



UNITED STATES COPYRIGHT OFFICE

Statement of Maria A. Pallante
Register of Copyrights of the United States
Subcommittee on Courts, Intellectual Property and the Internet
Committee on the Judiciary

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“The Register’s Call for Updates to U.S. Copyright Law”¹

Thank you for the opportunity to appear before you today to discuss the state of our copyright law. My message is simple. The law is showing the strain of its age and requires your attention. As many have noted, authors do not have effective protections, good faith businesses do not have clear roadmaps, courts do not have sufficient direction, and consumers and other private citizens are increasingly frustrated. The issues are numerous, complex, and interrelated, and they affect every part of the copyright ecosystem, including the public at large. For reasons that I will explain, Congress should approach the issues comprehensively over the next few years as part of a more general revision of the statute. A comprehensive effort would offer an occasion to step back and consider issues both large and small, as well as whether and how they relate to the equities of the statute as a whole. This Subcommittee in particular has an opportunity to do what it has done in the past, not merely to update particular provisions of copyright law, but to put forth a forward-thinking framework for the benefit of both culture and commerce alike.

It has been fifteen years since Congress acted expansively in the copyright space. During that period, Congress was able to leave a very visible and far-reaching imprint on the development of both law and commerce. It enacted the Digital Millennium Copyright Act (“DMCA”), which created rules of the road for online intermediaries (*e.g.*, Internet service providers) and a general prohibition on the circumvention of technological protection measures (so-called “TPMs”) employed by copyright owners to protect their content. The DMCA also created a rulemaking mechanism by which proponents could make the case for temporary exemptions to the TPM provisions in order to facilitate fair use or other noninfringing uses (the “section 1201 rulemaking”).

Nonetheless, a major portion of the current copyright statute was enacted in 1976. It took over two decades to negotiate, and was drafted to address analog issues and to bring the United States into better harmony with international standards, namely the Berne Convention. Moreover, although the Act is rightly hailed by many as an accomplishment in balance and compromise, its long trajectory defeated any hope that it could be effective into the 21st century.

¹ For a more extensive discussion of these issues, *see* Maria A. Pallante, *The Next Great Copyright Act*, 37 COLUM. J.L. & ARTS (forthcoming Spring 2013), *available at* <http://www.law.columbia.edu/kernochan/manges>.

In fact, former Register of Copyrights Barbara Ringer, who had worked closely with Congress for much of the 1976 revision process, later called it a “good 1950 copyright law.”

I think it is time for Congress to think about the next great copyright act, which will need to be more forward thinking and flexible than before. Because the dissemination of content is so pervasive to life in the 21st century, the law also should be less technical and more helpful to those who need to navigate it. Certainly some guidance could be given through regulations and education. But my point is, if one needs an army of lawyers to understand the basic precepts of the law, then it is time for a new law.

A central equation for Congress to consider is what *does* and *does not* belong under a copyright owner’s control in the digital age. I do not believe that the control of copyright owners should be absolute, but it needs to be meaningful. 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 19th and 20th century copyright laws.

Moreover, while philosophical discussions have a place in policy debates, amending the law eventually comes down to the negotiation of complex and sometimes arcane provisions of the statute, requiring leadership from Congress and assistance from expert agencies like mine. The list of issues is long: clarifying the scope of exclusive rights, revising exceptions and limitations for libraries and archives, addressing orphan works, accommodating persons who have print disabilities, providing guidance to educational institutions, exempting incidental copies in appropriate instances, updating enforcement provisions, providing guidance on statutory damages, reviewing the efficacy of the DMCA, assisting with small copyright claims, reforming the music marketplace, updating the framework for cable and satellite transmissions, encouraging new licensing regimes, and improving the systems of copyright registration and recordation.

That said, Congress does not need to start from scratch, as it has already laid the groundwork for many core issues. For example, Congress already has had more than a decade of debate on the public performance right for sound recordings, and has given serious consideration to improving the way in which musical works are licensed in the marketplace. These issues are ripe for resolution.

Likewise, Congress has requested a number of studies from the Copyright Office in recent years, on a variety of timely topics, including the first sale doctrine, orphan works, library exceptions, statutory licensing reform, federalization of pre-72 sound recordings, and mass digitization of books. Additionally, we have reports in progress on small copyright claims and resale royalties for visual artists.

Congress also may need to apply fresh eyes to the next great copyright act to ensure that the copyright law remains relevant and functional. This may require some bold adjustments to the general framework. You may want to consider alleviating some of the pressure and gridlock brought about by the long copyright term — for example, by reverting works to the public domain after a period of life plus fifty years unless heirs or successors register their interests with the Copyright Office. And in compelling circumstances, you may wish to reverse the general

principle of copyright law that copyright owners should grant prior approval for the reproduction and dissemination of their works — for example, by requiring copyright owners to object or “opt out” in order to prevent certain uses, whether paid or unpaid, by educational institutions or libraries.

If Congress considers copyright revision, a primary challenge will be keeping the public interest at the forefront, 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. In revising the law, Congress should look to the equities of the statute as a whole, and strive for balance in the overall framework. It is both possible and necessary to have a copyright law that combines safeguards for free expression, guarantees of due process, mechanisms for access, and respect for intellectual property.

To this end, I would like to state 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, they are not a counterweight to the public interest but instead are 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.”² Congress has a duty to keep authors in its mind’s eye, including songwriters, book authors, filmmakers, photographers, and visual artists. A law that does not provide for authors would be illogical — hardly a copyright law at all.

Finally, evolving the Copyright Office should be a major goal of the next great copyright act. In short, it is difficult to see how a 21st century copyright law could function well without a 21st century agency. 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 statute and its legislative history, and in opinions of the courts. But today, 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 — from administering a small copyright claims tribunal to offering arbitration or mediation services to issuing advisory opinions. Moreover, as others have noted, the statute has become too detailed and less nimble, and could be more useful and flexible if certain aspects were handled administratively.

In closing I would like to express my gratitude to the members of the Subcommittee for your interest in and commitment to copyright policy, and encourage you to think big. The next great copyright act is possible if you approach it comprehensively, and as always, the staff of the U.S. Copyright Office is at your disposal.

² *Twentieth Century Music Corp. v. Aiken*, 422 US 151, 156 (1975).