

## The Next Great Copyright Act

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### INTRODUCTION

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

Those of you who have been to our offices in Washington know that we have a conference room featuring portraits of the former Registers of Copyright dating back to 1897.<sup>1</sup> When guests are seated at our table, the former Registers preside on high, wearing a variety of expressions and overseeing complex conversations about copyright law in the digital age. Sometimes I think they would be startled by the discussions we have, but then again it might all sound familiar.

### SOLBERG (1897–1930)

Thorvald Solberg was the first and longest serving Register of Copyrights. He seems inspired in his portrait, and for good reason. Solberg was a visionary leader, a champion of authors' rights, and an early advocate for the United States' adherence to the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention").<sup>2</sup> Under his care, the Copyright Office grew from a handful of employees to more than one hundred professional staff and took on the many roles that are still critical to the mission of the Office today. Solberg and his team administered the copyright registration system, managed the public records of

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1. The United States Copyright Office is located on Capitol Hill in the James Madison Memorial Building of the Library of Congress, Washington, DC. Images of the portraits described herein are available for viewing at <http://www.copyright.gov/docs/2013MangesLectureSlides.pdf> (last visited Apr. 5, 2013).

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

copyright information, facilitated the delivery of books and other copyright deposits to the Library of Congress (the “Library”), served as substantive experts within the U.S. government, provided policy advice to Congress, and represented the United States at international meetings.<sup>3</sup> He was Register during the revision process that led to the 1909 Act, in which copyright term was extended to a total period of fifty-six years subject to renewal registration, but he broached the subject of automatic protection as early as the 1920s.<sup>4</sup>

#### KAMINSTEIN (1960–1971)

Abraham (Abe) Kaminstein was Register during another key period for copyright revision. In his portrait, he stands in front of his law books, looking knowledgeable and perhaps a little impatient. He spent eleven years working with Congress and with stakeholders on revision issues, presiding over roundtables and legal studies and helping to mold many of the provisions that were enacted in the Copyright Act of 1976 (“1976 Act” or “Copyright Act”). In fact, the revision process began in the 1950s, during Arthur Fisher’s tenure as Register, and did not conclude until five years after Kaminstein’s departure, when Barbara Ringer was Register.<sup>5</sup>

What might be obvious today, but nonetheless is instructive, is that the long revision process that led to the 1976 Act reflected a spectrum of issues, from small or technical fixes to wholly new or controversial provisions. Small decisions were important then, as they can be now, because they added a degree of certainty to the statute, making it more user-friendly for those who need to interpret and rely upon its provisions. An example is the decision in 1976 to set the end of the copyright term on the last day of the calendar year.<sup>6</sup>

More tedious were the issues where policy consensus was achieved in principle, but later compromised or undermined by overnegotiation. A good example here is termination.<sup>7</sup> In copyright, the concept of termination is rooted in the equitable principle that authors should share in the long-term value of their works. The policy is sound, but the provisions as enacted are almost incomprehensible on their face, particularly for the authors, widows, widowers, children and other heirs who need to navigate them.

The termination provisions are important for another reason, however. They show that Congress sometimes will migrate policy principles into a new context. In the 1976 Act, Congress was moving to a singular and significantly longer term

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3. See generally 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1.41 (2013); see also John Y. Cole, *Of Copyright, Men and a National Library*, 28 Q.J. LIBR. CONG. 114, 134 (1971).

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

5. See PATRY, *supra* note 3, § 1.72.

6. Under the 1909 Copyright Act, a copyright expired twenty-eight years (or fifty-six years if the copyright was renewed) after the date of first publication with notice or after the date of registration (in the case of unpublished works). See 1909 Act, 17 U.S.C. § 24 (repealed 1978). Under the current statute, copyright expires at the end of the calendar year in the year of expiration. See 17 U.S.C. § 305 (2012).

7. 17 U.S.C §§ 203, 304.

of protection, and phasing out the renewal periods and renewal registration requirement in the law. At the same time, Congress recognized that the renewal period had provided authors with a legal trigger to renegotiate problematic licensing terms with their publishers and producers.<sup>8</sup> Thus, in crafting the termination provisions, Congress was acknowledging the need for a new legal framework, but also was carrying over and reinventing a compelling policy objective.<sup>9</sup>

Of course, the 1976 Act generated many discussions about exceptions and limitations, and if today's climate is any indication, they were not without complexity or controversy. Questions before Congress included whether and how to incorporate significant judicial doctrines into the statute, and whether and how to provide special treatment and specific guidance to discrete communities. Congress would codify the fair use doctrine, reaffirm the first sale doctrine, and create specific exceptions for libraries and archives.<sup>10</sup> But Congress would choose to defer any specific exceptions for educational use, concluding that such a treatment "is not justified."<sup>11</sup> These decisions reflect the work ethic of Congress when legislating copyright law for a new era. Congress looks to the equities of the statute as a whole and not just to the immediate interests before it.

Finally, and again instructively, there were deliberations on an array of topics that shifted and departed from the previous legal framework and therefore were at the more challenging end of the revision spectrum. In the end, Congress would codify divisibility, extend the copyright term<sup>12</sup> (a policy change strongly supported, incidentally, by Horace Manges<sup>13</sup>), and relax formalities.<sup>14</sup> In doing so, Congress was adapting the law to the times. It was not exactly fashioning solutions out of whole cloth, but it did a tremendous job in blending the world standards and pressures of global copyright law with the particular principles and practices of

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

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

10. *See* 17 U.S.C. §§ 107–109 (1976).

11. H.R. REP. NO. 94-1476, at 66–67 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.

12. Article 7 of the Berne Convention requires a minimum term of protection of fifty years following the death of the author. The United States' term extension put the country more on par with the sixty-four countries that were already Berne members in 1976. *See* World Intellectual Prop. Org. (WIPO), Contracting Parties: Berne Convention, *available at* <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf> (last visited Apr. 4, 2013).

13. Horace Manges specifically says:

The most important improvement would be a single term of copyright. Life of the author plus a 50 year term would have certain advantages, among them that the whole body of an author's work (including revisions) would go out of copyright at the same time and that there would be a uniformity with the system utilized in leading European countries.

U.S. COPYRIGHT OFFICE, COPYRIGHT LAW REVISION, STUDY NO. 30 93 (1961).

14. *See, e.g.*, 17 U.S.C. §§ 405, 406 (1976) (providing that errors in a copyright notice or the omission of a copyright notice would not necessarily invalidate the copyright in a published work).

American democracy.

#### **RINGER (REGISTER 1973–1980/ACTING REGISTER 1993–1994)**

In 1973, Barbara Ringer, a Copyright Office lawyer who was already heavily involved in the revision process, became Register. Like Kaminstein, she worked closely with congressional leadership, including long-time copyright steward Robert Kastenmeier, who was deeply involved in much of the 1976 revision process while he was Chairman of the House Subcommittee on Courts, Intellectual Property and the Administration of Justice, and Senator John McClellan, who was also very involved in all aspects of the reform effort as Chairman of the Senate Judiciary Committee.<sup>15</sup> Ringer and her team were involved in resolving last minute negotiations of the new law, documenting the significant legislative history, and implementing sweeping changes to the registration practices and related operations of the Copyright Office.

Ringer's portrait is very formal. Staring into the distance, she looks elegant but pensive, and perhaps a little concerned. Ringer was a staunch protector of authors and their role in a civilized society, and she began to worry about the future of the law, including what she saw as a growing effort by some to erode the copyright system by attempting to cast it as an obstacle rather than as a means to the dissemination of knowledge. She wrote passionately about this in her well known article "The Demonology of Copyright."<sup>16</sup>

#### **PETERS (1994–2010)**

Ringer was not wrong that copyright discussions were changing, both in complexity and tone, and she was not wrong to be uneasy. By the time my predecessor Marybeth Peters became Register in 1994, the world was well on its way to unprecedented technological change and therefore dramatic upheaval for copyright markets and copyright law. The times required Congress to act more boldly than before, not only to affirm core principles of copyright protection but also to provide guidance and direction to good faith intermediaries. The Digital Millennium Copyright Act ("DMCA"), enacted in 1998, was innovative in this regard.<sup>17</sup> Among other things, it created a notice-and-takedown procedure for copyright owners and online intermediaries, a corresponding safe harbor from liability,<sup>18</sup> and legal protection for technological protection measures.<sup>19</sup>

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

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

17. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

18. 17 U.S.C. § 512 (2012).

As is the case today in matters of complex copyright policy, passage of the DMCA harnessed expertise from throughout the government.<sup>20</sup> The Clinton Administration negotiated the Internet treaties and released a series of papers for public discussion, Congress negotiated their implementation into U.S. law, and a number of amendments were entrusted to the Copyright Office to administer, including a rulemaking procedure to address the intersection of the anticircumvention provisions and noninfringing uses.

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

## I. WHY IT IS TIME FOR REVISION

In American copyright law, there have been revisions and then there have been revisions. As a general matter, Congress introduces bills, directs studies, conducts hearings, and discusses copyright policy on a fairly regular basis, and it has done so for two centuries. But revision of the comprehensive sort is an entirely different matter. It requires a clear and forward-thinking set of goals and a sustained commitment from Congress, most certainly over multiple sessions. As Solberg observed in 1926, there comes a time when the “subject ought to be dealt with as a whole, and not by further merely partial or temporizing amendments.”<sup>21</sup>

In general, major copyright revisions require Members of Congress, especially the committee leaders who are responsible for the governance of intellectual property, and their staffs to have a meaningful degree of fluency in the substance of copyright law. While high level or even philosophical discussions do have a place in policy discussions, amending the law eventually comes down to the negotiation of complex and sometimes arcane provisions of the statute. Some of these provisions are challenging for copyright experts, let alone for elected officials who have a multitude of other national and international responsibilities. Add to this the intensity with which interested parties across the copyright spectrum sometimes make their views known—and the public’s confusion, if not aversion, when it comes to copyright issues<sup>22</sup>—and it is little wonder that Congress has moved slowly in the copyright space.

### A. RECENT YEARS

In terms of enacted legislation, Congress primarily has made minor adjustments

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19. 17 U.S.C. § 1201.

20. See Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights*, CONSERVATION ONLINE (July 1994), <http://cool.conservancy-us.org/bytopic/intprop/ipwg/>; Information Infrastructure Task Force, *Global Information Infrastructure: Agenda for Cooperation*, NAT’L TELECOMM. & INFO. ADMIN (June 1, 1995), <http://www.ntia.doc.gov/report/1995/global-information-infrastructure-agenda-cooperation>.

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

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

or technical corrections in recent years. Consider, for example, the Copyright Cleanup, Clarification, and Corrections Act of 2010,<sup>23</sup> the Satellite Television Extension and Localism Act of 2010,<sup>24</sup> the Temporary Extension Act of 2010,<sup>25</sup> followed by the Continuing Extension Act of 2010,<sup>26</sup> and three webcaster settlement acts in 2002, 2008 and 2009.<sup>27</sup>

Where Congress was able to act more substantively, its focus was directed at the growing problem of piracy in the digital environment—for example, the ART Act of 2005,<sup>28</sup> which addressed camcording in movie theatres, and the PRO-IP Act of 2008, which enhanced certain civil remedies and criminal sanctions, improved funding and resources for several federal enforcement programs, and created the position of the Intellectual Property Enforcement Coordinator (“IPEC”).<sup>29</sup>

Certainly, Congress is acting responsibly when it makes discrete adjustments to the copyright law from time to time, but its more valuable role always has come from reviewing and addressing, as appropriate, the larger policy themes and developments that require attention. In this regard, the last sustained period of copyright activity was fifteen years ago, a period that produced the DMCA and the Copyright Term Extension Act,<sup>30</sup> as well as concomitant changes to the library and archives exception. During this time, Congress, though legislating in a charged atmosphere, acted on copyright policy with authority, leaving a very visible and far-reaching imprint on the development of both law and commerce. In the age of the Internet, where technology can so quickly affect the creation and communication of creative materials, these global reviews may need to happen more frequently, at least if the statute remains as dense and detailed as it is today.

## B. PREPARATORY WORK

The next great copyright act would not require Congress to start from scratch, because it has put in motion a steady stream of preparatory work on core issues since 1998. For example, Congress has had more than a decade of debate on the public performance right for sound recordings,<sup>31</sup> and it has given serious

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23. Pub. L. No. 111-295, 124 Stat. 3180 (2010).

24. Pub. L. No. 111-175, 124 Stat. 1218 (2010).

25. Pub. L. No. 111-144, 124 Stat. 42 (2010).

26. Pub. L. No. 111-157, 124 Stat. 1116 (2010).

27. Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926 (further amending 17 U.S.C. § 114 to authorize a thirty-day negotiation period for webcasters and copyright holders); Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (amending 17 U.S.C. § 114); Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (codified at 17 U.S.C. § 114).

28. Pub. L. No. 109-9, 119 Stat. 218 (2005).

29. Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256.

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

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

consideration to improving the way in which musical works are licensed in the marketplace.<sup>32</sup> These issues are ripe for resolution.

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

- An early report on the issue of digital first sale,<sup>33</sup>
- A major study and ongoing recommendations on orphan works solutions;<sup>34</sup>
- Multiple reports on reforming or possibly eliminating the statutory licenses for cable and satellite retransmission under sections 111, 119 and 122;<sup>35</sup>
- An analysis of termination provisions in the context of pre-1978 contracts;<sup>36</sup>
- An analysis of the legal and business issues relating to mass digitization;<sup>37</sup>
- A report on the federalization of protection for pre-1972 sound recordings;<sup>38</sup>
- A pending analysis on the propriety of a resale royalty for visual artists;<sup>39</sup>  
and

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

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

33. U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT (2001) [hereinafter SECTION 104 REPORT], available at [http://www.copyright.gov/reports/studies/dmca/dmca\\_study.html](http://www.copyright.gov/reports/studies/dmca/dmca_study.html).

34. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006) [hereinafter ORPHAN WORKS REPORT], available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

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

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

37. U.S. COPYRIGHT OFFICE, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT (2011) [hereinafter MASS DIGITIZATION REPORT], available at [http://www.copyright.gov/docs/massdigitization/USCOMassDigitization\\_October2011.pdf](http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf).

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

39. *See Resale Royalty Right*, 77 Fed. Reg. 58,175 (Sept. 19, 2012).

- A pending study on solutions for enforcement of small copyright claims.<sup>40</sup>

Finally, Congress has introduced a number of bills that have not moved much over the years, on a variety of issues that it may or may not wish to consider further. For example, in the past ten years, bills have been introduced that would extend copyright-like protection to fashion designs,<sup>41</sup> exempt churches from infringement liability for showing football games,<sup>42</sup> add a fair use exemption to section 1201,<sup>43</sup> require a nominal fee to retain copyright protection after fifty years,<sup>44</sup> and require new standards for Copyright Royalty Judges with regard to webcasting.<sup>45</sup> A general revision effort would offer everyone the opportunity to step back and consider issues both large and small, as well as the relationship of these issues to the larger statute and the importance or unimportance of international developments.

### C. THE COURTS

It should come as no surprise that courts also are reflecting the wear and tear of the statute. In some areas, courts have picked up where Congress left off. Thus in the context of peer-to-peer networks, courts have fashioned the concept of inducement as part of the secondary liability analysis, and in the context of the DMCA, courts have interpreted section 512's knowledge standards.<sup>46</sup> In other areas, courts appear to be struggling with existing statutory language. Consider the Second Circuit's 2008 *Cablevision* holding on public performances, which indicates that a performance is not made "to the public" unless more than one person is capable of receiving a *particular* transmission (i.e., a transmission made using a unique copy of a given work).<sup>47</sup> As the Solicitor General's Office noted, "[s]uch a construction could threaten to undermine copyright protection in circumstances far beyond those presented."<sup>48</sup> Moreover, this comes at the very time that copyrighted works are increasingly disseminated via streaming, thus making the public performance right more important than ever.

In some cases, courts have expressed their opinions about the statute directly in their decisions. For example, in *Authors Guild v. Google Inc.*, the Southern District of New York stated that "[t]he questions of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more appropriately decided by Congress than through an agreement among

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40. See Remedies for Small Copyright Claims, 76 Fed. Reg. 66,758 (Oct. 27, 2011).

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

42. S. 2591, 110th Cong. (2008).

43. H.R. 107, 108th Cong. (2003).

44. H.R. 2601, 108th Cong. (2003).

45. H.R. 6480, 112th Cong. (2012); S. 3609, 112th Cong. (2012).

46. See, e.g., *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30–35 (2d Cir. 2012); *Columbia Pictures Indus., Inc. v. Fung*, 2009 U.S. Dist. LEXIS 122661, at \*10–11 (C.D. Cal. Dec. 21, 2009).

47. *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121, 139 (2d Cir. 2008).

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



private, self-interested parties.”<sup>49</sup> In *Sony BMG Music Entertainment v. Tenenbaum*, the First Circuit observed that Congress might wish to examine the application of the Copyright Act regarding statutory damages.<sup>50</sup> In *Flava Works, Inc. v. Gunter*, a case involving streaming video, the Seventh Circuit noted the difficulty of determining when a public performance begins and stated that “[l]egislative clarification of the public-performance provision of the Copyright Act would therefore be most welcome.”<sup>51</sup> And in *Golan v. Holder*, the Supreme Court observed that Congress may need to consider legislative solutions to offset “[o]ur unstinting adherence to Berne.”<sup>52</sup>

#### D. READABILITY

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

## II. REVISION ISSUES

The next great copyright act must be forward thinking but flexible, and, no matter what, it must serve the public interest. Thus, it must confirm and rationalize certain fundamental aspects of the law, including the ability of authors and their licensees to control and exploit their creative works, whether content is distributed on the street or streamed from the cloud. And it must provide sufficient clarity to those who seek to use protected works.

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

50. *Sony BMG Music Entm’t v. Tenenbaum*, 660 F.3d 487, 490 (1st Cir. 2011), *cert. denied*, 132 S.Ct. 2431 (2012).

51. 689 F.3d 754, 761 (7th Cir. 2012).

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

Courts offered further observations along these lines in the weeks following my delivery of this lecture. See *Kirtsaeng v. John Wiley & Sons*, 2013 U.S. LEXIS 2371, at \*57 (U.S. Mar. 19, 2013) (“Whether copyright owners should, or should not, have more than ordinary commercial power to divide international markets is a matter for Congress to decide. We do no more here than try to determine what decision Congress has taken.”); *WNET, Thirteen, Fox Television Stations, Inc. v. Aereo, Inc.*, 2013 U.S. App. LEXIS 6578, at \*50 (2d Cir. Apr. 1, 2013) (noting that “unanticipated technological developments have created tension between Congress’ view that retransmissions of network programs by cable television systems should be deemed public performances and its intent that some transmissions be classified as private”); *Capitol Records, LLC v. Redigi, Inc.*, 2013 U.S. Dist. LEXIS 48043, at \*35–36 (S.D.N.Y. Mar. 30, 2013) (concluding that the first sale doctrine does not apply to digital copies, acknowledging that “this limitation clearly presents obstacles to [the] resale [of digital music files] that are different from, and perhaps even more onerous than, those involved in the resale of CDs and cassettes,” and stating that “[i]t is left to Congress, and not this Court, to deem [these physical limitations] outmoded”).

This is not to say that the control of copyright owners should be absolute (it should not be), but it does need to be meaningful. After all, people around the world increasingly are accessing content on mobile devices, and fewer and fewer of them will need or desire the physical copies that were so central to the nineteenth and twentieth century copyright laws.<sup>53</sup> Thus, Congress has a central equation to consider today: what does and does not belong under a copyright owner's control? In considering the universe of issues that may warrant review at this time, Congress also will want to consider the exceptions and limitations, enforcement tools, licensing schemes and registration system it wants for the twenty-first century. Some of these issues are addressed below.

## A. MAJOR ISSUES

### 1. Exclusive Rights

Among the specific issues at play are the application of longstanding but evolving exclusive rights, such as reproduction and distribution, as well as the application and evolution of the public performance right on the Internet (for example, to authorize the streaming of music, movies, television shows or sporting events).<sup>54</sup>

Starting with the latter, the Copyright Office has long supported a more complete right of public performance for sound recordings, commensurate with the rights afforded to other classes of works under U.S. law and provided for in virtually all industrialized countries around the globe.<sup>55</sup> As noted above, this is an issue on which Congress has spent many years deliberating. Owners of sound recordings are disadvantaged under current law in that they enjoy an exclusive right of reproduction and distribution but not public performance.<sup>56</sup> Moreover, because

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53. See, e.g., *ITU Releases Latest Global Technology Development Figures*, INT'L TELECOMMS. UNION (Feb. 27, 2013), [http://www.itu.int/net/pressoffice/press\\_releases/2013/05.aspx](http://www.itu.int/net/pressoffice/press_releases/2013/05.aspx) ("ICT Facts and Figures report predicts that there will soon be as many mobile-cellular subscriptions as people inhabiting the planet, with the figure set to nudge past the seven billion mark early in 2014. More than half of all mobile subscriptions are now in Asia, which remains the powerhouse of market growth, and by the end of 2013 overall mobile penetration rates will have reached 96% globally, 128% in the developed world, and 89% in developing countries.").

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

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

56. In 1995, a limited right to perform a sound recording publicly by means of a digital audio transmission was added at 17 U.S.C. § 106(6) in order for the United States to comply with Article 15 of the WIPO Performances and Phonograms Treaty, see Pub. L. No. 102-155, § 2, 109 Stat. 336, 336

of the disparity in royalty obligations, there is an increasingly stark economic disadvantage for businesses that offer sound recordings over the Internet. Congress has done quite a lot of thinking on this already. How to craft a final resolution for all concerned should be a priority for the next great copyright act.

The scope of the distribution right also is a central theme today, as courts work through whether and how it may be implicated and enforced in relation to use of works over the Internet.<sup>57</sup> One key issue in the courts is the degree to which a claimed violation of the exclusive right to authorize distribution of a work requires a showing of actual dissemination of a work or whether the act of making the work available online is sufficient.<sup>58</sup>

## 2. Incidental Copies

The reproduction right could also use a makeover, but for a different reason. The reproduction right has been a valuable tool in enforcement proceedings, helping to ameliorate the confusion or inadequacies of other provisions, particularly in the context of peer-to-peer file sharing or illegal streaming.<sup>59</sup> However, new technologies have made it increasingly apparent that not all reproductions are equal in the digital age. Some copies are merely incidental to an intended primary use of a work, including where primary uses are licensed, and these incidental copies should not necessarily be treated as infringing.

The 1976 Act recognized and addressed the incidental nature of certain copies by providing fact-specific exceptions and limitations in section 112 (for making

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(1995), but no comparable right exists with respect to the public performances of sound recordings over the air by traditional broadcasters.

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

58. See, e.g., *Elektra Entm't Grp., Inc. v. Barker*, 551 F. Supp. 2d 234 (S.D.N.Y. 2008) (stopping short of endorsing a full "making available" right, but accepting that an offer to distribute a work for the purpose of its further distribution or public performance constitutes an infringement of the distribution right); *Atl. Recording Corp. v. Anderson*, 2008 WL 2316551, at \*7 (S.D. Tex. Mar. 12, 2008) (holding that making copyrighted works available for download via a peer-to-peer network contemplates "further distribution," which is a violation of the distribution right); *Motown Record Co. v. DePietro*, 2007 WL 576284, at \*3 (E.D. Pa. Feb. 16, 2007) (finding that infringement of the distribution right can be based on actual distribution or by an offer to distribute, i.e., proof that the work was "made available" by the defendant); *Universal City Studios Prods. LLP v. Bigwood*, 441 F. Supp. 2d 185, 190 (D. Me. 2006) (holding that defendants violated plaintiff's exclusive right to distribute copyrighted works "by using KaZaA to make copies of the Motion Pictures available to thousands of people over the internet"); *Interscope Records v. Duty*, 2006 WL 988086, at \*2 (D. Ariz. Apr. 14, 2006) (holding that the "mere presence of copyrighted [works] in [defendant's] share file may constitute copyright infringement"). *But see* *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 983 (D. Ariz. 2008) (concluding that "[m]erely making an unauthorized copy of a copyrighted work available to the public does not violate a copyright holder's exclusive right of distribution."); *London-Sire Records, Inc. v. Doe*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008) (concluding that "defendants cannot be liable for violating the plaintiffs' distribution right unless a 'distribution' actually occurred").

59. See Carson, *supra* note 57, at 150.

ephemeral recordings of certain works in order to facilitate broadcast transmissions) and section 117 (for making a copy of a computer program—such as a “read-only” copy—that is essential for the utilization of that work). The DMCA did the same in section 512 (for the intermediate and temporary storage of copyrighted material in the course of transitory digital network communications and system caching) and in section 117 (for making an incidental copy of a computer program when maintaining or repairing a machine that contains an authorized copy of that program).<sup>60</sup>

In 2001, the Copyright Office examined the issue in a report known as the *Section 104 Report*. There, the Office noted the uncertainty around temporary copies of works in the context of digital commerce, and the fact that “[c]ourts have not attempted to formulate a general rule defining how long a reproduction must endure to be ‘fixed,’ deciding instead on a case by case basis whether the particular reproduction at issue sufficed.”<sup>61</sup> The *Section 104 Report* recommended the enactment of several additional exemptions for the creation of copies that are incidental to licensed use.<sup>62</sup>

Because incidental or transient copies are made by consumers on a daily basis and in a variety of otherwise lawful activities involving consumer electronics and computer programs, there may be room for yet further discussion of this issue.<sup>63</sup> In any event, as the confusion over incidental copies has persisted, this is an area where Congress could provide a voice of reason.

### 3. Enforcement

A twenty-first century copyright act requires twenty-first century enforcement strategies. These must respect the technical integrity and expressive capabilities of the Internet as well as the rule of law. It is possible and necessary to combine safeguards for free expression, guarantees of due process, and respect for intellectual property in the copyright law. As the Supreme Court recognized, “the Framers intended copyright itself to be the engine of free expression.”<sup>64</sup>

In short, the next great copyright act presents an opportunity. All members of the online ecosystem should have a role, including payment processors, advertising networks, search engines, Internet service providers and copyright owners. These strategies can be a mix of legislative solutions and complementary voluntary initiatives,<sup>65</sup> but where gaps in the law exist, Congress should not be absent.<sup>66</sup>

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60. In 1998, the DMCA amended section 117 by inserting headings for subsections (a) and (b) and by adding subsections (c) and (d). Digital Millennium Copyright Act, Pub. L. No. 105-304, § 302, 112 Stat. 2860, 2887 (1998).

61. SECTION 104 REPORT, *supra* note 33, at 111.

62. *See id.* at 142–48.

63. *See generally* DENA CHEN ET AL., COPYRIGHT REFORM ACT: PROVIDING AN INCIDENTAL COPIES EXEMPTION FOR SERVICE PROVIDERS AND END-USERS (2011), *available at* <http://www.publicknowledge.org/files/docs/craincidentalcopies.pdf>.

64. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

65. For example, a number of rights holders and service providers recently announced a voluntary “Copyright Alert System” that will help educate the public and address online infringing occurring on

One critical issue is the ability of law enforcement to prosecute the rising tide of illegal streaming in the criminal context.<sup>67</sup> Streaming implicates the copyright owner's exclusive right of public performance: it is a major means by which copyright owners license their rights in sporting events, television programs, movies and music to customers, who in turn access the content on their televisions, smart phones, tablets or video consoles.<sup>68</sup> Under current law there is a disparity that may have once been of little consequence but is today a major problem: prosecutors may pursue felony charges in the case of illegal reproductions or distributions, but are limited to misdemeanor charges when the work is streamed, even where such conduct is large scale, willful and undertaken for a profit motive.<sup>69</sup> As a practical matter, prosecutors have little incentive to file charges at all, or they have reason to pursue only those cases where the rights of reproduction and distribution are also at issue. This lack of parity neither reflects nor serves the digital marketplace.<sup>70</sup>

Mechanisms for small copyright claims are also an active topic and the focus of a Copyright Office study.<sup>71</sup> Under current law, copyright lawsuits are reserved to

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certain networks. See generally *The Copyright Alert System*, CTR. FOR COPYRIGHT INFO., <http://www.copyrightinformation.org/the-copyright-alert-system/> (last visited Apr. 21, 2013).

66. For example, Congress has looked at the sufficiency of enforcement mechanisms in cases where bad faith actors are offering infringing content to U.S. consumers from websites controlled outside of the United States, a situation where the proposed solutions have generated a great deal of controversy and which are, at the very least, as complex as the problem itself. See generally *Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Parasites, Part 1: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. (2011), available at [http://judiciary.house.gov/hearings/printers/112th/112-153\\_65186.pdf](http://judiciary.house.gov/hearings/printers/112th/112-153_65186.pdf); *Targeting Websites Dedicated to Stealing American Intellectual Property: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg67443/pdf/CHRG-112shrg67443.pdf>.

67. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, SPECIAL 301 REPORT 11 (2011) (noting the problem of illegal streaming and linking sites); ORG. FOR ECON. CO-OPERATION & DEV., PIRACY OF DIGITAL CONTENT, CASE STUDY: THE SPORTS OWNERS SECTOR 90 (2009), available at [http://www.keepeek.com/Digital-Asset-Management/oced/science-and-technology/piracy-of-digital-content\\_9789264065437-en](http://www.keepeek.com/Digital-Asset-Management/oced/science-and-technology/piracy-of-digital-content_9789264065437-en) (discussing streaming of sporting events).

68. According to one recent study, video streaming traffic alone now accounts for more than one quarter of all Internet traffic and is among the fastest growing areas of the Internet. See ENVISIONAL, TECHNICAL REPORT: AN ESTIMATE OF INFRINGING USE OF THE INTERNET 3, 19 (2011), available at [http://documents.envisional.com/docs/Envisional-Internet\\_Usage-Jan2011.pdf](http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf).

69. See 18 U.S.C. § 2319(b)(1) (2008).

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

71. See *Remedies for Copyright Small Claims*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/docs/smallclaims/> (last visited Apr. 5, 2013). Congress has asked the Copyright Office to study the challenges of the current system for resolving small copyright claim disputes, as well as possible alternative systems, and to report back by the end of September 2013.

the federal courts. While this ensures consistency in the treatment of federal subject matter, it can also be quite costly and time consuming, effectively preventing the enforcement of many infringement claims of authors and others who do not have or cannot justify expending the resources. The question is whether Congress should create a streamlined adjudicative process to assist copyright owners with claims of small economic value.<sup>72</sup>

This brings me to statutory damages. Some would eliminate the precondition in section 412 of the Copyright Act that limits the availability of statutory damages to those who register with the Copyright Office in a timely manner.<sup>73</sup> They believe that it places an undue burden on the people who need statutory damages the most but are least likely to be aware of the condition, namely authors. Cost is also an issue, particularly for prolific creators like photographers, who may be unable to register each and every work under a separate application and have for years enjoyed a reduced rate through a group registration option. This gives photographers the ability to claim statutory damages, but often without providing effective public disclosure of what the group registration covers. Section 412 also acts as a filter, reducing the number of claims from copyright owners and the level of exposure for infringers. Unfortunately, it does this for bad faith actors and good faith actors alike.

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

Whether and how section 412 has achieved these goals may be ripe for review again.<sup>74</sup> On the one hand, the availability of statutory damages is essential for some copyright owners irrespective of registration, namely for authors. On the other hand, the public database is important, and the Library's collection is critical. However, if statutory damages are to remain tethered to registration, then the public record will need to be much more useful to prospective licensees than it is now. To

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72. The Copyright Office is not the only government agency investigating the issue of smaller-value intellectual property claims. The U.S. Patent and Trademark Office is conducting a review of small patent claims. *See* Request for Comments on Patent Small Claims Proceedings in the United States, 77 Fed. Reg. 74,830 (Dec. 18, 2012). The issue is also not limited to the United States; the United Kingdom has instituted a special track for smaller-value intellectual property claims. *See New Small Claims Track for Businesses with IP Disputes*, INTELL. PROP. OFFICE, <http://www.ipo.gov.uk/about/press/press-release/press-release-2012/press-release-20121001.htm> (last visited Apr. 5, 2013).

73. Section 412 provides that, with certain exceptions, statutory damages and awards of attorney's fees are not available to the copyright owner when: (1) infringement of copyright in an unpublished work commenced before the effective date of its registration; or (2) infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration was made within three months after the first publication of the work. *See* 17 U.S.C. § 412 (2008).

74. *See* LIBRARY OF CONG., ADVISORY COMM. ON REGISTRATION & DEPOSIT, REPORT OF THE CO-CHAIRS, ROBERT WEDGEWORTH AND BARBARA RINGER 6 (1993) [hereinafter ACCORD REPORT].

this end, one professor has suggested that the recordation function in the law could be improved by requiring exclusive licensees to record their licenses promptly or risk their rights defaulting back to the grantor.<sup>75</sup>

More globally, arguments abound on the subject of statutory damages, suggesting that they are too high, too low, too easy or too hard to pursue. Statutory damages have long been an important part of copyright law to ensure that copyright owners are compensated for infringement, at least where actual damages are unworkable. The Copyright Act of 1790 included a provision awarding the copyright owner fifty cents for every sheet of an unauthorized copy that was printed, published, imported or exposed to sale.<sup>76</sup> Statutory damages should remain squarely in the next great copyright act irrespective of section 412. However, there may be plenty to do on the edges, including providing guidance to the courts (e.g., in considering whether exponential awards against individuals for the infringement of large numbers of works should bear a relationship to the actual harm or profit involved), and finding new ways to improve the public record of copyright ownership.

#### 4. The Digital Millennium Copyright Act

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

The section 512 safe harbors in particular have generated more than their fair share of litigation on issues such as eligibility for the safe harbor, inducement and monitoring.<sup>77</sup> Some of these issues were imaginable at the time at the time of their enactment, and others were not. There are other concerns that go more generally to the question of whether the burdens of notice and takedown are fairly shared between copyright owners and intermediaries.

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75. Jane C. Ginsburg, *The U.S. Experience with Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311, 345–46 (2010); see also Council Directive 2006/116, 2006 O.J. (L 372) 1 (EC) (offering a longer term of protection where the author is identified).

76. See Act of May 31, 1790, 1 Stat. 124.

77. See, e.g., *UMG Recordings, Inc. v. Shelter Capital Partners*, No. 09-55902, at 33 (9th Cir. Mar. 14, 2013) (concluding that “merely hosting a category of copyrightable content, such as music videos, with the general knowledge that one’s services could be used to share infringing material, is insufficient” to prove that a website had actual knowledge of infringing activity); *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012) (distinguishing actual knowledge—or subjective awareness of specific infringing acts—from “red flag” knowledge, which the court described as an objective standard turning on whether the service provider was aware of facts from which a reasonable person would infer the existence of specific infringing acts); *Columbia Pictures Indus., Inc. v. Fung*, 2009 U.S. Dist. LEXIS 122661 (C.D. Cal. Dec. 21, 2009) (concluding that a file-sharing service that actively induced infringement was ineligible for the safe harbors because the safe harbors are intended to protect passive good faith conduct).

The DMCA also created legal protections for the technological protection measures used by copyright owners, as well as a triennial rulemaking process by which proponents could make the case for temporary exemptions to such measures to allow circumvention in cases where it is necessary to permit noninfringing activity.<sup>78</sup> The Copyright Office has conducted five rulemakings since 1998.<sup>79</sup> Each rulemaking is conducted de novo and includes an evidentiary record developed during the proceedings. Congress intended the rulemaking to provide “a fail-safe mechanism” for noninfringing uses, including fair uses.<sup>80</sup> Like much of Title 17, the mechanisms of the rulemaking may benefit from congressional review at this time, but it generally has served the nation well.

During the last proceeding, concluded in 2012, the Copyright Office recommended, and the Librarian granted, six exemptions that ran the gamut of technological issues. These included exemptions for persons with print disabilities using assistive technologies like screen readers, as well as exemptions for teachers and documentary filmmakers accessing protected motion pictures in the course of their work.<sup>81</sup>

When the Copyright Office has not recommended exemptions, it has been because the balancing of the factors set forth in section 1201 did not favor doing so—that is, because the legal or evidentiary standards (or both) had not been met. In the most recent rulemaking, the Office recommended against granting an exemption to permit “jailbreaking” of videogame consoles because the proponents did not establish that there were adverse effects stemming from the prohibition—namely because the record revealed myriad alternatives to achieve the proponents’ intended purpose which did not require circumvention. In the context of unlocking cell phones, the Copyright Office was again asked to consider the exemption that it had crafted in two of the previous four rulemakings. It concluded that the exemption should continue for “legacy” phones, i.e. phones already purchased by consumers on or before January 26, 2013, but was unable to extend the recommendation to new phones in light of the evidentiary record, which demonstrated that carriers were offering unlocked cell phones in the marketplace, and that consumers could therefore choose to purchase them over the next three

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78. See 17 U.S.C. § 1201 (2012).

79. The Conference Report on the DMCA states:

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

H.R. REP. NO. 105-796, at 64 (1998); see also *Section 1201 Exemptions to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/1201> (last visited Apr. 5, 2013).

80. H.R. REP. NO. 105-551, pt. 2, at 36 (1998).

81. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260 (Oct. 26, 2012) (to be codified at 37 C.F.R. pt. 201).



years.<sup>82</sup> While the rulemaking process is necessarily narrow, it sits at a dynamic intersection of technology, emerging markets, the protection of intellectual property, fair use and other nonfringing activities. It therefore often serves as a barometer for policy concerns and policy action beyond the confines of the statute.<sup>83</sup>

## 5. Digital First Sale

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

As for its role in the digital realm, the Copyright Office conducted an early study for Congress in 2001.<sup>85</sup> In part, the Office addressed the question of whether the first sale doctrine should be modified to allow users to transmit digital copies of creative works without the consent of copyright owners. At that time, the Office recommended against doing so, noting that transmission of works interfered with the copyright owners’ control, but acknowledged that the issues may require further

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82. See U.S. Copyright Office, *Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights*, at 45–47, 79 (Oct. 2012) [hereinafter *Recommendation of the Register of Copyrights*].

83. See, e.g., David R. Edelman, *It’s Time to Legalize Cell Phone Unlocking*, WHITE HOUSE, <https://petitions.whitehouse.gov/response/its-time-legalize-cell-phone-unlocking> (last visited Apr. 5, 2013) (Official White House response to a petition to “Make Unlocking Cell Phones Illegal”); *Statement from the Library of Congress Regarding White House Statement Today in Response to a Petition on Section 1201 Rulemaking*, LIBRARY OF CONG., (Mar. 4, 2013), <http://www.loc.gov/today/pr/2013/13-041.html>. As of this writing, several bills are pending. From time to time, the Copyright Office has also noted other issues of public policy in the context of the rulemaking analysis, including most recently the need to update provisions for persons who are blind or have other print disabilities. See, e.g., *Recommendation of the Register of Copyrights*, *supra* note 82, at 24; see also 159 CONG. REC. S1,594 (daily ed. Mar. 11, 2013) (statement of Sen. Leahy on the introduction of the Unlocking Consumer Choice and Wireless Competition Act), 159 Cong Rec S1594, at \*S1,594 (“Unfortunately, in its most recent proceeding, there was not a sufficient record for the Library to continue the cell phone exemption, despite the strong merits of the rule. Our legislation restores the important exemption that had been in effect in previous years. Although Congress has stepped in in this instance to restore an important policy objective, I urge parties in future rulemakings to provide a more full record so that the rulemaking process can proceed as it was designed.”); *House Judiciary Members Introduce Legislation to Restore Consumers’ Ability to Unlock Cell Phones*, COMM. ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES (Mar. 14, 2013), <http://judiciary.house.gov/news/2013/03142013.html> (“The quality of the DMCA process depends upon the quality of the record. Future participants in the process should build an adequate record upon which an exemption may be based,” Subcommittee Ranking Member Watt said.”).

84. 17 U.S.C. § 109(a) (1976).

85. See SECTION 104 REPORT, *supra* note 33.

consideration at some point in the future.<sup>86</sup> The report explained:

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

More than a decade later, the doctrine of first sale may be difficult to rationalize in the digital context, but Congress nonetheless could choose to review it, much as it considered the issues of renewal registration and termination in 1976.<sup>88</sup> On the one hand, Congress may believe that in a digital marketplace, the copyright owner should control all copies of his work, particularly because digital copies are perfect copies (not dog-eared copies of lesser value) or because in online commerce the migration from the sale of copies to the proffering of licenses has negated the issue. On the other hand, Congress may find that the general principle of first sale has ongoing merit in the digital age and can be adequately policed through technology—for example, through measures that would prevent or destroy duplicative copies. Or, more simply, Congress may not want a copyright law where everything is licensed and nothing is owned.

## 6. Exceptions and Limitations

Constructing the next great copyright act will require many discussions about the place given to exceptions and limitations.<sup>89</sup> These include: updating baseline standards for libraries and archives, crafting a digital age Chafee Amendment (for print disabilities), addressing the ecosystem of higher education institutions and markets, and possibly considering clarity in personal use activities. While fair use can also be helpful to users of copyrighted works in appropriately tailored circumstances, it requires an intensive application of the facts at hand and is therefore ill-suited as a vehicle for bright line rules or more systematic activities of users. Nonetheless, exceptions and the fair use provisions should be viewed as complements within the law.<sup>90</sup>

The Copyright Office has been focused on the section 108 library exceptions for

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86. *See id.* at 73.

87. *Id.* at xx.

88. *See supra* text accompanying note 8.

89. Article 9(2) of the Berne Convention first outlined what is known as the “three step test,” and applies that test to the right of reproduction. The WTO TRIPS Agreement, in Article 13, expanded the three step test to apply to all rights contained in the TRIPS Agreement, and states: “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” Furthermore, the two WIPO “Internet treaties,” the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, reiterated the three step test for the exclusive rights provided in those treaties (WCT Article 10 and WPPT Article 16).

90. Section 108(f)(4) includes an express savings clause specifically excepting fair use from the discussion of § 108 limitations. 17 U.S.C. § 108(f)(4) (2006) (“Nothing in this section . . . in any way affects the right of fair use as provided by section 107.”).

several years. More broadly, its work on orphan works has generated several hearings in past sessions of Congress and ongoing interest in the intellectual property community.<sup>91</sup> These issues are the subject of ongoing public inquiries, symposia and recommendations. Likewise, the question of special provisions for persons who are blind or have other print disabilities is ripe for review, having been front and center over the past few years, including in Geneva, in the courts, in the section 1201 rulemaking, and in a government study.<sup>92</sup>

Higher education activities could also benefit from congressional direction. As noted previously, Congress deferred the option of a general education exception in 1976. However, it did enact a special exception for distance education in 2002,<sup>93</sup> following a study from the Copyright Office.<sup>94</sup> Unfortunately, the complexity of the provision, as enacted, has largely undermined its usefulness in the eyes of many educators. Congressional review of higher education—which is so dynamic—would be beneficial, especially because the legal framework must ultimately support and encourage a variety of copyright objectives. These include: markets that produce quality educational materials, affordable licensing schemes, open source materials, the reasonable application of fair use, library exceptions, academic freedom—including the freedom of faculty to disclaim copyright in their own works—and formats that are accessible to persons with print disabilities.

## 7. Licensing

Congress is aware that the development of newer, more efficient licensing models is essential to the digital marketplace and the many submarkets that comprise it. Some of this does not require legislation and should merely be encouraged, i.e. by reviewing the growth of direct licensing, microlicensing, voluntary collective licensing and private and public registries.<sup>95</sup> In other

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91. See Letter from David J. Kappos, Under Sec’y of Commerce for Intellectual Prop., to Maria A. Pallante, Register of Copyrights (Jan. 2013) (expressing his support for the “work that the U.S. Copyright Office is doing to examine the problem of orphan works” and noting that “it is in the leadership interests of the United States to explore solutions”), reprinted in U.S. COPYRIGHT OFFICE, ORPHAN WORKS ANALYSIS, Part II (forthcoming 2013).

92. See *Recommendation of the Register of Copyrights*, supra note 82, at 16; Advisory Comm’n on Accessible Instructional Materials, *Report of the Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities* (Dec. 2011), available at [www2.ed.gov/about/bdscomm/list/aim/meeting/aim-report.doc](http://www2.ed.gov/about/bdscomm/list/aim/meeting/aim-report.doc); WIPO, *Draft Text of an International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities*, SCCR/25/2 REV. (2013), available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_25/sccr\\_25\\_2\\_rev.doc](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_25/sccr_25_2_rev.doc) (text of draft instrument currently in negotiation at the World Intellectual Property Organization).

93. See 17 U.S.C. § 110(2).

94. See U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DISTANCE EDUCATION (1999), available at [http://www.copyright.gov/reports/de\\_rprt.pdf](http://www.copyright.gov/reports/de_rprt.pdf).

95. In 2011, the Copyright Office, at the direction of Congress, explored in public hearings whether, after more than thirty-five years of experience with statutory licenses facilitating the retransmission of broadcast signals by cable and satellite providers, the time had come to eliminate the licenses in favor of one or more marketplace licensing mechanisms. The Office concluded that, while business models based on sublicensing, collective licensing and/or direct licensing may be relatively

instances, Congress may need to consider legislating new forms of licensing regimes as appropriate, e.g. by updating, or in some cases repealing, compulsory licenses, or perhaps by enacting extended collective licensing models.<sup>96</sup>

Music reform is a particularly important licensing topic. The mechanical license for musical works—over a century old and currently embodied in section 115 of the Act—was established by Congress out of a concern that a single entity might monopolize the piano roll market by buying up exclusive rights. Over time, this compulsory license—with its government-established rate—has become deeply embedded in the music industry. In the deliberations leading to the adoption of the 1976 Act, then-Register Kaminstein suggested that monopoly was no longer much of a concern and the license should perhaps be repealed.<sup>97</sup> But music publishers did not ultimately pursue that possibility, opting instead for an adjustment to the two-cent rate to two and three-quarters, and the license remains in effect today.

Although amended in 1995 to clarify that it covers digital phonorecord deliveries as well as physical formats, the basic song-by-song licensing mechanism of the mechanical license has remained unchanged for over one hundred years. But because digital service providers have varying business models, ranging from on-demand streaming services to permanent downloads to music bundled with other products, the rates adopted under section 115 have become increasingly complex. In recent years, some music publishers—especially larger ones—are choosing to license their reproduction and distribution rights, and even their public performance rights, directly to digital services instead of through third-party administrators such as The Harry Fox Agency, ASCAP, BMI or SESAC. Meanwhile, music services tell us that it is essential to have the full repertoire of musical works available to be a viable player in the digital marketplace.<sup>98</sup>

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

Congress is already taking another look at section 114, the statutory licensing provisions for webcasters, satellite radio and others seeking to engage in the digital

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undeveloped in this context, they are feasible alternatives to secure the public performance rights necessary to retransmit copyrighted content in most instances. See SECTION 302 REPORT, *supra* note 35.

96. Extended collective licensing would require Congress to enact a framework by which works are made available for certain purposes without the need for case by case or prior permission, but in which representatives of the various stakeholders negotiate fees, mechanisms for opting out and other key terms. For more information, see MASS DIGITIZATION REPORT, *supra* note 37.

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

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

performance of sound recordings.<sup>99</sup> As the November 2012 hearing before the House Subcommittee on Intellectual Property, Competition and the Internet highlighted, the rate setting concerns of the webcasting community cannot be viewed in isolation; they are tied to the overall statutory licensing structure and even the scope of exclusive rights afforded for sound recordings under the Copyright Act.

To make a long story short, Congress could make a real difference regarding gridlock in the music marketplace. Considering the issues comprehensively may be the most productive course of action.

## 8. Deposits for the Library of Congress

The Library of Congress receives books, films, music and other copyright deposits through two separate provisions of the Copyright Act: (1) section 408 deposits, which are the works copyright owners submit to the Copyright Office for purposes of copyright registration; and (2) section 407 deposits, which are those that the copyright owners of published works are required to submit for the national collection within three months of publication and which the Copyright Office has legal authority to demand in instances of noncompliance.<sup>100</sup> The provisions complement each other, and both should remain in some form in the next great copyright act. They may, however, require some fresh thinking, particularly as to the evolving state of the Library's collection needs.

With respect to the registration system, the Library enjoys a unique place in the copyright law, as it has been both the custodian and a key beneficiary of the system since 1870.<sup>101</sup> However, its ability to evolve in the twenty-first century is directly tied to its ability to collect and preserve a variety of content, including digital content. In the past, in some instances, the Copyright Office was able to align the format requirements for copyright deposits with the specific needs of the Library. For example, under the discretionary authority granted to the Register of Copyrights, the Office created special group options for newspapers in 1992, making it easier for newspapers to register but also facilitating the formats the Library desired for preservation (in this example, microfilm) and would otherwise have had to purchase.<sup>102</sup>

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99. See Internet Radio Fairness Act of 2012 ("IRFA"), H.R. 6480, 112th Cong. (2d Sess. 2012). Proponents of IRFA argue that Internet radio is disadvantaged under the current Copyright Royalty Board system and urge that what they perceive as the more flexible factors set forth in 17 U.S.C. § 801(b) for satellite radio and other digital users be substituted for the "willing buyer/willing seller" standard currently applicable to webcasters. The legislation has drawn substantial opposition, including from the artist community, which has emphasized the lack of a terrestrial performance right for radio. Both sides, in other words, are arguing for parity in the royalty rate structure across different platforms.

100. 17 U.S.C. §§ 407, 408 (2012).

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

102. Activities like this largely are carried out by the Register, in accordance with the statute. The exception is instances where regulations are finally promulgated, in which case the Librarian, as head of the agency for purposes of the Constitution and as reflected in the statutory framework, signs the final

As a matter of law, copyright registration of course predates the Library and has other longstanding functions. Registration is prima facie evidence of copyrightability and copyright ownership, a condition of the availability of statutory damages, and a catalyst for the public record of copyright information. The authoritative determination of copyrightability provides guidance to the courts in a number of areas, including questions related to the scope of protection and any limitations or presumptions reflected in the certificate. Registration certificates are frequently required by businesses to conclude intellectual property transactions, secure insurance policies, and settle matters of litigation, not only within the United States but also in deal making and litigation around the globe. It therefore must be evaluated broadly, against the objectives of the greater copyright law.<sup>103</sup>

In fact, as the Library seeks to acquire and preserve websites, electronic serials and the other kinds of twenty-first century authorship, registration may not be enough of a tool. Instead, the mandatory deposit provisions may need to play a greater role generally, and may need granular adjustments to make them viable in the digital environment. For example, many digital works may not be “published” within the meaning of the “best edition” requirements of current law, placing them outside the parameters of section 407. It is also true that the formats required by the Library may not be the formats that actually are published by the copyright owner, and it is further true that the Library’s collection of digital deposits may require clearer rules regarding the security of files and the conditions for making them available. In any event, the next great copyright act should ensure that the mandatory deposit provisions are flexible enough to support the needs of the national collection.

## B. THINKING A LITTLE MORE BOLDLY

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

### 1. Offsetting Copyright Term

Copyright term is a global issue and any discussion of U.S. term therefore should acknowledge international norms. Nonetheless, the current term—in most circumstances, the life of the author plus seventy years—is long, and the length has consequences.<sup>104</sup> One has to assume that *Eldred v. Ashcroft* is the last word as to

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rule. See 17 U.S.C. § 702 (1976).

103. See ACCORD REPORT, *supra* note 74 (noting that, while important, “[l]ibrary acquisitions policy should not drive copyright registration policy”).

104. 17 U.S.C. § 302 (1998) (setting forth general term, including a term for works made for hire and pseudonymous and anonymous works of ninety-five years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first). An informal count shows that approximately eighty countries (and probably more) have adopted life plus seventy years as the standard

whether life-plus-seventy is a constitutionally permissible term.<sup>105</sup> However, from a policy perspective, that is no longer the relevant question. The question now is how to make the long term more functional.

The Copyright Office is interested in pragmatic solutions that are appropriate and meaningful for the twenty-first century. Thus the Office's 2006 orphan works proposal suggested limiting remedies when copyright owners are unlocatable, effectively freeing many works from the long tail of time.<sup>106</sup> Similarly, the Office appreciates section 108(h), which allows libraries and archives to copy, distribute, display or perform any published work in its last twenty years of protection for purposes of preservation, scholarship or research. Of course, other limitations on the law, including fair use, effectively offset term as well, albeit in limited circumstances.

Perhaps the next great copyright act could take a new approach to term, not for the purpose of amending it downward, but for the purpose of injecting some balance into the equation. More specifically, perhaps the law could shift the burden of the last twenty years from the user to the copyright owner, so that at least in some instances, copyright owners would have to assert their continued interest in exploiting the work by registering with the Copyright Office in a timely manner.<sup>107</sup> And if they did not, the works would enter the public domain.<sup>108</sup>

## 2. Making Room for Opt-outs

The United States has long had opt-in licensing schemes that permit authors to license their exclusive rights by voluntarily opting into a collective management organization. We have the examples of ASCAP, BMI and SESAC in the music industry and the Copyright Clearance Center in the literary space.<sup>109</sup> In the words

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for works of authors, and it is incorporated in seventeen free trade agreements of the United States.

105. 537 U.S. 186 (2003).

106. See ORPHAN WORKS REPORT, *supra* note 34.

107. If U.S. history with respect to renewal registration of copyright is any indication, very few copyright owners—in this context, heirs and successors in interest rather than the author herself—will actually do so. See U.S. COPYRIGHT OFFICE, STUDY NO. 31, *supra* note 9, at 220 (stating that, of works registered in 1931–1932, one third of musical compositions, 7% of books and 11% of periodicals had been renewed). In contrast, a 2007 study by Stanford University found that an average of 30.8% of books published between 1923 and 1963 had their copyright registration renewed. See STANFORD UNIV. LIBRARIES & ACADEMIC INFO. RES., '23-'64 IMPRINT COPYRIGHT DETERMINATOR: FINAL REPORT 4 (2007), available at [http://collections.stanford.edu/copyrightrenewals/files/FinalNarrative\\_18Sept07.pdf](http://collections.stanford.edu/copyrightrenewals/files/FinalNarrative_18Sept07.pdf).

108. This should not, as far as I can see, present insurmountable problems under international law. The Berne Convention requires a minimum term of life plus fifty years, defers to member states as to the treatment of their own citizens, and provides the term of protection of the country of origin for the works of foreign nationals. See Berne Convention for the Protection of Literary and Artistic Works, *supra* note 2, art. 7. At the same time, copyright owners who choose to assert their continued interests would have the full benefit of the additional twenty years, subject to the requirement of additional registration.

109. Some collective management frameworks raise competition issues that would need to be reviewed and reconciled if collective licensing is part of the answer for consumers and market gridlock in the digital age. For example, both ASCAP and BMI operate under consent decrees with the U.S. Department of Justice that are designed to protect licensees from price discrimination or other anticompetitive behavior. Although the terms vary somewhat, under these consent decrees ASCAP and

of one professor, speaking here at Columbia just a couple of years ago, collective management organizations can be attractive because they “can put [the] Humpty Dumpty of rights back together again by allowing users to obtain all the rights necessary for a particular use.”<sup>110</sup>

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

Courts have affirmed the fact that fundamental changes like this are the domain of Congress, because Congress is designed to weigh the equities of the public interest and to craft broadly applicable policies. A court, by contrast, must apply the facts and law as it finds them. This is why the Supreme Court noted in *Eldred v. Ashcroft* that “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives,”<sup>111</sup> and why Judge Chin, in rejecting the proposed settlement between Google and a class of authors and publishers, said that “the establishment of a mechanism for exploiting unclaimed books is a matter more suited for Congress” than the courts.<sup>112</sup> Among the questions Congress could consider are what kinds of uses might benefit from opt-out regimes (e.g., certain kinds of uses in higher education or certain kinds of library access), and what the actual terms and opt-out mechanisms should entail.<sup>113</sup>

### 3. Making the Law More Accessible

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

When the Copyright Act was enacted, it contained seventy-three sections, and the entire statute was fifty-seven pages long. Today, it contains 137 sections and is

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BMI administer the public performance right for their members’ musical works on a nonexclusive basis and offer the same terms to similarly situated licensees. See *United States v. Am. Soc’y of Composers, Authors & Publishers*, No. 41-1395 (WCC), 2001 U.S. Dist. LEXIS 23707, (S.D.N.Y. Jun. 11, 2001); *United States v. Broad. Music, Inc.*, No. 64 Civ. 3787, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. Nov. 18, 1994).

110. Daniel J. Gervais, *Keynote: The Landscape of Collective Management Schemes*, 34 COLUM. J.L. & ARTS 591, 599 (2011); see also MASS DIGITIZATION REPORT, *supra* note 37.

111. 537 U.S. 186, 212 (2003).

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

113. See generally MASS DIGITIZATION REPORT, *supra* note 37.



280 pages long, nearly five times the size of the original. As former Register Marybeth Peters observed in 2007, the current “copyright law reads like the tax code, and there are sections that are incomprehensible to most people and difficult to me.”<sup>114</sup>

This is not merely a paradox; it is damaging to the rule of law.<sup>115</sup> The next great copyright act should be as accessible as possible.

### III. THE POLICY PROCESS

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

Because there are many more stakeholders than in previous revisions, it will be both harder and easier for Congress to weigh the issues. Why revision will be difficult is obvious. Not since the industrial revolution has there been a force like the Internet, and it has changed both the creation and dissemination of authorship. The copyright world, which once had predictable and even pristine demarcations, has morphed dramatically.<sup>116</sup>

It is also difficult to separate the medium from the message. As one journalist has observed, “[t]echnology executives like to suggest that media companies are selling buggy whips in the age of the automobile, but that doesn’t hold up. . . . So far, content generated by online businesses can’t compete with that from traditional media companies.”<sup>117</sup>

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

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114. Rob Pegoraro, *Debating the Future of Music*, WASH. POST (Sept. 18, 2007), [http://voices.washingtonpost.com/fasterforward/2007/09/debating\\_the\\_future\\_of\\_music.html](http://voices.washingtonpost.com/fasterforward/2007/09/debating_the_future_of_music.html).

115. The Section 108 Study Group found that many practitioners are confused by the basic organization of the library exception. See SECTION 108 STUDY GRP., THE SECTION 108 STUDY GROUP REPORT ix–x, 93–94 (2008), available at <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>. The same is true in the world of musical works and compulsory licenses, which are supposed to replace a dysfunctional market, but not at the expense of usability. Sections 114 and 115 are highly technical and confusing: new business entrants and even established users struggle with interpreting the language, which is perhaps appropriately the subject of criticism. And then there is the *Kirtsaeng* case, in which the Supreme Court was asked to interpret the phrase “lawfully made under this title”—five words that appear in five different sections of the Copyright Act—which has sparked intense debate over the first sale doctrine, importation, and geographical licensing. See *Kirtsaeng v. John Wiley & Sons, Inc.*, No.11-697 (U.S. Mar. 19, 2013).

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

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

we need content that is licensed, content that is free, or in some cases, content that is licensed for free.

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

Of course, government actors also have equities in copyright law and would be essential to the deliberation process of a general revision. As discussed above, the Copyright Office has a long history and deep expertise in the copyright law, has a direct advisory relationship with Congress, and has responsibilities for administering many copyright provisions.<sup>118</sup> The Office also interacts with many other agencies on a daily basis, which in turn have specific perspectives and statutory roles. This is how U.S. intellectual property policy works at the government level, and it is another reflection of the public interest.<sup>119</sup>

I would like to leave the topic of process by stating something that I hope is uncontroversial. The issues of authors are intertwined with the interests of the public. As the first beneficiaries of the copyright law, authors are not a counterweight to the public interest but are instead at the very center of the equation. In the words of the Supreme Court, “[t]he immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”<sup>120</sup>

Congress has a duty to keep authors in its mind’s eye, including songwriters, book authors, filmmakers, photographers and visual artists. Indeed, “[a] rich culture demands contributions from authors and artists who devote thousands of hours to a work and a lifetime to their craft.”<sup>121</sup> A law that does not provide for authors would be illogical—hardly a copyright law at all. And it would not deserve the respect of the public.

This does not mean that all authors want identical legal treatment. On the contrary, the diversity of authorship is part of the fun when it comes to copyright law, and the law should be accommodating. For example, some authors prefer

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118. See 17 U.S.C. § 701 (2012).

119. The U.S. Patent and Trademark Office conducted a “listening tour” in 2008 and, with the greater Department of Commerce, is preparing a comprehensive discussion document (a green paper) on copyright issues in the digital environment. The National Academy of Sciences is preparing a report that examines research methodology in the context of copyright policy. See *Copyright in the Digital Era: Building Evidence for Policy*, BOARD ON SCI., TECH. & ECON. POL’Y, [http:// sites.nationalacademies.org/PGA/step/copyrightpolicy/index.htm](http://sites.nationalacademies.org/PGA/step/copyrightpolicy/index.htm) (last visited Apr. 21, 2013) (describing the project). The Department of Justice, the State Department, the Intellectual Property Enforcement Coordinator and other parts of the White House, and the Office of the United States Trade Representative also interact with the copyright system and the Copyright Office in one way or another.

120. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

121. Scott Turow, Paul Aiken & James Shapiro, *Would the Bard Have Survived the Web?*, N.Y. TIMES, Feb. 15, 2011, at A29.

receiving credit to receiving payment, and some embrace the philosophy and methodology of Creative Commons, where authors may provide advance permission to users or even divest themselves of rights.<sup>122</sup> The law must be flexible enough to accommodate these decisions.

#### IV. EVOLUTION OF THE COPYRIGHT OFFICE

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

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

Of course there is always more to do, and although Congress has long relied upon the expertise of the Copyright Office, it has been slow to increase the Office's regulatory role.<sup>123</sup> In fact, from 1897 to 1998, the role was largely, though not entirely, administrative, meaning most regulations addressed administrative questions, i.e., rules pertaining to the registration process, the collection of fees, and the administration of certain aspects of compulsory licenses.<sup>124</sup> As more than one professor has noted, the Office has had very little opportunity to apply its expertise, leading Congress to write too much detail into the code on matters that are constantly changing, such as economic conditions and technology.<sup>125</sup>

Evolving the Copyright Office should be a major goal of the next great copyright act. In short, it is difficult to see how a twenty-first century copyright law could function well without a twenty-first century agency.<sup>126</sup> To the extent that

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122. See CREATIVE COMMONS, <http://creativecommons.org/> (last visited Apr. 18, 2013).

123. See Terry Hart, *Copyright Reform Step Zero*, 19 INFO. & COMM. TECH. L. 147 (2010) (noting that copyright law will become increasingly unable to keep up with technological and other challenges while also becoming increasingly resistant to reform efforts).

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

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

126. The Constitution permits Congress to delegate certain activities to agencies under certain

patent law offers any guidance, it is notable that the importance of the legal and business functions of the U.S. Patent and Trademark Office has been acknowledged over time, most recently through the amendments of the America Invents Act of 2011.<sup>127</sup>

In truth, many constituents want the Copyright Office to do better the things it already does, and to do a host of new things to help make the copyright law more functional.<sup>128</sup> For example, some people would like the Office to administer enforcement proceedings (such as a small copyright claims tribunal), offer arbitration or mediation services to resolve questions of law or fact (for example, where rights are murky or a license is unclear), issue advisory opinions (for example, on questions of fair use<sup>129</sup>), and engage in educational activities (like promulgating best practices or providing copyright guidance to teachers). The Office might also play a role in ensuring the governance or transparency of critical twenty-first century actors, such as content registries or collective licensing organizations.

There are some practical obstacles. Although migrating the Copyright Office to the next generation of services is a primary focus of Office staff at this time,<sup>130</sup>

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circumstances, provided that the delegation is not an end run around the distinct roles of the legislative and executive branches when it comes to deliberating upon and signing new laws. Justice Blackmun explained:

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

*Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (internal citation omitted). The Justices have made it clear that in applying such authority, an agency may “exercise judgment on matters of policy,” including “the determination of facts and the inferences to be drawn from them in the light of the statutory standards” as well as “the formulation of subsidiary administrative policy within the prescribed statutory framework.” *Id.* at 378–79 (internal citation omitted); *see also* *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1341–42 (D.C. Cir. 2012), *petition for cert. filed*, No. 12-926 (U.S. Jan. 25, 2013) (concluding that the Library “is a freestanding entity that clearly meets the definition of ‘Department’” for purposes of the Appointments Clause and that the Library and the Copyright Royalty Board have the power to promulgate copyright regulations, to apply the statute to affected parties, and to set rates and terms on a case by case basis).

127. For example, the statute authorizes the U.S. Patent and Trademark Office to deposit a portion of patent and trademark fees into a reserve fund, which the Office may access and spend as needed to run its operations, irrespective of its annual appropriations from Congress. *See* Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified as amended in scattered sections of 35 U.S.C.).

128. *See, e.g.*, Michael Weinberg et al., *A Copyright Office for the 21st Century: Recommendations to the New Register of Copyrights*, PUBLIC KNOWLEDGE (Dec. 2010), <http://www.publicknowledge.org/files/docs/ACopyrightOfficeforthe21stCentury.pdf>.

129. *See, e.g.*, Michael W. Carroll, *Fixing Fair Use*, N.C. L. REV. 1087, 1123 (2007) (proposing the establishment of a Fair Use Board within the U.S. Copyright Office to render advisory opinions on whether proposed uses of copyrighted works are fair). Some communities have begun to create and adopt fair use practices independently. *See, e.g.*, *Fair Use*, CTR. FOR SOC. MEDIA, <http://www.centerforsocialmedia.org/fair-use>.

130. The Office is in the process of evaluating potential improvements and technical enhancements to the information technology platforms that support its registration and recordation functions, including its online registration system. The Office has identified a number of key focus areas, including

much will depend on technical capacity and resources.<sup>131</sup> Moreover, not everyone is optimistic about the future of the Copyright Office. As recently as 2010, a group known as the Copyright Principles Project discussed the Office in meetings it held in Berkeley. It wrote:

The information that the Office currently collects and administers as part of the registration system is the kind that everyone expects to be accessible through something like a simple web search. More importantly, transactions involving copyrighted works often take place in the same hyper-efficient environment, and the parties to those transactions require access to copyright information at a speed and in a format that matches that efficiency. While the Office has observed and anticipated these developments and moved many of its functions and services online, the reality is that the functionality of the registry remains woefully behind what leading-edge search and database technologies permit.<sup>132</sup>

The Copyright Office agrees that a twenty-first century copyright law requires a twenty-first century agency.

## V. CONCLUSION

It is a point of pride for the United States that our past great copyright laws have served the nation so well. American experts are fond of pointing out that we have the most balanced copyright law in the world, as well as a robust environment of free expression and an equally robust copyright economy.<sup>133</sup>

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improved system navigation and user interface, application of mobile technologies, improved process tracking, enhanced search capabilities, and bulk data transfer (often called “business-to-business” or “system-to-system”) capabilities. See *Technological Upgrades to Registration and Recordation Functions*, 78 Fed. Reg. 17,722 (Mar. 22, 2013).

131. As an agency that supports both the marketplace and the nation’s cultural heritage, the Copyright Office is a bargain. However, it will need more resources to support the needs of the twenty-first century. Currently, two-thirds of the Office’s budget (less than \$40 million) comes directly from spending authority, i.e., congressional approval to spend the fees the Office collects for registration and other services to copyright owners. These revenues are nowhere near the revenues generated by the patent system, but they reflect the fact that registration is optional. One-third of the budget, approximately \$15 to \$18 million, comes from appropriated monies and helps fund public services that are for the benefit of the public at large—for example, the public records of copyright ownership, expiration and transfers. These appropriated dollars should be further reviewed against another public benefit, the hundreds of thousands of deposits provided to the Library’s collection at a value of \$30 million per year.

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

133. See STEPHEN E. SIWEK, INT’L INTELLECTUAL PROP. ALLIANCE, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2011 REPORT 4 (2011), available at <http://www.iipa.com/pdf/2011CopyrightIndustriesReport.PDF> (reporting that total copyright industries contributed \$1.627 trillion to the U.S. economy in 2010, which accounted for 11.10% of total GDP); THOMAS ROGERS & ANDREW SZAMOSSZEGI, COMPUTER & COMM’NS INDUS. ASS’N, FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE 6 (2011), available at <http://www.ccia.net.org/CCIA/files/ccLibraryFiles/Filename/00000000526/CCIA-FairUseintheUSEconomy-2011.pdf> (reporting that industries relying on fair use contributed an average of \$2.4 trillion to the U.S. economy in 2008 and 2009, which accounted for approximately 17% of total U.S. GDP).

Still, no law is perfect. The 1976 Act, which was a fair and remarkable achievement by many accounts, did not come close to the bleeding edge of technology. When all was said and done, Barbara Ringer acknowledged the shortcomings of the new law, calling it “a good 1950 copyright law.”<sup>134</sup> “[I]t may be resilient enough to serve the public interest for some time to come,” she said, “[b]ut some of its inadequacies are already becoming apparent, and no prophet is needed to foretell the need for substantial restructuring of our copyright system before the end of this century.”<sup>135</sup>

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

In closing, I would like to encourage Congress and all of you here tonight not only to think about copyright law but to think big, perhaps by harnessing all of the vision, commitment, impatience, concern and optimism of the nation’s former Registers. The next great copyright act is as possible as it is exciting. Most importantly, it would serve the public interest.

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134. Barbara Ringer, *Authors’ Rights in the Electronic Age: Beyond the Copyright Act of 1976*, 1 LOY. L.A. ENT. L. REV. 1, 4 (1981).

135. *Id.*