1. New beginnings

CHANGING OF THE GUARD

Although nobody realized it at the time, January 3, 2011 would turn out to be a major inflection point for the U.S. Copyright Office and, by extension, U.S. copyright policy. That morning, the first business day of the new year, Maria Pallante took the reins of the Office as the newly installed Register of Copyrights, following the retirement of Marybeth Peters, the beloved former head of the agency who had admirably serviced the Office in various capacities for more than 40 years.[1]

Peters would be a tough act to follow, but if anyone was up to the task it was Pallante. She had previously worked for Peters as a policy advisor and went on to hold two leadership positions within the Office, serving as its deputy general counsel, and later as the chief of its policy and international affairs department. Pallante had also previously served as counsel and the director of worldwide licensing for the Guggenheim Museums, during which she testified for libraries and museums, and early in her career was briefly the assistant director of the Authors Guild and executive director of the National Writers Union, as well as a law firm associate.[2] Pallante's deep expertise in copyright thus spanned a diverse array of stakeholders with varying perspectives, as well as considerable experience in the agency herself, making her amply qualified to manage the Office.

The U.S. Copyright Office, as one might expect, is responsible for administering the copyright laws of the United States. Broadly speaking, the Office has two central functions.

First, it serves as the principal advisor to Congress, the courts, and other government agencies on copyright-related issues by providing impartial,

[1] Pallante was appointed to the top position in an acting capacity in January 2011, and was subsequently appointed permanently to the position in June of that same year. *See* U.S. Copyright Office NewsNet, Issue 427: Maria Pallante Appointed 12th Register of Copyrights (June 1, 2011).

[2] See *Maria A. Pallante*, Association of American Publishers, https://publishers.org/about/maria-pallante.

expert advice, guidance, and support.[3] The Register of Copyrights often testifies before Congress on copyright issues, while the Office's expert staff produce public policy reports and proposed legislation relating to possible improvements to the nation's copyright laws and supports the executive branch in international trade negotiations involving copyright concepts. Similarly, the Office's lawyers routinely support the Department of Justice on copyright-related litigation in which the government becomes involved, often including cases that make it all the way up to the Supreme Court.

Second, the Office serves as the central repository for records of copyright ownership — the copyright equivalent of a registry of deeds — through its operation of the national copyright registration and recordation systems.[4] These systems allow copyright owners to register their copyright claims and record documents pertaining to the ownership of those claims. Although registration is not required to enjoy the benefits of copyright protection, copyright law provides some additional benefits to those copyright owners who do register,[5] making the registration system one of the most public-facing aspects of the Copyright Office's operations.

In addition to these two key functions, the Office also fulfills a number of ancillary duties: it provides information and education to the public about copyright issues, it administers payments made by users of copyrighted works under certain compulsory licenses in the law, and it manages the mandatory deposit provisions of the Copyright Act[6] — these provisions, often called "legal deposit" in other countries, require that every work published in the United States be submitted to the Library of Congress for potential inclusion in the library's collection. Although not really a copyright-related function, in that mandatory deposit does not affect a copyright owner's exclusive rights, Congress assigned the collection process to the Register at least in part because a rights holder may comply by submitting works for registration.[7] As a result, the Office has become the de facto administrator of the process.

Those in the real estate business might say that the Copyright Office was a fixer-upper when Pallante took the helm. It was functional, but it needed a lot of work. Employee morale was low and the copyright community's satisfaction with the Office's services was not entirely positive either, with some applications for registration taking over a year to be processed — delays attributable to the less-than-perfect transition from paper-based forms to an electronic processing system that had been implemented just three years prior.

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3 See 17 U.S.C. § 701 (2012).
4 *Id.* §§ 205, 408.
5 *Id.* § 411-12.
6 *See id.* § 407.
7 *Id*. § 408(b)(4).

Known publicly as eCO, short for "electronic Copyright Office" — adding "e" to things to indicate the use of a computer was trendy in those days — the system was built using an off-the-shelf software package designed primarily for customer relationship management applications where users would be tracking interactions with customers, registering complaints, and so on, making it a clumsy fit for the Office's needs. Moreover, many of the staff had been thrown into new roles without adequate training.

Copyright owners and their representatives publicly lamented the Office's unreasonably slow turnaround times for basic services. For the staff, most of whom were working as hard and as fast as they could, the public perception that they were somehow derelict in their duties was salt in the wounds already inflicted by the major changes at the Office.

While it would have been easy to blame Marybeth Peters for leaving the Copyright Office in disarray, the reality is that she had only nominal authority over the funding and technology infrastructure, and the unfortunate state affairs was the product of numerous forces acting upon the agency, the most significant of which is that it is a "service unit" of the Library of Congress — a sprawling bureaucratic behemoth with a diverse array of missions, objectives, and constituencies.[8] One unfortunate feature of the "service unit" nomenclature is that it implies that the unit's mission is to serve the Library. That is true for some of the Library's service units, such as the aptly named Library Services, which, as the name implies, manages the library-like functions of the Library. But the Copyright Office has a unique constituency, prescribed by statute, that is much broader than the Library.[9]

And yet, when it comes to resource allocation, the Office is treated like "just another service unit." It is expected to compete with the other service units for information technology resources, and use the Library's existing technology infrastructure, which is oftentimes insufficient for the Office's unique needs as a largely public-facing agency. What made matters especially awkward was that the Copyright Office was often forced to appear before members of the service unit responsible for Library-wide information technology initiatives and beg for funding for projects, often in competition with the IT unit's own projects.

The dysfunctional structure, later the subject of a scathing Government Accountability Office report,[10] was arguably the most significant contributing

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[8] See Library of Congress, Annual Report of the Librarian of Congress for the Fiscal Year Ending September 30, 2016 50 (2016) (Library of Congress organizational chart); see also *id.* at 92 (listing the Copyright Office as a "service unit").

[9] See 17 U.S.C. § 701.

[10] See Government Accountability Office, Library of Congress: Strong Leadership Needed to Address Serious Information Technology Management Weaknesses (2015).

factor to the Copyright Office's ability to build a technology platform that best served the needs of its users; and its inability to build such a platform is arguably the central reason why the public's perception of the agency, and staff morale, were suffering.

On the policy front, many of the issues confronting the copyright community shared a common thread with the Copyright Office's operational challenges: technology. Rapidly improving computing technology, the increasing ubiquity of broadband connections, and the rise of high-speed mobile networks have led to an abundance of new creative material and a variety of new business models and distribution mechanisms.

But for copyright owners, the evolution in technology is the proverbial doubled-edged sword. On the one hand it has made the distribution and promotion of creative content faster, cheaper, and more efficient; but on the other, it has made it easier, faster, and more efficient to create and widely disseminate unauthorized copies, and, unlike the bootlegging of the past, digital copies are perfect clones, virtually indistinguishable from the originals. One photographer on an internet message board summarized the dynamic succinctly: "My quandary is between having Internet exposure to a broad audience and protecting my copyrights."

Technology has proved to be just as frustrating for the "users" of copyrighted works as well. Owing in part to the relatively broad definition of protectable subject matter, the sheer volume of copyrighted material that is available today, commercially and otherwise, has become overwhelming, giving rise to various services and platforms that aim to aid in the discovery, organization, and management of creative content. At the same time, the internet has led to a new class of creatives — those that seek to celebrate their favorite books, movies, television shows, and songs, by using those works in their own creations, or by developing modified or extended versions, which they subsequently distribute online such that they often appear alongside the original releases, drawing the ire of copyright owners. One fan's homage is a copyright owner's unauthorized derivative work.

Supporting the evolving new world order of copyright are businesses whose sole purpose is to aid in the management and distribution of creative content, often without regard to its ownership. Google, for instance, was famously founded to "organize the world's information and make it universally accessible and useful."[11] In 2004, Google launched an ambitious project to scan all

[11] Lily Hay Newman, *Google is Moving Away From Its Original Mission Statement*, Slate (Nov. 3, 2014), http://www.slate.com/blogs/future_tense/2014/11/03/larry_page_says_that_google_needs_to_move_on_from_its_don_t_be_evil_mission.html.

of the world's books and make them searchable. To academics, researchers, and librarians, the project promised to be a life-changing godsend; to many publishers and authors, it amounted to little more than flagrant piracy. In 2006, Google bought YouTube, a platform devoted to sharing video content online. While the service has since blossomed into a home for some original programming, at the beginning its catalog was composed substantially of movies and television shows, all uploaded without authorization of the copyright owner, and remains today one of the most commonly used platforms for piracy.[12]

Because of the inherent tension between the copyright owners' business models and those of the internet platforms, a deep philosophical rift had emerged between the two camps. Often characterized as a war (or more politely, a debate) between Northern California, where many of the major internet companies are headquartered, and Southern California, known for its film and television production industry, copyright owners are generally known for favoring strong copyright protections and robust enforcement provisions, while the tech-sector players favor broadening copyright's limitations and exceptions and weakening enforcement provisions. In the annals of the blogosphere, the content industries are regularly characterized as "copyright maximalists" while many copyright owners often refer to the tech sector as the "copyleft."

All of this is to say, there was plenty for Pallante to do.

An aging copyright law that was showing signs of fraying, a deepening divide between major players in the copyright ecosystem, and significant operational challenges within the Office itself, offered a unique opportunity to change the course of U.S. copyright law and policy for the better, and Pallante wasted no time getting started.

CHARTING A COURSE

Just four months after she was appointed permanently to the Register post, after meeting with dozens of stakeholders from all sides of the copyright debates, and with virtually all of the Office's staff, Pallante released what she described as a "work plan … to address current complexities in the copyright system and prepare for future challenges."[13] The document, dubbed *Priorities and Special Projects of the U.S. Copyright Office, October 2011–October*

[12] Google is not, of course, the only company that has built businesses centered on content for which neither it nor its users have rights, but it is by far the most prominent.

[13] U.S. Copyright Office NewsNet, Issue 435: Director of U.S. Copyright Office Announces Priorities, Special Projects for Next Two Years (Oct. 25, 2011).

2013,[14] was intended to serve as a strategic plan for the first two years of her tenure.

The *Priorities* document was Pallante's acknowledgment that certain areas of the Copyright Office, and copyright law itself, required attention. Its breadth was a recognition of the multifaceted leadership role that the Office must play: leading larger policy discussions alongside Congress, as well as guiding the day-to-day operations of the national copyright system through its administrative functions.

At 15 pages, the document was brief but dense, offering a summary of the Copyright Office's history, funding mechanisms, and operations, before going on to articulate nearly 20 priorities in copyright policy, the administration of the Office, and a series of 10 "special projects" that would advance the agency's ability to serve the needs of its constituents.

The substance of many of the priorities and special projects is discussed more fully in later chapters. But to fully understand the magnitude of Pallante's ambitions as the new Register, and to establish the state of the copyright union, as it were, it is useful to review the key initiatives that Pallante outlined in *Priorities*.

Priorities in Copyright Policy

The document articulated nearly 20 priorities in copyright policy, including planned Copyright Office studies, legislative support, assistance with international trade negotiations, and improvements to the Copyright Office itself that would ultimately benefit the Office's constituents and the public.

One study on the Office's docket focused on the desirability and feasibility of creating a small claims court, of sorts, for copyright owners. Some copyright owners, particularly photographers and other visual artists, whose works are frequently infringed, often find they have no mechanism for redress because the cost of full-fledged federal litigation is so high — often far higher than the amount that would likely be recovered if the owner were to prevail in the case. A small claims court would ideally offer a streamlined process that would be cheaper, but would also have a cap on the amount of money that an aggrieved copyright owner could be awarded.

The Office also planned to release an analysis of the legal treatment of sound recordings made before 1972, which are not protected by the Copyright Act (specifically, February 15, 1972). Some have asserted that such recordings should be swept into federal protection, while others believe the "patchwork"

[14] Maria A. Pallante and United States Copyright Office, *Priorities and Special Projects of the U.S. Copyright Office, October 2011–October 2013* (2011).

of state laws that protect such works are sufficient, and that the complexities of dramatically changing the nature and scope of copyright protection afforded to such works far outweighed any benefit that copyright owners might derive.

Perhaps most significantly, though, was a study focused on what had become known as "mass book digitization," a catch-all term used to describe the various aspects of copyright law implicated by the Google Book Search (GBS) project. GBS was one of Google's attempts at making good on its promise to organize all of the world's information by scanning millions of books in the nation's academic libraries and making them searchable, for free, online. Chapter 3 discusses the project and the associated litigation in much more detail, but for now, suffice it to say that it got people talking. Google believed its use was a fair use under the Copyright Act. Publishers and authors disagreed.

Many of the works that Google scanned were "out of print" in the traditional publishing sense, and in many cases it was difficult or impossible to identify or locate the copyright owner. The Office's planned study would address the entire universe of copyright issues confronting any attempt at digitizing large numbers of works at scale — Google's or otherwise — including the prospect of establishing new licensing regimes, or creating new limitations and exceptions within the copyright law for mass scanning projects.

Closely related, Pallante intended to continue the Office's long-running work on the orphan works problem — the situation where someone wants to make use of a copyrighted work that requires permission, but they are unable to identify or locate the copyright owner. Over the prior several years, the Copyright Office had been instrumental in focusing Congress on proposed legislation that would have alleviated the problem by limiting damages for infringement in circumstances where users of copyrighted works had undertaken a proper search (as defined by the law) for the owner. Congress came close to passing such a bill in 2008 when the Senate passed the Shawn Bentley Orphan Works Act, but it never cleared the house. With the advent of mass scanning as demonstrated by the GBS project, and the legal environment as established by litigation associated with GBS, Pallante believed it was an appropriate time to reconsider what an orphan works measure might look like in the digital age.

Along similar lines, Pallante believed firmly that the Office should encourage Congress to think about updating the section of the Copyright Act that gives libraries and archives some latitude to engage with copyrighted works in ways that might ordinarily require permission of the copyright owner without first obtaining such permission.

The provision, one of dozens of limitations and exceptions on the exclusive rights of copyright owners contained in the Copyright Act, was drafted in an era where libraries were primarily concerned with the preservation of physical

manifestations of works — books, journals, microfilm, and the like — and makes only scant reference to digital copies. Because many of the issues raised by the GBS project are intertwined with issues facing libraries, Pallante thought it wise to consider legislative improvements for the library and archive exception alongside discussions about orphan works legislation and other issues related to mass scanning, while maintaining a flexible savings clause for fair use.

The Office also intended to encourage Congress to follow its perennial advice to abolish certain compulsory licenses that allow pay-television operators to obtain copyright licenses for certain programming without working through the copyright owner directly. As the Copyright Office has observed on each occasion that Congress has asked it to study the issue, the licenses made sense "at the dawn of commercial cable … and satellite systems"[15] in the 1970s and 1980s respectively, "to allow nascent industries to flourish."[16] But now that robust markets exist, the Office believes it is time to start phasing out the licenses in favor of market-based solutions.

Also on the broadcasting front, the Office planned to support Congress as it again pursued legislation that would create a public performance right in sound recordings. The United States is the only industrialized nation that does not require traditional broadcasters to pay record labels for the use of recorded songs. This means that digital broadcasters such as Pandora or SiriusXM are required to pay, but terrestrial broadcasters are not. The oddity in U.S. law is the product of a legislative compromise in which broadcasters convinced Congress that the promotion value of "free" airplay effectively benefits the record labels and performers such that forcing the radio industry to pay additional royalties would be double dipping.

As the industry evolved and technology advanced, many in the digital radio business began questioning the disparate licensing treatment, since it puts digital broadcasters on unequal footing vis-à-vis their traditional broadcasting counterparts, putting them at a competitive disadvantage. The distinction also creates a disparity between revenue streams available to performers and their record labels as compared with the songwriters, composers, and lyricists, who enjoy a full right of public performance. Various Members of Congress have introduced measures over the years to bring some parity to the law, and the Copyright Office has long supported the move as a matter of sound copyright policy.

Also on the Copyright Office's policy agenda were two items on which Congress was already focused: so-called rogue websites, and illegal streaming.

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[15] *Id*. at 8.
[16] *Id*.

Rogue websites, as they were called at the time, referred to websites that built businesses based on the distribution of illegal content. Far from the traditional image of online piracy that involves college students trading files with each other on college campuses, rogue websites are operated by commercial-scale criminal enterprises for the purpose of generating revenue that often goes to fund other nefarious activities.

Typically based overseas and thus outside the reach of the U.S. judicial system — and in jurisdictions that are not especially hospitable to U.S. rights owners — these websites make money by either selling pirated content directly to consumers, or by selling advertising around pirated content that is offered for free. Often, these sites look and feel like legitimate online content distributors such as Netflix or Apple's iTunes, leading even well-intentioned consumers astray. While copyright law contains robust enforcement provisions for relatively traditional infringement cases, it remains largely ill suited for these large-scale, offshore, internet-based, commercial-scale infringement operations.

A closely related enforcement issue concerns a disparity in the criminal enforcement provisions of the Copyright Act. Currently, felony penalties are available only for the reproduction and distribution of physical copies, but the unlawful public performance of a work is treated as a misdemeanor. In practice, it means that prosecutors are less interested in pursuing illegal streaming cases, and yet streaming has become the distribution mechanism of choice for internet pirates (just as streaming has become the technology of choice for most legal content distribution platforms). The disparity is therefore a major concern to copyright owners, particularly those in the music and motion picture industries, and both the Copyright Office and the Justice Department have encouraged Congress to fix the streaming loophole.

Beyond its domestic work, the Copyright Office plays a significant role in supporting the Executive Branch on international treaties and trade policy issues. The *Priorities* document noted two key areas of focus for the Office, the first of which related to the ongoing work with the World Intellectual Property Organization (WIPO), a Geneva-based agency of the United Nations whose mission is to develop global intellectual property frameworks. At the time *Priorities* was released WIPO had three major policy initiatives: (1) a treaty to protect performers in audiovisual works who are often not the owners of the copyrights to the works in which they perform; (2) a treaty to establish minimum standards for copyright exceptions in favor of individuals with vision impairments who often need to reproduce copyrighted materials in special formats; and (3) a possible treaty on the protection of broadcast signals. Since the *Priorities* document was issued, WIPO has successfully completed negotiations on the audiovisual and visually impaired treaties, and the broadcast treaty remains a key priority for both WIPO and the Copyright Office.

The other key area of focus of the Office was on its role as a member of the U.S. delegation alongside the U.S. Trade Representative. At the time that Pallante established her priorities, the major focus was on implementing a bilateral trade agreement with Korea, the copyright provisions of which became something of a gold standard for future negotiations, and on negotiating the IP provisions of the Trans-Pacific Partnership, a multilateral trade agreement among a dozen Pacific Rim countries, including Australia, Japan, and the United States. After several years of negotiation (and hundreds of hours of Copyright Office staff time), the agreement was finally signed in February of 2016, but President Trump, who took office in 2017, later withdrew the United States from the agreement.

Priorities in the Administration of the Copyright Law

In addition to the policy-focused initiatives described above, the *Priorities* document described several additional priorities that focused primarily on the Copyright Office as the chief administrator of the national copyright system. A common theme among the various undertakings is that the Copyright Office was sorely behind the times, and it desperately needed to improve for the sake of its employees and those who use the Office's public services.

For example, the Office planned to develop an electronic system to manage the database of "registered agents" that online service providers are required to register with the Copyright Office for certain safe harbors under the Digital Millennium Copyright Act (DMCA) (more on how that works in Chapter 4). Because the Office needed to move quickly following the passage of the DMCA, the initial registration system involved paper forms that were scanned by Copyright Office personnel and put on the Office's website in a simple alphabetical list. Although one could search the page by the name of the filing entity, none of the information on the underlying forms was readily searchable. Although the Office had been speaking with the Library's IT group for more than a decade about building an electronic system, nothing had ever gotten off the ground.

Similarly, Pallante was determined to automate the process of handling payments under various compulsory licenses — a function which, like the DMCA registration process, was largely handled manually. Those making payments had to produce and submit voluminous paper forms while those receiving payments could not easily access statements of their account online — something that had become more or less a standard of any financial management operation.

With respect to copyright registration, the Office planned improvements to two key areas of frustration for many copyright owners. The first focuses on how the Office should handle so-called "group registrations," which, as the

name implies, are where a copyright owner wants to be able to file a single registration form (and pay one fee) to cover a batch of copyright claims. This issue hits especially close to home for photographers, who often shoot thousands of images on a particular project. The cost to register each of those images at the single-work price (which, as of this writing, is $35) would be prohibitive, so photographers seek to register all of those images on one registration, ideally for the same price.

The public policy objectives of the registration system counsel that the Office should seek to encourage as many copyright owners to register their works as possible, so providing such accommodations makes some sense. But the Office must also consider the effectiveness of the public record of ownership that the registration system generates and maintains. If a would-be user of the images cannot reasonably identify which images are part of a particular registration, then how useful is the record?

On a related note, Pallante also committed to consider digital authorship, and how copyright owners can effectively register their born-digital works more effectively. Must a blog owner register each post separately, for example? Like the photographers in the example above, registration would be out of reach for the vast majority of bloggers. Should website owners be required to separately articulate the authorship of every component of a website — text, images, video, sound — and what sort of deposit copy should be required? Although there are no easy answers, the Office committed to spend some time with stakeholders to find a solution.

Finally, but perhaps most critically, Pallante noted that the Office had already begun its triennial legal obligation to undertake a rulemaking exercise to determine whether there should be exemptions to the DMCA's prohibition of the circumvention of measures controlling access to copyrighted works. In more straightforward terms, that means the Office is charged with figuring out whether, in certain circumstances, it should be legal to hack the rights management technologies used on certain copyrighted works — something that the law provides is generally unlawful. Arguably the most substantively weighty administrative obligation that the Office has, the rulemaking is laborious, complex, and the subject of a more detailed discussion in Chapter 5.

Special Projects

Finally, the document articulated 10 "special projects" — ad-hoc initiatives that were intended to focus primarily on the Office's own operations, but which would also have implications for the Copyright Office's various constituencies.

Although the projects were not ordered in any way, perhaps the most significant was described simply as "Technical Upgrades to Electronic Registration,"

which was a polite way to say that Pallante intended to undertake a comprehensive evaluation of the Office's ill-suited registration platform and identify what the users of the Office most wanted. The study would involve soliciting written comments from, and informal meetings with, those who interact with the registration system regularly as well as those who operate similar systems from which the Office's technology staff could learn. The goal was not to implement any immediate small fixes, but rather to inform Pallante's strategic plan so that the Office could obtain the funding necessary to make the globally desired design.

Along similar lines, one of the special projects sought recommendations and guidance on how to make the Office's paper-based pre-1978 registration records — some 70 million of them — accessible to the masses. While the Copyright Office and the Library had dabbled in digitizing some of the records, nobody had yet found a cost-effective, scalable solution.

Other projects, which were arguably more significant than their placement in the "special projects" category might suggest, included a wholesale revision of the Office's comprehensive operating manual. Dubbed the *Compendium of Copyright Office Practices*, the document describes, in great detail, the practices for examining works submitted for registration, documents submitted for recordation, and myriad other practices. Before Pallante took over, it had not been significantly revised since 1984, save small updates in 1988 and 1998, and was sorely out of date — it neither reflected the current state of the Office's actual practices, nor had it kept up with evolving judicial precedents.

Pallante also planned a wholesale reengineering of the recordation division — the department charged with managing the nation's "registry of deeds" for copyrights. The work performed by the recordation division is a critical part of the public record of copyright ownership, as the documents it maintains are essential to determine the chain of title to copyrighted works, which is, in turn, essential to virtually every business transaction involving such works, many of them from the tech community.

For budgetary reasons, the recordation division was left out of the reengineering process that improved the registration system in the mid-2000s, and the recordation process remained almost entirely manual when Pallante became the Register. A proponent of public-private partnerships where appropriate, Pallante raised the possibility of connecting the Copyright Office's recordation database to existing databases of copyright ownership, such as those maintained by the performance rights societies, for example, where users already have a strong incentive to keep the recorded information up to date.

Other special projects included the development of a research partnership program with academic institutions to help foster impartial research on copyright and related topics, a much-needed overhaul of the Copyright Office's website, increased opportunities for dialogues with various copyright constit-

uencies, more public outreach and copyright education, and more robust skills training for Copyright Office staff to ensure they had the tools necessary to effectively serve the needs of the Office's constituencies.

Public response to the *Priorities* document was largely positive. Tracey Armstrong, the head of the Copyright Clearance Center, a clearinghouse for licensing books and journal articles, noted that "Register Pallante has hit the ground running in her new role as head of the Copyright Office."[17] Even Public Knowledge, a tech-sector-funded organization that never misses an opportunity to criticize the Copyright Office, noted its appreciation for Pallante's "commitment to work with a diverse group of stakeholders to fashion a balanced and reasonably copyright policy that recognize the importance of limitations and exceptions to copyright law as well as enforcement."[18]

But the wave of positivity soon broke.

As the Copyright Office began work on its ambitious plan, it would soon become waylaid by events that led some to unreasonably question the Copyright Office's motives, giving critics of the agency, and those on the copyleft side of the policy debates, an opportunity to build a narrative that cast doubt upon the agency's impartiality.

HEADWINDS

The Stop Online Piracy Act (SOPA)

In the spring of 2011, representatives from various copyright constituencies descended on the Office to discuss the rogue website problem. Because such sites are typically operated in foreign jurisdictions, outside the reach of U.S. law, and where copyright infringement is not taken seriously, legal claims against the operators of the sites are typically ignored.

To combat the growing problem, Congress had developed a proposal that would authorize courts to grant injunctions against internet service providers to prevent users from accessing websites that were adjudicated to be substantially infringing. Such "site blocking" measures, discussed more fully in Chapter 4, are designed to starve illicit websites of users, and thus advertising revenue, by preventing users from accessing the site. The most notable proposal, dubbed

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[17] Copyright Clearance Center, CCC Statement on the Priorities and Special Projects of the United States Copyright Office (Oct. 2011), https://www.copyright.com/content/cc3/en/toolbar/aboutUs/newsRoom/newsArticles/news_2011/news_2011_10/ccc_statement_ontheprioritiesandspecialprojectsoftheunitedstates.html.

[18] Art Brosky, Public Knowledge Commends Copyright Office On New Priorities, Public Knowledge Blog (Oct. 25, 2011), https://www.publicknowledge.org/news-blog/blogs/public-knowledge-commends-copyright-office-new-pri.

the Stop Online Piracy Act (SOPA),[19] was introduced in October 2011, following a bill that had been pending in the Senate for months.

Opponents asserted that the bill was unnecessarily broad and put too much power in the hands of the copyright owners. Some claimed that the measure violated First Amendment free speech protections, while others criticized the bill's specific technical approach to site blocking, claiming it presented the risk of "breaking the internet."

A month after its introduction, Pallante testified in general support of SOPA at a congressional hearing. Characterizing the bill as providing Copyright Owners and the Justice Department with "21st century tools,"[20] Pallante observed that the bill was "measured"[21] and noted that "while the copyright industries are extremely important (and certainly a point of pride with respect to the U.S. economy), SOPA recognizes that many sectors rely on, invest in, and contribute to the success of the Internet."[22]

She also explained the importance of ensuring SOPA is implemented in a way that is consistent with longstanding First Amendment values, by not taking a "zero tolerance" approach to infringement on the internet.[23]

Despite supporters' assurances that the bill addressed many of the concerns raised by critics, vocal opposition mounted rapidly.

The Electronic Frontier Foundation, a tech-sector advocacy group, and its close cousin Public Knowledge, branded SOPA as a censorship measure, claiming that it would "break the internet."[24] Tens of thousands of activities called their elected officials voicing their opposition to the bill, and a number of major websites and services placed censorship-related messages on their homepage. House Leader Nancy Pelosi Tweeted her objection to the measure, and the issue quickly became a mainstream talking point.

Despite the Judiciary Committee's best efforts to resolve the issues with SOPA before the holiday recess, they proved too complex and divisive, and Congress went home leaving the issue to be resolved in the new year.

The opposition's indignation festered over the holiday break, and a number of anti-SOPA movements used the time to mobilize. Meanwhile, the bill's

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[19] H.R. 3261, 112th Cong. (2011).

[20] *Stop Online Piracy Act: Hearing on H.R. 3261 Before the H. Comm. on the Judiciary*, 112th Cong. 53 (2011) (Statement of Maria A. Pallante, Register of Copyrights, U.S. Copyright Office) [hereinafter SOPA Hearing].

[21] *Id*. at 52.

[22] *Id*.

[23] *Id*. at 55.

[24] See, e.g., Corynne McSherry, *SOPA: Hollywood Finally Gets A Chance to Break the Internet*, Electronic Frontier Foundation (Oct. 28, 2011), https://www.eff.org/deeplinks/2011/10/sopa-hollywood-finally-gets-chance-break-internet.

supporters, the copyright owner community, did virtually nothing. When Congress returned in early January, SOPA had become such a liability that many of its early supporters defected, and some began publicly questioning some of SOPA's key provisions.

On January 18, 2012, dozens of the internet's most visited websites, including Wikipedia, Reddit, Google, and Craigslist, staged a protest of unprecedented scale by either going offline or temporarily replacing their homepages with prominent anti-SOPA messages. One tech-sector advocate referred to the protests as a "truly historic day of Internet activism,"[25] while a SOPA advocate called it a "dangerous gimmick."[26]

Two days later, the bills were dead.[27]

The tech sector had effectively spun a narrative that characterized SOPA as a private censorship measure in favor of copyright owners, and owing to its public support of the bill, it allowed Silicon Valley to characterize the Copyright Office as the copyright owners' principal mouthpiece in Washington. Writing for his blog *Techdirt*, Mike Masenick asserted that despite the "massive unintended consequences"[28] that SOPA would have brought to bear on the internet, and society more generally, the Copyright Office supported it because it would "get[] a few more dollars into some legacy Hollywood studio's pockets."[29] Most of the coverage gave short shrift to the Copyright Office's caution to Congress that any site-blocking regime must take into account First Amendment values[30] and technology concerns.[31]

Having been blindsided by the guerrilla tactics (and in some cases, outright lies) of the tech sector, and the ensuing groundswell of public support, the copyright owner community that had supported the bill said very little. The

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[25] Trevor Timm, *After Historic Protest, Members of Congress Abandon PIPA and SOPA in Droves*, Electronic Frontier Foundation (Jan. 19, 2012), https://www.eff.org/deeplinks/2012/01/after-historic-protest-members-congress-abandon-pipa-and-sopa-droves.

[26] Richard Verrier, *MPAA's Chris Dodd takes aim at SOPA strike*, Los Angeles Times Company Town: The Business Behind the Show (Jan. 17, 2012), http://latimesblogs.latimes.com/entertainmentnewsbuzz/2012/01/dodd-lashes-out-at-sopa-strike.html.

[27] Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, The New York Times (Jan. 20, 2012), https://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html.

[28] Mike Masnick, *US Copyright Office Still Out Of Touch; Supports PROTECT IP/E-PARASITE & Felony Streaming Bills*, Techdirt (Oct. 28, 2011), https://www.techdirt.com/articles/20111026/02403816517/us-copyright-office-still-out-touch-supports-protect-ipe-parasite-felony-streaming-bills.shtml.

[29] *Id*.

[30] SOPA Hearing, *supra* note 20, at 55.

[31] *Id*. at 53–54.

absence of any meaningful pro-SOPA narrative to counter the tech community's misinformation campaign left the Office's reputation vulnerable and exposed at an especially pivotal time.

The Committee on House Administration

The tech sector's narrative got a boost a few months later during what should have been a routine oversight hearing before the House Administration Committee's oversight subcommittee. Traditionally the Committee focused primarily on operational matters concerning the Library, while leaving copyright policy issues to the House Judiciary Committee, which has authority over copyright law. But in April 2012, the Register was summoned to appear at a hearing alongside several of her Library colleagues whom, like her, were relatively new to their roles.

The hearing was supposed to be about "ensuring continuity and efficiency during leadership transitions,"[32] focusing mostly on relatively banal administrative matters: staffing, funding, current challenges, and the like. But Rep. Zoe Lofgren, a California democrat whose district includes a good portion of Silicon Valley, quickly attempted to turn the hearing into a referendum on the Copyright Office, and Pallante personally. Lofgren, who also sat on the Judiciary Committee, had been an outspoken critic of SOPA, describing it as "an extreme measure which blindly pursued copyright enforcement at the expense of many other considerations."[33]

Lofgren and Pallante engaged in a progressively heated tête-à-tête during which Lofgren sought to discredit Pallante by publicly questioning her impartiality. Lofgren asked about several meetings that Pallante had taken with various content industry representatives — primarily movie studios and publishers — during visits to Los Angeles and New York.[34] Lofgren attempted to characterize Pallante's meetings as improper, but as with any agency, the Office routinely meets with stakeholders to better understand the real-world implications of its work.

Indeed, the Copyright Office is widely known to have an "open door" when it came to meeting with stakeholders, and Office staff, including the Register, would often travel to speak with various constituencies from all corners of the copyright landscape. To wit, in a subsequent written response to Rep. Lofgren,

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[32] See *Library of Congress: Ensuring Continuity and Efficiency During Leadership Transitions Hearing Before the Subcomm. on Oversight of the H. Comm. on H. Administration*, 112th Cong. (2012).

[33] *Id*. at 34.

[34] *Id*. at 34, 39. Pallante was on the West Coast to participate in a seminar sponsored by the State Bar of California.

the Copyright Office revealed that it had met with dozens of stakeholders, including a number of tech-sector players such as Google and several of its surrogates, which had opposed SOPA.[35]

Lofgren then asked about remarks Pallante had made to the American Bar Association's intellectual property journal *Landslide* where, in the context of expressing concerns about the wellbeing of authors within the copyright landscape, Pallante said that "copyright is for the author first, and the Nation second." Lofgren explained that the "comment attracted quite a bit of attention among some people, especially my constituents in Silicon Valley" because "the Constitution makes it very clear that copyright does not exist inherently for the author but for the benefit of society at large,"[36] and went on to suggest that Pallante's remark demonstrated she "seems to favor particular stakeholders."[37]

Pallante explained that her remarks were simply intended to illustrate the dynamic set forth in the Constitution: to promote the production of copyrighted works Congress is empowered to confer upon authors the exclusive rights to their works for a limited period of time.[38] Copyright thus is to establish an incentive for authors to create new works (author first) so that the public will be enriched by those new works having been created in the first place (nation second). Those works enrich the public good even further at the expiration of the copyright term, when they enter upon the public domain and are free for the public to use without restriction.

Pallante did not demonstrate favoritism for any one particular stakeholder; rather, she simply articulated the fundamental principle of copyright, that "[a]s the first beneficiaries of copyright law, authors are not a counterweight to the public interest but are instead at the very center of the equation."[39]

But facts aside, Lofgren's public questioning became the headline associated with the hearing, and it served to affirm and amplify Silicon Valley's narrative, at least among those who favor weakened copyright protection, that the Copyright Office was little more than a mouthpiece for copyright owners, and would become something of a mantra for the tech sector, trotted out whenever the Copyright Office did something that it saw as potentially threatening to its comfortable status quo.

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35 *Id*. at 70–71.
36 *Id.* at 35.
37 *Id*.
38 *Id.*; see also U.S. Const., Art I, § 8, Cl. 8.
39 Maria A. Pallante, *The Next Great Copyright Act*, 36(3) Colum. J. L. & the Arts 315, 340 (2013).

Cell Phone "Unlocking"

A third blow to the public's perception of the Copyright Office came in early 2013, several months after the agency released its decision in an esoteric rule-making proceeding that required the Office to make a recommendation to the Librarian of Congress that ultimately affected the way people could use their cell phones — something that to many, understandably, it seems should be well outside of the Library and Copyright Office's purviews.

The specifics of the relevant law are discussed more fully in Chapter 5, but for now the salient points are that the law renders it unlawful to "hack" the software locks on video games, movies and television shows distributed electronically, electronic books, and the like (called "technological protection measures" or "TPMs").[40]

But the law is not absolute. When it enacted the probation, Congress established a procedure to evaluate and create new exemptions every three years. There is no renewal mechanism, so if a request is granted, but nobody advocates for it during the next cycle, the exemption ends when the new rules take effect. The responsibility to determine the exemptions rests with the Librarian of Congress who receives a recommendation from the Copyright Office, which confers with the executive branch, specifically the Department of Commerce, as the law requires. The Office's legal department does the lion's share of the work in determining when an exemption is appropriate.[41]

Advances in technology over the years have led to changes in the way TPMs are used. Increasingly, they are found on motor vehicles, consumer electronics, and other devices controlled by software, and more and more, manufacturers use TPMs to control access to that software for various reasons that often extend well beyond copyright protection. Cell phone manufacturers, and the wireless carriers that sell phones, for example, often use TPMs to lock the firmware — the software that enables the phone to operate — for the purpose of tying the phone to a particular network.

Such tying was an important part of the cellular industry's business model at one point, because carriers would often subsidize the cost of the phone in exchange for a consumer's commitment to use the service for a period of time. After the service contract had expired, however, consumers were legally free to use their phone on any network of their choosing, but for the TPM that locked it to the original carrier. Hacking a TPM to enable interoperability

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40 17 U.S.C. § 1201(a)(1)(A) (2012).
41 *Id*. § 1201(a)(1)(C).

became known as "unlocking"[42] and even though it was unlawful under the anti-circumvention provisions, it had become fairly commonplace.

In 2006, a company that recycled used cell phones filed a request for an exemption to allow cell phone unlocking, to render lawful that which had become common but nevertheless technically illegal. The Copyright Office weighed the evidence and concluded that the exemption was warranted. The Librarian agreed and the exemption was granted.

In 2010, a cell phone carrier picked up the cause, petitioning the Office for an unlocking exemption that was functionally identical to the one granted in 2006. Again, following a review of the evidence, the Copyright Office concluded that an exemption was appropriate, and the Librarian agreed.[43]

Then came the 2012 rulemaking.

As in past cycles, there was a request to allow unlocking. Unlike past cycles, however, proponents of the exemption barely participated, submitting virtually no evidence. Instead, they argued that because the Librarian granted the exemption in 2010, he should do so in 2012. Opponents of the exemption, namely a wireless industry trade association, submitted evidence that because most cellular carriers will unlock a customer's phone upon request, and because unlocked phones have become readily available in the marketplace, the exemption was no longer warranted.[44] Because the law requires that the Office and the Librarian review the evidence anew each rulemaking cycle,[45] the Copyright Office was forced to conclude that, based on the record before it, the exemption was no longer necessary for newly acquired phones, effectively phasing out the exemption.

At first, nobody seemed to notice. But then, in January 2013, when a portion of the old rule was set to expire, the story was picked up by the mainstream press, inspiring a mix of emotions ranging from rage and disbelief to quiet indifference. Because the law, the rulemaking procedure, and the resulting exemptions are complex, a lot of the press coverage omitted critical details, giving anti-copyright advocates the opportunity to criticize the Copyright Office and the Librarian of Congress for being out of touch with modern technology.

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[42] In contrast to hacking a TPM for the purpose of running software applications that were not approved by the device manufacturer, which became known as "jailbreaking." Functionally, the two are essentially identical.

[43] See U.S. Copyright Office, Section 1201 Rulemaking: Fifth Triennial Rulemaking to Determine Exemptions to the Prohibition on Circumvention: Recommendation of the Register of Copyrights 82 (2012).

[44] *Id*. at 99–100.

[45] *Id*. at 5–6.

One activist petitioned the White House to rescind the decision, and despite the fact that the White House had no authority to do that, the petition garnered more than 114,000 signatures.[46] In March 2013, the White House issued a response criticizing the decision, and the Federal Communications Commission said it "doesn't pass the common sense test."[47]

In a rare showing of speed and efficiency, and motivated by the opportunity to take up a bipartisan pro-consumer cause, Congress quickly took heed, introducing and ultimately passing the Unlocking Consumer Choice and Wireless Competition Act,[48] which essentially repealed the Librarian's decision, leaving the 2010 rule intact. At a hearing on the bill, congressional leadership sought to protect the Office and the rulemaking process by explaining that:

> The Register's authority to recommend an exemption is limited by the record that is presented to her by proponents of any exemption. In prior rulemakings, the record was sufficient to justify an exemption for cell phone unlocking. That was not the case in 2012, leaving it to Congress to determine if such an exemption was warranted.[49]

Still, those intent on besmirching the Office's reputation used the unlocking decision, and its relatively swift reversal by Congress, as an example of how the agency is out of touch, ineffective, and in the pocket of major industry players, all of which fed into a broader narrative about the Office's lack of integrity.

In many ways, the three events that consumed the Office from 2011 into the early days of 2013 — the support of a legislative measure that failed spectacularly, a rough Congressional hearing, and a legally-correct-but-unpopular administrative decision — are the normal and entirely predictable vicissitudes of running an administrative agency. Indeed, when you are a government entity, there is a strong chance that half the country is dissatisfied with your performance on the best of days.

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[46] Ezra Mechaber, *Here's How Cell Phone Unlocking Became Legal*, The White House Blog (Aug. 15, 2014), https://obamawhitehouse.archives.gov/blog/2014/08/15/heres-how-cell-phone-unlocking-became-legal.

[47] Federal Communications Commission, Statement of FCC Chairman Julius Genachowski on the Copyright Office of the Library of Congress Position on DMCA and Unlocking New Cell Phones (Mar. 4, 2013), https://apps.fcc.gov/edocs_public/attachmatch/DOC-319250A1.pdf.

[48] Pub. L. No. 113-144 (2014).

[49] *Unlocking Consumer Choice and Wireless Competition Act: Hearing on H.R. 1123 Before the Subcomm. on Courts, Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 12 (2013) (statement of Chairman Bob Goodlatte).

But the events of those couple of years took place at an especially pivotal time for the Copyright Office and for copyright policy generally. Under new management for the first time in more than a dozen years, and Pallante the first Register appointed in the digital age, the Office was well positioned to establish itself as a forward-thinking, innovative agency poised to move copyright law into the next century.

Instead, it found itself playing defense.

Silicon Valley, emboldened by the likes of Lofgren and the industry's strong ties to the White House, used every available opportunity to characterize the Copyright Office as a biased agency, captured by copyright owners, and used SOPA and cell phone unlocking as the two principal data points in support of its view. The tech-sector echo chamber amplified these views, all with an eye toward minimizing the Office's role in policymaking, a key step in support of its ultimate policy objective: weakening copyright law in favor of business models that rely on freely available third-party content.

The copyright conversation in the United States needed a reboot, and Pallante was thinking big and bold.