register does not have the authority to do the job he or she is

[7] *Eldred v. Ashcroft*, 537 U.S. 186 (2003).
[8] "*Report and Recommendations of the Technical Upgrades Special Project Team*," Office of the Chief Technology Office, U.S. Copyright Office (Feb. 2015)(available at http://copyright.gov/docs/technical_upgrades/usco-technicalupgrades.pdf.)

hired to do. All Copyright Office internal operations such as IT and HR are dependent on the approval of the Library of Congress, and the Register cannot issue rule makings or regulations; the Librarian of Congress does.

As a practical matter, the Copyright Office is a secondary consideration for the Librarian, whose primary mission is to run the national Library. Administering the multi-trillion dollar copyright system should not be a part-time job. Of course, in reality, the Register is the source of copyright expertise, not the Librarian. In copyright litigation, courts cite to the views of the "Copyright Office" or the "Register," not to the Librarian. The Librarian is not an IP official, but nonetheless has authority over the Copyright Office.

As a practical matter, this poses real operational problems for the Copyright Office. The Librarian has sought authority to divert appropriations from the Copyright Office to other Library offices. The Copyright Office has no IT department in the real sense; is it forced to rely on the Library's willingness (or not) to support it. As a result, Copyright Office services remain woefully outdated, some still paper-only.[9] In short, central processes essential to the administration of the copyright system are beyond the Register's control. Further, the Library salary structure lags behind Executive Branch agencies, making it harder for the Copyright Office to attract and retain top talent.

The Register of Copyrights, the true head of the Copyright Office and a position grounded in copyright expertise, should be appointed by the President and confirmed by the Senate. Legislative language can be included to ensure that the Library can continue to receive copies of works in a reasonable way. It can also be clear that the Copyright Office retains the ability to give candid, expert advice and counsel to Congress, and that it remains subject to full Congressional oversight. Correspondingly, restructuring the Copyright Office need not disturb or alter the present allocation of IP responsibilities within the relevant Executive Branch agencies.

Restructuring the Copyright Office will not only allow it to modernize, it may help resolve some of the substantive copyright issues before the Committee. For example, more vibrant, functional databases of authorship and rights holders can help alleviate the orphan works issue and generally reduce transaction and information costs across the copyright system. Further, to the extent that Congress will rely on the Copyright Office to implement and administer the Copyright Act, the first step must surely be to provide a structure that allows the Copyright Office the best position to perform its functions.

IV. **Conclusion**

[9] "*Transforming Document Recordation at the United States Copyright Office*," A Report of the Abraham L. Kaminstein Scholar in Residence, U.S. Copyright Office (Dec. 2014)(available at http://copyright.gov/docs/recordation/recordation-report.pdf.)

The nearly two-dozen hearings the Committee has conducted over the past two years on copyright review have represented an historic commitment to maintaining the vibrancy of our copyright system. The Chamber appreciates and commends this undertaking. As the Committee now considers the lessons of those hearings, we submit that the single most important and long-lasting result of this process, and the one upon which any other steps should be built, is to restructure the Copyright Office. The Chamber stands ready and eager to assist in that effort.

Mr. MARINO. Ms. Pallante, the idea for an efficient, searchable database seems to have a lot of support. Can you tell us what you believe you and your team would need in terms of resources, personnel, et cetera, in order to create and maintain such a database that will get us into the second half of the 21st century?

Ms. PALLANTE. Thank you, Mr. Marino. So I agree that the Copyright Office database is a key piece of the digital economy, and we have actually several databases that are not connected. So one thing we have to do is make sure that the registration database—that is, when people apply for registration and receive certificates—is connected to the recordation database, that reflects later transactions in the marketplace, including licensing of those works. And then that database, that chain of commerce needs to reflect metadata and connect to private sector databases where people can be found and licenses can happen.

So, in terms of resources, I would say two things: We should look at the fee schedule that we currently have, and we should figure out what, if anything, the Committee would like us to do in terms of charging for capital expenses. Right now, our statute allows us to charge for cost only, not future cost. That's something that has come up in our appropriations hearings. It's an interesting question. Obviously, it would have to be carefully calibrated to be reasonable. Beyond that, some degree of taxpayer support I think is important because I don't think you should put the database and the cost of the databases on the backs of copyright owners alone. So many user communities and aggregators also use—the general public uses the databases. So, that said, I think that the lion's share of it can be through fees.

Otherwise, I think in terms of technology, we have to have the ability to focus our own staff on our technological needs and not have what we need diluted through, perhaps, what the Library, as a bigger agency, needs. That's been a big problem for us.

Mr. MARINO. My next question, on the issue of depositing their works for purposes of registration, I'm told there are limited instances in which a party can simply apply and produce a copy in digital form. Is this true?

Ms. PALLANTE. Yes. So it's a vestige of the relationship of the Copyright Office to the Library. And, in analog days, when one registered and provided a physical copy, the Library became the archive for that copy. Today, we don't need preservation-quality works to register them. We need a data-driven system where people can register on iPads and other mobile devices. So that is true.

Mr. MARINO. And, in 50 seconds, my last question, can you describe the system used for parties to register in order to receive the safe harbor under DMCA?

Ms. PALLANTE. Are you talking about our database?

Mr. MARINO. Yes.

Ms. PALLANTE. So that has been pending for some time. We have a rudimentary version of it that has been in place since 1998, when the DMCA was enacted. Three years ago, we did a rulemaking and provided guidance as to how to update that so it's more interactive and interoperable. And, because our IT is managed by the Library of Congress, it is one of many projects still pending in that office.

Mr. MARINO. Thank you. And we've come in under the wire by 15 seconds.

The Chair now recognizes the gentleman from Michigan, the Ranking Member, Congressman Conyers.

Mr. CONYERS. Thank you, Chairman Marino.

And I want to congratulate you, Ms. Pallante, you took 35 pages and boiled them down to 10 minutes in a very excellent way.

In your written statement and oral statement, you suggest that there are policy issues that warrant studies and analysis, including section 512, section 1201, mass digitization, and moral rights. I would like the Copyright Office to conduct and complete reports on those policy issues, and we'll work with the Chairman on making a formal request. Is that compatible with all of our discussions and all your writing?

Ms. PALLANTE. Thank you.

Mr. CONYERS. Okay. A strong copyright system requires a strong Copyright Office, obviously. And there's consensus to restructure the Copyright Office to bring it into the 21st century and to strengthen the copyright system. We think it hasn't been given the appropriate attention considering its importance. You already provided a response to my February request for your views on restructuring the Office. And I've got a couple followup questions.

In your letter, you urge Congress to decide soon on the organizational structure of the Office. What kind of a realistic timeline for Congress addressing the restructuring do you have and why?

Ms. PALLANTE. That's an excellent question, Mr. Conyers. I think, ideally, you would do it in this Congress. And my reason for saying that is because——

Mr. CONYERS. As soon as possible.

Ms. PALLANTE [continuing]. Because we have a situation where we need to map out the next decade really. And we either have to do that in the current structure, where, for example, we're making IT investments for the copyright system through the Library's central IT governance process, or we're doing it in a way that's more targeted to the copyright system. That's not theoretical. We actually have a recordation system that is paper-based. We've done all of the analysis for that. We're ready to bring it online, and we need to know whether we're doing that in our own IT infrastructure and subject to our own IT needs or through a general agency model. I also think that some of the policy issues that are interesting to this Committee—small claims, orphan works—would be greatly improved if you could structure the agency itself properly.

Mr. CONYERS. Very good. I'm going to combine my last two questions because I know the light is going to flash. The Copyright Office provides an impartial voice for copyright policy in Congress and the Administration. How would it continue to do so under the different approaches you've suggested as an independent branch? And, finally, how would the different approaches you suggested in your letter affect your Office's future funding? And would this impact fees for the copyright community?

Ms. PALLANTE. So it's a big question, obviously. We've been in the same structure for—two big questions—we've been in the same structure for 118 years. We have been a department of the Library of Congress, so not a subagency, not an agency. During that time,

we have served the Administration, and we have had a very close relationship with Congress on copyright policy, every major revision since we were created in 1897.

Interestingly, although we perform executive branch functions and serve Congress, our legal status is unclear. Recently, the Department of Justice, in a music case, in a CRB case, said that when the Library of Congress is performing copyright functions, it is clearly in the executive branch. What we are asking you to do is to codify the structure that we are all comfortable with and have known for over a century, which is an independent structure where we are impartially serving everybody. In that model, the President would appoint the next Register, the Senate would confirm the position, but the Congress would decide the term, and the person would be free to advise Congress as well as the Administration, without interference, in the way that it always has worked. It doesn't disrupt the Administration or their IP experts but, in fact, confirms the coordinating role that now occurs.

In terms of funding, we are two-thirds fee-funded right now. As I said, we might be able to look at charging for capital costs. Big copyright owners, large ones, have indicated they're willing to do that if they get services back that reflect that investment. But, no doubt, there will be some capital improvements. What I would suggest is that those capital improvements are a great investment in the digital economy, though.

Mr. CONYERS. Thank you so much. This is your third time before us. And each time is as good as it gets. And it gets better. I welcome your coming before the Committee so much.

And I appreciate your testimony.

Ms. PALLANTE. Thank you, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. MARINO. Thank you.

The Chair now recognizes the gentleman from California, Congressman Issa.

Mr. ISSA. Thank you.

Ms. Pallante, it's good to have you here again. I want to pick up where the Ranking Member left off because I think it's very important. When you came into office, as you know, I was extremely pleased. You talked in terms of things that must get accomplished. But today's hearing brings us a lot of information about studies in which you want to do more studies. And you already are a fairly independent agency, in spite of your lack of certainty in certain areas. How do we get you from studying to proposing? And how do we get you from proposing to doing?

Ms. PALLANTE. Well, we would love to be able to be more hands-on and help the copyright system function. So that is the vision that I think——

Mr. ISSA. No, I'm talking about in your organization. I'm not talking about your affecting—because you've been very good, and your predecessor was, in telling us what we ought to do in copyright law. And I appreciate that. But I looked to the Constitution before I came in. And I'm okay with our role.

What is it going to take for you to come from studies to real, concrete proposals, dollars and cents, "this is what we need"? Look, you're the chief executive of an agency. Once the laws are set—and

they are currently set—when you fail to perform, you have two choices, as a member of your board, so to speak, you have two choices: Come to us and tell us you don't have a solution or come to us and tell us you do have a solution. You've come to us with studies. My question today—and I'm not trying to be in any way the bad guy here. I support you. I thought you started well, but now I'm beginning to see, after 3 years, a pattern of we have these studies and we want more studies. When are we going to see, beyond your desire to be an independent agency and have that codified, when are we going to see solid proposals not on what we do but on what you can do or what you cannot do?

Ms. PALLANTE. Thank you, Mr. Issa. We have proposed recommendations for technology infrastructure and technology recommendations that are fairly precise. Those were done with the full public participation of the copyright community. And we published that in February. And that was also referenced by the GAO recently. So I think we have been fairly proactive about saying what we need. We need our own technology enterprise architecture, distinct from the Library. We need our own technology infrastructure, our own technology staff. And we need to make sure we have targeted IT investments that are not synergized with the Library mission. So we have been actually very precise about that.

In terms of fees, we have been very precise that we need an updated fee allocation so we can begin to charge for capital costs.

In terms of authority, I am not the chief executive of the agency. I'm the head of a department which is run by the Librarian of Congress. So the question, I think, that we are asking you is: Do you want us to put further investments in that structure, or do you want to give us the authority legally to do something different?

Mr. ISSA. Okay. Let me read you back your own words because I think you've given us a lot of what I asked for: One, you don't have enough money to update the Copyright Office to the level that the IT system needs; two, you don't have internal expertise to update the Copyright Office to that level; and, three, the Librarian is not going to give it to you, nor do they have it. Is that pretty close?

Ms. PALLANTE. Almost. What I'm saying is that we don't have the authority to have our own IT staff or control.

Mr. ISSA. I left that part out.

Ms. PALLANTE. I would love to——

Mr. ISSA. I left that part out because if I understand correctly, you need more money and you need a working IT system and you lack the expertise in-house and you believe that it does not exist within the Library system.

Ms. PALLANTE. It does not. And we do not have the authority to duplicate it.

Mr. ISSA. So the request here today—and I know my time is expiring, Mr. Chairman—the request I see here today, the solid proposal that I want to go away from this with is: One, you need more money; two, you need an IT system that works; and, three, we have to figure out how we structure your getting that IT system that works, either, A, making sure the Library has it, or, B, finding an agency or a structure that would cause you to do so. Is that correct?

Ms. PALLANTE. Yes. Except I would say this. That the IT system being divorced from the head of the Copyright Office has been a terrible model.

Mr. ISSA. No, no, I understand that. I understand that you are looking at a structural IT system that meets your needs.

Ms. PALLANTE. Correct.

Mr. ISSA. I cannot presume today that we would do anything except find a way to work it under the current structure, albeit, independent of the Librarian's needs. So, given that, that is what you're asking for?

Ms. PALLANTE. I think that's accurate.

Mr. ISSA. Mr. Chairman, I have a hundred more questions. But that is the best answer that I could possibly hope for on one of the root problems that we have in having the Copyright Office meet the 21st century needs. And I thank you for your indulgence. Thank you.

Mr. MARINO. Thank you.

The Chair now recognizes the gentleman from New York, Congressman Nadler.

Mr. NADLER. Thank you, Mr. Chairman.

I want to begin by thanking Chairman Goodlatte for conducting the comprehensive review of copyright law and of the Copyright Office that we are now concluding. Over the course of these 20 hearings, we have learned a lot about what is working and also what needs to be improved. It's now our task to put this knowledge into action.

Fortunately, the Copyright Office has helped guide us through these difficult issues. And I appreciate all the assistance that you, Ms. Pallante, and your staff have provided us throughout this review process. I particularly appreciate your call for the United States to join 70 other countries around the world in providing fair compensation to visual artists through a resale royalty and your comprehensive report on music licensing.

Along with my colleagues Marsha Blackburn, John Conyers, and Ted Deutch, I recently introduced the Fair Play Fair Pay Act to correct several longstanding injustices that plague music creators. This legislation would ensure that all artists are fairly compensated regardless of where their music is played or when it was recorded and would create a technology-neutral system whereby Internet radio is on an equal footing with AM/FM, cable, and satellite services.

Ms. Pallante, you mentioned in your testimony that music licensing issues are ripe for action. Do you believe that Congress should move forward with legislation, such as the Fair Play Fair Pay Act, to enact the full public performance right? If so, why do you believe this is an urgent matter that Congress should address?

Ms. PALLANTE. Thank you, Mr. Nadler. I think that the Fair Play Fair Pay Act is an excellent legislative framework. It reflects a lot of the findings of our study. On the public performance right for terrestrial radio, in particular, which I understand to be the focus of your question, I'll say this, it's indefensible as a matter of law and, frankly, embarrassing as a matter of policy that the United States does not pay public performance—for the public performance

of terrestrial radio to the creators of the music. We are out of step with the entire rest of the world.

Mr. NADLER. Thank you. I think it's very well put, very eloquently put.

Similarly, do you believe it's important for Congress to take action now to enact platform parity, where all radio services play by the same rules? If so, why?

Ms. PALLANTE. Yes. That was one of the major conclusions of our study. I think it was a conclusion that everybody knew was a long time coming. We have been regulating the music industry for a century. We, therefore, have all these disparate rates and grandfathered clauses that are really, really difficult to apply, do not serve the digital economy, do not serve new entrants to the digital marketplace, definitely do not serve creators. And beginning to look at parity across platforms is a crucial first step.

Mr. NADLER. It's a first step toward?

Ms. PALLANTE. Toward a balanced music bill that reflects the 21st century.

Mr. NADLER. Thank you.

Switching topics, do you think that the time is ripe for legislation on the issue of resale royalties for visual artists? In your testimony, you mentioned that several of the recommendations in your past reports have been included in the bill I introduced this Congress, the American Royalties Too Act of 2015. Can you explain why this bill would be a good foundation, in your opinion, if the Committee were prepared to act?

Ms. PALLANTE. I think it's an excellent foundation. And we really enjoyed doing that study because we, again, are out of step with about 70 countries around the world in the way that we treat visual artists. They operate differently under the Copyright Act from others in that their works are unique. And the value of their works is tied to the uniqueness, not the proliferation of copies, as in a book or a film where you're pricing it according to those copies. So we would really like to see visual artists generally fare better under the Copyright Act because their contributions are critical to our heritage and to the digital economy. We just recently issued a Federal Register notice asking for even more information about how photographers, graphic artists, and illustrators are faring under the Copyright Act as a follow-on process to your request for that study.

Mr. NADLER. Thank you. Going back to music, online music service providers today struggle to obtain accurate and comprehensive ownership information about the music on their services. Often such information is incomplete, not up to date, simply unavailable, or not in a format that is universally useable. The lack of ownership information prevents artists and composers from being paid in a timely manner. It also disincentivizes new service providers from entering the digital music space because of the threat of statutory damages for failure to appropriately license or pay creators and other copyright holders when they don't know who they are. What reforms do you think might be appropriate to remedy this situation?

Ms. PALLANTE. Yes, so, again, another major focus of our public process was data. Data is everything to the digital music market-

place. In some instances, there is data. And, in some instances, there is a lack of coordination of data. In other words, sometimes there's data missing. Sometimes it's the coordination of existing data that's the problem. So we proposed a central authoritative public database. We recommended that it be operated by a non-profit entity that is government mandated, along the lines of SoundExchange. Licensees could pay royalties for the unidentified works into that entity, and that would solve their exposure to liability.

Mr. NADLER. Thank you. Let me just thank you for your testimony and for your work.

And I yield back.

Mr. GOODLATTE [presiding]. Thank you, Register Pallante. I'm going to go ahead and give my statement since I'm late getting here, and then I'll go straight into my question, but a brief statement.

Two years ago, this Committee began the first comprehensive review of our Nation's copyright laws since the 1960's. During these 2 years, we have had a total of 20 hearings with 100 witnesses, had hearings that covered broader topics, such as the role of technology and copyright in our economy, to more specific topics, such as the scope of copyright protection and fair use.

Our first witness was the Register of Copyrights, Ms. Pallante. She returns this morning and has given her perspective on what the Committee has learned over the past 2 years and to update us on the in-depth studies that the Copyright Office has completed during this time. The Committee recognizes the strong, in-depth analysis routinely conducted by the Copyright Office. The Committee has always expected the advice of the Register being provided to Congress on copyright policy issues and the role of the Copyright Office itself to come from her independent perspective without filtering or direction from others. The Committee welcomes her forthrightness about the challenges her office faces, as well as what options Congress should consider in order to meet her legal requirements and the needs of the copyright community.

As the copyright review hearing process proceeded, each witness was essentially limited to speaking on the topic of that particular hearing. However, there are a few participants in the copyright system that care about only one copyright issue. Over the next several months, the Committee will be reaching out to all stakeholders to invite them to share their views on the copyright issues we have examined over the course of our review so far as well as any others. Even since we began our review, there have been several new Copyright Office studies, new technologies, court decisions, and even changes in business models. So we look forward to hearing from stakeholders on all of these important issues. During this process, we also encourage all participants in the copyright system to continue their dialogues with each other. Progress in copyright policy requires all parties to work together. Although it is certainly easier to discuss copyright policy with a traditional ally, copyright policy will not advance unless the lines of communication are open among all participants.

Finally, I'm going to my questions.

You recently released a comprehensive music study, recommending a series of changes to the music licensing system to improve it. Is improving the existing music licensing system preferable to shifting it to a free-market system with robust antimonopoly controls so that market forces determine prices rather than the government?

Ms. PALLANTE. The goal is most definitely ultimately the free market. I would completely agree with you on that. What we did was take a century-old regulatory process and try to move it in that direction incrementally but also progressively. So if you want to completely dismantle all regulation, many people would be very supportive of that. I think our concern would be the timetable for doing that and how small actors would fare without the regulatory protections that have served them and consumers fairly well.

Mr. GOODLATTE. Smaller copyright owners and users have indicated that they struggle with a complex copyright law that is difficult to navigate. Is overall clarification of the existing statute just as important as updating the statute itself?

Ms. PALLANTE. Yes. There is no question that copyright law touches everybody, everybody in a modern culture, in a modern nation, in modern global world. And it's unlike other laws in that respect. It affects everybody. So that is something that our Office would presumably be able to help the Congress with by taking on more of the education and guidance role.

Mr. GOODLATTE. The Committee has heard numerous and sometimes conflicting comments about copyright remedies that range from a not very functional system to extreme financial penalties divorced from actual harm. Does this wide range of comments simply reflect different opinions? Or can everyone's comments all be accurate, indicating that we have a remedy system that is not focused properly?

Ms. PALLANTE. Everybody is right. I think our remedies are critical to the functioning of the Copyright Act. You can't have exclusive right, a system based on exclusive rights without meaningful remedies. They would be hollow without remedies. Can we provide more guidance to courts? Possibly. Can we make licensing work better so that we're not in litigation and so that remedies play a more productive role rather than a hammer? Yes. But whether it's actual damages, injunctions, or statutory damages, they have been with the Copyright Act since 1790 in some instances. So it's very, very, I would be very, very careful about amending that quickly.

Mr. GOODLATTE. This Committee traveled to New York City for a field hearing on first-sale issues. There are clear differences between analog and digital items. But how should the law treat mixed goods?

Ms. PALLANTE. This is a great instance of our Copyright Act intersecting with what our consumers want. And we do live in a global marketplace. People do want to obtain the best prices and the best goods. There is a lot to be said for that model. And I think our stakeholders who are copyright owners are adapting to that. So I would probably monitor that situation at this point. I don't see a need for congressional legislation, anyway, at this point.

Mr. GOODLATTE. Thank you. Those are my questions. We are going to have to stand in recess for the speech by the Japanese Prime Minister.

However, we do have time to take one more.

And so the Chair recognizes the gentlewoman from California, Ms. Lofgren, for her questions.

Ms. LOFGREN. Thank you, Mr. Chairman.

I appreciate this hearing. And I just wanted to make a quick statement. In your testimony, there's some things I agree with. There's some things that are reminiscent of SOPA. And I just want to state for the Netroots that, to the extent that there are SOPA-like elements, I'm still against them.

I want to talk about the IT system. I agree that the IT system needs to be updated. But I want to talk about the whole idea of having taxpayer money allocated to this function. I realize from your testimony the constraint really has been created by us because of the forward funding. But the USPTO budget is $3.2 billion, and it's 100 percent fees. And it just seems to me that that ought to be the model here. Your budget is much smaller. But there is no reason why the taxpayers should be funding this any more than the taxpayers should be funding the Patent and Trademark Office. I just think that it's possible to do. We have very successful industries in the content area. And I just am eager to work with you to explore that further.

I also want to talk on section 1201. And I was looking up and down the dais here, realizing there's only a few of us left who were actually here when the DMCA was adopted. And 1201 caused me a lot of heartburn at the time. And it still does. And so here is one of the questions I have—and I had then—which is, do you believe that fair use is a defense to circumvention under 1201?

Ms. PALLANTE. I do not believe that the way you enacted the statute, that chapter 12 is subject to section 107. It is not part of the core Copyright Act. So, no, not legally.

Ms. LOFGREN. I agree with you. And it's a major problem. Because without a fair use exception, the digital locks could be used to eliminate a fair use or an otherwise authorized use. Digital locks could be used to perpetuate only monopolistic practices, not content at all. And so I'm hopeful that as you are thinking about 1201, that we think, not just about the exceptions—and I think your idea about forwarding the approval—of prior approval, but as the exemptions have proliferated, I think it tells us something about the underlying defect in the statute.

Now, sometimes when you say this, people assume, well, you're for infringement. I'm not actually for infringement. But I am for eliminating monopolistic practices that hide behind copyright. And I am for not using copyright to cripple technology innovation that has nothing to do with protecting copyright. And I'm also for making sure that the fair use exception is not destroyed through misuse of technology.

Now, I was interested in your cybersecurity exception issue and the need to expand it. In your mind, what would a cybersecurity exception look like? What would it encompass?

Ms. PALLANTE. I would really want to talk to experts in that area before commenting on that.

What I can say with confidence is that having cybersecurity research needs subject to a 3-year exemption process under the DMCA conducted by the Copyright Office and the Library is probably not the best way to go for the Nation.

Ms. LOFGREN. I very much agree. I recently met with some researchers, academically based, and I think they had probably been over to the Copyright Office as well. And they are good guys. They are exploring cybersecurity issues. And to do so, they have to actually do some breaking. And we want them to because we want to find out what the holes are. But they're very concerned. They're a law-abiding group. They don't want to be behind a law violation. Have you set up a group that would help you to think about this exception?

Ms. PALLANTE. Nobody has asked us to look at the exception, but we would like to do that. And it would be an interesting group because it would be very much in need of technical experts and security experts and people who are really looking out for the security interests of the United States.

Ms. LOFGREN. Thank you, Mr. Chairman.

I see my time is about to expire. And the Committee needs to get over to the floor to listen to the Japanese Prime Minister.

Mr. GOODLATTE. The Chair thanks the gentlewoman.

And the Committee will stand in recess until noon. And we thank Ms. Pallante for her patience.

[Recess.]

Mr. GOODLATTE. The Committee will reconvene.

When the Committee recessed, Members were asking questions of our star witness, and we'll resume by recognizing the gentlewoman from California, Ms. Chu, for 5 minutes.

Ms. CHU. Thank you, Mr. Chair.

First I'd like to enter into the record statements from the Copyright Alliance and Creative Future on their support for a strong copyright system. I'd also like to enter a statement from Sound Exchange into the record.

Mr. GOODLATTE. Without objection, they will be made a part of the record.

[The information referred to follows:]

CreativeFuture
Creativity. Innovation. Tomorrow.

March 10, 2015

Dear Members of Congress,

We are members of the creative community. While our political views are diverse, as creatives, there are a few core principles on which we can all agree. We appreciate the opportunity to share our views with the 114th Congress.

We embrace the internet as a powerful democratizing force for our world and for creative industries. We recognize its ability to inspire positive change and improve lives. In our creative industries, the internet has helped to advance creativity by removing barriers to entry for newcomers, fostering a dialogue with fans and audiences, and providing numerous additional ways to reach them. The internet holds great potential to expand creativity and free expression.

We embrace a strong copyright system that rewards creativity and promotes a healthy creative economy. The internet is a revolutionary platform that connects the world. The incredible cultural and economic value that it delivers to billions of users is based in very large part on the efforts of creative content makers whose livelihoods depend on being compensated for their efforts. Technology companies are making massive profits from creatives' contributions to the internet's growth. It is not too much to ask that content creators should be compensated for the value they bring.

We proudly assert that copyright promotes and protects free speech. Freedom of speech and freedom of expression go hand in hand with the freedom to create and to preserve the value and integrity of what one creates. The copyright clause of the Constitution is not in conflict with the First Amendment. To creative people, self-expression is deeply personal. It is at the heart of everything creatives do. We view any effort to diminish the rights of creatives in the name of "free speech" as cynical and dishonest.

Copyright should protect creatives from those who would use the internet to undermine creativity. The internet can be a great tool for creatives, just as it can be a tool for science, education, health care, and many other disciplines. However, when misused, it can harm creativity and stifle freedom of expression. President Obama, who has consistently advocated for a free and open internet, acknowledged at Stanford last month, "It's one of the great paradoxes of our time that the very technologies that empower us to do great good can also be used to undermine us and inflict great harm." Pirate site operators who profit from stolen creative works with impunity are one obvious example of the latter.

Creatives must be part of the conversation and stand up for creativity. Some organizations and advocates, who in many cases are funded by technology companies, repeatedly claim to be pro-creatives and pro-audience to mask their own self-serving agenda. They denigrate or block effective efforts to preserve and promote creative content, including enforcement of existing laws and voluntary industry initiatives. The creative community is rightfully wary of any company or organization that claims to be "against piracy" when their actions do not match their words.

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There is no "left" or "right" when it comes to respecting copyright. The creative community stands united in support of a copyright system that has made and continues to make the United States the global leader in the creative arts and the global paradigm for free expression. Our copyright system is not perfect but, like democracy, it is better than the alternatives. It works. We urge Congress to resist attempts to erode the right of creatives to determine when and how they share their works in the global marketplace.

Thank you for the opportunity to contribute our views.

Kate Abernathy
David Akins
Bill Allen
Gilbert Alloul
Hilton Als
Marilyn Atlas
Eli Attie
Jonathan Bader
Steve Baldikoski
Mark Balsam
Carol Baum
Peter Baxter
Jason Beck
Dion Beebe
Jessica Bendinger
Alec Berg
Albert Berger
Shari Springer Berman
Cary Bickley
Tony Bill
Julia Bloch
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Bill Borden
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Cindy Cowan
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Caitlin Dahl
Melinda Dahl
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Jonathan Dana
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Jonathan Dayton
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Catherine Dent
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Bill Duke
Russ Duncan
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Alison Emilio
Robert Emmer
Susan Emmer
Jacob Estes
Valerie Faris
Katherine Fausset
Paul Federbush
Jason Felts
Susan Ferris
Adam Fields
Jordan Fields
Wendy Finerman
Natalie Fischer
Kerthy Fix
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Brooke Ford
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Cecilia Friederichs
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April 28, 2015

The Honorable Robert Goodlatte
Chairman
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Democratic Member
House Committee on the Judiciary
2142 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers:

America has the most innovative and influential music culture in the world, but despite its tremendous leadership, our Copyright Office is still operating with resources and an infrastructure from the early part of the twentieth century, a time long before the digital revolution in music. American recording artists and the millions of Americans who treasure music need and deserve a Copyright Office that can keep pace with our musicians' remarkable creative output.

SoundExchange is an independent, nonprofit organization founded by–and for–the recording industry. As you know, we were created to help foster the growth of digital music services, and we are helping to usher the music industry into the age of digital streaming. We have therefore watched with great interest over the past two years as Members of Congress have questioned the governance structure in which the Copyright Office currently operates, considering constitutional, budget, and information technology management concerns.

There is no remaining question that the Copyright Office must be permitted to evolve and adapt to the realities of the digital marketplace. Congress has an historic opportunity, one for which your committee already has laid important groundwork. Providing the means for the Copyright Office to be more efficient, flexible and responsive to the changing needs of music creators and the users of their work will help everyone in the music ecosystem in their efforts to thrive in the digital environment. A modernized Copyright Office would be a vital partner to the entire universe of copyright industries that added nearly $2 trillion to the U.S. GDP in 2013.

In the course of the Committee's consideration of modernization of the Copyright Office, a number of possibilities for its future have been presented. We believe the path that would best enable the Copyright Office to serve its mission is giving it independence from the Library of Congress and a leader appointed by the President and confirmed with the advice and consent of the Senate. This would enable a more efficient and responsive organization to provide legal and policy expertise to Congress, federal agencies, and the public; allow the Office to be a more active and effective leader on domestic

and international copyright issues; and quiet constitutional challenges that, as the Register has stated, can compromise confidence in our copyright system.

This independence must, of course, be coupled with resources adequate to build the infrastructure necessary for a truly modern Copyright Office. Making the Copyright Office an independent agency would also have an immediate impact on the oversight and development of the extensive information technology systems required to fulfill its mission. We agree with the recent GAO report that the Copyright Office is hindered by significant challenges related to the Library of Congress' deficiencies in IT governance. We believe the ability to manage vast amounts of data within a modern IT system is one of the most critical functions of the Copyright Office. However, it has been hamstrung by the lack of a Library-wide IT plan for a number of years.

While the GAO report correctly assessed the IT problems the Copyright Office faces, it came to the absolutely wrong conclusion about how to address them. We strongly disagree with the report's conclusion that the goal should be to integrate the Copyright Office IT systems into a more centralized Library of Congress system. The IT objectives of the Library and the Copyright Office are dramatically different and cannot be simply "integrated." Additionally, centralization is counter to technology systems in the private sector that are instead trending toward more distributed and federated architectures. The American music industry and its consumers need a Copyright Office that is readily able to service its mission and the people and industries that depend upon it. Centralizing this function further within the Library of Congress would be moving in exactly the wrong direction.

The entire landscape of the U.S music industry has changed in the past decade–and continues to change nearly every day. SoundExchange exists to empower this change and to ensure that artists and creators are effectively, fairly and efficiently compensated for the music at the heart of this evolution. The Copyright Office–at the heart of our copyright and music ecosystem–needs to be at the cutting edge of this change, and time is of the essence.

We urge Congress to act swiftly to modernize the Copyright Office and give American musicians and music consumers the type of Copyright Office that is essential to our innovative musical industry, evolving culture and progress as a nation.

Sincerely,

Michael J. Huppe
President & CEO

cc: Members of House Committee on the Judiciary

Ms. CHU. Thank you.

Mr. Chair, thank you for holding this important hearing today. After speaking with so many diverse stakeholders from the Los Angeles region and throughout the country, it's clear to me that we have to bring the Copyright Office into the modern age. We need a Copyright Office that serves the needs of owners, users, and the American public. And that includes giving the Office independence and sound legal ground to perform its core mission to administer the Copyright Act and resources to invest in a workable IT infrastructure that makes sense for a creative future. I look forward to working with you, my colleagues, on the Committee, the Register, and the impacted stakeholders to produce a viable solution.

Register Pallante, you and your team have done such a great job despite the challenges you faced from limited resources, staffing issues, to outdated technologies. It seems to me that you're faced with the challenge of running an analog office in a 21st century world. In addition to this, you're limited in your decisionmaking, given how the Office is currently structured under the Library of Congress.

When Professor Brauneis last testified in the Committee, he urged Congress to give serious thought to the vehicle of an independent agency.

What are your thoughts to creating an independent agency instead of placing the Copyright Office within the Department of Commerce or the Patent and Trademark Office?

Ms. PALLANTE. Thank you, Dr. Chu, for the questions, and thank you for recognizing my staff as well. I don't know how I'm so lucky to have the staff that I do.

I think that those questions go right to the heart of what copyright is about. So if the Office is in the Commerce Department, it clarifies a few things. It clarifies what the Department of Justice has said is the case, which is namely that we are by and large an executive branch agency when we are performing copyright functions. And since all we do in my shop in the Library is copyright functions, it's clear that we are the part of the Library that is engaged in executive branch functions.

So the question becomes, does it matter? And what does that mean for the Library, and what would one lose if we were in the Commerce Department?

I think the principal thing that you lose as the Congress is the unfettered and impartial advice of the Copyright Office, which you have had since 1897. I think this Congress and all Congresses before it have been very hands-on in copyright policy. The House in particular has led the way in discussions about what a balanced Copyright Act should look like from the very beginning. And I personally would be heartbroken to see that part of our job compromised, diluted, or even eliminated by putting us only in the executive branch.

That led us to the conclusion that an independent model would really honor what we have always been, and that means that we have served Congress impartially, and we have also, though, supported the Administration. In treaties, in trade, we work with the Department of Justice very carefully because we administer the law. And we didn't want to disrupt what's already the case in the

Administration, meaning that the Congress has provided that the Register has a statutory relationship with the Under Secretary, who heads the Patent and Trademark Office, and a statutory relationship with the IPEC, that is in the Executive Office of the President. The only issue is that the Register is not at the same level and runs the copyright system and the Copyright Office. So, in looking at potential conflicts with the Library, because the Library has a library mission and a library view of copyright law, in the future and looking at the kinds of resources and focused technology and staffing that we need, it led us to believe that separating it out but honoring the tradition as leanly as possible was the right answer.

Ms. CHU. Thank you for that.

I'd also like to ask a question about the small claims process that could be an alternative to Federal court. I hear from so many small business owners, and the general consensus is that going to Federal court is very, very costly. And that is why I believe we must establish a small claims court for creators that need it the most.

Can you discuss how a system could be established and how it will function alongside the Federal court system?

Ms. PALLANTE. Yes. Thank you.

So this Committee requested a report from us, and we did a very public study for over 2 years about what a small claims process could look like. The overwhelming response of the creative community is that they are priced out of Federal court, even where statutory damages are available. And, without meaningful enforcement or resolution of contractual issues in cases, not necessarily full-blown major precedent-setting litigation, but just trying to resolve gridlock and claims, they need something else. And the small claims process that we developed constitutionally would have to be voluntary. Both parties would have to agree to it. We think both parties would in the circumstances that we've laid out. It would be capped at $30,000. That's certainly up to the Committee to change or amend or further deliberate on. We thought that number came out of our process. And we think it's critical because we don't want a Copyright Act in the 21st century that provides exclusive rights and no way to effectively enforce them, license them, protect them, and monetize them.

Ms. CHU. Thank you.

I yield back.

Mr. GOODLATTE. The Chair recognizes the gentleman from Michigan, Mr. Trott, for 5 minutes.

Mr. TROTT. Thank you, Chairman.

I want to thank our witness this morning, Ms. Pallante. I've been looking forward to your testimony. I'm new here in Congress, but everyone I've spoken with has commented to me on how insightful, helpful, and pragmatic some of your suggestions and insight has been for this Committee, and one of the few people that I've heard about since being here that everyone says great things about, and it doesn't happen too often in this town.

Ms. PALLANTE. Thank you. Thank you so much.

Mr. TROTT. So thank you for being here.

I agree with your earlier comments about how you envision reorganizing the Copyright Office and the independence and the autonomy you need.

At a high level, what additional costs—you know, how much do you think it would cost to do it. Particularly how much in technology needs to be invested, and what's the cost there? Do you envision the new Office, as reorganized, would be giving guidance on issues that come up, and would you also envision new positions like a chief technology officer? At a high level, you know, what's it look like, and how long would it take to accomplish?

Ms. PALLANTE. Thank you. Thank you for your kind words about the Office.

I think you have a big opportunity here to be innovative and create something that you haven't really had before in the Federal Government. So small, nimble, innovative, forward-thinking, flexible agency. Independent, in so that it can serve the Congress as well as the Administration, protecting the impartial role that we've always had. To do that, I have said that we need to have a staff that is probably more and more data- and tech-driven. Right now I have created a CIO position. I did that last year and hired a deputy as well to begin to do more planning and take more direct responsibility.

What I think you need to know is that when the GAO came in and audited the Library's IT and they found severe deficiencies—it's a public report—that was not unknown to us. A lot of people knew about it. But, unfortunately, I think in making the 39 recommendations to the Library that they made, they also said you shouldn't have multiple CIOs in one agency. You shouldn't have multiple tech staff in one agency. And, although they didn't say it that precisely, it's very clear from reading the report that that's their recommendation.

What I said is: It hasn't worked. We've been in the Library's IT system for quite some time. We are not a primary customer. The Library's mission is their first and foremost mission, and I think it should be. But it makes it impossible for me to move forward if the steps I've taken to develop a small IT staff with hopes of building out a better one—and the IT staff includes data people, which are really business people. So what kind of metadata are they using in the music community? And these are our customers. It's hard for me to build that out if we're getting the opposite suggestion from auditors.

And, to be fair to the Library, they're in a difficult position because they're being told from me that's not going to work and from the auditors that that's what they should do. So that's why I asked this Committee to please weigh in on it.

Mr. TROTT. And the timing, how long do you think once we have plan in place and you get some direction and the budget if you had to——

Ms. PALLANTE. It's a great question. I've thought about this a lot and I've talked to the stakeholders about this. I hope this isn't too simplistic. I would hope the Committee would do what it thinks is right for the copyright system by elevating it appropriately to reflect the significance of the system so that it's no longer just a department in the Library.

And then I would suggest that you have an effective date that allows you a transition plan to figure out what part of the budget should come from fees, what the 3- to 5-year costs are, what the long-term costs are. And I think it's an exciting situation because I think in a modern government you should expect a lean, small agency to borrow and purchase services from across the government. Like, the Office doesn't need to have its own HR department. It doesn't necessarily need to create data standards from thin air. So I think it could go actually fairly innovatively because our customers are in that space now.

Mr. TROTT. Great. Well, thank you. I agree with everything you said, and the only disappointment is, with all those tech savvy people, you're going to need you probably don't need someone like me that has Betamax and tape cassettes still.

So, you know, one of the things that I've—since I've been here there have been a number of groups have come and talked to me about the performance rights issue. And there was an earlier question, and I can't discern necessarily whether you think the fair play legislation that's been introduced is going to solve that problem, but, you know, how should I approach that? Because you have the strain necessarily between the broadcasters and then, you know, the artist who, you know, believe in a willing seller/willing buyer concept.

How should that be looked at by Members, in your opinion?

Ms. PALLANTE. Well, almost always our Office finds the right balance in these discussions because almost always everybody has a legitimate point of view. I have to say, our Office has been looking at the public performance right for over 20 years, and it is an example of an issue where we are just on the wrong side. We are out of step with virtually every industrial country in the world, and it is, as I said earlier to Mr. Nadler, it's just frankly indefensible as a matter of policy that we are not paying creators when their songs are played on radio. They're subsidizing the profits of broadcasters in that particular issue. There are plenty of issues where broadcasters have legitimate rights and they should be looked at, but that is not one I agree with them on.

Mr. TROTT. Great. Thank you for being here today.

I yield back. Thank you, Chairman.

Mr. GOODLATTE. The Chair thanks the gentleman.

Recognizes the gentleman from Florida, Mr. Deutch, for 5 minutes.

Mr. DEUTCH. Thank you, Mr. Chairman.

Mr. Chairman, first I'd like to join the chorus of voices heaping praise on Ms. Pallante and her office. Thank you for your leadership, your thoughtful, very thoughtful, analysis of these issues and the tireless efforts that you and your staff put in in really strengthening the intellectual property of our country. We appreciate it.

I want to follow up on this issue of independence, and the understanding that I have that a lot of us I think have come to conclude, certainly from today, that the Register would be in a better position—significantly better position if it gained more independence through Copyright Office modernization, which I think is one thing where there's broad agreement and I hope that we move forward on.

But following up on this issue, when you were here with us last, you somewhat reluctantly discussed the challenges created by the fact that the Copyright Office is forced to rely on technical infrastructure at the Library of Congress, including its network servers, telecommunications and security operations, in spite of the vastly different mandates that the Library and the Copyright Office have. And you touched on that a bit here today.

It seems to me like your inclusion under the umbrella of the Library of Congress, however well intentioned, is hampering the work that you do beyond simple technical challenges. It's not just about the technical issues. And I'm sure that—and I acknowledge that your response has been somewhat limited here today, but I will simply say on your behalf, if I may, that it's hard to see how the Copyright Office can rise to the many challenges of the 21st century work that you do without dramatically more independence and dramatically more flexibility. I would just make that point.

I also wanted to follow up on Mr. Trott's last point. One of the primary recommendations of your recent music licensing study is that Congress should adopt a uniform market-based rate setting a standard for all government rates, and I agree with that. And when the Music First Coalition showed me this graphic that we're about to hold up that depicts the current system for the various forms of radio, it solidified for me how unnecessarily complex and, in fact, as you've just pointed out, how unfair the current system is. You spoke about the—I mean, your words, that it's indefensible that we don't pay creators when songs are played on the radio. I wholeheartedly agree with that.

Do you agree that all forms of radio should be governed by the same fair-market-value rate standard?

Ms. PALLANTE. I do. And I think what we're suggesting in our report is that we move toward the free market and we not subsidize or grandfather in oddities that are a reflection of a century-old system that's been cobbled together.

Mr. DEUTCH. Great. And, Mr. Chairman, I'd like to submit for the record a considerably smaller version of this graphic that I presented.

[The information referred to follows:]


FAIR PAY FOR RADIO PLAY
Do I get Fair Pay when my Music is Played on the Radio?
Today, it depends...
First, What Kind of Radio?
AM/FM
INTERNET/ SMARTPHONE
SATELLITE
When was it recorded?
After 2.15.1972
Before 2.15.1972
When was it recorded?
Do mobile or desktop?
After 2.15.1972
Before 2.15.1972
With a digital app or an "FM chip"?
FM Chip
Digital App
NO!
You get royalties but they are below market rates
NO!
NO!
The largest internet radio services refuse to pay
YES
With the
Fair Play Fair Pay Act
Getting Paid is a Simple
YES
Click Here to Support The Bill!
musicFIRST
@musicFIRST
musicFIRSTCoalition.org
#FairPlayFairPay

Mr. COLLINS [presiding]. Oh, without objection, but the bigger version will be fine as well.

Mr. DEUTCH. Thank you.

And, Ms. Pallante, when you appeared before the Committee in March of 2013, you and I had an exchange about how to keep the copyright review effort timely and relevant, and you said at the time that although we love the trade associations that visit us on a daily basis——

Ms. PALLANTE. We do.

Mr. DEUTCH [continuing]. As we all do, getting around them, as you said then, sometimes in getting to other kinds of creators would really by instructional. So, you said, I would also probably recommend that if we were to have roundtables, that we get of Washington a little bit, go somewhere where people make from a living from writing songs at their kitchen table.

I wonder if you've had an opportunity to follow through on that and meet with real working creators outside of Washington.

Ms. PALLANTE. Yes, in fact, and I remember that exchange. In fact, that's been the most inspiring part of the work for me for the last 2 years. I have met with recording artists across the country in multiple cities, and to the Recording Academy's credit, they did not filter or script those meetings. I think there was some squirming at times, but it was a very inspiring set of meetings because I was really hearing from creators about why they make the livings they make, why they care about culture, why they care about creativity; how incredibly disciplined they are and trained in their various disciplines; and how they really just want to make sure that they are credited and compensated fairly.

Mr. DEUTCH. And, ultimately, as we go about our work here, it is that commitment to their craft, the discipline that they exercise, that not only wants them to be compensated, but I think requires us to fairly compensate them, ensure that they are fairly compensated for the work that they do.

Ms. PALLANTE. I agree with you.

Mr. DEUTCH. Thanks, Miss, Pallante. I yield back.

Mr. COLLINS. Gentleman yields back.

And now, at this time, the Chair recognizes himself for his questions. And before I start I want to ask unanimous consent to—and put into the record Intellectual Property Guidelines for the 114th Congress. It's an open letter.

Hearing no objection, so ordered.

[The information referred to follows:]

Intellectual Property Guidelines
for the 114th Congress

AN OPEN LETTER

Dear Members of Congress,

Congratulations to the Members of the 114th Congress! It is an exciting time for America, particularly in the knowledge-based economy. American entrepreneurship, ingenuity and creativity lead the world, and we believe that Intellectual Property Rights are the key to maintaining global competitiveness.

The undersigned organizations represent millions of Americans through both state and national advocacy or engage in rigorous research and educational work on intellectual property rights. We would like to share with you our strong support for all types of intellectual property, by providing you with the following information and guidelines that our respective organizations look to when we consider intellectual property.

Intellectual Property Rights Are Grounded in the Constitution
The Founding Fathers recognized the importance of IP in Article 1, Section 8 of the Constitution: "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."

This clause, articulated by the founders, is rooted in the notion that the best way to encourage creation and dissemination of new inventions and creative works to the benefit of both the public good and individual liberty is to recognize one's right to his or her intellectual property.

Intellectual Property Rights Are a Fundamental Property Right Deserving the Same Respect as Physical Property
James Madison elaborated on this provision of the Constitution in Federalist Paper #43; with regard to intellectual property, as with all property rights protected in the common law, "[t]he public good fully coincides ... with the claims of individuals."

Intellectual Property Rights Promote Free Speech and Expression
Strong IP rights go hand in hand with free speech as creators vigorously defend their ability to create works of their choosing, free from censorship.

By affording innovators and creators the ability to support themselves, IP rights promote free expression unencumbered by government.

Intellectual Property Rights Are Vital to Economic Competitiveness
IP rights create jobs and fuel economic growth, turning intangible assets into exclusive property that can be traded in the marketplace.

The most recent report on IP-related jobs in the U.S. from the Department of Commerce and the Patent and Trademark Office found that in 2010, direct employment in the most IP-intensive industries in the U.S. accounted for 27.1 million jobs, and indirect activities associated with those industries provided an additional 12.9 million jobs for a total of 40 million jobs, or 27.7 percent of all jobs in the economy.

According to economists Kevin A. Hassett and Robert J. Shapiro, in 2010 the value of IP in the U.S. was between $8.1 trillion and $9.2 trillion, or the equivalent of 55-62.5 percent of GDP. In a knowledge-based global economy, America's ability to remain a world leader in innovation depends on strong protection of IP.

Intellectual Property Rights Must Be Protected Internationally Through Effective IP Provisions in Trade Agreements
Far too many foreign governments look the other way when it comes to the theft of IP. The lure of access to the U.S. market should be used as an incentive to convince trading partners that they should increase their protection of IP rights. Therefore, strong IP protections are integral to all trade agreement negotiations.

Intellectual Property Rights Are Integral to Consumer Protection and National Security
IP rights protect consumers by enabling them to make educated choices about the safety, reliability, and effectiveness of their purchases. The protection of IP rights is also vital to national security by preventing counterfeit parts, which compromise the reliability of weapons systems and the safety of military personnel, from entering the defense supply chain.

Intellectual Property Rights Must Be Respected and Protected on the Internet
The Internet is an incredible platform for innovation, creativity and commerce enabling widespread distribution of ideas and information. However, IP theft online is a persistent and growing problem. Protecting IP and Internet freedom are both critically important and complementary; they are not mutually exclusive.

A truly free Internet, like any truly free community, is one where people can engage in legitimate activities safely, and where bad actors are held accountable.

Voluntary Initiatives to Address Intellectual Property Theft Are Positive
Good faith actors in the Internet ecosystem should engage in private sector, voluntary initiatives to address illegal conduct. These voluntary efforts can empower consumers to make educated decisions about their online activities and encourage investment, innovation and jobs.

We encourage you to consider these guidelines as you review and discuss existing laws and regulations governing IP. The Founding Fathers understood that by protecting the proprietary rights of artists, authors, entrepreneurs, innovators, and inventors, they were promoting the greater public welfare. The continued protection of these fundamental rights is essential to American innovation and competitiveness.

Sincerely,

James L. Martin
Chairman
60 Plus Association

Phil Kerpen
President
American Commitment

Daniel Schneider
Executive Director
American Conservative Union

Carly Fiorina
Chairman
American Conservative Union Foundation

Steve Pociask
President
American Consumer Institute
Center for Citizen Research

Thomas Sydnor II
Visiting Fellow
Center for Internet, Communications, and Technology Policy
American Enterprise Institute

Ned Ryun
Chairman
American Majority

Douglas "Dee" Stewart
President
Americans for a Balanced Budget

Stephen DeMaura
President
Americans For Job Security

Grover G. Norquist
President
Americans For Tax Reform

Jeffrey Mazzella
President
Center for Individual Freedom

Peter Pitts
President
The Center for Medicine in the Public Interest

Adam Mossoff
Professor of Law, George Mason University School of Law
Co-Founder and Director of Academic Programs,
Center for the Protection of Intellectual Property

Mark Schultz
Professor of Law, Southern Illinois University School of Law
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Chuck Muth
President
Citizen Outreach

Col Francis X. De Luca USMCR(Ret)
President
Civitas Institute

Thomas A. Schatz
President
Council for Citizens Against Government Waste

Katie McAuliffe
Executive Director
Digital Liberty

Hance Haney
Director and Senior Fellow, Technology and Democracy Project
Discovery Institute

Charles Sauer
President
Entrepreneurs for Growth

Robert Roper
President
Ethan Allen Institute

Eric Feinberg
Executive Director
Fans Against Kounterfeit Enterprises

George Landrith
President
Frontiers of Freedom

Grace-Marie Turner
President
Galen Institute

Michael Krull
Adj. Professor of Politics and Public Policy
Georgetown University

Louie Hunter
Chairman
Georgia Center Right Coalition

Dr. Keli'i Akina
President
Grassroot Institute of Hawaii

Mario H. Lopez
President
Hispanic Leadership Fund

Harold Furchtgott-Roth
Senior Fellow
Hudson Institute

Sabrina Schaeffer
Executive Director
Independent Women's Forum

Robert D. Atkinson,
Founder & President
Information, Technology & Innovation Foundation

Andrew M. Langer
President
Institute for Liberty

Tom Giovanetti
President
Institute for Policy Innovation

Geoff Manne
Executive Director
International Center for Law & Economics

Ambassador Mark Green
President
International Republican Institute

Sal J. Nuzzo
Vice President of Policy
The James Madison Institute

Seton Motley
President
Less Government

Colin Hanna
President
Let Freedom Ring

Bartlett D. Cleland
Managing Principal
Madery Bridge Associates, LLC

Mary Adams
Leader
Maine Center-Right Coalition Leader

Matthew Gagnon
Chief Executive Officer
Maine Heritage Policy Center

Stephen Parente, PhD
Director
Medical Industry Leadership Institute (MILI) University of Minnesota

Brian McClung
Chairman
Minnesota Center Right Coalition

Kim Keenan
President & CEO
Minority Media & Telecommunications Council

Lieutenant Colonel Allen B. West
(US Army, Ret) President/CEO
National Center for Policy Analysis

Justin Vélez-Hagan
Founder / Executive Director
National Puerto Rican Chamber of Commerce

Todd McCracken
President and CEO
National Small Business Association

Scott Cleland
Chairman
Net Competition

Sally C. Pipes
President and CEO
Pacific Research Institute

Kevin P. Kane
President
Pelican Institute for Public Policy

Charlie Gerow
Chairman
Pennsylvania Center Right Coalition

Ron Nehring
Chairman
Project for California's Future

Lorenzo Montanari
Executive Director
Property Rights Alliance

Don Racheter, PhD
President
Public Interest Institute

Steve Smith
Executive Director
Rainbow PUSH Coalition

Jason Llorenz, JD
Senior Fellow
Rutgers University School of
Communication & Information

Karen Kerrigan
President & CEO
Small Business & Entrepreneurship
Council

David Williams
President
Taxpayers Protection Alliance

Patrick Rosenstiel
Executive Director
Trade Alliance to Promote Prosperity

Javier Palomarez
President and CEO
United States Hispanic Chamber of
Commerce

Gregory Dolin
Associate Professor of Law & Co-Director,
Center for Medicine and Law
Associate Director, Center for Law of
Intellectual Property & Technology
University of Baltimore School of Law

Chris Holman
Professor of Law
University of Missouri–Kansas City
School of Law

Kristen Jakobsen Osenga
Professor of Law
University of Richmond School of Law

Jonathan Taplin
Director, Annenberg Innovation Lab
University of Southern California

Ron Busby
President and CEO
US Black Chambers, Inc.

Susan Au Allen
National President and CEO
US Pan Asian American Chamber
of Commerce
Education Foundation

Barbara Kasoff
President and Co-Founder
Women Impacting Public Policy, Inc.

Mr. COLLINS. Ms. Pallante, you're back, and it's good to have you here.

Ms. PALLANTE. Thank you.

Mr. COLLINS. Your staff and you, we have probably developed a very good relationship I feel like, and it's because I think of your frankness. I think it's because of your staff's willingness to be open about where you are in the situations that you're facing. I think also, just as a little bit for those who've been here for the hearing as well, I think the good part about it it is time for us to act. It is time for Congress to act. You have gave ideas and you have laid it out fairly well, and I do appreciate that. And we're going to talk about a little bit of that today in my time of questioning.

But one of things I want to go back to, it's been mentioned a lot, is the copyright in the music marketplace that we have spoke of before. Those guiding principles, as you know, and most everybody in this world and hopefully in this room know that I introduced the Songwriter Equity Act, along with my friend from New York as well, to make modest fundamental changes to section 114 and 115 of the Copyright Act, and I believe it comports with the principles of fair compensation that you talk about.

Do you agree that the Songwriter Equity Act is ripe for congressional consideration and passage?

Ms. PALLANTE. I do. It's a great framework. It reflects everything we said in our report on those issues. What we provided you with is a bigger ecosystem with more issues. We gave you all the music issues in one bundle.

Mr. COLLINS. Yes, you did.

Ms. PALLANTE. We thought that would be more fun for you. We obviously defer to you. If you want to pull out some issues that are more ripe than others.

Mr. COLLINS. Well, and can I just—because we've had this conversation. And I think sometimes that getting this whole thing—we've looked at this sort of ball of copyright, and I think one of the things is what is putt read out there? Where are we going with this so that the community, not just music, but publishers, everything—and writers all look at this. And so I am anxious to sort of see where we're going, and I appreciate your comments on that.

If we don't act, do you see a down side in the marketplace on these issues, especially from the songwriter and creator standpoint?

Ms. PALLANTE. I'm sorry. One more time.

Mr. COLLINS. If we don't act, if Congress doesn't act, we continue to sort of move—do you—what kind of downside do you see from your position.

Ms. PALLANTE. Oh, we are already torturing our music community, right, on music issues. So I don't know if your question's broader than music, but in that space alone——

Mr. COLLINS. It is.

Ms. PALLANTE. So, in general, the fundamental principles of the Copyright Act are strong. We have a duty to protect exclusive rights, provide flexible exceptions, but limited, and to provide meaningful enforcement. So many of the provisions that we have now are from the analog world or older, from the turn of the century. And we're trying to reinforce the incredible creative output of

the United States. And to do that, we owe all creators, all investors in the marketplace and the public a strong Copyright Act.

Mr. COLLINS. Okay. One of the things—and you've always been very blunt, and I appreciate that. And for anyone who would take your bluntness to be anything else, consider it—you know, I would just say to them, this Congress, and especially this Congressman, would take to grass the exception if anyone was to say anything about that. So I'm going to ask direct questions; we've talked about this. On administering, because, in your report, it's very broad, especially for music, and we're not even touched the other parts, and I believe that leads to something that I said in one of these hearings earlier, that I'm very concerned your department would have a trouble handling that given the current structure.

So if the Copyright Office was not located in the Library of Congress, you know, and did not act as a subdepartment under the authority of the Librarian of Congress, could you more effectively administer and sustain our national copyright system?

Ms. PALLANTE. There's no question.

Mr. COLLINS. And, again, I don't think that's a fault of anyone. I think it's the development of the process. But you do report to the Librarian of Congress. Correct?

Ms. PALLANTE. Absolutely. My whole staff does.

Mr. COLLINS. And really from a constitutional perspective, does that not at times lead to a conflict, inherent?

Ms. PALLANTE. Yeah. It's a very interesting constitutional question. So, legally, there are potentials for conflict all the time. The Library has a library mission. The Librarian's being asked to oversee two very different missions at the same time. There's an accountability question. The Librarian is appointed by the President and, therefore, can appoint inferior officers like the Register. That's the legal accountability.

But the practical accountability is that Librarians serve multiple Presidents generally, and so the accountability as a practical matter is less clear. After the—there was a case where the Department of Justice basically said you are in the executive branch, not the legislative branch, which opens the door for us not to be able to serve Congress the way we have in the past. So that's why we're asking for a secure legal footing.

Mr. COLLINS. Well, and I think that is something that we will have because I am concerned about sometimes basically you getting contradictory directives from the Librarian's mission, and no offense to them. I think they have that perfect mission to do. They need to encourage—but when we talk about IT, we talk about all these other things, you are in a different situation. I want you to continue, you and your staff, to keep that fight going because you do have Members who are intensely interested in what's going on there because I believe it is the very underpinning of our foundation for the next generation of economic development and also the creators that have been around forever. So I do appreciate that.

With that, my time has expired, and I recognize the gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Let me thank you for your presence here today, and I know that Members have been going in and out because we've been detained in other meetings, and in fact there is

one overlapping now. But I think it's very important to, one, emphasize how important copyright and intellectual property is to this Committee, to this Congress, and to the Nation, and I might say that you are particularly important today because the prime minister of Japan in his speech just finished and indicated his commitment to protecting intellectual property, of which I think he received a standing ovation. So you might want to use that quote or comment on how important it is to do that.

Let me go to the whole question of finance and staffing. In your testimony, you mentioned that the Copyright Office has one of the smallest staffs within the government generally, and so I would be interested in how that's impacting on your work, and as we're going forward, have you looked at—I know you looked at the President's budget, but we're getting ready to go forward. We are absolutely opposed to sequester. We think it has had a dastardly impact. But I'd like to know presently what your situation is with your copyright staffing.

Ms. PALLANTE. Thank you, Congresswoman Jackson Lee.

I think we should be lean and innovative, and I think when we add staff, they should be the kind of staff that can take us into the 21st century. That said, we've lost over 100 people since 2007, and we only—you know, we have under 400 FTEs filled now. That's just way too small to do the kind of complex work that we do, and it's much smaller than the staff that previous Copyright Offices had when they were doing less complex things. So, while I think we should stay small, I think we are cut to the bone at the moment.

One thing that has been rather frustrating for me is that in my conversations with the community, the tech sector, and the content industry, it became clear that we should have more hands-on technology expertise. So I took the step of hiring the first Copyright Office CIO, chief technologist, and filled that position last year, and then hired a deputy as well for the purpose of figuring out what our infrastructure should be, what our databases should look like, what our enterprise architecture should be, and then to build out the kind of staff that we need slowly, but using our budget allocations.

What was frustrating for me is that because best practices in the Federal Government generally avoid duplication, when the Government Accountability Office audited the Library and made its 39 recommendations about how to fix that very severely deficient system, one of the things they said was that there shouldn't be multiple CIOs. There shouldn't be duplications of staff. So I am really caught in a bind on this, and I really am asking the Committee to help because I frankly think it's ludicrous that the Copyright Office wouldn't have data experts and IT staff.

Ms. JACKSON LEE. I'm going to follow up on that line of questioning.

Let me just quickly ask this question about modernizing the Office with the structure of greater legal and operational independence. And what should Congress consider in that new structure?

And let me get in another question as well because I think this goes to how you do your job. And I like the word "lean but effective." I like to say that. Lean and ineffective or with the shades

down and the doors locked are not helpful to creating the economic engine that you want to create. So the other question I would have, I'm wearing my Homeland Security hat, we just passed two cybersecurity initiatives last week, when I chaired the Transportation and Security and Infrastructure Committee, we recognize, and I know that number's gone up, 85 percent of the cyber ownership is in the private sector, but the private sector submits through the copyrighting process their data.

So the question I'd ask is the question about legal and operational independence, but also how important it is to have a tech-savvy office——

Ms. PALLANTE. Yes.

Ms. JACKSON LEE [continuing]. That puts for you, the government, an infrastructure to protect the intellectual property that you are now the custodian of or the requests that come in, the applications that come in. If you would include that in your coming together of your answer and the kind of investment and planning you think we need for a tech-savvy office that is 21st century.

Ms. PALLANTE. Thank you so much for the question. That is exactly the crossroads that we find ourselves at. How do we build out the tech-savvy office that actually not just serves the digital economy but interacts with it in a way that facilitates it? So when people are submitting to us for registration digital works, they want them to be secure. They want them to be effective for registration purposes. And they want the technology to accept the data that they're sending us and the files, not to not recognize it because we're using antiquated technology. I don't think that's too much to ask when people are seeking legal protection and, hence, remedies.

They then want the chain of commerce to reflect the entire copyright transaction. So people register with us, and then later they might license their works. And then we record those licenses, and the metadata should be the same global identifying information that is used in the private sector. That is exactly the vision that you should expect for the 21st century Copyright Office.

And as to cost, we, as I said, are two-thirds fee-funded now, but that is because we are also intertwined in the Library's IT. That could be viewed as a subsidy. My argument would be that that is not a subsidy that is working for the copyright community. And so, as we look at the proper ratio of taxpayer investment and fees, we should go back to what you just said and think about what it takes to invest in the economic engine that is the Copyright Act for this country.

Ms. JACKSON LEE. And do you think the operational and legal independence would help you as well as you look forward just restructuring or structuring the Office?

Ms. PALLANTE. Yeah. I think it's essential because if you don't have that directive, you have an agency that is being required to find synergies even though the missions are different and to use IT investments for multiple competing purposes. And even in the system we have now where people are paying us for services, nonetheless the money needs to be allocated in this kind of central IT environment, and it hasn't worked, and I hope that the Library makes all the improvements it needs to make for the national Library, but

I don't think it's fair or logical to ask the Copyright Office to wait until that happens and then to expect that it will work.

Ms. JACKSON LEE. Mr. Chairman, and I thank you. I saw the Chairman with the gavel up. I'd ask unanimous consent for an additional minute just to pose a follow up on the questions that I just gave her.

Mr. COLLINS. At this point, we have a hard meeting coming up at 1 o'clock they're going to have to clear the room for. So at this point——

Ms. JACKSON LEE. Thirty seconds then?

Mr. COLLINS. How about 15?

Ms. JACKSON LEE. Okay. But she'll have to ask her question.

We know that Korea and Singapore have strong copyright protections. Should we have that in the TPP?

Ms. PALLANTE. Strong copyright protections in the TPP? Should we have strong copyright protections in the TPP?

Ms. JACKSON LEE. Yes. We know Korea and Singapore have——

Ms. PALLANTE. We should most certainly have strong copyright protections as negotiating goals of the TPP.

Ms. JACKSON LEE. And the Congress—you're asking us on some of the items that you've just said to help you with the tech and the funding, staffing, and the operational control.

Ms. PALLANTE. Yes. You are our oversight Committee. We need you to direct us.

Mr. COLLINS. And the gentlelady——

Ms. JACKSON LEE. Thank you.

Mr. COLLINS [continuing]. Had a wonderful Georgia 15 seconds.

With that, the gentleman from New York is now recognized.

Mr. JEFFRIES. Thank the Chairman, and I thank the Register for your testimony here today——

Ms. JACKSON LEE. I yield back.

Mr. JEFFRIES [continuing]. And your——

Mr. COLLINS. Thank you. Since the time is expired, that's wonderful.

Mr. JEFFRIES. Thank you for your testimony here today, and for your thoughtfulness on a whole host of these issues.

Let me just begin by just trying to get a deeper understanding of your perspective as it relates to the need for independence.

I think the three things that have been under consideration in terms of a different model from the current one, would, one, obviously, involve a Presidential appointment but the Office remaining within the Library of Congress; two, taking the Office out of the Library of Congress and placing it perhaps within another department, most often discussed is the Department of Commerce; and then, three, creating an independent agency.

It's my understanding, of course, that you strongly support the third option, an independent agency. Is that correct?

Ms. PALLANTE. That's correct.

Mr. JEFFRIES. And so that would involve both a Presidential appointment——

Ms. PALLANTE. Yes.

Mr. JEFFRIES [continuing]. Of the director. Correct?

Ms. PALLANTE. Yes.

Mr. JEFFRIES. And, presently, you're appointed by the Librarian of Congress. Is there a fixed term to that appointment, or do you serve at the pleasure of the Librarian?

Ms. PALLANTE. Serve at the pleasure of the Librarian. The Librarian has the power to appoint and remove the Register and the entire Copyright Office staff, actually.

Mr. JEFFRIES. Now, in the context of an independent agency, would you suggest, or is it your view, have you given any thought to whether a fixed term would be appropriate connected to the Presidential appointment to establish and embed the independence of the agency?

Ms. PALLANTE. Yes. So that's a great granular question. My understanding is that in order to make it an independent agency, which is a way of saying that you are preserving the role that the agency would play with Congress, because if the agency is in the executive branch fully, completely, it will be subject to the normal clearances of executive branch agencies when it speaks to Congress. So, in order to preserve that 118-year tradition, the President would appoint the Register or the director, the Senate would confirm the position, that's the accountability that you need because the system is so important. But, by Congress setting a fixed term, Congress is saying you're not serving at the pleasure of the President completely. You're serving subject to a term that Congress has enacted. That's point number one to make it independent.

Point number two is that you would specify that that agency, when called by Congress, will speak impartially and freely.

And, thirdly, you will decide what the regulatory powers of that agency are. Could just be registration, recordation, statutory licenses. It could be small claims. You could add things over time, but it's completely in your discretion.

Mr. JEFFRIES. And, in your view, is that important, given the long tradition and involvement in Congress with respect to copyright and the fact that our authority to create an intellectual property system in fact traces back to Article I, section 8, clause 8, in the Constitution?

Ms. PALLANTE. Yes. And, you know, you didn't have a Copyright Office the entire time, but you have had one since 1897, and copyright policy has always been very hands on in Congress. It has the only position in the government that allows the kind of balancing of equities that is essential to a good Copyright Act. The Supreme Court has affirmed this multiple times that it is in Congress' power to do that and to decide the overall regime. So I would be personally quite heartbroken to see that dissipated. I think it served the Nation well, and I think that an agency that continues to serve Congress but also continues to interact in a coordinated manner with the Administration is a great model for the 21st century.

Mr. JEFFRIES. And in order to have sort of a modern, fully functional, first-rate, 21st century Copyright Office, how important is the budget autonomy that would be provided in an independent agency context that might not necessarily exist if you were to be resident within the Department of Commerce or even remain within the Library of Congress even as a Presidential appointee?

Ms. PALLANTE. I think it's crucial. So you have never had a Register tell appropriators directly and freely what the Office needs because that's not how budgets work in the Federal Government. You wouldn't have it in the Commerce Department either. What you will always have, unless you give budget autonomy, meaning that the head of the Office can tell the appropriators what the needs are and then have a direct conversation. If you don't have that, you will always have Copyright Office needs being weighed along things that are not about the Copyright Office.

Mr. JEFFRIES. As my time expires, one last question. With the leadership of my good friend from Georgia, Representative Collins, in a bipartisan way, several of us have become interested in resolving inequities that exist in the compensation of songwriters. And Congressman Collins touched on this to some degree, but I just wanted to ask one followup question. You mention that music licensing issues broadly defined are ripe for congressional action. Do you think that there's room for us to precisely consider the dynamic that songwriters find themselves in in terms of their compensation or perhaps moving toward a willing buyer/willing seller standard, and also allowing the rate courts to have an opportunity to consider how artists are compensated on the song recording side and factoring in what is fair?

Ms. PALLANTE. Yes. So we thought those provisions in the Songwriter Equity Act were right on the money. I think we have talked extensively today about why a willing buyer/willing seller is the right move toward the free market. A better reflection of it than a regulated rate, but the issue about what the courts are allowed to consider is a crucial one, and we are fully supportive of changing that.

Mr. JEFFRIES. Thank you very much.

I yield back.

Mr. COLLINS. I thank the gentleman from New York.

As we get ready I just want to—something that was brought up is your office has been since 1897. I think what's amazing is, is some of our creators, and especially in the music community are still dealing with laws that were created only 15 to 20 years after that. That seems to be ripe, if not overripe, for a change. But I also want to remind—you also represent a vast industry that is—that is growing and changing. I hold in my hand here something that I found over the weekend. And if you look through these, here is something that you've heard me mention before about why songwriters matter. These are handwritten songs and poems that were written from my wife's grandfather and her brothers.

Ms. PALLANTE. Is that right?

Mr. COLLINS. They're somewhere in the neighborhood of 50 to 60 years old. They were written probably at a kitchen table or on the side of the road. But, for everyone who is here, and for the reason that operate your office and what you do every day, there's a book to be written, there's a song to be sung. There's these creative rights that I believe the Copyright Office is there to protect, not to inhibit but to promote creativity like's in this folder right here.

And, with that, that concludes today's hearing. Thanks to the witnesses for attending.

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

With that, the hearing is adjourned.

[Whereupon, at 12:53 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Response to Questions for the Record from the Honorable Maria A. Pallante, Register of Copyrights and Director, 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) 707-8350

July 2, 2015

Chairman Bob Goodlatte
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Re: Responses to Questions for the Record Regarding the
April 29, 2015 Hearing on the Register's Perspective on Copyright Review

Dear Chairman Goodlatte:

Thank you for holding the April 29, 2015 hearing on the Register's Perspective on Copyright Review. I was honored to testify about important copyright matters and to respond to Member questions. I am also pleased to provide responses to the Questions for the Record posed by Representative Issa, Representative Chaffetz, and Representative Bass. I have enclosed these responses with this letter.

Respectfully submitted,

Maria A. Pallante
United States Register of Copyrights

QUESTIONS FOR THE RECORD FROM REPRESENTATIVE DARRELL ISSA (CA-49)

You have highlighted that the Copyright Office currently suffers from inadequate technology and IT structure. If the Copyright Office were moved out of the Library of Congress and made a part of an existing agency in the Department of Commerce, would the Office be able to gain assistance from the Department, and specifically USPTO, in use of modern technology? Has the Copyright Office examined or had conversations with officials in those offices regarding how to develop and modernize IT needs? Would moving the Copyright Office to an existing agency with modernized technology needs make the transition more efficient?

What the Copyright Office requires is a lean, innovative, and modern technology structure and staff that is focused singularly on the unique needs of the copyright system. To this end, in recent years, we engaged in a comprehensive review of our technology requirements, drawing on public comments and the impressive expertise of the technology, user, and content sectors.

As a matter of transparency, my Office commissioned and published an independent report in February 2015, titled *Report and Recommendations of the Technical Upgrades Special Project Team.* The project was led by the Copyright Office's newly appointed Chief Information Officer. I created the CIO position in 2014, as a first step to address major gaps in the technology services provided to us by the Library of Congress, including an overall lack of attention to our needs. The entire copyright system is driven by data and technology, from the licensing of exclusive rights to the administration of financial data to the tracking of ownership and term. No Register can administer the copyright law effectively in the digital age if the technology and data teams that she depends upon operate under competing priorities and report to supervisors outside of the Copyright Office. The current state of affairs within the Library proves this point.

My office also published an in-depth public study of the recordation system, which remains a paper-based system and is a key aspect of our modernization vision. The December 2014 report, titled *Transforming Document Recordation at the United States Copyright Office, A Report of the Abraham L. Kaminstein Scholar in Residence,* was prepared under the independent auspices of our scholar in residence. The report provides a series of exciting options for the future, but also shows that the Copyright Office has suffered because its mission has never been the primary focus of its parent agency. Thus I agree with members of the public and the press who have noted time and time again that the Copyright Office should be positioned to serve its customers directly. We are now working with Congress to create a detailed modernization plan.[1]

Moving the Copyright Office to the Department of Commerce or, more specifically, into the Patent and Trademark Office (PTO) is a complicated solution. It is difficult to understand how running the copyright system through the patent and trademark system would serve the unique and important objectives of the copyright law. The Copyright Office facilitates the vast cultural and creative output of U.S. authors as well those who invest in and distribute their rich works, and the copyright marketplace contributes a trillion dollars to the economy annually.

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[1] H.R. REP. NO. 114-110 (2015).

Members of my staff spoke with PTO officials regarding PTO's technology on a couple of occasions in recent years, including most recently during the Technical Upgrades Project mentioned above. They learned that while the PTO's system works well for that agency overall, it has been highly customized to meet the very specific needs of patent and trademark examination and records. In other words, Congress has provided to the PTO what we need at the Copyright Office—the legal and budgetary authority to build a properly devoted IT enterprise.[2]

The Committee's witnesses underscored this conclusion during the House Judiciary Committee's February 2015 hearing. The hearing, titled *U.S. Copyright Office: Its Functions and Resources*, highlighted some of the fundamental differences of copyrights as compared to trademarks and patents, and the fact that placing copyright functions within an agency focused primarily on commerce may not serve the broader interests of the American public.[3] More practically, the technological needs of the patent/trademark and copyright systems may differ. Patents, for example, require extensive supporting documentation, and in May 2015, the average time from initial receipt of the application to final disposition (traditional total pendency) was reported at 26.7 months.[4] In our view, subsuming the copyright functions within an agency devoted to patents and trademarks would likely result in fewer innovative technology strategies that are designed specifically for the unique aspects of copyright registration – not more. This is not to suggest that Copyright Office leadership could not continue to consult with PTO or other agencies on technology decisions.

If the Copyright Office were moved to the Department of Commerce, how would the relationship between the Register and the Under Secretary of Commerce for Intellectual Property be structured, especially regarding the current copyright functions of the Under Secretary?

Over the 118 years since the Copyright Office was created by Congress, it has played an integral role in copyright law and policy. Because the Office administers the copyright laws, it has firsthand and first-rate expertise in interpreting legal provisions and analyzing gaps in the statute. Over the years, as Congress created additional intellectual property responsibilities in the government, it was careful to ensure the ongoing role of the Register in intellectual property matters and copyright law in particular.

Congress defined the relationship between the Register of Copyrights and the Under Secretary of Commerce for Intellectual Property when it amended the Patent Act in 1999. There, the Under Secretary, who is also the Director of the PTO, is authorized to advise the President and federal departments and

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[2] Additionally, I recently hired Ricardo Farraj-Feijoo as Director of the Copyright Technology Office, and he has extensive knowledge of the Department of Commerce IT systems. Prior to joining the Office, Mr. Farraj-Feijoo served as the Director of Information Technology Services within the Office of the Chief Information Officer at the U.S. Department of Commerce, where he implemented cloud-based solutions as well as server virtualization farms.

[3] *See generally U.S. Copyright Office: Its Functions and Resources: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (2015); *see also The Omnibus Patent Act of 1996: Hearing on S. 1961 Before the S. Comm. on the Judiciary*, 104th Cong. 19, 24 (1996) (statement of Marybeth Peters, United States Register of Copyrights and Director, U.S. Copyright Office) (stating that copyright law and policy have "a unique influence on culture, education, and the dissemination of knowledge," and the values that underlie it "may be slighted if copyright policy is wholly determined by an entity dedicated to the furtherance of commerce.").

[4] *Traditional Total Pendency*, UNITED STATES PATENT AND TRADEMARK OFFICE (May 2015), http://www.uspto.gov/corda/dashboards/patents/kpis/kpiOverallPendency.kpixml.

agencies on intellectual property matters. By statute, he or she is required to have professional background and experience in patent or trademark law.[5]

In crafting the position of Under Secretary, Congress made clear that the Register of Copyrights has a separate and ongoing statutory role to administer and interpret the Copyright Act, and to provide legal and policy assistance to Congress and federal agencies.[6] Moreover, the Patent Act provides that the Under Secretary must consult directly with the Register of Copyrights on all copyright related matters.[7] And it provides further that the Under Secretary's powers and duties to advise generally on IP cannot derogate from the separate functions and duties of the Register of Copyrights, as set forth in the Copyright Act.[8] The Copyright Office and PTO have managed these separate mandates for many years. Each office works with the other on policy matters of mutual interest, each drawing on its specific statutory mandate.

If Congress were to move the Copyright Office to the Department of Commerce, it would have to consider how to accurately reflect this long-standing statutory structure and substantive expertise. From my perspective, the problem we have now is how to position the Copyright Office to perform the work it needs to do in the most efficient and effective manner. To do this, we need to ensure that meeting the objectives of the copyright system is not a secondary mission but a primary mission.

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[5] *See* 35 U.S.C. § 2(b)(8)-(9); 35 U.S.C. § 3(a)(1).

[6] *See* 17 U.S.C. § 701.

[7] 35 U.S.C. § 2(c)(5) ("In exercising the Director's powers and duties under this section, the Director shall consult with the Register of Copyright on all copyright and related matters.").

[8] 35 U.S.C. § 2(c)(3) ("Nothing in subsection (b) shall derogate from the duties and functions of the Register of Copyrights or otherwise alter current authorities relating to copyright matters.").

QUESTIONS FOR THE RECORD FROM REPRESENTATIVE JASON CHAFFETZ (UT-03):

You noted in your testimony that the Copyright Office needs information technology improvements in order to administer copyright laws effectively in the digital era. At the same time, the Copyright Office faces inadequate financial resources to support these changes. In March 2015 the Office of Management and Budget issued a Congressionally-requested report on no-cost contracting that explored its potential to enable IT upgrades in a cost-constrained environment. Has the agency considered no-cost contracting for improving the Copyright system?

Thank you for highlighting this option. The Copyright Office is interested in and open to no-cost contracting as one option to address some of its technology needs. No-cost contracting occurs where a contractor provides a service to an end user, but instead of receiving compensation from the agency, the contractor charges and retains fees paid by the end user.[9] Currently, the Office has limited experience using no-cost contracts for non-IT services. (The Copyright Office is not an agency so all contracts are administered by the Library of Congress.) As the OMB's March 2015 letter referenced, experience with no-cost contracts in the IT realm has been somewhat limited overall in the federal government to date.[10]

We recognize that there may be additional opportunities to leverage no-cost contracting for some of our fee-based services. In doing so, we would have to thoroughly consider any potential legal or conflict issues. We will continue to review the issue as we further develop our IT strategies. And I have incorporated the concept of no-cost contracting into the modernization assessment we are now undertaking for Congress.[11]

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[9] *See* Letter from Gary L. Kepplinger, General Counsel, U.S. Gov't Accountability Office, to Hon. Barbara A. Mikulski, U.S. Senate 2 (Nov. 27, 2007) (internal citation omitted), *available at* http://www.gao.gov/decisions/appro/308968.pdf.

[10] Letter from Anne E. Rung, Administrator, Office of Federal Procurement Policy, Office of Mgmt. & Budget, Exec. Office of the President, to Hon. Hal Rogers, Chairman, Comm. on Appropriations, U.S. House of Representatives 3 (Mar. 12, 2015) (on file with United States Copyright Office) ("Experience with no-cost contracts to support IT requirements has been limited to date.").

[11] H.R. REP. NO. 114-110 (2015).

QUESTIONS FOR THE RECORD FROM REPRESENTATIVE KAREN BASS (CA-37):

Register Pallante, if we give you the tools you need at the Copyright Office, what impact do you think that would have on the entire copyright system?

A fully-functioning Copyright Office that has all of the technological and administrative tools it needs, and that the general public desires, would provide huge benefits for the copyright system and the American economy as a whole. The Copyright Office is at the center of a vibrant copyright marketplace that serves multi-billion dollar companies and individual users and creators alike. In a 2015 technical upgrades report, the Office's first Chief Information Officer identified key areas of improvements for Office infrastructure that would significantly foster growth and innovation in the copyright marketplace. For example, a digitally-integrated Copyright Office should include mobile capabilities that would allow external users to submit copyright applications and use Copyright Office services through smart phones and tablets; the Office should identify and consider enhancements to its existing public records; and, as is critical in today's online environment, any next generation system must securely protect the works submitted for registration.[12] An updated Copyright Office would provide owners and users of copyrighted works easy access to accurate information to facilitate the licensing and dissemination of copyrighted works worldwide. Shared database technologies would enable efficient licensing payments. Streamlined registration procedures would encourage and further incentivize creators to create. The list of potential benefits is endless and exciting.

In the process of making your recommendations for reforms, how does the Office engage the user community, and what input has the user community provided you?

All of the work of the Copyright Office is public and transparent. When the Office engages in major analyses, as it has done with respect to the copyright review process and corresponding studies, it conducts public inquiries that include published notices that notify the copyright community (including users, owners, consumers, and scholars) about opportunities to submit comments on the record and/or attend meetings or hearings with Copyright Office staff. In addition, Copyright Office staff, including the Register, General Counsel, head of Policy and International Affairs, and head of Registration Policy and Practice, travel to speak at or attend meetings with stakeholders, including major organizations or companies that identify as users of copyrighted works. This input is critically important and much appreciated.

For example, during the past two years, my Office has completed a number of comprehensive studies on the following topics: the music licensing framework (February 2015), remedies for small copyright claims (September 2013), orphan works and mass digitization (June 2015), resale royalties (December 2013), and a separate study on potential technical upgrades to the Office's IT infrastructure (February 2015). During these public comment periods, we have received numerous comments from those representing user interests, such as the National Federation of the Blind, the Electronic Frontier Foundation, Public Knowledge, and the Consumer Federation of America. Users speaking to the Copyright Office have requested clarity in the law so that the rules and any exceptions thereto are easy to

[12] *Report and Recommendation of the Technical Upgrades Special Project Team,* UNITED STATES COPYRIGHT OFFICE 8-11 (Feb. 2015), *available at* http://copyright.gov/technology-reports/reports/usco-technicalupgrades.pdf.

understand and to navigate. For example, Fredric Schroeder of the National Federation of the Blind, speaking in a Copyright Office roundtable on orphan works and mass digitization, argued that the structures put into place to allow access to digitized materials "should be simple enough, straightforward enough that blind people and others who are using these works can readily use them and use them with, certainly, whatever safeguards are needed, but still remembering the needs of the end user."[13] Vickie Nauman, former North American President for 7Digital Inc., lamented that "[t]he complexity of interpreting U.S. music licensing laws and assessing risk is unintelligible to the marketplace and is hampering innovation."[14] Many of the Office's recommendations for updates to the copyright law reflect the important concerns and comments of copyright users. And in fact, many if not most copyright owners are also users of copyrighted works.

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[13] *Orphan Works and Mass Digitization Roundtable*, U.S. COPYRIGHT OFFICE 197 (Mar. 11, 2014) (statement of Fredric Schroeder, National Federation of the Blind), *available at* http://copyright.gov/orphan/transcript/03111OC.pdf.

[14] Vickie Nauman, *Comment in Response to March 17, 2014 Notice of Inquiry*, U.S. COPYRIGHT OFFICE (May 22, 2014), *available at* http://copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/Vickie_Nauman_MLS_2014.pdf.

Material submitted for the Official Hearing Record*

Letter from James H. Billington, The Librarian of Congress

Letter from Ruth Vitale, Executive Director, CreativeFuture; and Sandra Aistars, Chief Executive Officer, Copyright Alliance

Letter from Rick Swindelhurst, President, Fairness in Music Licensing Coalition (FMLC)

Letter from Michael Beckerman, President & CEO, Internet Association (IA)

Recommendations of the Library Copyright Alliance (LCA) on Copyright Reform

Letter from Christopher J. Dodd, Chairman and Chief Executive Officer, the Motion Picture Association of America, Inc. (MPAA)

Letter from Daryl P. Friedman, Chief Industry, Government, & Member Relations Officer, The Recording Academy

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***Note:** The submitted material is not printed in this hearing record but is on file with the Committee and can also be accessed at: *http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=103385.*