

# CAPTURED:

*Systemic Bias at the U.S. Copyright Office*

A Public Knowledge Report

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# I. INTRODUCTION

Regulatory capture occurs when a government agency “is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself.”<sup>1</sup> This risk of “persistent policy bias” is “widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members.”<sup>2</sup> For example, in a recent series of essays, Senators Elizabeth Warren, Mike Lee, and Sheldon Whitehouse all agree that regulatory capture is a serious and pervasive problem.<sup>3</sup>

This report examines regulatory capture—both its sources and its consequences—at the U.S. Copyright Office. Capture at the Office is widely recognized among many copyright practitioners and stakeholders. As Professor Jessica Litman noted in 2006, “the Copyright Office has tended to view copyright owners as its real constituency, and has spent the past ten years moving firmly into the content industry’s pocket”—a statement that still holds true today.<sup>4</sup> Section I of this report details how, consistent with the extensive academic literature identifying the main causes of regulatory capture, the Copyright Office’s entrenched bias arises from both material and cultural capture, as well as from political incentives for the Office’s leadership.

The consequences of this capture are equally clear, as described in Section II of this report. In both the interpretation of existing copyright law and the recommendation of

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<sup>1</sup> DANIEL CARPENTER & DAVID A. MOSS, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 13 (2014).

<sup>2</sup> Rachel E. Barkow, *Insulating Agencies: Avoiding Capture rough Institutional Design* (N.Y. Univ. Sch. of Law, Working Paper No. 10-82, Dec. 1, 2010), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article>.

<sup>3</sup> See RegBlog, *Rooting Out Regulatory Capture*, REGBLOG (Jan. 13, 2016), <http://www.regblog.org/2016/06/13/rooting-out-regulatory-capture/>.

<sup>4</sup> JESSICA LITMAN, DIGITAL COPYRIGHT 74 (2001).

potential changes,<sup>5</sup> the Copyright Office typically sides with the interests of rightsholders—in particular, large entertainment industries and other corporate rightsholders—over the interests of other stakeholders, from consumers and technology providers to libraries and academics. As a result, the Copyright Office:

- Contorts existing copyright law with the effect of furthering the interests of rightsholders;
- Advocates for expanded copyright with fewer limitations, exceptions, and consumer protections;
- Inserts itself into more and farther-flung policy debates, issuing opinions on topics far beyond its expertise;
- Makes decisions that prioritize its own policy objectives over input from stakeholders; and
- Has its views ignored or outright rejected by courts, Congress, and other agencies.

As long as the Copyright Office remains heavily captured, these failures and missteps are likely to continue.<sup>6</sup>

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<sup>5</sup> For much of its history, the Copyright Office performed primarily ministerial functions—registering copyrighted works, accepting deposits, maintaining records, and so on. See Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 91 (2004). The Office also has a limited grant of authority to advise Congress and assist federal agencies and the judiciary on “national and international issues relating to copyright.” See 17 U.S.C. § 701(b). In recent decades, however, the Office has been assigned more duties, such as providing recommendations to the Librarian of Congress in the triennial proceeding to consider exemptions to the anti-circumvention provisions of the Digital Millennium Copyright Act. See 17 U.S.C. § 1201(a)(1)(C).

<sup>6</sup> The major entertainment industries have a long history of overreaction and overreach on copyright, from composer John Philip Souza’s 1906 prediction that player pianos would “ruin the artistic development of music in this country,” to Jack Valenti’s 1982 testimony to Congress analogizing the VCR to the Boston Strangler for the film industry to the RIAA’s legal attacks on early digital music players. Mike Masnick, *A History of Parabolic Overreaction to Copyright Issues: The Entertainment Industry and Technology*, TECHDIRT (Nov. 9, 2011), <https://www.techdirt.com/blog/innovation/articles/20111108/17562016686/history-hyperbolic-overreaction-to-copyright-issues-entertainment-industry-technology.shtml>. It is thus not surprising that their undue influence would lead the Office astray.

# II. SOURCES OF REGULATORY CAPTURE AT THE COPYRIGHT OFFICE

Economists recognize that regulatory capture can take a variety of forms, such as material capture and cultural capture. Material capture occurs when government officials have some self-interest that leads them to favor a regulated industry over the public interest.<sup>7</sup> Cultural capture refers to social “mechanisms of influence” that “induce . . . regulators to identify with industry members and their interests.”<sup>8</sup> As any lobbyist knows, government officials may be swayed by their own prior identities and/or relationships, as they are “more likely to adopt positions advanced by people whom they perceive as being in their in-group” and “who are in their social network.”<sup>9</sup>

The well-known phenomenon of the revolving door—in which employees cycle between government and industry—can foster both material and cultural capture. On the material side, government employees may “anticipate entering or returning to employment with the regulated industry” and thus “do not want to make enemies within [that] industry.”<sup>10</sup> On the cultural side, a revolving door will typically promote a common “ingroup” identity and social network between government and industry—including staff who have not passed through the revolving door themselves.<sup>11</sup> Ultimately, these ties are likely to foster “a set of shared but not explicitly stated understandings about the world,” in addition to making regulators more directly susceptible to industry influence.<sup>12</sup>

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<sup>7</sup> JAMES KWAK, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 75 (2014).

<sup>8</sup> *Id.* at 79.

<sup>9</sup> *Id.*

<sup>10</sup> Barkow, *supra* note 2, at 23.

<sup>11</sup> KWAK, *supra* note 7, at 90-91.

<sup>12</sup> *Id.* at 79.

The Copyright Office easily fits this model of capture. The Office has a well-trodden revolving door between its leadership, its other legal and policy staff and major rightsholders and their representatives.<sup>13</sup>

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<sup>13</sup> See LITMAN, *supra* note 4, at 74 (“Copyright Office policy staff often come from and return to law firms that regularly represent copyright owners.”).

# A. RECENT EXAMPLES OF THE REVOLVING DOOR<sup>14</sup>

## 1. Industry to Copyright Office

	<b>Copyright Office Position(s)</b>	<b>Previous Employer(s)</b>
Maria A. Pallante	Register of Copyrights (2011-present)	Executive Director, National Writers Union (1993-1995); Assistant Director, Authors Guild (1991-1993)
Jacqueline C. Charlesworth	General Counsel (2013-2016)	Of Counsel, Morrison & Foerster LLP (2008-2011); Senior Vice President and General Counsel, National Music Publishers' Association (2006-2008); Senior Vice President and General Counsel, Harry Fox Agency (2001-2006)
Karyn Temple Claggett	Director of Policy & International Affairs (2013-present)	Vice President for Litigation and Legal Affairs, Recording Industry Association of America (2004-2009)
Catherine R. Rowland	Senior Advisor to U.S. Register of Copyrights (2015-present)	Associate, Arnold & Porter LLP (2002-2010)
Michele Woods	Associate Register for Policy & International Affairs (2011-2012); Senior Counsel (2009-2011)	Counsel, Arnold & Porter LLP (2000-2009) <sup>15</sup>
Steve Ruwe	Assistant General Counsel (2014-2016); Attorney Advisor (2006-2014)	Literary Agent, Literary and Creative Artists Agency, Inc. (2000-2006)

<sup>14</sup> Sources for the employment histories below include Copyright Office press releases and organizational charts, public LinkedIn profiles, and legal firm materials.

<sup>15</sup> Representing RIAA and SoundExchange in particular.

## 2. Copyright Office to Industry

	<b>Copyright Office Position(s)</b>	<b>Subsequent Employer(s)</b>
Marybeth Peters	Register of Copyrights (1994-2010)	Advisor, Muncy, Geissler, Olds & Lowe, P.C. (2011-present); Board of Directors, Copyright Clearance Center (2011-present)
David O. Carson	General Counsel (1997-2012)	Vice President, International Federation of the Phonographic Industry (2012-2014)
Steven M. Tepp	Senior Counsel for Policy & International Affairs (1999-2010)	Chief IP Counsel, U.S. Chamber of Commerce (2010-2012); Founder, Sentinel Worldwide (outside lobbyist for Motion Picture Association of America) (2012-present)
Mary Rasenberger	Policy Planning Counsel (2002-2008)	Executive Director, Authors Guild (2014-present); Partner, Cowan DeBaets Abrahams & Sheppard LLP (2011-2014); Counsel, Skadden, Arps, Slate, Meagher & Flom LLP (1994-1999; 2008-2011)
Ben Golant	Assistant General Counsel (2006-2012)	Chief Counsel, IP Policy, Electronic Software Association (2015-present)
Christopher S. Reed	Senior Advisor for Policy and Special Projects (2011-2014)	Chief Operating Officer, Creative Future (2016-present); Senior Counsel, Content Protection Policy, Fox Entertainment Group (2014-2016)
Jesse Feder	Acting Associate Register for Policy and International Affairs (2001-2003)	Director of International Trade and IP, Business Software Alliance (2004-2013)

Beyond the revolving door, frequent gatherings—both formal and informal—of Office staff and industry representatives provide further evidence of cultural capture. For example, the Copyright Office organizes a series of “Copyright Matters” lectures, both “to provide education and training” to Copyright staff and to serve as a larger “community forum.”<sup>16</sup> Since 2014, the Office has held five such events, all in express collaboration with entertainment industry organizations:

- April 26, 2016: “World Intellectual Property Day, Digital Creativity: Culture Reimagined”—organized with the Copyright Alliance (an advocacy group representing major entertainment industries and other corporate rightsholders).<sup>17</sup>
- April 28, 2015: “World Intellectual Property Day, Get up stand up. For Music.”—included presentation by Copyright Alliance.<sup>18</sup>
- April 23, 2014: “World Intellectual Property Day, Movies: A Global Passion”—organized with the Copyright Alliance.<sup>19</sup>
- February 25, 2014: “ASCAP on the occasion of its 100th”—organized with ASCAP.<sup>20</sup>
- January 29, 2014: “Dramatists Guild of America on the Occasion of Its 100th Anniversary”—organized with the Dramatists Guild.<sup>21</sup>

In addition to these formal events hosted by the Copyright Office, the Register of Copyrights and other senior officials meet frequently with entertainment industry groups, in Washington and around the country.<sup>22</sup>

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<sup>16</sup> U.S. Copyright Office, *Copyright Matters Lecture Series* (last visited Sept. 7, 2016), <http://www.copyright.gov/copyrightmatters/>.

<sup>17</sup> U.S. Copyright Office, *A Copyright Matters Event* (Apr. 26, 2016), <http://www.copyright.gov/copyrightmatters/images/flyers/world-ip2016lg.jpg>.

<sup>18</sup> United States Copyright Office, *A Copyright Matters Event* (Apr. 28, 2015), <http://www.copyright.gov/copyrightmatters/images/flyers/worldip-2015lg.jpg>.

<sup>19</sup> United States Copyright Office, *A Copyright Matters Event* (Apr. 23, 2014), <http://www.copyright.gov/copyrightmatters/images/flyers/world-ip2014lg.jpg>.

<sup>20</sup> United States Copyright Office, *A Copyright Matters Event* (Feb. 25, 2014), <http://www.copyright.gov/copyrightmatters/images/flyers/ascaplg.jpg>.

<sup>21</sup> United States Copyright Office, *A Copyright Matters Event* (Jan. 29, 2014), <http://www.copyright.gov/copyrightmatters/images/flyers/dramatist-lg.jpg>.

<sup>22</sup> See, e.g., ASCAP, *US Register of Copyrights Maria Pallante Visits ASCAP* (Nov. 7, 2013), <http://www.ascap.com/playback/2013/11/action/maria-pallante-visit> (noting visit to ASCAP’s offices in Los

Perhaps the starkest evidence of cultural capture can be found in statements by the current Register of Copyrights, Maria Pallante. She has, at various times during her tenure, commented that:

- “Copyright is for the author first and the nation second.”<sup>23</sup>
- “I think the problem we have today in terms of imbalance that we might feel in the copyright statute is that we have gotten away from that equation that puts the authors as the primary beneficiaries, followed by the public good.”<sup>24</sup>
- “Unfortunately, I start with enforcement because, if you don’t have exclusive rights in the first place, you can’t get to other questions.”<sup>25</sup>
- “The primary policy issue for us, in large part because of digital communication, has got to be enforcement.”<sup>26</sup>

These statements reflect the many specific examples, detailed in Section II, in which the Copyright Office has acted more as an *advocate* for rightsholder interests than an objective referee of copyright debates.

Several other dynamics reinforce regulatory capture at the Copyright Office. Most importantly, industry groups are often “well positioned to contribute to political campaigns

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Angeles); The Recording Academy, *The Academy To Host Creator Roundtables With Register Of Copyrights* (Dec. 18, 2013), <http://www.grammy.com/news/the-academy-to-host-creator-roundtables-with-register-of-copyrights> (noting ongoing roundtables with Register Pallante, to “begin in New York on Jan. 14, 2014, and continue to other Academy Chapters whenever the Register or her senior team are in town”); Sarah Skates, *U.S. Register of Copyrights Maria Pallante Plans Nashville Visit* (Aug. 29, 2012), <http://www.musicrow.com/2012/08/u-s-register-of-copyrights-maria-pallante-plans-nashville-visit/> (noting September 2012 visit to Nashville “at the invitation of the Nashville Songwriters Association International”).

<sup>23</sup> Judith Saffer, *An Interview with Register of Copyrights Maria A. Pallante*, LANDSLIDE, Apr. 2012.

<sup>24</sup> *The Register’s Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the Comm. on the Judiciary*, 113 Cong. 113-20 (2013) (testimony of Maria A. Pallante, Register of Copyrights and Dir.).

<sup>25</sup> Nate Anderson, *New Register of Copyrights: “Unfortunately, I start with enforcement”*, Ars Technica (July 13, 2011, 7:50 AM), <http://arstechnica.com/tech-policy/2011/07/new-register-of-copyrights-unfortunately-i-start-with-enforcement/>.

<sup>26</sup> AlvinJonesComm, *Copyright Alliance: Maria Pallante*, YouTube (Nov. 8, 2011), <https://www.youtube.com/watch?v=Pufu0ciCp18&noredirect=1>.

and to lobby, which in turn gives them influence with the agency’s legislative overseers on the relevant oversight committee.”<sup>27</sup> With the Copyright Office, the primary committees of jurisdiction on copyright law and policy are the House and Senate Judiciary Committees, where the major entertainment industries have longstanding ties and invest large amounts of money in campaign donations and lobbying.<sup>28</sup> As a result, the Copyright Office has powerful political incentives to avoid antagonizing these interests. If the Office has their support, these interests can help “protect it from budget cuts and incursions on its turf,” give the Register added job security, and otherwise advance the Office’s priorities.<sup>29</sup>

This support is especially valuable to the Copyright Office at the present moment, as Congress considers legislation to restructure and modernize the Office, and as the Register of Copyrights continues to advocate for greater independence from the Library of Congress.<sup>30</sup> Given its unusual placement in the legislative branch of the federal government, the Office is insulated from oversight by or accountability to the executive branch. Instead, by statute, the Register is appointed by the Librarian of Congress, and operates under her general direction and supervision.<sup>31</sup> The previous Librarian largely deferred to the Register on copyright matters, granting the Office significant practical independence with little meaningful

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<sup>27</sup> Barkow, *supra* note 2, at 22-23.

<sup>28</sup> For example, according to data from the Center for Responsive Politics for the 2016 election cycle, total congressional campaign donations to date from the “TV / Movies / Music” industry group total \$16.9 million. See *TV / Movies / Music: Money to Congress* (accessed Sept. 6, 2016), <https://www.opensecrets.org/industries/summary.php?cycle=2016&ind=B02>. For the same industry group, lobbying expenditures totaled \$62.1 million in 2015. See *TV / Movies / Music: Lobbying, 2015* (accessed Sept. 6, 2015), <https://www.opensecrets.org/industries/lobbying.php?cycle=2016&ind=B02>.

<sup>29</sup> LITMAN, *supra* note 4, at 74.

<sup>30</sup> *U.S. Copyright Office: Its Functions and Res.: Hearing Before the Comm. on the Judiciary*, 114th Cong. 114-4 (2015) (statement of Maria A. Pallante, Register of Copyrights and Dir.).

<sup>31</sup> 17 U.S.C. § 701(a).

oversight.<sup>32</sup> A new Librarian of Congress—Dr. Carla Hayden—will take office in September 2016, though her intentions for management of the Copyright Office are not yet clear.<sup>33</sup>

Finally, it is not surprising that rightsholders—especially large businesses—have significantly greater incentives and abilities to influence the Copyright Office than any other competing interest. While copyright law affects a wide range of stakeholders, including individual consumers and the public at large, resource limitations and collective action problems will hobble their practical ability to influence the Office.<sup>34</sup> Even where other well-funded industries may oppose rightsholders on particular copyright issues, they often will have other competing priorities, and will not have anywhere near the same incentives as the entertainment industries to maximize their influence.<sup>35</sup> Because of this, regulatory capture is a persistent concern not only in the Copyright Office but also in other government departments with a significant role in copyright policy.<sup>36</sup>

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<sup>32</sup> See Robinson Meyer, *How a New Librarian of Congress Could Improve U.S. Copyright*, The Atlantic, Jun. 19, 2015, available at <http://www.theatlantic.com/technology/archive/2015/06/could-a-new-librarian-of-congress-fix-us-copyright-law-dmca/396080/>; Government Accountability Office, *Copyright Office Needs to Develop Plans that Address Technical and Organizational Challenges*, GAO-15-338 (March 2015) at 30-32.

<sup>33</sup> See Kevin Smith, *Does the Copyright Office Belong in a Library?*, LIB. J. (Jul. 2, 2015), <http://lj.libraryjournal.com/2015/07/opinion/peer-to-peer-review/does-the-copyright-office-belong-in-a-library-peer-to-peer-review/>.

<sup>34</sup> See LITMAN *supra* note 4, at 74.

<sup>35</sup> See Sen. Sheldon Whitehouse, *How Government Can Root Out Regulatory Capture*, RegBlog (June 15, 2016) <http://www.regblog.org/2016/06/15/whitehouse-how-government-can-root-out-regulatory-capture/>; Barkow, *supra* note 2.

<sup>36</sup> See, e.g., Margot E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977, 987-88 (2014) (finding that the Office of the United States Trade Representative “is a captured agency” beholden to “one subset of domestic IP stakeholders at the expense of others, including the public”); see also *id.* at 988 (finding “substantial evidence that USTR agency staff receive revolving-door incentives from industry, taking IP industry jobs after USTR employment and coming from IP industry to the USTR”).

# III. EFFECTS OF REGULATORY CAPTURE AT THE COPYRIGHT OFFICE

While all forms of regulatory capture carry consequences, the proliferation of digital communication and its attendant copyright issues (both real and imagined) put the Copyright Office in a unique position at the crossroads of modern technology and communications policy. It has used this position to push a vision of expansive, all-encompassing copyright, in which many policy issues, no matter how tangential to intellectual property, are ultimately determined by their implications on rightsholders' abilities to monetize their products. To that end, the Copyright Office has misinterpreted existing law, aggressively advocated for expanding copyright, sought to expand its own role, furthered pet projects over widespread opposition, and seen its output criticized or disregarded by other government officials.

Without vocal opposition from consumer advocates, libraries, and other stakeholders, the Copyright Office, buoyed by a vision of itself as an advocate for rightsholders and propelled by its ambition to weigh in on ever more issues, threatens to swallow large swaths of policymaking well beyond copyright law.

## A. THE COPYRIGHT OFFICE FREQUENTLY MISINTERPRETS THE SCOPE OF COPYRIGHT TO THE BENEFIT OF RIGHTSHOLDERS

The Copyright Office has stated, on the record, its position that “all ambiguities must be resolved against” limitations and exceptions to copyright liability.<sup>37</sup> Perhaps unsurprisingly, the Office has broadcast this position through a long history of misreading, misinterpreting, and misapplying statutory language in order to find broader rights for rightsholders.

From safe harbor provisions to statutory licenses, the Copyright Office has, for decades, misapplied, ignored, or “creatively interpreted” statutory and common law. It assumed a strained and flatly unfeasible reading of safe harbor provisions in order to strip websites of statutory legal protections when they are sued by certain sound recording rightsholders; concluded against the force of common and statutory law that a broad “making available” right existed where it does not; and mischaracterized key aspects of copyright law with regard to proceedings at the Federal Communications Commission, all in support of the position of rightsholders against other industries and the public.

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<sup>37</sup> U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS 132 (2011) [hereinafter Pre-1972 Report], *available at* <http://www.copyright.gov/docs/sound/pre-72-report.pdf>.

## 1. Declaring Safe Harbor Provisions Unavailable to Large Classes of Works

Prior to 1972, the federal government did not recognize a copyright in sound recordings. These pre-1972 sound recordings were (and still are) largely governed by copyrights and related rights granted at the state level. The patchwork nature of these state protections has caused no small amount of confusion for music services, consumers, and artists alike.<sup>38</sup>

Generally speaking, section 512 of the Digital Millennium Copyright Act protects Internet services from being held liable for copyright infringement under certain circumstances. As one of the legal bedrocks of the modern Internet, section 512 is designed to provide legal certainty for web-based services while giving rightsholders a streamlined mechanism to remove infringing content. To do this, the section gives online platforms limited protection from liability in the event that a user uploads infringing content, so long as the service meets certain conditions. By providing this certainty, section 512 has encouraged the development and growth of innovative services that allow Internet users to communicate and express themselves in new and creative formats. Section 512 is commonly applied in cases of uploaded music files.

In 2011, the Copyright Office released its report on pre-1972 sound recordings. Among its other findings, the Office claimed that, even when a site was eligible for protection under

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<sup>38</sup> See, e.g., Neil J. Rosini & Michael I. Rudell, *Pre-1972 Sound Recordings—A Legal Breed Apart*, FRANKLIN, WEINRIB, RUDELL & VASSALLO, P.C. (Oct. 28, 2013), <http://fwrv.com/articles/100954—pre-1972-sound-recordings-a-legal-breed-apart.html> (“This disconnect between legal treatment [sic] given pre-1972 sound recordings and those recorded on or after February 15, 1972, can be particularly troublesome in the digital sphere”); June M. Besek, *Pre-1972 Sound Recordings: Why Does the Law Treat Them Differently?*, 5 IP THEORY No. 1 (2015), available at <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1039&context=ipt> (describing pre-1972 sound recordings as subject to an “increasingly confusing array of state laws”); Ober Kaler, *To understanding the copyright protections of pre-1972 sound recordings you have to keep on trunkin’ with Hot Tuna and the sounds of the 60s*, LEXOLOGY (Feb. 13, 2015) <http://www.lexology.com/library/detail.aspx?g=ce47f58e-b256-4cff-b81a-7484b36dedc6> (noting that “the current state law for protection of pre-1972 recordings is complex and uneven”); Laura Moy, *Protecting Sound Recording Artists and Getting It Right This Time*, PUB. KNOWLEDGE NEWS BLOG (Dec. 4, 2013), <https://www.publicknowledge.org/news-blog/blogs/protecting-sound-recording-artists-and-gettin>.

section 512 for other works, it could not invoke the safe harbor for hosting pre-1972 recordings. While admitting that there was no policy reason to deny equal protection regardless of the recording’s age, the Office argued that the phrase “infringement of copyright” in section 512 was ambiguous—enough so that it could not reasonably be interpreted to apply to pre-72 recordings.<sup>39</sup>

To buttress its decision, the Office incorrectly claimed that “basic canons of statutory interpretation” require that “any doubts must be resolved against the party asserting the exception” to liability—such as (but presumably not limited to) services and sites seeking immunity under section 512, or any other statutory provision the Office deems inconveniently “ambiguous.”<sup>40</sup> The scope of such a claim is staggering; by this logic, many limitations on liability could, through creative readings, be rendered sufficiently (for the Copyright Office’s purposes) “ambiguous” and thus unavailable.

#### *a. The Second Circuit’s Response in Vimeo*

In addressing the Copyright Office’s report, the Second Circuit stated unequivocally that the Copyright Office’s conclusions were “based in major part on a misreading of the statute.”<sup>41</sup> The Court found the Copyright Office’s interpretation of the statute incompatible with “a literal and natural reading of the text,” and “[a]t the very least, a strained interpretation—one that could be justified only by concluding that Congress must have meant something different from what it said.”<sup>42</sup> The court then went out of its way to highlight the Office’s gross misreading of existing jurisprudence to favor rightsholders, calling it “arbitrary and without logical foundation”:

First, the Report’s conception that, under the canon it cited, statutes “must be construed” in a certain way misconceives what such canons are. They are not rules, but rather suggestive “guides.” [...] Such guides are based on

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<sup>39</sup> See Pre-1972 Report.

<sup>40</sup> Pre-1972 Report at 132 (citing *New York Times Co. v. Tasini*, 533 U.S. 483 (2001)).

<sup>41</sup> *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016).

<sup>42</sup> *Id.* at 78.

commonsense logic and can aid in the interpretation of a legislature's intentions in the face of an ambiguous provision, but only to the extent that the logical propositions on which they are based make sense in the particular circumstance. [...]

Second, the proposition cited by the Report with citation to our *Tasini* decision was not the proposition we espoused in *Tasini*. What we said in that case was that reading a statutory exception to a general rule “as broadly as appellees suggest would cause the exception to swallow the rule.” [...] [T]he proposition stated by the Report—that exceptions must in all circumstances be construed narrowly, “and any doubts must be resolved against the one asserting the exception”—is arbitrary and without logical foundation. There is simply no reason to assume as a general proposition that a legislature intended all exceptions to all general principles to be construed narrowly—or broadly for that matter.<sup>43</sup>

Turning to the Office’s analysis, the Court noted, “as for the arguments based on canons of statutory construction, *a subject not within the special expertise of the Copyright Office*, we respectfully conclude that the pertinent canons were misunderstood and misapplied.”<sup>44</sup> As a parting blow, the Second Circuit closed by reminding parties that the Copyright Office, as a non-rulemaking agency, is not entitled to *Chevron* deference, and is entitled “appropriate deference” only in cases of “reasonably persuasive interpretations of the Copyright Act”—a standard that was not met in this case.<sup>45</sup>

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<sup>43</sup> *Id.* at 90.

<sup>44</sup> *Id.* at 89 (emphasis added).

<sup>45</sup> *Id.* at 93.

## 2. Declaring a Broad “Making Available” Right Against Overwhelming Contrary Jurisprudence and Statutory Language

Under current U.S. law, rightsholders have the exclusive right to “distribute copies ... of the copyrighted work to the public.”<sup>46</sup> In layman’s terms, this means that only the rights holder is allowed, under the law, to hand out copies of their work to the public. However, copyright industries have recently advocated for a more expansive “making available” right. Such a right would go far beyond the distribution of a work, and might encompass situations where the work was offered (but not transferred), or even situations where the work was accidentally made available to the public—regardless of whether anyone actually *saw* it. Such a theory “suggests that the mere identification and listing of works available constitutes unauthorized distribution without any further showing that a copyrighted file was actually copied or transferred.”<sup>47</sup> As a practical matter, this would lower the bar for rightsholders to prove copyright infringement, allowing them to go after any public listing of copyrighted work, whether the files were distributed or not.

In a 2015 report, the Copyright Office creatively read such a “making available” right into U.S. copyright law, despite its complete absence from the text of the statute. The report claimed this right existed by implication through a “gestalt”-style reading of the distribution, public performance, and public display rights. The report also claimed that this right, completely absent from the language of the statute, was itself separately enforceable as is, without any legislative clarification from Congress.

Supporters of the right (such as the Recording Industry Association of America) contend that “making available” merely represents an updated reading of the distribution

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<sup>46</sup> 17 U.S.C. § 106(3).

<sup>47</sup> Kristy Wiehe, *Dollars, Downloads and Digital Distribution: Is “Making Available” a Copyrighted Work a Violation of the Author’s Distribution Right?*, 15 UCLA ENT. L. REV. 117, 120 (2008).

right; however, “despite the RIAA’s contentions to the contrary, there is no basis of statutory interpretation on which to argue that the exclusive right of distribution supports the ‘making available’ doctrine.”<sup>48</sup> Courts have overwhelmingly agreed; although the Copyright Office’s report does note that “some district courts have questioned the existence of the right under U.S. law, ultimately failing to recognize a cause of action where copyright owners cannot prove that downloads or receipt occurred,”<sup>49</sup> this phrasing grossly understates the weight and scope of authority stacked against such a right.<sup>50</sup>

### 3. Consistent and Adamant Misinterpretations of Statutory Licenses

When pay TV systems transmit broadcast programming, they generally do so under a compulsory license, such as section 111 of the Copyright Act. Section 111 provides a compulsory license—that is, a system under which cable systems can deliver copyrighted content for a calculated fee, without having to individually negotiate with copyright holders.

Historically, these licenses came about in response to Supreme Court rulings<sup>51</sup> which decided that, because cable systems merely amplified and retransmitted existing broadcast signals, they functioned as a kind of large antenna and did not raise copyright concerns. Rightsholders, upset with the ruling, sought to change the law. In a compromise, lawmakers labeled cable retransmissions as public performances under copyright law, but established a

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<sup>48</sup> John Horsfield-Bradbury, “Making Available” as Distribution: File-Sharing and the Copyright Act, 22 HARVARD J.L. & TECH. NO. 1 (2008), available at <http://www.mishkabobble.com/articles/pdf/v22/22HarvJLTech273.pdf>.

<sup>49</sup> Making Available Report at 3.

<sup>50</sup> As one court noted, “[t]he general rule, supported by the great weight of authority, is that infringement of the distribution right requires an actual dissemination of either copies or phonorecords.” *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 149 F. Supp. 3d 634, 666 (E.D. Va. 2015). See also *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981 (D. Ariz. 2008); *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1225 (D. Minn. 2008); *London-Sire Records, Inc. v. Doe*, 542 F. Supp. 2d 153, 166-67 (D. Mass. 2008); *In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796, 805 (N.D. Cal. 2005); *Musical Prods., Inc. v. Roma's Record Corp.*, No. 05-cv-5903, 2007 WL 750319, at \*1 (E.D.N.Y. Mar. 7, 2007); *et al.*

<sup>51</sup> *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broad. Sys.*, 415 U.S. 394 (1974).

compulsory license to allow for cable systems to transmit programming without having to negotiate one-on-one with each potential rights holder. (Since the 1992 Cable Act, pay TV systems also usually have to get consent from broadcasters to carry their signals—but this is a “signal” right unconnected from any copyrights in actual broadcast programming.) This protected the then-nascent technology from being systematically disfavored by large content interests. Perhaps unsurprisingly, the Copyright Office was not a fan of compulsory licenses, and advocated the narrowest possible interpretation of such licenses throughout the 1990s.

Prior to the development of the Satellite Home Viewer Act of 1994, the Copyright Office refused to apply section 111’s compulsory licenses to microwave transmissions. Congress went out of its way to clarify that the law did cover microwave transmissions, despite the Office’s position, and instructed the Office to retroactively amend itself:

This amendment is necessary because of an unnecessarily restrictive interpretation by the Copyright Office of the phrase ‘or other communications channels’ in the same definition. Because the amendment is a clarification of existing law, the Copyright Office is expected to apply the amendment to previously-filed statements of account.<sup>52</sup>

This narrow perspective persisted throughout the 1990s. Notably, in the process of drafting what would become the Satellite Home Viewer Improvement Act of 1999, a new amendment, not present in either the House or Senate versions of the bill, appeared without notice (or sponsor) in the Conference Report. This amendment sought to explicitly exclude Internet retransmissions from utilizing compulsory licenses under section 111 of the Telecommunications Act, which provided for retransmission of broadcast signals under a host of conditions. When public interest groups, Internet companies, and lawmakers alike cried foul, then-Register Marybeth Peters wrote to Congress in support of the amendment. In her letter, she claimed that the amendment was a “clarification” and not an alteration of the

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<sup>52</sup> H.R. REP. NO. 103-703 at 17 (1994).

law itself: “I believe that the section 111 license does not and should not apply to Internet transmissions.”<sup>53</sup>

The amendment was so controversial that its inclusion threatened to sink the bill entirely. It was ultimately removed, and the bill was signed into law. Despite the overwhelming opposition to the content of the amendment, and the Congressional decision to *actively remove* language prohibiting Internet retransmissions from utilizing section 111’s compulsory license, the Copyright Office was unswayed. Regardless of legislative history, Congressional intent, or any other evidence to the contrary, Peters asserted that “Our view on this matter has not changed: if there is to be a compulsory license covering such retransmissions, it will have to come from newly enacted legislation.”<sup>54</sup> The Copyright Office was so focused on maintaining its maximalist vision of the statute that it remained unwilling to adjust position, even in the face of contrary Congressional intent.

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<sup>53</sup> Letter from Marybeth Peters, Register of Copyrights, to Rep. Howard Coble (Nov. 10, 1999).

<sup>54</sup> Copyrighted Broadcast Programming on the Internet: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary, 106th Cong. 2nd Session (2000) (statement of Marybeth Peters, Register of Copyrights), available at <http://www.copyright.gov/docs/regstat61500.html>.

## B. RIGHTSHOLDERS FIRST: PUSHING TO EXPAND COPYRIGHT AT THE EXPENSE OF CONSUMERS' RIGHTS

*“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.” Justice John Paul Stevens.*<sup>55</sup>

*“Copyright is for the author first and the nation second.” Maria Pallante, Register of Copyrights.*<sup>56</sup>

Congressman Robert W. Kastenmeier, a member of the House Judiciary Committee who was central to the passage of the 1976 Copyright Act, once explained that “[t]he proponent of change [to copyright law] should present an honest analysis of all the costs and benefits . . . . The argument that a particular interest group will make more money and therefore be more creative does not satisfy this threshold standard or the constitutional requirements of the intellectual property clause.”<sup>57</sup> Copyright, as designed, is by definition a limited monopoly, with the direct aim of promoting the public good by securing incentives to creation for a limited time. These incentives are not boundless, and those who seek to expand them bear a substantial burden in proving their case.

The Copyright Office, however, does not adhere to this view of copyright law; instead, history has borne out again and again the observation that it “has tended to view copyright owners as its real constituency.”<sup>58</sup> It has repeatedly aligned itself with the policy agendas of major industry groups, seeking to expand the reach of copyright in scope, duration, and ease of enforcement. From seeking to curtail the usability of orphan works, to advocating for expansive moral rights for rightsholders, to supporting copyright expansion in the face of

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<sup>55</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

<sup>56</sup> Judith Saffer, *An Interview with Register of Copyrights Maria A. Pallante*, LANDSLIDE, Apr. 2012.

<sup>57</sup> Robert W. Kastenmeier & Michael J. Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 MINN. L. REV. 417, 441 (1985).

<sup>58</sup> LITMAN, *supra* note 4, at 74.

contrary statutory mandates, to outright technophobia, the Copyright Office has repeatedly placed the interests of rightsholders above both the public interest.

## **1. Advocating Moral Rights, and Passing the Burden of Orphan Works to Consumers**

“Orphan works” refers to those works that are new enough to be covered by the statutory term of copyright, but whose current rightsholders are either indeterminate or impossible to reach. This can happen for a number of reasons: the author (or the last known rightsholder) may die without explicitly passing on his copyright holdings to an heir, the work may not be clearly attributed or registered, the rights may have been held by a company that no longer exists and did not clearly dispose of its copyright assets, or contact information for the last known rights holder may be impossible to obtain.

This is an especially difficult problem for libraries, which hold thousands—or even millions—of volumes accumulated over decades of collecting.<sup>59</sup> Libraries that want to digitize portions of their collection face an impossible choice: attempt to identify, track down, and obtain permission from every rights holder for each work in their collection; or face potentially massive copyright damages in civil court if a rights holder comes forward after their work has been digitized. These dual issues of orphan works and mass digitization have been the focus of two Copyright Office reports; one in 2006, and an “updated” report released in 2015.<sup>60</sup>

### ***a. Open Disdain for Community Standards and Organizations***

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<sup>59</sup> The University of Chicago Library system, for example, housed over 11 million individual volumes in 2014. See Martha Kyrillidou, Shaneka Morris, & Gary Roebuck, *ARL Statistics 2013–2014* (2014), available at <http://publications.arl.org/ARL-Statistics-2013-2014>.

<sup>60</sup> U.S. COPYRIGHT OFFICE, *ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS* (2015) [hereinafter *Orphan Works Report*], available at <http://www.copyright.gov/orphan/reports/orphan-works2015.pdf>.

Given the precarious situation faced by libraries and other not-for-profit groups that utilize orphan works, community standards are a common method of educating organizations about their rights and responsibilities under copyright law. The Copyright Office, however, used its 2015 report to openly deride best practices promulgated by nonprofits and community groups. The Report claimed that any guidelines—even non-editorialized restatements of law—made without input from copyright owners are merely “aspirational” and therefore unreliable.”<sup>61</sup>

### *b. Championed the “Solution” of Expansive Moral Rights*

This open bias against non-rightsholders continued throughout the Orphan Works report. The Office used its platform to propose granting rightsholders access to sweeping and easily available injunctions against the use of orphan works. These would be available even in cases where the new work is clearly fair use (containing “significant amount of original expression”), so long as the “infringer” fails to provide “reasonable compensation and provide attribution.”<sup>62</sup>

Even more troubling was the Office’s recommendation that Congress adopt a European-style moral right for authors to bar use of their work. The Office asserted that, even in cases where the author of the “orphan” work has been compensated, attributed, and his work has been transformed into a new work meeting fair use standards, that author should retain the right to an injunction if he in any way “objects” to its use on the grounds that he feels it “would be prejudicial to the owner’s honor or reputation, and this harm is not otherwise compensable.”<sup>63</sup> Allowing such expansive, subjective, and ill-defined downstream

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<sup>61</sup> Orphan Works Report at 45. As the Association of Research Libraries points out, “Best practices that have been negotiated with rightsholders would likely fall far short of what the law actually permits under fair use.” Krista Cox, Ass’n of Research Libraries, *Copyright Office Releases Report on Orphan Works and Mass Digitization; Recommends Burdensome Legislation*, ARL POL’Y NOTES (June 5, 2015), <http://policynotes.arl.org/?p=1075>.

<sup>62</sup> Orphan Works Report Appendix A, at 6.

<sup>63</sup> Orphan Works Report Appendix A, at 6.

control of how a work is used could result in a substantial chilling effect on orphan use works, particularly in highly critical or controversial contexts.

Further complicating the Copyright Office’s position is the fact that such a moral right—namely the right of an author to actively control what can and cannot be done with his work, no matter how far down the stream of commerce—is not only alien to U.S. law, but antithetical to the practical, economic nature of American copyright law.<sup>64</sup> As commentator William Patry notes, Congress went to great lengths to *avoid* inserting expansive moral rights into domestic law; when implementing the Berne convention, “a number of provisions were inserted into the Copyright Act and declarative sections of the Berne Implementation Act to ensure that moral rights claims cannot be raised under the Convention ... [and] reiterate that domestic U.S. law provides the sole source of rights.”<sup>65</sup>

### *c. Advocating Impractical Minimum Search and Disclosure Standards*

The Report’s proposal would have also required prospective users of orphan works to preemptively scour the Copyright Office’s physical archives in Washington, D.C. —a task that would mandate physical travel to Capitol Hill to search, by hand, the Copyright Office’s archives *before* engaging in any use of an orphan work. These “overly burdensome and complicated”<sup>66</sup> minimum search standards, including a search of “copyright office records not available to the public through the Internet,”<sup>67</sup> would effectively chill small-scale use of orphan works and burden potential creators outside the Washington area, limiting diverse geographic participation in even the most minimal use of orphan works.

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<sup>64</sup> Moral rights are currently available in only one context in the United States: that of visual art. For a discussion of the tensions generated by the Visual Artist Rights Act (VARA) and the underlying assumptions behind the concept of moral rights, see Amy M. Adler, *Against Moral Rights* (N.Y. Univ. Sch. of Law, Working Paper No. 121, Mar. 19, 2009), available at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1121&context=nyu\\_plltwp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1121&context=nyu_plltwp).

<sup>65</sup> Patry §23:23.

<sup>66</sup> Krista Cox, Ass’n of Research Libraries, *Copyright Office Releases Report on Orphan Works and Mass Digitization; Recommends Burdensome Legislation*, ARL Pol’y Notes (June 5, 2015), <http://policynotes.arl.org/?p=1075>.

<sup>67</sup> Orphan Works Report Appendix A at 3.

The proposal also mandated that, to be eligible for even marginal protection against liability, users send out extensive Notice of Use disclosures *before* utilizing any orphan work.<sup>68</sup> This provision was so widely disliked (by publishers, libraries, and consumers alike) that it had been previously employed as a “poison pill” to successfully kill a 2008 orphan works bill.<sup>69</sup>

## 2. Reversing its Published Stance Days after Receiving a Phone Call from the RIAA

In *Arista Records v. Launch Media*, the Second Circuit was tasked with deciding whether Launch’s music streaming service constituted an interactive service or not. Admitted into evidence was a memo issued by the Copyright Office and posted on its website on November 21, 2000, and re-posted again the following month. The November version of the memo concluded in a footnote that Launch Media was conceivably a non-interactive service (and thus subject to fewer restrictions and fees). That conclusion, however, was apparently subject to change without notice:

In a footnote, the Copyright Office noted that the RIAA and DiMA had discussed LAUNCHcast “to illustrate the type of offerings that are in dispute.” The Copyright Office concluded that “[f]rom these descriptions, there is considerable doubt whether [LAUNCHcast] would qualify as an ‘interactive service.’ ” On December 8, 2000, the Copyright Office posted a message on its website that there had been a typographical error in its letter. It then reissued its letter with identical substantive footnote to read: “From these descriptions, there is considerable doubt whether [LAUNCHcast] would qualify as a noninteractive service.” In the published version of the letter, however, the Copyright Office again altered the footnote to read as it had read in the November 21, 2000

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<sup>68</sup> Orphan Works Report, at 56.

<sup>69</sup> Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th CONG. (2008). See also Krista Cox, Ass’n of Research Libraries, *Copyright Office Releases Report on Orphan Works and Mass Digitization; Recommends Burdensome Legislation*, ARL POL’Y NOTES (June 5, 2015), <http://policynotes.arl.org/?p=1075>.

letter—noting that there was considerable doubt that LAUNCHcast *was* interactive.<sup>70</sup>

When the attorney for Launch noticed the reversal, he contacted the Office. As the Court notes,

In a memorandum from Kenneth L. Steinthal, attorney for Launch, admitted into evidence at trial, Steinthal stated that he spoke with the individual in the Copyright Office who drafted the footnote. Steinthal stated that according to that individual, someone from the RIAA had called the Copyright Office and as a result, the substance of the footnote was changed.<sup>71</sup>

The blatant reversal under pressure from the recording industry did not go unnoticed. The court noted dryly that “the history of its revisions—complete reversals of opinion by the Copyright Office over a matter of days—seriously call into question the thought process, if any, that went into drafting the footnote” and that “[w]hatever the etiology of the Copyright Office's inability to make up its mind, we find the Copyright Office efforts here of little help.”<sup>72</sup>

### **3. Advocating Resale Royalties Despite an Admitted Lack of Evidence**

The Copyright Office’s December 2013 report, “Resale Royalties: An Updated Analysis,” exemplifies the Office’s willingness to support an expansion of copyright protection even when faced with a total lack of supporting evidence.

In its report, the Office supported the passage of legislation that would create a resale royalty for authors of visual works. In practice, it would require owners of an original artwork (e.g. paintings and sculptures) to pay, in some circumstances, a percentage of any

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<sup>70</sup> *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 156–57 (2d Cir. 2009).

<sup>71</sup> *Id.* at 157

<sup>72</sup> *Id.* at 161

value received from the sale of the art, such as a sale through an auction house or dealer.<sup>73</sup> The Office reached this conclusion despite an admitted dearth of evidence that creators of visual works are disadvantaged under the current copyright system and need such a royalty to compensate, or that the creation of a royalty would incentivize more creation of new works or otherwise fulfill the purposes copyright.

What is remarkable is that the Office itself *admits* that it lacks evidence to support its position. In one sentence, the Office embraces the claim that the “current U.S. copyright system leaves many visual artists at a practical disadvantage in relation to other kinds of authors,”<sup>74</sup> while in the very next sentence it admits that “the general lack of reliable empirical evidence in this area makes any comparison of the relative positions of visual artists and other creators inherently imprecise.”<sup>75</sup> Similarly, with respect to evidence showing that a resale royalty might incentivize the creation of more works, the Office noted that “although there are some indications that a resale royalty might incentivize the creativity of visual artists, there is insufficient evidence to conclude that a resale royalty is an effective, much less optimal, means of incentivizing such creativity.”<sup>76</sup>

It was not even clear to the Office how many artists would benefit from this expansion of exclusive rights. Observing that its own 1992 report on the same subject lacked reliable empirical data on how many artists would benefit from a resale royalty, the Office admitted that its “reexamination of the issue in connection with this report has revealed a similar dearth of conclusive information.”<sup>77</sup> The lack of evidence supporting an expansion of copyright led the Office to recommend against its adoption in 1992. While that deficit persisted through 2013, the Office saw no reason to hold back its endorsement.

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<sup>73</sup> U.S. COPYRIGHT OFFICE, *RESALE ROYALTIES: AN UPDATED ANALYSIS* (2013) [hereinafter *Resale Royalties Report*] at 3, available at <http://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf>.

<sup>74</sup> *Id.* at 65.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 39.

<sup>77</sup> *Id.* at 68.

The Resale Royalty Report is an example of how the Office’s policy recommendations are founded in a “why not?” approach expanding the scope of copyright protection. Rather than acknowledge the reality that, as then-future Justice Stephen Breyer once noted, “a heavy burden of persuasion should be placed upon those who would extend such protection,”<sup>78</sup> the Office did not even require measurable evidence that authors would benefit, let alone that the public interest would be served, before supporting a new right.

#### **4. Endorsing SOPA and PIPA Despite Profound Implications for the Internet and Overwhelming Public Disapproval**

The Office also famously endorsed the doomed Stop Online Piracy Act (SOPA) and Protect IP Act (PIPA). The bills were widely criticized as an example of gratuitous copyright overreach that gave both government and private rightsholders expansive and unprecedented enforcement powers.

Despite the fact that the bills attacked critical safe harbor protections for online services<sup>79</sup> and constructed an internet filtering regime in the United States,<sup>80</sup> among many other flaws, the Copyright Office lent the bills unwavering support. Testifying before Congress, Register of Copyrights Maria Pallante called SOPA “a sound policy choice,”

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<sup>78</sup> Stephen Breyer, *The Uneasy Case for Copyright*, 84 HARV. L. REV. 281, 322–23 (1970).

<sup>79</sup> Mike Masnick, *How SOPA 2.0 Sneaks In A Really Dangerous Private Ability To Kill Any Website*, TECHDIRT (Dec. 16, 2011), <https://www.techdirt.com/articles/20111216/03275317104/how-sopa-20-sneaks-really-dangerous-private-ability-to-kill-any-website.shtml>.

<sup>80</sup> See Yochai Benkler, *Seven Lessons from SOPA/PIPA/Megaupload and Four Proposals on Where We Go From Here*, TECHPRESIDENT (Jan. 25, 2012), <http://techpresident.com/news/21680/seven-lessons-sopapipamegaupload-and-four-proposals-where-we-go-here> (“In that earliest version [of PIPA], the Justice Department was supposed to create a blacklist of ‘bad actors’ by mere allegation; no proof necessary before these sites would start to be blocked. By the time SOPA was introduced, that power was directly granted to copyright owners for blocking payment systems and advertising, and again to the Justice Department, with slightly higher constraints, for blocking DNS service to the sites”); Rebecca MacKinnon, *Stop the Great Firewall of America (Op-Ed)*, N.Y. TIMES, Nov. 15, 2011, available at [http://www.nytimes.com/2011/11/16/opinion/firewall-law-could-infringe-on-free-speech.html?\\_r=4](http://www.nytimes.com/2011/11/16/opinion/firewall-law-could-infringe-on-free-speech.html?_r=4); Jay Walsh, *Wikimedia supports American Censorship Day*, WIKIMEDIA BLOG (Nov. 15, 2011), <https://blog.wikimedia.org/2011/11/15/wikimedia-supports-american-censorship-day/>.

“measured,” and thanked its drafters for drafting language that “would bestow a number of important responsibilities on the Copyright Office.”<sup>81</sup>

Despite the Copyright Office’s enthusiastic endorsement, both bills were ultimately defeated after opposition by technology experts, consumer groups, free speech and human rights advocates, and individual citizens participating in the 2012 Internet Blackout.

## **5. Encouraging Companies to Contract Away Their Customers’ Rights**

The Office’s dim view of consumers as irrelevant in the face of rightsholders’ monetization came into stark relief when it issued an opinion letter on the Federal Communication Commission’s set-top box proceeding. The Office, in defending cable companies’ monopoly on set-top boxes, emphasized that programmers and distributors needed to retain the ability to contract away their customers’ rights to make fair uses of programming in order to provide “certainty” for their business relations.<sup>82</sup> This extremist “freedom of contract” argument—that consumers may only engage in fair use when the content providers allow it—actively promotes the idea that content and distribution services may bargain away the rights of their consumers, without those consumers’ consent.

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<sup>81</sup> *The Stop Online Piracy Act: Hearing on H.R. 3261 Before the H. Comm. on the Judiciary*, 112th Cong. 59 (2011) (statement of Maria Pallante, Register of Copyrights), available at <http://www.copyright.gov/docs/regstat111611.html>.

<sup>82</sup> Letter from Maria Pallante to Rep. Blackburn et al, at 7 (Aug. 3, 2016), available at <https://www.eff.org/document/letter-maria-pallante-fcc-re-set-top-boxes>.

## 6. Technophobia and the FCC Broadcast Flag

The digital television transition, completed in 2009, amounted to “the most significant advancement of television technology since color TV was introduced.”<sup>83</sup> Recognizing that the transition was an issue of telecommunications law, Congress charged the FCC with managing the transition in the 1996 Telecommunications Act.

The Motion Picture Association of America and other industry trade groups disagreed with Congress’s assessment; they took to Congress and the FCC, claiming that high quality transmissions heightened the threat of content piracy. These groups demanded that the Commission include a “broadcast flag” that allowed the programmer to exert granular control over what the end consumer could and could not do once they had received the broadcast. The programmers’ lobby also demanded that the FCC use its authority to require that all electronics sold in the United States come bundled with the capacity to translate and honor those flags by controlling consumer usage.

The FCC agreed, but public interest groups and others pushed back and successfully sued to block the rules in federal court. The D.C. Circuit threw out the broadcast flag on the grounds that the flags weren’t regulating communication by wire or radio, but were instead an attempt to regulate usage *after* the transmission had been completed, a degree of control outside of the FCC’s statutory authority.<sup>84</sup>

During the ongoing debate over the broadcast flag, the Copyright Office was asked to testify before Congress on the issue. While not overtly endorsing the flag, then-Register Marybeth Peters attempted to write off previous case law that protected consumers’ ability to use technology to make fair use of broadcasted material. When asked about *Sony Corp. of America v. Universal Studios*—which held that studios could not exert complete downstream

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<sup>83</sup> David Rehr, National Association of Broadcasters, *Broadcasters Prepare For DTV Transition*, TWICE (January 7, 2008), <http://www.twice.com/news/tv/broadcasters-prepare-dtv-transition/3675>.

<sup>84</sup> *Am. Library Ass’n v. Fed. Comm’n Comm’n*, 406 F.3d 689 (D.C. Cir. 2005) at 692 (“Great caution is warranted here, because the disputed broadcast flag regulations rest on no apparent statutory foundation and, thus, appear to be ancillary to nothing.”).

control over consumers' devices—Peters claimed that it was “simply incorrect” to read the case as granting consumers any substantial fair use rights.<sup>85</sup>

More troublingly, Peters also asserted that the case was likely no longer relevant in light of technological developments and the specter of piracy, saying that “[i]n today's digital world, the ‘private’ and ‘non-commercial’ use of works can quickly and easily become public distribution of copies that has a substantial harmful effect on the commercial value of copyrighted works.”<sup>86</sup> This idea that basic protections for consumers should be discarded whenever rightsholders perceive new threats to their revenues is both extremely troubling and at odds with established law.

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<sup>85</sup> Piracy Prevention and the Broadcast Flag: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary, 108th Cong. 1st Session (2003) (statement of Marybeth Peters, Register of Copyrights), available at <http://www.copyright.gov/docs/regstat030603.html>.

<sup>86</sup> *Id.*

# C. THE COPYRIGHT OFFICE HAS ENGAGED IN AN EVER-BROADENING SCOPE OF LEGAL ANALYSIS AND ACTIVITY ON NON-COPYRIGHT ISSUES

*"It makes me really happy that your car mechanic knows about copyright law." Register of Copyrights Maria Pallante.<sup>87</sup>*

The Copyright Office has, for years, engaged in an ever-broadening scope of legal analysis on issues outside of its mandate. The Office's triennial 1201 exemption hearings provide a ready example of the Office's attempts at "manifest [copyright] destiny"; however, even outside of the 1201 context, the Office has regularly rendered opinions on issues well outside its expertise, all while maintaining an expectation of deference. This trend has reached a head in recent years, with the office attempting to engage in everything from antitrust analysis, to highway safety regulations, to analyses of economic markets.

## 1. Mission Creep and the "Office of Everything"

Section 1201 of the Digital Millennium Copyright Act (DMCA) prohibits any attempt to circumvent technological protection measures used to lock access to copyrighted works. In passing the DMCA, Congress directed the Copyright Office to recommend exemptions to this rule in the form of rulemakings held every three years. All exemptions must be argued *de novo*; in other words, they expire at the end of each three-year term, and must be granted anew. Although the Librarian of Congress technically makes the final decision on what exemptions to grant and which to deny, historically the Librarian has deferred to the Copyright Office's recommendations, almost without exception.

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<sup>87</sup> Speakers: Laura Gasaway, Jane Ginsburg, Maria Pallante, Shira Perlmutter, Richard Rudick, *Session 1: The Legal Landscape*, 36 COLUM. J.L. & ARTS 545 (2013).

The triennial exemption hearings under section 1201 have long been recognized as “ineffective and cumbersome”<sup>88</sup> and “time-consuming, obscure and expensive, effectively excluding many digital consumers.”<sup>89</sup> The latest round of hearings saw the Copyright Office opine on non-copyright policy questions related to the regulation of medical devices,<sup>90</sup> aerospace component safety standards,<sup>91</sup> agricultural equipment,<sup>92</sup> emissions standards,<sup>93</sup> and highway safety standards,<sup>94</sup> among other far-flung topics.

In at least one case, these external, non-copyright concerns were enough to outweigh a proposal that was, by the Office’s own admission, fully sufficient to support the exemption. The exemption for accessing software in land-based vehicles was delayed for one year, based exclusively on (largely speculative) policy grounds completely unrelated to copyright.<sup>95</sup> The recommendation noted that although “from a copyright perspective proponents had made the case for an exemption,” it needed to still be delayed “to be carefully tailored to address a

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<sup>88</sup> Arthur H. Neill, *Fixing Section 1201: Legislative and Regulatory Reforms for the Digital Millennium Copyright Act Anti-Circumvention Provisions*, 19 TUL. J. TECH. & INTELL. PROPERTY (2016), available at <http://ssrn.com/abstract=2791198>.

<sup>89</sup> Mitch Stoltz, *New “Breaking Down Barriers to Innovation Act” Targets Many of DMCA Section 1201’s Problems*, ELECTRONIC FRONTIER FOUND. (Apr. 20, 2015), <https://www.eff.org/deeplinks/2015/04/new-breaking-down-barriers-innovation-act-targets-many-dmca-section-1201s-problems>.

<sup>90</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 80 Fed. Reg. 65944, 65955 (Oct. 28, 2015), available at <http://www.copyright.gov/fedreg/2015/80fr65944.pdf>.

<sup>91</sup> U.S. Copyright Office, *Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention (Recommendation of the Register of Copyrights) 374 (2015)* (hereinafter *Register’s 2015 Recommendations*), available at <http://www.copyright.gov/1201/2015/register-recommendation.pdf> (“The record indicates that 3D printing processes are used to produce medical implants, aerospace parts, and consumer goods, which are all subject to strict safety standards. It is reasonable to suspect that if these types of items were manufactured using alternative materials or with altered printer software, the resulting goods might not comply with the applicable standards.”). See also Michael Weinberg, *Unlocking 3D printers ruling is a mess* (Oct. 27, 2015), <http://michaelweinberg.org/post/132021560865/unlocking-3d-printers-ruling-is-a-mess>.

<sup>92</sup> *Id.* at 218.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 80 Fed. Reg. 65944 (Oct. 28, 2015), available at <http://www.copyright.gov/fedreg/2015/80fr65944.pdf>.

number of concerns” outside of the Office’s jurisdiction.<sup>96</sup> The end result was that individuals who wished to repair their farm equipment or other vehicles would not be allowed to do so until 2016 and would only enjoy a two-year exemption, rather than the three years given to other approved uses.

The Office has seen its anti-consumer recommendations overturned on two occasions. The Office’s 2010 recommendation against allowing blind or print-disabled consumers from accessing books in by e-readers<sup>97</sup> was similarly derided by public interest groups, and ultimately overturned by the Librarian of Congress with a pointed critique of the Office’s process:

In the view of the Librarian, the proposed exemption should be granted because: (1) the record includes statements on the likelihood of access not being available to blind individuals, (2) no one opposed the exemption, and (3) there are broad benefits to society in making works accessible to the visually impaired. The Librarian notes that, in contrast with its actions in both 2003 and 2006, the Copyright Office did not submit any post-hearing questions on this proposed exemption. Such development of the record would have been helpful. The Librarian also notes that the Assistant Secretary for Communications and Information of the Department of Commerce, with whom the Register is required by Section 1201(a)(l)(C) to consult when she makes her recommendation, supports granting the exemption.<sup>98</sup>

And in 2012, the Office declined to renew an existing exemption that would allow consumers to unlock their cell phones, citing non-copyright policy concerns about phone

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<sup>96</sup> *Id.* at 65954.

<sup>97</sup> U.S. COPYRIGHT OFFICE, RECOMMENDATION OF THE REGISTER OF COPYRIGHT IN RM 2008-08; RULEMAKING ON EXEMPTIONS FROM PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES (June 11, 2010), available at <http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf>.

<sup>98</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43838 (July 27, 2010), available at <http://www.copyright.gov/fedreg/2010/75fr43825.pdf>.

trafficking.<sup>99</sup> Public outcry<sup>100</sup> prompted Congress to adopt legislation specifically overruling the Office’s finding and creating a permanent statutory exemption for cell phone unlocking.<sup>101</sup>

## 2. Offering “Antitrust Analysis” in Lieu of Copyright

In 2016, a dispute over the consent decrees governing two songwriters’ organizations—BMI and ASCAP—prompted Congress to ask for the Copyright Office’s opinion on the state of copyright law as it applied to the specific issue at hand: fractional licensing of songs by multiple authors.<sup>102</sup> Rather than respond to the question, however, the Copyright Office instead attempted a lengthy antitrust analysis, defending the organizations’ proposed licensing schema based purely on their business model.<sup>103</sup> It concluded that factional licensing was an important option for ASCAP and BMI to retain as a business matter, and encouraged the DoJ to interpret the standing consent decrees in such a way as to be most business-friendly (regardless, presumably, of the legal soundness of such an interpretation).

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<sup>99</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65265 (Oct. 26, 2012), *available at* <http://www.copyright.gov/fedreg/2012/77fr65260.pdf> (“[T]here are ample alternatives to circumvention. That is, the marketplace has evolved such that there is now a wide array of unlocked phone options available to consumers.”).

<sup>100</sup> 1159 Cong. Rec. S1, 594 (daily ed. Mar. 11, 2013) (statement of Rep. Leahy et al.) (“Over the past few weeks and months, consumers have spoken clearly—they want to retain the right to transfer their cell phones between wireless providers, if they so choose, when their contracts expire.”).

<sup>101</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Wireless Telephone Handsets, 79 Fed. Reg. 50552 (Aug. 25, 2014), *available at* <http://www.copyright.gov/fedreg/2014/79fr50552.pdf>.

<sup>102</sup> Letter from Rep. Collins, Vice Chairman, Subcomm. on Courts, Intellectual Prop., & the Internet, to Maria Pallante, Register of Copyrights (Jan. 12, 2016), *available at* <http://www.copyright.gov/policy/pro-licensing.pdf>.

<sup>103</sup> U.S. COPYRIGHT OFFICE, VIEWS OF THE UNITED STATES COPYRIGHT OFFICE CONCERNING PRO LICENSING OF JOINTLY OWNED WORKS (2016), *available at* <http://www.copyright.gov/policy/pro-licensing.pdf>.

The Department of Justice declined to accept the Office’s conclusions, pointing out that “the language and intent of the decrees and years of interpretations by federal courts” made it clear that fractional licensing was not allowed.<sup>104</sup>

### 3. Holding “Last-Mile Copyright” over Consumer Choice in Set-Top Box Markets

Most recently, several members of Congress asked the Office to weigh in on an ongoing FCC proceeding aimed at opening up competition in the market for cable set-top boxes. In its response, the Office misstated the content of the FCC’s proposed rules, framing it as a looming disaster for copyright holders.<sup>105</sup> Preoccupied with its discussion of the need to maintain current market structures, the Office only passingly touched on the actual legal questions upon which it was originally invited to comment. Its final conclusion that the FCC should abandon its current proposal was based squarely on what the Office perceived to be the economic state of the content marketplace, and not on actual issues of copyright law.

Copyright scholars disagreed with the Office’s position, warning in a letter that “[i]nterpretations of copyright law that operate to expand copyright entitlements into copyright-adjacent fields of commerce run counter to Supreme Court precedent and the

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<sup>104</sup> DEP’T OF JUSTICE, STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE CLOSING OF THE ANTITRUST DIVISION’S REVIEW OF THE ASCAP AND BMI CONSENT DECREES 11 (Aug. 4, 2016), <https://www.justice.gov/atr/file/882101/download>.

<sup>105</sup> Letter from Maria Pallante, to Rep. Blackburn *et al.* (Aug. 3, 2016), available at <https://www.eff.org/document/letter-maria-pallante-fcc-re-set-top-boxes>. For a more thorough discussion of the technical misrepresentations in the Copyright Office’s letter, see Press Release, Public Knowledge, *Public Knowledge Responds to Copyright Office Attack on Set-top Box Competition* (August 3, 2016), available at <https://www.publicknowledge.org/press-release/public-knowledge-responds-to-copyright-office-attack-on-set-top-box-competition>; John Bergmayer, *Private Interests Don’t Override the Law—in Music Publishing, Cable Boxes, or Anywhere Else*, PUB. KNOWLEDGE NEWS BLOG (Aug. 5, 2016), <https://www.publicknowledge.org/news-blog/blogs/private-interests-dont-override-the-law-in-music-publishing-cable-boxes-or-anywhere-else>; Charles Duan, *The Copyright Office Doesn’t Understand Economics*, MORNING CONSULT, Aug. 10, 2016, <https://morningconsult.com/opinions/copyright-office-doesnt-understand-economics/>.

copyright system's goal of increasing public access to knowledge and information."<sup>106</sup> Indeed, the Office's position, taken to its logical conclusion, would reject any governmental regulation that interferes with private contracting by parties--no matter the context or tension with other statutory mandates. This extreme laissez-faire position does not recognize as legitimate any countervailing rights if they potentially interfere with the ability of content industries to exert maximum control over their works.

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<sup>106</sup> Letter from Annemarie Bridy, Peter Jaszi, et al., to David S. Mao, Acting Librarian of Congress, Re: FCC Notice of Proposed Rulemaking on Expanding Customers' Video Navigation Choices and Commercial Availability of Navigation Devices (June 22, 2016), available at [https://cyberlaw.stanford.edu/les/blogs/IP%20Professors%20Letter%20to%20Librarian%20of%20Congress%207.22.2016\\_3.pdf](https://cyberlaw.stanford.edu/les/blogs/IP%20Professors%20Letter%20to%20Librarian%20of%20Congress%207.22.2016_3.pdf).

## D. THE COPYRIGHT OFFICE'S DECISION MAKING PRIORITIZES ITS OWN POLICY OBJECTIVES OVER INPUT FROM STAKEHOLDERS

The Copyright Office has a documented history of pushing its pet projects without regard to input offered by affected parties. This continues even in the face of opposition from the supposed beneficiaries of these projects. The Office has pushed ahead with proposals panned by rightsholders and consumer groups alike, including renewal requirements for copyright safe harbors, extended collective licensing, and revising library and archive protections over the objections of libraries and archives themselves.

### **1. Pushing for New Rules Requiring Websites to Renew their DMCA Registration, Even in the Face of Universal Opposition**

As noted above, section 512 of the Digital Millennium Copyright Act provides some protection from liability for websites that register with the Copyright Office, in the event that their users upload infringing content. In May 2016, the Office proposed reducing the registration fees paid by these websites. But buried in the text was a previously-tabled 2011 proposal<sup>107</sup> to make websites register not once (as is currently the standard), but once every three years.

The registration process as it stands is a substantial administrative burden on websites; to force them to re-apply every three years or else lose their legal protection could push many smaller, independent websites out of compliance. A broad and unusually diverse

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<sup>107</sup> Section 108: Draft Revision of the Library and Archives Exceptions in U.S. Copyright Law, 81 Fed. Reg. 36594 (June 7, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-06-07/pdf/2016-13426.pdf>.

coalition had panned the idea in 2011; groups ranging from the Motion Picture Association of America,<sup>108</sup> to the Computer and Communications Industry Association,<sup>109</sup> to Microsoft,<sup>110</sup> to the Electronic Frontier Foundation<sup>111</sup> flatly opposed periodic renewals. Perhaps anticipating the backlash, when it re-noticed the proceeding in 2016,<sup>112</sup> the Copyright Office didn't allow for any comments on the every-three-years proposal, but only on reducing the fees.

## 2. Extended Collective Licensing: A “Solution” with No Support

In 2016, the Office pushed ahead with its idea for extended collective licensing (ECL) for mass digitization projects.<sup>113</sup> Extended collective licensing is a mechanism by which an entity (presumably designated by the Copyright Office) acts on behalf of all possible unidentified authors. The entity then takes payments for the use of orphan works and (again, presumably) pays out royalties as the authors are located.

The Office's insistence on ECL seems odd, given that nearly every participant in the comments leading up to the report opposed an ECL solution outright.<sup>114</sup> During public

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<sup>108</sup>Comments of Motion Picture Association of America, Notice of Proposed Rulemaking and Request for Comments on Designation of Agent to Receive Notification of Claimed Infringement, 76 Fed. Reg. 59953 (Nov. 23, 2011), available at <http://www.copyright.gov/docs/onlinesp/comments/2011/initial/mpaa.pdf>.

<sup>109</sup> Comments of Computer and Communications Industry Association, 76 Fed. Reg. 59953 (2011), available at <http://www.copyright.gov/docs/onlinesp/comments/2011/initial/CCIA.pdf>.

<sup>110</sup> Comments of Microsoft Corporation, 76 Fed. Reg. 59953 (Nov. 28, 2011), available at <http://www.copyright.gov/docs/onlinesp/comments/2011/initial/microsoft.pdf>.

<sup>111</sup> Comments of Electronic Frontier Foundation, 76 Fed. Reg. 59953 (Nov. 28, 2011), available at <http://www.copyright.gov/docs/onlinesp/comments/2011/initial/eff.pdf>.

<sup>112</sup>Section 512 Study: Notice and Request for Public Comment, 80 Fed. Reg. 81862 (Dec. 31, 2015), <http://www.copyright.gov/fedreg/2015/80fr81862.pdf>.

<sup>113</sup> See Orphan Works Report.

<sup>114</sup> See, e.g., Comments of Motion Picture Association of America, *Orphan Works and Mass Digitization; Request for Additional Comments and Announcement of Public Roundtables*, 79 Fed. Reg. 7706 (May 20, 2014), available at [http://www.copyright.gov/orphan/comments/Docket2012\\_12/Motion-Picture-Association-of-America\(MPAA\).pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/Motion-Picture-Association-of-America(MPAA).pdf) (calling the ECL proposal “problematic”); Comments of Library Copyright Alliance, *Orphan Works and Mass Digitization: Notice of Inquiry*, 77 Fed. Reg. 64555 (Jan. 15, 2013), available at [http://www.copyright.gov/orphan/comments/noi\\_10222012/Library-Copyright-Alliance.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Library-Copyright-Alliance.pdf) (“[A]ny legislative approach that involves licensing, such as extended collective licensing, is completely

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unacceptable to the library community.”); Additional Comments of Library Copyright Alliance, 79 Fed. Reg. 7706 (May 16, 2014), *available at* [http://www.copyright.gov/orphan/comments/Docket2012\\_12/Library-Copyright-Alliance\(LCA\)-American-Library-Association\(ALA\)-Association-of-Research-Libraries\(ARL\)-Association-of-College-and-Research-Libraries\(ACRL\).pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/Library-Copyright-Alliance(LCA)-American-Library-Association(ALA)-Association-of-Research-Libraries(ARL)-Association-of-College-and-Research-Libraries(ACRL).pdf) (“In contrast to the disagreement concerning orphan works legislation, there was general agreement at the public meeting that extended collective licensing (ECL) would not be an effective solution to issues relating to mass digitization, even if limited only to books”); Comments of National Federation of the Blind, 77 Fed. Reg. 64555 (Mar. 6, 2013), *available at* [http://www.copyright.gov/orphan/comments/noi\\_11302012/National-Federation-of-the-Blind.pdf](http://www.copyright.gov/orphan/comments/noi_11302012/National-Federation-of-the-Blind.pdf) (“NFB opposes any suggestion that the solution to the orphan works crisis lies in the creation of a European-style ‘extended collective licensing’ (ECL) system”); Comments of International Documentary Association et al., 77 Fed. Reg. 64555 (Feb. 4, 2013), *available at* [http://www.copyright.gov/orphan/comments/noi\\_10222012/International-Documentary-Association.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/International-Documentary-Association.pdf) (“such regimes are incompatible with fundamental principles that are at the core of our copyright laws”); Comments of Independent Film and Television Alliance, 77 Fed. Reg. 64555 (Feb. 4, 2013), *available at* [http://www.copyright.gov/orphan/comments/noi\\_10222012/Independent-Film-&-Television-Alliance.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Independent-Film-&-Television-Alliance.pdf) (“IFTA opposes any extended collective licensing scheme because it is an overbroad measure that lessens the ability of rights holders to monetize exclusive rights, thereby undermining such rights, especially those for online exploitation”); Comments of Graphic Artists Guild, 79 Fed. Reg. 7706 (May 19, 2014), *available at* [http://www.copyright.gov/orphan/comments/Docket2012\\_12/Graphic-Artists-Guild\(GAG\).pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/Graphic-Artists-Guild(GAG).pdf) (“ECL would likely result in forcing licensing fees downward for the entire market, which is detrimental to creators”); Comments of Massachusetts Institute of Technology (MIT) Libraries, 79 Fed. Reg. 7706 (2014), *available at* [http://www.copyright.gov/orphan/comments/Docket2012\\_12/Massachusetts-Institute-of-Technology\(MIT\)-Libraries.pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/Massachusetts-Institute-of-Technology(MIT)-Libraries.pdf) (“We also do not believe collective agencies would offer an effective solution to managing orphan works”); Additional Comments of Center for Democracy and Technology, 79 Fed. Reg. 7706 (May 16, 2014), *available at* [http://www.copyright.gov/orphan/comments/Docket2012\\_12/Center-for-Democracy-and-Technology\(CDT\).pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/Center-for-Democracy-and-Technology(CDT).pdf) (“Extended collective licensing in particular did not appear to have much support from roundtable participants – in either the orphan works or the mass-digitization context”); Comments of Music Library Association, 79 Fed. Reg. 7706 (May 20, 2014), *available at* [http://www.copyright.gov/orphan/comments/Docket2012\\_12/Music-Library-Association.pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/Music-Library-Association.pdf) (“We do not support extended collective licensing as a solution, in whole or in part, to the orphan works problem”); Comments of Internet Archive, 79 Fed. Reg. 7706 (2014), *available at* [http://www.copyright.gov/orphan/comments/noi\\_10222012/Internet-Archive.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Internet-Archive.pdf) (“Use of orphan works by nonprofit museums, libraries and archives should not be dependent on extended collective licensing”); Comments of HathiTrust, 79 Fed. Reg. 7706 (May 21, 2014), *available at* [http://www.copyright.gov/orphan/comments/Docket2012\\_12/HathiTrust.pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/HathiTrust.pdf) (“HathiTrust is not persuaded that extended collective licenses (ECLs) are a solution to the orphan works problem”); Comments of American Association of Independent Music (A2IM), 79 Fed. Reg. 7706 (May 21, 2014), *available at* [http://www.copyright.gov/orphan/comments/Docket2012\\_12/American-Association-of-Independent-Music\(A2IM\).pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/American-Association-of-Independent-Music(A2IM).pdf) (ECL “might very well result in a race to the bottom, in which those collective licensing rates, often statutory rates, will probably reduce the amounts received by copyright owners that had opted-out of any collective licensing regime, creating overall market pricing decreases”); Comments of College Art Association, 77 Fed. Reg. 64555 (Mar. 6, 2013), *available at* [http://www.copyright.gov/orphan/comments/noi\\_11302012/College-Art-Association.pdf](http://www.copyright.gov/orphan/comments/noi_11302012/College-Art-Association.pdf) (“CAA does not support extended collective licensing, statutory licensing, or other schemes requiring payment of fees into escrow”); Additional Comments of California Digital Library, 79 Fed. Reg. 7706 (May 21, 2014), *available at* [http://www.copyright.gov/orphan/comments/Docket2012\\_12/California-Digital-Library\(CDL\).pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/California-Digital-Library(CDL).pdf) (“An

roundtables, only the Authors Guild and the American Society of Illustrators Partnership supported ECL; the Motion Picture Association of America, Digital Media Association, HathiTrust Digital Libraries, Museum of Fine Arts Boston, Future of Music Coalition, IFPI,

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extended collective license (ECL) is not an appropriate or viable solution for library uses of orphan works”); Comments of University of North Carolina at Chapel Hill Scholarly Communication Office, 79 Fed. Reg. 7706 (2014), *available at* [http://www.copyright.gov/orphan/comments/Docket2012\\_12/University-of-North-Carolina-Chapel-Hill\(UNC-Chapel%20Hill\)-Scholarly-Communication-Office.pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/University-of-North-Carolina-Chapel-Hill(UNC-Chapel%20Hill)-Scholarly-Communication-Office.pdf) (“implementing an extended collective licensing scheme for historic photographs would not be equitable because of the likelihood that creators would never be found and could not be compensated”); Comments of University of California Los Angeles Library, 79 Fed. Reg. 7706 (May 21, 2014), *available at* [http://www.copyright.gov/orphan/comments/Docket2012\\_12/University-of-California-Los-Angeles\(UCLA\)-Library.pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/University-of-California-Los-Angeles(UCLA)-Library.pdf) (“Extended Collective Licensing Systems Are NOT a Solution to Problem of Orphan Works”); Comments of University of Minnesota Libraries, 79 Fed. Reg. 7706 (May 20, 2014), *available at* [http://www.copyright.gov/orphan/comments/Docket2012\\_12/University-of-Minnesota-Libraries.pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/University-of-Minnesota-Libraries.pdf) (“[W]e strongly oppose the idea of extended collective licensing as a solution to the problem of orphan works”); Comments of Society of American Archivists, 77 Fed. Reg. 64555 (Jan. 29, 2013), *available at* [http://www.copyright.gov/orphan/comments/noi\\_10222012/Society-American-Archivists.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Society-American-Archivists.pdf) (“Extended collective licensing will only further impede noncommercial access to orphan works.”); Additional Comments of Society of American Archivists, 79 Fed. Reg. 7706 (May 20, 2014), *available at* [http://www.copyright.gov/orphan/comments/Docket2012\\_12/Society-of-American-Archivists\(SAA\).pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/Society-of-American-Archivists(SAA).pdf) (“We cannot state too strongly that an ECL scheme will not work for archives”); Comments of Carnegie Mellon University Libraries, 77 Fed. Reg. 64555 (Mar. 6, 2013), *available at* [http://www.copyright.gov/orphan/comments/noi\\_11302012/Carnegie-Mellon-University.pdf](http://www.copyright.gov/orphan/comments/noi_11302012/Carnegie-Mellon-University.pdf) (“We urge the Copyright Office not to pursue ECL.”); Comments of Association for Recorded Sound Collections, 79 Fed. Reg. 7706 (May 18, 2014), *available at* [http://www.copyright.gov/orphan/comments/Docket2012\\_12/Brooks-Tim.pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/Brooks-Tim.pdf) (“Collective licensing is not an [sic] desirable solution in our view”); Comments of The Digital Media Association (DiMA), 77 Fed. Reg. 64555 (Feb. 4, 2013), *available at* [http://www.copyright.gov/orphan/comments/noi\\_10222012/Digital-Media-Association-DiMA.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Digital-Media-Association-DiMA.pdf) (ECL and other proposals “have significant disadvantages that, at the very least, would require considerable additional further exploration, if they could prove workable, at all”); Comments of Software and Information Industry Association, 79 Fed. Reg. 7706 (May 20, 2014), *available at* [http://www.copyright.gov/orphan/comments/Docket2012\\_12/Software-and-Information-Industry-Association\(SIIA\).pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/Software-and-Information-Industry-Association(SIIA).pdf) (“We oppose the creation of an extended collective licensing (ECL) regime under U.S. law because it is inconsistent with U.S. copyright laws, legal norms, and industry practices.”); Comments of Dance Heritage Coalition, 77 Fed. Reg. 64555 (2013), *available at* [http://www.copyright.gov/orphan/comments/noi\\_10222012/Dance-Heritage.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Dance-Heritage.pdf) (“Experience suggests that such systems [as ECL] create more of a burden on users, and even some owners, than a benefit.”); Comments of Wikimedia District of Columbia, 79 Fed. Reg. 7706 (May 20, 2014), *available at* [http://www.copyright.gov/orphan/comments/Docket2012\\_12/Wikimedia-District-of-Columbia.pdf](http://www.copyright.gov/orphan/comments/Docket2012_12/Wikimedia-District-of-Columbia.pdf) (“Any provision that requires payment to use an orphan work, for example a self-defense fee in escrow, would likely impede most uses on Wikimedia, again because the Wikimedia Foundation and many of our volunteers have limited financial resources with which to pay such fees”).

National Federation for the Blind, American Association of Independent Music, as well as public interest groups and academics, all opposed.<sup>115</sup>

Leaving aside the consensus rejection of ECL by stakeholders, the Copyright Office’s ECL proposal presents two unique problems. First, the Office insisted that it would be a “voluntary” system—namely that only authors who wanted to be represented by such an entity, would be. Confusingly, that means that the only authors who could participate were, at least in part, known authors, and thus that none of their works were orphaned. This would also create a situation in which a party was collecting money owed to a third party without that third party’s authorization. Second, even if the Office did implement ECL, the ostensible participants in such a system—libraries and research institutions—had no interest in working within it. But the Copyright Office, undeterred by stakeholders’ lack of support, has not indicated that it will drop the suggestion or otherwise heed the overwhelming objections voiced in the record.

### **3. Reviving a Widely-Opposed “Zombie” Section 108 Proposal**

When formulating modern copyright law, lawmakers took into account the unique position of libraries and archives, and the difficulties they would face under a strict system requiring individualized permissions and licensing fees. To secure these institutions’ abilities to function, Congress has, since 1909, limited the scope of copyright to allow for libraries and archives to copy and store work. The modern version of this provision—section 108—has been hugely important to not only libraries and archives, but also to nonprofits, such as the Internet Archive, which seek to catalog and store historical records of the Internet.

The Office recently revived a long-dead 2008 proposal to “update” section 108, altering protections for how libraries and archives can copy and store works. The proposal

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<sup>115</sup> Transcription, Orphan Works and Mass Digitization Roundtables. Session 8: Extended Collective Licensing and Mass Digitization, Orphan Works & Mass Digitization; Request for Additional Comments & Announcement of Pub. Roundtables, 79 Fed. Reg. 7706 (Library of Congress, Copyright Office Mar. 11, 2014) (No. 2012-12), <http://www.copyright.gov/orphan/transcript/0311LOC.pdf>.

included defining works as “publicly available” only if they had not opted out of archiving via a robots.txt file or were not hidden behind click-wrap.<sup>116</sup> Even by 2008 standards, the proposal was out of touch with technical reality, and would have hamstrung any attempt to comprehensively archive the Internet.<sup>117</sup> Libraries and archives—the very institutions which section 108 was designed to protect—staunchly oppose the idea, and have from its first mention.<sup>118</sup> Nevertheless, as the University of Virginia Libraries noted in a letter to Chairman Bob Goodlatte of the House Judiciary Committee, “the Office has chosen to proceed despite widespread opposition from libraries.”<sup>119</sup> Numerous groups—including the American Library Association,<sup>120</sup> Association of Research Libraries,<sup>121</sup> the Internet Archive,<sup>122</sup> the Society of American Archivists,<sup>123</sup> and the Digital Public Library of America—have pushed back, in a clear

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<sup>116</sup> Click-wrap “refers to the assent process by which a user must click “I agree,” but not necessarily view the contract to which she is assenting.” *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 394–95 (E.D.N.Y. 2015).

<sup>117</sup> SECTION 108 STUDY GROUP, SECTION 108 STUDY GROUP REPORT (2008) [hereinafter 108 Study Group Report], available at <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>.

<sup>118</sup> Comments of Association of Research Libraries, *Section 108 Study Group: Copyright Exceptions for Libraries and Archives*, 71 Fed. Reg. 70434 (Nov. 9, 2006), available at <http://www.arl.org/storage/documents/publications/part-ii-detailed-responses-to-section-108-working-group-questions.pdf>; Comments of Internet Archive, 71 Fed. Reg. 70434 (Apr. 7, 2006), available at [http://www.section108.gov/docs/Kimpton\\_Internet-Archive.pdf](http://www.section108.gov/docs/Kimpton_Internet-Archive.pdf); Transcription, Section 108 Study Group. Topic 4: New Website Preservation Exception, Section 108 Study Group: Copyright Exceptions for Libraries & Archives, 71 Fed. Reg. 70434 (Library of Congress, Copyright Office Mar. 8, 2006) (No. 07–10802), <http://www.section108.gov/docs/0308-topic4.pdf>.

<sup>119</sup> Letter from Carrie Lynn Cooper, Dean of Univ. Libraries, Coll. of William & Mary, John E. Ulmschneider, Univ. Librarian, Va. Commonwealth Univ., John M. Unsworth, Univ. Librarian & Dean of Libraries, Univ. of Va., John Zenelis, Dean of Libraries & Univ. Librarian, George Mason Univ. Libraries & Tyler Walters, Dean of Univ. Libraries, Va. Tech, to Rep. Bob Goodlatte, Chairman, House of Representatives Judiciary Committee (Aug. 16, 2016), <https://www.library.virginia.edu/assets/VA-Research-Libs-Goodlatte-Ltr.pdf> (“We are concerned that the Office’s current process may not be the best approach for seeking consensus, which has proved elusive over the past decade. Notably, the Office has chosen to proceed despite widespread opposition from libraries”).

<sup>120</sup> Carrie Russell, *Top Secret, Hush, Hush*, DISTRICT DISPATCH: ALA WASH. OFF. (July 7, 2016), <http://www.districtdispatch.org/2016/07/top-secret-hush-hush/>.

<sup>121</sup> Press Release, Krista Cox and Prue Adler, Ass’n of Research Libraries, *Library Copyright Alliance Opposes Reform of US Copyright Act Section 108* (June 23, 2016), <http://www.arl.org/news/arl-news/4052-library-copyright-alliance-opposes-reform-of-us-copyright-act-section-108>.

<sup>122</sup> Lila Bailey, *The Copyright Office is trying to redefine libraries, but libraries don’t want it — Who is it for?*, INTERNET ARCHIVE BLOG (July 27, 2016), <https://blog.archive.org/2016/07/27/the-copyright-office-is-trying-to-redefine-libraries-but-libraries-dont-want-it-who-is-it-for/>.

<sup>123</sup> Press Release, Soc’y of Am. Archivists, Statement on U.S. Copyright Office Draft Revision of Section 108: Library and Archives Exceptions in U.S. Copyright Law (July 7, 2016), available at

sign that “the vast majority of the community benefiting from the exception does not want to see Section 108 amended.”<sup>124</sup>

Nevertheless, the Copyright Office recently resurrected the proposal.<sup>125</sup> This time, though, the Office accepted no comments, only including a sentence in their announcement that anyone who wanted to speak on the issue could contact them directly for a meeting. No public comments were solicited (or allowed), and stakeholder meetings have been conducted off the public record and behind closed doors. The Office has indicated that, rather than abandoning the approach in the face of overwhelming opposition from the institutions it was supposed to help, it would instead charge ahead and recommend that Congress rewrite the law to include the new language.

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[http://www2.archivists.org/sites/all/files/SAA%20Comments%20on%20Section%20108\\_July-2016.pdf](http://www2.archivists.org/sites/all/files/SAA%20Comments%20on%20Section%20108_July-2016.pdf).

See also Soc’y of Am. Archivists, Issue Brief: Archivists and Section 108 of the Copyright Act (May 2014), <http://www2.archivists.org/statements/issue-brief-archivists-and-section-108-of-the-copyright-act>.

<sup>124</sup> Krista Cox, *Why is the Copyright Office Trying to Reform Section 108?*, ARL POL’Y NOTES (Aug. 10, 2016), <http://policynotes.arl.org/?p=1408>.

<sup>125</sup> Section 108: Draft Revision of the Library and Archives Exceptions in U.S. Copyright Law, 81 Fed. Reg. 36594 (June 7, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-06-07/pdf/2016-13426.pdf>.

## E. THE COPYRIGHT OFFICE’S DECISIONS ARE FREQUENTLY OVERTURNED OR IGNORED

### 1. By Courts

Courts have repeatedly taken a dim view of the Copyright Office’s analysis of larger questions—and, on occasion, even of their judgment in their core function of issuing registrations. The Second Circuit in *Vimeo* took the Office to task, slamming its analysis of safe harbors in the Pre-1972 Sound Recordings report<sup>126</sup> as “arbitrary and without legal foundation,” “incompatible with a literal and natural reading of the text,” and “based in major part on a misreading of the statute.”<sup>127</sup> The Court also commented that the Office’s position was “[a]t the very least, a strained interpretation—one that could be justified only by concluding that Congress must have meant something different from what it said.”<sup>128</sup>

The Second Circuit went out of its way to remind parties that the Copyright Office, as a non-rulemaking agency, is not entitled to *Chevron* deference, but deserves “appropriate deference” only in cases of “reasonably persuasive interpretations of the Copyright Act”—a standard that was not met in the case at hand.<sup>129</sup> Nor does the Copyright Office deserve unique deference in its core function: registering copyrights. The Sixth Circuit has held that the decision to grant registration is entitled to deference only to the extent that it is reasonably persuasive.<sup>130</sup>

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<sup>126</sup> Pre-1972 Sound Recordings Report.

<sup>127</sup> *Vimeo*, *supra* note 41, at 89-91.

<sup>128</sup> *Id.* at 89.

<sup>129</sup> *Id.* at 93.

<sup>130</sup> *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 479 (6th Cir. 2015). The Court granted the Office’s decision *Skidmore* deference, which attaches when an agency’s decisions have the “power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). See also *Christensen v. Harris*

Finally, the Court was impressed by the Copyright Office’s attempts at applying broader legal principles. The opinion noted that “canons of statutory construction [are] a subject not within the special expertise of the Copyright Office” and that, as a result, “the pertinent canons were misunderstood and misapplied.”<sup>131</sup>

Nor was this the first time that courts had been faced with arbitrary “legal” decisions issued by the office. In *Arista Records v Launch Media*, the court, when faced with one shape-shifting footnote that seemed to support one position, then (upon re-release) the other, before being revised back again, noted dryly that “the history of its revisions—complete reversals of opinion by the Copyright Office over a matter of days—seriously call into question the thought process, if any, that went into drafting the footnote” and that “[w]hatever the etiology of the Copyright Office's inability to make up its mind, we find the Copyright Office efforts here of little help.”<sup>132</sup>

## 2. By Congress

Congress has also not hesitated to overturn the Copyright Office’s actions. When the Copyright Office adopted an “unnecessarily restrictive interpretation” of “cable systems” covered by the Satellite Home Viewer Act, Congress passed an amendment in 1994 to explicitly add microwave transmission systems to the statute’s purview. In doing so, it reiterated that the law had always included microwave transmissions, and that the amendment was nothing more than a clarification of existing law to correct the Office’s erroneous position.<sup>133</sup>

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*Cty.*, 529 U.S. 576, 587 (2000) (holding that *Skidmore* deference applies “only to the extent that those interpretations have the ‘power to persuade.’”).

<sup>131</sup> *Vimeo*, *supra* note 41, at 89.

<sup>132</sup> *Arista*, *supra* note 70, at 161.

<sup>133</sup> H.R. REP. NO. 103-703 at 17 (1994).

More recently, Congress passed legislation that permanently implemented an exemption to the DMCA for cell phone unlocking. This came in direct response to the Office’s denial of an identical exemption during the 1201 rulemaking two years prior.<sup>134</sup>

### 3. By Other Agencies

The Copyright Office’s flawed views have also been repeatedly rejected by other agencies. For example, the Department of Justice similarly gave the Copyright Office’s concerns little weight when they completed their review of the BMI and ASCAP consent decrees in 2016. The DoJ in its decision cited the Office’s letter supporting fractional and joint licensing only twice, both for basic factual propositions.<sup>135</sup>

When the Office urged the Librarian of Congress to deny a standing DMCA exemption for e-readers—an exemption that had gone completely unopposed in the rulemaking—the Librarian of Congress ignored the recommendation and enacted the exemption anyway. In doing so, it critiqued the Office’s process, noting that the exemption was unopposed, that the Copyright Office hadn’t attempted to remedy what they saw as a lack of evidence by asking follow-up questions, and that NTIA—an agency with which the Copyright Office is statutorily required to consult in its rulemaking—had supported the exemption as proposed.<sup>136</sup>

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<sup>134</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Wireless Telephone Handsets, 79 Fed. Reg. 50552 (Aug. 25, 2014), *available at* <http://www.copyright.gov/fedreg/2014/79fr50552.pdf>.

<sup>135</sup> This may be due to the fact (noted above) that the Copyright Office, rather than addressing copyright concerns, used their platform to present their incomplete attempt at an antitrust analysis. It is perhaps unsurprising that the Antitrust Division, as the group tasked with monitoring the consent decrees, declined to substitute the Copyright Office’s judgment in this arena for its own.

<sup>136</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43838 (Library of Cong., Copyright Office July 27, 2010), *available at* <http://www.copyright.gov/fedreg/2010/75fr43825.pdf>.

## IV. CONCLUSION

The Copyright Office, isolated from effective mechanisms of governmental accountability, has become deeply and troublingly captured by major entertainment industries and other rightsholder interests. As a result, it has regularly disregarded the concerns of other stakeholders, such as libraries, archives, and the public at large. It has frequently aligned itself with the agendas of industry trade groups, pushed for expansion of copyright at the expense of consumers' established rights, and published reports that embrace extreme interpretations that rise above and beyond the scope of settled law.

The current state of affairs is unsustainable. The Copyright Office cannot, and should not, remain insulated from accountability. We must, as a nation, have a serious discussion about the Office's role in policymaking, its reviewability, and the proper scope of its expertise. The constitutional purpose of copyright is to "promote the progress of science and the useful arts." It is long past time that we have a Copyright Office that reflects this fundamental principle.