

Copyright Reporter

Journal of the Copyright Society of Australia

ISSN 0725-0509

December 2014

Volume 32 Number 4

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Published by Australian Copyright Council
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Copyright Reporter

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Mode of citation

(2014) 32 Copy Rept 000

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Keynote Remarks

Copyright and the Digital Economy: Where to From Here?

Maria A. Pallante¹

United States Register of Copyrights
March 13, 2014

Thank you and good morning. It is great to be with you in this beautiful country and this beautiful city, and I would like to thank the Australian Copyright Council and the Copyright Society of Australia for hosting me.

I am really falling in love with Australia to be honest, and only wish that I had come sooner. Indeed, I hope you will forgive me if I sound a little surprised. It's just that I did a little reading on the plane, including this passage from Bill Bryson's book *In a Sunburned Country*:

[Australia] has more things that will kill you than anywhere else. . . . If you are not stung or pronged to death in some unexpected manner, you may be fatally chomped by sharks or crocodiles, or carried helplessly out to sea by irresistible currents, or left to stagger to an unhappy death in the baking outback.²

So I am delighted, if a little nervous, to be here this morning.

In my remarks, I will discuss certain copyright developments in the United States, as seen from my perch as the Register of Copyrights. To begin, you should know that there are a number of efforts underway, including legislative considerations, reports of government agencies, and discussions about voluntary agreements. However, the most remarkable thing may be that we are having a national conversation in the first place. In fact, when Fiona Phillips reached out to me last year about this forum, I had very little to report. The past 12 months have changed all of that, making U.S. developments at this symposium a very timely topic.

Still, it is not yet possible to know where the conversation is headed. Our 113th Congress began in January of 2013 and runs through December of 2014. Most of this two-year period has been or will be spent on high-level discussions about a broad spectrum of copyright issues, covering most aspects of the Copyright Act and related provisions of Chapter 12 (governing technological protection measures and rights management information). The review is also a government-led conversation, involving Congress, the Copyright Office, a Department of Commerce Task Force, and the Intellectual Property Enforcement Coordinator (although that position is vacant at the moment).

Although the process may seem sudden—indeed, some of our stakeholders have expressed this view—it actually has been building for a long time. There have been many policy studies in the past fifteen years, as well as hearings, roundtables, and court opinions on important issues. And

1 As Register, Ms. Pallante is the director of the United States Copyright Office, Washington, DC. These are the prepared remarks from her keynote address at the biennial Copyright Law and Practice Symposium, Sydney, Australia, March 13, 2014. "Copyright and the Digital Economy: Where to From Here?" was the theme of the symposium.

2 Bill Bryson, *In a Sunburned Country* (2000) p 6.

while our Congress is now taking a comprehensive look at the law, they have been looking at discrete sections of the law for quite a while.

As a threshold matter, I would suggest that it is pretty widely accepted in the United States that our underlying statute is showing the strain of its age. The Copyright Act was enacted in 1976, but that revision was first broached in the 1950s and negotiated in large part in the 1960s. Certain digital provisions are younger. Most of these were enacted in 1998 as part of the Digital Millennium Copyright Act (DMCA), which implemented the WIPO Internet Treaties. Still, this period of time is not insignificant for the development of the Internet. This is where the consensus ends and questions begin among interested parties. Is it really necessary to update the law? Or is it possible that the law, though not ideal, remains functional enough to incentivise authorship, facilitate transactions, guide courts, and facilitate voluntary agreements?

In Washington, the Copyright Office is located across the street from the Capitol and we have always worked closely to support legislators.³ Our view is that Congress cannot be absent from debates about copyright policy. Its job is to weigh all of the equities that are at play in the intellectual property framework, not only to exercise its authority in developing the Nation's laws but also to protect the public interest in a way that no other branch of government can do. For example, voluntary agreements or private orderings can move industries forward in instances when the law is out of date or unclear. These agreements can even serve as a template for broader consensus or for legislation. But private actors are motivated by private interests. They are not motivated by, nor charged with worrying about, what is best for the broader public or the legal regime in general. Thus even in this context Congress has an important oversight role.⁴

In speaking about The Next Great Copyright Act, and in my subsequent congressional testimony, I suggested that it is time once again for Congress to address copyright policy, albeit in a comprehensive manner.⁵ Rather than introducing one bill at a time—for example new enforcement measures or orphan works provisions—congressional leaders might instead step back and focus on the overall equities of the statute. This would permit them to better understand and therefore decide what is right for legislation and what is not, and to engage in the kind of overall balancing that is their mandate.

In my view, a revised law will need to be more forward thinking and more flexible than before if it is to remain viable. And, because the dissemination of content is so pervasive to so many people in the twenty-first century, the law should be less technical and more helpful to those who need to navigate it. All of this is a way of saying that while the United States has always enjoyed very strong copyright laws, these laws have best served our Nation when the Congress has acted with foresight and authority, putting its unique imprimatur on the law.

Clear congressional guidance is also helpful to the courts. In general, I would say that U.S. courts have done an excellent job of applying a statute designed for copies to circumstances brought about by new and complex technologies. But there have been recent instances where the aging

3 The U.S. Copyright Office was created by Congress in 1897 as a department of the Library of Congress. By statute, the Copyright Office is an expert advisor to Congress on matters of national and international copyright law, among other duties. See 17 U.S.C. § 701.

4 See *Exec. Office of the President, 2011 U.S. Intellectual Property Enforcement Coordinator Annual Report on Intellectual Property Enforcement* 5 (2012), available at http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_annual_report_mar2012.pdf; *The Role of Voluntary Agreements in the U.S. Intellectual Property System, Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Sept. 18, 2013).

5 See Maria A. Pallante, "The Next Great Copyright Act", 36 *Columbia Journal of Law & the Arts* 315 (2013); *The Register's Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 4 (Mar. 20, 2013) (statement of Maria A. Pallante, Register of Copyrights).

statute seems ill-suited to twenty-first century facts, and the courts are therefore beginning to disrupt well-established policies and practices. These questions include, for example, whether copyright owners can divide international markets,⁶ and whether they can prevent the wholesale copying of their works if such copying is technically transformative or socially beneficial. There is no question that these cases are driving policy discussions. Indeed, for better or for worse, they have unhinged the statute from its prior history and unnerved authors in the process.

As Register, I am aware that many kinds of creators, including book authors, songwriters, photographers, and performers, feel underserved if not marginalised by the copyright law, and I share their concern about long-term implications. As stated by the Authors Guild's Scott Turow, it "seems almost every player—publishers, search engines, libraries, pirates and even some scholars—is vying for position at authors' expense."⁷ My point is that while the judiciary plays a major role in developing the copyright law, litigation is not a substitute for policy direction.

And so let me return to the legislative branch. It was April 24, 2013 when we first learned that the United States would undertake copyright review. On that day, the Copyright Office had invited Congressman Bob Goodlatte, who is Chairman of the House Judiciary Committee, to speak at our World Intellectual Property Day program. We had several hundred people in the audience, including Copyright Office staff, lawyers from other agencies, members of the general public, and stakeholders from the private sector. In keeping with the international theme set by WIPO, *Creativity: The Next Generation*, we had a number of speakers, including Nashville songwriters speaking about (and performing) their music and young filmmakers speaking about their creative and business processes.⁸ It was in this venue that the Chairman announced that he would conduct a wide review of U.S. copyright law to "determine whether the laws are still working in the digital age."⁹ I can tell you that it was an exciting and unexpected moment. People were running out of the room to make phone calls.

At this point, I would like to underscore something that is very important to the dialogue that the Chairman commenced. He did not say, nor have I, that we are seeking to "reform" the copyright law of the United States. Although open to interpretation, reform in this context could be used to suggest that the fundamental principles of the copyright system are on trial. As Register, I do believe that we need certain revisions and adjustments to the statute, to ensure its ongoing viability in the digital age. However, the undertaking is a very positive one. It is designed to assess disparate concerns, formulate priorities, and consider solutions, only some of which may lead to legislation. This premise has been clearly articulated by Members of Congress during the hearings held to date, as well as the many witnesses who have testified.¹⁰

6 See *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013).

7 Scott Turow, "The Slow Death of the American Author", *New York Times*, Apr. 7, 2013, at A21.

8 See *World Intellectual Property Day*, U.S. Copyright Office, http://www.copyright.gov/copyrightmatters/world_ip.html.

9 Press Release, "Chairman Goodlatte Announces Comprehensive Review of Copyright Law" (Apr. 24, 2013), available at <http://judiciary.house.gov/index.cfm/press-releases?ID=1B5C521A-D006-B517-9949-43E692E1E52E>.

10 See *A Case Study for Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (May 16, 2013); *Innovation in America: The Role of Copyrights: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (July 25, 2013); *Innovation in America: The Role of Technology: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Aug. 1, 2013); *The Role of Voluntary Agreements in the U.S. Intellectual Property System: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Sept. 18, 2013); *The Rise of Innovative Business Models: Content Delivery Methods in the Digital Age: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Nov. 26, 2013); *The Scope of Copyright Protection: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Jan. 14, 2014); *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Jan.

For the most part, witnesses have agreed that although there are some gaps in the law, in the end stakeholders rely upon each other, at least with respect to business needs; it is one ecosystem. I give a great deal of credit to Chairman Goodlatte for setting this tone, because the conversation thus far has indeed been respectful. The very first hearing featured a group called the Copyright Principles Project, which met for a couple of years at the invitation of a U.C. Berkeley professor.¹¹ The Project members were not called because their recommendations were popular—indeed many people have opposed their conclusions and the members themselves represent a wide range of copyright perspectives. The point is that they were able to conduct their conversations in a professional manner over a sustained period of time.

I would like to turn now to the executive branch. As many of you may know, the Department of Commerce formed a task force for Internet issues and in July 2013 issued a public Green Paper.¹² The Green Paper is a discussion document designed to guide the executive branch to conclusions and recommendations. This participation of the Administration means that all three branches of government are actively involved in copyright law.

One of the issues addressed in the Green Paper is the notice and takedown system of the DMCA. On this issue, the Administration has undertaken a leadership effort asking people to agree to best practices outside the margins of the law. On the one hand, there is fairly widespread frustration. On the other hand, there is widespread recognition that the concept of a safe harbor is reasonable and prudent. The question is whether and how to make improvements.

As to the work of the Copyright Office, we have a number of balls in the air. We recently issued a notice of inquiry on the right of “making available.”¹³ Some of you know that when the United States ratified the WIPO Internet Treaties in 1996 (affirming the application of copyright law on the Internet), experts concluded that we did not need to create a making available right *per se*, because the confluence of other exclusive rights, including especially the distribution right, would operate to fulfil the obligation. Nonetheless, courts have been inconsistent about the degree of evidence required to find infringement online, i.e., does it require an actual distribution, or is the uploading of a file, say to a cyberlocker, enough, irrespective of whether anyone downloaded or disseminated it? We have a variety of judicial opinions on this question.¹⁴ The point today is,

27, 2014); *Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Mar. 13, 2014); *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Apr. 2, 2014); *First Sale Under Title 17: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (June 2, 2014); *Music Licensing Under Title 17 Part One: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (June 10, 2014); *Music Licensing Under Title 17 Part Two: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (June 25, 2014); *Moral Rights, Termination Rights, Resale Royalty, and Copyright Term: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (July 15, 2014); *Copyright Remedies: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (July 24, 2014); *Chapter 12 of Title 17: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (September 17, 2014); *Copyright Issues in Education and for the Visually Impaired: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (November 19, 2014). Witness statements and video recordings of each hearing are available at <http://judiciary.house.gov/index.cfm/hearings>.

11 See *A Case Study for Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (May 16, 2013).

12 See U.S. Dep’t of Commerce Internet Policy Task Force, Report: *Copyright Policy, Creativity, and Innovation in the Digital Economy* (2013), available at <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf> [hereinafter GREEN PAPER].

13 *Study on the Right of Making Available; Comments and Public Roundtable*, 79 Fed. Reg. 10,571, 10,573 (Feb. 25, 2014).

14 See, e.g., *Diversey v. Schmidly*, 738 F.3d 1196, 1202-03 (10th Cir. 2013) (holding that making a work available

although we ratified and implemented the WIPO treaties properly, is it important or necessary to clarify or affirm the making available right for the benefit of ecommerce?

Music licensing is another major focus in the United States. The music marketplace is very active and the legislative discussions in this area are more than enough to keep us busy. The Copyright Office recently raised several questions in a public notice, most focusing on the century-old provisions that are still in our statute.¹⁵ We have disparity between Internet businesses and terrestrial broadcasters; statutory rates that do not necessarily pay authors fairly; as well as new investors and new entrants saying that they cannot get started in this space. I will also say that the music industries around the world have worked epically to reinvent themselves in past years, making the legal and business solutions in this field a very global discussion.

We also have some gaps in criminal remedies, particularly for the public performance right.¹⁶ This is mostly because infringement by streaming was not a primary problem until the last several years; before then the poor visual quality and inconsistent technical nature of illegal streaming made criminal business models, for example, to watch feature length films, unpopular and unlikely. Today, of course, it is not only quite easy to find this type of offering, it is becoming the infringement of choice. More generally, enforcement will always be a necessary part of the copyright law, with the challenge being how to ensure adequate legal tools while also ensuring due process.¹⁷

This brings us to fair use. To understand anything about exceptions and limitations and revising and updating the copyright law, one has to understand how fair use discussions come to bear. Fair use was initially a judicial doctrine in the United States; it dates back to 1841 in a case involving two books about George Washington, and whether one could quote the other. Justice Story, a very famous and eloquent U.S. Justice, is credited by many for crafting the precursor to the four factors of the fair use doctrine.¹⁸ In the years leading up to the 1976 Act, a significant discussion ensued about whether to codify fair use in the statute. There were strong opinions in

to the public through a library constitutes distribution, but declining to examine the application of the distribution right in the file-sharing context); *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1014, 1027 (9th Cir. 2001) (concluding that distribution encompasses making works available through a peer-to-peer filing sharing network); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (holding that where a library completed all the necessary steps for distribution to the public by adding a book to its collection, listing it in the catalog system, and making it available for borrowing, a distribution had occurred); *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l., Inc.*, 991 F.2d 426, 434 (8th Cir. 1993) (rejecting the proposition that making a work available without an actual distribution violates the distribution right); *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1218 (D. Minn. 2008) (stating that Congress's failure to mention making available in the statute "indicates its intent that an actual distribution or dissemination is required in § 106(3)"); *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 983 (D. Ariz. 2008) ("Merely making an unauthorized copy of a copyrighted work available to the public does not violate a copyright holder's exclusive right of distribution."); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 168 (D. Mass. 2008) (asserting that "[m]erely because the defendant has 'completed all the steps necessary for distribution' does not necessarily mean that a distribution has actually occurred"); *Advance Magazine Publishers, Inc. v. Leach*, 466 F. Supp. 2d 628, 638 (D. Md. 2006) ("[B]y making available unauthorized copies of Plaintiff's publications, [Defendant] has infringed its right to distribution.").

15 *Music Licensing Study: Notice and Request for Public Comment*, 78 Fed. Reg. 14,739, 14,739 (Mar. 17, 2014).

16 See 18 U.S.C. § 2319 (providing felony penalties only for infringements that involve the "reproduction" or "distribution" of a minimum number of copies above a threshold value).

17 See Green Paper at 3; *The "Stop Online Piracy Act": Hearing on H.R. 3261 Before the H. Comm. on the Judiciary*, 112th Cong. 58-59 (Nov. 16, 2011) (statement of Maria A. Pallante, Register of Copyrights); *Oversight of Intellectual Property Law Enforcement Efforts: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (June 22, 2011) (statement of Sen. Patrick Leahy); *Promoting Investment and Protecting Commerce Online: The ART Act, the NET Act and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 19-22 (June 1, 2011) (statement of Maria A. Pallante, Acting Register of Copyrights).

18 See *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901).

both directions. Some experts said don't do it—it will alienate the courts from their own doctrine or force them to follow the four factors in a very religious way. Others believed codification was essential to preserving and underscoring flexibility in the law.

The doctrine was codified, but the debate is still alive. Fair use was the subject of a January 2014 congressional hearing and also came up at a May 2013 hearing. One of the law librarians who testified described fair use as important but overused, and of questionable assistance to frontline librarians.¹⁹ Another witness, a law professor, said the doctrine is working fine, the courts are doing a wonderful job of developing it, and Congress should leave it alone.²⁰

What are the courts doing, exactly? Experts speaking later in this program will be discussing a series of cases in the United States that created and then extended a legal premise known as “transformative use.” Initially, this premise applied to a person taking a part of a work and using it in a transformative manner to create a new, expressive, and copyrightable work. Over time, and most recently, courts have been considering not whether the use is necessary to a new work of authorship, but rather, whether the purpose of the use is transformative—has the actor used it in an altogether new manner?

This kind of thinking represents a sea change in the development of fair use, and it is affecting many parts of copyright review in the United States. To give you just one example of this, many of you are aware that the Authors Guild has sued the HathiTrust, which is a consortium of libraries that agreed to allow Google to create digital copies of their collections. The HathiTrust uses the digitised copies in three ways: (1) to allow users to run full-text searches for terms, (2) preservation, and (3) to facilitate access for persons with certified print disabilities. The Guild contends that a print book is not transformed simply by digitising it; the mechanical conversion does not add any new information, new insights, or new understanding to the work, and they note that we have established exceptions in the law for preservation and print disabilities.

However, the court has held, at least thus far, that the use of the works for full-text searching is transformative because the digitised copies serve an entirely different purpose than the original works.²¹ The purpose here is superior search capabilities, rather than actual access to copyrighted material, the court suggests.²² The search capabilities give rise to new methods of academic inquiry and text mining. The plaintiff's argument that the use is not transformative because defendants have not added new material misses the point, says the court. The court said that even making an exact copy of a work might be transformative, so long as the copy serves a different function than the original work.²³

19 *A Case Study for Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 17 (May 16, 2013) (statement of Prof. Laura N. Gasaway, Univ. of North Carolina School of Law).

20 *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 6 (Jan. 27, 2014) (statement of Prof. Peter Jaszi, Washington College of Law, American Univ.).

21 *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012). Following these remarks, the U.S. Court of Appeals for the Second Circuit affirmed the district court's judgment in part, vacated in part, and remanded the case to the district court for further proceedings. See *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

22 902 F. Supp. 2d at 460. The court also held that HathiTrust's use of digital copies to facilitate access for print-disabled persons was transformative. *Id.* at 461. On appeal, the Second Circuit found that determination to be a “misapprehension,” concluding that “providing expanded access to the print disabled is not ‘transformative.’” 755 F.3d at 101. Nevertheless, the court of appeals held that such use “is still a valid purpose under Factor One even though it is not transformative” and ultimately affirmed the district court's holding that the use was fair. *Id.* at 102-03.

23 902 F. Supp. 2d at 460.

The related case is the *Authors Guild v. Google Inc.*, which is on appeal to the Second Circuit on the merits of fair use and which you will hear more about later today.²⁴ One argument from the plaintiff, the Authors Guild, is that the only thing transformative about Google's display of snippets (from print books) is that it transforms online browsers of book retailers into online users of Google's search engine. Google transforms Amazon's customers into Google ad clickers, the Guild points out. The alternative perspective is that Google's use of copyrighted works is highly transformative because it is innovative and new. The district court accepted this latter view, holding that "Google Books digitizes books and transforms expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books."²⁵

The relationship of fair use to exceptions is important under U.S. law. The Copyright Office is of the view that our library exceptions need to be updated because they are pre-digital; they are analog provisions.²⁶ Provisions for print disabilities also are out of date.²⁷ There is no codified solution for our orphan works problem. In the not-so-distant past, a key challenge of lawmakers was how to get copyright owners to support the codification of exceptions or at least to acknowledge the importance of exceptions in a well-functioning law. However, because of the posture of the fair use cases just described, it is now the beneficiaries of these exceptions who are torn. Calibrated exceptions are very helpful. They can prescribe certainty and relieve liability and risk. The concern is whether, faced with a set of freshly minted exceptions addressing specific activities in the digital era, courts will cease or slow the onward expansion of fair use.

I think many people would have to agree that in the absence of updated exceptions, the courts have no choice but to apply fair use. It is my view that both are essential to a twenty-first century framework. Exceptions offer clarity, and clarity is critical if we expect people to navigate the law. I would also note that section 108 (library use) has always had a savings clause, making it clear that nothing shall preclude the application of fair use as an additional, affirmative defense.²⁸

Orphan works span both of these issues, that is, excepted library activities and the application of fair use. This year we have continued the public discussion with public inquiries and roundtables, asking people questions about problems with singular orphan works as well as mass digitisation, and how to design legislation.²⁹ Even assuming that the courts continue in the direction they have been going, we do not anticipate their opinions will permit making entire works available to the public beyond individuals with print disabilities.³⁰ In other words, if libraries want to do this, what is the licensing mechanism and pricing that is appropriate?

This brings me to my final point, which I will briefly mention. Licensing and fair use have always made for a tense relationship. What affects one, affects the other. As you likely know, the fourth factor of fair use takes into account both the market and the potential market of the copyright owner.³¹ As digital markets expand, courts will undoubtedly be called upon to consider subsets of activities, not only new applications of fair use but also new categories of licensing, including micro-licensing, subscription services, and collective licensing.

24 954 F. Supp. 2d 282 (S.D.N.Y. 2013), appeal docketed, No. 13-4829 (2d Cir. Dec. 23, 2013).

25 *Id.* at 291.

26 17 U.S.C. § 108.

27 17 U.S.C. § 121.

28 See 17 U.S.C. § 108(f)(4).

29 The public notices and transcripts of the roundtables are available on the Copyright Office website at <http://www.copyright.gov/orphan/>.

30 See, e.g., *HathiTrust*, 755 F.3d at 97 (finding it "[i]mportant[]" that digital library "does not allow users to view any portion of the books they are searching" but "simply permits users to 'word search'—that is, to locate where specific words or phrases appear in the digitized books").

31 17 U.S.C. § 107(4).

In closing, I want to express my sincere thanks for the opportunity to join you today. I have heard it said that everybody suffers from the “grass is greener on the other side” mentality, except people in Australia, because in Australia the grass really is greener. Whether this is a metaphor for copyright discussions is unclear. However, I do know that if ever I find myself worrying about copyright law late into the night, I can call you, because the sun will surely be shining here in Darling Harbour.