

# The Life Cycle of Copyright Law: A Push for Copyright Reform

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## I. INTRODUCTION

Copyright law can be effectively compared to the life cycle of a painting. Both begin with an original work that then experiences changes throughout its lifetime caused by damage and aging.<sup>1</sup> Depending on the materials used and the amount and quality of alterations the painting has undergone, the damage can cause a distorted view of an original painting.<sup>2</sup> However, if a museum that has greater resources and access to technical equipment realizes the value of a painting, then an opportunity may arise for art historians, conservators, and scientists to restore the painting and essentially bring it back to life.

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1. Isabel Thottam, *The Cost of Conservation and Restoration*, ART BUS. NEWS (Dec. 7, 2011), <http://artbusinessnews.com/2015/12/the-cost-of-conservation-and-restoration/>.

2. *Id.*

The restoration process is “an art form in itself” and requires “fillers, colors, or coatings to reconstitute a missing component of the art.”<sup>3</sup> However, controversies may arise between those involved in the restoration project as there are multiple techniques that can be used.<sup>4</sup> For example, the “American method” focuses on returning a painting to its intended appearance by removing varnish, while the “European school” method may focus on a stricter cleaning of a painting.<sup>5</sup> Regardless of the method, restoration is expensive as well as time-consuming; for example, “depending on a piece’s condition, the extent of the damage, and the painting’s size,” restoration could take months or even years.<sup>6</sup> Furthermore, multimedia works created by contemporary artists are far more difficult to care for than traditional works.<sup>7</sup> However, if quality conservation techniques are used by careful and experienced conservators, there will be no loss in value.<sup>8</sup> Ultimately, renewing a work can inspire other artists and attract new audiences.

Similar to a painting’s lifecycle, copyright law has arguably been degraded due to age and human interaction. There is great value in having a law that can properly protect and enforce an authors’ rights, while effectively furthering creativity. The purpose of this Comment is to advocate reform for the Copyright Act of 1976 in order to meet the needs of society. First, the Comment will discuss the deterioration of the current Copyright Act and the implications of having an out-of-date copyright law. Second, the Comment will include an analysis of different mechanisms that can be used to restore balance in the copyright community. Finally, the Comment will provide suggestions for Congress to effectively “take on” copyright reform. Congress must begin copyright reform now, or society will suffer both culturally and economically.

## II. STRUCTURAL AND AESTHETIC DAMAGE OF ORIGINAL WORK

The Copyright Act of 1976 is a byproduct of “a congressional bipartisan effort to create an intellectual infrastructure.”<sup>9</sup> Congress derives its authority to enact copyright legislation from Article I of the United

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3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. David H. Donaldson, Jr., *After 40 Years, Copyright Law Needs to Be Tweaked*, UT NEWS (Jan. 1, 2008), <http://news.utexas.edu/2018/01/08/after-40-years-copyright-law-needs-to-be-tweaked>.

States Constitution.<sup>10</sup> Article I states that the purpose of copyright law is “[t]o promote the progress of science . . . by securing for limited times to authors . . . the exclusive right to their respective writings.”<sup>11</sup> During the specified amount of time, an author maintains exclusive control over their work.<sup>12</sup> After the limited time expires, the work enters the public domain unless the author renews its ownership in the protected work.<sup>13</sup> The public domain is a designation for creative works that are not subject to copyright law and can be used by anyone.<sup>14</sup> This utilitarian philosophy drives Article I by addressing the best way to advance public welfare is to provide incentives to individuals through the promise of personal gain.<sup>15</sup> In other words, “[t]he immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor . . . [b]ut the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”<sup>16</sup>

Copyright protection has, in fact, benefitted the United States by stimulating its economy and enriching its culture.<sup>17</sup> The ability to legally protect a work of authorship has encouraged people in a range of industries, like the entertainment industry, to create new works.<sup>18</sup> For example, the creation and production of books, motion pictures, television, music, software, and video games are affected by copyright law.<sup>19</sup> Additionally, manufacturers and sellers of said copyrighted works also benefit from copyright law.<sup>20</sup> These industries amount to 7.95% of employment in the United States, and adds \$2.1 trillion to the United States gross domestic product, which amounts to 11.69% of the economy.<sup>21</sup> Not only are copyrighted works responsible for employing almost 11.4 million people in the United States, but the average annual

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10. U.S. CONST. art. 1, § 8, cl. 8.

11. *Id.*

12. 17 U.S.C. § 106 (2002).

13. *Id.* § 302.

14. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

15. *See Mazar v. Stein*, 347 U.S. 201, 219 (1954).

16. *Aiken*, 422 U.S. at 156.

17. Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 315-44 (2013), [http://www.copyright.gov/docs/next\\_great\\_copyright\\_act.pdf](http://www.copyright.gov/docs/next_great_copyright_act.pdf); Paul Keller, *New Study: Ever More Complex Copyright Is Holding Back Creators*, INT’L COMMUNIA ASS’N (Feb. 19, 2018), <http://www.communia-association.org/2018/02/19/new-study-ever-complex-copyright-holding-back-creators/>.

18. Pallante, *supra* note 17; *see also* Keller, *supra* note 17.

19. STEPHEN E. SIWEK, INT’L INTELLECTUAL PROP. ALL., COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2016 REPORT 4 (2016), <http://iipa.org/files/uploads/2018/01/2016CpyrtRpt-Full-1.pdf>.

20. *Id.* at 2.

21. *Id.*

compensation exceeds the U.S. average annual wage by 21%.<sup>22</sup> Besides being essential to several money-making industries, copyrighted works enrich society by facilitating public access to knowledge and entertainment.<sup>23</sup> For example, consider a “normal” conversation you might have with a friend, such as recommending a book, discussing a recent movie or television show, or complaining about a boring slide-show in a meeting. These are all topics related to works protected by copyright law.<sup>24</sup> Copyrighted works help to educate as well as be a source of interest and discussion; however, an increase in accessible copyrighted works has diminished Congress’s capacity to regulate, enforce, and protect copyrighted works under the current Copyright Act.<sup>25</sup>

#### A. *Determining Factors of Distortion of Copyright Law*

It has been over forty years since the Copyright Act of 1976 was passed. The Act—a revision of the Copyright Act of 1909—was enacted in response to technological developments and intended by Congress to align the United States with international copyright law.<sup>26</sup> The reform process, however, began in the 1950s, so even though the Act was enacted in 1976, many of the concepts reflect a 1950s mindset.<sup>27</sup> A former director of the Copyright Office, also referred to as the Register, has even “acknowledge[d] the shortcomings of the new law, calling it ‘a good 1950 copyright law.’”<sup>28</sup> For a piece of legislation that was already outdated at its ratification, the introduction of the Internet practically antiquated the Copyright Act of 1976 overnight.

The introduction of global digital networks, along with various other computing and communications technologies, caused a “radical transformation of public access to information.”<sup>29</sup> These networks affect

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22. *Id.*

23. Keller, *supra* note 17.

24. 17 U.S.C. § 102 (2002).

25. SIWEK, *supra* note 19, at 1.

26. *Copyright Timeline: A History of Copyright in the United States*, ASS’N RES. LIBR., <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.Ws0xLNMBPBI> (last visited Mar. 8, 2018).

27. THE U.S. COPYRIGHT OFFICE, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, ch.1:1 (1977), <http://www.copyright.gov/reports/guide-to-copyright.pdf>.

28. Sarah Laskow, *Copyright’s New ‘New Law’: Maria Pallante’s Vision for Copyright Reform*, COLUM. JOURNALISM REV. (Apr. 5, 2013), [http://archives.cjr.org/cloud\\_control/maria\\_pallantes\\_vision\\_for\\_cop.php](http://archives.cjr.org/cloud_control/maria_pallantes_vision_for_cop.php).

29. Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1177 (2010).

the way works are created, published, and disseminated.<sup>30</sup> The Copyright Act of 1976 largely regulates copyright industries; however, the Internet enables persons, other than the author, to not only use a copyright owner's work, but also allows them to become creators themselves.<sup>31</sup>

In response to these technological advances, Congress enacted the Digital Millennium Copyright Act (DMCA) of 1998 to address gaps in the Copyright Act of 1976.<sup>32</sup> When the DMCA was originally passed, there were less than three million webpages.<sup>33</sup> Since 1998, there are over 4.5 billion webpages with new and transformative technological developments including social media platforms, peer-to-peer file sharing, and online streaming of videos and music.<sup>34</sup> Former Register of the Copyright Office Maria Pallante commented on the effectiveness of the DMCA in 2018, stating, "That's a long time in Internet years."<sup>35</sup> Thus, "the law is showing its age,"<sup>36</sup> with the DMCA rapidly becoming ill-equipped to regulate copyrighted works in an even more progressive digital age.<sup>37</sup>

### B. *Subsequent Effects of Deterioration*

The original draft of the Copyright Act of 1976 was only fifty-seven pages with seventy-three sections.<sup>38</sup> Today, it is 280 pages with 137 sections,<sup>39</sup> because Congress continues to add amendments to the Act in the face of technological advancements.<sup>40</sup> This has resulted in an Act that is merely "patched up," instead of a consistent overhaul, so the current Act lacks clarity and is difficult to interpret.<sup>41</sup> Furthermore, it is unlikely that an average person will have the knowledge, access, or understanding to read the dense legislation. The consequence of having an amended Act is

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30. *Id.*

31. Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH. L. REV. 551, 555.

32. *Copyright Timeline: A History of Copyright in the United States*, *supra* note 26.

33. Ben Richmond, *2018 Is the Last Year of America's Public Domain Drought*, MOTHERBOARD (Jan. 1, 2018, 9:00 AM), [http://motherboard.vice.com/en\\_us/article/xw4gwd/public-domain-drought](http://motherboard.vice.com/en_us/article/xw4gwd/public-domain-drought).

34. Samuelson, *supra* note 29; *see also* Donaldson, *supra* note 9.

35. Laskow, *supra* note 28.

36. *Id.*

37. Mark Schultz, Opinion, *Digital Age Changes All the Rules on Intellectual Property*, HILL (Nov. 16, 2017), <http://thehill.com/opinion/finance/358963-digital-age-changes-all-the-rules-on-intellectual-property>.

38. Pallante, *supra* note 17, at 338-39.

39. *Id.*

40. *See id.*

41. *See id.*

that authors may decide against creating or licensing work to avoid violating the Act's complex guidelines.<sup>42</sup> If the copyright legislation hinders the production of creative works, then Congress is failing to uphold the constitutional purpose of protecting the arts and sciences.

Users of copyrighted works are not the only people frustrated with the current copyright law. In many instances courts have struggled to interpret the statutory language of the Copyright Act of 1976, stating the need for legislative clarification in order to rule on an issue or have Congress interpret that issue.<sup>43</sup> For example, some courts have struggled with addressing the issue of streaming services, like Spotify.<sup>44</sup> One of the primary issues is whether a song that is streamed online is considered a public performance<sup>45</sup> (like listening to a song on the radio) or considered a reproduction of an original work since the song can be played repeatedly and on demand (like owning a physical record).<sup>46</sup> The Court of Appeals for the Seventh Circuit grappled with the issue associated with streaming services in *Flava Works Inc. v. Gunter*, stating, "Legislative clarification of the public-performance provision of the Copyright Act would therefore be most welcome."<sup>47</sup>

During the lifecycle of a painting, damage to the piece can cause the original work to be unrecognizable. Art conservators categorize damage as either structural or aesthetic.<sup>48</sup> Structural damage or deterioration can be the result of its environment or human interaction, while aesthetic

42. *Id.*

43. Pallante, *supra* note 17, at 322-23; *see, e.g.*, *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30-35 (2d Cir. 2012); *Columbia Pictures Indus., Inc. v. Fung*, 2009 U.S. Dist. LEXIS 122661, at \*10-11 (C.D. Cal. Dec. 21, 2009); *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121, 139 (2d Cir. 2008); *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 677 (S.D.N.Y. 2011); *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 490 (1st Cir. 2011), *cert. denied*, 132 S.Ct. 2431 (2012); *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 761 (7th Cir. 2012).

44. Samuelson, *supra* note 29, at 1177.

45. *What Is a Public Performance of Music and What Is the "Performing Right"?*, BMI, [http://www.bmi.com/faq/entry/what\\_is\\_a\\_public\\_performance\\_of\\_music\\_and\\_what\\_is\\_the\\_performing\\_right1](http://www.bmi.com/faq/entry/what_is_a_public_performance_of_music_and_what_is_the_performing_right1) (last visited Oct. 5, 2018) ("A 'public performance' of music is defined in the U.S. copyright law to include any music played outside a normal circle of friends and family. Songwriters, composers, and music publishers have the exclusive right to play their music publicly and to authorize others to do so under the copyright law. This is known as the Performing Right . . . . The same restrictions apply to music that is purchased, broadcast, or live musicians that are hired to play in a public setting. Every business or organization must receive permission from the copyright owners of the music they are playing before playing it publicly.")

46. *See* Pallante, *supra* note 17, at 322-23.

47. *Flava Works*, 689 F.3d at 761; *see also* Pallante, *supra* note 17, at 338-39 (noting that Marybeth Peters, former Register of the Copyright Office, stated that at times she was confused by the Copyright Act, claiming it "reads like the tax code, and there are sections that are incomprehensible to most people and difficult to me").

48. *Flava Works*, 689 F.3d at 761.

damage is the consequence of the aging of a work, for example discoloration or paint flaking.<sup>49</sup> Similar to the lifecycle of a painting, the Copyright Act of 1976 has reached a point where it is no longer recognizable in the sense that the purpose of the law has become convoluted.<sup>50</sup> There is “structural damage” caused by the environment and human interaction (i.e., the advancement of technology increasing accessibility to copyrighted works and the burst of amateur creators).<sup>51</sup> Furthermore, the Copyright Act has experienced aesthetic damage as additional amendments and technological advancements have rendered it obsolete.<sup>52</sup> Since its enactment, the Copyright Act has become legally ineffective due to its size and complexity—it is no longer expressive of its original intent.<sup>53</sup> It is time for Congress to develop a restoration plan.

### III. DETERMINING THE STRATEGY FOR RESTORATION

Just as controversies arise out of what techniques to implement when restoring a painting, controversies arise in determining the best approach to enacting a new copyright law because of the different individuals involved, as there are various stakeholders promoting a new law.<sup>54</sup> Stakeholders with an interest in copyright reform fall on opposite sides—those that advocate for the authors and those that advocate for the public.<sup>55</sup> “In one camp are tech and Internet companies that seek exemptions to regulations in their efforts to spark innovation. On the other side are filmmakers, authors, musicians and television producers who want to limit unauthorized content and be paid for their creativity.”<sup>56</sup> However, the advancement of digital technology has introduced a third group of ordinary persons who push for copyright reform as users and creators.<sup>57</sup> The current copyright laws—the Act of 1976 and the DMCA—have failed these groups as they are outdated and ill-equipped to handle technological

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49. Thottam, *supra* note 1.

50. *Id.*

51. *Id.*

52. *Flava Works*, 689 F.3d at 761.

53. *Id.*

54. See Samuelson, *supra* note 31, at 555; Pallante, *supra* note 17, at 338-39; Peggy McGlone, *Songwriters Say This Federal Bureaucrat Championed Their Rights. Now She's Lost Her Job*, WASH. POST (Nov. 7, 2016), [http://www.washingtonpost.com/entertainment/music/with-change-at-the-top-of-copyright-office-a-battle-breeds-over-free-content/2016/11/07/a8c0b140-a4ea-11e6-8042-f4d11c862d1\\_story.html?utm\\_term=.ef9bcab85f72](http://www.washingtonpost.com/entertainment/music/with-change-at-the-top-of-copyright-office-a-battle-breeds-over-free-content/2016/11/07/a8c0b140-a4ea-11e6-8042-f4d11c862d1_story.html?utm_term=.ef9bcab85f72).

55. See McGlone, *supra* note 54.

56. *Id.*

57. Samuelson, *supra* note 31, at 555.

advances brought on by the digital age.<sup>58</sup> Internet and technology companies rely on access to free information as well as regulatory exemptions in order to stimulate innovation.<sup>59</sup> Though, to an extent, licensed works hinder a company's efficiency.<sup>60</sup> For example, Google, in 2016, received over 900 million takedown requests, which interrupted its business because the company had to distribute man power to answer every request.<sup>61</sup> The purpose of copyright protection is to promote innovative ideas by benefiting both copyright holders and the public; therefore,

[a] well-functioning copyright law [should] carefully balance[] the interests of the public in access to expressive works and the sound advancement of knowledge and technology, on the one hand, with the interests of copyright owners in being compensated for uses of their works and deterring infringers from making market-harmful appropriations of their works, on the other.<sup>62</sup>

Two major advocates of copyright reform, Maria Pallante and Pamela Samuelson, took on the task to change the current Copyright Act into a well-functioning tool.<sup>63</sup> Pallante was a champion for all copyright owners, including artists, filmmakers, authors, musicians, and television producers.<sup>64</sup> Samuelson argued for a more lenient copyright law that granted better access to information in order to benefit Internet and technology companies.<sup>65</sup> Many of the mechanisms the two advocates suggested to update the Copyright Act were the same.<sup>66</sup> A couple of the suggestions were to adjust the current copyright term and alter the language in order to make the law easier to understand by lay persons.<sup>67</sup> However, both Pallante and Samuelson differed on who would be viewed as the primary benefactor.<sup>68</sup> Unfortunately, both of these women no longer have a platform to implement the changes they desired.<sup>69</sup>

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58. Schultz, *supra* note 37.

59. McGlone, *supra* note 54.

60. Schultz, *supra* note 37.

61. *Id.*

62. Samuelson, *supra* note 29, at 1176.

63. Pallante, *supra* note 17, at 338-39; Samuelson, *supra* note 31, at 555.

64. Jeff John Roberts, *U.S. Copyright Office Is in Turmoil Amid a Firing and Lobbying Controversy*, FORTUNE (Oct. 27, 2016), <http://fortune.com/2016/10/27/copyright-office-pallante/>; see Pallante, *supra* note 17, at 339-40.

65. See Samuelson, *supra* note 31, at 555; Samuelson, *supra* note 29.

66. See Pallante, *supra* note 17; Samuelson, *supra* note 31.

67. See Pallante, *supra* note 17; Samuelson, *supra* note 31.

68. See Pallante, *supra* note 17, at 336-37; Samuelson, *supra* note 31, at 555.

69. See *Project to "Restate" Copyright Law Under Scrutiny*, AUTHORS GUILD (Jan. 31, 2018), <http://www.authorsguild.org/industry-advocacy/project-estate-copyright-law-scrutiny/> [hereinafter *Project to "Restate"*]; Roberts, *supra* note 64.

A. *Copyright Reform Under Maria Pallante*

On Friday, October 21, 2016, Pallante, Register of the Copyright Office, arrived at work to find she no longer had access to the Library of Congress's computer system.<sup>70</sup> Her access had been revoked by the Librarian of Congress, Carla Hayden.<sup>71</sup> The Copyright Office is a subdivision of the Library of Congress, so as Librarian, Hayden appoints the Register, maintains access to the Library's internal computer system, and acts as supervisor to all Library of Congress's employees.<sup>72</sup> Therefore, by preventing Pallante's access to the system, Hayden acted within her authority.<sup>73</sup> Hayden, who had spoken to members of Congress and top business trade organizations about her decision, announced that Pallante would be reassigned as "senior adviser."<sup>74</sup> This reassignment was essentially a demotion, so Pallante declined the offer and resigned the following Monday.<sup>75</sup>

In 2013, when Pallante was the Register, she addressed Congress in a speech entitled, "The Next Great Copyright Act."<sup>76</sup> In her speech, Pallante stated: "[T]he need for comprehensive review and revision of the U.S. copyright law, identif[ies] the most significant issues, and suggest[s] a framework by which Congress should give weight to the public interest, which includes the interest of authors[, and] . . . the necessary evolution of the Copyright Office itself."<sup>77</sup>

Pallante recommended that legal streaming, public performance, orphan works, collective licensing, first sale rights, incidental copies, and statutory damages included in the Copyright Act should be reviewed.<sup>78</sup> In her analysis, Pallante utilized several interest groups that have been hindered by the inaccessibility of the Act, including "[the] authors who don't know they're supposed to register, libraries, archives, people with

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70. Daniel Sanchez, *Is Google Behind the Recent Firing at the U.S. Copyrights Office?*, DIGITAL MUSIC NEWS (Oct. 24, 2016), <http://www.digitalmusicnews.com/2016/10/24/pallante-dismissed-copyrights-office-google/>.

71. David Post, *Murder (or Not) at the Library of Congress?*, WASH. POST (Oct. 31, 2016), [http://www.washingtonpost.com/news/voikh-conspiracy/wp/2016/10/31/murder-or-not-at-the-library-of-congress/?noredirect=on&utm\\_term=.1d301f48b022](http://www.washingtonpost.com/news/voikh-conspiracy/wp/2016/10/31/murder-or-not-at-the-library-of-congress/?noredirect=on&utm_term=.1d301f48b022).

72. Sanchez, *supra* note 70.

73. 17 U.S.C. § 701 (1998).

74. McGlone, *supra* note 54.

75. Letter from Maria A. Pallante, Registrar of Copyright Office, to Dr. Carla Hayden, Librarian of Congress (Oct. 24, 2016) (Letter of Resignation).

76. Corynne McSherry, *2013 in Review: The Next Great Copyright Act?*, ELECTRONIC FRONTIER FOUND. (Dec. 26, 2013), <http://www EFF.ORG/deeplinks/2013/12/next-great-copyright-act>.

77. Pallante, *supra* note 17, at 315.

78. Laskow, *supra* note 28.

print disabilities, educational institutions, courts that are ‘doing legal gymnastics’ in order to apply 20th century laws to 21st century problems, [and] startup tech companies that don’t know what they can do with other people’s content.”<sup>79</sup>

Pallante envisioned a copyright law that would be “forward thinking but flexible.”<sup>80</sup> As Register, she had hoped to “modernize [the] copyright system to the benefit of all, including the structure, services, and authority of the Copyright Office.”<sup>81</sup> She urged Congress to review the exceptions and limitations, enforcement tools, licensing schemes, and registration system to reflect society’s current and future technological advancements.<sup>82</sup> She requested that Congress grant the Copyright Office more autonomy by increasing its regulatory role from a mere administrative body.<sup>83</sup> Pallante also offered advice to Congress on how to undertake the drafting of a new Copyright Act, highlighting the fact that Congress does not have to start from scratch.<sup>84</sup> She recommended Congress take its time to “legislate carefully in response to technological innovation rather than in real time” and to consider lower courts’ frustrations.<sup>85</sup> Pallante encouraged Congress to consider the Act’s “shortcomings” in order to draft a document that will not so easily become obsolete.<sup>86</sup> Most importantly, she advocated owners’ rights for “a copyright that does not provide for authors would be illogical—hardly a copyright law at all . . . [a]nd it would not deserve the respect of the public.”<sup>87</sup>

As Register, Pallante pushed for the cooperation of Congress and industry stakeholders towards a copyright reform that could benefit both owners and users.<sup>88</sup> Owners and authors called her firing “a major affront to copyright.”<sup>89</sup> In response to Pallante’s demotion and subsequent resignation, Don Henley of the Eagles declared it to be “an enormous blow,” and several members of Congress made known their

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79. Laskow, *supra* note 28; *see* Pallante, *supra* note 17.

80. Pallante, *supra* note 17, at 323.

81. Letter from Maria A. Pallante, *supra* note 75.

82. Pallante, *supra* note 17, at 324.

83. *Id.* at 341-42.

84. *See id.*

85. *Id.* at 344.

86. *See id.* at 344.

87. *Id.* at 340.

88. Dina Lapolt, Opinion, *The Copyright Office: Our Bastard Stepchild Six Times Removed*, HILL (Feb. 27, 2015), <http://thehill.com/opinion/op-ed/234035-the-copyright-office-our-bastard-stepchild-six-times-removed>.

89. McGlone, *supra* note 54.

disappointment by stating that it “underscore[d] the long-standing challenges’ of housing the Copyright Office in the Library of Congress.”<sup>90</sup>

The timing of Pallante’s demotion, which was only six weeks after Hayden accepted the position of Librarian, caused speculation.<sup>91</sup> Speculators within the entertainment industry believed that the decision was a “political ploy” concocted by Google and other Silicon Valley corporations.<sup>92</sup> This belief originated from the fact that Pallante had a role in opposing various Google-sponsored legislation; thus, Google must have persuaded Hayden to fire her.<sup>93</sup> Those speculators called on the Senate to investigate the matter, claiming that Pallante’s opposition of Google was proof that Hayden had anti-copyright bias.<sup>94</sup> In comparison, some argued her firing was the result of an inefficient use of taxpayers’ dollars.<sup>95</sup> While others claimed Pallante had turned the Copyright Office into a “captured agency.”<sup>96</sup> Under the captured agency claim, individuals believed that Pallante advocated solely for owners’ rights by pushing the entertainment industry’s agenda, in effect disregarding the interests of libraries, archives, and the public.<sup>97</sup> Lastly, some theorized that it was personal—that Pallante and Hayden simply did not like each other—due to “previous statements made by Pallante to the effect that the Register position was not subordinate to the Librarian.”<sup>98</sup>

The above conspiracy theories seem to undermine the integrity of an intelligent and well-respected woman in a complicated field. It is possible

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90. *Id.*

91. Post, *supra* note 71.

92. Sanchez, *supra* note 70.

93. McGlone, *supra* note 54.

94. *Who Fired Maria Pallante? Groups Call for Senate Oversight Investigation into Pallante Firing*, ARTIST WATCH (Oct. 26, 2016), <http://artistrightswatch.com/2016/10/26/music-answersnow-who-fired-maria-pallante/?platform=hootsuite>; see also McGlone, *supra* note 54.

95. See Mike Masnick, *Newly Leaked Documents Expose Stunning Waste and Incompetence at the Copyright Office*, TECHDIRT (Apr. 3, 2017), <http://www.techdirt.com/articles/20170401/23571937059/newly-leaked-documents-expose-stunning-waste-incompetence-copyright-office.shtml>.

96. *Captured Agency*, GLOSSARY POL. ECON. TERMS, [http://www.auburn.edu/~johnspm/gloss/captured\\_agency](http://www.auburn.edu/~johnspm/gloss/captured_agency) (last visited Oct. 05, 2018) (“A government agency, especially a regulatory agency, that is largely under the influence of the economic interest group(s) most directly and massively affected by its decisions and policies—typically business firms (and sometimes professional associations, labor unions, or other special interest groups) from the industry or economic sector being regulated. A captured agency shapes its regulations and policies primarily to benefit these favored client groups at the expense of less organized and often less influential groups (such as consumers) rather than designs them in accordance with some broader or more inclusive conception of the public interest.”).

97. See McGlone, *supra* note 54; Post, *supra* note 71; Roberts, *supra* note 64.

98. Roberts, *supra* note 64.

that the sudden demotion was simply the result of a fundamental disagreement on the role and future of copyright law as well as the Copyright Office and the Library.<sup>99</sup> For example, Pallante advocated many times for the independence of the Copyright Office,<sup>100</sup> whereas Hayden aimed to modernize the Library by restructuring the whole institution.<sup>101</sup> This Comment suggests Hayden made an executive decision to bring order to the Library of Congress by reassigning Pallante, which would be difficult with Pallante, the head of the Copyright Office, actively attempting to separate from the Library of Congress.<sup>102</sup> All theories aside, Pallante's demotion and subsequent resignation resulted in a top advocate for reform no longer occupying a platform sufficient to implement change.

#### B. *Copyright Reform Under Pamela Samuelson*

Pamela Samuelson is a Berkley law professor as well as the founder of the Samuelson-Glushko Technology Law & Policy Clinic, which advocates policy in favor of the technology industry.<sup>103</sup> In 2007, she wrote an article that was republished in Utah's law review entitled, *Preliminary Thoughts on Copyright Reform*, which discussed her support of a copyright law reform because the current law is "much too long, . . . far too complex, incomprehensible to a significant degree, and imbalanced in important ways."<sup>104</sup> Samuelson also coauthored an article in 2010 with University of Michigan law professor, Jessica Litman, which listed twenty-five recommendations for updating the Copyright Act of 1976: "These changes would include dramatically shortening copyright's duration, cutting back on the scope of protection, privileging private, non-commercial uses of protected works, and reinstating copyright rules that provide the public with better notice of copyright claims than the law today requires."<sup>105</sup> Both of Samuelson's articles contributed to her project, The

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99. Post, *supra* note 71.

100. *See id.*

101. *See id.*

102. *See* Roberts, *supra* note 64.

103. Scott A. Burroughs, *ALI's Great Copyright Caper: Has the American Law Institute Been Hijacked by Big Tech?*, ABOVE L. (Jan. 24, 2018), <http://abovethelaw.com/2018/01/alis-great-copyright-caper-has-the-american-law-institute-been-hijacked-by-big-tech/>.

104. Samuelson, *supra* note 31, at 551.

105. Samuelson, *supra* note 29, at 1177.

Restatement of Copyright.<sup>106</sup> Samuelson, along with four other writers, or Reporters, began drafting a restatement of law.<sup>107</sup>

Restatements are produced by the American Law Institute (ALI), an independent organization that strives “to bring clarity and consistency to complicated areas of U.S. case law, by spelling out general principles and rules for particular areas of law.”<sup>108</sup> Restatements “serve an invaluable purpose where no statute or collective understanding exists.”<sup>109</sup> They are typically created for areas of common law because some statutes vary from state to state; so, a restatement provides a uniform interpretation of a law by defining a precise meaning of legal terms for the states to follow.<sup>110</sup> Samuelson’s restatement is the first federal law that ALI has produced, which is unusual because there is already the statutory law (the Copyright Act) that is applicable to every state in the same way.<sup>111</sup> As current acting Register Karyn Temple Claggett states, “There can be no more accurate statement of the law than the words that Congress has enacted.”<sup>112</sup> The consequence of having a restatement of federal law is that any “departure from the words” whether through substitution or condensing texts could result in further “confusion and misinterpretation” and ultimately “alter sense and meaning.”<sup>113</sup> Hence, the restatement of the Copyright Act of 1976 would “create a pseudo-version of the Copyright Act” and in effect circumvent the legislative process by reshaping copyright law.<sup>114</sup>

Upon the release of the first draft, stakeholders in copyright law realized that the restatement on copyrights was not presented as an objective view.<sup>115</sup> Many of the reporters, other than Samuelson, who took on this task have “devoted their careers to curtailing copyright protections” and have lobbied Congress for amendments that would reduce copyright protection.<sup>116</sup> For example, Reporter Christopher Sprigman has served as

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106. *Id.*

107. *Project to “Restate,” supra note 69.*

108. *Id.*

109. David Newhoff, *Ideologues Seek Revision of Copyright Law Without Legislative Process*, ILLUSION MORE (Jan. 23, 2018), <http://illusionofmore.com/ideologues-seek-revision-of-copyright-law-without-legislative-process/>.

110. Letter from Karyn Temple Clagget, Acting Registrar of Copyright Office, to Professor David Levi & ALI Council Members, President of ALI (Jan. 16, 2018) (*Re: Council Draft No.1, Restatement of the Law, Copyrights*).

111. Newhoff, *supra* note 109.

112. Letter from Karyn Temple Clagget, *supra* note 110.

113. *Id.*

114. Letter from Karyn Temple Clagget, *supra* note 110.

115. *Project to “Restate,” supra note 69*

116. *Project to “Restate,” supra note 69; Newhoff, supra note 109.*

counsel for Spotify and has had at least five of his research projects funded by Google—both of which demonstrate a potential conflict of interest.<sup>117</sup>

Advisors from the Author's Guild, which is an organization that advocates for copyright protection, were assigned to provide feedback on the reporters' copyright restatements.<sup>118</sup> Upon release of the first chapter of the restatement, it was clear the advisors' comments, which advocated for a balance of interests, were not taken into consideration as the restatement heavily favored technology companies; for example, the reporters focused on several minority opinions.<sup>119</sup> Furthermore, the reporters typically preferred using the minority's view on crucial copyright cases.<sup>120</sup> The first chapter was not an objective restatement but rather favored Big Tech and their fight to weaken copyright protection.<sup>121</sup> Acting Register Claggett wrote a letter to the President of ALI stating that the copyright restatement project was misguided and urged the council to suspend the project.<sup>122</sup> Due to backlash, ALI considered a "new format" instead of voting to continue pursuit of the restatement by the original reporters.<sup>123</sup> Regardless, if the ALI Council had continued with the project, ALI's restatement was likely to become outdated as Congress is reviewing the Copyright Act and anticipates amending the Act with new legislation.<sup>124</sup>

#### IV. UNDERTAKING RESTORATION

In the wake of Pallante's demotion, subsequent resignation and the failure of the restatement project, the possibility of a comprehensive reform seems unlikely. The Copyright Act of 1976 needs to be updated because the tangle of outdated statutory language and "patchwork" amendments can result in chaotic law.<sup>125</sup> Though suggestions have been offered on how to reform the law, it is unlikely that a major overhaul could be accomplished in the immediate future.<sup>126</sup> For example, the Copyright Act of 1976 took decades to draft, so it is unlikely that a modern

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117. *Project to "Restate," supra* note 69; Newhoff, *supra* note 109.

118. *Project to "Restate," supra* note 69.

119. *Id.*

120. *Id.*

121. Burroughs, *supra* note 103.

122. Letter from Karyn Temple Claggett, *supra* note 110.

123. *Project to "Restate," supra* note 69.

124. *Id.*

125. Bill Rosenblatt, *The Big Push to Reform Music Copyright for the Digital Age*, FORBES (Feb. 25, 2018), <http://www.forbes.com/sites/billrosenblatt/2018/02/25/the-big-push-to-reform-music-copyright-for-the-digital-age/#1a78085e2d6d>.

126. Samuelson, *supra* note 31, at 556.

copyright law would be any different.<sup>127</sup> Just as a large painting can take years to be properly restored, restoring the Copyright Act of 1976 would require time to carefully plan and draft a document that effectively balances all stakeholders' interests.<sup>128</sup> Furthermore, Congress may not have the time to allocate enough man power and resources to start a copyright reform project. That being said, there is still an opportunity to modernize the Copyright Act of 1976 for the immediate future, while still initiating a plan for long-term reform.

#### A. *The Immediate Future of Copyright Law*

There are currently several bills proposed in Congress that could help update the 1976 Copyright Act by addressing specific issues that have troubled courts and stakeholder industries.<sup>129</sup>

##### 1. Current Legislation

There have been several major bills proposed to Congress. First, the Compensating Legacy Artists for their Songs, Service and Important Contributions to Society Act (CLASSICS) would apply federal copyright protections to pre-1972 recordings.<sup>130</sup> Second, the Allocation for Music Producers Act (AMP) plans to “formalize royalty payments to producers and engineers for sound recordings played on digital radio services so that they are more likely to get shares of those royalties.”<sup>131</sup> Third, the Fair Play Fair Pay Act would close the loophole between the performance royalties paid for musical compositions, in both digital and AM/FM plays, and payment on performance royalties for sound recordings that digital radio has to pay but not AM/FM.<sup>132</sup> These three bills all relate to the music industry and, if passed, would increase royalty payments for music creators and efficiency for digital music providers.<sup>133</sup>

The Copyright Alternative in Small-Claims Enforcement Act (CASE) is another bill that will help to enforce copyright protection for

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127. *Id.*

128. *Id.* at 555.

129. See *Legislative Developments*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/legislation/> (last visited Feb. 25, 2019).

130. Rosenblatt, *supra* at note 125.

131. *Id.*

132. *Id.*

133. *Id.*

owners.<sup>134</sup> CASE would give creators and small businesses a less-expensive way to enforce infringing works.<sup>135</sup> This bill would create a small claims court for copyright disputes that are less than \$15,000.<sup>136</sup> This would be a significant change from bringing a claim in federal court where averages are around \$350,000.<sup>137</sup> Thus, if CASE is enacted, owners can more effectively litigate an infringement claim.<sup>138</sup>

Lastly, in light of the recent controversy between Hayden and Pallante, there has been a call for creating a Copyright Office independent from the Library of Congress.<sup>139</sup> There is a direct conflict between the mission of the Copyright Office, which is to protect authors' works, and the Library of Congress's mission, which is to make works more publicly accessible.<sup>140</sup> The Register of Copyrights Selection and Accountability Act (RCSAA) would provide the President of the United States the power to appoint the Register, with the Senate's consent, rather than Librarian of Congress, which would allow the Copyright Office to operate with more autonomy.<sup>141</sup> Currently, the bill awaits review by the Senate Rules Committee; however, a companion bill passed in the House on April 26, 2017, with the final vote count at 378 to 48.<sup>142</sup> The RCSAA would allow the Copyright Office to function more independently, similar to the United States Patent and Trademark Office, which has regulatory and adjudicatory power.<sup>143</sup> The Constitution states that Congress promotes both patents and copyrights for the benefit of the public, but the Copyright Office has had less authority as it is monitored by an office that at times directly conflicts with its overall mission to protect authors' works.<sup>144</sup>

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134. Keith Kupferschmid, *Small Step for Copyright, Giant Step for Creators—The CASE Act*, HILL (Jan. 10, 2018, 11:00 AM), <http://thehill.com/blogs/congress-blog/judicial/368209-small-step-for-copyright-giant-step-for-creators-the-case-act>.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. McGlone, *supra* note 54.

140. Terry Hart, *2018 in Copyright Law and Policy*, COPYHYPE (Jan. 3, 2018), <http://www.copyhype.com/2018/01/2018-in-copyright-law-and-policy/>.

141. See Register of Copyrights Selection and Accountability Act of 2017, H.R. 1695, 115th Cong. (2017).

142. Hart, *supra* note 140.

143. *Id.*

144. *Id.*

## 2. The United States Copyright Office's Revision of Section 108

In addition to different legislation working its way through Congress, the Copyright Office worked alongside “librarians, museum professionals, content creators, archivists, scholars, and technology professionals” to release a document detailing revisions to section 108 of the Copyright Act.<sup>145</sup> Just as the restoration of a painting requires art historians, conservators, and scientists working together, revising a law requires the coordination of individuals with common and competing interests to produce objective laws. Like most clauses in the Copyright Act of 1976, section 108 is out-of-date due to changes in how works are created, distributed, preserved, and accessed.<sup>146</sup> The purpose of the document was to “better reflect the facts, practices, and principles of the digital age and provid[e] greater clarity for libraries, archives, and museums.”<sup>147</sup>

Section 108 is a limitation of owners' rights as it authorizes “libraries and archives to reproduce and distribute certain copyrighted works without permission on a limited basis for the purposes of preservation, replacement, and research.”<sup>148</sup> The document suggests various proposals to update section 108, including:

[R]eorganizing section 108 to make it easier to understand and apply in practice; clarifying the contract supremacy provision to grant libraries, archives, and museums more flexibility to make preservation and security copies of works covered by licensing and purchasing agreements; and eliminating the exclusion of musical, pictorial, graphic, or sculptural works, and motion pictures or other audiovisual works from the provisions permitting copies made upon the request of users, under certain conditions. Importantly, the Discussion Document includes model statutory language to guide future discussions, and the Copyright Office is hopeful this language will serve as a means for generating consensus on these and other discrete issues in section 108.<sup>149</sup>

Objective proposals like the proposal to section 108 are positive steps toward bringing the Copyright Act of 1976 into the twenty-first century.

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145. *Revising Section 108: Copyright Exceptions for Libraries and Archives*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/policy/section108/> (last visited Feb. 25, 2019).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

### B. *The End-Game of Copyright Law*

With the proposed legislation and different revisions undertaken by the Copyright Office, there will not be a major overhaul of the Copyright Act of 1976, but rather the process will be slow and singular. Any effort towards modernizing the law is an achievement, so Congress should both modernize and reform the Copyright Act of 1976. Recent legislation should act as a filler for one comprehensive revision. Congress can effectively achieve this by granting more regulatory power to the Copyright Office through the passage of the RCSAA.<sup>150</sup> Furthermore, due to the suggested provisions by Pallante and Samuelson, a task force could also contribute to finding more effective measures.<sup>151</sup> In other words, a task force would not be starting from scratch but rather could refer to proposals, the recent legislation, and the Section 108 Revision Discussion Document.<sup>152</sup>

A comprehensive review of current copyright law is essential because it is clear that the average person was not taken into account when it was initially passed.<sup>153</sup> Even though current legislation could benefit both owners and users, the Copyright Act of 1976 is still long and complex.<sup>154</sup> The average person will have difficulty comprehending the legalese of the Copyright Act; for example, what is protected by the fair use clause or what is considered infringing on another's exclusive rights.<sup>155</sup> Both Congress and the Copyright Office's efforts in revising the Copyright Act applies primarily to powerful stakeholders, not "the millions of people who have found their voice due, in part, to the emergence of technologies and platforms that allow them to speak to a larger audience than ever before."<sup>156</sup>

## V. FINAL PRODUCT

Copyright law performs a wide range of important functions, including:

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150. See Register of Copyrights Selection and Accountability Act of 2017, H.R. 1695, 115th Cong. (2017).

151. See Pallante, *supra* note 17, at 338-39; see also Samuelson, *supra* note 29, at 1177.

152. *Revising Section 108: Copyright Exceptions for Libraries and Archives*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/policy/section108/> (last visited Feb. 25, 2019); Pallante, *supra* note 17; Samuelson, *supra* note 29.

153. Pallante, *supra* note 17; Samuelson, *supra* note 29.

154. Pallante, *supra* note 17; Samuelson, *supra* note 29.

155. Pallante, *supra* note 17; Samuelson, *supra* note 29.

156. McSherry, *supra* note 76.

It facilitates public access to knowledge and a wide range of uses of creative works of authorship, and, in so doing, it helps educate our populace, enrich our culture, and promote free speech, free expression, and democratic values. It provides opportunities for rights holders to recoup investments in creating and disseminating their works and to enjoy the fruits of whatever success arises from the public's uses of their works. In the process, copyright also plays a role in regulating new technologies and services through which creative works may be accessed.<sup>157</sup>

In order to effectively perform these functions, a law is needed to balance the rights of owners, public interest, entertainment industries, and technology companies, as well as big-budget stakeholders and average users. A “patchwork” amendment will not be sufficient in providing “a simpler copyright law . . . [and] a comprehensible normative framework for all of us who create, use, and disseminate works of authorship.”<sup>158</sup> With careful and patient work, a painting that was once almost unrecognizable can be restored to greatness, where it can be enjoyed by all. If Congress addresses these issues properly, a masterful Copyright Act can once again fulfill its purpose.

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157. Samuelson, *supra* note 29.

158. Samuelson, *supra* note 31.