

Preface

Many believe that U.S. copyright law is, in many ways, severely outdated. Although the core principles of the law remain valid — that is, a set of exclusive rights to expressive works offset by series of measured limitations and exceptions for certain socially desirable uses — the specific provisions that animate those principles largely date back to the mid-1970s, long before the advent of digital production and distribution technologies that have become commonplace today. The law was updated in 1998 with the passage of the Digital Millennium Copyright Act (DMCA), an attempt to address new issues raised by emerging networking technologies. But Congress could not possibly have envisioned what the modern, commercialized internet has become, much less consider how it would affect copyright interests. Indeed, even the DMCA is today showing signs of its age.

While the practice of producing and distributing creative expression, and the business environment that supports it, have evolved along with technology, the copyright law that undergirds it all has remained largely static. While the courts have attempted to fill in the gaps by applying extant law to new situations — primarily fair use — their interpretations have increasingly contorted the law to achieve socially desirable, case-specific outcomes without much apparent regard to how those decisions impact the broader copyright scheme — an analysis that is more properly undertaken by Congress.

As a result of this congressional inattention and courts' attempts at making it up as they go along, copyright has become a functional but tortured body of law that many believe is no longer fit for purpose. Indeed, some extremists even question whether we need copyright at all.

Hoping to refocus attention on the fraying state of the law, in 2013, then Register of Copyrights and director of the U.S. Copyright Office, Maria Pallante, delivered what would become a landmark lecture, *The Next Great Copyright Act*, calling on Congress to update the copyright law for the twenty-first century and to recognize the technological shifts that have taken place since the Copyright Act of 1976 was passed.

Congress invited Pallante to testify almost immediately, and within a few weeks embarked on a “comprehensive review” of copyright law which, described by one commentator, represents “a commitment of time and resources that exceeded any since the efforts to develop the last great copyright

act almost half a century ago.”¹ Over the course of three years, the House Judiciary Committee held 20 hearings featuring 100 witnesses, developing a record comprising more than 3,000 pages. Meanwhile the Register and her senior team produced nearly a dozen public policy studies to help guide Congress’ efforts.

For all the policymakers’ enthusiasm, the stakeholder community’s response was tepid. While many would privately acknowledge the need for copyright reform, virtually all of the major players feared that the outcome of a legislative compromise would leave them worse off. One lobbyist said that although Pallante’s speech was laudable, it was unlikely that their client would be able to support any of Pallante’s proposals. Another Washington insider quipped that the review amounted to little more than a three-year bipartisan fundraiser, as stakeholders shoveled money toward both sides of the aisle in an attempt to maintain the status quo.

Thus, despite the age of the current copyright regime, and the plainly apparent need to update it, a lack of interest among key stakeholders suggested that the chances of achieving another general revision were virtually nil, at least in the early days of the process.

But recent changes to the strategic and business imperatives in certain affected industries, coupled with an evolving political climate, have led some major stakeholders to show signs of softening their longstanding tribalistic positions, and to express a willingness to engage in meaningful discussions about revising the law. The Orrin G. Hatch-Bob Goodlatte Music Modernization Act of 2018, for instance — a measure that represents the most sweeping change to music licensing in decades — was successful largely because stakeholders agreed with the Register’s testimony and comprehensive Copyright Office study that concluded the regime desperately needed to be fixed, and came together to cooperate with Congress and negotiate in good faith. There are other bills pending that have roots in the copyright review process. Whether these proposals will be successful remains to be seen, but they nevertheless offer a glimmer of hope that the greater promise of the next great Copyright Act may yet be realized.

Using *The Next Great Copyright Act* as a jumping-off point, this book recounts one of the most active periods of copyright policy discourse since the 20-year period preceding the enactment of the Copyright Act of 1976.

This book is intended to achieve two separate but interrelated goals. First, it documents the major issues confronting the copyright system today, as

¹ Hayden W. Gregory, *The Next Great Copyright Act?*, Landslide, November–December 2014, https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2014-15/november-december/the_next_great_copyright_act.

well as the dynamic between the dominant stakeholder communities — most commonly characterized as a battle between the major content-producing industries, on one hand, and the internet industry, on the other.

Second, this book is a piece of commentary, intended to convey my own thoughts and impressions as a copyright practitioner. I wrote this book from what I believe to be a unique perspective: I worked at the Copyright Office as a senior policy advisor while Pallante was preparing her call for Congress to update the copyright law. Shortly after Congress announced it would conduct its comprehensive review, I left the Office to join the motion picture industry — an industry which, like most of the major content-producing industries, was less than enthusiastic about the prospect of negotiating legislative change in the then-current political environment.

While I have attempted to provide citations to either the law or various administrative records for the majority of the assertions made throughout this book, in some cases I make statements based upon my own observations, knowledge, or experience. In a small number of cases I paraphrase background conversations I had with key players, for which there are no citations.

The book begins with Pallante's appointment as the 12th Register of Copyrights in 2011, and concludes with the end of the 115th Congress in early 2019, spanning a period of roughly eight years. Chapter 1 explores the public perception of copyright law and of the Copyright Office around the time Pallante took the helm, while Chapter 2 focuses on Pallante's attempt to refocus the national conversation through a series of public addresses and Congressional testimony including, most notably, *The Next Great Copyright Act*.

Chapters 3 to 9 delve more deeply into several substantive areas of copyright law that have generated persistent and fervent debate, including orphan works and mass digitization, online copyright enforcement, the use of copyright protection systems, as well as issues confronting visual artists, the music industry, and the pay-television industry. Chapter 9 offers a look at a debate over the Copyright Office itself — the scope of its authority and its situs within the government.

Chapter 10 recounts several significant changes to the copyright system's cast of characters, including, most notably, Pallante's abrupt reassignment and subsequent resignation from the Copyright Office mere weeks after a new Librarian of Congress had arrived. The chapter offers some observations about what we can learn from the copyright review and what it means for the future of U.S. copyright policy.

Finally, Chapter 11 makes some broad observations about the state of copyright policy discourse and offers some predictions for the future of the U.S. copyright system.