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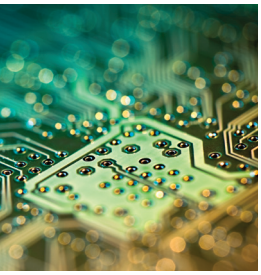



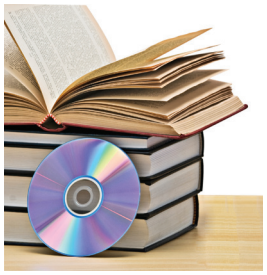

Copyright Principles and Priorities to Foster a Creative Digital Marketplace

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EXECUTIVE SUMMARY

Over the course of the last two years, Congress has engaged in a comprehensive review of the Copyright Act. This is the first such review in nearly two generations, and it lays the groundwork for further inquiries and proposals regarding how the law might be amended and how the institution responsible for its administration—the U.S. Copyright Office—might be modernized and restructured to better support a thriving digital marketplace of unprecedented creativity and innovation. A robust, well-functioning, and up-to-date Copyright Act, along with a modern, appropriately-resourced Copyright Office, are important to all stakeholders, especially the general public, which is the ultimate beneficiary of the copyright system

We propose the following organizing principles for any further work reviewing or revising the Copyright Act:

A. Stay True to Technology-Neutral Principles and Take the Long View

B. Strengthen the Ability of Authors to Create and to Disseminate Works

C. Value the Input of Creative Upstarts

D. Ensure that Copyright Continues to Nurture Free Speech and Creative Freedom

E. Rely on the Marketplace and Private Ordering Absent Clear Market Failures

F. Value the Entire Body of Copyright Law

These principles in turn suggest that Congress prioritize the following areas for action:

A. Copyright Office Modernization

B. Registration and Recordation

C. Mass Digitization and Orphan Works

D. Small Claims

E. Notice and Takedown

F. Streaming Harmonization

A focus on and respect for authorship and creativity reflects the values our country was built on, rooted in our Constitution. The public benefits from the resulting intellectual and cultural diversity, from the innovation that is possible through collaboration with the technology industries, as well as from the promotion of a sustainable and innovative economy.

Copyright Principles and Priorities to Foster a Creative Digital Marketplace*

SANDRA AISTARS, DEVLIN HARTLINE, & MARK SCHULTZ

I. Introduction

A brief overview of the constitutional origins of copyright protection is helpful in framing the current review.

A. *The Founders recognized that copyright protection for authors was morally justified and that it would spur creativity and benefit society*

The Copyright Clause of the U.S. Constitution grants Congress the power "To promote the Progress of Science …by securing for limited Times to Authors…the exclusive Right to their respective Writings[.]"[1] As one of the few constitutionally-enumerated powers of the federal government, this grant of authority reflects the Founders' belief that copyright protection is a significant governmental interest and that ensuring appropriate rights to authors drives creativity to the benefit of society.

Consistent with the dominant natural rights philosophy in the early American Republic, the premise of our copyright system is that authors' rights and the public good are complementary.[2] By properly securing all individual rights, including the right to property, the government makes possible the happiness of individuals and a flourishing society. For this reason, James Madison noted the truism in his day in the *Federalist Papers* that "[t]he public good fully coincides . . . with the claims of individuals" when it comes to the protection of copyright.[4] Like other individual rights, the property rights secured to authors are not at the expense of the public interest. And as with all property rights, this recognition and protection is instead essential to promoting the public interest.

In *The Wealth of Nations*, Adam Smith famously invoked the metaphor of an "invisible hand" to explain that individuals promote public interests by pursuing private ones.[5] Smith argued that individual effort to pursue one's own interests often benefits society more than when one sets out to benefit the interests of the public. It is the unplanned and uncoordinated actions of individuals pursuing their own agendas that generally lead to positive effects for the community as a whole.

Copyright works the same way: By empowering authors to pursue their own private interests through the exercise of their exclusive rights, the progress of science is promoted through the proliferation of knowledge to the public.[6] In ensuring the protection of the rights of authors, the focus of copyright law has properly been first on authors, but the ultimate effect is a benefit to society at large.[7] As Justice Reed so eloquently put it for the Supreme Court in 1954:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.[8]

Copyright is a unique form of property grounded in an author's own creativity, productive labor, and talent. In many ways, it epitomizes the American Dream. Countless copyright owners in the United States are neither famous nor wealthy. These individuals and small businesses are found in nearly every community in the country. They include graphic artists, photographers, songwriters, filmmakers, and authors who make or supplement a middle-class living from their creative works. Copyright rewards them for their efforts in order to benefit us all.

In *Two Treatises of Government*, John Locke provided the justly-famous philosophical justification for property rights based in an individual's value-creating, productive labor.[9] As is well known, Locke's political theory generally and his property theory specifically were common currency in the Founding Era.[10] In a short essay published in the *National Gazette* in 1792, James Madison evidenced this basic truth when he asserted as a foundational premise that "property" "embraces every thing to which a man may attach a value and have a right," which includes intangibles like one's "opinions" and "rights."[11] Copyright, consistent with the views of the Founders, recognizes both that an author

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deserves a property right for her value-creating, productive labors and that this property right will in turn be beneficial to society.

The justification of property rights in values created through productive labors is particularly strong when it comes to the fruits of intellectual labors.[12] This is likely the reason why Locke explicitly recognized in 1695 that writings are the "property" of authors.[13] This moral justification for all intellectual property (IP) rights was commonly understood in the early American Republic. For instance, focusing on productive labor as the basis for property, Circuit Justice Levi Woodbury explained in 1845: "we protect intellectual property, the labors of the mind, productions and interests as much a man's own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears."[14]

This moral justification is further strengthened by Locke's derivative moral requirement that productive labor should not take away or infringe upon another's property. With tangible property, like land, it is easy to see how taking something for oneself would mean that others could not have it. The number of tangible things that can be owned is finite.

However, the same does not hold true for intangible property, like copyrights. As some constitutional scholars have noted, "the field of creative works is infinite, and one person's expression of an idea does not meaningfully deplete the opportunities available to others; indeed it *expands* the size of the 'pie' by providing inspiration to others."[15] Authors do not take goods held in common; they create new goods that never before existed. The moral claim for authors is thus *stronger* since they are not taking anything for themselves at the expense of everyone else.[16]

These basic Lockean ideas continue to be relevant today.[17]

B. *The Founders' belief that protecting property rights in works of authorship would spur creative innovation was prescient*

Today, copyright drives innovation in the creative industries and in other industries as well, providing tremendous economic benefits to our economy.[18] The outputs of the creative industries serve as the inputs that spur the creation of many innovative goods and services. Authors collaborate with technology partners not only to distribute their works, but often to create them. Sometimes storytelling itself leads to scientific discoveries and technological innovation. More and more frequently, the presumed distinction between creators and innovators is vanishing as individuals and firms simultaneously generate creative works and innovative technology.[19]

Examples of this symbiotic relationship between creative and innovative industries are abundant. For the recent film *Interstellar*, director Christopher Nolan collaborated with physicist Kip Thorne to convincingly depict how light travels near black holes. The mathematical analysis and computer programs produced in order to render imagery for the film resulted in discoveries regarding black holes that Thorne intends to publish in scientific journals.[20]

James Cameron spent years and millions of dollars developing the technologies required to bring his vision for the movie *Avatar* to the screen. His work required a number of groundbreaking, state-of-the-art technologies, such as new types of cameras, leaps forward in 3-D imaging, and great advances in performance-capture technology, which are continuing to benefit professional filmmakers as well as other businesses. Before *Avatar*, Cameron developed patented technology to assist with underwater filming for the movies *The Abyss* and *Titanic*.[21] George Lucas similarly invented to create, pioneering such technology as the THX sound systems now common in movie theaters.[22]

Such advances also benefit amateur creators. Many of the techniques and technologies now used by amateur filmmakers and musicians on sites like YouTube were originally motivated, created for, tested, and perfected by professional filmmakers and musicians.[23]

Similarly, Getty Images, a leading creator and distributor of still imagery, video footage, and music, was the first company to license digital imagery online. Investing more than $450 million, it has developed and deployed tools to allow users to intuitively search for, license, and download

images for use online and in traditional publishing and broadcasting settings. Getty licenses over 200,000 images a day (more than 2 images per second) and serves over one million customers. This thriving commercial marketplace is possible because Getty has developed the technological tools to efficiently set license terms via automated digital transactions.[24]

This sort of innovation is simply part of everyday business in the creative industries. For example, the publishing industry invests millions of dollars in research and development (R&D), infrastructure, skilled labor, and other resources to create, publish, distribute, and maintain scholarly articles on the internet. Publisher Reed Elsevier began development of its online publishing platform, ScienceDirect, in 1995, beta tested it in 1997–1998, and finally rolled it out in 1999. The company invested $26 million in initial development costs and made an initial investment of $46 million to create the digital archives.[25]

Since then, Reed Elsevier has spent hundreds of millions of dollars shifting to digital production and publication of journals. This includes paying developers to code, scan, and beta-test platforms, purchasing hardware and machinery, R&D, ongoing maintenance, and enhancements. Currently, it maintains over ninety terabytes of digital storage capacity from which an average of ten million active users from 120 different countries download nearly 700 million articles per year. More than 1.5 million articles in science, technical, and medical fields were published in 2009 alone.[26]

Creative businesses are developing new tools for their readers as well. *The New England Journal of Medicine* employs a full-time staff of medical illustrators to redraw and recompose all of the images submitted by authors. A recent feature pioneered by the journal is a 3D video animation of all of the medical images that allows the images to be rotated on multiple axes for different perspectives. The benefits to medical and biochemical researchers for their own innovative work are obvious.[27]

Creative communities contribute greatly to the U.S. economy. In 2010, the U.S. Patent and Trademark Office found that copyright-intensive industries provided 5.1 million jobs in the United States and that every two jobs in these industries supported an additional one job elsewhere in the economy. Education levels, wage levels, and the ability to lead economic recovery in copyright-intensive industries outpaced those in non-IP-intensive industries.[28]

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Globally, copyright is a driver of economic benefits. Analyzing forty-two national studies of the economic contributions of the copyright industries, the World Intellectual Property Organization (WIPO) found in 2014 that countries with an above-average share of gross domestic product (GDP) attributed to the copyright industries have rapid economic growth and above-average national employment.[29] This should not be surprising, given the important role property rights play in creating efficient markets, encouraging product differentiation and competition, enabling division of labor, and spurring investments by entities beyond the original creator.

Additionally, WIPO found that there are strong and positive relationships between the contributions of the copyright industries to GDP and many indicators of socio-economic performance. For example, countries with greater GDP attributed to the copyright industries have greater government effectiveness, more freedom from corruption, and greater innovation and competitiveness.[30]

These insights are confirmed by empirical and comparative research examining how artists respond to copyright incentives (or to the lack thereof). Jiarui Liu, a fellow at Stanford's Center for Internet and Society, conducted an empirical study of market incentives and the intrinsic motivations of musicians in China—a country with one of the highest piracy rates in the world—in order to ascertain how musicians respond to copyright incentives and how markets are transformed where copyright protection essentially does not exist.[31]

Based on analysis of industrial statistics and extensive interviews with individuals in the Chinese music industry, Liu concludes that "copyright incentives do not function as a reward that musicians consciously bargain for and chase after but as a mechanism that preserves market conditions for gifted musicians to prosper, including a decent standard of living, sufficient income to cover production costs and maximum artistic autonomy during the creative process."[32]

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Liu's interviews reveal how piracy has distorted the Chinese music industry, much to the detriment of musicians and audiences alike. These experiences offer a glimpse of how the marketplace for music might look in the U.S. if copyright protection was weaker. Liu reports that, in China, royalties have ceased to be a meaningful source of income to musicians. As a result, musicians have to focus on other income sources to make ends meet, such as ringback tones, overseas sales, live performances, jingle-writing, merchandizing, and second jobs.[33]

Liu notes that pop artists in China often have their creativity stifled by the demands of their patrons. Many commercial sponsors focus more on celebrity appeal than on artistic merit, and in some cases this leads to replacing musicians in bands with models judged to be more attractive and commercially viable.[34] While the influence of commercial sponsors is not so fully expressed in the U.S., many other changes observed by Liu in China are already beginning to take hold here as well. As musicians are less able to rely on royalties to make a living, they spend less time on their craft and more time searching for alternative sources of income—much to the detriment of audiences.

II. Principles for the Copyright Review Process

Against this backdrop, it is useful to set forth some organizing principles for any further work Congress might take in reviewing or updating the Copyright Act.

A. *Stay True to Technology-Neutral Principles and Take the Long View*

Copyright law should remain rooted in technology-neutral principles. As noted above, the fundamental premise of copyright law is that ensuring appropriate rights to authors will drive creative innovation and benefit society as a whole. The evidence from WIPO and other sources demonstrates that innovative businesses in a variety of sectors benefit when authors are able to create and collaborate with other experts in different fields. Hence, it is important to take the long view of copyright and innovation policy. To undermine copyright protection on the theory that this will spur additional innovation in certain subsectors of our economy simply amounts to gambling with our nation's overall economic health and cultural heritage.

B. *Strengthen the Ability of Authors to Create and to Disseminate Works*

Since its inception in the United States in 1790, copyright law has operated under the premise that both creators and the public benefit from the commercial marketplace that copyright law enables.[35] To benefit society, copyright law must create a framework that encourages both the creation of copyrighted works and their commercial distribution to the public.

While many focus on the incentive to create copyrighted works as the primary purpose of copyright law, the incentive to disseminate those works is crucial as well—without works entering into the marketplace of ideas, progress would not be promoted. As the Supreme Court observed in 2012:

> Nothing in the text of the Copyright Clause confines the "Progress of Science" exclusively to incentives for creation. . . . Evidence from the founding, moreover, suggests that inducing *dissemination*—as opposed to creation—was viewed as an appropriate means to promote science. . . . Until 1976, in fact, Congress made federal copyright contingent on publication, thereby providing incentives not primarily for creation, but for dissemination. . . . Our decisions correspondingly recognize that copyright supplies the economic incentive to create *and disseminate* ideas.[36]

In considering changes to copyright law, Congress should therefore seek to maximize creative outputs *and* to ensure that creators of all disciplines and economic means are able to commercialize their works if they so desire. Because rights are not self-executing, this means that Congress will have to focus on changes that safeguard the exclusive rights of authors as others make use of their copyrighted works. Copyright best fulfills its constitutional purposes by establishing a favorable environment for authors to create and market their works.

C. *Value the Input of Creative Upstarts*

Creative upstarts are commercial, yet independent, creators and producers who operate outside of the larger creative industries. They are a source of innovative ideas and solutions, often being the first to adopt new technologies that transform the means of producing creative works. Creative upstarts include a diverse array of authors, such as writers, filmmakers, musicians, artists, and photographers. Among the most pressing concerns of such creators is that the institutions of the copyright system (*e.g.*, registration and enforcement) should be affordable and practical for them to access.[37]

Creative upstarts and the more established copyright industries both drive creative innovation by using tools in new ways, thus providing technology producers the impetus to create new products and services to meet their needs. At the same time, creative upstarts are perhaps most harshly affected by gaps in the copyright law, and their experiences and challenges are often least heard by policymakers. When reviewing the Copyright Act, it is important to evaluate whether a proposed change would have a different, and potentially detrimental impact, on these developing creative businesses. Examining copyright law from the perspective of creative upstarts can also temper otherwise polarized debates.

D. *Ensure that Copyright Continues to Nurture Free Speech and Creative Freedom*

Weak copyright protection limits free speech and creative freedom by forcing authors to rely on state or corporate patronage that can exert coercive and limiting influences. The Founders "intended copyright itself to be the engine of free expression,"[38] yet in recent years, commentators have focused inordinately on proposals that seek to limit the rights of authors. Some argue that strong protections for authors have chilling effects on others, particularly amateur creators, and they suggest that disintermediated creators are abused and stifled by the enforcement of authors' rights.[39] Such a narrow and negative focus misses the purpose of copyright as an engine of free expression.

The House Judiciary Committee's review process has wisely and largely sidestepped the battling narratives that have characterized copyright policy discussions in recent years. Instead, it has focused on exploring the health of the Copyright Act. It should continue this thoughtful approach in any legislative action, considering how copyright nurtures free speech and creative freedom as the Founders intended. If the structure, complexity, and administration of the Copyright Act are refined, it should be to make it more navigable so that it is welcoming to uninitiated creative upstarts and commercial actors alike.

E. *Rely on the Marketplace and Private Ordering Absent Clear Market Failures*

Like all forms of private property, copyright presents an invitation to a transaction and an opportunity to bargain. The great virtue of property rights is that they push decision-making and power down to the lowest level possible, empowering owners to decide what uses best support their needs to succeed and flourish in life. Property rights also put decisions in the hands of those with the best information and biggest stake in getting things right—the owner of the right and her customers and trading partners. These features make property rights both efficient and liberating.

An appreciation of the virtues of copyright-as-property highlights the possibilities for a different type of copyright revision—the continuous updating of business models that results from private action. As property, copyright is incredibly malleable, allowing tremendous choice and freedom for owners and users to reach their own arrangements. And, in fact, they do. The Creative Commons system of licensing and the Open Source movement are excellent examples of how certain creators have shaped the ways that copyright protection applies to their works without the need for legislative and regulatory interventions.

Copyright largely reforms itself, given sufficient market incentives and the freedom to pursue them. While such market-based reforms may not be as deep or far-reaching as some advocates prefer, they do a superb job of meeting the needs and desires of creators and their audiences. Copyright practices and copyright-based business models change greatly and frequently, and this is precisely because of the control afforded by property rights. Absent clear market failure, the government should be reluctant to impose its judgment over that of the marketplace.[40]

F. *Value the Entire Body of Copyright Law*

When considering copyright, it is important to value the entire body of law, including exceptions and limitations

Creative communities contribute greatly to the U.S. economy.

such as fair use. Copyright owners are authors as well as users of others' copyrighted works, and they rely on these provisions as much—if not more—than those who simply consume the works created by others. These exceptions and limitations must remain robust, but they cannot be made to swallow the rights afforded to authors by the Copyright Act. To generate the greatest benefits for society, exceptions and limitations should be applied in areas where they produce public benefits—not where they simply act as a transfer of wealth from one industry to another.

III. Priorities for Congressional Action

When people hear that Congress is reviewing the copyright law, the tendency is to think that the focus must be on revising Title 17. But some of the most important work that Congress can do has nothing at all to do with rewriting the Copyright Act. Rather, the House Judiciary Committee can use its oversight role to encourage law enforcement to take seriously criminal copyright violations. It can also encourage all stakeholders in the internet ecosystem to proactively take commercially-reasonable, technologically-feasible measures to reduce the theft of intellectual property.

Law enforcement has stepped up in recent years to address IP crime. The creation of the National Intellectual Property Rights Coordination Center, the success of Operation In Our Sites, and the Megaupload indictment are just three of the many law enforcement initiatives that have signaled to the public—and to criminals—that the U.S. does not consider IP theft to be a mere nuisance crime. Congress can play an important role to ensure that these efforts continue in an appropriate fashion.

Likewise, privately-negotiated, voluntary initiatives between rightholders and online intermediaries have started to have an impact in this arena, and Congress should be actively encouraging such efforts. To cite but a couple of examples, commercial copyright owners and user-generated content (UGC) sites established certain "UGC Principles,"[41] and rightholders have made agreements with payment processors, internet service providers, and ad networks.[42] Ideally, future private efforts will involve the participation of all affected rightholders and will address the needs of creators, such as photographers, graphic artists, authors, and songwriters, who thus far have not been participants in these privately-led initiatives.

Where Congress does choose to act, it should do so in a fashion that maximizes benefits and seeks to ensure the success of as many different creative individuals and businesses as possible. The suggestions that follow do not propose specific solutions for any single industry sector or creative discipline. Rather, these suggestions seek to close gaps in the law that either affect all stakeholders negatively, thus distracting them from creative or innovative work, or that are necessary in order to prevent the copyright regime from becoming a class-based system where only certain authors have the means to succeed. Our suggestions thus focus less on the scope of substantive rights, and more on questions of procedure, institutional design, and real-world practice.

A. *Copyright Office Modernization*

If Congress wishes to leave a lasting and meaningful legacy on the development of copyright law, it should consider options that remove practical, structural, and constitutional impediments to more efficient lawmaking and regulation in copyright.[43] The current structure and funding of the Copyright Office is inadequate to serve the needs of the public in both administering the copyright law and facilitating the innumerable transactions the public wishes to undertake involving copyrighted works.[44] Before engaging in a legislative rewrite of the Copyright Act, Congress should examine how the Copyright Office currently operates and is funded, ensuring that it has the infrastructure and critical resources necessary for it to serve the public good.

A number of discussion drafts and outlines of possible legislative reforms are currently circulating in Congress. While the approaches differ in terms of the institutional design they propose for the Copyright Office, all of the proposals recognize that in order for the Copyright Act to be administered in an effective and efficient manner, some change to the current structure of the office is needed.

Various challenges to efficient and effective copyright legislation have been identified by scholars. Chief among these is the lack of any regulator with comprehensive authority and expertise to address the many nuanced,

technical matters currently at the intersection of copyright and technology law. This often results in detailed, industry-specific legislative compromises expressed in complicated language hardwired directly into the Act, or in the Copyright Office being asked to undertake studies and issue recommendations, with no further action taken by Congress.[45] Ensuring that the Copyright Office is led by a political appointee who is appropriately accountable to Congress and/or the Administration and that the Register has appropriate regulatory and adjudicatory authority to serve the needs of all stakeholders would avoid such problems.

B. *Registration and Recordation*

Among the core functions the Copyright Office must serve for stakeholders is maintaining a reliable and efficient registration and recordation system. While registration has been voluntary since passage of the Copyright Act of 1976, authors have important incentives to register their works.[46] Doing so also provides public benefits, such as reducing transaction costs, limiting the risks of unintended infringements, facilitating commercial transactions, providing constructive notices to third parties of the facts stated in recorded documents, and aiding transferees in perfecting claims where the underlying works have been registered.[47] As a result of these benefits, and despite the voluntary nature of registration, the United States attracts more registrations annually than all other major countries with public registries combined.[48]

Despite the central role that registration and recordation plays in the efficient and accurate operation of the marketplace for copyrighted works, the Copyright Office lacks autonomous decision-making power over the planning and implementation of the systems used to facilitate registration. The Copyright Office has testified that the current electronic registration system, implemented in 2008, is not optimal for the needs of its stakeholders and is merely an adaptation of "off-the-shelf software" that "was designed to transpose the paper-based system of the 20th Century into an electronic interface."[49] Moreover, the recordation system, by which transfers, licenses, and security interests in copyrights are recorded, has not been updated for many decades, and it relies on manual examination and data entry.[50]

These infrastructure challenges are exacerbated by the limited funding available to the Copyright Office and the high rate of vacancies in both registration and recordation staff. As a result, the waiting times for processing copyright registrations are currently 8.2 months for paper applications and 3.3 months for electronic applications. Recordation time lags are even longer, averaging seventeen months, due to the fact that the work is performed manually and is not online.[51] Backlogs of this magnitude are incompatible with modern digital commerce.

Copyright best fulfills its constitutional purposes by establishing a favorable environment for authors to create and market their works.

Copyright owners and users alike have requested that the Copyright Office improve its registration and recordation system to ensure that, at a minimum, it can offer a searchable database with accurate, interactive, and easily accessible information about registrations and renewals. Such a system could potentially link to private databases of information about copyrighted works on a voluntary basis through the use of application program interfaces. Improvements like these could be leveraged commercially by businesses operating in the digital space and would ameliorate some of the policy challenges Congress is currently considering in its review of the Copyright Act, such as licensing, enforcement, and avoiding the creation of so-called "orphan" works.[52]

C. *Mass Digitization and Orphan Works*

The recent Second Circuit decision in the Google Books case[53] demonstrates the limits of seeking to resolve issues such as those involving orphan works and mass digitization through litigation and reliance on fair use alone. These issues are too complex and affect too many interested parties to be efficiently resolved through litigation. Furthermore, relying on fair use results in overly-narrow solutions that do not meet the needs of authors (to be compensated for the use of their works) or of readers (to gain access to full texts of works, rather than mere snippets).

The Copyright Office is currently pursuing a pilot program to examine better solutions to the challenges inherent in the mass digitization of works for socially beneficial purposes.[54] The proposed extended collective licensing (ECL) pilot program appropriately recognizes the limits of fair use as

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a solution and takes a flexible approach in balancing the rights of creators with the needs of the public.[55]

The ECL program has the potential of realizing the benefits of private ordering in addressing IP issues. First, it brings the right parties to the table and allows them all to have a voice. For example, it includes the Authors Guild, which represents a large cross-section of authors. It brings them into contact with entities that wish to embark on mass digitization projects for socially-beneficial reasons. It also ensures that authors who do not wish to participate can opt out of the program. The parties can agree to broader or different uses than are currently possible relying on fair use alone, authors are compensated for such uses, a responsible entity assumes the task of ensuring payments reach the intended authors, and perhaps most importantly, legal certainty and increased flexibility with respect to how mass digitization projects will operate and evolve is possible for all parties concerned.

While orphan works issues and mass digitization issues are distinct problems, an effective solution for the challenges of rights-clearance with mass digitization will tend to reduce the likelihood that works are deemed orphaned. Coupled with the much-needed improvements to the registration and recordation functions of the Copyright Office discussed above, an ECL program that designates an appropriate representative to collect and deliver licensing fees to authors will tend to ensure that searches for authors are conducted for the primary purpose of identifying authors and rightholders so that their works do not fall into orphan status (as opposed to deeming works orphaned or adding works to a list of orphaned works for licensing or other purposes).

We believe the Copyright Office can also play a very important role in promoting the identification of authors of works and limiting the number of works which fall into orphan status by (1) establishing officially-recognized registries for various types of works, and (2) defining standards for conducting a reasonably diligent search for the author of a work. Happily, the Authors Guild already has experience in administering royalties collected on behalf of U.S.-based authors when their works are licensed through various ECL systems in the United Kingdom and numerous European countries.

D. *Small Claims*

Among the most serious obstacles for authors in commercializing their works is the daunting and costly exercise required for such creators to protect their rights when they are infringed. The promise of exclusive rights for authors goes unfulfilled when it is not practical to enforce those rights. This problem is particularly acute for creative upstarts because copyright claims can only be brought in federal courts where the costs and legal obstacles are substantial, often outweighing the licensing fees that can be recovered as damages. Individual creators typically do not seek damages in the six-plus digit range, unless such damages are their only option for redress as the sole way to obtain the representation of effective counsel.

The Copyright Office has recommended an alternative forum that would be more accessible to the average person—a small claims court for copyright cases.[56] The proposal suggests a simplified adjudication process conducted by a tribunal within the Copyright Office itself. It provides incentives for both parties to consent to jurisdiction, including damages caps and the possibility of foregoing the need for counsel. This voluntary system is constitutional because it allows recourse to the federal judiciary if either party wishes the dispute to be decided by an Article III court. Ideally, adopting such a proposal would not only provide an efficient forum for resolving copyright claims of limited monetary value, but it would likewise limit the need for many parties to resort to the statutory damages provisions of the Copyright Act.

E. *Notice and Takedown*

The notice and takedown provisions of the Digital Millennium Copyright Act (DMCA) are not working for any of their intended beneficiaries, whether authors, artists, copyright owners, or internet service providers.[57] Rightholders are faced with a never-ending need to send repeated notices of infringement. As soon as they get an infringing copy of their work taken down, other copies pop up elsewhere (or even at the same site).[58] This creates a vicious cycle that distracts all involved from the creative and innovative work they could be doing instead. To give a sense of the scope, Google Search alone receives takedown notices for over 50 million links per month.[59]

Rather than incentivizing sites to develop solutions to prevent the immediate reposting of infringing works by repeat offenders, the DMCA as applied has spurred this perverse, costly, and senseless Whac-A-Mole game of endless notice sending. Sites that may otherwise be willing to take action to stem infringing activity are often advised by their counsel to do nothing until notified by a copyright owner for fear of being subjected to greater obligations under the DMCA.

We need a level playing field with clear obligations for all sites to reduce infringement without suffering heightened obligations by virtue of imputed knowledge. To achieve this, we recommend two solutions:

- First, notice and takedown should mean notice and stay-down, and service providers should be rewarded for taking steps to limit the flagrant reposting of works already taken down pursuant to takedown notices.
- Second, the red flag provisions should be strengthened by codifying a strong version of the willful blindness doctrine, but with a specific acknowledgement that sites should not be penalized for seeking to stem infringement by users.

Together, these solutions should reduce the enormous volume of takedown notices while also strengthening copyright enforcement and making it meaningful in the modern, digital marketplace.

F. *Streaming Harmonization*

Numerous government officials, including senior lawyers at the Department of Justice, the Intellectual Property Enforcement Coordinator, and the Register of Copyrights, have called for harmonizing the penalties applicable to large-scale criminal enterprises engaged in copyright infringement so that the penalties are the same regardless of whether the technology used to infringe is downloading or streaming.[60] However, thus far the remedies for criminal infringement have not been updated to reflect the realities of how copyrighted works are commonly misappropriated these days.[61]

Whether criminal infringement of copyrighted works can be prosecuted as a felony or a misdemeanor depends on whether the defendant offers downloads or streams. Someone who wrongfully uploads works to the internet for others to *download* can be charged with a felony.[62] But someone who *streams* those same works over the internet can only be charged with a misdemeanor.[63] This disparity in potential remedies results in a lack of attention to cases involving streaming technology and allows many large-scale infringers to escape criminal prosecution.[64]

This loophole is particularly troubling given the rising popularity of streaming. Nowadays, many people prefer to stream copyrighted works over the internet on-demand rather than download them or buy physical copies. Legal streaming services such as Netflix, Hulu, Amazon, Spotify, and Pandora are used by millions to stream content in real-time with just the click of a mouse.

Unfortunately, illegal streaming sites have become popular as well, and cyberlockers abound where users can find illicit versions of just about any content.[65] These illegal streaming sites harm not only the creators of copyrighted works, but also the technology innovators who have developed popular legal streaming platforms to meet consumer demands. Congress should heed the repeated calls to harmonize the criminal remedies for bad actors that enable infringement of works via streaming with those who enable infringement via downloads.

IV. Conclusion

The Founders understood that copyright protection was morally justified for authors and artists who labor to create new works, and they also had the foresight to recognize that the public ultimately benefits when this protection is secured by law. Over the two centuries since the Founding, the prescience of their vision has proved astounding, and we have a robust and flourishing democracy built on property rights of authors and artists. The creative innovation in the United States is the envy of the world. We hope these principles and priorities will help Congress as it navigates through the copyright revision process, keeping history and first principles in mind as it paves the way to our creative future.

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ENDNOTES

1 U.S. Const. art. I, § 8, cl. 8.

2 *See* Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003) ("Rewarding authors for their creative labor and 'promot[ing] ... Progress' are thus complementary[.]").

3 *See* The Declaration of Independence para. 2 (U.S. 1776) (recognizing that governments secure "unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness"); *see also* The Federalist No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) (recognizing that "the rights of property originate" from the "diversity in the faculties of men" and that the "protection of these faculties is the first object of government").

4 The Federalist No. 43, at 272 (James Madison) (Clinton Rossiter ed., 1961).

5 Adam Smith, The Wealth of Nations 160-61 (P. F. Collier & Son 1902) (1776).

6 *See Eldred*, 537 U.S. at 212 n.18 ("Accordingly, 'copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge.... The profit motive is the engine that ensures the progress of science.'" (quoting Am. Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 27 (S.D.N.Y. 1992))); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

7 *See* Terry Hart, *Copyright is for the author first and the nation second*, Copyhype (Oct. 23, 2012), http://www.copyhype.com/2012/10/copyright-is-for-the-author-first-and-the-nation-second/.

8 Mazer v. Stein, 347 U.S. 201, 219 (1954).

9 *See* John Locke, Two Treatises of Government bk. II ch. V, at 285-303 (Peter Laslett ed., Cambridge Univ. Press, 1988) (1690).

10 *See, e.g.,* VanHorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (Patterson, J.) ("No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry."); Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *reprinted in* The Life and Selected Writings of Thomas Jefferson 719 (Adrienne Koch & William Peden eds., 1944) (stating that the Declaration of Independence "was intended to be an expression of the American mind" and that "[a]ll its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, &c.").

11 James Madison, Property, Nat'l Gazette, Mar. 29, 1792, *reprinted in* James Madison, Writings 515-17 (Jack N. Rakove ed., 1999); *see also* John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49, 56 (1996) ("Madison believed that individuals possessed a property right in their ideas and opinions just as surely as they possessed a property right in the material goods they fashioned.").

12 *See* Adam Mossoff, *Locke's Labor Lost*, 9 U. Chi. L. Sch. Roundtable 155 (2002).

13 *See* Adam Mossoff, *Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory*, 29 Soc. Phil. & Pol'y 283, 308-10 (2012) (discussing 1695 memorandum in which Locke endorses copyright as property); Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. Cal. L. Rev. 993, 1012 (2006) (discussing same).

14 Davoll v. Brown, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845).

15 Paul Clement, Viet Dinh, & Jeffrey Harris, The Constitutional and Historical Foundations of Copyright Protection 2 (Ctr. for Individual Freedom, 2012), http://cfif.org/v/images/pdfs/constitutional-and-historical-foundations-of-copyright-protection.pdf.

16 *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 Geo. L.J. 287, 329 (1988) ("Intellectual property systems, however, do seem to accord with Locke's labor condition and the 'enough and as good' requirement. In fact, the 'enough and as good' condition seems to hold true only in intellectual property systems. That may mean that Locke's unique theoretical edifice finds its firmest bedrock in the common of ideas." (footnote omitted)).

17 *See* Eric R. Claeys, *On Cowbells in Rock Anthems (and Property in IP): A Review of Justifying Intellectual Property*, 49 San Diego L. Rev. 1033 (2012) (discussing importance of Lockean property theory in conceptually understanding intellectual property doctrines); Adam Mossoff, *Is Copyright Property?*, 42 San Diego L. Rev. 29, 40-43 (2005) (noting importance of the Lockean definition of property to understanding copyright today); Benjamin G. Damstedt, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 Yale L.J. 1179, 1179 (2003) ("Historically, Lockean natural rights informed the Framers' understanding of intellectual property law. Courts also have a long history of using natural law justifications in intellectual property cases." (footnotes omitted)); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002-03 (1984) (citing Locke for the proposition that trade secrets are property since they are the result of productive labor).

18 *See* Johannes Trüby, Christian Rammer, & Kathrin Müller, The Role of Creative Industries in Industrial Innovation (Ctr. for Eur. Econ. Res., Discussion Paper No. 08-109, 2008), https://www.econstor.eu/dspace/bitstream/10419/27592/1/dp08109.pdf.

19 *See* Sean M. O'Connor, *Creators, Innovators, and Appropriation Mechanisms,* 22 Geo. Mason L. Rev. 973, 974 (2015) ("Great creators are innovators and great innovators are creators. The content companies, including large legacy movie and music studios, have developed impressive new digital technologies. And digital technology and platform distribution firms are increasingly creating new content.").

20 Adam Rogers, *Wrinkles in Spacetime: The Warped Astrophysics of Interstellar*, Wired (Oct. 2014), http://www.wired.com/2014/10/astrophysics-interstellar-black-hole/.

21 *See* Gene Quinn & Steve Brachmann, *Hollywood Patents: Inventions from 12 Celebrity Inventors*, IPWatchdog (Mar. 3, 2014), http://www.ipwatchdog.com/2014/03/03/hollywood-patents-inventions-from-12-celebrity-inventors/id=48201/.

22 *See The THX Story*, THX, http://www.thx.com/about-us/the-thx-story/.

23 *Innovation in America (Part I and II): Hearings Before the Subcomm. on Cts., Intell. Prop., and the Internet of the Comm. on the Judiciary*, 113th Cong. 50-53 (July 25, 2013) (statement of Sandra Aistars, Exec. Dir., Copy. All.), http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg82157/pdf/CHRG-113hhrg82157.pdf.

24 I*nnovation in America (Part I and II): Hearings Before the Subcomm. on Cts., Intell. Prop., and the Internet of the Comm. on the Judiciary*, 113th Cong. 5-29 (July 25, 2013) (statement of John Lapham, Senior Vice President and Gen. Couns., Getty Images, Inc.), http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg82157/pdf/CHRG-113hhrg82157.pdf.

25 *See* Adam Mossoff, *How Copyright Drives Innovation in Scholarly Publishing* 18 (Geo. Mason L. & Econ., Working Paper No 13-25, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243264.

26 *Id.* at 18-20.

27 *Id.* at 25.

28 *See* Econ. and Stat. Admin. & USPTO, Intellectual Property and the U.S. Economy: Industries in Focus (Mar. 2012), http://www.uspto.gov/sites/default/files/news/publications/IP_Report_March_2012.pdf.

29 WIPO, WIPO Studies on the Economic Contribution of the Copyright Industries 2-5 (2014), http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf.

30 *Id.* at 10-12.

31 *See* Jiarui Liu, *Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation*, 38 Colum. J.L. & Arts 467 (2015).

32 *Id.* at 472-73 (footnote omitted).

33 *Id.* at 481-93

34 *Id.* at 489-90.

35 *See, e.g.,* Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

36 Golan v. Holder, 132 S. Ct. 873, 888-89 (2012) (emphasis in original) (quotations, citations, and brackets omitted).

37 *See* Sean Pager, *Making Copyright Work for Creative Upstarts*, 22 Geo. Mason L. Rev. 1021, 1022 (2015).

38 *Harper & Row*, 471 U.S. at 558.

39 *See, e.g.,* Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights,* 11 Vand. J. Ent. & Tech. L. 921, 955-60 (2009) (surveying proposals); Pager, *supra* note 37, at 1035 n.89 ("Scholars have proposed expanding the limits of fair use doctrine, crafting new safe harbors, reforming notice-and-takedown procedures, limiting statutory damages, as well as a host of related proposals." (citation omitted)).

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41 *See* Principles for User Generated Content Services, http://www.ugcprinciples.com/.

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43 *See* Sandra Aistars, *The Next Great Copyright Act, or a New Great Copyright Agency?: Responding to Register Maria Pallante's Manges Lecture*, 38 Colum. J.L. & Arts 339, 342 (2015).

44 *Id.* at 341; *see also* Maria A. Pallante, *The Next Great Copyright Act*, 36 Colum. J.L. & Arts 315 (2013).

45 *Id.* at 340-41.

46 *See* 17 U.S.C. §§ 410-12 (2012) (establishing that registration of a work, while voluntary, confers various legal benefits to the copyright owner, such as the availability of statutory damages and a *prima facie* presumption of validity).

47 *See* Dotan Oliar, Nathaniel Pattison, & K. Ross Powell, *Copyright Registrations: Who, What, When, Where, and Why*, 92 Tex. L. Rev. 2211, 2217 19 (2014).

48 *Id.* at 2212-13 (citing WIPO, Survey of National Legislation on Voluntary Registration Systems for Copyright and Related Rights, Annex II at 1 (Nov. 9, 2005), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_13/sccr_13_2.pdf).

49 *U.S. Copyright Office: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the Comm. on the Judiciary*, 113th Cong. 34 (Sept. 18, 2014) (statement of Maria A. Pallante, Register, U.S. Copy. Off.).

50 *Id.* at 35.

51 *Id*. at 37-39.

52 Aistars, *supra* note 43, at 343-44.

53 Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015)

54 *See, e.g.,* Sofia Castillo, *Copyright Office proposes pilot program for extended collective licensing to address mass digitization*, Copyright Alliance (June 15, 2015), https://www.copyrightalliance.org/2015/06/copyright_office_proposes_pilot_program_extended_collective_licensing_address_mass.

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57 *See Section 512 of Title 17: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the Comm. on the Judiciary*, 113th Cong. 8-15 (Mar. 13, 2014) (statement of Sean M. O'Connor, Prof. of Law, Univ. of Wash.), http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg87151/pdf/CHRG-113hhrg87151.pdf.

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59 *See* Google Transparency Report, Google, http://www.google.com/transparencyreport/removals/copyright/.

60 *See, e.g., Copyright Remedies: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the Comm. on the Judiciary*, 113th Cong. 15-16 (July 24, 2014) (statement of David Bitkower, Acting Deputy Assistant Att'y Gen., U.S. Dep't of Justice), http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg88815/html/CHRG-113hhrg88815.htm; U.S. Intell. Prop. Enf't Coordinator, Administration's White Paper on Intellectual Property Enforcement Legislative Recommendations 10 (Mar. 2011), http://www.whitehouse.gov/sites/default/files/ip_white_paper.pdf; *Promoting Investment and Protecting Commerce Online: The ART Act, the NET Act and Illegal Streaming: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the Comm. on the Judiciary*, 112th Cong. 8-22 (June 1, 2011) (statement of Maria A. Pallante, Register, U.S. Copy. Off.).

61 *See* Devlin Hartline & Matthew Barblan, Protecting Authors and Artists by Closing the Streaming Loophole (Ctr. for the Prot. of Intell. Prop., Oct. 2015), http://cpip.gmu.edu/wp-content/uploads/2014/04/Hartline-Barblan-Protecting-Authors-and-Artists-by-Closing-the-Streaming-Loophole.pdf.

62 *See* 17 U.S.C. § 506(a)(1)(A); 18 U.S.C. §§ 2319(b)(1)-(2), 3571(b)(3), 3559(a)(3) (establishing misdemeanor and felony penalties for certain reproductions and distributions, including a fine up to $250,000 and imprisonment up to five years; for subsequent convictions, imprisonment can be up to ten years).

63 *See* 17 U.S.C. § 506(a)(1)(A); 18 U.S.C. §§ 2319(b)(3), 3571(b)(5), 3559(a)(6) (establishing misdemeanor penalties for certain public performances, including a fine up to $100,000 and imprisonment up to one year; there are no increased penalties for subsequent convictions).

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65 *See, e.g.,* NetNames, Behind the Cyberlocker Door 1 (2014), https://media.gractions.com/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/8854660c-1bbb-4166-aa20-2dd98289e80c.pdf) ("Analysis of a sampling of the files on . . . thirty cyberlocker sites found that the vast majority of files were clearly infringing. At least . . . 83.7 percent of files on streaming cyberlockers infringed copyright.").

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