

A CASE STUDY FOR CONSENSUS BUILDING: THE COPYRIGHT PRINCIPLES PROJECT

HEARING BEFORE THE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED THIRTEENTH CONGRESS FIRST SESSION

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OFFICIAL HEARING RECORD

MATERIAL SUBMITTED FOR THE HEARING RECORD BUT NOT REPRINTED

Report titled *The Copyright Principles Project: Directions for Reform*, submitted by the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary. This report is available at the Subcommittee and can also be accessed at:

<http://docs.house.gov/meetings/JU/JU03/20130516/100830/HHRG-113-JU03-20130516-SD004.pdf>

Study titled *Copyright in the Digital Era, Building Evidence for Policy*, submitted by the Honorable Blake Farenthold, a Representative in Congress from the State of Texas, and Member, Subcommittee on Courts, Intellectual Property, and the Internet. This study is available at the Subcommittee and can also be accessed at:

http://www.nap.edu/catalog.php?record_id=14686

A CASE STUDY FOR CONSENSUS BUILDING: THE COPYRIGHT PRINCIPLES PROJECT

THURSDAY, MAY 16, 2013

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 2:55 p.m., in room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Goodlatte, Marino, Smith, Poe, Holding, Collins, DeSantis, Watt, Johnson, Chu, Deutch, Bass, DelBene, Jeffries, Nadler, and Lofgren.

Staff Present: (Majority) Joe Keeley, Chief Counsel; Olivia Lee, Clerk; and (Minority) Stephanie Moore, Minority Counsel.

Mr. COBLE. The Subcommittee on Courts, Intellectual Property, and the Internet will come to order.

Without objection, the Chair is authorized to declare recesses of the Subcommittee at any time.

We welcome all of our witnesses today. And at the outset, I want to again reiterate our apology for the delay. The votes take precedent oftentimes, and I am sorry. We appreciate your patience.

I will give my opening statement, then call on Mr. Watt afterwards.

This afternoon's hearing is an initial step in this Subcommittee's effort to undertake a comprehensive review of our Nation's copyright laws.

Last month, when Register Pallante testified before this Subcommittee, she illustrated the mutual interest of authors and the public. As she accurately and eloquently explained, "As the first beneficiary of the copyright law, they are not a counterweight to the public but instead are at the very center of the equation. As such, the copyright law must start with the creator as the center of the equation." As Ms. Pallante concluded, "A law that does not provide for authors would be illogical, hardly a copyright law at all."

Central to any review is identifying what has worked and is working in the law. Copyright law is well-rooted, with 200 years of precedent that has produced a level of creativity and innovation that is the envy of the world. Our consumers enjoy an incredible

selection of high-quality content that is available on an array of technology platforms. Meanwhile, we continue to lead the world with new ideas and creations. These achievements are stunning and should not, in my opinion, be overlooked.

That being said, I commend Chairman Goodlatte and Register Pallante for recognizing the need for a comprehensive review. Piracy is an enormous—piracy or threat—the terms are synonymous, in my opinion—is an enormous problem that must be addressed. Licensing is a periodic battle which oftentimes leaves consumers with the short end of the stick. We should take the time to consider whether there are other options.

Our high-tech innovators, which are also helping to drive creativity, are frustrated by all of the above. Our policies should incentivize innovation, not frustrate it.

These are some of the many issues I hope we will have an opportunity to review to determine whether or not the law is meeting its constitutionally-ordained purpose.

I am interested in hearing how this witness panel of diverse perspectives on copyright law was able to put aside their differences in an effort to work together. Such efforts and others like them should be applauded. This Committee has often heard from witnesses who were better at talking at each other rather than with each other.

Of course, that does not mean that anyone should retreat from his or her views on any subject. It should come as no surprise that the Ranking Member, Mr. Watt, and I do not agree on every issue that the full Judiciary Committee considers, but we try to serve the people of our great State.

And, by the way, I am pleased to see that one of our witnesses this afternoon is from the University of North Carolina.

Efforts in the copyright world to recognize where consensus can and cannot be reached are helpful as we undertake a comprehensive review. I have no doubt that Chairman Goodlatte, I, and other Members of the Subcommittee will hear from interesting creators over the months ahead on how copyright is and is not working for them.

The Register has already highlighted some problems with copyright law, especially for the ability of copyright owners to protect their works. The report generated by the Copyright Principles Project and the testimony submitted today have also highlighted problems that need to be addressed.

It seems to me that those who believe everything should be free fundamentally disrespect the creators who have put so much effort into their works and improve our Nation's culture as a result.

I again want to thank the witnesses for your presence today and for your willingness to spend so much time working in a collegial manner with those whose views may not always embrace or agree with. Their willingness to listen to others in such a manner is one that I urge everyone to follow.

I am now pleased to recognize the distinguished gentleman from North Carolina, the Ranking Member, Mr. Mel Watt.

Mr. WATT. Thank you, Mr. Chairman, and thank you for convening the hearing.

For those of you who showed up today expecting my grandson Nico, I have to extend my regrets. After yesterday's performance went viral on a number of outlets, including "Good Morning, America" this morning and others, he said he was giving me no more exposure without royalties. So he is not here with me today, although he is still in Washington for those of you who want to sign him up.

Anyway, let me be serious. Earlier this week, I attended the "We Write the Songs" event at the Library of Congress. The auditorium was packed with an audience transfixed on the skillfully crafted lyrics and the astonishing performances, including the electrifying performance that earned a standing ovation from the audience for a young group out of my home State of North Carolina, the Carolina Chocolate Drops.

Bearing in mind the Chairman's call for a comprehensive review of copyright law in the digital era, I left the event with an even more passionate view that our copyright system must preserve and protect the rights of the creators of the music, books, games, movies, and other forms of intellectual ingenuity that enrich each of us individually and all of us collectively, as a Nation.

I start with this observation because it seems that, over the past few years, there has been a shift in public discourse about copyright away from the people who actually devote their talent to create works for the benefit of society and those who invest in them toward the users of those works and the financial interests of those companies eager to commercially exploit them.

That shift has often been accompanied by assertions of lofty principles and constitutional values. But, as I have said in the specific context of online theft, free speech does not mean free stuff. And the free flow of information, even through legitimate channels, doesn't mean that information, the substance of what is flowing, should be free. It simply cannot be the case that the digital age turns creators into content servants for the rest of us.

That said, I am neither hardlined nor hardheaded about the realities of today's marketplace or the complexity of the task before us. The digital environment is replete with both challenges and opportunities, but, currently, uncertainty abounds for all stakeholders. Companies that invest in and develop individual talent must be secure in their expectation that strong copyright exists and that a mechanism to enforce those rights effectively is in place. Consumers deserve clarity about legitimate uses. And Internet and tech companies should have clear rules to help them develop sustainable business models that fairly compensate authors.

Companies that invest in creative talent may have to adjust their business models to accommodate the digital revolution, and many have. But the digital companies, some of whom have taken to exalting their disruptive power, well, they are not exempt from the need to adjust their practices either.

Keeping our focus on creators, while hardly novel or radical, is seemingly controversial in some quarters. Some of that controversy is evident in the Copyright Principles Project report and process that we will hear about today. Some is also evident in the reaction to the report, for example, the op-ed authored by musician David

Lowery that was published earlier this week, which I ask unanimous consent to offer for the record.

Mr. COBLE. Without objection.

[The information referred to follows:]

Getting copyrights right - POLITICO.com Print View

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POLITICO

Getting copyrights right

By David Lowery
May 13, 2013 05:22 AM EDT

Chairman Bob Goodlatte (R-Va.) plans a hearing on Thursday before the House Intellectual Property subcommittee to pursue his worthy goal of copyright reform.

The hearing is called "A Case Study for Consensus Building: The Copyright Principles Project" and focuses on a group called the "Copyright Principles Project" that produced a white paper called "The Copyright Principles Project: Directions For Reform."

Goodlatte has a refreshing desire for less polarization in America's debate on copyright reform, but I must note that the Copyright Principles Project is a strange kind of "consensus" on copyright — because it's no consensus at all.

Why Were Creators Excluded?

There are no creators involved in the Copyright Principles Project at all! None. As in not one.

The Internet has democratized creativity, but this group of Big Tech and Big Media companies and the lawyers and academics who love them is about as undemocratic a "consensus" as any artist could imagine.

Creators are the most affected by the "Project's" many proposed changes to copyright law. But creators were apparently not even considered as eligible to participate in discussions with these elites.

Any number of creators (including me) would have been glad to hash out ideas for reforms. Ideas we get from on-the-ground practical experience. Experience you won't find in the ivory towers of academia or corporate corner offices.

A Small Example

Let me give you one small example from the many proposals — copyright registration and orphan works. Had they been included, photographers could have explained that they typically take hundreds of photographs in a single photo session. The registration recommendation in this report would require photographers to register each and every photograph with a government registry to protect against "orphaning"— the use of a copy of their works by someone who can't seem to find them.

This registration idea has been around for quite a while. The pitch to artists is never from other artists — it's usually pitched as a good thing because the Internet would unleash a torrent of untold riches if people could just find you. This must be someone's idea of a

joke, because if the Internet has unleashed anything on artists, it is not a torrent of people trying to pay us. It's another kind of torrent—a Bit Torrent.

This registration issue is tricky — they can't condition the right to copyright itself on registration because I'm told that would probably violate international law and land the U.S. in yet another arbitration (remember the Fairness in Music Licensing Act?). So a registration just allows your work to be exploited if the people who want to use the work can't find you — even if they look really, really, really hard. That idea is something that any artist could have told the "Principles" elites was ... well, incorrect. Had we been asked.

There are plenty of ways to find musicians, songwriters and recording artists right now. The problem isn't that we can't be found. The problem is that only the honest people want to look for us.

The Market Already Has A Real Consensus

The market has already produced a solution to this. Artists who want to be found have registered with Getty Images, ASCAP, Flickr, BMI, SESAC, SoundExchange or Deviant Art and can continue to do so. Who benefits, then, from this registration requirement?

Big Tech. A Google lawyer told the Copyright Office that Google was interested in millions of orphans. In these recommendations, the person doing the looking has no incentive to actually find the artist because they benefit economically by failing to find artists.

Be Skeptically Bipartisan

Legislators would do well to be deeply skeptical of the "Principles", particularly when there is a superior bipartisan approach true to both conservative and liberal core principles.

Conservatives: There are very real unintended consequences in the "Principles", such as reversing the basic precept that if the government exists for anything it is to secure private property rights to the people. Instead, the proposed registry makes government the issuer of a kind of compulsory license.

Conservatives should also be troubled that these proposals implicitly would collectivize the rights of individual creators. Why stop with copyright? Why not collectivize privacy rights, too, if it benefits Big Data? When have conservatives ever supported such positions?

Liberals: These proposals are largely unfair to creators. They burden individual creators of modest means with new regulations and expenses while unburdening multinational corporations.

And guess who is going to pay for these registries? Individual creators who will be required to pay for something they don't want that ultimately hurts them? The already overburdened U.S. taxpayer? Or multinational corporations who are planning to profit from works that are available to exploit if they are not registered. When have liberals abandoned Main Street to protect multinational corporations?

Register Your Family Albums

Both conservatives and liberals should be frightened by the "Principles" attempt to

"reformatize" effective copyright protection by encouraging Goodlatte to take away "rights and remedies" for those who do not register their works. Especially those works that the report deems to have "no commercial value"—as decided by the elites rather than the market, apparently.

So if one of the "users" the principles seem to think they represent — like me — posts a photo of my children on my Facebook page but I don't register it, and somehow a company or individual then uses this picture commercially, or in some other vile manner, this report explicitly states that I would not have the same "rights and remedies" that I currently enjoy. In fact my reading of this report says I would have no remedies unless I were to win an argument that my family photos have commercial value — full employment for lawyers.

So are we all gonna have to register our family photos with Big Brother in order to keep control of them?

DMCA Abuse

Finally, how anyone could have a serious conversation about copyright in the 21st century without addressing the utter abuse of Digital Millennium Copyright Act notice and take-downs to benefit Big Tech and pirates alike? The "Project's" failure to even raise this issue is breathtaking.

For the uninitiated this is a-Whack-a-Mole game of "notice and shakedown" that creators can never win. I personally have to issue hundreds of take down notices to infringing sites each day (or hire a service to do this for me). Most of these sites then claim to remove the infringing file, but often within hours the identical file re-appears on the same site.

Google's own Transparency Report shows Google receives 20,000,000 DMCA take-down notices a month for search alone! Artists simply cannot afford this huge drain on resources to participate in this game of "catch me if you can."

Only those who live in an ivory tower could be oblivious to this fundamental disregard for property rights.

I truly believe that this result was never the Congress's intention. I'm sure Goodlatte respects artists as the creative drivers of copyright — professionals and amateurs alike. Artists have commended him frequently for his support for creators.

The continuing theme of the "Principles" elites is to weaken the rights of artists — artists who are not represented in the non-consensus consensus. And it's not like they don't know we are around.

I am confident that Goodlatte will include artists in future discussions in Congress. Not only do we create these works of copyright, but we can provide practical advice for implementing copyright reform on the ground.

Unfortunately, starting the discussion with an elite group masquerading as a "consensus" with selective proposals is a missed opportunity for ending the polarization.

David Lowery is singer songwriter for the bands Cracker and Camper Van Beethoven. He also blogs about musicians rights.

Mr. WATT. As Chairman Goodlatte has made clear, the Committee does not endorse the specific recommendations of the Copyright Principles Project. Still, the project does contain some useful background and insight into how parties with divergent views might be able to engage in a constructive and respectful dialogue.

I am particularly intrigued by the recommendation to strengthen the exclusive right of copyright holders to control communications of their works to the public, which I believe more closely aligns with the principle that aims to preserve and protect the creators' rights.

A report from this Committee in the 21st Congress observed, "It cannot be for the interest or honor of our country that intellectual labor should be depreciated and a life devoted to research and laborious study terminate in disappointment and poverty."

As we review copyright law and policy in the digital era, this Committee should work to secure the rights of the creators, who enhance our lives and grow our economy, while balancing the interest of the public. Let me be clear that I believe that the global appetite for intellectual property will benefit best from a robust copyright regime that protects the individual expressive rights of creators and authors.

Mr. Chairman, I thank you for the time, and I yield back.

Mr. COBLE. I thank the gentleman from North Carolina.

And other Members' opening statements will be made part of the record, if so desired.

I stand corrected. Our Chairman of the full Committee has just arrived, the gentleman from Virginia, Mr. Bob Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. I apologize for being late getting back.

Mr. Chairman, thank you for holding this hearing.

This afternoon, we will hear from several participants in the Copyright Principles Project, who collectively have worked on or studied copyright issues for decades. They have also traveled here from all over the United States, and I thank them for their willingness to be here today.

Copyright is a fundamental economic principle enshrined in our Constitution. It has become a core part of our economy and society in ways that Framers of our Constitution could never have imagined.

The ways in which creators could express themselves when the Constitution was written were very limited. Photography, musical recordings, film, and software did not arrive for decades, if not centuries, afterwards. Even many of these creations have changed significantly as digital technologies made the creation of content more diversified. Digital technologies have also enabled wider distribution to occur. Local artists can have a global reach.

The passion and skills of our Nation's creators have enhanced our society and culture. Creators deserve our support and respect.

Despite rapidly changing technologies and business models since the enactment of the 1976 Copyright Act, there appears to have been few efforts to bring together parties from different perspectives to discuss how the 1976 act has worked as technology and business models evolve. There have certainly been short-term events where interested parties spoke for a few minutes each about

the latest technology or the latest court decision. What has been lacking is something broader in perspective.

What impressed me about the Copyright Principles Project was not its report, or even on what issue its participants were able to agree or disagree. In fact, the Committee does not endorse the specific recommendations and findings of the report. However, we do want to highlight that its participants, with strongly held views on copyright law, many of which were in direct opposition to each other, committed to spending 3 years together in an effort to productively discuss copyright issues.

The Committee has invited five of the participants here today as an example of how people with divergent views on copyright law can productively debate a range of copyright issues. Their written testimony highlights the fact that they are all here this afternoon certainly not speaking with one voice but speaking with a recognition that the person next to them at the witness table has just as much right to advocate their position on copyright law as they do.

This Judiciary Committee is no stranger to policy issues on which opinions vary widely. This hearing room has and is continuing to debate numerous policy issues in which there are sharp disagreements. There were, of course, sharp disagreements on the 1976 Copyright Act that we use today and whose hearing record in 1975 in the Committee journals is before me.

Since announcing my interest in a comprehensive review of copyright law several weeks ago, a variety of interested parties began identifying their specific areas of interest that they wanted to see reviewed. I appreciate their input, and I look forward to working with all interested parties.

We should not be in a rush to focus on specific issues without first recognizing the fundamentals of copyright and the social and economic benefits that copyright brings to our economy. It is my intention to conduct this broad overview by hearing from everyone interested in copyright law, as we begin by holding hearings on important fundamentals before we begin to look at more specific issues.

There are numerous questions that will be raised by interested parties during this review. I have several myself, including: How do we measure the success of copyright and what metrics are used? How do we ensure that everyone's voice is heard? How is copyright working for individual artists? How is copyright working for our Nation's economy? These are only a few of the issues we will be looking into.

This review of copyright law will not be a quick process, simply because the issues are so numerous. However, we must undertake this review to ensure that copyright law continues to incentivize creativity and innovation in the digital age.

I want to thank all of the witnesses for being here today. And I definitely appreciate the Chairman's forbearance in allowing me to give this opening statement, even though I had to dash in to make sure it got done.

Mr. COBLE. You are indeed welcome.

Mr. GOODLATTE. We call all of your attention to this light reading if you are having difficulty sleeping at night here from 1975.

Thank you, Mr. Chairman.

Mr. COBLE. I will begin by swearing in our witnesses prior to introducing them.

If you would, please rise.

[Witnesses sworn.]

Mr. COBLE. Let the record reflect that all responded in the affirmative.

We have a distinguished panel of witnesses today.

Each of the witnesses' written statements will be entered into the record in its entirety, and I ask each witness, if you can, to summarize your testimony in or about 5 minutes. When your green light turns to amber, that is your signal. When the red light turns red, that is an ultimatum. You won't be penalized, but, if you could, wrap up shortly after that.

I am now pleased to introduce our witnesses.

Our first witness today is Mr. Jon Baumgarten, former general counsel of the U.S. Copyright Office and retired attorney at Proskauer Rose, LLP. Mr. Baumgarten was appointed as general counsel of the Copyright Office in January 1976 by the Register of Copyrights, Barbara Ringer. He served his term until 1979, being a leading participant in the final formulation of the general revision of the U.S. Copyright Act of 1976. Mr. Baumgarten then joined Proskauer Rose as partner in 1980 until 2011, when he retired. Mr. Baumgarten received his J.D. degree from New York University School of Law and his B.A. from the City University of New York.

Our second witness is Professor Laura Gasaway from the University of North Carolina-Chapel Hill.

And Mr. Watt and I may be guilty of giving you preferential treatment today, Professor. You are from Glory Land.

Professor Gasaway joined the UNC Law faculty in 1985 as director of the law library and professor of law. She was director until 2006, when she became Associate Dean for Academic Affairs. She also co-chaired the Section 108 Study Group for the U.S. Copyright Office of the Library of Congress from 2005 to 2008. Professor Gasaway received her J.D. from the University of Houston and her B.A. from the Texas Woman's University with highest honors.

Professor Gervais, Mr. Daniel Gervais, professor of law and director of the Intellectual Property Program at Vanderbilt University School of Law. Prior to joining the Vanderbilt faculty in 2008, Mr. Gervais researched international intellectual property law for 10 years on behalf of the World Trade Organization and the World Intellectual Property Organization. He is currently editor-in-chief of the Journal of World Intellectual Property. Professor Gervais received his doctorate degree from the University of Nantes in France.

Our fourth witness today is Professor Pamela Samuelson at the University of California Berkeley School of Law. Professor Samuelson currently serves as director of the Berkeley Center for Law and Technology and as a chancellor professor of information management and law. She is currently a fellow in the Association for Computing Machinery and also serves on the advisory board for Public Knowledge. Professor Samuelson received her J.D. from the Yale School of Law and a B.S. From the University of Hawaii.

The fifth and final witness is Mr. Jule Sigall, assistant general counsel for copyright at Microsoft Corporation, and, in his position,

Mr. Sigall leads the company's Copyright and Trade Secrets Group. Before joining Microsoft, he served as Associate Register for Policy and International Affairs at the U.S. Copyright Office, where he led the division responsible for providing domestic and international oversight policy to both the legislative and executive branches. Mr. Sigall also served as adjunct professor at the George Washington University School of Law. Mr. Sigall received his J.D. summa cum laude from Catholic University and his A.B. from Duke University in Durham.

We will give you special treatment, too, Professor.

Welcome to you all.

And we will begin with Mr. Baumgarten. And I will remind you again of the signal on your panel before you.

**TESTIMONY OF JON BAUMGARTEN, FORMER GENERAL
COUNSEL, U.S. COPYRIGHT OFFICE (1976-1979)**

Mr. BAUMGARTEN. Thank you, Mr. Chairman.

I am pleased to appear here today in my individual capacity in response to invitation from the Committee to testify regarding my participation—

Mr. WATT. Could you pull your mike closer to you so we could—

Mr. BAUMGARTEN [continuing]. To testify regarding my participation in the Copyright Principles Project. In addition to having served as general counsel of the Copyright Office, I have acted as counsel to copyright-owner plaintiffs in a number of leading cases which are the subject of considerable contention, as well as in non-litigation matters to major copyright industry entities.

In short, I have not been a neutral or, even in retirement, a dispassionate observer of the great copyright debates; nor, of course, were or are any of my CPP colleagues, whether the numerous representatives of the academy or the few from the private sector. We all brought to our deliberations strongly held and frequently contesting views.

The CPP report is not a disinterested, independent assessment, but it may usefully serve as one example of a collegial and informal discussion of the important issues facing this Committee as it again takes up its critically important stewardship of this country's copyright law with the assistance of the forward-looking and expert Register of Copyrights.

When viewed from the perspective of today's increasingly polarized copyright debates, the process and report of the CPP was, indeed, a breath of fresh air. A hallmark was not simply civility, but rather, real dialogue among representatives of substantially differing views. By and large, the participants listened to instead of speaking past each other and took the remarks of others genuinely and respectfully into account.

As thoroughly documented in my written statement, however, this process did not generate a great deal of substantive agreement. Unfortunately, we referred to "agreements" and "proposals" and defined those terms in such a way that understandably may have caused such confusion. In fact, the report's description of many of those misnamed proposals explicitly recorded a lack of consensus, opposing views, expressed concerns or, in a few cases, the

need for considerably more detail, participation, and study before any judgment can be made.

This is no surprise to this Committee, as our panel was instructed from the very beginning to participate in issue spotting, not to pretend to come up with a legislative package, which, of course, is not our function. We were also asked to demonstrate how contending parties can agree to disagree in civil fashion.

Mr. Chairman, Members of the Committee, I will not review my own objections and reservations with aspects of the report, principally because for the most part the report does a fair job of at least summarizing them, as well as all other participants'. I probably would have written some of those summaries different, but that was not the point of the exercise.

But all of this does not mean that the deliberations and report of the CPP are irrelevant to the program that Chairman Goodlatte has announced or unsuitable as a beginning to the difficult task of Chairman Coble, Ranking Member Watt, and Members of this Committee. To the contrary, the report expressed the hope that, "recording the nature of our disagreements could advance discourse on copyright issues by others."

Although the tenor of the CPP deliberations is a welcome tempering of recent copyright debate, there are other instances, described in my prepared testimony, where procedural and substantive collegiality prevailed on very complex copyright issues, notwithstanding very intense differences.

And at a personal level, if I may add, Mr. Chairman, my friend to my left and I have probably not agreed with each other in 40 years, but we have, over that period, had significant discussions, significant and respectful, productive instances, where some agreements we managed to extract.

At the risk of introducing a discordant note into this discussion, I will conclude my testimony with an additional point. For the reasons spelled out in my written statement, I think it fair to consider the discussions and report of the CPP as somewhat more attentive to perceived problems caused by copyright to access and related interest users than to the substantive and enforcement needs of authors and other copyright owners in the 21st century.

As this Committee goes beyond the CPP report toward the announced comprehensive review, I am confident that it will take forward and expand the CPP's focus of attention to encompass even more comprehensively the needs and concerns of authors and other copyright owners as well as those of all stakeholders and participants in the world of copyright.

Thank you for your time.

Mr. COBLE. Thank you, Mr. Baumgarten.

[The prepared statement of Mr. Baumgarten follows:]

**Prepared Statement of Jon Baumgarten, former General Counsel,
U.S. Copyright Office (1976-1979)**

I am Jon Baumgarten. Having retired from the practice of law, I am appearing today in my individual capacity in response to invitation from Chairman Goodlatte to testify regarding my participation in the Copyright Principles Project ("CPP"). By way of disclosure, in addition to government service as General Counsel of the Copyright Office from 1976 through 1979, before and after that period I served as counsel to copyright owner plaintiffs in a number of leading cases that established precedent and principles of copyright law which are subject of considerable contention in to-

day's copyright debates, as well as counsel to major copyright industry trade associations, consortia, and companies. I have not been a neutral or (even in retirement) dispassionate observer of the great copyright debates. Nor, of course, were or are my CPP colleagues, whether the numerous representatives of the academy or the few from the private sector.

We all hold and brought to our deliberations strongly held views borne of scholarship, citizenship, learning, experience, observation and practice. The report of the Copyright Principles Project—*The Copyright Principles Project: Directions for Reform*, 25 Berkeley Tech. L.J.1 (2010) (“*Report*”)—is not a disinterested independent assessment or impartial opinion. It may, however, usefully serve as one example of a more frank and less rhetorical, or at least more collegial and informative, discussion than many others of some of the important issues facing this committee as it continues its vigilant, deliberate and critically important stewardship of this country's copyright law. It is important to go further and make even more clear to this committee what the *Report* was, and even more important, to make clear what it was *not*. As I suggested a moment ago, when viewed from the perspective of today's increasingly polarized, largely distrustful, and deeply antagonistic copyright debates, the process and *Report* of the CPP was a breath of fresh air. (As I will mention a bit later, however, its tenor was not entirely unique or unprecedented.)

A hallmark of the process was not simply civility, but rather real dialog among representatives of significantly differing views. During the discussions, and as reflected in the *Report*—and notably in several cases in its evolution from draft to final form—by and large the participants listened to instead of speaking past each other and took the remarks of others genuinely into account in developing and putting toward their own positions and replies. While this process yielded a constructive exchange and, I hope, a cadre of continuing disputants who are more understanding, tolerant, and perhaps even respectful of each other's' views, it does not at all mean that it generated overwhelming or even a good deal of substantive agreement. Indeed, it became apparent quite early in the process that considerable meaningful agreement would probably not be—as indeed it was not—the conclusion of our efforts. That objective was, in fact, soon disavowed as even our purpose. The *Report* (pg 3) notes, for example, that “we are not in a position to offer a comprehensive and detailed set of . . . proposals”; that “CPP members are not uniformly of one mind about various steps that could lead to improvements”; and that “we have succeeded in . . . articulating both where we agree and where and why we disagree”. It also cautions (pg 4) that “participation in the project should not . . . be interpreted as an endorsement of each and every proposal discussed in the document. In fact, various members of the group maintain reservations and even objections to some proposals described as recommendations in this Report.”

I will not, in my prepared testimony, review my own objections and reservations with aspects of the *Report*; this is principally because, in tribute to my colleagues and our convener, for the most part the *Report* does a fair job of explicating or at least summarizing my concerns and those of all other participants.

Examination of the (unfortunately mis-named) section of the Report that sets forth “twenty five reform proposals” makes the qualitative preponderance of “disagree[ment]” quite clear. The majority of descriptions of these points explicitly recorded (and explained) lack of consensus, opposing views, express concerns, or in a few cases the need for considerably more detail and study before any judgment could be made. The express acknowledgement of disagreement among the CPP participants appears elsewhere in the *Report* as well, in connection with such important subjects as possible changes to copyright duration (pg 10), to the definition of exclusive rights (pg 13), to allocation of the idea/expression dichotomy (pg 16), and to application of the preemption doctrine (pg 16).

Of the twelve descriptions that did *not* record explicit disagreement, at least one (#17: expanded statement of fair use purposes) and perhaps more were in fact the subject of substantial reservation and objection at the meetings; two (#12: injunctions and principles of equity; and #14: permanence of public domain) have been subject of dissension among CPP participant related interests in the courts; one (#19) may—as I understand it—have been since disavowed by some or all of the same interests that supported it; one (#21: orphan works legislation) has been explored in far greater detail by the Copyright Office and others; and in my view few (##7; 14; 17; 19; 21) are of major doctrinal and practical significance. It is worth noting, however, that one of these uncontested yet important proposals (#7: right of communication to the public) is of increasing benefit to copyright owners.

Given this lack of agreement, it is understandable for members or staff of the committee and other readers of the *Report* to wonder how the document could describe a collection of twenty five revision “proposals” (after explicitly concluding that “we are not in a position to offer a comprehensive and detailed set of . . . proposals

[pg 3]”), refer to “recommendations”, or assert that “*we believe . . .*”. The *Report* explains (pgs 4, 22):

“While various proposals elicited enough support within the group that it was deemed constructive to style them as recommendations, *we do not intend affirmative statements or use of phrases, such as ‘we recommend’ or ‘we believe’ to suggest that the group as a whole was uniformly in support of each particular view stated.* It is a tribute to the collegiality of the group and our collective desire to foster a constructive dialog . . . that there was enough agreement among us to set forth recommendations in this manner.”

Given the composition of the membership and strength of dissenting views, the “enough support” rationale is, at least in retrospect (and was to some at the time) an unfortunate and inadvertently misleading one.

But all of this does not mean that the deliberations and *Report* of the CPP are irrelevant to the process Chairman Goodlatte has announced, or unsuitable as a point of orientation or beginning to the difficult but important task of Chairman Coble, Ranking Member Watt, and members of this committee. To the contrary, the *Report* expressed the hope that “recording the nature of our disagreements could advance discourse on copyright issues by others” (pg 4), that the Report “will contribute to a wider and more effective conversation . . .” (pg 4), and that the purported proposals would “stimulate thoughtful conversation . . .” (pg 12). If my CPP colleagues and I have proven ourselves useful to the committee in that posture then we may conclude that our time in the CPP was not only intellectually rewarding and socially pleasant, but also productively spent.

Although the tone and tenor of the CPP deliberations and conclusions is a welcome tempering of at least the decibel level of recent copyright debate, there are other instances where procedural and substantive collegiality prevailed among interested parties on very difficult and complex copyright policy issues notwithstanding intense differences. For one example, the sometimes harshly contrasting and loudly voiced positions of the motion picture industry on the one hand, the consumer electronics industry on another and the information technology industry on yet a third on certain copyright issues are very well known to this committee. Yet over a period of several years a number of us—notably including counsel, technologists, and business persons from each group—repeatedly convened, carefully explored each other’s concerns, put aside the rhetoric, and in result created the legal and technical environment—and with the essential aid of Congress, the critical legislative support—for emergence of the then great new media consumer success, DVD and related formats. There are other examples of productive professional collegiality existing side by side with or under the surface of simmering copyright controversy. Since at least the years of the great copyright revision program of the 1960’s and 70’s and to more recent times, these include negotiated guidelines and even legislation, and multi-party studies and reports. Not all have survived the years, the progress of technology, or the evolution of political strategies; some have not yet become effective or operational; others have been perhaps more the product of congressional prodding than of voluntarily initiated association. Yet—at least in my own experience—for the greater part, much like the CPP, these events have “proven that it is possible for persons of good will with diverse viewpoints and economic interests to engage in thoughtful civil discourse on even the toughest and most controversial copyright issues [*Report* pg 4].”

At the risk of now suddenly introducing an extra discordant note into this discussion, I will conclude my testimony with an additional point:

I think it fair to consider the discussions and *Report* of the CPP as somewhat more attentive to perceived problems caused by copyright to access and related interests of “users” than to the substantive and remedial/enforcement needs of “copyright owners” in the Twenty First Century. (I do apologize for resurrecting this old and imprecise class distinction; but for the moment it serves a purpose.) In my judgment, nineteen of the twenty five points examined by the Report (all but ##5, 7, 9, 23, 24 and 25) can reasonably be categorized as addressing “user” access and related concerns. Please understand that I am speaking here in comparative terms of the CPP’s *focus of attention*; not of its absolute substance. Indeed, there are notable acknowledgments of copyright owner interests in both specific “proposals” (#7: communication to the public; #9: recognizing importance of ISP responsibility, though with substantial disagreement on implementation; see also, ##5 & 23 [small claims and treatment of contributions to software] and, for individual authors ##24 & 25 [termination and attribution rights]); in many of the discussions of recorded objections and concerns to other “proposals”; and in other sections of the *Report* as well. For example, it is most welcome to

see instead of the more commonplace copyright trampling rush to instant gratification of an immense technology enhanced appetite for immediate content, the following: "It may take some time and patience to allow disrupted copyright sectors to consider, experiment with, and develop other or more refined models and approaches with which they will be reasonably comfortable [pg 2]." It is comforting as well to note the Report's tight categorization of the Supreme Court's *Sony Betamax* decision as involving only some device "makers" and time shifting of free to air broadcast [pg 5] rather than the far broader if not unbounded cloak of immunity for primary and secondary infringement liability wrongly accorded to that decision by others; its recognition of copyright's importance to "encouraging provision of capital and organization needed for *dissemination* of works" as well as to authorial effort [pg 2]; and the importance of developing and deploying technical protection measures in the digital age [pg 19].

As this committee goes beyond the CPP Report toward the announced "comprehensive review of copyright law" I am confident that it will take forward and expand the CPP's "focus of attention" to encompass even more comprehensively the needs and concerns of copyright owners as well as of all stakeholders and participants in the world of copyright, and of the public.

I am confident of that because I have seen and closely experienced this committee, including its predecessors, do so before. During the last omnibus copyright revision I spent many hours as Copyright Office General Counsel assisting committee staff and members in addressing major concluding issues of the revision program and its implementation. Prior to and after that period I had numerous opportunities to confer with the committee on behalf of clients affected by its copyright related deliberations. I have high regard for its process, deliberation and expertise; but I add, rather selfishly, that today, having retired from practice, I am particularly delighted to experience something of a homecoming in venue and in substance, and I am thankful for the opportunity to appear here again.

Mr. COBLE. Professor Gasaway?

TESTIMONY OF LAURA N. GASAWAY, PAUL B. EATON DISTINGUISHED PROFESSOR OF LAW, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW

Ms. GASAWAY. Thank you.

Chairman Coble, fellow North Carolinian, and Ranking Member Watt and Members of the Subcommittee, thank you so much for inviting me to participate in this distinguished panel.

I have worked with these folks for many years, and, as Mr. Baumgarten told you, he and I have worked together probably more than 35 years, usually taking opposite positions but remaining friends all that time.

I have participated in a number of groups working on copyright issues over the years, representing the Association of American Universities in the Conference on Fair Use, and, as you mentioned, co-chairing the Section 108 Study Group, and then most recently as a member of the Copyright Principles Project.

You also heard that I am both a law librarian and a law professor, and so it is natural that my focus throughout my career has been on libraries, archives, museums, and educational institutions, not only on the use of copyrighted works by these institutions but also on the creation of these works by faculty and employees.

My written statement mentions educational uses, but in my comments today I am going to talk just about libraries, archives, and museums.

Copyright concerns have been part of these institutions long before the 1976 act and the advent of photocopying. The 1976 act does not work so well on a number of fronts but especially for li-

braries, archives, and museums and for their users, visitors, and students. The current act is bewildering, to say the least, often even to copyright lawyers.

I believe there are three potential ways to solve the copyright problems that these institutions face. And when I call them copyright problems, I mean how do we deal with users and still protect the rights of creators, which so many of you eloquently spoke about.

The first would be a total revision of the Copyright Act based on principles, I would hope removing some of the regulations from the statute and putting them into the Code of Federal Regulations, where as a law librarian I will tell you they belong, rather than in the statute, and at the same time taking into account the unique roles that libraries, archives, and museums play in our society.

For example, as a matter of principle, recognize the roles of these institutions and allow them to provide access to works; permit the reproduction of portions of works even in digital format in order to encourage research, scholarship, and private study. As a matter of principle, the Act could ensure the ability of these institutions to preserve works digitally so that they are available for future generations.

In addition to the Copyright Principles Project, another model of these principles might be the European treaty proposals that I mention in my written statement.

A second proposal would be to repeal section 108 and rely solely on section 107: fair use. The Copyright Principles Project highlights the difficulties with this approach, which I believe are exacerbated for frontline employees in libraries, archives, and museums.

Sometimes I think academic law librarians and academic librarians at large institutions, which have legal counsel to advise them, would like to rely solely on fair use. But I will tell you that public librarians and librarians in small colleges, which may not have any legal counsel, much less one that is familiar with copyright, are often faced with a user standing at a desk kind of ranting and raving and wanting to do something, and they need an immediate answer. If only copyright lawyers can understand and apply the Act, something is fundamentally wrong.

A third way to solve the problem for libraries, archives, and museums is to enact the recommendations of the Section 108 Study Group and update them, as detailed in my written statement.

But there are two other issues that are crucial to these institutions: solving the orphan works problem and finding a way to deal with mass digitization. These are serious issues facing these institutions as well as society.

Determining and maintaining the appropriate balance in copyright is not an easy proposition, but, as the Copyright Principles Project illustrates, it is possible for people of good will to come together, discuss difficult issues, and reach some agreements. But they must keep foremost in their minds what is best for society and not just what is best for their constituencies.

Thank you so very much, and best wishes to you as you begin this endeavor. If I can help in any way, I would be delighted to do so. Thank you.

Mr. COBLE. Thank you, Professor Gasaway.

[The prepared statement of Ms. Gasaway follows:]

**Prepared Statement of Laura N. Gasaway, Paul B. Eaton Distinguished
Professor of Law, University of North Carolina School of Law**

Distinguished Chairman Goodlatte, Ranking Member Watt and Members of the Subcommittee on Intellectual Property, Competition, and the Internet: Thank you for inviting me to talk to you today about revising the Copyright Act. I am a law librarian and law professor, and I have worked in copyright arena since 1973 focusing on the use of copyrighted works in libraries, archives and educational institutions and the creation of copyrighted works by faculty and employees of these organizations. I was the co-chair of the Section 108 Study Group;¹ a group convened to consider recommend changes to the library and archives exceptions embodied in section 108 of the Copyright Act. I was also a member of the Copyright Principles Project.

Libraries, archives, museums and educational institutions have experienced tremendous changes over the past few decades; they have been active adopters of technology to improve internal processes, to provide increased access to information and to update educational methodology to meet the needs of students today. The digital age has revolutionized these institutions as well as copyrighted works which are increasingly available in digital format. The 1976 Copyright Act was enacted in the very early days of this revolution, and no one envisioned creation of the Internet, the importance of digital works and the rise of user generated content. These changes are highlighted in the report of the Copyright Principles Project. For libraries, archives, museums and educational institutions, the ability to rely on digital technologies to perform their traditional functions is crucial. These institutions are also beginning to engage in new activities such as digital preservation and even so-called “mass digitization.” The current statute does not deal with any of these issues. At the same time, the creators of copyrighted works must be protected, encouraged and compensated for their works, if they so choose, while making their works available to the public. This means that whatever changes to the copyright statute are adopted must create a balance between creators and users of copyrighted works.

I have thought long and hard about how to solve the problems that libraries, archives, museums and educational institutions encounter in dealing with digital works as copyright owners increasingly attempt to lock down their works with restrictive licensing provisions. For these institutions, just trying to comply with the current complicated statute is expensive and maybe even cost prohibitive. Moreover, today’s students and library patrons demand that works be made available in digital format, but the current Copyright Act makes it difficult to provide these copies and still comply with the provisions of section 108. There are three possible ways to ameliorate these problems while still providing necessary protections to copyright owners. (1) Develop a new copyright act that is flexible, less technical and easy for ordinary people to understand, one that is based on underlying principles rather than lobbying efforts that eliminates the difference in the ways different types of works are treated under the statute. An example of such an approach is the Treaty Proposal on Limitations and Exceptions for Libraries and Archives developed jointly by the International Federation of Library Associations, the International Council on Archives, Electronic Information for Libraries and Innovarte, a library non-governmental organization.² (2) Repeal section 108 and rely solely on the fair use doctrine to provide these entities with the flexibility they need to fulfill their missions and provide materials to their users, patrons, faculty, staff and students. (3) Revise section 108 of the Act to expand the exceptions to the exclusive rights of the copyright owner to take into account the changes wrought by the digital age in accordance with the Section 108 Study Group Report³ and update and expand those recommendations.

The first alternative comes from the Copyright Principles Project. The focus would be on providing to users of libraries and archives, visitors at museums and students, faculty and staff of educational institutions the ability to use copyrighted works in a non-commercial manner to provide access to copyrighted works to their users. It would require a flexible statute that is truly technology neutral. The European

¹The Section 108 Study Group was created by the U.S. Copyright Office and the National Digital Information Infrastructure and Preservation Program of the Library of Congress. It issued its report in 2008.

²See http://www.ifla.org/files/assets/hq/topics/exceptions-limitations/documents/TLIB_v4.3_050712.pdf.

³See <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>.

Treaty Proposal on Limitations and Exceptions for Libraries and Archives⁴ includes the ability for libraries and archives to lend tangible copyrighted works to a user or another library; to provide temporary access to copyrighted works in digital format to user or another library for consumptive use; and to provide a copy of a copyrighted work in connection with a user request for the purpose of education, research or private use, provided that the reproduction and supply is in accordance with fair practice. For preservation or replacement, the proposed treaty permits libraries and archives to reproduce works and allows preserved or replacement copies to be used in place of the originals in accordance with fair practice. Another general principle in the proposed treaty is that libraries and archives are permitted to reproduce and make available to the public any work for which the rights holder cannot be identified and located after reasonable inquiry. The treaty proposal deals with digitization only as a preservation matter or to meet the needs of people with disabilities, however.

The second method to solve the statutory copyright problem for these institutions is to repeal the current section 108 and rely entirely on fair use. Fair use may offer much of what these institutions need, but as the Copyright Principles Project noted, the application of fair use is highly technical and often requires interpretation by a copyright lawyer to provide librarians, archivists, museum staff and faculty the answers they need. Many librarians may prefer the fair use solution but there are also significant difficulties with relying on fair use to such an extent. For front-line employees of these institutions fair use is too indefinite and fails to provide the immediate guidance they need to answer questions about whether a particular activity is likely to be infringement, particularly when those questions come from a user who wants a quick answer. Further, fair use was never intended to be relied upon so substantially, and it is likely overused today.

The third alternative solution is to amend section 108 to take digital issues into account in a more comprehensive but flexible manner. Clearly, in 1976, section 108 was drafted for the photocopy era; the 1998 amendments improved the statute to permit some digital copying, but they did not really provide what was needed for these institutions to function in a digital world. The Section 108 Study Group, made up of experts from libraries, museums and archives as well as the experts from the copyright content community, spent three years addressing how to amend the library and archives section of the Act. The Study Group Report offered some recommendations and reached other conclusions short of recommendations.⁵ But even those recommendations and conclusions are now dated; digital technology as well as library, archives, museum and educational institution practices are simply moving too fast. So, one approach is to enact the changes recommended in the Section 108 Report but also to update them. There are other issues that must be addressed, however, such as orphan works and mass digitization. The need to solve the orphan works problem was highlighted by the Copyright Principles Project. Other organizations and institutions in addition to libraries, archives and museums are interested in large digitization projects, so that the issue might be addressed either within the exceptions for libraries, archives and museums or outside of the section 108 exceptions.

The Section 108 Study Group recommended changes to the existing section 108 to include adding museums to the institutions eligible to take advantage of the exceptions but also with better definitions of libraries, archives and museums that qualify for the exception or by adding additional criteria for qualification such as having a public mission, a trained professional staff and having a lawfully acquired collection. Any amendment should also include the ability for these institutions to outsource covered activities as long as the contractor is acting solely as the provider and cannot retain copies of the works digitized. Further, there would be an agreement between the parties to permit rights holders to obtain redress for infringement by the contractor.

For preservation and replacement, subsections 108 (b)-(c), the current statute permits the making of digital copies, but it restricts the total number of copies to three. Any amendment should change the three copy limitation to a reasonable number of copies in order to provide one usable copy. Statutory change should also provide for refreshing digital copies as needed and upgrading them to new platforms when necessary. Moreover, the Study Group recommended removing the current "premises" requirement in (b) and (c) if the original work that has been preserved or replaced could be used outside the premises of the institution. Two new preservation subsections should be added to the statute according to the Section 108 Study Report. The first would permit up-front preservation of publicly disseminated digital

⁴See *supra* note 2.

⁵See *supra*, note 3.

works because once a digital work has begun to deteriorate, it is too late to preserve it. Libraries, archives and museums that undertake such preservation would be required to meet additional criteria such as maintaining preserved copies in a secure, managed, monitored, best practices environment and to adopt transparent means to audit the practices, standard security and a robust storage system with backup copies. The second new recommended preservation subsection would permit the preservation of publicly available websites and online content that is not restricted by access controls. The idea is that this exception would produce a curated collection of websites, available after an embargo period for which copyright owners could opt out, but not if the website is a government or political website. Preserved websites would have to be labeled as such.

The Section 108 Study Report contained other recommendations and conclusions in addition. Although the Group did not agree broadly on providing off-site access to preserved and replacement digital copies and to users who request digital copies under subsections 108(d)-(e), there was agreement that academic institutions with a defined user group (such as students, faculty and students) which have a way to authenticate these users before providing such access could give off-site access to individual, authenticated users without harm to copyright owners. Libraries and other institutions that qualify for the exceptions but which do not have such narrowly defined user groups were more problematic for the Study Group. The ability to provide digital copies to users is a crucial need for the modern era—users are demanding such access, libraries have the ability to provide these copies and to warn users about further distribution of the digital copies. Any amendment to section 108 should provide for off-site access with conditions to prevent further distribution.

For libraries and archives within educational institutions, many of the copyright problems they encounter deal with providing materials for students and faculty for teaching, learning and research. Digital technology has changed the way courses are taught, the way that students learn and how they access and interact with material. Copyright issues for educational institutions can also be dealt with in the three ways described above: from a general principles approach, by reliance on fair use alone, or by specifically amending the exceptions in sections 108 and 110(1)-(2).

Changes to modernize and update the Copyright Act may require society to re-evaluate its values: is the primary value of copyright making works available through these important institutions for the purposes of educating the populace, teaching and learning, scholarship, etc., or as stated in the 1790 Copyright Act “the encouragement of learning”? Or is the primary value of copyright maximizing profits for rights holders? Are both of the goals essential to fulfill promotion of the progress of science and the useful arts? How can these competing purposes of copyright law be balanced to provide maximum benefit for society? Balancing these goals will be difficult to accomplish, but it must be done if our society is to flourish and maintain its competitive position in the world.

Mr. COBLE. Professor Gervais?

**TESTIMONY OF DANIEL GERVAIS, PROFESSOR OF LAW,
VANDERBILT UNIVERSITY LAW SCHOOL**

Mr. GERVAIS. Chairman Coble, Ranking Member Watt, Members of the Subcommittee, thank you for the invitation to appear before you today.

I wish to begin by commending this Subcommittee for its leadership in tackling this issue of utmost importance and economic significance.

It is time, I believe, to embark on the process that will give us what the Register of Copyrights recently referred to as “the next great Copyright Act,” as was done three times in the past: 1790, 1909, and 1976. So much has happened since 1976, when personal computers, the Internet, and the digitization of music and the phenomenon of social media were not yet realities.

Copyright should allow professional creators, whom I see as small businesses, to get a fair return on their creative investment when their work is successful in the marketplace. It should also allow many sustainable business models to flourish in producing,

exporting, and providing access to U.S. copyrighted material around the world.

Copyright should also be balanced. Individual users should have fair access to copyrighted material and be able to take advantage of the almost infinite possibilities that the Internet offers.

As I explain in my written statement, making copyright work should focus on maximizing authorized uses of copyrighted material because then everyone wins, instead of focusing solely on minimizing unauthorized uses.

I believe that copyright modernization is necessary in part because copyright law is now everyone's business. It was not always so. Before the Internet and digital devices became what is now probably the most widely used way of accessing copyrighted material, individual consumers and users had few reasons to think about copyright in their daily lives. Copyright was a set of rights for and negotiated between professionals such as authors, publishers, record companies, and broadcasters. For them, dealing with complex rules was part of the cost of doing business.

Individuals who purchased copies of works in the form of books, tapes, or CDs had ownership rights, in fact, in those copies. As a result, copyright constraints were mostly irrelevant in the daily lives of most Americans.

That situation has changed dramatically. Accessing a song online, downloading an e-book, or streaming a movie generally requires a license, which may restrict the uses that individuals can make of the material. Technological locks may also be in place.

On the flip side, however, technology has made it much easier to copy, modify, and disseminate copies of material, including sometimes material that belongs to others. This points to a need to clarify the language of the statute but also, and more importantly, the scope of rights, exceptions, and remedies.

The international dimension is also relevant. I provide details in my written statement. Let me just say that the international picture is beginning to look like a patchwork of rules. I believe a comprehensive review of the statute should allow a clearer path for U.S. leadership in global copyright discussions.

I would also like to say a few words, if I may, about licensing. Both individual and collective licensing have become an important vehicle through which creators and other rights holders monetize their creative work. Let me give a brief example of each.

Collectively, many songwriters and publishers authorize performing rights organizations, such as ASCAP or BMI, to license musical works for broadcasting and streaming. Individually, authors and publishers may license, say, a foreign publisher to translate or publish an e-book or a book in another country.

Whether the Internet will perform adequately in years to come as a viable marketplace for copyrighted material is in large measure a function of whether licensing can work. The statute contains eight compulsory licenses. Those are usually fixes to temporary problems, but they tend to become permanent. One of those licenses was first established for player pianos. I point out many of the other issues in my written statement.

I believe the best way forward is to leave some discretion to a specialized agency, such as the Copyright Office, to decide from

time to time whether changes are required to those licenses, whether an existing license is still needed, or even whether a new one should be established.

Finally, formalities also need to be modernized. When you buy a car, the fact of the car's existence is not, unless perhaps you are a student of philosophy, one that most people would doubt. Registration may confirm things like the model or place of manufacture. For a copyrighted work, it could be the author, the publisher, or the year of publication. But buying a car requires a determination that the person selling the car has the title to the vehicle. This is where recordation of transfers comes into play. I believe that a heightened recordation requirement would ameliorate the number of issues, including orphan works.

In closing, I commend the Subcommittee for its leadership in this important endeavor and invite any questions that you may have. Thank you.

Mr. COBLE. Thank you, Professor Gervais.

[The prepared statement of Mr. Gervais follows:]

**Statement of Professor Daniel Gervais, Vanderbilt University Law School
before the Subcommittee on Courts, Intellectual Property and the Internet
Committee on the Judiciary**

United States House of Representatives

113th Congress, 1st Session

A Case Study for Consensus Building: The Copyright Principles Project

May 16, 2013

Chairman Coble, Ranking Member Watt, Members of the Subcommittee, thank you for the opportunity to appear before you today. I commend the Subcommittee for its leadership in tackling this issue of utmost importance and economic significance to the United States.

A comprehensive review and modernization of our copyright system is necessary. If correctly undertaken and achieved on a timely basis, addressing digital rights, exceptions and enforcement, and numerous issues in the area of licensing and formalities has the potential to generate positive and much needed outcomes for this country. Any such review should also bear in mind that the United States is a major exporter of copyrighted material and a leader in global discussions on copyright issues.

I have been teaching domestic and international copyright and intellectual property law for 12 years.¹ Before that, I worked as Head of Copyright Projects at the World Intellectual Property Organization (WIPO) and Legal Office at the World Trade Organization (WTO) during the TRIPS negotiations. I was also Vice-President of Copyright Clearance Center, Inc. (based in Danvers, MA) and served as Vice-Chair of the International Federation of Reprographic Rights Organizations (IFRRO) and Deputy Secretary General of the International Confederation of Societies of Authors and Composers (CISAC), two international bodies specializing in copyright licensing. I have published several books, including a reference book giving a detailed analysis of the drafting history and present application of the TRIPS Agreement, approximately 30 book chapters and 60 articles on copyright and intellectual property, many dealing with particular aspects of copyright policy.

I live in Nashville, known to many as “Music City,” where I can see the impact that copyright policy has on songwriters, artists, and on their fans, publishers and record companies each and every day. Indeed, America is at its best when it produces and exports intellectual property. Copyright has been an important part of the US economy, as the success of US creators, book publishers, film and record companies, and many others over the past decades, have shown. As the transition to the digital realm continues, it is absolutely essential to get copyright policy right.

There are tremendous opportunities for growth in digital media, gaming, and online commerce, but there are also significant challenges. Most people already have one or more devices permanently connected to the Internet at work, home and/or school. This move from a one-to-many to a many-to-many infrastructure and the increased degree of reliance on shared computers (the “Cloud”) to store and access both private and commercial data and copyrighted material is a major shift, one that the current statute cannot easily accommodate.

Modernizing copyright law should not involve just trade-offs between those who want more rights and those who want more exceptions. Today’s copyright system should create benefits for *all* stakeholders. It should allow both amateur and professional creators to disseminate their work, without imposing an obligation on professional creators to provide their work for free or on amateurs to charge for theirs. Professional creators are best viewed as small businesses, and they should be treated with the respect they deserve.

¹ While I am a faculty member at Vanderbilt University, I am here in a personal capacity and I do not purport to speak on behalf, or represent the views, of Vanderbilt University.

Copyright should allow many sustainable business models and entrepreneurs to flourish as they produce and distribute US goods and services that include copyrighted material around the world. Individual users should have fair access to copyrighted material and be able to take advantage of the almost infinite possibilities that the Internet offers.

This requires a review of most aspects of copyright and particularly rights, exceptions, enforcement, updated formalities and licensing. I examine each area in my comments in the following sequence to sketch what I believe to be a blueprint for a modernized copyright regime:

- The differences between “traditional” copyright and digital copyright;
- The modernization of rights, exceptions and enforcement;
- Licensing; and
- Formalities.

I wish to begin, if I may, by commenting on the revision process itself. There are basically three ways in which copyright revisions have proceeded in the past.

- 1) Small (targeted) changes to the statute to effect one or more smaller scale adjustments;
- 2) A “package” of new rights and new exceptions reflecting the interests of “both sides” of the copyright debate, as was done with the *Digital Millennium Copyright Act* (DMCA) in 1998;²
- 3) A comprehensive review of the statute focusing on fostering American domestic industries and international competitiveness.

Each of these options presents advantages and disadvantages. The first approach is the easiest to conceptualize and implement, but it may lack “balance,” and is almost necessarily insufficient in scope and depth. The second is likely to be more balanced but this package model risks taking the form of a patchwork of new rights and exceptions sought by stakeholders, with little regard for the actual overall operation of the statute, thus creating unintended consequences that have impacted the effectiveness of copyright. The interface of new rights and exceptions with existing ones can get lost in this mix, and with current practices. The package approach may thus fail to adequately consider whether the changes it effects will serve United States’ creators, copyright-based industries, and consumers.

As the Hon. Maria Pallante, the Register of Copyrights, noted in her testimony before this Subcommittee on March 20, 2013, the challenges are significant and will affect several industries:

“The issues are numerous, complex, and interrelated, and they affect every part of the copyright ecosystem, including the public at large. For reasons that I will explain, Congress should approach the issues comprehensively over the next few years as part of a more general revision of the statute.”³

² The DMCA was a significant achievement at the time, but much has happened since 1998.

³ Statement of Maria A. Pallante, Register of Copyrights, United States Copyright Office before the Subcommittee on Courts, Intellectual Property and the Internet Committee on the Judiciary, United States House of Representatives 113th Cong., 1st Sess. March 20, 2013. Available at

It may indeed be time to embark on the process that will give us the “Next Great Copyright Act,” as was done three times in the past (Copyright Acts of 1790, 1909 and 1976).⁴ So much has happened since 1976 when personal computers, the Internet, the digitization of music, and the phenomenon of social media were yet realities.

At the same time, there is no need to rewrite the statute from scratch. The basic structure of the Act (definitions, rights & exceptions, ownership, duration, formalities, etc.) is sound. It can always be improved upon but I do not see a need to do so as a matter of priority. Rather, *a comprehensive set of balanced changes to existing provisions is what the current situation demands*. I explain possible changes of this nature below. The major adaptations that are needed fit neither the “small targeted change” model nor the “package” approach of simply adding rights and exceptions to an already complex—some might say messy—statute. The review can be comprehensive without being a complete overhaul.

Any revision should anchor its work in principles, as was done for example by the Copyright Principles Project (CPP), a project in which I was a participant and which forms the backdrop for this hearing.⁵ This way, each proposed change or issue could be measured against and/or informed by such principles, which could also serve as a roadmap. Based on those principles, several changes to the statute can be developed in a structured and balanced way. The CPP demonstrated how people with different opinions can agree on even very difficult issues in copyright on the basis of a structured discussion. In the following part of my statement, I focus not on the broad principles identified by the CPP-- with which I agree--, but rather on specific points.

Before moving on to specific areas, I would also submit that any revision should include an examination of (a) the transaction costs of changing the regulatory regime under which current businesses and stakeholders operate (the so-called “incumbents” as they rely on/are affected by “legacy regulation”) and (b) the unintended consequences and “second-level effects” that can be foreseen.⁶

Now I turn to the substantive issues.

1) Digital copyright

The CPP’s sixth principle provides the need for balance in dealing with digital copyright issues, recognizing both the opportunities and challenges that they create. Copyright legislation should take into account the specific nature and challenges of the Internet environment, the computing Cloud, and the role of interconnected devices (smart phones, tablets, even special eyeglasses) that people use to communicate and connect and that they also use to access, modify and distribute copyrighted material.

<http://www.copyright.gov/regstat/2013/regstat03202013.html>.

⁴ Maria A. Pallante, *The Next Great Copyright Act*, 37 COLUM. J.L. & ARTS (forthcoming Spring 2013), available at <http://www.law.columbia.edu/kernochan/manges>.

⁵ Pamela Samuelson et al. *The Copyright Principles Project: Directions for Revision*, 25 BERKELEY TECH. L.J. 1, 6-7 (2010), available at http://www.law.berkeley.edu/files/bclt_CPP.pdf.

⁶ See Daniel Gervais, *The Regulation of Inchoate Technologies*, 47 HOUSTON L. REV. 665 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1710679.

Copyright rules (both general and digital-specific) were designed before much was known about the operation of the Internet in practice. Yet, the statute makes a number of distinctions between the traditional brick-and-mortar and online environments. For example:

- Section 106(6) provides a right in sound recordings only for digital transmissions;
- Section 114 contains a compulsory license specifically for certain digital transmissions;
- Sections 1201-1205 are entirely “digital.” They provide many of the rights (and exceptions to those rights) adopted by the Digital Millennium Copyright Act.⁷

That is suboptimal in today’s environment in large measure because business models change and evolve very fast online. The copyright system should allow creators to get fair returns on their creative work *when such work is successful with their audience(s)*, and it should *let entrepreneurs compete fairly and innovate* on how business is done online. Without both these essential elements in balance, new models are unsustainable. Once sustainable, those business models can then be exported around the world.

Conversely, as the CPP Report notes, there are good reasons in certain cases to limit control by right holders. In part this is simply because the Internet is difficult to control. This is a statement of fact. It is also true, however, that in many cases, “control” even if possible may simply not be desirable. Let me briefly explain why I think this is so.

The World Wide Web is 20 years old this year, though as a way of distributing and accessing copyrighted material it dates back less than 15 years. For approximately ten of those 15 years, a number of technologists have promised “solutions” to limit and control how people use copyrighted digital material. That has not really happened. There are two main reasons for this. *First*, the Internet and digital technology more generally are very nimble, and measures to prevent or control access and use are often circumvented by users, especially when no equivalent legal option for access is available. Although such circumvention is not generally permitted under the DMCA, it is still quite common in practice. In some cases, consumers may actually feel justified in trying to copy material (say from an old computer to a newer one, or from one smart phone to another device) because they paid for the material and don’t want to pay again for the same file on a new device. Yet, that transfer is often difficult and sometimes next to impossible to do because of technological locks—that is, unless authorized by the copyright holder—leading to what one might call “digital frustration.” *Second*, when online service providers launch copyright-based business which control what users can do on their various devices in a way that users consider too heavy-handed, those users may choose to do business with someone who imposes fewer restrictions or, if no such option is available, access material in other ways.

There is a divergence of opinions on the objectives to be achieved by a modernization of copyright rules. This is a matter of perspective and of how to define the issue. If the objective is, as I think it should be, to *maximize authorized access and use* of copyrighted material and, therefore, revenue streams for creators and all copyright-based businesses, then the efficacy of measures can and should be measured against that yardstick. The discussion does not always

⁷ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

adopt that perspective, however. Another view revolves around *minimizing unauthorized uses and leakage*--as opposed to maximizing authorized uses. Those are fundamentally different ways of looking at the problem. To put the matter in the form of a question, should one increase enforcement measures and then evolve business models, or should a recognition of consumer expectations in business models be sought (meeting consumer demand and shaping it gradually) and then use enforcement against recalcitrant users and professional infringers?

As the National Academy of Sciences recent report on copyright revision mentions, it is possible and probably necessary to get empirical data before proceeding further:⁸

“This debate is poorly informed by independent empirical research. Although copyright law’s efficacy and second order effects are largely empirical questions amenable to systematically collected data subject to transparent analytical methods, this type of analysis is rarely conducted.”⁹

Recent business practices suggest that a number of online service providers are choosing to use “softer” Digital Rights Management systems (DRMs), which impose some limits without controlling all uses, combined with an increasing tendency to stream rather than download copies may reduce the scope of the problem. Still, the issue of digital rights and exceptions, and enforcement, should be reviewed as part of any comprehensive process.

2) Digital rights and exceptions, and enforcement

- Copyright is (now) everyone’s business

Before the Internet and digital devices became what is now probably the most widely used way of accessing copyrighted material, individual consumers and users had few reasons to think about copyright in their daily lives. Copyright was a set of rights for, and negotiated between, professionals such as authors, publishers, distributors, record companies, broadcasters, etc. Dealing with complexity was a normal cost of doing business. Individuals who purchased copies of works in the form of books, tapes or CDs had *ownership rights in those copies* and could resell them under the first-sale-doctrine. Copyright was mostly irrelevant as a practical constraint in the daily lives of most Americans.

That situation has changed dramatically. *Accessing a song online, downloading an ebook, streaming a movie generally requires a license.* Those licenses (based on copyright rights) often restrict the use(s) that individual users can make of the material. Conversely, *digital technology has also made it much easier to copy, modify and disseminate copies of material, including copyrighted material that belongs to others.* As a result, copyright now part of almost every American’s daily activities, from simple email to online database access to entertainment consumed at home. This may be a good reason to reduce the degree of complexity and/or enhance the clarity as to what is and is not allowed. Some sections of the

⁸ NATIONAL ACADEMY OF SCIENCES, BOARD ON SCIENCE, TECHNOLOGY, AND ECONOMIC POLICY, COPYRIGHT IN THE DIGITAL ERA: BUILDING EVIDENCE FOR POLICY (2013). Available at www.nap.edu/catalog.php?record_id=14686.

⁹ *Id.* at 1-2.

existing statute (§114 comes to mind, though fortunately that one is rarely relevant for individuals) have become virtually incomprehensible even for experts in the field.

Beyond the need to improve the *language* of the statute, there are major substantive issues that need to be addressed. The first is *whether the rights in section 106, in particular for digital uses, match current use patterns and needs*. Copyright policy should have as its lodestar the enhancement of American competitiveness in this field by providing balanced incentives to creators and copyright industries, while securing fair ways to access and use copyrighted material. Second, *all parts of the copyright statute act are potentially interrelated*. Consequently, a balanced discussion on copyright modernization should include both rights and exceptions.¹⁰ Remedies should be available to ensure that rights can be enforced appropriately when infringed.

- The international dimension

In 1989, the United States joined the *Berne Convention*, the most substantive copyright treaty (166 member States as of May 2013). That Convention, first negotiated in 1886, was last updated in 1971, well before personal computers, CDs and the Internet were part of our daily lives. In 1994, the United States signed the Agreement Establishing the World Trade Organization, which includes the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). That Agreement is enforceable under the WTO dispute-settlement mechanism. TRIPS incorporated the substantive parts of the Berne Convention and added enforcement related provisions to international copyright law, but it added little in terms of new rights and enforcement, other than the “three-step test” designed to cabin exceptions and limitations that WTO members can adopt under international rules.

In 1996, two “Internet treaties” were negotiated under the auspices of WIPO, the *WIPO Copyright Treaty (WCT)* and the *WIPO Performances and Phonograms Treaty (WPPT)*, both ratified by the United States in 1999. Recent trade-based initiatives have tried to increase enforcement and in some cases also to tighten the policy space available to countries to enact new exceptions and limitations. The Anti-Counterfeiting Trade Agreement (ACTA) and the Trans-Pacific Partnership (TPP) are examples of this.¹¹ So-called “South-South” superregional consultations have also led people in a number of emerging and developing nations to propose the development of parallel instruments.

A new treaty creating a regime (exception) to improve access by visually disabled users negotiated under the aegis of WIPO is scheduled to be signed in Marrakech this summer. In parallel, a number of stakeholder groups and organizations have proposed other exceptions, including for libraries and archives.

¹⁰ I discuss this in greater detail in Daniel Gervais, *Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations*, 5:1/2 UNIV. OTTAWA L. & TECH. J. 1-41 (2008). Available at <http://www.uottj.ca/articles/vol5.1-2/2008.5.1-2.uottj.Gervais.1-41.pdf>.

¹¹ ACTA was signed in October 2011 by Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, and the United States. In 2012, Mexico and the European Union signed as well. One signatory (Japan) has ratified the agreement. The TPP is being negotiated by Australia, Brunei, Chile, Canada, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. Others (including Japan) may join at a later date.

There is a risk that an array of “alternative norm-sets” will be developed. The result could be several levels and even “kinds” of copyright laws around the world, a patchwork of treaties and rules that will inevitably reduce certainty and increase transaction costs. This is not in the interest of US exporters. On the basis of a comprehensive review of the Copyright Act, the United States could take the lead in crafting a new treaty to update copyright norms, including tougher enforcement and a set of updated rights, exceptions and limitations for the digital age.

Let me now turn to some of the digital issues that a comprehensive review might usefully address.

- *Rights*

*Redesigned digital-era copyright should capture most forms of commercially significant uses of copyrighted material.*¹² A number of court decisions on the rights involved do not deal with what should be subject to an exclusive right, but rather with the technical nature of the use. They ask whether one or more copies are to be made; whether a public performance or display has taken place, etc.).¹³ This makes copyright unnecessarily complicated and outcomes are sometimes unpredictable and places the focus on peripheral rather than central issues. Rather, to quote the CPP, a “right to control communications of their protected works to the public, whether by transmission or otherwise,”¹⁴ something akin to a “making available right,” is what should be considered. In part, this is required to comply with the WCT and the WPPT.

The main reason to adopt a making available right is not treaty compliance. It is simply that this is the most commercially significant way of disseminating copyrighted works online. Aggregating it under public performance or determining whether a reproduction, display and/or distribution has taken place (the current situation) risks focusing the issue on the technical means used and not being technologically neutral. The underlying policy design should *not* focus primarily on language or technical means used, *but rather on whether a use is commercially significant*. I would define “commercially significant” in this context as uses that a right holder can normally expect to be able to perform himself or herself, or to license a third party to exploit. Then there are uses that copyright traditionally protects for non-economic reasons (or not just economic), such as the *right of first publication*. Those rights should be maintained and strengthened where necessary.

The United States is also obligated to protect *moral rights* under Article 6bis of the *Berne Convention for the Protection of Literary and Artistic Works*.¹⁵ This is mentioned in the CPP report.¹⁶ Again, this is not just a matter of compliance with international norms. Many creators value the right to be recognized as the author of their copyrighted work(s), even in

¹² As the CPP recommendation 6 has it: “Commercial use or commercial effect should be given weight in assessing whether an exclusive right has been infringed.” CPP report, at 33.

¹³ See e.g., *U.S. v. American Soc. of Composers, Authors, Publishers*, 627 F.3d 64 (2d Cir. 2010), cert. denied 32 S.Ct. 366.

¹⁴ CPP Report, *supra* note 5, at 38.

¹⁵ Berne Convention for the Protection of Literary and Artistic Works art. 7, adopted Sept. 9, 1886, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3 (amended Sept. 28, 1979). The United States adhered to this treaty in November 1988 (effective as of March 1, 1989).

¹⁶ CPP Report, at 13.

noncommercial contexts.¹⁷ For example, 98% of authors using a Creative Commons license ask for attribution.¹⁸ Users can also derive value from knowing who created the work. When the United States joined the Convention it only adopted a very narrow moral right for certain works of visual art (section 106A). This limited adoption of moral rights was due in part to assurances received in a letter from the Director General of WIPO that moral rights could be effected using various state doctrines and trademark law.¹⁹ Since then, however, the Supreme Court has greatly reduced the applicability of trademark law in this context.²⁰

- *Exceptions*

If all commercially significant digital uses should by default be covered by an exclusive right, then when a use is *not* commercially significant and not subject to one of the few other interests that copyright protects (such as first publication), and especially when there is a public benefit to the use, the default rule should be that an exception or limitation should be available.

In many cases, *most of the work of adapting exceptions and limitations to the digital domain has been done by our courts under the fair use doctrine*. The flexibility of that doctrine has been used in mostly positive ways and it can be maintained as it currently exists. However, not all the work can be done by the fair use doctrine. There are cases where Congress should set appropriate limits in order to increase predictability. This would help smaller companies that want to start a new business using copyrighted material and are wondering which uses may need to be licensed. While major existing stakeholders have the resources to litigate the matter, not all users do. There may be a chilling effect on innovation as a result.

Today, individual users have to make difficult calls on the scope of fair use and risk litigation, including in the educational sector.²¹ Uncertainty about fair use may also limit investment by new businesses and competition and the formation of public-private partnerships to develop those archives. Consequently, Congress could have a role in providing both exceptions and guidance on licensing.²²

For these reasons, existing exceptions, including section 108 (libraries and archives) need to be revisited. *Digital libraries and archives* will become a major way to archive our cultural heritage but they will also become a major avenue to access copyrighted works.

Whether an exception for *education* is required is another interesting question. After passage of the 1976 Act, guidelines were agreed upon among authors, publishers and users on

¹⁷ See CPP report, at 66-67.

¹⁸ See Jeanne C. Fromer, *Expressive Incentives In Intellectual Property* 98 VA. L. REV. 1745, 1791 (2012).

¹⁹ See The Berne Convention: Hearings Before the Subcommittee on Patents, Copyrights and Trademarks of the Committee on the Judiciary United States Senate on S. 1301 and S. 1971, 100th Cong., 2nd Sess. at 323 (1988) (letter of Arpad Bogsch to Irwin Karp, Chairman of the National Convention, June 16, 1987).

²⁰ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). A comprehensive review should revisit this issue, bearing in mind the need for appropriate safeguards for works-made-for-hire, which have been an (unnecessary in my view) stumbling block to achieving a workable solution.

²¹ See *Cambridge Univ. Press v. Becker* (aka Georgia State), 863 F. Supp. 2d 1190 (N.D. Ga 2012).

²² The possible role of compulsory licensing is discussed below.

the scope of fair use precisely with the aim of providing greater clarity.²³ An effort launched in 1997 to adopt similar guidelines for the digital environment failed to reach consensus.²⁴ Perhaps it was too early and the environment was not understood well enough to proceed. 15 years later, things are different.

The issue of *search engine liability* may also merit review. Some courts, in particular the Court of Appeals for the Ninth Circuit, have applied the fair use doctrine quite liberally to search engines, for example in cases involving thumb nail reproduction of full images.²⁵ Without going into all the details here, a review of the operation of section 512(c)'s safe harbor might include an updated, specific liability exemption for search engines with proper safeguards that makes reliance on fair use (and the related uncertainty that this may generate) either unnecessary or, at least, a less central part of the equation.

An exception *allowing individual users to copy in order to move* legally-obtained material from one device to another should also be considered. The Supreme Court recently interpreted the first-sale doctrine as applying to (based on the facts of the case) imports of authorized physical copies of books.²⁶ A federal court later decided that this did not apply to digital copies.²⁷ That opinion seems correct because digital copies are not sold; they are licensed and their use is subject to contractual restrictions. Many consumers believe, however, that, if they have paid for a digital copy of a copyrighted work that copy is “theirs” and they should not have to pay again if they upgrade their computer, phone or tablet. Indeed, they may believe they can use that paid copy on all their devices, and possibly that they can also “resell” that copy to a third party--provided they do not keep a copy. Although some online service providers do provide ways to transfer files in this way, few provide all the options that consumers expect. This may warrant Congressional scrutiny and possibly a specific exception.

- *Enforcement*

A review of enforcement should be guided by the same principles. “*Professional*” pirates *should be held accountable under the full force of the law*. Penalties need to be severe in such cases. Unauthorized use by individual users in their private sphere (sometimes caused by misapprehension of, or lack of clarity about, the scope of fair use) is a different matter, however. The last 10 years or so have demonstrated that *enforcement works best if it follows an effort to adapt business models to consumer expectations*. Put differently, it works best not as a tool to coerce a majority of Americans but rather as a way to deal with users who disregard copyright law almost as a matter of “principle.” A review of this area should also include a clarification and update of the rules concerning statutory damages. The range of such damages and rather vague criteria should be reviewed.

²³ See Copyright Office, *Circular 21: Reproduction of Copyrighted Works by Educators and Librarians*, available at <http://www.copyright.gov/circs/circ21.pdf>.

²⁴ See *Final Report To The Commissioner On The Conclusion Of The Conference On Fair Use*, November 1998. Available at <http://www.uspto.gov/web/offices/dcom/olia/confu/confurep.pdf>.

²⁵ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2002); and *Perfect10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006), *aff'd in part, rev'd in part sub nom. Perfect10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

²⁶ *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct. 1351 (2013).

²⁷ *Capitol Records, LLC v. ReDigi Inc.*, 2013 WL 1286134 (S.D.N.Y., March 30, 2013).

3) Licensing

- The role of licensing

Copyright is a bundle of enforceable rights designed to be exploited in the marketplace by private enterprise, from individual professional creators to large global entertainment, broadcasting and Internet-based business. “Licensing” is a major way on which such exploitation takes place. means that an author or other copyright owner authorizes a third party to exploit all or part of the copyright rights. For example, a songwriter can license a Performing Rights Organization (or “PRO,” namely ASCAP, BMI and SESAC) to license a musical works for broadcasting. A book publisher might license a foreign publisher to translate and publish a book in a different language. A group of authors of book publishers might license a corporation to photocopy and make digital copies and use journal articles through centralized structure such as Copyright Clearance Center, Inc. (CCC).²⁸

A *compulsory or statutory license* (the two terms are basically interchangeable) is a tool used when a market has demonstrably failed. In eight cases, Congress has imposed such licenses. For example, section 115 contains such a license to make and distribute phonorecords (a system known as “mechanical rights”).²⁹ This compulsory license was first established for perforated player piano rolls.³⁰ Under this system a fee is paid (usually via a collective management organization such as the Harry Fox Agency) each time a song is commercially copied on a CD, etc.³¹ That license may still be useful in the digital environment, but that is a good example of old regulation woven into the fabric of copyright that needs to be reviewed. At the same time, a previous review of that license shows that doing this review of the statute “a la carte” may not be optimal. Including it as part of a comprehensive review of how compulsory licenses operate is a better option.³² This, like many other possible changes to the system, is also

²⁸ The difference between the PRO/SoundExchange model and CCC is that in the latter case the centralized structure is used to “connect” a user and a right holder but prices are set by right holders. In the former model, prices are generally set for a broad basket or “repertoire” of rights and each work is given the same value (though payment to right holders will usually depend on how many times each work has been used).

²⁹ The others are:

- Section 111 - Statutory License for Secondary Transmissions by Cable Systems
- Section 112 - Statutory License for Making Ephemeral Recordings
- Section 114 - Statutory License for the public performance of Sound Recordings by Means of a Digital Audio Transmission
- Section 118 - Compulsory License for the use of Certain Works in Connection with Non-Commercial Broadcasting
- Section 119 - Statutory License for Secondary Transmissions for Satellite Carriers
- Section 122 - Statutory License for Secondary Transmissions by Satellite Carriers for Local Retransmissions
- Section 1003 - Statutory Obligation for Distribution of Digital Audio Recording Devices and Media (Chapter 10).

³⁰ See Reforming Section 115 of the Copyright Act for the Digital Age, Statement of Marybeth Peters, Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee of the Judiciary (March 22, 2007). Available at `

³¹ The current rate is just shy of \$0.10 per copy (per song).

³² See *Section 115 Compulsory License: Hearing Before the Subcomm. on Courts, The Internet & Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 1 (2004).

“amenable to systematically collected data subject to transparent analytical methods,” to quote the NAS report again.³³

- Licensing can maximize value and access

Licensing (as the above example shows, individually or through collective models) *has become the most important vehicle through which authors and other right holders make their works available to others*, and not always against payment.³⁴ Whether the Internet will perform adequately in years to come as a marketplace for copyrighted material is in large measure a function of whether licensing can work.

When creative material is valued at zero, then the aggregate value of copyrighted material is reduced. This may happen, for example, when business entities claim that using any and all professionally created material (in those cases, it is usually referred to as “content”) without paying for it. It is *not* in the interest of the United States as a major producer and exporter of creative material to value this export at zero. Conversely, when there are many copyright holders who must agree on a single business model for a single work and fail to do so or when they use their exclusive rights repeatedly in ways that do not maximize value, or prevent others from maximizing value, or when a licensing transaction is simply unreasonable, the aggregate value of creative material is not optimized and access to the material is diminished.

In cases where transaction costs are such that individual transactions are impossible or much too costly, collective or centralized systems usually work much better. When markets fail to respond, a compulsory license can be used, as in the eight above-mentioned cases in which Congress has made such a call. But whether the compulsory license, once adopted, should be permanent and inflexible is a valid question. In other words, whether the eight existing licenses are still required, need to be updated or whether new ones are required are matters that deserve immediate attention. This review should have but one goal: maximizing value and access, that is, generate sustainable revenue streams for creators and other right holders without imposing undue costs or constraints on users.

- Improving the licensing structure

Given the fast pace of technological change and related changes in the marketplace, and with the objective of maximizing the authorized dissemination and use of copyrighted material for the benefit of creators, right holders and the public, it seems that *leaving some discretion to a specialized agency, under the supervision of Congress*, to decide from time to time whether changes are required or even whether a license is needed at all is the best option. That agency (probably the Copyright Office) should be empowered to obtain and analyze data about market conditions and provide stakeholders an opportunity to participate in the process. Today, if a license is no longer needed, or needs to be adapted, legislative changes are required. By the same token, if a new market failure occurs, no remedy (short of amending the statute) is

³³ See *supra* note 8.

³⁴ For example, Creative Commons offers royalty-free standardized licensing options for those who want to limit certain uses of their works and/or require attribution, but not payment.

available. An agency should thus be authorized by Congress to address these issues in a timely and expert manner.

The Copyright Office currently has a limited rulemaking role, for example in regulating the reporting of monthly and annual statements of account under the compulsory license in section 115. The Copyright Office's rulemaking ability under section 1201, though quite narrow in scope, has proven to be a useful tool to understand the practical application of the DMCA, how it needed to be adapted to changing technology, and in many cases to provide a solution to a specific problem. For example, in the 2008-2009 rulemaking the Register suggested an exemption from the prohibition against circumvention of technological measures that control access to copyrighted works for:

"Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book's read-aloud function or of screen readers that render the text into a specialized format."³⁵

This provides a good example of a specific issue that could not have been foreseen in 1998, but was addressed successfully in a rulemaking context.

Any modernization of licensing should ensure that copyright legislation is *business-model and technologically neutral*. That neutrality must be applied correctly. Technological neutrality implies a risk because the regulation will apply to technologies that have not yet been invented. It can be viewed as excessive if the unintended consequences are severe. This also calls for a greater role for flexible rulemaking to adapt some parts of the statute to ongoing changes on the basis of evidence and statements submitted by interested parties.

To take a specific example that may illustrate both points just mentioned, in the case of the *public performance of music*,³⁶ the statute currently draws a number of distinctions around which online service providers have organized their business models. The statute is far from neutral.

First, the public performance of *musical works* (music and lyrics), the rights to which usually belong to the songwriter and publisher, is often licensed via one of the US (PROs) and their counterparts in other countries.³⁷ Then, the statute provides a separate layer of rights in *sound recordings*. Typically, those rights are held by a record company, though they may also be owned or co-owned by the artist/performer. For some, but not all, digital uses, the rights in the sound recording are licensed by an entity designated by law, namely SoundExchange. Section 114 contains a statutory license for the public performance of sound recordings by means of *digital audio transmissions*. The statute makes two distinctions here, namely one

³⁵ *Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works*, 2008-2009, available at <http://www.copyright.gov/1201/2010/>.

³⁶ The reproduction of music under section 115 is discussed above.

³⁷ More details on this issue are available in Daniel Gervais, *The Landscape of Collective Management*, 24:4 COLUM-VLA J. L & ARTS 423-449 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1946997.

between subscription and non-subscription services; the other between interactive and non-interactive services. Some of these services can operate under the statutory license (and thus compete on the quality of services etc.). Others (for example, interactive services such as iTunes downloads or Spotify) require a negotiated license from or on behalf of right holders in every *sound recording* they wish to use. By contrast, the rights of songwriters or publishers in the musical work are usually licensed to those services via a PRO that typically has no reason to--and may not be allowed under antitrust laws--to refuse a license.

Whether this unnecessarily complex model makes sense going forward is questionable. A number of online service providers are operating very close to the line of the interactive/non-interactive distinction, trying to remain on the non-interactive side of the fence, where they can benefit from the compulsory license. This suggests that allowing the use of music with fewer limits but with usage reporting and fair compensation for creators and other copyright-based businesses would be a better way to encourage open competition and align new business models as closely as possible with user expectations of access to “everything on every device.” Again, the objective should be to maximize authorized uses and revenue streams without imposing undue costs or constraints on users.

4) Formalities

As United States law presently stands, *registration* is a pre-condition for bringing an infringement action (unless the work is foreign).³⁸ It serves to provide constructive notice that a work is under protection,³⁹ and makes available the recovery of statutory damages and attorney’s fees.⁴⁰ A defense of innocent infringement is unavailable if the work infringed bears notice of copyright protection.⁴¹ Recordation of transfers still provides constructive notice, but is no longer a prerequisite to an infringement action.⁴² The deposit requirement has been retained. However, failure to comply is penalized only with a fine, not forfeiture of copyright.⁴³

This system needs to be modernized. A real property analogy might help illuminate the issue. If one were to buy a car, the fact of the car’s existence is not one that most people would doubt (if the car was in front of them). Registration may confirm not the existence of a car, or work but useful “metadata.” For a car, that would be the model, place of manufacture, etc. For a copyrighted work, it could be the author, publisher, year and place of publication, etc. But the main point is that buying the car requires a determination by the buyer that the person selling the car actually has the title to the vehicle. This is where recordation comes into play.

The current copyright system creates incentives for work “manufacturers” to register new vehicles, but it is much less insistent on recordation of title. The consequences of a failure to register a work (e.g., loss of a claim for statutory damages and attorneys’ fees) or, conversely, the advantages of registering, are much greater than those associated with recordation of, or failure to record, a transfer. This situation causes several problems, not the least of which is

³⁸ 17 U.S.C. § 411.

³⁹ 17 U.S.C. § 410(c).

⁴⁰ 17 U.S.C. § 412.

⁴¹ 17 U.S.C. § 401(d).

⁴² 17 U.S.C. § 205(c).

⁴³ 17 U.S.C. § 407(d) (2000).

millions of *orphan works* (works with no known or locatable owner). Even a diligent user who is willing to seek a license to use those works cannot get a license because no owner or licensor can be found. Yet, that person is still subject to statutory damages etc. That dysfunction may dissuade investment in businesses that want to use copyrighted material. It also makes the life of users generally more difficult, for no good reason. An update of copyright formalities could ameliorate this situation significantly.

There are significant constraints under international law to the imposition of formalities, however. Article 5 of the Berne Convention reads in part as follows:

“Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention. *The enjoyment and the exercise of these rights shall not be subject to any formality.*”⁴⁴

Prioritizing recordation of transfers seems a good way forward. If done correctly, it would also be consistent with applicable international obligations. It would ensure that the owner of a work (like the owner of a car) can be identified. *Some remedies* (at least statutory damages and attorneys’ fees) *could be tied to a subsequent copyright holder’s recordation of transfers of title.* Using the language of the diligent search proponents (in the orphan works context), *diligent recordation* may be a significant part of the solution.⁴⁵ Provisions for confidentiality of material filed to support transfer (perhaps as with computer software registration now), and/or requiring an affidavit in lieu of confidential documents could be made.⁴⁶ Finally, the system should not apply to works not exploited or lawfully available in the United States.

Any such change would require a significant review of the Copyright Office’s systems, infrastructure and staff.⁴⁷ One option in this context would be to consider private/public partnerships and decentralized registration options, as is discussed in the report of the CPP:

“The new registry regime we envision would allow for private registries to exist for particular communities of copyright owners, and ideally, public and private registries

⁴⁴ Berne Convention, art. 5(1) and (2) [emphasis added].

⁴⁵ On the notion of “diligent search,” see US Copyright Office, *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document* 26 (Oct. 2011), available at www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf (accessed April 29, 2013).

⁴⁶ For the same reasons, transferees should also have an obligation to keep their contact information up-to-date, as they do for Internet domain names, for example. See the *Whois Data Reminder Policy*, available at www.icann.org/en/resources/registrars/consensus-policies/wdrp/faqs (accessed April 24, 2013).

⁴⁷ As the Register of Copyrights noted in a recent keynote speech :

“The leadership and staff of the Copyright Office are keenly aware that recordation will require improvements to administrative infrastructure as well as the statute. In a public inquiry published last month (which I encourage all of you to read and respond to) we have asked a series of important questions about technology, design and related resources.”
Maria Pallante, *The Curious Case of Copyright Formalities* (April 2013). Available at <http://www.law.berkeley.edu/files/Pallante-BerkeleyKeynote.pdf>.

would be able and have incentives to share information about registered works, thereby increasing the social value of all of the registries.”⁴⁸

The key takeaways from the above are, I believe, straightforward. I want to leave you with five main messages:

1. A comprehensive review of the Copyright Act is urgently needed. This review must be undertaken and achieved correctly in policy terms and on a timely basis;
2. Copyright is a key ingredient of future US economic growth and competitiveness. As a major exporter of copyrighted material, the US should be a leader in global discussions on copyright modernization in a way that reflects the outcome of the comprehensive review of the statute;
3. Digital copyright presents unique challenges and opportunities to policy makers. The Internet and digital technology are generally more difficult to control, yet offer creators, copyright-based industries and individual users unprecedented ways of accessing, modifying and disseminating copyrighted material. Rights and exceptions need to be updated taking into account the dynamics of this new environment and the systemic nature of the statute (changes to one part are likely to affect its overall operation);
4. Licensing has become the most important vehicle for many businesses to disseminate and monetize copyrighted material. The compulsory licensing structure needs significant updates. Consideration should be given to a broader regulatory role for a specialized agency such as the Copyright Office;
5. A review of formalities should consider a heightened recordation requirement.

In closing, again I commend the Subcommittee and its leadership for this important endeavor. Thank you, and I invite any questions you may have.

⁴⁸ CPP, *supra* note 5, at 26.

Mr. COBLE. Professor Samuelson?

**TESTIMONY OF PAMELA SAMUELSON, RICHARD M. SHERMAN
DISTINGUISHED PROFESSOR OF LAW, BERKELEY LAW
SCHOOL, FACULTY DIRECTOR, BERKELEY CENTER FOR LAW
& TECHNOLOGY**

Ms. SAMUELSON. Thank you.

Mr. COBLE. Your mike is not activated.

Ms. SAMUELSON. I am sorry.

Mr. COBLE. A little closer to you, if you will.

Ms. SAMUELSON. Mr. Chairman, Members of the——

Mr. COBLE. That is better.

Ms. SAMUELSON [continuing]. Subcommittee, thank you for the opportunity to come and talk about the Copyright Principles Project.

This is a project that I initiated, I convened. And I convened it after having a series of conversations with copyright lawyers, both in practice and in industry, and also with then-Register of Copyrights Marybeth Peters. And all of these people encouraged me to organize a conversation to bring together a group of people who had expertise in different parts of the copyright regime and who could talk together about what is working well with copyright law today and what might need to be updated.

So it was an effort to reach out to people of different points of view and to bring together a group of people who would be willing to have a series of conversations over time and see whether, at least on some issues, we could reach consensus.

And while I didn't highlight this in my statement, I think it is worth mentioning that some part of the report that we wrote actually discusses parts of copyright law that we think, in fact, are really valuable. I think that all of the members of the Copyright Principles Project really believe that a good copyright law is important to society as well as to creators.

But we think, I think, that some changes may be needed, and partly this is because the statute has become extremely lengthy. It is very complicated. I have never been able to read it from start to finish. And it seems to me that if we have a law that applies to pretty much everybody who is both a user and a creator, that the law ought to be somewhat more comprehensible than it is today. And I think Register Pallante, when she appeared before this Subcommittee recently, also indicated that comprehensibility was really something to be striven for in whatever comprehensive review might be undertaken.

Of course, because the law was drafted largely in the 1960's, not enacted until the 1970's, it was a law that predated the Internet, predated many of the challenges that the courts have been facing in recent years. And it is no surprise that things like the reproduction right, the distribution right, and the public performance right have been difficult to apply because they were written at a time when the technology was very different.

So I think that some fine-tuning of exclusive rights is a very important part of the comprehensive review that is under way. And I hope that some of the ideas that were in the Principles Project report might at least give rise to some useful conversations about

how those rights might be tailored to our current environment, and maybe, in fact, some new right might be needed.

One of the things that the Principles Project talked about was the communication to the public right. This is actually something that is in international treaties. The United States doesn't have it. It does seem to me that, to be more consistent with the international copyright regime, that it might be beneficial to think about what that right ought to do that would be different from the public performance right.

And while I could go on on many other issues, I did want to raise a couple of things that I think that we, with the Principles Project, were able to accomplish.

One was to think forward, in a forward-looking way, about reviving the registration-of-copyright regime. We think that there is not enough good information out there to facilitate licensing today and that a better regime, a regime that encourages more registration so that we have more information to facilitate licensing, would be desirable. And we think that there are some advances in technology that really can help with that.

And, finally, I do want to mention that I agree with the Register of Copyrights that there needs to be some guidance about statutory damages. At the moment, I have done a big study about statutory damages which shows that there is a lot of inconsistency in statutory damage awards. And although the statute says that those awards should be just, the Principles Project group reached some consensus that sometimes the awards in these cases are excessive.

One of the things that is a concern to me as a Californian is that many of the companies in the Bay Area and elsewhere, who are high-technology companies, are worried about statutory damages that are having a chilling effect on innovation. I think that it would be desirable to provide guidance, and I do in my testimony and elsewhere, suggest some of the ways that guidance could be provided.

Thank you very much.

Mr. COBLE. Thank you, Professor.

[The prepared statement of Ms. Samuelson follows:]

Statement of Pamela Samuelson,
Richard M. Sherman Distinguished Professor, Berkeley Law School,
Faculty Director, Berkeley Center for Law & Technology

To the Subcommittee on Courts, Intellectual Property and the Internet,
Committee on the Judiciary,
United States House of Representatives, 113th Congress, 1st Session

Hearing on "A Case Study in Consensus Building: The Copyright Principles Project"

May 16, 2013

Mr. Chairman and Members of this Subcommittee, thank you for the opportunity to come before you to discuss the Copyright Principles Project (CPP) and the copyright reform proposals it explored.

I convened the CPP project in 2007 with the support and encouragement of then-Register of Copyrights Marybeth Peters who thought that it would be beneficial for a group of copyright professionals to start conversations about copyright reform. I began by inviting twenty experts to participate in a three-year project to consider in what respects U.S. copyright law might be in need of reforms. Some members of this group were industry lawyers; some were practitioners with law firms; and some were law professors.¹ While we often had diverse perspectives on copyright issues, we agreed to conduct our conversations in a respectful manner and to work toward consensus if this could be achieved. From our first meeting in July 2007, we decided to call ourselves the Copyright Principles Project and to meet three times a year for two days for each session to discuss reform issues.

WHY COMPREHENSIVE REFORM IS NEEDED

My motivation for initiating this project grew out of my conviction that it was time to think in a broad way about what has been working well in copyright law today and what has not.² I agree with Register Pallante that the Copyright Act of 1976 (1976 Act) is well-described as "a good 1950s law" that needs to be updated to respond to challenges posed by advances in technology, business models, and novel uses that can now be made of protected works.³

A second reason to consider comprehensive reform is that U.S. copyright law has been amended so many times in the last 37 years that it has become more like a patchwork quilt than a

¹ The members of the project are listed by name and affiliation in Pamela Samuelson, et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1180 (2010).

² One article, written before the CPP convened, discussed both the rationale for undertaking copyright reform and numerous issues that should be considered in the course of a reform project. See Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551.

³ Statement of Maria Pallante, Register of Copyrights, to the Subcommittee on Courts, Intellectual Property and the Internet, Committee on the Judiciary, U. S. House of Representatives, 113th Congress, 1st Session, March 20, 2013 at 2 ("Register's Statement").

coherently woven fabric that can serve well the much more diverse creative environment of today.

A third is that the length of the 1976 Act, as amended, its complexity, and the highly technical language in many provisions have become impediments to the law's comprehensibility, and that in turn has obscured the normative foundations of the law which are so important to engendering public support and respect for the law.

A fourth is the 1976 Act was drafted without an expectation that this law would come to have applicability on a daily basis to common activities of hundreds of millions of people. Its incomprehensibility may have been tolerable when it affected only copyright professionals who had become accustomed to its peculiarities. However, now that this law applies to virtually everyone and to online activities that pervade modern life, it needs to be more comprehensible. I agree with Register Pallante who recently observed in her testimony to this Subcommittee that "if one needs an army of lawyers to understand the basic precepts of the law, then it is time for a new law."⁴

THE COPYRIGHT PRINCIPLES PROJECT REPORT

Members of the CPP ultimately drafted and agreed to publish a report on our deliberations, "The Copyright Principles Project: Directions for Reform," to achieve three main goals. First, we sought to articulate a set of principles that should undergird a good copyright law.⁵ Second, we considered in what respects the existing law was fully consistent, partly consistent, or inconsistent with these principles.⁶ Third, we explored ways in which the law might be reformed so that U.S. copyright law would be more consistent with the principles.

Our report suggests that serious consideration should be given to 25 possible reforms.⁷ While some proposed reforms attracted a high level of support, others were more controversial and attracted less support among CPP members. There was, however, sufficiently strong interest and support for each proposal so that we agreed as a group to include discussion of them in our report, albeit sometimes with a statement of concerns or divergent views that would provide a more nuanced view of our deliberations and conclusions.

THE ROLES OF COPYRIGHT OFFICE, THE COURTS, AND CONGRESS IN REFORM

Some reforms proposed in the CPP Report are capable of being carried out by the Copyright Office without any change to the copyright statute. For instance, the Report recommended that the Copyright Office hire a chief economist to provide expert input to its policy deliberations, which would be desirable in view of the increasingly important role of copyright law as an

⁴ *Id.* at 2.

⁵ The principles are set forth in the CPP Report, *supra* note 1, at 1181-83.

⁶ *Id.* at 1183-97.

⁷ *Id.* at 1198-1245.

instrument of economic policy.⁸ Additionally, the CPP Report recommended that the Office hire a chief technologist to advise it on new technology matters.⁹

Some reforms proposed in the CPP Report would best be carried out by the courts. This would include clarification of the proper test(s) for determining when copyrights have been infringed based on similarities of a structural or nonliteral character,¹⁰ consideration of commercial harm as an element of infringement,¹¹ and refinement of copyright preemption rules as applied to state contract provisions that arguably conflict with federal copyright policy.¹²

Several reforms considered in the CPP Report would seem to require Congressional action. They include: improvements in the Copyright Office registration system;¹³ refinements in the exclusive rights provision of U.S. copyright law;¹⁴ updated limitations and exceptions applicable to libraries, archives and museums;¹⁵ limitations on remedies that can be levied against those who make what they legitimately believe to be orphan works more widely available;¹⁶ more guidance from Congress with respect to statutory damage awards;¹⁷ and mechanism through which small claims of copyright infringement could be adjudicated.¹⁸ It is notable that there are several similarities between these reform proposals from the CPP Report and the reform agenda Register Pallante set forth at the March 20, 2013, hearing before this Subcommittee.¹⁹

A NEW VISION AS TO COPYRIGHT REGISTRATION

The CPP Report considered more extensive and ambitious improvements to the copyright registration than the Register may have contemplated. I will highlight here the first two recommendations in the CPP Report which set forth the reconceptualization of registry functions that are worthy of serious consideration.

Recommendation #1: Copyright law should do more to encourage copyright owners to register their works so that better information will be available as to who claims copyright ownership in which works.²⁰

⁸ *Id.* at 1205-06.

⁹ *Id.*

¹⁰ *Id.* at 1215-16.

¹¹ *Id.* at 1209-14.

¹² *Id.* at 1235-38.

¹³ *Id.* at 1198-1205.

¹⁴ *Id.* at 1208-15.

¹⁵ *Id.* at 1232-34.

¹⁶ *Id.* at 1234-35.

¹⁷ *Id.* at 1220-22.

¹⁸ *Id.* at 1207-08. Some other CPP proposals would involve fine-tuning of existing statutory provisions, such as clarification of elements of copyrighted works—other than abstract ideas—that are unprotectable by U.S. copyright law. *Id.* at 1228.

¹⁹ Register's Statement, *supra* note 3, at 2.

²⁰ CPP Report, *supra* note 1, at 1198.

The vast majority of copyrighted works created each year have little or no commercial value. Billions of works, such as emails and business memos, are created without the incentive of copyright and lack independent commercial value as expressive works. Many other works that people create, such as blog posts, are subject to copyright, although their authors intend to distribute them without restraint or with fewer restraints than the default rules of copyright impose. Many works are created with the intent to exploit their commercial value as expression and enjoy evanescent commercial value that endures for a much shorter period than the current copyright term.

These types of works are similar in one important respect. They are not producing revenues for the copyright term. For this reason, continued copyright protection serves no real economic interest of the author. Copyright does not, of itself, create commercial demand for protected works. In a deformed, opt-out copyright system, commercially "dead" works cannot safely be reused as building blocks for potentially valuable new works or safely made available by cultural heritage institutions. The costs of locating the rights holder and obtaining permission will often be prohibitively expensive. In such instances copyright is unbalanced: its potential benefits are absent or depleted, and it therefore imposes only social costs.

To respond to the overly expansive copyright regime now in place, there emerged strong interest within the CPP group for "reformatizing" copyright law. Copyright law should not just re-introduce the formalities from the past. However, a more robust registration system would be desirable. Non-compliance with this registration procedure would not, as in the past, consign a work into the public domain. Instead, it would affect the rights and/or remedies available to the rights holder, so as to reduce certain liability risks for reusing unregistered works. The law presently does this in part by making the availability of statutory damages and attorney fee awards dependent on prompt registration, but this inducement to registration has not sufficed.

Recommendation #2: The Copyright Office should transition away from being the sole registry for copyrighted works and toward certifying the operation of registries operated by third parties, both public and private.²¹

The basic idea would be to shift the Copyright Office away from day-to-day operation of the copyright registry and toward a role of setting standards for and superintending a system of separate but networked and interoperable private registries.

The first step would be to authorize the Copyright Office to set standards for acceptable private registries—i.e., both technical standards and also specifications determining what kinds of copyright information a compliant registry *must* and *may* ask for from users and

²¹ *Id.* at 1203.

place into its database. The Office would need to be empowered to make sure any private registry meets important public interest requirements regarding transparency and efficient searches through multiple services, so as to minimize burdens on both copyright owners and users on accessing the data and benefits of these services. Once these standards are established, the Copyright Office could accept applications from firms seeking to operate as private registries and would certify that private registries (of many different types) meet and continue to adhere to the registry standards.

The end result, if this task is done properly, would be an environment in which private firms compete to obtain copyright registration information from rights holders. Competition should lead to lower costs and innovations in registry design. And if the registries operate according to compatible technical standards, user searches for copyright information will be able to draw upon the data stored in all of the networked private registries. The result would be a system that is in reality decentralized but that is architected and managed to provide a "search once, search everywhere" experience to users. The model is similar to the domain name registration system, where multiple private parties provide services and access to the database of domain names.

To explore in greater depth the possible benefits and downsides of thinking anew about copyright registration and other types of formalities, the Berkeley Center for Law & Technology recently held a conference entitled "Reform(aliz)ing Copyright for the Internet Age?" at which Register Pallante was the Keynote Speaker and several CPP members were speakers. The agenda, schedule and audio of the presentations is available at <http://www.law.berkeley.edu/formalities.htm>. A transcript of the Register's remarks at this conference, which expressed considerable interest in revisiting copyright formalities, can be found at <http://www.law.berkeley.edu/files/Pallante-BerkeleyKeynote.pdf>. One session of the conference was given over to consideration of the constraints and flexibilities that derive from the Berne Convention for the Protection of Literary and Artistic Works, of which the U.S. is a signatory. Another session focused on advances in technologies that have made efficient online registry systems feasible and desirable in the Internet age.

THE NEED FOR GUIDANCE FOR STATUTORY DAMAGE AWARDS

Apart from our vision for a 21st century registration system, the CPP Report recommendation that I most wish to highlight in my testimony today is one that which calls for meaningful guidelines to ensure that awards of statutory damages are "consistent, reasonable, and just."²²

Present law allows copyright owners who have promptly registered their claims of copyright to choose, in lieu of an award of actual damages and infringer's profits, an award of "statutory damages" in an amount ranging from \$750 to \$30,000 per infringed work in the ordinary case,

²² *Id.* at 1220.

and up to \$150,000 per infringed work in cases of willful infringement, as the court deems "just."²³ Courts can reduce statutory damages to \$200 when an infringer proves that he was not aware of and had no reason to believe his conduct was infringing, and to \$0 if the good faith user is affiliated with a nonprofit educational institution. In practice, however, the lower level of statutory damages is hardly ever used.²⁴

Statutory damages sometimes provide reasonable compensation when actual damages and infringer profits are difficult or expensive to prove or when damages and profits are low. At the higher end of the scale, statutory damages are thought to provide extra deterrence or punishment for egregious infringement.

However, the wide numerical range of permitted awards, coupled with the lack of standards or guidelines for awards, the ability of the plaintiff to unilaterally elect an award of statutory damages at any time in the litigation, and the willingness of courts and juries to decide that infringement was willful if the defendant should have realized his acts were infringing, has, CPP members concluded, too often led to awards that seem arbitrary and capricious, inconsistent with awards in similar cases, and sometimes grossly excessive or disproportionate when compared with a realistic assessment of actual damages and profits.²⁵

The unpredictability of statutory damage awards and the risk of grossly excessive awards is particularly troubling for entrepreneurial technology companies and other entities that may devise innovative ways for users to interact with copyrighted works. Because statutory damage awards must be levied based on the number of works alleged to be infringed with a minimum of \$750 per work, products and services that enable use of thousands or millions of works can put their developers at great risk, even as to products or services that if litigated would ultimately be deemed lawful.

A recent empirical study has shown that the potential for grossly excessive statutory damages has had a chilling effect on investments in innovative technology products and services.²⁶ At a time when the United States aspires to grow its economy and support innovation, the excessive deterrent effect of copyright statutory damages under U.S. law should be of concern to members of Congress.

The risk of excessive awards can be greatly exacerbated when copyright claims are aggregated. Consider, for instance, the risk that Apple took when it introduced the iPod into the market place with an advertising campaign that urged purchasers to "rip, mix, and burn" music onto these devices. The developers of Slingbox took a similar risk when launching a product whereby users

²³ 17 U.S.C. 504(c).

²⁴ CPP Report, *supra* note 1, at 1221.

²⁵ See, e.g., Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 480–91 (2009) (discussing examples).

²⁶ Michael Carrier, *Copyright and Innovation: The Untold Story*, 2013 WISCONSIN L. REV. 891.

could stream cable television programs so they could watch them via the Internet. Both products were designed for use with very large numbers of copyrighted works. Consider also the risk Google took by scanning in-copyright books from major research library collections for its Google Book Search project. Three members of the Authors Guild have sought to represent a class of U.S. authors whose works were unlawfully scanned. (A District Court has granted class certification, although the class certification is presently on appeal to the Second Circuit.) One commentator has estimated that Google's statutory damage exposure in this lawsuit may be as high as \$3.6 trillion,²⁷ even though Google's fair use argument is very plausible and even though actual damages would realistically be far less than this, assuming Google was ultimately deemed an infringer. Apple, Slingbox, and Google may have been willing to bet their companies on these initiatives, but many other companies would be understandably reluctant to do this.

In addition, grossly excessive statutory damage awards have contributed to public disrespect for copyright law. The well-publicized jury awards against filesharers Jammie Thomas-Rasset (\$1.92 million in one of her trials) and Joel Tenenbaum (\$675,000) may have been gratifying to the plaintiffs in those cases, but it is impossible for members of the public to consider such awards just.²⁸ These awards also starkly contrast with judge-rendered awards in a dozen or so other file-sharing cases which were based on the statutory minimum per infringed work.²⁹ To be consistent with those rulings, the award against Thomas-Rasset would have been \$18,000 and against Tenenbaum \$22,500. To many members of the public, even these awards might seem excessive, but at least they are far less excessive than what the juries awarded.

One other social cost of the lack of guidance in U.S. copyright law in relation to statutory damage awards is the rise of "copyright troll" lawsuits and pre-litigation cease-and-desist letters that challenge their targets with infringement, highlighting the high statutory damage award risk, with an offer to settle for a few thousand dollars.³⁰ However weak the claims might be, individuals have all too often paid the proposed settlement amount because it is cheaper to do this than to defend a lawsuit.

There are a number of alternatives that Congress could consider to provide guidance so that statutory damage awards would be more consistent, reasonable, and just. One option would be to peg statutory damage awards to a certain range of multiples over actual damages, depending on how egregious (or not) the defendant's conduct might be. Another would be to limit statutory damage awards in particular kinds of cases. Canada, for instance, has adopted a cap of CA\$5000

²⁷ Jonathan Band, *The Long and Winding Road to the Google Book Settlement*, 9 J. MARSHALL REV. INTELL.PROP. L. 227, 229 (2009).

²⁸ The trial judges in both the *Thomas-Rasset* and *Tenenbaum* cases perceived these awards to be unjust and both judges tried to reduce them to more reasonable levels.

²⁹ Opening Statement by Pamela Samuelson, Debate, *Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, PENNUMBRA (2009), available at www.pennumbra.com/debates/debate.php?did=22.

³⁰ Tim Worstall, *The Simple Way to Beat Copyright Trolls Like Prenda*, FORBES, May 8, 2013, available at <http://www.forbes.com/sites/timworstall/2013/05/08/the-simple-way-to-beat-copyright-trolls-like-prenda/>.

against noncommercial infringers.³¹ Congress might also grant courts power to reduce statutory damage awards that are unreasonable and unjust.

It is worth realizing that while statutory damage awards have a long history in U.S. copyright law, very few nations with substantial copyright industries have statutory damage regimes in their copyright laws.³² And those nations that have adopted such regimes have limits built in to these rules to curb the risk of unjust awards.³³ It would be worthwhile to study these other regimes to see if there are useful lessons to be learned from them.

CONCLUDING THOUGHTS

Delving back into the legislative history of the 1976 Act, as I have done for several scholarly projects, I have come to believe that it has been possible for people of goodwill and divergent views to conduct thoughtful civil discourse about how to craft a well-functioning and balanced copyright law. It has happened before and can happen again, even though the policy landscape is much more complicated today than it was in the 1960s and 1970s. It was in the hope of rediscovering this discursive potential that I convened the CPP group. Our efforts bore some fruit. It is an honor to have the opportunity to discuss our work with this Subcommittee.

If "the next great copyright law" that Register Pallante envisions is to truly earn this name, it must be the product of wide-ranging consultations with the much more diverse set of stakeholders today than those who participated in deliberations leading up to the enactment of the 1976 Act. If the law is to engender public respect, it must aim to do more than freeze in place all of the rules favorable to authors and copyright industry groups and extend those rights further to reach activities now either outside the law's reach or in an ambiguous territory. Compromises and rebalancing of interests will be needed. If there is something I can contribute to this effort, I would be pleased to do so.

³¹ Michael Geist, *Why Liability Is Limited: A Primer on New Copyright Damages as File Sharing Lawsuits Head to Canada*, Nov. 28, 2012, available at www.michaelgeist.ca/content/view/full/6710/125/.

³² A recent empirical study of the remedy regimes of nations that are members of the World Intellectual Property Organization shows that only 24 of the 179 nations (13.4%) for which English translations of their copyright laws are available have statutory damage regimes at all, and most of those 24 are developing economies. Only 5 developed economies (including the United States) have statutory damage regimes. The 28 other developed economy nations, including the UK, France, Germany, and the Netherlands, do not have this type of remedy. Pamela Samuelson, Phil Hill, & Tara Wheatland, *Statutory Damages: A Rarity in Copyright Laws Internationally—But For How Long?*, J. Cop. Soc'y USA 5-6 (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240569.

³³ *Id.*, Part III (discussing several types of limits that other nations have placed on statutory damage awards).

Mr. COBLE. Mr. Sigall, you are the cleanup hitter.

**TESTIMONY OF JULE SIGALL, ASSISTANT GENERAL
COUNSEL—COPYRIGHT, MICROSOFT CORPORATION**

Mr. SIGALL. Thank you, Mr. Chairman.

Chairman Coble, Ranking Member Watt, Members of the Subcommittee, thank you for inviting me to appear today to discuss copyright law and its potential reforms.

Copyright has been an important part of our economy and culture since the founding of our Nation, but, as Register Pallante has noted, the current law is under stress brought on by technological change that continues to advance rapidly and by shifting patterns in the way expressive works are created, disseminated, enjoyed, and reused.

Today, the law is straining to remain relevant in the world of smartphones and tablets connected to the Internet and in the face of the demands of consumers, who expect to access, use, and share creative works through any device at any time in an instant. This stress is reflected in the heated and often strident public debate that copyright policy seems to generate these days.

The Committee is to be commended for beginning a dialogue about how our copyright system can be improved to meet these new challenges, and I am honored to contribute to that discussion. I am hopeful that the dialogue will include a wide range of stakeholders and consider a broad set of topics and approaches to reform and that participants will engage in a manner that is at all times constructive, clear-eyed, and civil.

I believe this can be achieved because I have seen that kind of copyright debate take place during the Copyright Principles Project. When Professor Pamela Samuelson asked me to join the project, she explained that the group would have diverse perspectives on copyright but all members would share a common trait: no sharp elbows, she explained.

I was interested in the Principles Project because, during my nearly 20 years in copyright, I have watched its public perception deteriorate from a positive, if little-known, means of enriching public knowledge to the negative and even hostile manner in which it is sometimes viewed today.

In this environment, progress can prove elusive even when there is general support for reform. For example, a broad spectrum of stakeholders support fixing the orphan works problem, but that discussion has at times been heated, and the path to legislative action has been marked more by hurdles than by progress.

In my current role at Microsoft, I see firsthand and every day the ways in which copyright law is struggling to keep pace with the dynamic technology environment. As a copyright owner, Microsoft has long relied on copyright to protect our core software products like Windows and Microsoft Office and to ensure that our customers enjoy legitimate and safe copies of our software. Our world-class antipiracy team has created tools based on copyright to make that protection real.

From the user side, on the other hand, I have seen how ambiguous areas of the law are sometimes strained to question the ordinary and reasonable personal use of copyrighted works. I am not

talking about piracy here but situations in which consumers who legitimately purchased content are confronted and confused by assertions that actions enabling the enjoyment of that content are somehow infringing. This tactic creates needless uncertainty and risk for businesses that are trying to provide tools that simply help consumers communicate and share information in the networked world.

These are the dual perspectives I brought to the Copyright Principles Project.

In my remaining time, I would like to highlight three ideas that were discussed in the Principles Project and that will be important in possible reforms.

First, the copyright system must understand, accommodate, and support the new generation of creators and business models enabled by the Internet that often operate independent of established publishers, distributors, and collective organizations. Often, when these authors look to copyright and how it might help them develop and market their works, they are mystified by a system built for traditional modes of distribution and not the new channels.

Second, as I noted earlier, the lack of clarity around reasonable and ordinary personal use has contributed to the declining public reputation of copyright and a lack of respect for the law among some consumers. Fifteen years ago, in the Digital Millennium Copyright Act, Congress helped launch a new wave of online services by establishing a safe harbor that limits the uncertainty and risk faced by telecommunications companies, search engines, and other online businesses. It may be time to consider a safe harbor for consumers, providing certainty that the ordinary and reasonable personal use of legitimately purchased content will be enabled, not stifled, by copyright.

As my final point, copyright reform needs to improve the infrastructure of the law, which works best when information about who owns a particular work and where and how to contact the rights owner is available and flows very easily throughout the system. International treaties crafted decades before the digital era prohibit formalities, but, given the current extended copyright term and the availability of tools that readily collect and make such ownership information available online, it is time to consider whether the law has the right incentives for dissemination of copyright information at the speed and at the scale that the Internet requires.

Reform like this can help in many ways. It can address the orphan works problem, remove uncertainty for users, facilitate new uses and new modes of dissemination, and help individual authors obtain real and practical enforcement and respect for their copyright.

Thank you again for the opportunity to appear today, and I would be happy to answer any questions you may have.

[The prepared statement of Mr. Sigall follows:]

**Written Testimony of Jule Sigall
Assistant General Counsel – Copyright
Microsoft Corporation**

May 16, 2013

“A Case Study for Consensus Building: The Copyright Principles Project”

Chairman Coble, Ranking Member Watt, thank you for inviting me to appear today to discuss copyright law and its potential reform. My name is Jule Sigall, and I am Assistant General Counsel for Copyright at Microsoft, and before that I was Associate Register for Policy & International Affairs at the U.S. Copyright Office.

Copyright has been an important part of our economy and culture since the founding of our nation. But, as the Register of Copyrights has noted, the current law is under stress, brought on by technological change that continues to advance rapidly, and by shifting patterns in the way expressive works are created, disseminated, enjoyed and re-used. This stress is reflected in the heated and often strident public debates that copyright policy seems to generate these days.

The Committee is to be commended for beginning a dialogue about how our copyright system can be improved to meet these new challenges, and I am honored to contribute to this discussion. I am hopeful that the dialogue will include a wide range of stakeholders and consider a broad set of topics and approaches to reform, and that participants will engage in a manner that is at all times constructive, clear-eyed and civil.

I believe this can be achieved because I’ve seen a robust but civil copyright debate take place. In early 2007, just after leaving the Copyright Office, I was invited by Professor Pamela Samuelson of Berkeley Law School to join the Copyright Principles Project. I had not worked with Professor Samuelson before, and her invitation was a surprise, but I was delighted to join the distinguished group she was organizing. In a phone call describing the project, I recall her explaining that the group would have diverse perspectives on copyright but all members would share a common trait: “no sharp elbows”, she explained.

I was interested in the Principles Project because I have spent nearly twenty years working on copyright issues, in private practice, at the U.S. Copyright Office, and as in-house counsel for Microsoft. Those twenty years have coincided with a period of tremendous change, not only in the law itself, but, more importantly, in the impact technology has had on the purpose of copyright -- encouraging the production and distribution of creative works. When I began to counsel clients, copyright law was struggling to deal with computer bulletin board systems, which are now -- in technology time -- ancient history. Today, the law is straining to remain relevant in the world of smartphones and tablets connected to the Internet, and in the face of the demands of consumers who expect to access, use and share creative works through any device, at any time, in an instant.

Over the past twenty years, I’ve also watched the public perception of copyright deteriorate, from a positive (if little-known) means of enriching public knowledge, to the increasingly negative, and

even hostile, manner in which it is sometimes viewed today. In this environment, progress can prove elusive even when there is general support for reform.

For example, during my tenure at the Copyright Office, I was involved in efforts to find ways to address the practical and policy issues raised by orphan works. The Office's work was aimed at relieving the growing pressure on copyright by addressing a specific problem created by the current law: it can discourage the productive and beneficial use of works even though the copyright owner cannot be located and very likely has no interest in enforcing the copyright. And while many copyright stakeholders from all sides of the debate support such reform, the discussion has at times been heated, and the path to legislative action has been marked more by hurdles than by progress.

In my current role at Microsoft, I see first-hand and every day the ways in which copyright law is struggling to keep pace with the dynamic technology environment, from both the copyright owner perspective and the user or consumer perspective. As a copyright owner, Microsoft has long relied on copyright to protect our core software products like Windows and Microsoft Office and to ensure that our customers enjoy legitimate and safe copies of our software. Our world-class antipiracy team has created tools based on copyright to make that protection real.

From the user side, on the other hand, I've seen how ambiguous areas of the law are sometimes strained to question ordinary and reasonable personal use of copyrighted content. I'm not talking about piracy here, but situations in which consumers who have legitimately purchased content are confronted and confused by assertions that actions enabling the enjoyment of that content are somehow infringing. This tactic creates needless uncertainty and risk for businesses that are trying to provide tools that simply help consumers communicate and share information in the networked world. The Supreme Court has cautioned that copyright must "[do] nothing to compromise legitimate commerce or discourage innovation having a lawful promise,"¹ but, unfortunately, it can be exploited to that effect to the detriment of innovators and consumers.

These are the dual perspectives I brought to the Principles Project.

In my remaining time, I'd like to highlight three ideas that were discussed by participants in the Principles Project and that will be important in possible reforms. Obviously, we are at a very early stage in this process, so it is premature to offer or focus on specific proposals. At a high level, though, I believe that truly effective copyright reform will benefit from serious consideration of these issues.

First, the Internet and new technologies are enabling and inspiring a new generation of creators that often operate independent of established publishers, distributors and collective organizations. We've seen this in the software industry, where apps for smartphones and tablets can be created, marketed and sold entirely by one person, worldwide and in substantial volumes. Often when these authors look to copyright and how it might help them develop and market their works, they are mystified by a system built for traditional modes of distribution, and not the new channels. As we look to reform the copyright system, we need to ensure that it understands, accommodates and supports these new creators and evolving business models.

¹ MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 937 (2005).

Second, as I noted earlier, the lack of clarity around reasonable and ordinary personal use has contributed to the declining public reputation of copyright and a lack of respect for the law among some consumers. Too often consumers view copyright as an impediment to their enjoyment of creative content they have paid for and a deterrent to innovation in new products and services. Fifteen years ago, in the Digital Millennium Copyright Act (DMCA), Congress helped launch a new wave of online services by establishing a safe harbor that limits the uncertainty and risk faced by telecommunications companies, search engines and other online businesses. It may be time to consider a safe harbor for consumers, providing certainty that the ordinary and reasonable personal use of legitimately purchased content will be enabled, not stifled, by copyright.

Finally, copyright reform needs to improve the infrastructure of the copyright system. Copyright best achieves its goal of promoting the creation and dissemination of works when information about who owns a particular work and where and how to contact the rights owner is available and flows very easily throughout the system. International treaties crafted decades before the digital era prohibit “formalities,” such as requiring copyright registration or recordation of transfers of ownership as a condition for protection. But given the current, extended copyright term and the availability of tools to readily collect and make such ownership information available online, it is time to consider whether the law has the right incentives for production and dissemination of copyright information at the speed and scale that the Internet requires. The Copyright Office should play a key role in this aspect of reform, and to its credit has begun to think about how it might transform aspects of the registration system.² Reform in this area can help address the orphan works problem, remove uncertainty for users, facilitate new uses and new modes of dissemination of works, and help individual authors obtain real and practical enforcement and respect for their copyright.³

Thank you again for the opportunity to appear today, and I am happy to answer any questions you may have.

² “Technological Upgrades to Registration and Recordation Functions”, 78 Fed. Reg. 17722 (March 21, 2013).

³ See Copyright Principles Project Report at 27-29.

Mr. COBLE. Thank you all again for your testimony today.

A journalist friend of mine saw me recently, and he said, "I note that you sit on the Intellectual Property Subcommittee. How do you like it?" he said. I said, "Oh, I find it very provocative, very interesting." He said, "Intellectual property law is the most dull, boring law." He didn't say that it induces sleep, but he came close to it. I said, "Get used to it because intellectual property is not going away."

And thank you again.

And, folks, we try to comply with the 5-minute rule, as well. So if you could keep your answers as terse as possible, we will be appreciative.

This is to all witnesses. I will start with Professor Gasaway. In March, the Register testified before this Subcommittee about her top priorities that included such topics as felony streaming and orphan works. What copyright issues are your top priorities?

And we will start with you, Ms. Gasaway, and work our way down.

Ms. GASAWAY. Thank you.

Obviously, solving the problem for libraries, archives, and museums. And included in her priorities was also section 108 and looking at the study group again. And she did reconvene the study group to come back and talk for 1 day about how we saw what had happened in the 5 years since—I guess it was only 4 years at that time—since the study group report was issued.

So that would be my top, to look at that. But the orphan works issue is huge. And so is—I actually don't like the term "mass digitization," although I guess we would have to say that is what Google Books and maybe HathiTrust is doing. But many more libraries and archives and museums are doing large digitization projects, but I wouldn't call them "mass digitization."

And so I think dealing with those issues would be my top.

Mr. COBLE. I thank you.

Professor Gervais?

Mr. GERVAIS. Thank you, Mr. Chairman.

So the five main points of my written testimony are summarized on the last page, but if I had to pick three, I would say, clearly, modernization of rights and exceptions would be number one. And I do mean modernization, not just adding rights and exceptions, but actually thinking about the existing ones and how the interface—this means the making-available right; consumer-related exceptions. And I have mentioned many others in the written testimony.

A second point would be to review the licensing structure, which needs to be coherent, flexible, and responsive. And, arguably, the current one is none of these things, at least in some cases.

And, finally, a review of formalities recordation, how it is linked to remedies, would be my third.

Thank you.

Mr. COBLE. Professor?

Ms. SAMUELSON. I agree with Professor Gervais that refining both the exclusive rights and also thinking in a more systematic way about exceptions and limitations to those rights should be a very high priority.

If you look at sections 107 through 121, you see that they are a kind of hodgepodge, and it is difficult to gather what the normative underpinnings of those exceptions really are. And I think thinking about that in a more systematic way would be really beneficial, including a possible safe harbor of the sort that Mr. Sigall mentioned.

For me, a reform of statutory damages to give guidance, something that also Register Pallante indicated was a priority on her agenda, would be something. And then rethinking registration in a way that will take advantage of the opportunities of the new information technology environment.

Mr. COBLE. Thank you, ma'am.

Mr. SIGALL. I would have to say orphan works, as well. It is an issue I worked on when I was in the Copyright Office and continue to work on at Microsoft. I think it is ripe for action now.

And I think the main point is that it is one of the classic areas where the public scratches its head as to what copyright is doing when it potentially interferes with very productive uses of works, even where the copyright owner cannot be located and probably has no interest in preventing those uses of the works. And I think it would unlock a lot of those works for public consumption and enjoyment.

So I think orphan works would be a good start toward reinvigorating copyright.

Mr. COBLE. Thank you, sir.

Mr. Baumgarten, let me put a question to you. I think I have time for one more question. You were general counsel in the Copyright Office during the last major revision of copyright law through the 1976 Copyright Act.

Based upon a lengthy review of copyright then, what can we learn from that prior experience as we undertake a comprehensive review of copyright law today?

Mr. BAUMGARTEN. I think, Mr. Chairman, that one thing we can learn is that it is going to take a lot of patience to solve these problems. But I think the patience is not only to be expected of the Committee, it is to be expected of the participants in the process, as well.

I fear that, too often, people look for a very quick and simple solution to very complex problems simply because technology makes things able to happen and do not give the copyright community enough time to figure out how they can happen in a more rational manner.

I think the second thing is tone. I believe one of the distinguishing factors between the revision program in those days—and I remember those hearings all too well—and the copyright debate as it is happening today—and I do not mean in the Copyright Principles Project—there were some big issues, and there were some very strong voices, for example, in the cable television issue.

But, by and large, the copyright revision debates in the 1960's and the 1970's were engaged in by people who respected and, in many respects, loved the copyright law. They thought it needed updating, they thought it needed improvement, but they understood what it did.

I think, increasingly, today, outside the confines of the Copyright Principles Project and some other limited exceptions, the copyright debates today and the search for changes are too often driven by those who are so infused with the promise of new technology that anything standing in the way is to be lightly and simply tossed aside in favor of permitting it to happen.

Mr. COBLE. I thank you, sir.

My time has expired.

The gentleman from North Carolina, Mr. Watt?

Mr. WATT. Thank you, Mr. Chairman. As has become my policy, I will defer and go last in the process.

Mr. COBLE. The gentlemen from Georgia?

Mr. JOHNSON. Thank you.

I think Ranking Member Watt enjoys putting me first up for some reason.

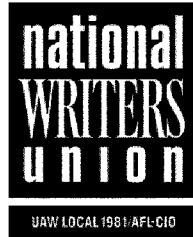
Mr. WATT. No, just somebody else to go.

Mr. JOHNSON. Yeah. All right. I see. But you like to do that. So it is not personally directed at me. Okay. All right.

Well, I will say that I hope I am not out of place by offering a letter from the National Writers Union, UAW Local 1981, into the record, which simply—

Mr. COBLE. Without objection.

[The information referred to follows:]



National Writers Union, UAW Local 1981, AFL-CIO
256 W. 38th St., Suite 703
New York, NY 10018
212-254-0279
nwu@nwu.org

www.nwu.org

May 15, 2013

Rep. Bob Goodlatte
Chair, House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Rep. John Conyers Jr.
Ranking Member, House Committee on the Judiciary
B-351 Rayburn House Office Building
Washington, DC 20515

Re: Hearings on Copyright Law

Dear Chairman Goodlatte and Ranking Member Conyers:

As representatives of one of the groups of Americans with the greatest stake in copyright law – working writers who earn our living by creating copyrighted works – the National Writers Union (NWU) welcomes Chairman Goodlatte's call for a review of copyright law, and requests the opportunity to provide testimony to the Committee during your forthcoming hearings.

The National Writers Union is a national labor union, Local 1981 of the United Auto Workers, AFL-CIO, that advocates for freelance, contract and self-employed writers. The NWU includes local chapters throughout the U.S. as well as at-large members nationwide and abroad, including the U.K. The NWU works to advance the economic conditions of writers in all genres, media and formats. NWU membership includes, among others, book authors, journalists, business and technical writers, website and e-mail newsletter content providers, bloggers, poets, playwrights, editors and academic writers.

National Writers Union
<<http://www.nwu.org>>

Hearings on Copyright Law
May 13, 2013

The NWU has played a leading role in analysis, advocacy, and litigation on copyright issues since our founding in 1981. The NWU has been involved in precedent-setting litigation to defend writers' copyrights against infringement by publishers and others, including *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), in which the NWU's president was the lead plaintiff. Whenever there has been an opportunity for public input on policies affecting writers' interests, the NWU has been among the most active contributors to Copyright Office consultations, including ongoing proceedings on "orphan works" and remedies for small copyright claims. We have also been actively engaged with the Intellectual Property Enforcement Coordinator in relation to the lack of effective means for enforcement of writers' copyrights.

Copyright exists to provide an incentive and protection, both economic and social, for creative work. Publishers, intermediaries, and those academics and other writers who don't actually earn their living from the creation of copyrighted work are distinct groups of stakeholders who have interests distinct from, and often opposed to, those of working writers. They do not speak for us – or for graphic artists, photographers, fine artists, musicians, and the range of creative workers in the dramatic and broadcast arts.

For example, the "Copyright Principles Project" to be discussed as a case study at the first of your hearings on May 16, 2013, was carried out by an invitation-only group. No working writers, other working creators, or organizations of working creators were invited to participate. Not surprisingly, the resulting report reflects a "consensus" among all those stakeholders whose interests are opposed to those of working creators.

There is no genuine consensus in favor of many of the recommendations of the Copyright Principles Project. In fact, there is a general consensus among a wide range of working creators, including working writers, against several of these recommendations, particularly those related to "orphan works" and to more burdensome formalities to make it harder to protect copyrights. Other reforms of copyright law critical for writers and other creators are not mentioned in the report.

We urge you to follow your initial hearing – devoted to the ways that third parties want to use the products of our creative labor – with a hearing at which the full range of creative workers can testify about the ways that copyright law could be improved, and the ways – some of them unforeseen – that copyright reform proposals from others would affect us.

Sincerely,

Larry Goldbetter, President

cc: Rep. Howard Coble
Chair, Subcommittee on Courts, Intellectual Property and the Internet
Co-Chair, Congressional Creative Rights Caucus
2188 Rayburn House Office Building
Washington, DC 20515-3306

National Writers Union
<<http://www.nwu.org>>

Hearings on Copyright Law
May 13, 2013

Rep. Melvin L. Watt
Ranking Member, Subcommittee on Courts, Intellectual Property and the Internet
2304 Rayburn House Office Building
Washington, DC 20515-3312

Rep. Judy Chu
Co-Chair, Congressional Creative Rights Caucus
1520 Longworth House Office Building
Washington, D.C. 20515

National Writers Union
<<http://www.nwu.org>>

Hearings on Copyright Law
May 13, 2013

page 3 of 4

Mr. JOHNSON. Thank you—which simply notes the absence of writers from the Copyright Principles Project.

But I can assure you, I appreciate the voluntary nature of what you all did. I think it is good, and I think it serves as a model for what should take place in the future as we embark upon comprehensive copyright reform.

And, Ms. Samuelson, in your written testimony, you described U.S. copyright law as a patchwork quilt that is in need of comprehensive reform. Our approach to copyright must be balanced, clear, and forward-thinking. As we take a holistic look at copyright in today's hearing, we should keep in mind that there is not a simple fix to these challenges and that we cannot help one industry or group at the expense of another.

We should also be sensitive to the fact that we live in a global society, and this global society has a global economy. And so, therefore, there is a need for a comprehensive reform to U.S. copyright law that is harmonious with the laws of other Nations, and perhaps can even lead other Nations, but certainly not working without considering the views of our international partners.

What are the drawbacks, Ms. Samuelson, to a piecemeal approach to copyright?

Ms. SAMUELSON. Thank you for that set of observations and for the questions.

I think that part of the problem with patchwork amendments is that, over time, the statute has become much longer than it was in 1976, and the longer it has become, the more technical it has become. And so it is very difficult to, as I said earlier, read it through.

I know that there has been an effort in Europe by a group of copyright scholars there to articulate a European copyright code draft, called the Wittem Group. And its draft copyright law is basically about 20 pages long. A person can read through the whole thing and understand it. And, especially today, it seems to me that we need a law that people can read and can understand.

One of the things that I tried very hard to do, especially in the first part of the Principles Project report, was really to explain copyright in a very straightforward, unjargonistic way so that it could help to articulate what are the positive principles that underlie copyright law.

I think the norms of copyright and the values that copyright has for our society will be better understood by the public as well as by many of the creators whose works are being protected if it, in fact, is more comprehensible than it is today. And I think you don't get comprehensibility easily when you have 37 years of amendments that get tacked on to the statute.

Mr. JOHNSON. Yeah, we have the same situation with our tax laws in this country.

Ms. SAMUELSON. Well, unfortunately, the copyright law is beginning to look like the tax law.

Mr. JOHNSON. If it is that book that is on Chairman Goodlatte's desk, then it is probably worse than the Tax Code. But I will ask, also, perhaps you could help us in that regard, if the Europeans have some kind of 20-page tax document, that would be great.

But, listen, how important that comprehensive copyright reform take into consideration international standards?

Ms. SAMUELSON. I think that to the extent that U.S. law can be compatible with the laws of other Nations that actually assists the United States in being able to talk effectively to other Nations and to conform their practices and our practices, I think it helps in enforcement.

It is one of the reasons why I thought that the communication-to-the-public right is something that we should be considering. The United States is the only country in the world, so far as I know, that has a public display right. That is a right that hasn't been used very much. People don't actually know what it means. If you took it literally, you might have to shut down the Internet, and that doesn't seem like a good idea.

So thinking about how we could think in a more comprehensive way about what the role of the different exclusive rights are and how we can foster international conversations and agreement on that seems to me all to the good.

Mr. JOHNSON. Thank you.

I yield back.

Mr. COBLE. I thank the gentleman.

The distinguished gentleman from Pennsylvania, Mr. Marino.

Mr. MARINO. Thank you, Chairman.

Good afternoon, ladies and gentlemen. Thank you for being here.

And, Professor Samuelson and your Committee, if I may refer to it as that, I want to commend you folks on what you have accomplished thus far. It is very helpful to me.

Mr. Sigall—am I pronouncing that right?

Mr. SIGALL. Sigall.

Mr. MARINO. Sigall. All right. I am sorry.

Let's move into—I don't want to get too far down in the weeds because this is a review and we need responses from all sides before we come to a conclusion, and that will take a while, as the Chairman said. But let's move into the digital arena for a moment.

Can you give me your opinion as to what could be done that is not being done by Internet providers concerning downloading of music, movies, purchasing of items that are pirated here in the United States and around the world?

Mr. SIGALL. Well, as you probably know, from our perspective at Microsoft, piracy is a serious problem, and it continues to be a problem. And we are very keenly interested in addressing it in effective ways.

Our approach to online piracy focuses on the notice and takedown system that is built on top of the Digital Millennium Copyright Act that I referenced. And our antipiracy team works very hard to make that system as efficient as possible so that they can get information about where our works are being pirated and how those works can be taken down as quickly as possible.

And so we work with Internet providers around the world to make sure that that system is as effective as possible. And we think that is really the right approach to take in dealing with the online piracy problem, from our perspective as a software provider.

Mr. MARINO. All right.

Professor Gasaway, as a law student, can you give me some examples of where you would like to see changes concerning research that the law student would have to perform concerning photocopying, using specific verbatim in preparing briefs, for example, and where that should not be permitted?

Ms. GASAWAY. Well, let me start by saying that photocopying is almost dead in law schools.

Mr. MARINO. Okay. I think I just dated myself, or you did that for me.

Ms. GASAWAY. Right.

Mr. MARINO. But—

Ms. GASAWAY. Okay, I was in college and remember when we got our first photocopier at Texas Woman's University.

Mr. MARINO. Yes, yes, it was great, wasn't it? Well, let's say drawing up digitally the material and printing it out.

Ms. GASAWAY. Yes. Most of that is licensed. So, for law, we may be the wrong discipline to actually be looking at. Because with Lexis and Westlaw and then what the Federal courts and State courts put online, we are sort of in a unique position that we either have it from a commercial source or we have it free on the Internet, when we are talking about our primary legal materials.

But what we don't have so much free really is—and I guess I shouldn't say "free" because law schools do pay; law students don't, but we do pay. I think it is something like, the University of North Carolina pays something like \$80,000 a year for law students' free access, but it is free to the student. But other materials are not so available. And, increasingly, even in legal briefs, we are seeing interdisciplinary materials, whether they are science-and-technology-related or something else.

The other thing we are beginning to see is multimedia. You know, when most of us were in law school, it was your textbook and a legal pad, and that was about it. But now we are seeing students, you know, who are using video clips, and faculty who are using them.

And so all types of works need to be available and part of this research database. And I am going to use that in a—or I should say databases. It may be licensed, maybe not.

Mr. MARINO. Okay. Thank you.

Professor Samuelson, let's stay with the law school concept here for a moment.

And you jogged my memory, Professor Gasaway, concerning a professor who is preparing a curriculum and lectures and is pulling information off the Internet from legal scholars, from individuals who write treatises, and so on.

What do you think we should do with that? Should it be more regulated or less regulated, and why?

Ms. SAMUELSON. I think that the norms of the academy, actually, in general, respect copyright. Most of us who are academics are authors, and we care, actually, about misuses of our work. And I think that that helps to create a culture in an academic environment in which respect for copyright is more likely to occur than perhaps in some other sectors.

In respect of the activities of professors, it is the case that we draw upon many types of works. I still, actually, like photocopies

sometimes, myself. But I am really quite careful about this, partly because I am a copyright person. And I think that my colleagues also are now making much greater use of online materials. As Professor Gasaway mentioned, much of that material is licensed, and we have access to many journals that we don't have on our shelves now. And I think licensing has become a solution to a lot of problems in this domain.

Mr. MARINO. Thank you.

My time has expired.

Mr. COBLE. I thank the gentleman.

The gentlelady from California, Ms. Chu.

Ms. CHU. Professor Samuelson, I appreciate the efforts that you and the project participants put into the report. I think it is so important that the participants came together in the spirit of having a civil discussion on many complicated and controversial issues.

However, I am concerned that the report didn't include the input from a creator's view, someone who could give an on-the-ground, practical perspective, such as a writer, a musician, or a filmmaker. And, in fact, as a co-chair of the Congressional Creative Rights Caucus, I feel that there should have been creators even in today's hearing.

So I would like to ask you, Professor Samuelson, to what extent were the interests and perspectives of the individual creator considered during the project? And why weren't they directly involved?

Ms. SAMUELSON. It is the case that I hope that many conversations take place, and many different creative communities are invited to participate in the kind of conversation that this Committee seems intent on doing. If I had to have a representative of each of the creative industries participating in the Principles Project, it would have been a group of 50. And I think you can't have a good conversation about some of these issues with a large number of people.

So I believe that both as creators, ourselves, and also as people who enjoy the arts and who respect copyright that, in fact, we were keeping in mind the interests of individual creators. And we hoped just to start a conversation, not to say that because we had this conversation that that necessarily meant that whatever we might think is the way that everyone else should think. We hope that this discourse that we shared with the public through this report is something that would foster more conversation and more communication.

So I don't believe that we were excluding the interests of creators at all. In fact, I think we were very much keeping the interests of creators in mind.

Ms. CHU. Well, Professor, I think that if there were individual creators, the issue of the Digital Millennium Copyright Act might come up, in particular, the abuse of DMCA takedown notices, which is not addressed, actually, in your report.

And that is of concern to me, considering this is a big challenge for individual creators. They are often trying to keep up with issuing thousands of notices to infringing sites, and a lucky few can afford to hire a service to do it. What is most frustrating is that these sites claim to remove the infringing file, only to have the same identical file reappear on the same site within a few hours.

And, in fact, David Lowery in his op-ed called it a Whac-a-Mole process.

So how can individual creators keep up with a game that they can't ever seem to win? Is there a better way that could be more meaningful than the current DMCA process for them to effectively address this rampant infringement of their works on the Internet?

Ms. SAMUELSON. Thank you for the question. I do recognize that individual creators are at some disadvantage, that they don't have the resources that Microsoft, for example, has to police online infringement. And I am concerned about that.

I do think that Congress went through a very careful process in 1998 to think about how the rules for taking material down should be handled, and they came up with a particular solution: the notice and takedown. And if it is not working effectively, I do think that it would be worth having that be part of your agenda.

In terms of the agenda of the Principles Project, it wasn't to say that we could take on every single issue that might be out there. We gave the opportunity to our members to raise issues that were of concern to them, and those were the ones that we addressed in the report.

Ms. CHU. Well, I did also want to ask one last question, which is, our current U.S. copyright law has enhanced and delivered substantial benefits to our economy, and I am concerned what would happen if our copyright law was watered down.

Commerce recognized recently that resource-intensive copyright industries, such as movies and music, have contributed greatly to our GDP. And, in fact, figures have been underreported over the years. They are now looking to revise decades of official economic figures. In fact, creative works are truly our most precious export, creating a positive trade balance.

So what are the implications if we do not have a strong copyright framework like we currently have?

Ms. SAMUELSON. I don't think anything in the Copyright Principles Project report was recommending watering down or weakening U.S. copyright law, but really trying to make it more effective. And so, to me, the proposals and the suggestions that were being made are ones that would continue to foster the growth and strength of the U.S. copyright industries.

Ms. CHU. Thank you.

I yield back.

Mr. COBLE. I thank the gentlelady.

The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Let me start by pursuing the line of questioning that Ms. Chu started. I will ask each of you, how is copyright working for the individual artist who wants to maximize the use of his or her talents instead of having to spend time understanding and using copyright law to protect their rights?

So, Mr. Baumgarten, do you want to take a shot at that?

Mr. BAUMGARTEN. I will.

I think the notion in many circles that the copyright law has become totally dysfunctional and counterproductive is not the way the situation is. If I look around, I see services and means of creation and dissemination, many under copyright control, more of

which probably should be under copyright control, thriving. I don't think the copyright system is broken or dysfunctional.

I think it may need some updating and improving. I am not sure how much. I will not purport to speak for individual creators. I spent too much of the last copyright revision as an ally of one of the strongest creators' representatives who has ever lived, Irwin Karp. And if I purported to speak for individual creators, I am afraid what Mr. Karp's specter would do to me.

I will say, though, in partial response to your question—

Mr. GOODLATTE. You are going to have to be quick because I have five people and I would like to ask more than one question.

Mr. BAUMGARTEN. Okay. In partial response to the question that was just asked by Ms. Chu, I want to make it absolutely certain that I do not purport to speak for individual creators. I represented them many times—

Mr. GOODLATTE. Sure.

Mr. BAUMGARTEN [continuing]. Early in my career, and I worked as allies with them, but their interests were not overlooked completely. They weren't presented as eloquently, perhaps, as Mr. Lowery or others were, but, for example, on the question of the—

Mr. GOODLATTE. Let me go to Professor Gasaway. I appreciate that, but—

Mr. BAUMGARTEN. Thank you.

Mr. GOODLATTE.—I have to let some other people say some things, too.

Ms. GASAWAY. Mr. Goodlatte, I believe that we do have a problem when it comes to individual creators. And I think if you talk to a lot of the people in the user community, they want to do things for the individual creator.

The resentment has come, I think, with big publishers, big companies, big record companies. The way our Copyright Act is structured, individual owners have to pursue their rights, and litigation is the way they do that. And I think it is unfortunate, but we don't, as a society, have much of a way so far to deal with that. We favor the big guys. Sorry.

Mr. GOODLATTE. Professor—is it Gervais?

Mr. GERVAIS. Yes. Thank you, Chairman Goodlatte.

At the high level, copyright policy is very easy. We need creators, users, and ways to connect them. And it seems that debate is always focused on that part in middle, and it is a very important part.

These commercial intermediaries obviously are important. I said in my written testimony there should be healthy competition. But for creators, creators really want two things, typically. They want attribution; we have heard that. But professional creators need a way to monetize their work.

I mean, I live in Nashville. I don't think we would have had George Jones or we would have—

Mr. GOODLATTE. They probably want to have more than one way to monetize their work, right? I mean, they may want to do their own thing, be independent, have a simple system where they can have their copyright royalties, rewards, however they enforce that on their own. Or they may want to license with one of these big entities that you refer to so that they can completely focus on their

work and let someone else take care of it. Obviously, you are going to pay a premium for doing that, but you certainly want to have that option. Those are two. There may well be more, as well.

Professor Samuelson?

Ms. SAMUELSON. I think it would be worthwhile for there to be more empirical studies about the interests of individual creators and how the copyright system is working for them or not. I think that is an empirical question. The National Academy of Sciences just published a report suggesting that more empirical research should be done in respect of copyright. And as part of a comprehensive reform, it would seem to me that this might be a good time to engage in some of that empirical research.

The one thing that the Copyright Principles Project identified that I think addressed the interests of small, individual creators is the small claims court, that right now litigation costs are so high that many people who—

Mr. GOODLATTE. Before my time runs out, I am going to start a—

Ms. SAMUELSON. Sorry.

Mr. GOODLATTE [continuing]. Second question that is a compliment to all of you. I mentioned in my opening remarks, but I want to ask you, based on your joint experience working together to find at least some common ground, what advice would you give to your colleagues about how they can perhaps do the same? And many of them are sitting right behind you.

Let's start with Mr. Sigall.

Mr. SIGALL. That is a very good and interesting question to think about. From my sort of personal perspective, one of the things that I think did not happen in our discussions is I think we avoided the good-versus-evil stories. And we didn't try to characterize either side as in a drama, in a sense, and focused really on trying to understand the interests, where the other side potentially was coming from, so that we could modify our remarks to make sure that we could communicate our interests to the others, as well.

And I think that helps in these kinds of discussions because copyright should be a very functional, pragmatic discussion and really shouldn't be about drama or heated rhetoric.

Mr. GOODLATTE. Mr. Baumgarten?

Mr. BAUMGARTEN. Tough question. Listen to each other and try to search for a solution, rather than yell at each other, I guess is the best I—

Mr. GOODLATTE. Ms. Gasaway?

Ms. GASAWAY. Stop being so polarized. Think about the needs of society and our economy, what enriches our lives, and how do we make works available that do that. I think that is what we need to focus on, rather than just representing a client.

Mr. GOODLATTE. Professor Gervais?

Mr. GERVAIS. Yes, I would say I hear a lot of people saying that they speak on behalf of the public interest. If I may, I think the public interest requires that copyright work for the three categories of people I was identifying earlier: creators, users, and the people who connect them.

Mr. GOODLATTE. Professor Samuelson?

Ms. SAMUELSON. I think having a holistic understanding that copyright is now an ecosystem and that it has multiple parts and multiple stakeholders and that each of them has a role to play in trying to help us get to the right kind of balance.

I think that if you start conversations in a way that promote that kind of mutual respect, you are more likely to end up with something that actually is both comprehensible and also is considered fair and just. And that is what we are looking for.

Mr. GOODLATTE. Well, thank you.

Mr. Chairman, I have abused my time here by letting them all answer the—oh, I am sorry.

So I also want to ask unanimous consent to enter into the record the Copyright Alliance's statement that they prepared for this hearing. And I very much appreciate their doing that and want to have this entered into the record.

Mr. COBLE. Without objection.

[The information referred to follows:]



FOR IMMEDIATE RELEASE

May 16, 2013

**STATEMENT FROM COPYRIGHT ALLIANCE EXECUTIVE DIRECTOR
SANDRA AISTARS RE: TODAY'S JUDICIARY SUBCOMMITTEE ON
COURTS, IP, AND INTERENT, "A CASE STUDY FOR CONSENSUS
BUILDING: THE COPYRIGHT PRINCIPLES PROJECT"**

WASHINGTON, D.C. – Copyright Alliance Executive Director Sandra Aistars made the following statement re: today's hearing on "A Case Study For Consensus Building: The Copyright Principles Project," to the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet.

The theme you have chosen for this first hearing to review the Copyright Act is consensus building. As an organization that unites creators across disciplines and transcends boundaries between copyright holders of different backgrounds, we agree consensus building is important whenever challenging issues are discussed. We believe, however, that the Committee needs to take one step further back.

For the Committee's work to have meaning, in reviewing copyright law you must bear in mind one thing: before there are competing vested interests to balance, and nuanced policy issues to navigate, *there is an author*.

The author is the core around which any well functioning Copyright Act must be constructed. Because the author will choose a path for his or her work based on the framework of laws you construct, and society will benefit – or not – accordingly.

We welcome this opportunity for a review of how the Copyright Act is serving authors, motivating the creation of new works of authorship, and the commercialization and dissemination of such works, for the benefit of our society. All three of these purposes are indispensable to a well functioning copyright system that serves consumers and creators alike. Ensuring authors feel inspired to create, that investors find value in commercializing copyrighted works and that copyright owners of both commercial and non-commercial works feel empowered and safe disseminating their works is key to ensuring an appropriate framework of laws. While the focus may begin on the author, the lives spent creating works, which enlighten, inspire, and entertain us ultimately benefit the general public and drive innovation including in media and communications technology.¹

¹ See, e.g., Adam Mossoff, *How Copyright Drives Innovation in Scholarly Publishing*, George Mason Law & Economics Research Paper No. 13-25 (April 2, 2013). Available at: <http://ssrn.com/abstract=2243264>.

It is good to begin this review with a discussion of first principles – How to discuss copyright law amicably and rationally, without resorting to rhetoric and recriminations. If the choice of the Copyright Principles Project as the theme for the hearing was for that reason, then we can agree with the drafters of that report that,

*“Too much discourse about copyright law in the past fifteen years has been burdened by rhetorical excesses and an unwillingness to engage in rational discourse with those having differing perspectives. The CPP has proven that it is possible for persons of good will with diverse viewpoints and economic interests to engage in thoughtful civil discourse on even the toughest and most controversial copyright issues.”*²

Even so, the Principles Project is of somewhat limited value to illustrate best practices on a procedural basis.³ The Project was a self-convened effort of “law professors, lawyers from private practice, and lawyers for copyright industry firms.”⁴ We recognize that there are limits to the abilities of the conveners of this project to have reached all relevant parties, but we note, as have others,⁵ the startling absence of any individual creators or small businesses in the group convened.

The presence of authors themselves, or of those who work with them daily is important for numerous reasons. Most obviously, it is not possible to issue spot as well and to creatively address problems if you don’t understand how the framework of laws impacts an individual author’s life and livelihood in the real world. A solution to a thorny issue that seems elegant to an academic considering the matter from a distance may entirely miss the mark for a small business owner who will ultimately have to create and disseminate works within the confines of that law. In fact, the Copyright Alliance membership has benefitted immensely over the years from members educating members internally about the issues they face and the ways that the copyright laws affect each of them differently.

More importantly, however, if the author’s place in the creative ecosystem is to be preserved — this review will of necessity have to include a purely human element. To craft a truly great Copyright Act you will need to return dignity to authors, to preserve their place in the value chain and their right to set a path for

² The Copyright Principles Project: Directions for Reform, p. 3.

³ The drafters of the CPP themselves prominently note that they have not achieved consensus, and that they mapped where they “agree and where and why we disagree” *id.* at 3; that “various members of the group maintain reservations and even objections to some proposals described as recommendations in this Report;” *id.* at 4; and that the group had “strong differences on some issues” *id.*

⁴ *Id.* 1-2.

⁵ David Lowery, “Getting Copyrights Right”, Politico, May 13, 2013
<http://www.politico.com/story/2013/05/building-a-real-copyright-consensus-91231.html>

their works. Unfortunately, the answers to those foundational questions cannot be found by examining the academic debates of well meaning lawyers.

ABOUT THE COPYRIGHT ALLIANCE

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing artists and creators across the spectrum of copyright disciplines, including more than 40 trade association, companies and guilds, and 8,000 individual artists and creators. For more information, please visit www.copyrightalliance.org.

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Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. COBLE. Thank you, sir.

The distinguished gentleman from Florida.

Mr. DEUTCH. Thank you, Mr. Chairman.

And, Mr. Chairman, I want to begin by thanking you for holding this hearing and starting what I hope will be a robust and comprehensive review of copyright law.

We all know the challenges that any substantive discussion of copyright law has in this, shall I say, rhetorically charged, Twitterized environment we live in. These are complex issues, and they don't lend themselves to easy sound bites.

It is important to recognize the tremendous success of our current system. We live in a Nation in which creation has thrived in large part due to the protections guaranteed to creators under our Constitution and detailed in our copyright law.

Millions of Americans depend on copyright for their livelihood—from the songwriters, musicians, actors, directors, and writers creating the music, movies, shows, and stories that speak to us all, to the music publishers and the programmers, the app developers, and the Web designers who help works find audiences, not to mention the carpenters, engineers, and countless others who contribute to the creative works.

It is a great American success story, but there are challenges. We all know how easy it is to steal content. Our copyright system needs to encourage ways to deliver the great content we all love to the public while allowing for new transformative technologies to continue to be developed in the future.

But let's remember that even the most innovative technology in this area relies upon the innovative creators, whose work has to be protected. Our copyright laws may once have impacted only a narrow subset of people; that has been a theme of this discussion. But thanks to the transformative advances of technologies in recent years, we are truly living in a world where copyright impacts nearly all of us.

As an avid music lover, I have been able to enjoy my favorite artists and discover new ones in ways I never would have dreamed of in the 1970's and 1980's when I was listening to records on my combination turntable/eight-track player. The way that consumers interact with these works has changed not only the way the content is delivered but frequently the way that it is created.

And these are all positive developments as long as we keep the foundation of our copyright system intact. The belief that a creator has the right to get paid fairly for their ideas and creative contributions, or, as the Constitution puts it, "in order to promote the progress of science and useful arts by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries," that is the fundamental principle upon which the whole complex copyright system rests. And any changes must help grow the pie so that legal streaming technologies and apps can take off and succeed with both the creators and the tech companies jointly reaping the benefits.

If any changes are made to our system, they have to be done with all stakeholders sitting down together, as you have said, at the same table, including the public, the creators, and the tech-

nology companies. As lawmakers, however, we cannot be intimidated by those voices that simply want to stifle all reasonable reform.

I appreciate the Chairman's approach. And, from my conversations with Mr. Goodlatte, I know that he is also committed to giving everyone a voice in this review process. And I want to commend both of you for that approach and that good work.

Now, advancing technologies may have made copyright issues more complex, but, Mr. Chairman, if the Committee decides to modify the Copyright Act, I hope that we do it in a way that makes it easier for people to understand. Right now, that is not always the case for consumers, for investors, or even for creators.

And so, while I wouldn't say that the CPP paper should be the foundation of a comprehensive reform, I would like to delve into just one of the issues that it raises related to complexity.

Professor Samuelson, recommendation seven of the report specifically calls for establishing a right of communication to the public in order to simplify the law and make it conceptually more coherent. Today, cable and satellite retransmissions and digital transmissions via the Internet are dealt with either as performances or distributions or displays or reproductions. And in a mobile and on-line world, most people don't have an idea whether they are enjoying a performance or a distribution or a display or a reproduction, much less what the rights are.

So the report says that the right of communication is the international norm. Could you just explain how that approach works elsewhere in the world?

Ms. SAMUELSON. Professor Gervais may have more information than me about how the communication right is practiced elsewhere. But it is my understanding that broadcast, for example, of television signals and the like is handled through a communication right, and I think transmissions of different sorts, digital transmissions as well as broadcast transmissions, I think fit more easily under that kind of right. And it is my understanding that that is the practice.

And that part of what happened with the public performance right in the United States is, at the time that the 1976 Act was put in place, that cable television transmission had been deemed not a performance, so the statute was amended to add it, rather than thinking about the communication-to-the-public right as an alternative framework.

So, in some sense, we are stuck with something that was a response to one particular technology at the time, and we are now bundling transmissions under different kinds of rights. And I think we don't know—we don't have a coherent view about that.

I think if we were engaged in a comprehensive review of copyright, we could say, this is the work that the communication right does, this is the work that the public performance right does, this is the work that the reproduction right serves, and so forth. And it seems to me that that would be something that would be very helpful, especially going forward, as we try to understand how these rights should apply in these environments.

Mr. DEUTCH. Thank you.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, the gentleman from Florida.
The distinguished gentleman from Texas, Mr. Poe.

Mr. POE. Thank you, Mr. Chairman.

I want to thank you and Chairman Goodlatte for holding this first of a whole lot more hearings.

You know, copyright law is difficult. My friend and lawyer, Mr. Marino, is going through the copyright law. He is finding out that it is twice as long as "War and Peace" and not near as funny.

And, Professor Gasaway, when I was at the University of Houston, I studied enough copyright and patent law to spend the rest of my career, up until coming to Congress, in the criminal justice area. Stealing and killing and robbing is a whole lot easier to understand than copyright law.

But I appreciate the five of you, your work in this area. It is difficult, it is complex, and it needs fixing. And that is what we are going to try to do, with the Chairman's lead.

You know, the law has existed for 200 years, and it has been good. America is better because we have the concept of copyright. During the Cold War, I think part of the reason that we were successful in the cold war was because of the communication that was done by people in the copyright business, songs and movies. All of that concept was able to go worldwide and helped us win the Cold War. But there are a lot of other examples, as well. But it has been good for the country.

We certainly don't want to, as Congress sometimes does, when we start working on things, we make a system worse than better. We want to make sure we don't do that. All these folks in the audience here are saying "amen" to that, I know, because they don't want us to make the system worse because they have stakeholders in it.

Let me ask this question, a specific question. I have four questions to all five of you. The current system, the law that Professor Marino is going through here, what is good in it? I want to talk about the good, the bad, and the ugly. Let's just talk about the good. What is good in the law right now?

Mr. Sigall? We will start on this end and go the other direction.

Any of it?

Mr. SIGALL. I think there is a fair amount that is good. As I mentioned, I think the section 512 of the Digital Millennium Copyright Act for online services is a very positive development. I think the set of remedies and the way, certainly, the U.S. legal system works is a very useful thing for copyright owners and authors and creators to use to protect their copyrights. I think the protections for the use of technological measures in section 1201 are, by and large, a positive force that are used by both small creators and larger copyright owners.

So I think there is a lot that is valuable. I think it is—certainly, as others on the panel have mentioned, one of the things about this project was that everyone agreed that there is a lot valuable and beneficial in the current system that, as you have said, needs to be preserved and protected and not interfered with. It becomes a question of what amendments can make it better and stronger, especially in the eyes of consumers.

Mr. POE. Professor Samuelson?

Ms. SAMUELSON. I agree with Mr. Sigall that there is much in U.S. copyright law today that is valuable and worth preserving.

Mr. POE. Like what?

Ms. SAMUELSON. Specifically, that copyright protects original works of authorship from the moment of their fixation for a period of time. That principle is one that was novel in its day. There was a time when only published works were protected by U.S. copyright law. So I think that is something that we all thought was a valuable thing.

A second valuable thing is that copyright protects the expression in a work, not ideas, processes, procedures, facts, data, knowledge. That way, second-comers can basically extract unprotected elements and make new works of authorship. And that goes a long way toward producing ongoing creation that advances the constitutional purpose.

I think there is consensus that the fair-use provision of U.S. copyright law has done much good by enabling copyright law to adapt during times of change. And so some uses aren't fair, but some uses are. And I think courts have more or less done a pretty good job in applying fair use in these areas.

And so, while I could go on, I think those three examples are some of my favorites.

Mr. POE. I am out of time. I would like the rest of you to be specific in answering that question, other than what is already in your testimony, and submit that.

Plus, the other question: What is the worst part about the copyright law we have?

So we will talk about the good and the bad, and we will get to the ugly some other day. So the worst part and the best part.

And I yield back, Mr. Chairman. Thank you.

Mr. COBLE. I thank the gentleman from Texas.

The gentlelady from California.

Ms. BASS. Yes, thank you very much.

Mr. Poe, maybe I will ask that question if I have enough time.

I wanted to ask the question about the report. It says in the report that personal uses do not involve copyright's main job of providing authors with the means of controlling commercial exploitation of their works. So I wanted to know, anyone on the panel, if you could help me understand what exactly that means.

And then isn't every instance of someone downloading or streaming a song or a movie or a photograph for their personal enjoyment an example of commercial exploitation?

Mr. BAUMGARTEN. I will take a crack at it, if I may. I will try to be brief, because I have spent too much time giving speeches about personal use in the past.

Over the years, I have represented a great number of clients whose job, whose investments, whose capital, whose creative energy, in terms of individual creators, has been in creating, replicating, and disseminating works to individuals for their personal use and enjoyment. I have always been troubled by the fact that now, because individuals can do it for themselves and because major industries can grow up developing technologies and systems and services to enable consumers to fulfill their own needs, that

somehow the idea has grown that personal use should be an exemption from copyright. That doesn't make any sense to me.

There may be newer ways to deal with it that are required. Technology may enable those very newer ways to do it. But there is a recognition in the report that there are severe issues with simply considering personal use to be an exempted field of activity. And I think some of those are, as I said, acknowledged in the report itself.

Ms. BASS. Thank you very much.

I wanted to ask you a question about international copyright. The World Intellectual Property Organization is going to be meeting next month, actually, in Morocco and dealing with the whole issue of tweaking international copyright for the visually impaired.

And I wanted to know if you were concerned about that process. I have heard some concerns from some areas. I wanted know if you had the same concerns.

Mr. GERVAIS. If I may take that. Thank you for your question.

Indeed, there is a diplomatic conference that is scheduled to adopt this treaty. So this is a treaty that would, in a way, make an exemption mandatory for visually impaired users. And I don't know that anyone disagrees with the normative side of it, which is this is a good idea—

Ms. BASS. Right.

Mr. GERVAIS [continuing]. But there have been concerns raised, in particular as to the application of the so-called three-step test, which is the test for exceptions under international rules, recently.

I certainly personally support this treaty, but it, I think, is an example that a more comprehensive approach, not just domestically but in fact internationally, might work better. Because if you push just one treaty that has one new right or one new exception, it is harder to get people to rally around that, even for something that seems as fairly obvious as the visually impaired.

Ms. BASS. I thought, actually, that was part of the problem, that part of the concern was that to open it up and to look at it in a broader way might raise many more concerns and might compromise copyright. No?

Mr. GERVAIS. I meant broader, not just broader in terms of more exceptions, but a more broader reform of international copyright. There are rights missing, and there are exceptions missing. And I think that broader discussion needs to happen, but there is really no clear leadership internationally right now to make that happen.

We have had international treaties, the Berne Convention. But the U.S. joined that convention once it was all wrapped up, so it was too late to influence it from the inside. Since then, we have had the TRIPS Agreement, the World Trade Organization, but it didn't do very much in terms of copyright. It was mostly an enforcement-based instrument from the copyright perspective.

And since then, we have had partial efforts—ACTA, now there is a TPP, and all these things. But they are all very partial. And I kind of wonder if that is the best way forward, to have all these parallel instruments.

And there are countries that are proposing counter-treaties to the treaties now.

Ms. BASS. Right.

Mr. GERVAIS. I am a little worried about where that is going. And I think if the U.S.—

Ms. BASS. Which countries? I certainly know that there are some concerns around Nigeria, or, rather, a person representing Nigeria, not necessarily the country. But which other countries are proposing?

Mr. GERVAIS. So there is something that I refer to in my written testimony, the official jargon is “super-regional meetings.” And some of them have taken place in Latin America, some of them have taken place in Africa. And, basically, these are countries that are having meetings where the Europeans and the Americans are simply not invited. And their argument is, “Well, you are having meetings we are not invited to.” And I am not sure that is a very healthy development.

And if you are a U.S. exporter of copyrighted material, I would think you might be a little worried about having a picture where each country develops different norms. So I think that leadership to update the entire system or at least to look at the possibility of doing that might work better.

Ms. BASS. Thank you.

Thank you, Mr. Chair.

Mr. COBLE. The gentleman from Georgia, Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate your leadership on this issue and the commitment that you have shown, along with Chairman Goodlatte, to discussing the Copyright Act in an objective and nonpolarizing manner.

Although technology has developed far beyond what our Founders could have imagined, their genius remains as true today as it was when they crafted the Copyright Clause in Article I.

There seems to be a tendency, however, in this day and age to frame the idea of free and open access to creative rights as a moral imperative. Those who believe in the right of an individual to capitalize on their creation, be it a work of art, music, or a brilliant reshaping of the English language in a written work, are portrayed as anti-innovation and as outdated as the flip phone that my father currently uses.

But our Founders understood what many of us have forgotten: Unless we incentivize creators to create by giving them the rights of ownership to their works, innovation will truly cease to exist. Everything has an owner. I have said it before, and I will continue to say it. Unless the law encourages the creative genius in a person to take risk, both professional and financial, by assuring appropriate protection of their intellectual property, then the law does a disservice to what the Framers intended in the Copyright Clause.

I would be remiss if I did not mention that I do have concerns with the CPP report—concerns about the lack of artist involvement, concerns about the conclusions reached, and concerns about the seeming abandonment and disregard of the fact that copyright protection finds its origins in our Constitution.

Make no mistake, however. I recognize and strongly support the economic vibrancy created by the technology sector. In my home State of Georgia, there are over 13,000 technology companies, employing over 250,000 men and women. Georgia also continues to see record growth in the number of tech startups. In fact, Atlanta

is one of the top five startup centers in the entire country. I am proud of the business environment we have created in Georgia to allow this industry to thrive.

I firmly believe that protecting copyright leads to more creation and more innovation and even more growth in every sector that relies on the ideas and ingenuity of individuals.

Although I appreciate the witnesses being here and I have fully read their testimony and the report, I do not have any questions for them today.

And, Mr. Chairman, I yield back.

Mr. COBLE. You win the prize, Mr. Collins.

The gentlelady from Washington is recognized.

Ms. DELBENE. Thank you, Mr. Chair. I just want to thank you for holding this hearing, and thank all of the witnesses for taking the time to be here today.

When the Register was here for a hearing, she mentioned that when all the work was going on for the Copyright Act in 1976, she said by the time it got done, it was already out of date, because it took about 15 years to do it and many sections of it were for many years before the final passage date.

So here we are today looking at things, and I know your report is from 2010 already. And so my first question would be, what has even changed between 2010 and now, whether it is court decisions or technology changes, that you weren't able to anticipate when you wrote the report that you think are important for us to have on our radar now?

And anyone who has some feedback on that would be helpful.

Mr. BAUMGARTEN. I think we probably all would have different answers.

My answer is that I am concerned about what is happening in the courts, which is something I never used to think. I was pretty happy with the way the decisions were going. But the decisions now in the area of fair use and in the area of public dissemination of works, particularly in the Second Circuit, I think those have changed. Some on the Principles Project would applaud those changes. I think some of us would not applaud those changes.

Ms. DELBENE. Others?

Professor Gervais?

Mr. GERVAIS. A very brief answer. Thank you for your question. I think one predictable and one less predictable change.

The predictable change is the fact that the focus even in 3 years has visibly shifted from hard enforcement online to more licensing, more authorization, more streaming, more content legally available, which I think was predictable and is a good thing.

If I had to point to one unpredictable change, it is the Supreme Court reading of the statute in the first-sale case known as *Kirtsaeng*. But it is not a digital case, so I don't think that it impacts the CPP conclusions.

Ms. DELBENE. Okay. Thank you.

Ms. GASAWAY. I think that one of the major changes has been these so-called mass digitization projects. They were just beginning at the time that we completed our work, really. And Google was under way, but with libraries and archives beginning to do them,

and looking at ways to do them. Does it need to be licensed? You know, how are we going to do this?

Ms. DELBENE. Uh-huh.

Ms. SAMUELSON. I think that cloud computing and mobile devices were not really in contemplation as we were talking through our deliberations about the Act.

But I think something that came out of our deliberations which I think is something that can carry forward is a notion that if we find a way to articulate what the right balance is and we identify exclusive rights and some exceptions to those rights that become comprehensible, that become predictable, that they can, in fact, advance over time and get applied to new things.

So I think we have learned a lot of lessons, but I think that part of the challenge for this revision has got to be comprehensibility, building in some flexibility, but also keeping the norms at a level of generality so that the law doesn't become obsolete. I don't want to have an exclusive right to control this aspect of cloud computing because that is going to go out of fashion.

So trying to figure out what is the right way to frame the rights, and exceptions that might be needed to them, I think is something that we have learned something about over the last several years.

Ms. DELBENE. Uh-huh.

Mr. Sigall?

Mr. SIGALL. I would say it is the proliferation of devices and cloud services, not only that they exist more so than they did in 2010, but that people are really using them and they are becoming integrated into their lives in the way they communicate with their families, their friends.

And what that means is—another positive development that has happened is that a lot more legitimate entertainment services are being delivered over those devices and over the Internet, which is, again, as Professor Gervais pointed out, the win-win, where authorized uses are being made and creators are being compensated. But it is also changing the way that consumers expect to interact with the content that they find very important and, as has been said, makes those devices and services valuable.

And that is probably not going to change; that is going to continue. And it is very hard to keep up with the dynamic expectations of consumers around what they find important in their devices and their technology.

Ms. DELBENE. Now, you talked earlier, Mr. Sigall, about transparency and that you think that is an area where we could do a lot more. Can you elaborate a little bit more on that?

Mr. SIGALL. Yes. There is an obvious need to have better access to information about who owns what copyrights and what those copyright owners would like—who they are, how you contact them, what you can and can't do with their works. And the first thought is always that the Copyright Office can build a better database for people to use.

I think the Principles Project talks about an idea; rather than do that, what the Copyright Office should get in the business of doing is tapping into the already-existent private registries of copyright information. The database that ASCAP and BMI use for songwriters, the Copyright Clearance Center uses for authors of journal

and textual materials, the ways photographers are distributing their works online—all of that information exists. It is very conducive to the way authors exploit their works and get paid for their works.

If the Office can somehow give some legal significance to those databases, and therefore give those authors access to the remedies that are keyed to making that information available, I think that would be a very efficient way to help improve the flow of information.

And then, that way, authors get very practical enforcement. If someone knows that there is an author standing behind that work and they don't want it used in a certain way, those folks will probably restrain that use without ever having to take them to litigation or do anything that requires expensive outlays by the authors. And I think that is the approach that is described in the project as a way to help this information-flow problem.

Ms. DELBENE. Thank you very much.

And I think my time has expired. I yield back, Mr. Chair.

Mr. COBLE. The Chair recognizes the other distinguished gentleman from North Carolina, Mr. Holding.

Mr. HOLDING. Thank you, Mr. Chairman.

You know, our Chairman is known with great affection amongst the North Carolina delegation as our leader. So it is a pleasure to be with him today.

And I want to thank the witnesses.

I would like to harken back to something that Chairman Goodlatte was touching on in his questioning, and it referred to, you know, the CPP process that you all have gone through was successful in large part because you weren't throwing sharp elbows and you kind of ratcheted down the level of hostility in the discourse and so forth.

So I would like to ask, you know, why do you think the current copyright policy discussions have become so polarizing and antagonistic just in the last few years? And just run through the panel and get some idea of, you know, what has caused that.

Mr. Sigall?

Mr. SIGALL. Well, I think it starts by showing how important creativity is to both the persons who create the works and to the consumers and others who use them. I mean, these are incredibly important things to both sides of the debate because they are matters of intense labor and time spent by the creators and also free expression and, you know, people's personalities about the works they care deeply about.

So you start from a place that is very important to the participants in the debate. And I think that is, by and large, the good thing about copyright, that copyright is an engine for the creation of these things that people feel so important about.

The question is, how do you go from that positive feeling and import of these issues to a rational debate about the law? And that is the tricky part. But I think it starts from a positive sense that these issues are important and something that people do care deeply about.

Mr. HOLDING. Professor, perhaps, you know, of course, there are positive influences and so forth, but I am particularly interested in,

what are the negative influences that are ratcheting up the antagonism in the debate?

Ms. SAMUELSON. I think it is partly a reaction to the huge disruption that the Internet and advances in information technology have enabled. There was a hope, there was a sense that in the future that people would be able to control their content better than before through digital rights management technologies and the like. And then to discover that those technical protection measures, while they are useful and important, are not actually being quite as effective as I think many hoped means that there is a sense of loss of control that has made people extra nervous about things.

And I think peer-to-peer file sharing and the willingness of people to engage in that activity in the millions has been something that has created a toxic environment. Now, I think that we are working our way out of that because there are more opportunities now to get more legal content, and people are taking advantage of those. So we may be working our way out of that particular problem. But I do think that that has contributed to the polarization in the——

Mr. HOLDING. Yeah, just to follow up on that just a bit, you know, you say we might be working our way out of that. Now, we don't know what the next new technological advancement is going to be. I mean, we were just talking about, you know, what has happened in the last 3 years and what we could not have foreseen.

But, you know, knowing what you know, if we are working our way out of it toward a better place, I mean, do you have any horizon for that?

Ms. SAMUELSON. I wish I did.

Mr. HOLDING. Okay.

Well, quickly, Professor, if you could just touch on my original question, quickly, because I would like to get the other comments as well.

Mr. GERVAIS. I will be very brief.

So, you know, copyright is what allows creators and a lot of businesses to function and to live, so, obviously, when you touch it, people get very nervous. But the thing with the CPP, I think we all agree it could be a lot better. So if you look at it from a distance, some improvements are pretty clear.

The problem also is that when regulation is on the books that is not particularly good, there are people who take advantage of that structure. So if you change it for something better, they might not be happy.

Mr. HOLDING. When they take advantage of that and turn it into a business model which makes a lot of money, it fuels the antagonism.

Mr. GERVAIS. Exactly.

Mr. HOLDING. Alright.

Professor?

Ms. GASAWAY. I actually think that this sort of disagreement began to rise really in the early 1980's. We began to see it even over photocopying.

I think it also tracks a general lack of civility in society. I mean, in the legal profession we see it and, you know, get warned about

it. And I think we have to return to the days when “compromise” was not a dirty word.

Mr. HOLDING. Mr. Baumgarten, do you have a final comment?

Mr. BAUMGARTEN. I suggested earlier, I think some aspects of the framework have changed. I think what had been a discussion of how to respectfully fix copyright law has in some cases become a discussion of how to diminish the “obstacles” posed by copyright law to the promise of technologies that we know today and technologies that will come tomorrow and treat copyright law as just another impediment to be dispensed with.

I don’t suggest that everyone is guilty of that, but when that attitude comes and there is a counter from the other side, things get loud and, more importantly, things get distrustful. And I think that is what is missing today, is a lot of trust.

Mr. HOLDING. Thank you.

Mr. Chairman, I yield back.

Mr. COBLE. I thank the gentleman.

The distinguished gentleman from New York.

Mr. JEFFRIES. Thank you, Mr. Chair.

And let me thank the panel for your work as it relates to the project, as well as for your very thoughtful testimony today.

I think I will start with Professor Samuelson.

In the context of the congressional obligation to protect creative works, it obviously is an obligation that stems from a constitutional charge, article I, section 8, clause 8.

In the context of the project or of the work that you have done academically, what can you tell us on the Committee about the thought process that the Founding Fathers undertook in including what was a groundbreaking provision in the heart of the Constitution, when so many other complex things were being discussed—obviously, separation of powers, the Electoral College, checks and balances, federalism?

This was a complex document, yet the Founding Fathers saw fit to include this provision to promote, obviously, scientific works and useful arts. What can you tell us about what the Founding Fathers were thinking?

Ms. SAMUELSON. I think one thing we can know is that many of the Founding Fathers, as we often call them, were authors and publishers and people who were engaged in learning and scientific knowledge advancement, so this is something that they actually cared about.

Secondly, many of the States, in fact most of the States, in what is now the United States had already had individual copyright and patent laws. They weren’t all the same. And if you wanted to form a Nation and you wanted for works, let’s say, published in New York to be able to easily be protected in Georgia, then having a national law, having a uniform national law, was something that was seen, I think, as something really valuable.

So I think it was in order to help the transition to a more national way of disseminating knowledge that was part of the motivation of the Founders.

Mr. JEFFRIES. And that, presumably, is still a principle that holds great merit today.

Ms. SAMUELSON. Yes. Absolutely.

Mr. JEFFRIES. Now, with respect to the challenge that I think the Committee faces as it undertakes this comprehensive review, we have this constitutional charge, of course, to protect science and protect innovation, protect people's creative genius in the artistic field as well, but also do it in a way that allows for technological innovation to flourish and to not be stymied.

Can anyone on the panel comment as to how we strike that appropriate balance moving forward in a very complex commercial environment that exists right now?

Mr. GERVAIS. Well, thank you. That is truly the core question, I think. And what I said earlier about a law that works for creators, users, and people who connect them, I think, holds and is the best way to an answer.

So if the statute allows companies to flourish in the way that they help produce and distribute content without frustrating users, I think the system will work better. And the way that I captured that in my written testimony and in my opening remarks was to say, we should focus on maximizing authorized uses of material as opposed to focusing first on minimizing unauthorized uses. And I think we are moving in that direction.

Mr. JEFFRIES. Now, to follow up on that observation, one of the challenges, of course, we face is that, as the technology develops rapidly, we have to put into place statutes that accommodate the changing technology. We face that issue now as it relates to piracy. Originally, it was unlawful reproduction and distribution, and now it is largely done through illegal streaming.

On that point, would you support or does the group support strengthening penalties to deal with the essential change in the manner in which piracy is taking place over the Internet right now?

Mr. SIGALL. Well, as I said before, piracy is a problem, and we would certainly support looking at ways to help address the problem, especially for individual creators.

I think as a company that also builds online services that people use to communicate, we have the opposite concern that any new measures to help on the piracy side might go too far and overreach and cut back on people's ability to use the technology for perfectly legitimate purposes.

So you always have to strike the right balance, and it is difficult. But, certainly, considering both of those at the same time is really the critical aspect of trying to figure out ways to really help the copyright owner but not go too far in chilling the legitimate use.

Mr. JEFFRIES. Thank you.

And I see, Mr. Chairman, that my time has expired.

Mr. COBLE. I thank the gentleman from New York.

The distinguished gentleman from Florida is recognized for 5 minutes.

Mr. DESANTIS. Thank you, Mr. Chairman.

Thank you to the guests.

Professor Samuelson, the group, how was that group assembled?

Ms. SAMUELSON. I talked to Marybeth Peters, I talked to some of the practicing lawyers that I knew, I talked to some law professors that I knew. And this was basically the use of some social net-

works to try to bring a group of people together that I thought would be able to have this kind of thoughtful civil discourse.

Mr. DESANTIS. Because I guess some have said, well, you know, there is really not—there is a dearth of perspective of independent artists and creators, who basically depend on copyright for every day of what they do.

So do you think that you got sufficient input from those types of individuals?

Ms. SAMUELSON. I think that it is important to recognize that most of the academics on the panel are actually authors of books, and those books actually bring in some income for those people.

And I think the other thing is that, when we have been teaching copyright law for decades or practicing copyright law for decades, as is true of all the people who were participating, I think that we have been taking into account the interests of others, including small creators as well as large creators.

So, as I said earlier, I think it is really important as this process goes forward for you to hear from all manner of different creator communities and individuals and groups. One project of the sort that I tried to assemble really couldn't reach out to every particular community. And so we tried to have as broad a perspective as we could, while recognizing that this was just hopefully the start of a conversation rather than the end of a conversation.

Mr. DESANTIS. Very well.

The report, I think, focuses on copyright and the parameters thereof, really focusing on economic and utilitarian principles, not as much as it being kind of based in a property interest and property rights. And I guess, it seems to me, when the Founding Fathers talked about it, you know, they believed in the economic and utilitarian principles, but they believed that the property right was really what would drive economic benefits.

So do you think that your report kind of moves us away from that historical understanding?

Ms. SAMUELSON. No, actually, I think that our recognition that the utilitarian principle helps to define what the proper scope of a property right is, is as much a foundational principle of property law in the United States across the board. All different kinds of property have some limitations built into them, and I think that has been true for copyright.

Copyright has gotten somewhat broader in certain respects, and it has evolved over time, but I don't think that it is not a property right. I do think that it is a utilitarian-informed property right, as it should be.

Mr. DESANTIS. There was this article, I think it was in Politico, and it was a musician. He basically said that if some of what you were advocating was adopted, that you could have an individual just post a photo online, like a family photo or something that wasn't registered, and you could have a user just take that and use that for their commercial gain.

So do you agree? Is that true?

Ms. SAMUELSON. No, I don't believe it is true at all.

Mr. DESANTIS. And why not?

Ms. SAMUELSON. Well, because one of the things that we made very clear is that, to the extent that someone is commercializing

something that someone posts online, that that is actually an activity that copyright law would apply to. I think that is very clear from our report, especially the discussion about commercial harm.

Mr. DESANTIS. Okay. Well, thank you.

Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman from Florida.

The Chair recognizes the distinguished gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

And I want to thank all of the witnesses, who have enlightened us.

And I have gotten in the habit of waiting until last on our side to go, because I always am fascinated by some of the questions that get asked and some of the answers. I would have to say that the one that has fascinated me the most today is Ms. Samuelson's notion that we might be able to do this in 20 pages. And somebody in Europe apparently did this in 20 pages.

And I am kind of searching for a way forward here. So I am looking for either consensus on the 20-page notion or a repudiation of the 20-page notion.

Mr. Baumgarten, I think, wants to either affirm it or repudiate it.

Mr. BAUMGARTEN. Repudiate.

I am not one of those who beats the drum for simple solutions. The problems are too complex. I fear that a simple—

Mr. WATT. Okay. I got you, I got you.

Actually, I like simple solutions. I mean, the great beauty of the Constitution and the amendments was simplistic, but the great beauty of the Community Reinvestment Act actually is simplistic in the statement you—a financial institution should serve the community in which they live. Right? But the regulations that have been written to interpret that have gone into volumes now, and the court decisions to interpret the Constitution have gone into volumes now.

And our problem here in Congress is that we either have to write a law that covers every eccentricity, every nuance, or we have to write a general principle and delegate responsibility for the nuances to regulators. Then we get accused of, you know, delegating to people who have not been elected. You know, so we are kind of in a quandary here about how to move forward.

If there is anybody on this panel who actually agrees that we could do this in 20 pages, I would love to have you take a shot at it. Seriously. I am not being facetious here. Because I would love to see a copyright law that is encompassed in 20 pages.

But then the question I would raise is, who would enforce it? Who would interpret the general principles? And how would you move forward without just massive litigation if it were the courts doing it? Or if you gave the authority—the Copyright Office doesn't have any enforcement authority now. I mean, it is a wonderful office, but it can't smack anybody upside the head and write a decision and say, "You can't do this under the principles that exist."

So I am in this quandary. I mean, should we be giving more enforcement authority to somebody? Should we have regulators? I

mean, we have the FCC, so, I mean, they are kind of in their niche over there to do some of this.

But, Professor Samuelson, we have these simple principles. You say we have to build in flexibility. That was your—I wrote that down when you said it. My question is, how do we do this with simple principles, flexibility, without some other enforcement mechanism other than ending all the parties up in massive litigation?

Ms. SAMUELSON. Well, I think much of copyright law that I admire—and we talk about that in the first part of the report—is basically very simple principles that have proven to be——

Mr. WATT. But it took you 68 pages to write the article.

Ms. SAMUELSON. Well, yes, but I do actually——

Mr. WATT. I mean, I did look at the article. There are 68 pages of the article that you wrote.

Ms. SAMUELSON. But I think actually only about 10 of them distill down——

Mr. WATT. So you want to take me up on my offer, then——

Ms. SAMUELSON. I would, actually.

Mr. WATT [continuing]. To give me 20 pages. I mean, I am serious. I would——

Ms. SAMUELSON. Yes. I think——

Mr. WATT. I think the Committee would benefit from your conceptions on this panel of what the law should say and how we do this, build in principles, give it flexibility, and who would enforce it. That is my challenge.

Ms. SAMUELSON. Well, a lot of what causes copyright to be enforced now are the norms and practices of the people who engage in this activity. And——

Mr. WATT. But one of the reasons we are updating it is people are less and less abiding by those norms, especially users, who just think everything ought to be free, and they don't want to pay for anything.

Ms. SAMUELSON. Well, I don't know that that is always true. There is actually a study called Copy Culture that suggests that a lot of people who engage in some sharing actually are bigger purchasers of content than other people.

So I care as much, I think, as anyone in this room for developing a law of copyright that can be more widely respected. And it seems to me the more comprehensible it is, the more it focuses on normative principles, the more likely it is to breed respect. And that has been a driving goal of mine in this project.

Mr. WATT. Mr. Chairman, I know I am over my time, but I want to see if there is anybody else on the panel who wants to take me up on the 20-page challenge.

Seriously.

Ms. GASAWAY. Seriously. We will work with Pam on it.

Mr. GERVAIS. I am certainly happy to work with you and the Subcommittee.

Can I say in 10 seconds why I think this 20-page version that Professor Samuelson was showing you is a great idea? Essentially, it recognizes this: There are some uses that are exclusive uses that should be exploited only by the copyright holder. There are uses that should be entirely free, like fair use in this country. And then

there are uses in between that are subject to what we would call compulsory licensing, but they made them a special category.

And they clearly explain why certain users fit in all three, and I think that is—it may not be, legislatively speaking, a model we can use in terms of language, but the idea sounds very good.

Mr. WATT. How long do you all think it will take you to get me 20 pages? I am not—there is no—I mean, I am not putting pressure on you. I am just trying to get a ballpark idea of when we might expect something. I know you have law school to teach and—

Ms. SAMUELSON. That is true.

Mr. WATT. Especially in North Carolina. We want our lawyers down there to be taught well.

So, anyway, I will—

Mr. COBLE. The gentleman's time has expired.

Mr. WATT. I will yield back.

Mr. COBLE. I want to echo what Mel said.

I want to, first of all, thank the witnesses. You have been here for 3 hours.

I want to also express thanks to those in the audience. I did not detect anyone has been induced to sleep. So maybe it is not as dull and boring as my journalistic friend concludes.

This concludes today's hearing. Thanks to all for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 5:10 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Blake Farenthold, a Representative in Congress from the State of Texas, and Member, Subcommittee on Courts, Intellectual Property, and the Internet

While the Project adds great ideas to the debate, I think we need to consider whether reliable data exists to inform us about how the current copyright landscape is impacting not only the Internet and content industries but also our entire economy. That is why I ask to submit the National Academies National Research Council's recent study, *Copyright in the Digital Era*, into the record. This study makes an important finding—the current copyright debate “is poorly informed by independent empirical research.” More specifically, it points out that there is simply insufficient data to reach any sound conclusions about the impact of the digital age on our current copyright system.

As we move forward in conducting a comprehensive review of the copyright system in the digital age, our discussions (similar to discussions regarding patent policy) must be supported by credible empirical research. To generate reliable data, the study suggests a number of research projects such as case studies, international and sectoral comparisons, experiments, and surveys. Taking these actions will provide further insight on this debate and ensure that our policy decisions do not disturb the current balance between copyright protection for creators and flexible exceptions and limitations, which promote innovation and democratic discourse.

Testimony of
Future of Music Coalition
On
“A Case Study for Consensus Building: The
Copyright Principles Project”
Hearing
House Subcommittee on Intellectual Property,
Competition Policy and the Internet
May 16, 2013

Testimony of Future of Music Coalition

May 17, 2013

House Subcommittee on Intellectual Property,
Competition Policy and the Internet
2138 Rayburn Office Building
Washington, DC 20515

May 17, 2013

Dear Chairman Goodlatte, Congressman Quayle and members of the committee:

It is a privilege to submit the following testimony for the record in this initial hearing on matters relating to U.S. copyright law.

Future of Music Coalition (FMC) is a national nonprofit education, research and advocacy organization for musicians. For more than a decade, we have observed changes to traditional music industry business models, and sought to inform artists about what these changes could mean for their ability to reach audiences and grow their careers. With regard to copyright, FMC has long championed artists' ability to leverage their expression in the ways that make the most sense for their careers.

Clearly, the tremendous changes to the music business due to rapid technological shifts have impacted how musicians, songwriters and composers reach audiences and earn a living, but we are inclined to be optimistic about the future. From iTunes to Pandora to Spotify to YouTube, musicians have more ways than ever to make their music available through legal, licensed channels, and fans are able to enjoy access to huge catalogs of music, on demand and across devices.

Still, there is a lot to be done to ensure that artists are equitably, transparently and – where possible – directly compensated for the uses of their work. To meet these goals, it is necessary to examine how copyright functions in a digitally networked, increasingly globalized world. The much-used term “copyright reform” might better be thought of as “copyright optimization” — a deliberate approach towards harmonizing creator and

public interests. This is nothing less than a constitutional imperative, and one that those on all sides of the debate should have a vested interest in achieving.

After attending the Committee's hearing on May 15, we were struck by three reoccurring themes: (1) copyright debates, both current and past, are highly charged because there is so much at stake; (2) reform efforts suffer when stakeholders approach the problems with distrust and "sharp elbows," and; (3) the entire policymaking process lacks primary source data on the real-world impact of copyright on creators' ability to produce, disseminate and monetize their works. FMC agrees with all three of these takeaways, and offers this Committee any assistance needed to make progress on this important work. More specifically:

Including creators in the conversation

We welcome the Chairman's efforts to hold hearings on the state of U.S. copyright, and understand that this initial hearing is the beginning of a broader inquiry. However, we would encourage the Committee to take every effort to include creators in future hearings, as they are important stakeholders whose perspectives will serve to inform the process in crucial ways. Understanding the experiences of creators is essential to achieving copyright laws that can provide for continued investment in expression while ensuring that musicians and other artists have the necessary flexibility to exploit their work in a manner that best serves their interests.

With thirteen years of organizing and curating panel discussions for our own Future of Music Policy Summits, we not only appreciate the value of bring diverse voices together to tackle big problems, but we also have a good sense of stakeholders' positions on these key issues. FMC is happy to help this Committee identify musicians, performers, composers, or other stakeholders who will bring a reasonable perspective to the conversation.

Primary source data collected from musicians and composers

During Thursday's hearing, a few members and witnesses cited the National Academy of Science's recent report, *Copyright Policy in the Digital Era: Building Evidence for Policy*.¹ "Acknowledging that a lack of data has handicapped research on copyright policy, the report calls for the collection, organization, and availability of data associated with the activities of various stakeholders and end-user populations."²

FMC absolutely agrees with this report's call for more data to inform the policymaking process. More so, we have primary source data to contribute to the effort.

In 2010, FMC launched Artist Revenue Streams – a multi-method, cross-genre examination of whether and how musicians' revenue streams are changing in this new music landscape.

The impetus for this particular research project stems from the same sentiment that underscores both the NAS report and this Committee's own work: it's quite clear that new technologies such as digital music stores, streaming services and webcasting stations have simultaneously reduced the cost barriers and increased musicians' access to the marketplace, but how have these changes impacted musicians' ability to *generate revenue* based on their creative work? Almost all existing analyses of the current music industry landscape rest purely on assumptions that they have improved musicians' bottom lines, or on top-level assessments of the music industry based on traditional metrics: number of albums sold, number of spins on radio, even stock price valuations.

Since 2010, the Artist Revenue Streams project has collected information from a diverse set of US-based musicians about the ways that they are currently generating income from

¹ "Copyright in the Digital Era: Building Evidence for Policy." *The National Academies Press*. National Academy of Sciences, 2013. Web. 17 May 2013.

² NAS/NRC Issues Report on Copyright in the Digital Era, email from the NAS announcing the report's release, May 2, 2013.

their recordings, compositions, performances or brand, and whether this has changed over the past five years.

We used three data collection methods simultaneously: in-depth interviews with more than 25 different musician types; financial snapshots that show individual artists' income and expenses in any given year and across time; and, a wide ranging online survey that collected rich data from over 5,300 US-based musicians and composers in fall 2011. Findings and reports from this project can be found at <http://money.futureofmusic.org>.

We believe that this qualitative and quantitative data serves as a vital benchmark for understanding the shifting revenue streams for musicians. For example, this information — and that collected going forward — can help provide a realistic picture of musician earnings from both the sound recording copyright and the composition copyright, as well as a sense of how these rights impact direct and indirect compensation, depending on various roles and career profiles. Further extrapolations may be possible, such as the degree of artist leverage within specific compensation structures (for example, collective vs. direct licensing on digital music services) and copyright's underlying incentive to the creation of new works. We welcome the Committee's questions regarding the existing dataset, or about further evidence that could inform policymaking.

CCP and key issues

Given our abiding interest in how copyright law impacts artist compensation and the development of a legitimate digital marketplace, we read with much interest the report from the Copyright Principles Project (CPP), as well as the testimony of its members, several of whom were witnesses at Thursday's hearing. We share the basic view that the copyright debates have become unnecessarily contentious, and often fail to capture the complexities — or even the fundamental realities — of today's creative landscape. We welcome any efforts to engender greater respect and civility in these conversations.

The Copyright Principles Project touched on several areas we see as impacting the broader creative sector, and musicians and composers in particular. The following are either issues touched on in the CPP report, or areas that we at FMC believe worthy of further investigation by the Committee.

Voluntary Rights Database(s): Several FMC associates have been working diligently to bring stakeholders together to establish global databases for music.³ This would make it much easier to know who owns both the composition and the sound recording, thereby streamlining licensing and putting more money in rightsholders' pockets, artists included. We recognize that compulsory registries are not in step with our international treaty obligations. However, we maintain that the establishment of *voluntary* rights databases is an important prerequisite to an efficient, global licensing system. We believe that the US policymakers — Congress, the Copyright Office and beyond — should examine current registry efforts and help nudge US rightsholders towards making them a reality.

Licensing and Leverage: We often hear complaints from artists and independent labels about the lack of transparency regarding payments on emerging digital services, particularly those that operate under an “interactive” statutory designation. Some of this could be because the market for streaming on-demand is not yet mature; greater transparency may result from market pressure and compensation may increase along with consumer adoption of these platforms. Regardless, there is likely more to be done to ensure transparent, equitable compensation for creators, and Congress may have a role to play. Due to the contours of current copyright law, and depending on the platform or use, the mechanisms for artist compensation look very different. A review of §114 and §115 of the Copyright Act should be undertaken to ensure that the statutory language enables, not inhibits, artist compensation and the promulgation of more legal, licensed services. The ability to more efficiently bring large catalogs of music to the marketplace is one part of the picture. Also important are compensation structures that provide for timely, equitable and transparent payment to artists. One model that provides for streamlined

³ See Global Repertoire Database, <http://www.globalrepertoiredatabase.com/> (last visited May 16, 2013); *Copyright and Related Rights*, WIPO, <http://www.wipo.int/copyright/en/> (last visited May 16, 2013). See NARM's *Metadata Summit* agenda and speakers (last visited May 16, 2013).

licensing, efficient enforcement and clear creator splits is the public performance right for digital broadcasts, as managed by SoundExchange. It may be time to look more closely at the leverage and transparency afforded by such licensing schemes as a potential framework for other digital environments. We will stop short of advocating for an expanded statutory license for broader classes of service, but suggest that all options should be open to evaluation.

Orphan Works: One of the more persistent issues in the recorded music industry is in knowing what material can legally be used for new purposes. While we see functional rights databases as necessary to solving many issues of assignment, there is still the problem of how to treat works whose copyright owners cannot be located. We believe in the ability of the public and other parties to access and build upon works that are essentially abandoned, but have the strong preference that authors are eligible for some limited remedies in the instance that they are locatable but the owner of the copyright is not. By aligning the interests of creators and new users, this “low hanging fruit” of copyright reform could finally happen. We encourage the respective agencies and Congress to work with stakeholders to implement a solution that allows for lawful access to more works while recognizing the needs of authors/creators. Our recommendations for how to achieve this outcome can be found in our comments to the Copyright Office in its Inquiry Concerning Orphan Works and Mass Digitization.⁴

Closing Loopholes: Previous written testimony offered to this Committee around its “Music Licensing, Part 1” hearing in November 2012 outlined our take on “parity” among broadcast-type services. While we will not go into detail here, we would like to remind the Committee that true parity requires, at the very least, closing the loophole in copyright law that exempts terrestrial radio broadcasters from compensating performers and sound copyright owners for the over-the-air performance of their recordings. FMC stands with many other artist and music industry organizations in urging Congress to adopt a public performance right for sound recordings, to ensure that American musicians

⁴ “Future of Music Coalition.” *FMC Orphan Works Filing with US Copyright Office*. Future of Music Coalition, 04 Feb. 2013. Web. 17 May 2013.

are fairly compensated when their recordings are used, whether broadcast in the US or abroad.

Safe Harbors and Third-Party Liability: We understand that there is a great deal of debate around the “safe harbor” provisions and notice-and-takedown requirements outlined in §512 of the Act. This issue is surely the Pandora’s box of copyright, and there are legitimate arguments to be made by stakeholders including rightsholders, artists, services and the public. Congress must closely consider issues of third-party liability in light of court decisions and statutory intent, but we caution the Committee from being overzealous in applying remedies that would inhibit those innovations that have come to prove so crucial to today’s legitimate digital marketplace.

FMC remains committed to advocating for copyright laws that reflect the balance between creator and public benefit. We offer our organization as a resource in any negotiations and encourage policymakers to include musicians in these important conversations.

Casey Rae
Deputy Director
Future of Music Coalition



May 16, 2013

Honorable Howard Coble
Chairman of the Subcommittee on
Courts, Intellectual Property, and the
Internet
U.S. House Committee on the Judiciary
2188 Rayburn HOB
Washington, DC 20515

Honorable Mel Watt
Ranking Member of the Subcommittee on
Courts, Intellectual Property, and the
Internet
U.S. House Committee on the Judiciary
2304 Rayburn HOB
Washington, DC 20515

Dear Chairman Coble and Ranking Member Watt:

The Digital Media Association (“DiMA”) and its member companies are pleased to learn of the House Judiciary Committee’s plans to conduct a series of hearings on the subject of copyright reform. A comprehensive review of the copyright law is due. The process not only promises to shed light on those provisions of existing law that need to be modernized, but it will also serve to highlight provisions that work well.

Many of the provisions that require updating are of importance to online distributors of digital content, and the problems attendant to these outmoded provisions are not new. Since its inception, DiMA has aggressively advocated for music licensing reforms that will provide online music stores and Internet radio service providers with the ability to continue to innovate in ways that reward creators while also responding to consumer demands. In the context of online video distribution, over the last few years we’ve routinely looked for ways to improve and update existing copyright law in a manner that would allow new digital video service providers to better compete with some of the more well-established, legacy video services.

Today’s hearing on the recent report produced by members of the Copyright Principles Project (“CPP”) has the potential to lay the groundwork to develop a Copyright Act that is truly ready for the digital age. Of particular significance in this regard are the CPP’s general principles that:

Letter to Hon. Coble and Hon. Watt, May 16, 2013.

- Copyright law should encourage and support the creation, dissemination, and enjoyment of works of authorship in order to promote the growth and exchange of knowledge and culture, by embodying rules that are clear and sensible, yet flexible in a changing environment - and by encouraging the provision of capital and organization needed for both the creation AND the dissemination of creative works;
- Copyright law should facilitate the provision of capital and organization by providing a set of rights over which parties can reliably transact, including clear and sensible rules for identifying which works and parts of protected works can be protected by copyright law, in whom copyright ownership initially vests, and which specific rights the copyright owner enjoys;
- Copyright law should set boundaries on the rights of copyright owners and on remedies for infringement, with clear articulation of sensible rules regarding limitations on copyright owners' power over uses of creative works that correspond to the purposes of copyright and that take into account the reasonable needs and interests of users of copyrighted works;
- Copyright law should support opportunities for innovation and competition in technologies for disseminating and experiencing creative works and recognize that new technologies create new opportunities to transact and new opportunities to distribute and use copyrighted works.; and
- Recognizing that whether a particular type of use should be within the scope of copyright's exclusive rights requires balancing the sometimes-competing interests of creators, distributors, consumers, and the public.

Needless to say, the aforementioned list of policy principles is not exhaustive. These are however, a few concepts that the CPP highlighted that are worthy of prioritization.

DiMA and its member companies stand ready and willing to assist Congress as it seeks to update a law that no longer comports with the needs of the current economy. If you have any questions regarding this correspondence or need any additional information, please do not hesitate to contact me at (202) 639-9508.

Sincerely,
/s/ Lee Knife
Executive Director, DiMA

cc: Members of the Subcommittee on Courts, Intellectual Property, and the Internet

