

The Next Great Copyright Act, or a New Great Copyright Agency?

Responding to Register Maria Pallante's Manges Lecture

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In March 2013, U.S. Register of Copyrights Maria Pallante gave the Horace S. Manges Lecture at Columbia Law School. Settling into her role as Register, she compared some of the issues of the day to issues that had faced previous Registers, and urged Congress, the copyright bar, the creative community and the public at large to consider beginning work on “The Next Great Copyright Act.”¹

Now, after more than a year of comprehensive review hearings before the House Judiciary Committee’s Subcommittee on Courts, Intellectual Property and the Internet,² and simultaneous inquiries into various copyright topics by the U.S. Patent and Trademark Office (USPTO)³ and by the Copyright Office itself,⁴ it is

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1. See Maria Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013) [hereinafter *The Next Great Copyright Act*] (extended version of Pallante’s Manges Lecture).

2. For a regularly updated list of relevant congressional hearings, see *Congressional Hearings on the Review of the Copyright Law*, U.S. COPYRIGHT OFFICE, <http://perma.cc/CK5D-MVJR> (last visited Feb. 18, 2015).

3. INTERNET POLICY TASK FORCE, DEP’T OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2013) [hereinafter INTERNET POLICY TASK FORCE GREEN PAPER], available at <https://perma.cc/5XPS-FSJJ?type=pdf>; see also U.S. PATENT & TRADEMARK OFFICE, DEP’T OF COMMERCE ROUNDTABLE DISCUSSIONS ON REMIXES, STATUTORY DAMAGES AND DIGITAL FIRST SALE DOCTRINE [NO. 1] (2014), available at <https://perma.cc/VH5E-2QRB?type=pdf> (transcript of the first roundtable discussion in Nashville, TN on May 21, 2014); U.S. PATENT & TRADEMARK OFFICE, DEP’T OF COMMERCE ROUNDTABLE DISCUSSIONS ON REMIXES, STATUTORY DAMAGES AND DIGITAL FIRST SALE DOCTRINE [NO. 2] (2014), available at <https://perma.cc/BA6J-2XME?type=pdf> (transcript of the second roundtable discussion in Cambridge, MA on June 25, 2014); U.S. PATENT & TRADEMARK OFFICE, DEP’T OF COMMERCE ROUNDTABLE DISCUSSIONS ON REMIXES, STATUTORY DAMAGES AND DIGITAL FIRST SALE DOCTRINE [NO. 3] (2014), available at <https://perma.cc/ECB2-VU7R?type=pdf> (transcript of the third roundtable discussion in Los Angeles, CA on July 29, 2014); U.S. PATENT & TRADEMARK OFFICE, DEP’T OF COMMERCE ROUNDTABLE DISCUSSIONS ON REMIXES, STATUTORY DAMAGES AND DIGITAL FIRST SALE DOCTRINE [NO. 4] (2014), available at <https://perma.cc/9PSQ-G89U?type=pdf> (transcript of the fourth and final roundtable discussion in Berkeley, CA on July 30, 2014).

4. Music Licensing Study: Notice and Request for Public Comment, 78 Fed. Reg. 14,739 (Mar. 17, 2014); Study on the Right of Making Available; Comments and Public Roundtable, 79 Fed. Reg. 10,571 (Feb. 25, 2014); Orphan Works and Mass Digitization; Request for Additional Comments and

possible to explore whether a “Next Great Copyright Act” is the best approach to address the challenges facing authors and their audiences, or whether other bold approaches, such as a restructuring of the Copyright Office, might better serve the public interest.

As an advocate for artists and authors, I believe that the Copyright Act must first and foremost serve the public interest, which, as Register Pallante aptly noted in her remarks, is inextricably linked with promoting the well-being of authors and artists.⁵ Put simply, if the public believes that art matters, then its authors matter. Consequently, a Copyright Act that encourages and empowers artists and authors in the creation and dissemination of works of authorship to the public best serves the public interest. These principles have been at the heart of copyright law in the United States since the beginning. Because copyright law is now more than ever also intertwined with the advancement of new technologies, we also cannot ignore the need to ensure a Copyright Act that is as “future proof” as possible. This suggests that a nimble approach to addressing the issues of the day is needed.

Like any law, the laws applicable to creative works must be understandable and respected by those whose activities they govern—authors, distributors and users of copyrighted works, as well as by the general public. In order for creators’ rights to be respected, and in order for authors to benefit from the commercial value generated by their works, the public must understand and respect the law. Comprehensibility is becoming more and more problematic. Register Pallante is not the only one to note that “the copyright law has become progressively unreadable during the very time it has become increasingly pervasive.”⁶ Others have more colorfully referred to the copyright laws as “an obese Frankensteinian monster”⁷ and “a swollen, barnacle-encrusted collection of incomprehensible prose.”⁸

Perhaps it is time to examine the underlying reasons why this is so. Today, no agency exists with comprehensive and independent rulemaking authority in the area of copyright law. The Copyright Office is a department within the Library of Congress, and the Register of Copyrights, as head of that department, is limited to establishing regulations for the administration of functions and duties of her office, subject to the approval of the Librarian of Congress.⁹ In certain limited cases, such as the triennial rulemaking proceeding relating to exemptions from certain provisions of the Digital Millennium Copyright Act (DMCA), the Register is empowered to conduct notice-and-comment rulemaking, but she may only recommend regulations to the Librarian of Congress.¹⁰ Likewise, the USPTO

Announcement of Public Roundtable, 79 Fed. Reg. 7,706 (Feb. 10, 2014).

5. *The Next Great Copyright Act*, *supra* note 1, at 340 (“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.”).

6. *Id.* at 338.

7. Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 557 (2007).

8. Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 3 (2010).

9. See 17 U.S.C. § 702 (2012).

10. See H.R. REP. NO. 105-796, at 64 (1998) (Conf. Rep.) (“The determination will be made in a

executes its duties with respect to intellectual property subject to the policy direction of the Secretary of Commerce.¹¹ Insofar as copyright matters are concerned, the USPTO Director and the USPTO act in consultation with the Register of Copyrights, and the powers and duties of the USPTO do not derogate or alter those of the Copyright Office.¹²

The lack of any administrative agency with comprehensive regulatory authority and expertise to address the many nuanced, technical matters currently at the intersection of copyright and technology law often results in detailed, industry-specific legislative compromises expressed in complicated language hardwired directly into the Act. The end result: the Copyright Act today is many times the length of the original Act, contains numerous sections dealing with very narrowly focused issues¹³ and, on some issues, provides little guidance for courts.¹⁴

All this suggests that rather than continuing on the current path of amending and expanding the Copyright Act, Congress should first take the bolder step of considering how the rules governing copyrighted works are themselves crafted and administered.

Congress could pursue a variety of paths to improve upon the current state of affairs. Even if it does nothing else, before Congress engages in a legislative rewrite of the Copyright Act it should examine how the Copyright Office currently operates and is funded, and should ensure that it has all the necessary infrastructure and critical resources to serve the needs of the public in both administering the copyright law and facilitating the innumerable transactions the public wishes to undertake involving copyrighted works.¹⁵ Devoting attention to the structure and resources of the Copyright Office is consistent with the oversight role that the House and Senate Judiciary Committees exercise over the Copyright Office, and is an important part of exercising their jurisdiction over the intellectual property laws of the United States.¹⁶

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.”); *see also* Section 1201 Exemptions to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works, U.S. COPYRIGHT OFFICE, <http://perma.cc/DEV3-D24L> (last visited Feb. 18, 2015) (“[T]he Librarian of Congress, upon the recommendation of the Register of Copyrights, may exempt certain classes of works from the prohibition against circumvention of technological measures that control access to copyrighted works.”).

11. 35 U.S.C. § 2(c)(5) (2012).

12. *Id.*

13. *See The Next Great Copyright Act*, *supra* note 1, at 338–39.

14. *Id.* at 322–23.

15. The Register has also advocated for an examination of the Copyright Office’s funding and structure. *See, e.g.,* Maria Pallante, *The Next Generation Copyright Office: What It Means and Why It Matters*, 61 J. COPYRIGHT SOC’Y 213 (2014).

16. Note, for instance, that under Senate Rule XXV the confirmation of the Under Secretary for Intellectual Property, the Director of the USPTO and the Intellectual Property Enforcement Coordinator are referred to the Committee on Judiciary for consideration. *See* U.S. SENATE, STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at 25–26 (2013), *available at* <http://perma.cc/2WQS-5NZ6>.

If Congress wishes to leave a lasting and meaningful legacy on the development of copyright law, it could also consider options that remove practical, structural and constitutional impediments to more efficient lawmaking and regulation in copyright. For instance, Congress could expand the authority and autonomy of the Copyright Office to afford greater rulemaking authority, and allow it to take on additional adjudicatory functions while leaving it in its current form as a department of the Library of Congress. Alternatively, Congress could act more boldly to create a new agency that is able to engage both authors and the public to nimbly address technically and substantively challenging copyright issues.

This Article examines the range of options open to Congress. It first identifies the operational challenges facing the Copyright Office in its current configuration. Next, it outlines the benefits and drawbacks of different approaches to reorganizing the Copyright Office. Finally, it demonstrates how several of the major issues likely to be considered in any further review of the Copyright Act could be more readily resolved if Congress could partner with a responsible, well-resourced, politically accountable entity—a Next Great Copyright Office.

I. IMAGINING A NEXT GREAT COPYRIGHT OFFICE

Copyright and the creative industries it supports play an important role in the economic, social and cultural well-being of the public. Copyright is the foundation for a thriving and ever-expanding market of cultural, educational and scientific works, one that in 2012 contributed over one trillion dollars to the U.S. economy and directly employed 5.4 million workers.¹⁷ The significant economic impact of the creative industries in the United States justifies a dedication of specialized resources that fosters the continued development of this sector for the public welfare and facilitates smooth interactions between authors and users of copyrighted works.

With the rise of digital technology, and the ability of individuals to more easily create, manipulate and share works of authorship, copyright law has a broader impact on the day-to-day lives of the public than ever before. Ensuring that the Copyright Office has the resources it needs to serve stakeholders and that copyright law and regulations appropriately keep pace with their increasing importance is critical. Yet with its current budgetary and structural constraints, the Copyright Office faces challenges meeting some of the most basic functions stakeholders expect from it.

A. UNDERSTANDING THE CHALLENGES FACING THE COPYRIGHT OFFICE

The Copyright Office as currently structured faces three major challenges: (1) insufficient funds, staff and infrastructure to efficiently perform its core functions; (2) operational impediments stemming from its integration with the Library of Congress and (3) potential risk of constitutional challenges to its decision-making

17. STEPHEN SIWEK, INT'L INTELLECTUAL PROP. ALLIANCE, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2013 REPORT 11 (2013), *available at* <https://perma.cc/Y8M9-6QY2?type=pdf>.

authority should the Office take on increased regulatory or adjudicatory responsibility. Congress could improve the effectiveness of any future legislative work it undertakes regarding the Copyright Act by first addressing these structural challenges to ensure it has a strong partner in executing future copyright policy decisions.

1. Registration and Recordation

Among the core functions the Copyright Office must serve for stakeholders is maintaining a reliable and efficient registration and recordation system. While registration has been voluntary since passage of the Copyright Act of 1976,¹⁸ authors have important incentives to register their works.¹⁹ Doing so also provides public benefits such as reducing transaction costs, limiting the risk of unintended infringement, facilitating commercial transactions, providing prima facie evidence of the validity of a copyright and constructive notice to third parties of the facts stated in a recorded document, and aiding transferees in perfecting claims where the underlying work has been registered.²⁰ As a result of these benefits, and despite the voluntary nature of registration, the United States attracts more registrations annually than all other major countries with public registries combined.²¹

Despite the central role that registration and recordation plays in the efficient and accurate operation of the marketplace for copyrighted works, the Copyright Office lacks autonomous decision-making power over the planning and implementation of the systems used to facilitate registration. The Copyright Office has testified that the current electronic registration system, implemented in 2008, is not optimal for the needs of its stakeholders and is merely an adaptation of “off-the-shelf software” that “was designed to transpose the paper-based system of the 20th Century into an electronic interface.”²² Moreover, the recordation system by which transfers, licenses and security interests in copyrights are recorded has not been updated for many decades, and relies on manual examination and data entry.²³ These infrastructure challenges are exacerbated by the limited funding available to the Copyright Office and the high rate of vacancies in both registration and

18. Copyright Act of 1976, Pub. L. No. 94-553, § 408 (codified as amended at 17 U.S.C. § 408 (2012)).

19. See 17 U.S.C. §§ 410–12 (2012) (establishing that registering a work, while voluntary, confers various legal benefits to a copyright owner such as the availability of statutory damages and attorneys fees as remedies for works registered prior to their infringement, and a prima facie presumption of validity of the copyright when promptly registered).

20. See Dotan Oliar et al., *Copyright Registrations: Who, What, When, Where, and Why*, 92 TEX. L. REV. 2211, 2217–19 (2014).

21. *Id.* at 2212–13 (citing to STANDING COMM. ON COPYRIGHT & RELATED RIGHTS, WORLD INTELLECTUAL PROP. ORG., NO. SCCR/13/2, SURVEY OF NATIONAL LEGISLATION ON VOLUNTARY REGISTRATION SYSTEMS FOR COPYRIGHT AND RELATED RIGHTS, ANNEX II, at 1 (2005)).

22. *Oversight of the U.S. Copyright Office: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 34 (2014) (statement of Maria Pallante, Register of Copyrights, U.S. Copyright Office).

23. *Id.* at 35.

recording staff.²⁴ As a result, the waiting times for processing copyright registrations are currently 8.2 months for paper applications and 3.3 months for electronic applications.²⁵ Recordation time lags are even longer, averaging 17 months, due to the fact that the work is performed manually and is not online.²⁶ Backlogs of this magnitude are incompatible with modern digital commerce.

Copyright owners and users alike have requested that the Copyright Office improve its registration and recordation system to ensure that, at a minimum, it can offer a searchable database with accurate, interactive and easily accessible information about registrations and renewals. Such a system could potentially link to private databases of information about copyrighted works on a voluntary basis through the use of Application Program Interfaces (APIs).²⁷ Improvements like this could be leveraged commercially by businesses operating in the digital space and would ameliorate some of the policy challenges Congress is currently considering in its review of the Copyright Act such as licensing, enforcement and avoiding the creation of so called “orphan works.”

2. Integration with the Library of Congress’ Systems

Although the Copyright Office resides within the Library of Congress, it serves a market-oriented function distinct from other departments of the Library. Recognizing that a modern and efficiently functioning Copyright Office is vital not only to protecting and promoting creative works, but also to serving the digital economy as a whole, the Senate Appropriations Committee has directed the Government Accounting Office (GAO) to “provide a legal and technical evaluation of the information technology infrastructure that the Copyright Office shares with the Library of Congress” to ensure that any taxpayer investments in modernizing the Copyright Office are used efficiently and effectively.²⁸ Ideally, the GAO report will consider not only technical issues, but also the strategic implications of separating the infrastructures of the Library and the Copyright Office so that each system is optimized to suit its main purposes and clients. Among the benefits of creating separate, purpose-oriented systems for each entity might be maximizing the use of digital deposits for copyright registration and examination, while separately resolving the delivery of deposit copies in appropriate formats for the Library to archive and make available to the public for research and scholarship.

3. Constitutional Concerns

Because the Copyright Office is a department of the Library of Congress, which has a rather unique constitutional structure, the constitutionality of the Librarian’s role in the appointment of officials responsible for administering the copyright laws

24. *Id.* at 37–39.

25. *Id.* at 39.

26. *Id.*

27. *Id.* at 33–34.

28. S. REP. NO. 113-196, at 40–41 (2014).

has been challenged in the past. In *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, a company unhappy with the decision of the Copyright Royalty Board (CRB) judges challenged the constitutionality of the Librarian's appointment of the judges under the Appointments Clause.²⁹ The Appointments Clause requires principal officers of the United States to be appointed pursuant to a Presidential nomination and Senate confirmation, in contrast with inferior officers who may be appointed and dismissed by the heads of executive departments.³⁰ The court held that the CRB judges were acting as principal officers, and that their appointment violated the Appointments Clause. The court corrected the problem by striking part of the statute creating the CRB to clarify that the CRB judges could be appointed and dismissed at will by the Librarian, thus rendering the judges inferior officers. It then also made clear that for purposes of the Appointments Clause, the Librarian is the head of an executive department because the Librarian is appointed by the President, confirmed by the Senate and removable at will by the President.³¹

Although the opinion of the D.C. Circuit as a specialist court on matters of agency law is authoritative, and should put this question to rest, the D.C. Circuit does not have exclusive jurisdiction over such questions. A party "with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights";³² thus, this issue could arise again with another fact pattern in another circuit.³³

II. APPROACHES TO REORGANIZING THE COPYRIGHT OFFICE

Given the operational challenges facing the Copyright Office in its current

29. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012). The CRB is, like the Copyright Office, a department within the Library of Congress. *See* 17 U.S.C. § 801 (2012). And, like the Register of Copyrights, CRB judges are appointed by the Librarian of Congress. *See id.* § 801(a). Thus, constitutional analysis of the appointment of the Register and the CRB judges should be similar.

30. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

31. *Intercollegiate Broad. Sys.*, 684 F.3d at 1341–42.

32. *Buckley v. Valeo*, 424 U.S. 1, 117 (1976).

33. *See, e.g., Eltra v. Ringer*, 579 F.2d 294 (4th Cir. 1978). In *Eltra*, the Fourth Circuit observed that courts, including the Supreme Court, had long ruled on the Copyright Office's regulations without questioning or commenting on its regulatory authority. *See id.* at 299. It would be "incredible," said the court, that a constitutional infirmity (in that case, with the 1909 Act) should have escaped the courts and the bar for so long. *Id.* Accordingly, constitutional challenges to the Librarian's and the Register's regulatory authority should be taken with a grain of salt. However, given that *Eltra* was decided in an era where the Register and Librarian exercised essentially ministerial regulatory authority, it would be imprudent to leave the issues unresolved if Congress is to act in this area, because the inefficiencies and time delays introduced by litigation testing the constitutional bounds of any increased substantive regulatory authority for the office could undermine the goals of reform.

configuration, and the important role it plays for authors, innovators and the public, Congress should consider reorganizing the structure of the Office. There are three basic options for reinvigorating the Copyright Office so that it may better share the burden in administering our copyright laws and limit the need for further expansions of the Copyright Act:

- A. Leave the Copyright Office as a department of the Library of Congress, but address the operational challenges identified earlier as best as possible, and increase the regulatory and adjudicatory role the Copyright Office plays;
- B. Move the Copyright Office to an appropriate executive department, such as the Department of Commerce, relating it to the USPTO or
- C. Create a separate administrative agency, responsible solely for copyright matters.

The following section briefly considers the positive and negative attributes of each of these options, as well as other policy considerations they raise.

A. LEAVING THE COPYRIGHT OFFICE WITHIN THE LIBRARY OF CONGRESS

The Copyright Office's duties have grown over time, and it has evolved to serve not only a crucially important administrative function, but also to provide technical and policy expertise to all three branches of government, as well as to the public directly. *Nimmer on Copyright* catalogs some of the Office's wide-ranging responsibilities thus:

Congress relies extensively on the Copyright Office to provide its technical expertise in the legislative process. It also relies on studies that, from time to time, it requests the Office to prepare. In addition, the Office prepares voluminous materials to guide the public through the maze of copyright registration—and even to answer basic questions about copyright doctrine.

In addition, the Copyright Office also plays a 'leadership role in international copyright matters to develop policies for the improvement of international standards for the protection of intellectual property.' Most notably, the Office exerts significant impact on the resolution of copyright cases in the courts *via* its examination of registration applications and its resulting decision to accept or to reject registration of the deposited work . . . the *prima facie* presumption flowing from the decision to register—and the concomitant lack of presumption flowing from the decision to deny registration—is of inestimable importance to the litigants in any infringement action.³⁴

Nevertheless, Nimmer observes that while courts are willing to defer to Copyright Office practices, "one gathers the impression that their deference ends as soon as their disagreement with the Office's position begins."³⁵

It is also notable that because the Register lacks comprehensive, independent rulemaking authority, the Copyright Office is often asked to undertake studies and

34. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.26, 7-236 (rev. ed. 2013) (internal citations omitted).

35. *Id.* at 7-238.1.

issue recommendations, but no further action is taken.³⁶ Strengthening of the Copyright Office's regulatory and adjudicatory authority would avoid such a waste of resources.

Increasing the authority of the Copyright Office would have all the typical benefits of delegating authority to an expert agency. Agencies can act more expeditiously and effectively in areas where a fact-specific understanding of complex issues is needed. This is harder for legislators to accomplish because they are required to operate in many areas of the law in their day-to-day activities, and thus rarely can devote the resources to developing as specialized an understanding of any one issue as is possible for an expert agency to do.

Agencies acting in an adjudicatory capacity also have certain advantages over the judiciary branch. Agencies, for instance, are not limited in their activities by the actual case or controversy requirement applicable to judicial decision-making. Nor are agencies limited to considering issues based solely on the specific set of facts in a dispute between two litigants, or on the basis of precedential adjudication. In contrast to courts, agencies may more fully take into account the manner in which a decision will affect other industry participants. Moreover, because the decisions of administrative law judges do not have precedential effect, even in a formal adjudication an agency may have more flexibility to rule in a manner that "gets to the right result" than would a court guided by (and creating new) precedent.

There are notable reasons for not increasing the Copyright Office's role in its current configuration, however. As a practical matter, if the Office were to continue as a department of the Library of Congress, it is questionable whether the Register's authority could actually be increased—more likely only her ability to advise Congress and the Librarian would be expanded. The three main risks of doing so have already been discussed: (1) the Copyright Office has inadequate resources and relies on the Library of Congress for both financial resources and infrastructure needs; (2) the distinct market-oriented mission of the Copyright Office complicates various functions of both the Library and the Office if the Copyright Office continues fully integrated with the Library of Congress and (3) there is a possibility of continuing constitutional challenges to the Register's and the Librarian's authority.

While it would do little to overcome the complications inherent in the Copyright Office's configuration, it is nevertheless worthwhile to consider elevating the position of Register of Copyrights to that of a Presidential Appointee. Acknowledging the Register as a principal officer of the United States, and

36. See, e.g., U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT (2001), available at <http://perma.cc/V7TA-MKTT>; U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006), available at <http://perma.cc/7BFA-WLBV>; U.S. COPYRIGHT OFFICE, ANALYSIS OF GAP GRANTS UNDER THE TERMINATION PROVISIONS OF TITLE 17 (2010), available at <https://perma.cc/4YHC-DYG2?type=pdf>; U.S. COPYRIGHT OFFICE, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT (2011), available at <http://perma.cc/A7RW-9A63>; U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS (2011), available at <http://perma.cc/4HCA-RHSW>.

subjecting such a role to Senate confirmation, would serve the laudable goal of increasing the political accountability of the Office and better ensuring that the Register, and by extension the Copyright Office, can act directly on important matters of copyright policy where it has unparalleled expertise. As noted earlier, the responsibilities of the Office have increased over time, and are now wide-ranging. Had the evolution of the scope of its duties been foreseen, it is unlikely that the position would have been designed as it exists now—as a role not directly accountable to any elected official and without any time limit on tenure either for the Register or the Librarian of Congress. Moreover, as has been noted, the significant economic impact of the creative industries and the ubiquity of copyrighted works in the lives of the public justify such a change.

B. MOVING THE COPYRIGHT OFFICE TO A RELATED EXECUTIVE DEPARTMENT

The suggestion to move the Copyright Office to a related executive department is not without precedent. In 1996, Senator Orrin Hatch introduced the United States Intellectual Property Organization Act to create a government corporation handling all intellectual property matters, reporting through the Secretary of Commerce.³⁷ The U.S. Intellectual Property Organization (USIPO) would have united the functions of the Copyright Office with those of the USPTO under the directorship of a single individual.³⁸ The self-funding corporation would have been comprised of three separate offices charged with administering the duties of registering/issuing copyrights, patents and trademarks, each independently led by a commissioner of copyrights, patents and trademarks.³⁹ All policy functions would have resided with the corporation head. Among the main policy justifications motivating the introduction of the bill was a desire to coordinate all international and domestic intellectual policymaking within one office in the executive branch.⁴⁰

It is not surprising that then-Register of Copyrights Marybeth Peters expressed grave concerns.⁴¹ Register Peters outlined three principal problems with the approach:

1. Placing the Copyright Office on a self-funding basis, as the bill proposed, by requiring increased registration fees would lead to a steep decline in registrations, and a corresponding cost in public access to information;
2. Stripping the Register of her policy duties would mean the loss of a balanced, apolitical, non-partisan voice in policy formulation and
3. The basic concept of copyright would change—it would be treated for the first time as purely industrial property along with patents and trademarks.⁴²

37. Omnibus Patent Act of 1996, S. 1961, 104th Cong. (1996).

38. *Id.*

39. *Id.*

40. *The Omnibus Patent Act of 1996: Hearing on S. 1961 Before the S. Comm. on the Judiciary*, 104th Cong. 25 (1996) [hereinafter *Omnibus Patent Act of 1996 Hearing*] (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

41. *Id.* at 19–20.

42. *Id.*

Some, but not all, of these shortcomings might be addressed by selecting a different structure if a USIPO were to be created today. One of the characteristics of a federal government corporation such as the USIPO proposed in 1996, as opposed to a traditional agency of the United States, is that agencies receive the bulk of their financial support from funds appropriated by Congress, whereas government corporations receive most or all of their funding from users of their services.⁴³

There may be some surface appeal to limiting the need for appropriated funds to operate an agency by shifting funding responsibilities to customers of an agency. However, in the case of an entity like the Copyright Office, perhaps more so than for the USPTO, the customer base for the agency is really the public at large. The Copyright Office serves diverse functions including providing technical expertise to the legislative process, policy expertise to the executive branch and helping resolve judicial disputes through its registration examination function. In addition, it serves a leadership role in international copyright negotiations and provides guidance to the general public on copyright matters along with serving a crucial role in providing access to information on the ownership of copyrighted works and facilitating marketplace transactions involving such works. In contrast with patents and trademarks, which remain largely the domain of businesses, copyrighted works are ubiquitous in many individuals' daily lives, and policies regarding their use are more relevant to the general public. Consequently, it is important to incentivize registrations (which are voluntary under copyright law, as required by international obligations, but mandatory for patent and trademark protection) because this data is important to digital commerce. Appropriately structured fees are part of the equation.

In order to address the risk to the registration system that would result from the steep increase in registration fees required to put the Copyright Office on a self-funding basis, a more traditional agency structure could be proposed for a USIPO. This would allow the USIPO to continue to draw some, but not all, of its needed funding from registrations when serving copyright functions, and to receive additional funding from appropriations. This, however, might raise fairness concerns among patent and trademark stakeholders if a similar approach is not applied to the operation of the patent and trademark offices. On the other hand, applying a traditional agency funding structure to all three departments of a USIPO would seem to undo budget progress the USPTO has made in recent years towards ensuring that it can operate on a sustainable budget basis, including having an operational reserve to guard against interruptions caused by Congressional budget impasses and government shut downs.⁴⁴

The remaining challenges identified by former Register Peters in 1996—the reduced policy role for the Register, and the conceptual concerns related to treating copyrights together with industrial properties like patents and trademarks—are

43. KEVIN R. KOSAR, CONG. RESEARCH SERV., NO. RL30365, FEDERAL GOVERNMENT CORPORATIONS: AN OVERVIEW 7 (2011), available at <http://perma.cc/V2AJ-ZW5K>.

44. See Michelle K. Lee, *Director's Forum: A Blog from USPTO's Leadership*, U.S. PATENT & TRADEMARK OFFICE (June 9, 2014), <https://perma.cc/UM3M-R2TB?type=source>.

more or less inherent to the creation of a unified agency. While it would be possible to structure a USIPO with three separate branches, each focused on a specific area of intellectual property, and retain some policy expertise within each department of the agency, the final policy responsibilities for the agency would nevertheless, as a practical matter, need to be overseen by the agency head.

Likewise, it is true that copyrights differ from patents and trademarks and that those inherent differences have been recognized both in the structures governments have selected for administering them, as well as in international treaties in intellectual property. As Register Peters noted in response to the USIPO proposal, many countries other than the United States have elected to handle copyright issues in their ministries of culture, while ministries of commerce or trade handle patent and trademark issues.⁴⁵ The two leading international treaties on intellectual property issues are also divided this way: the Berne Convention addresses copyrights, while the Paris Convention covers patents and trademarks.⁴⁶ While copyrighted works provide tremendous economic contributions to the U.S. economy, their social, cultural and scientific contributions cannot be measured, and policy regarding copyright should not be driven purely on commercial grounds. There remains a risk that by joining the policy functions of the Copyright Office with those of the USPTO, and resting responsibility for developing policies regarding the differing areas in one individual (particularly if the USIPO reports through the Department of Commerce), commercial and economic interests may overshadow the unique cultural and societal forces that motivate the creation and dissemination of works protected by copyright law.

C. CREATING AN ADMINISTRATIVE AGENCY RESPONSIBLE FOR COPYRIGHT MATTERS

The final possibility, creating an administrative agency focused entirely on copyright issues, avoids concerns related to a unified USIPO. It also realizes the benefits of creating a regulatory partner for Congress, with a traditional agency structure that makes it capable of direct action yet appropriately accountable. And it would do the most to reflect the complexities and importance of the copyright system as it exists in the Internet age. Moving the functions of the Copyright Office outside the current Library of Congress structure also addresses operational impediments (e.g., the IT infrastructure challenges and associated harm to the registration and recordation system) and reduces the likelihood of constitutional challenges inherent in the current structure of the Copyright Office as a department of the Library of Congress. Finally, it would free the Librarian of Congress to focus on the important mission of preserving our cultural heritage and encouraging and promoting the important work of the Congressional Research Service (CRS), which serves a vital role in providing authoritative and nonpartisan policy and legal

45. *Omnibus Patent Act of 1996 Hearing*, *supra* note 41, at 24 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

46. *Id.*

analysis to Congress.⁴⁷

An administrative agency focused on copyright issues could be structured in a variety of ways. The agency could be an executive agency, reporting to the President, or it could be an independent agency or commission, led either by a single agency head or by a bipartisan panel of experts, appointed by the President. There are good arguments favoring each of these approaches.

A single agency head, reporting to the President, is a constitutionally clear and politically accountable structure, not likely to be challenged. On the other hand, because copyright is typically not a politically partisan issue, it may be an area well suited for regulation by an independent agency or commission with a panel of experts. The day-to-day work of administering the copyright law entails significant legal and business expertise. A collegial board of experts serving staggered terms could provide stability over time and expand the capacity of the agency. However, where strong policy disagreements exist, agency action could be stymied more so than in a case where a single, politically accountable leader is called to act.

III. REVIEW OF MAJOR ISSUES: HOW A COPYRIGHT AGENCY COULD IMPROVE THE OPERATION OF THE COPYRIGHT LAW

Regardless of the approach chosen, an examination of major copyright issues currently before Congress demonstrates that, with the exception of the creation or modification of exclusive rights of authors,⁴⁸ all of the major issues one might otherwise anticipate addressing in a “Next Great Copyright Act” would benefit from first resolving issues related to the structure of the Copyright Office. Even with respect to issues such as exclusive rights and the nature and scope of exceptions and limitations on copyright—where Congress would have to legislate to implement any significant policy changes—empowering an entity to exercise appropriate regulatory authority could serve an important role and reduce the need for and scope of legislative action.

A. EXCLUSIVE RIGHTS

Among the exclusive rights identified by Register Pallante in *The Next Great Copyright Act* as being ripe for discussion are: (1) a fuller public performance right for sound recordings and (2) consideration of the longstanding rights of

47. CRS currently enjoys greater autonomy within the Library of Congress than the Copyright Office. Pursuant to 2 U.S.C. § 166(b), the Librarian of Congress is directed to “in every possible way, encourage, assist, and promote the Congressional Research Service” and must “grant and accord to the Congressional Research Service complete research independence and the maximum practicable administrative independence.” Affording the Copyright Office equally broad independence within the Library of Congress may be another approach worth considering, at least as an interim step while Congress evaluates the best structure for the Copyright Office for the long term. Such autonomy would not address the constitutional concerns identified earlier, but might allow the Copyright Office greater control over budget and infrastructure issues.

48. Including enforcement of such rights, and exceptions and limitations pertaining to such rights.

reproduction,⁴⁹ distribution and performance in light of technological developments.⁵⁰ The creation or modification of any of these exclusive rights would require legislative action, and the House Judiciary Committee's Subcommittee on Courts, Intellectual Property and the Internet has already held multiple hearings on these topics to inform its further deliberations.⁵¹ Several legislative proposals have been introduced by members of the Subcommittee to address music licensing-related issues. Additional proposals are anticipated.⁵²

The degree to which music licensing issues have consumed the House Judiciary Committee's time in recent years aptly demonstrates why having the aid of an expert regulator would be helpful. During hearings to consider the Internet Radio Fairness Act, Representative Jim Sensenbrenner, after discussing the various webcaster settlement bills of the past decade, commented with some frustration:

Now here we are back again, and this is the 1, 2, 3, 4, fifth attempt of the Congress and specifically this Committee to deal with this issue.

. . . .

Let me say that the Members of this Committee have[] spent probably more time dealing with this issue than with any other single issue in the last decade or decade and a half, and we have got lots of other stuff on our plate that we have got to deal with, as everybody in this room knows.⁵³

Representative Sensenbrenner's comments illustrate the limitations of relying purely on legislative action to resolve nuanced, evolving, technical areas of copyright law, and speaks to Congress' limited bandwidth to legislate in a manner that stays apace with the marketplace. The Copyright Office has demonstrated the valuable substantive expertise it could bring to resolving issues in this area. One example is its most recent music licensing inquiry, in which it examined all aspects of the challenges facing the music industry, ranging from antiquated consent decrees under which performing rights organizations ASCAP and BMI operate, to

49. Including issues related to incidental copies.

50. See *The Next Great Copyright Act*, supra note 1, at 324–26.

51. See *The Scope of Copyright Protection: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014); *Music Licensing Under Title 17 Part One: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) [hereinafter *Music Licensing Part One Hearing*]; *Music Licensing Under Title 17 Part Two: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014).

52. Songwriter Equity Act of 2014, H.R. 4079, 113th Cong. (2014); RESPECT Act of 2014, H.R. 4772, 113th Cong. (2014); Free Market Royalty Act, H.R. 3219, 113th Cong. (2013) (note that this bill is no longer active since the main sponsor has since left Congress). Based on comments and questions made at the music hearings, Ranking Member Nadler is expected to introduce an 'omnibus music bill' to consolidate all of the various music related proposals, including issues related to the appropriate standards to be used to set royalty rates, etc. See *Music Licensing Part One Hearing*, supra note 51, at 5 (statement of Rep. Jerrold Nadler).

53. *Music Licensing Part One: Legislation in the 112th Congress: Hearing Before the Subcomm. on Intellectual Prop., Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 146–47 (2012).

the nuances of the various statutory license regimes.⁵⁴ Additionally, in recent years the Copyright Office has conducted other detailed reviews of music licensing issues, including, for example, issues related to whether or not pre-1972 sound recordings should receive federal copyright protection.⁵⁵

Similarly, regarding the “making available right,” while any modification to the contours of the right would require legislative action, the Copyright Office has already engaged in a thorough review of this issue⁵⁶ consisting of initial public comments,⁵⁷ a full day of roundtable hearings⁵⁸ and an additional opportunity to submit public comments and answer follow-up questions.⁵⁹ While some believe that no legislative action is needed to clarify the making available right at this time,⁶⁰ numerous participants have noted the benefit that additional regulatory guidance to courts could play in the proper interpretation of the right.⁶¹ Thus, in the main areas involving exclusive rights of copyright owners where one might anticipate legislative action, a reinvigorated Copyright Office or new copyright agency would be well-positioned to lessen the burden on Congress by tackling much of the substantive work that has previously been handled legislatively, and by capably administering the law and providing guidance to the public and to courts on any new legislative enactments.

B. ENFORCEMENT

Enforcement issues are intimately linked to exclusive rights. Hence, rights and remedies will both require some legislative action to be established, but both will benefit from an expert copyright agency’s involvement in administration. This is particularly true where rights can be adjudicated, and for remedies issued in a

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

55. See U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS (2011), available at <http://perma.cc/4HCA-RHSW>.

56. *Making Available Study*, U.S. COPYRIGHT OFFICE, <http://perma.cc/MT7E-JJ5F> (last visited Feb. 14, 2015).

57. Copyright Office Study on the Right of Making Available; Comments and Public Roundtable, 79 Fed. Reg. 10,571 (Feb. 25, 2014) [hereinafter *Making Available; Comments & Public Roundtable*].

58. *Id.*

59. *Id.*; Request for Additional Comments, 79 Fed. Reg. 41,309 (July 15, 2014).

60. *Making Available; Comments & Public Roundtable*, *supra* note 57; Copyright Alliance, *Comments of the Copyright Alliance*, in U.S. COPYRIGHT OFFICE, MAKING AVAILABLE STUDY: COMMENTS IN RESPONSE TO FEB. 25, 2014 NOTICE OF INQUIRY (2014), available at <http://perma.cc/F4AA-3CHV>; Entm’t Software Ass’n, *Re: Request for Comments: Study on the Right of Making Available [Docket No. 2014-2]*, in U.S. COPYRIGHT OFFICE, MAKING AVAILABLE STUDY: COMMENTS IN RESPONSE TO FEB. 25, 2014 NOTICE OF INQUIRY (2014), available at <http://perma.cc/8SC6-2ZBD>; Motion Picture Ass’n of Am. & Recording Indus. Ass’n of Am., *Comments of the Motion Picture Association of America, Inc. and the Recording Industry Association of America, Inc.*, in U.S. COPYRIGHT OFFICE, MAKING AVAILABLE STUDY: COMMENTS IN RESPONSE TO FEB. 25, 2014 NOTICE OF INQUIRY (2014), available at <http://perma.cc/RKS2-HVLF>.

61. U.S. COPYRIGHT OFFICE, PUBLIC ROUNDTABLE ON THE RIGHT OF MAKING AVAILABLE (2014) (statements of Allan Adler, Association of American Publishers; Keith Kupferschmid, Software & Information Industry Association; & Jane Ginsburg, Columbia Law School), available at <http://perma.cc/5KXQ-WYXD>.

proceeding before an administrative law judge. Three principal issues have emerged during the copyright review process regarding enforcement of exclusive rights: (1) the need for appropriate penalties for criminal streaming of infringing copyrighted material; (2) issues related to statutory damages and (3) the need for alternative means to resolve copyright claims of relatively small economic value without resort to the federal court system (sometimes referred to as the “small copyright claims court” proposal).⁶²

Issues related to changing the level of penalties currently applicable to infringements would require legislative action.⁶³ Since such penalties, if adopted, would apply only in actions before federal courts, the role of an expert agency would largely be to provide advice and comment to Congress in advance of enacting legislation (as the Copyright Office has already done in various contexts⁶⁴). Formalizing and regularizing such a role would nevertheless be useful.

Congress has received input supporting some of the proposed adjustments (i.e., the harmonization of streaming penalties) from a variety of sources, including the USPTO,⁶⁵ the Department of Justice⁶⁶ and the Intellectual Property Enforcement Coordinator,⁶⁷ but it has not yet enacted a provision to accomplish this goal. The specific drafting expertise of an agency with deep copyright knowledge may be helpful in achieving the suggested improvements to the law while avoiding unintended consequences. This would benefit authors and the public alike.

Issues related to statutory damages levels have been examined in overlapping reviews by a variety of entities in the recent past. Congress and the USPTO have held hearings or issued Notices of Inquiry on these topics, and the issue has arisen in related proceedings at the Copyright Office.⁶⁸ Regardless of one’s perspective on the merits of the issue, the expertise of a copyright agency would be well suited to assisting Congress in balancing the concerns raised with respect to this issue as

62. *Copyright Remedies: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 3–5 (2014).

63. For example: (1) establishing felony penalties for large scale, willful infringements of copyright by streaming so that the penalty is on par with those applicable to similar acts involving infringement using downloading technologies and (2) making any adjustments to the statutory penalty scheme.

64. See, e.g., *The Register’s Call for Updates to U.S. Copyright Law, Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 63 (2013) (statement of Maria Pallante, Register of Copyrights, U.S. Copyright Office); U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS 20–21 (2013) [hereinafter COPYRIGHT SMALL CLAIMS], available at <http://perma.cc/Z5DA-VSKJ>.

65. INTERNET POLICY TASK FORCE GREEN PAPER, *supra* note 3, at 45.

66. *Copyright Remedies: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 16 (2014) (statement of David Bitkower, Acting Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice).

67. U.S. INTELLECTUAL PROP. ENFORCEMENT COORDINATOR, 2011 U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR JOINT STRATEGIC PLAN 7 (2011).

68. *Copyright Remedies: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014); Request for Comments on Dept. of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, 78 Fed. Reg. 61,337, 61,339 (Oct. 3, 2013); Remedies for Small Copyright Claims, 76 Fed. Reg. 66,758, 66,759–60 (Oct. 27, 2011).

well.

Finally, a fully empowered copyright agency with a panel of administrative law judges would be best suited to overseeing a small copyright claims alternative dispute resolution mechanism, as is currently proposed by the Copyright Office in its *Copyright Small Claims* report.⁶⁹ If such an alternative dispute resolution mechanism were successful, it would reduce costs to all participants and reduce the burden on the federal courts. A small claims approach might also ameliorate certain concerns about statutory damages claims by making the need to pursue such claims less frequent.

C. THE DMCA

Roughly fifteen years after its passage, the DMCA is not working as intended either for the authors and owners of copyrighted works who rely on its notice-and-takedown and repeat infringer provisions to reduce infringement of their works, nor for the website operators who must respond to the notices sent. When authors are forced to send upwards of 20 million notices a month to a single company—often concerning the same works and the same infringers—something is amiss.⁷⁰

Although the situation for authors enforcing their rights online is bleak, and the burden on sites to respond to notices is staggering, agency rulemaking could be a vehicle to address the many nuanced and technical issues presented by the varied designs of websites, cyberlockers and other forums where infringing content may be posted by users. Addressing such issues in statutory language, which not only complicates the already complicated Act, but locks in such issues for future generations well past the time today's technologies have become obsolete, is less optimal over the long term.

D. EXCEPTIONS AND LIMITATIONS

As already noted, changes to exceptions and limitations would generally require legislative action. However, the aid of an expert agency would be beneficial in guiding both authors and the public in the new laws' application and in fostering a greater respect for and understanding of the copyright laws.

Exceptions and limitations hold an important place in the copyright law. Among these, the doctrine of fair use is perhaps the most important to authors both to ensure the continuation of practices that lie at the very heart of creativity—the ability to draw inspiration from the work of others—and to simultaneously protect original expression. Fair use is also among the doctrines of copyright law where the interests of the public and authors intersect the most.

During hearings before the House Judiciary Committee's Subcommittee on Courts, Intellectual Property and the Internet in January 2014, witnesses generally

69. COPYRIGHT SMALL CLAIMS, *supra* note 64, at 110–12.

70. *Transparency Report: Requests to Remove Content Due to Copyright*, GOOGLE, <https://perma.cc/UTK4-E6K6?type=source> (last visited Feb. 21, 2015). As of February 2015, Google stated it removes over 33 million URLs a month from its search engine as a result of DMCA takedown notices.

agreed that no legislative amendments to the doctrine of fair use were needed.⁷¹ Nevertheless, there are areas where application of the doctrine is still vague, or where interpretations by courts are troubling. Greater clarity and guidance would be useful to creators, users and intermediaries moving forward. An administrative agency with full authority to issue guidance would be in the best position to provide such assistance due to its neutrality, expertise and familiarity with relevant stakeholders.

This suggestion is consistent with those made by academics and practitioners who view copyright issues from a variety of policy perspectives. For instance, among the recommendations reflected in the Copyright Principles Project, is a recommendation that the Copyright Office give serious consideration to offering more guidance to users on the topic of fair use.⁷² The Copyright Principles Project suggested issuing fair use letters similar to the “business review letters” issued by the Department of Justice, developing best practices guidelines for various disciplines reliant on the doctrine of fair use, and developing a guidebook for users on fair use issues.⁷³ All of these suggestions illustrate the useful role an expert agency can play in shaping the development of important parts of the copyright law, without necessarily resorting to legislative amendments.

E. ORPHAN WORKS AND MASS DIGITIZATION

As with the general topic of exceptions and limitations, any move to limit existing rights of authors with respect to the licensing of their work would likely implicate legislative action. However, much of what has been suggested thus far stops short of requiring legislative change, and instead implicates increased responsibility for an administrative entity. For instance, with respect to orphan works, solutions proposed by many stakeholders in the creative community urge a greater role for the Copyright Office in defining how those seeking to identify an author of a work should conduct a diligent search.⁷⁴ For different reasons, many in the library community urge that expanded exceptions and limitations are not

71. *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (statements of Peter Jaszi, Professor, American University–Washington College of Law; June Besek, Executive Director, Kernochan Center for Law, Media, and the Arts & Lecturer-in-Law, Columbia Law School; & Naomi Novik, Author & Co-Founder, Organization for Transformative Works). Note, however, that June Besek cautioned the Subcommittee about the risks inherent in over-reliance on the transformativeness element. She explained, “A finding that a use is transformative tends to sweep everything before it, reducing the statutory multifactor assessment to a single inquiry. It is important that the fair use pendulum once again be moved back toward the center.” *Id.* at 14.

72. Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1206–07 (2010).

73. *See id.*

74. *See, e.g.,* American Photographic Artists, *Proposal for Orphan Works Legislation*, in U.S. COPYRIGHT OFFICE, ORPHAN WORKS: COMMENTS IN RESPONSE TO OCT. 22, 2012 NOTICE OF INQUIRY (2013), available at <http://perma.cc/EFV9-MSMT> (“[T]he final version of any orphan works legislation must empower the Copyright Office to work in tandem with the visual arts community in order to promulgate best practices defining guidelines for a ‘reasonably diligent search’ requirement . . .”).

needed to address the orphan works issue, and that any disputes may instead be resolved by the courts applying existing exceptions and limitations such as the fair use doctrine.⁷⁵

The record regarding mass digitization is less clear but, to the extent the issue has been considered outside the courts, it has been considered primarily by the Copyright Office in various inquiries. Among the approaches the Copyright Office has hinted at is “extended collective licensing.”⁷⁶ Presumably under such an approach representatives of authors could enter into license agreements with entities seeking to digitize their works for purposes such as educational uses or preservation, and authors who do not wish to participate in such agreements could thereafter withdraw their consent. Should such an approach be considered, the licenses required would be best negotiated directly by stakeholders themselves overseen and aided by an agency, rather than imposed by Congress as a legislative enactment such as a statutory license.

IV. CONCLUSION

Taking any of the aforementioned approaches to reinvigorate the Copyright Office and ensure Congress has a strong partner to collaborate with in keeping the Copyright Act current is an important first step in any copyright review effort. Properly empowering an agency to act more nimbly than Congress can in this arena also would be consistent with our democratic, common law approach to legislating. In common law countries like the United States, in contrast to civil law countries, the legislative branch does not attempt to engage in comprehensive, continuously updated lawmaking intended to prescribe and codify the necessary outcome of every eventuality. Rather, the legislature creates a more dynamic and evolving body of law, which is further elaborated through agency rulemaking and judicial action.

Each of the approaches analyzed would curb the need to constantly legislate to address rapidly evolving, industry-specific concerns, and instead would allow some of these matters to be handled by regulatory action. As a result, future amendments of the Copyright Act would be limited to matters such as the establishment of overarching policy decisions or the creation of new substantive rights or exceptions. With Congress retaining proper oversight of the agency, a more regularized, direct and politically accountable approach to legislating and rulemaking in this arena could develop.

75. See Library Copyright Alliance, *Comments of the Library Copyright Alliance in Response to the Copyright Office’s Notice of Inquiry Concerning Orphan Works and Mass Digitization*, in U.S. COPYRIGHT OFFICE, ORPHAN WORKS: COMMENTS IN RESPONSE TO OCT. 22, 2012 NOTICE OF INQUIRY (2013), available at <http://perma.cc/9XJJ-FDFF>.

76. See *The Next Great Copyright Act*, *supra* note 1, at 334, 338.