

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”

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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

¹The 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:

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 Abraham 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 be 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. Bob 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

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);

for Law & Technology) (“I think something that came out of our deliberations 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 best can encourage technological advances, reward creativity, and bring benefits to society. To make this possible, we must keep the balance 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 Subcomm. 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

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-ipecc-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

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

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

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

(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. Mertz, 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 Coble, 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 by 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 report³⁶ 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.

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 Public 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/february-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

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 issue⁴⁹ 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.

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

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. Bob 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 exceptions⁶⁰ and the importance of “web harvesting” activities.⁶¹

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

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

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/0/6811a9d4-9b0f-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 be, 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 obstacle 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 October 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 by 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

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

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 establish 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

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

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 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.

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 scope⁹¹ 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

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

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.

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.

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_bad_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 circumscribed¹¹⁴ 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

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

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. Ginsburg, *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 treaties¹²⁵ and multiple free

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-Samuels 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 job 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, Columbia 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 available and communication to the public 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

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 registration¹³² 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

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.

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).

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.

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.

(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

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.*