



# **A Revue of Review: Update on U.S. Copyright Law Review and Studies**

**The Fourth Annual U.S.-China IP Conference:  
Best Practices for Innovation and Creativity**

**October 8-9, 2015  
Berkeley, California**

# Today's Revue



- **Copyright Review**
- **Office Modernization**
- **Copyright Office  
Studies and Reports**



# The Register's Call for Updates to U.S. Copyright Law (March 2013)



“Ultimately if the law does not serve authors, it is not working and it doesn’t deserve the respect of the public.”

“The law is showing the strain of its age and requires [Congress’s] attention.”

“Authors are not a counterweight to the public interest but instead are at the very center of the equation.”



# Congressional Copyright Review Announced in April 2013



“It is my belief that a wide review of our nation’s copyright laws and related enforcement mechanisms is timely.”

“The House Judiciary Committee will hold a comprehensive series of hearings on U.S. copyright law in the months ahead.”

“The goal of these hearings will be to determine whether the laws are still working in the digital age.”



Program includes presentations by filmmakers, musical performances by songwriters, and remarks by  
**Bob Goodlatte**, Chairman, Committee on the Judiciary, U.S. House of Representatives,  
**Maria Pallante**, United States Register of Copyrights,  
**James Pooley**, Deputy Director General, Innovations and Technology Sector, World Intellectual Property Organization, and  
**Teresa Rea**, Acting Under Secretary of Commerce for Intellectual Property.

**Wednesday**  
**April 24, 2013**  
**1:00 PM – 3:00 PM**  
**Coolidge Auditorium**  
Jefferson Building  
Library of Congress  
*\*Open to the public*

# Copyright Review Hearings: 20 hearings, 100 witnesses, 2 years



A Case Study for Consensus Building: The  
Copyright Principles Project

Innovation in America: The Role of Copyrights

Innovation in America: The Role of Technology

The Role of Voluntary Agreements in the U.S.

Intellectual Property System

The Rise of Innovative Business Models

The Scope of Copyright Protection

The Scope of Fair Use

Section 512 of Title 17



Preservation and Reuse of Copyrighted Works

Compulsory Video Licenses of Title 17

First Sale Under Title 17

Music Licensing Under Title 17 (two hearings)

Moral Rights, Termination Rights, Resale

Royalty, and Copyright Term

Copyright Remedies

Chapter 12 of Title 17 (Circumvention/TPMs)

Copyright Issues in Education and for  
the Visually Impaired

The U.S. Copyright Office: Its Functions  
and Responsibilities

# Copyright Review Hearings: Participating Stakeholders



- Amazon.com
- Americana Music Association
- American Association of Community Colleges
- American Association of Independent Music
- American Association of State Colleges and Universities
- American Cable Association
- American Council on Education
- American Foundation for the Blind
- American National Standards Institute
- American Society of Composers, Authors and Publishers
- American Society of Media Photographers
- Association of American Publishers
- Association of American Universities
- Authors Guild
- Association of Public and Land-grant Universities
- Automatic Inc.
- Authors Guild
- Benetech (Technology non-profit)
- BSA—The Software Alliance
- BMI
- Center for Copyright Information
- Center for Democracy and Technology
- Center for Internet, Communication and Technology Policy, American Enterprise Institute
- Columbia University
- Computer & Communications Industry Association
- Copyright Alliance
- Copyright Clearance Center
- Digital Media Association
- DISH Network
- Electronic Frontier Foundation
- Elsevier Inc.
- Entertainment Software Association
- Film Independent and International Documentary Association
- Future of Music Coalition
- Getty Images
- Graphic Artists Guild
- Google Inc.
- Yep Roc Records, Red Eye Distribution (Independent Record Companies)
- Indegogo
- Independent Creators
  - Roseanne Cash (singer/songwriter/performer)
  - David Lowery (singer/songwriter/lecturer)
  - Naomi Novik (author)
  - Maria Schneider (GRAMMY Award Winning Composer)
- International AntiCounterfeiting Coalition
- Interactive Advertising Bureau
- John Wiley & Sons, Inc.
- Knowledge Ecology International
- Law Professors/Scholars
  - June Besek
  - Annemarie Bridy
  - Michael W. Carroll
  - Laura Gasaway
  - Daniel J. Gervais
  - Peter Jaszi
  - Glynn Lunney, Jr
  - David Nimmer
  - Sean O'Connor
  - Pamela Samuelson
  - Mark F. Schultz
  - Steven Tepp
  - John Villasenor
- Library of Congress
- Microsoft Corporation
- Motion Picture Association of America
- Nashville Songwriters Association International
- National Association of Broadcasters
- National Association of Independent Colleges and Universities
- National Federation for the Blind
- National Music Publishers Association
- Newspaper Association of America
- New York Public Library
- One House LLC
- Organization for Transformative Works
- Owners' Rights Initiative
- PACA/Digital Media Licensing Association
- Pandora Media Inc.
- PharmacyChecker.com
- PLUS Coalition
- PreEmptive Solutions
- Public Knowledge
- Public.Resource.org
- Rackspace
- Radio Music License Committee Inc.
- The Recording Academy
- Recording Industry Association of America
- ReDigi
- Sirius XM Holdings Inc.
- SnapStream Media
- Stereo D
- Songwriters Guild of America
- SoundExchange Inc.
- SparkFun Electronics, Inc.
- TV Music License Committee
- U.S. Copyright Office
- U.S. Department of Justice



# The Register's Perspective on Copyright Review (April 29, 2015)



## Eight Policy Issues Ready for Legislative Development

Copyright Office Modernization

Music Licensing

Small Claims

Felony Streaming

Section 108

Orphan Works

Resale Royalty

Improvements for Persons with Print Disabilities

Section 1201 – Regulatory Presumption

## Four Issues Ripe for Study

Section 1201 – Other Issues

Section 512

Mass Digitization

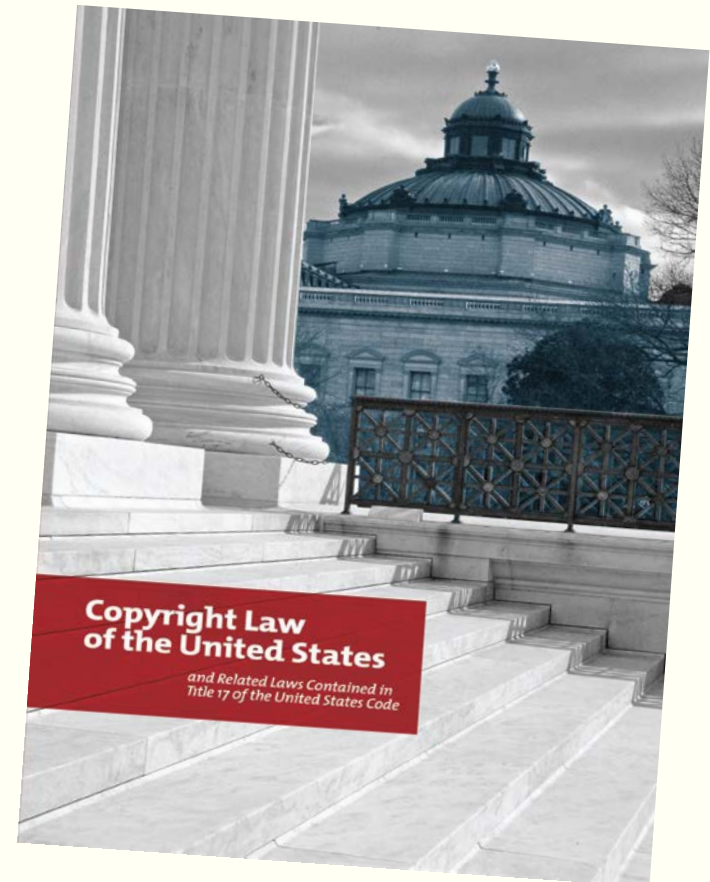
Moral Rights



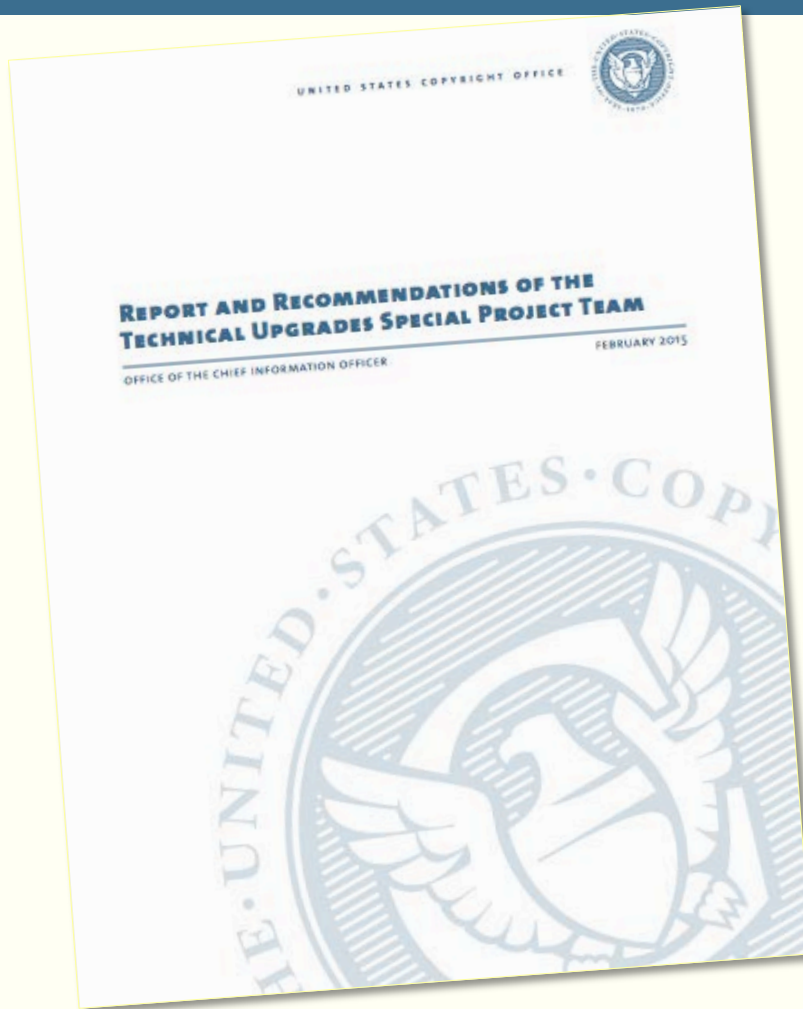
# Modernization of the Copyright Office



- Information Technology
- Presidential Appointment/Senate Confirmation of the Register
- Office Location in the Government



# Technology Upgrades



Independent infrastructure

Additional expert staff

Enterprise solution

Mobile capabilities

Better public record

Sophisticated data  
management

Security practices



# Some Statistics about the Office

- Approximately 360 current employees, below the authorized number of 475
- Funded by fees and appropriations
- Budget of \$50 million in 2014
- Registration Snapshot
  - 476,000 registration applications received in 2014
    - 219,000 applications for literary works
    - 65,000 applications for sound recordings
  - Receive ~ 9,000 applications a week
  - Application processing time for electronic applications is ~4 months



# Recent Reports for Congress & Other Documents (2011-2015)



- **Orphan Works and Mass Digitization (2015)**
- Music Licensing (2015)
- **Fair Use Index (2015)**
- Technical Upgrades (2015)
- **Compendium of Copyright Office Practices (2014)**
- Document Recordation (2014)
- Resale Royalties (2013)
- Small Claims (2013)
- Fee Study (2013)
- Satellite Retransmission (2011)
- Mass Digitization Analysis (2011)
- Pre-1972 Sound Recordings (2011)



# Orphan Works and Mass Digitization



- **Orphan work:** work for which a good-faith user cannot identify and/or locate copyright owner where permission is necessary as a matter of law
- Potential infringement liability/statutory damages/attorneys' fees/injunction if copyright owner reemerges



**"The orphan works problem is perhaps the single greatest impediment to creating new works . . . . The United States desperately needs a workable solution."**

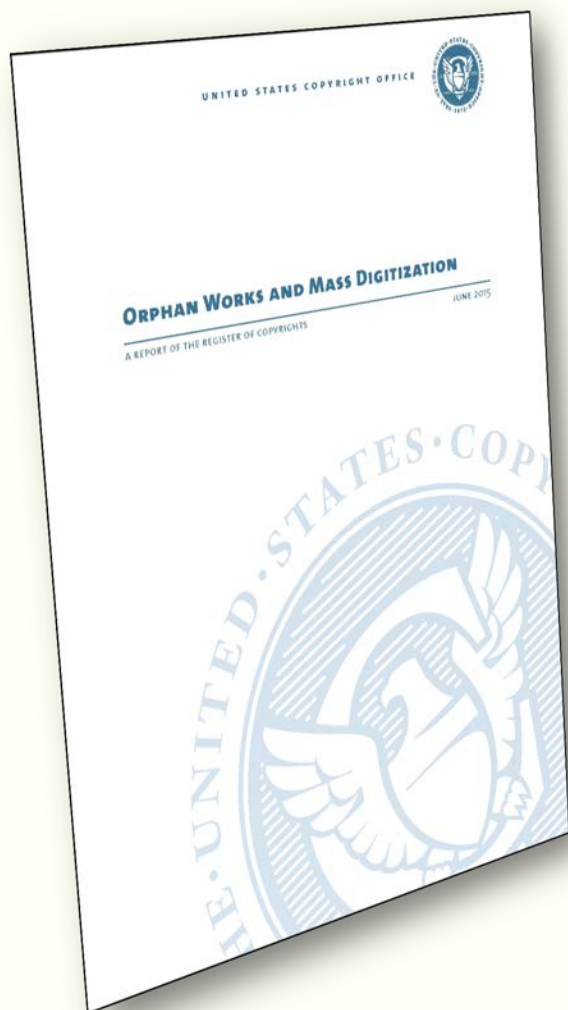
**--Michael C. Donaldson, Int'l Documentary Association/Film Independent**

# Study on Orphan Works & Mass Digitization (2012-2015)



- Federal Register notices issued in October 2012 and February 2014.
- Three rounds of public comments – 346 comments received.
- Public roundtables: March 10-11, 2014

# June 2015 Report

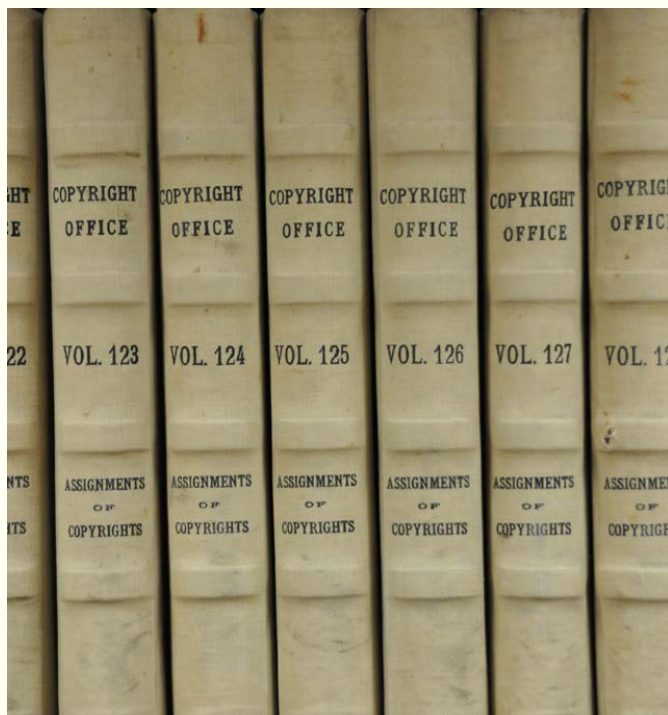


With separate  
recommendations on  
**Orphan Works**  
and  
**On Mass Digitization**

# For Orphan Works ...



## Recommendations



- **Limitation on remedies** for users who can prove that they engaged in **good faith diligent search** for copyright owner
- **Diligent search** would include:
  - Copyright Office records
  - Sources of authorship, ownership, and licensing
  - Technology tools
  - Databases



# On Orphan Works ...

## Recommendations (continued)

- **Injunctive relief** must account for harm caused by reliance on orphan works legislation
  - *E.g.*, enjoin new copies, but permit sale of existing copies
- **Derivative works:** Where an orphan work is combined with “significant original expression,” user can continue to prepare and use work if he provides reasonable compensation and attribution where requested
  - But, court may impose injunctive relief if harm is reputational in nature and not otherwise compensable

# On Mass Digitization ....



## Conclusions/Recommendations

- Fair use/voluntary licensing unlikely to provide a comprehensive solution.
- France, Germany, and the U.K. have adopted forms of **extended collective licensing (ECL)** to address mass digitization.
  - Longstanding use in Nordic countries
  - Collective management organizations (CMOs) are authorized by government to negotiate and administer licenses. Terms are “extended to” all members of class, unless rightsholders opt out.
  - Proposed Google Books class settlement adopted similar model.



# On Mass Digitization ...



## Conclusions/Recommendations (cont'd)

- Office recommends **ECL “pilot program”** for certain mass digitization projects
  - CMOs could apply to Copyright Office for authorization to license works on behalf of members and non-members
  - Limited to (1) literary works, (2) pictorial or graphic works published as illustrations, etc. in literary works, and (3) photographs
  - Copyright owners could opt out
  - Limited to nonprofit educational or research uses

•PUB

# Notice of Inquiry on Pilot Project



- Office has issued Federal Register notice seeking public comment to assist in developing legislation.
- Issues to be considered, *e.g.*:
  - Qualifying collections (minimum number of works, commercial availability, publication date)
  - User eligibility and access
  - Security requirements
  - Dispute resolution
- Comments are due October 9





# Fair Use Index

- The Fair Use Index tracks a variety of judicial decisions to help both lawyers and non-lawyers better understand the types of uses courts have previously determined to be fair—or not fair. The decisions span multiple federal jurisdictions.
- Provides brief summary of facts, question(s) presented and court's determination
- Provides citations to cases (but not the cases themselves)
- Searchable
- Available at <http://copyright.gov/fair-use>

THIRD EDITION  
Compendium of  
U.S. Copyright Office Practices

Code of Federal Regulations  
TITLE 37, CHAPTER II

Copyright Law of the United States  
AND RELATED LAWS CONTAINED IN  
TITLE 17 OF THE UNITED STATES CODE

Fair Use Index  
CASES AND INFORMATION

*“... something [the Copyright Office Fair Use Index] that finally came out just a few months ago and is actually pretty damn good.”*

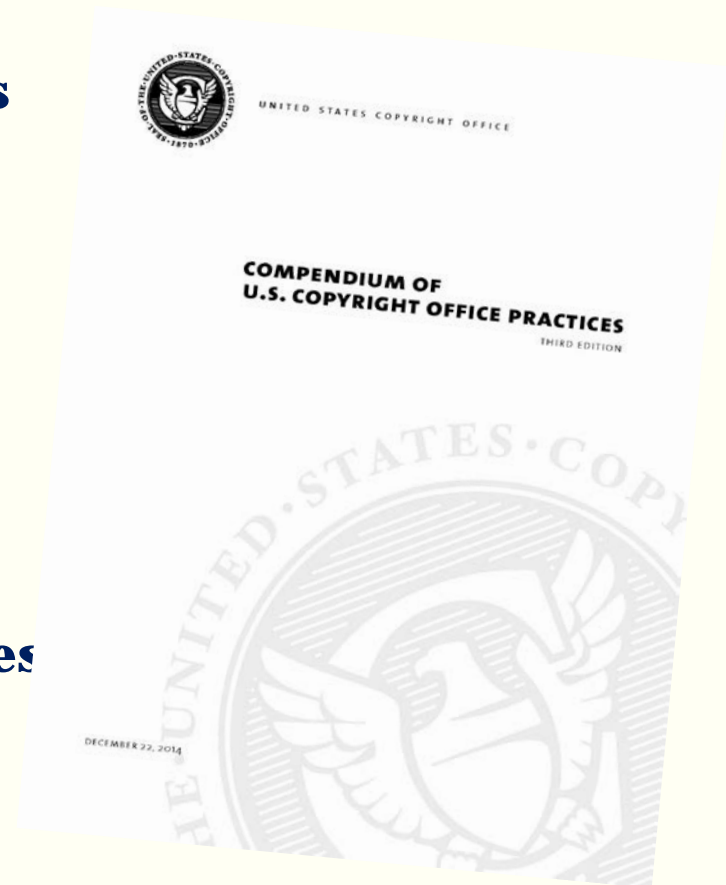
- Mike Masnick, Techdirt,  
Sept. 8, 2015



# The Compendium III

- **Technical manual for the Office's staff**
- **Also a Guidebook**
  - Authors
  - Licensees
  - Practitioners
  - Scholars
  - Courts
  - The Public
- **Addresses fundamental principles of copyright law and routine questions**

Available at:  
<http://copyright.gov/comp3/>



# Ongoing: Notice of Inquiry regarding Visual Works



- Topics include:
  - Monetizing and/or licensing visual works
  - Enforcement challenges
  - Registration challenges
  - Challenges for users
- Initial comments are posted on USCO website; reply comments were due October 1



# Forthcoming: Report on Making Available



- USCO held one day of public roundtables on May 5, 2014
  - Licensing associations
  - Legal scholars
  - Technology entities
- Participants representing diverse viewpoints
- Discussed existing exclusive rights, benefits of clarification, and foreign implementation and interpretation.



# Forthcoming: Sixth Triennial Section 120 Rulemaking



Federal Register / Vol. 79, No. 180 / Wednesday, September 17, 2014 / Proposed Rules 55607

## FOR [ENTER PRODUCTION COMPANY]

### Signature and Date

Name of Production Company Representative:

### Title and Address

Dated: September 11, 2014.

Aaron Siegel,  
Alternate OSD Federal Register Liaison  
Officer, Department of Defense.  
[FX Doc. 2014-22030 Filed 9-16-14; 8:43 a.m.]  
BILLING CODE 5001-06-P

## LIBRARY OF CONGRESS

### U.S. Copyright Office

#### 37 CFR Part 201

[Docket No. 2014-07]

#### Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of inquiry and request for petitions.

**SUMMARY:** The United States Copyright Office is initiating the sixth triennial rulemaking proceeding under the Digital Millennium Copyright Act, concerning possible exemptions to the Act's prohibition against circumvention of technological measures that control access to copyrighted works. The Copyright Office invites written petitions for proposed exemptions from interested parties. Unlike in previous rulemakings, the Office is not requesting the submission of complete legal and factual support for such proposals at the outset of the proceeding. Instead, in this first step of the process, parties seeking an exemption may submit a petition setting forth specified elements of the proposed exemption, as explained in this notice. After receiving petitions for proposed exemptions, the Office will consider the petitions, group and/or consolidate related and overlapping proposals, and issue a notice of proposed rulemaking setting forth the list of proposed exemptions for further consideration. The notice of proposed rulemaking will invite full legal and evidentiary submissions and provide further guidance as to the types of evidence that may be expected or useful vis-à-vis particular proposals, with the aim of producing a well-developed administrative record.

The Office believes that the adjustments it is making to its process,

as discussed in this notice, will enhance public understanding of the rulemaking process, including its legal and evidentiary requirements, and facilitate more effective participation in the triennial proceeding.

**DATES:** Written petitions for proposed exemptions must be received no later than November 3, 2014.

**ADDRESSES:** Each proposal for an exemption should be submitted as a separate petition. The Copyright Office strongly prefers that petitions for proposed exemptions be submitted electronically. See the **SUPPLEMENTARY INFORMATION** section below for information about the content and format requirements for petitions. A petition submission page and a template petition form will be posted on the Copyright Office Web site at <http://www.copyright.gov/1201/>. To meet accessibility standards, all petitions must be uploaded in a single file in either the Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of the submitter (and organization) should appear on both the form and the face of the comments. Petitions will be posted publicly on the Copyright Office Web site in the form they are received, along with the name of the submitter or organization. If electronic submission is not feasible, please contact the Copyright Office at 202-707-8330 for special instructions.

**FOR FURTHER INFORMATION CONTACT:** Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at [jcharlesworth@loc.gov](mailto:jcharlesworth@loc.gov) or by telephone at 202-707-8330; Sarah V. Damle, Special Advisor to the General Counsel, by email at [sdamle@loc.gov](mailto:sdamle@loc.gov) or by telephone at 202-707-8330; or Stephen Rowe, Attorney-Advisor, by email at [srowe@loc.gov](mailto:srowe@loc.gov) or by telephone at 202-707-8330.

**SUPPLEMENTARY INFORMATION:** As contemplated by 17 U.S.C. 1201(a)(1), the U.S. Copyright Office is initiating a proceeding to determine whether there are any classes of copyrighted works for which noninfringing uses are, or in the next three years are likely to be, adversely affected by the prohibition on circumvention of technological measures that control access to copyrighted works. The Office invites submission of petitions for proposed exemptions. The requirements for which are described in part IV.B.1 below.

## 1. Background

In 1998, Congress enacted the Digital Millennium Copyright Act ("DMCA") to implement certain provisions of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. See generally Public Law 105-304, 112 Stat. 2860 (1998). The DMCA governs many aspects of the digital marketplace for copyrighted works by establishing "a wide range of rules . . . for electronic commerce" and "defin[ing] whether consumers and businesses may engage in certain conduct, or use certain devices, in the course of transacting electronic commerce." Report of the H. Comm. on Commerce on the Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105-351, pt. 2, at 22 (1998) ["Commerce Comm. Report"].

Among other things, title 17 of the DMCA, which added a new chapter 12 to title 17 of the U.S. Code, prohibits circumvention of technological measures employed by or on behalf of copyright owners to protect access to their works (also known as "access controls"). Specifically, section 1201(a)(1)(A) provides in pertinent part that "no person shall circumvent a technological measure that effectively controls access to a work protected under title 17." Under the statute, to "circumvent a technological measure" means "to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner." 17 U.S.C. 1201(a)(1)(A). A technological measure that "effectively controls access to a work" is one that "in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work." 17 U.S.C. 1201(a)(1)(B). In enacting this prohibition, Congress noted that technological protection measures can "support new ways of disseminating copyrighted materials to users, and to safeguard the availability of legitimate uses of those materials by individuals." Staff of House Comm. on the Judiciary, 103rd Cong., Section-by-Section Analysis of H.R. 2281 as passed by the United States House of Representatives on August 4, 1998, at 6 [Comm. Print 1998] ("House Manager's Report").

As originally drafted, the prohibition in section 1201(a)(1)(A) did not provide for an exemption process.<sup>1</sup> The House of

<sup>1</sup> The original version of the bill did provide for certain prominent exemptions, including for library browsing, reverse engineering, and other activities.

Continued

Triennial process to identify exemptions of certain classes of works from the prohibition against circumvention of technological measures that control access to copyrighted works.

- **September 2014: Notice of Inquiry**
  - 44 petitions for exemptions
  - Office created 27 proposed classes of exemptions for consideration
- **Received nearly 40,000 comments (including many form comments)**



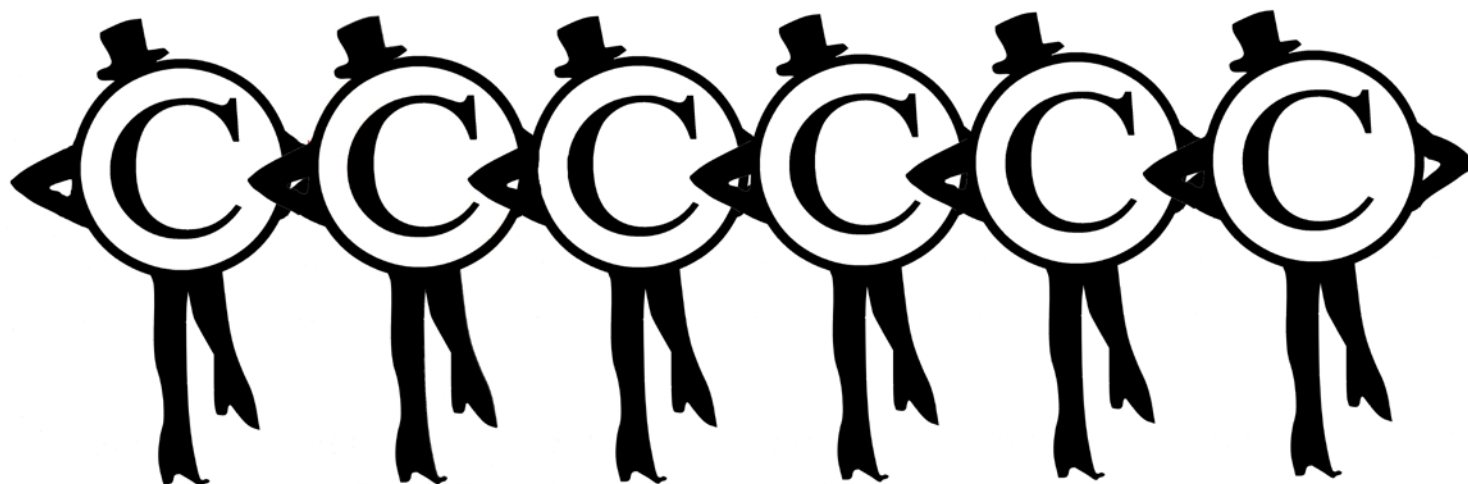
# Other U.S. Initiatives

- **U.S. Department of Commerce Internet Policy Task Force**
  - July 2013: Released “Copyright Policy, Creativity, and Innovation in the Digital Economy”  
<http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>
  - Held roundtables and public comment on issues relating to copyright law in the digital environment
- **U.S. Intellectual Property Coordinator (IPEC)**
  - June 2013: Released 2013 Joint Strategic Plan (JSP) on IP Enforcement
  - Facilitated several voluntary initiatives between various stakeholders
    - Copyright Alert System
    - Voluntary Best Practices
  - Public comments for next JSP due on October 16





# A Revue of the Review ....





*Xie xie*

Maria Strong  
Deputy Director of  
Policy and International Affairs  
United States Copyright Office

[www.copyright.gov](http://www.copyright.gov)