

Making Copyright Work for a Global Market: Policy Revision on Both Sides of the Atlantic

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INTRODUCTION

Copyright has become a more central part of society today than ever before. We have new objective evidence of the economic contribution of the copyright industries: in the United States, the Department of Commerce's (DOC) 2012 report on "Intellectual Property and the U.S. Economy" found that copyright-intensive industries contributed \$641 billion, or 4.4%, to the U.S. GDP in 2010, and provided more than 5 million jobs.¹ Last year's comparable study for Europe from the Office for Harmonization of the Internal Market (OHIM) found that copyright-intensive industries contributed 3.2% of total employment.² And copyright has become more pervasive in the daily life of the ordinary person, not only as a user of content in the online environment, but also as a creator of new material and as a transformer and effectively a publisher of material created by others. As a result, almost every copyright issue these days sparks press coverage as well as public attention and debate.

Paradoxically, this enhanced role has made it harder to adapt public policy to changed circumstances—and at a time when the changes are fast and furious. There are more, and more diverse, large commercial interests involved. There is more lobbying from more players, and a larger variety of outlets for press reporting. Perhaps most important, there is more consumer and grassroots involvement—all greatly amplified by new techniques of mass communication.

Despite the difficulty, we have seen waves of reform take place in the past at points when technological and market changes reach critical mass. This may be one of those points, both in the United States and in the European Union. A flurry of activity took place in Washington, Brussels and Geneva over the period from the mid-1990s to the early 2000s, in response to the development of mass market

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1. ECONOMICS AND STATISTICS ADMINISTRATION & U.S. PATENT AND TRADEMARK OFFICE, DEPARTMENT OF COMMERCE, *INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: INDUSTRIES IN FOCUS* (2012), available at <http://perma.cc/Q2M4-7G7M>.

2. Eur. Patent Office & Office for Harmonization in the Internal Mkt., *Intellectual Property Rights Intensive Industries: Contribution to Economic Performance and Employment in the European Union* (Sept. 2013), available at <http://perma.cc/K5NK-PVE5>.

digital technology. The 1996 World Intellectual Property Organization (WIPO) Internet Treaties,³ designed to address these challenges, were followed by several years of implementation activity in both the United States and the European Union, culminating in the Digital Millennium Copyright Act (DMCA) in 1998⁴ and the Information Society Directive in 2001.⁵ As a political counterweight, legislation providing for safe harbors for Internet service providers was enacted around the same time, incorporated into the DMCA⁶ and the 2000 E-Commerce Directive.⁷ During the period between 2002 and 2005, there were several updates to exceptions in the United States, notably for digital distance education, the visually impaired and libraries.⁸

We then experienced almost ten years of dormancy in the United States, when several bills were proposed, but little passed—nothing that changed the balance of rights. In contrast, the European Union was active on copyright substance during this time, although the directives adopted were not specific to Internet issues. They dealt with term of protection, orphan works and collective rights management.⁹

In the course of that decade, of course, much changed in the online world. Technology moved on, and we saw the development of peer-to-peer services, cloud services, cyberlockers, social media and streaming services, as well as the proliferation of powerful new personal devices. Internet commerce has also grown by leaps and bounds, with an explosion in the availability of content in a multiplicity of formats. The market has evolved unevenly across different creative sectors, but all are increasingly participating.

Not surprisingly, then, activity in Internet copyright policymaking has picked up since 2011. The initial goals were to improve enforcement in areas where the existing framework left gaps due to new and unforeseen challenges. The primary areas of focus were rogue websites outside the jurisdiction and infringement taking

3. WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121; WIPO Performances and Programs Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203.

4. Digital Millennium Copyright Act, 17 U.S.C. § 1201 *et seq.* (2012).

5. Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10 [hereinafter Information Society Directive].

6. 17 U.S.C. § 512 (2012).

7. Directive 2000/31/EC, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1 [hereinafter E-Commerce Directive].

8. Technology, Education and Copyright Harmonization (TEACH) Act of 2002, 17 U.S.C. § 110 (2012); Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified in scattered sections of 20 U.S.C.); Preservation of Orphan Works Act of 2005, 17 U.S.C. § 108 (2012); *see also* Family Movie Act of 2005, 17 U.S.C. § 110 (2012) (creating a new exemption for skipping objectionable audio and video content in motion pictures).

9. Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market, 2014 OJ (L 84) 72; Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, 2013 O.J. (L 299) 5 [hereinafter Orphan Works Directive]; Directive 2011/77/EC of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the Term of Protection of Copyright and Certain Related Rights, 2011 O.J. (L 265) 1.

place over peer-to-peer file-sharing networks. But a growing storm of attention and concern—and arguably a failure by governments and stakeholders to invest sufficiently in developing public legitimacy—derailed several proposals on both sides of the Atlantic. I am referring of course to the now-infamous Stop Online Piracy Act (SOPA) and Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PROTECT IP Act) in the United States,¹⁰ and the much-maligned Anti-Counterfeiting Trade Agreement (ACTA) in the European Union.¹¹ In addition, repeated attention to potential updates of the EU Enforcement Directive during this period led nowhere.¹²

After the demise of SOPA and PROTECT IP Act in early 2012, the rest of that year was devoted to reflection (and wound-licking) in the United States. Policymakers, as well as private sector interests, bided their time and considered their options. In the European Union, the Commission undertook various studies and focused on what could be done through private initiatives, launching the “Licences for Europe” stakeholder dialogue.¹³

In 2013, the United States began gearing up again to tackle the difficult issues. At the same time, the European Commission initiated an ambitious public consultation on copyright.¹⁴

First, I will describe the work being done in the United States in different parts of the government and compare it to the European Union’s consultation. I will then venture to give reasons for the similarities and differences and identify several common themes. Finally, I will suggest some directions for future policy work on both sides of the Atlantic.

10. Stop Online Piracy Act (SOPA), H.R. 3261, 112th Cong. (2011); Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PROTECT IP Act), S. 968, 112th Cong. (2011).

11. See, e.g., Cory Doctorow, *How Advocacy Beat ACTA in Europe*, BOING BOING (May 16, 2014), <http://perma.cc/6HB2-ZVQB>; see also Council Proposed Agreement (EU) No. 12196/11 of 23 Aug. 2011, Anti-Counterfeiting Trade Agreement Between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America, available at <http://perma.cc/DBQ-8GNM>.

12. See, e.g., Monica Horton, *EU Commission Re-sets Clock for IP Enforcement Review*, IPTEGRIETY.COM (Apr. 30, 2012), <http://perma.cc/6VH8-MKP3>. Since this lecture was delivered, the European Commission on July 1, 2014 adopted a Communication on an Action Plan “aiming at renewing the consensus on the enforcement of Intellectual Property Rights.” See *Action Plan on the Enforcement of Intellectual Property Rights*, EUROPEAN COMM’N, <http://perma.cc/R5P3-ERPT> (last visited Nov. 2, 2014).

13. See *Licences for Europe: Structured Stakeholder Dialogue*, EUROPEAN COMM’N, <http://perma.cc/N5CE-SEQS> (last visited Oct. 4, 2014) (collecting speeches given at and documents related to “Licences for Europe”); see, e.g., JULIAN BOULANGER ET AL., *ASSESSING THE ECONOMIC IMPACTS OF ADAPTING CERTAIN LIMITATIONS AND EXCEPTIONS TO COPYRIGHT AND RELATED RIGHTS IN THE EU: ANALYSIS OF SPECIFIC POLICY OPTIONS* (2014), available at <http://perma.cc/E5LX-99GA> (example of one of a series of studies launched by the European Commission post-2012).

14. *Public Consultation on the Review of the EU Copyright Rules* (June 26, 2013) [hereinafter *EU Public Consultation*], available at <http://perma.cc/V9HX-CG65>.

I. OVERVIEW OF DEVELOPMENTS IN THE UNITED STATES

Over the past twelve months, there has been a tremendous amount of activity initiated in the United States. In various forums in both Congress and the Administration, the government has begun a comprehensive body of work on outstanding copyright issues. This has been a collaborative and cooperative process across the executive and legislative branches, as we seek to complement each other and avoid duplication as much as possible.

The timeline so far:

Beginning in 2010: The DOC Internet Policy Task Force (the Task Force) begins its copyright work stream, led by the United States Patent and Trademark Office (USPTO) and the National Telecommunications and Information Administration (NTIA). This work was essentially put on hold during the 2011 Congressional debates, and resumed in 2012.

March 2013: “The Next Great Copyright Act,” a speech by the Register of Copyrights, calls for a review of the 1976 Copyright Act to ensure that its provisions are still fit for purpose.¹⁵

April 2013: A congressional review of the Copyright Act is announced by Bob Goodlatte, Chairman of the House Judiciary Committee, in response to the Register’s call.¹⁶ The Judiciary Committee leadership has indicated that this will be a careful evaluation of where the Copyright Act needs updating—not necessarily a rewrite from scratch as in 1976.¹⁷

July 2013: The DOC Task Force issues our Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy (the Green Paper).¹⁸

There has already been a series of congressional hearings—typically at least one or two per month—numbering ten so far.¹⁹ The topics have mostly been general in nature, rather than aimed at specific proposals. The hearings began by examining copyright principles, and issues involving creativity and copyright, and innovation and copyright.²⁰ Since then, they have proceeded through the Act, mostly section-

15. Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013).

16. See Press Release, U.S. Judiciary Cmte., Chairman Goodlatte Announces Comprehensive Review of Copyright Law (Apr. 24, 2013), <http://perma.cc/5QBL-GUNB>; see also *The Register’s Call for a Comprehensive Review of Copyright: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013), available at <http://perma.cc/3DND-U8EJ>.

17. See *Copyright Review Process Will Continue into 2015; Education and Circumvention Will Be Next Issues Examined*, BLOOMBERG BNA (Aug. 20, 2014), <http://perma.cc/78PQ-4R8R>.

18. DEP’T OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2013) [hereinafter DOC TASK FORCE GREEN PAPER], available at <http://perma.cc/L7RS-YUQY>. As part of the DOC Task Force, the author was a principal drafter of the Green Paper.

19. For a regularly updated list of relevant congressional hearings, see *Congressional Hearings on the Review of the Copyright Law*, U.S. COPYRIGHT OFFICE, <http://perma.cc/QE7U-ZLVN> (last visited Oct. 19, 2014).

20. See *A Case Study for Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013), available at <http://perma.cc/5QMX-KA5Y>; *Innovation in America (Part I and II): Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the*

by-section.²¹ The hearings are expected to continue all year, and may culminate in the release of drafts for revision of the statute early in 2015.

Meanwhile, the Copyright Office is conducting studies on a number of issues, with possible legislative recommendations to emerge; topics include music licensing, orphan works and mass digitization, and the public registration and recordation system.²²

II. DEPARTMENT OF COMMERCE GREEN PAPER

A. GOALS

The DOC Task Force had two overall goals in producing the Green Paper. First, we believed it was valuable for the Administration to articulate clearly certain basic principles:

1. Copyright is important to our economy and our cultural development, and we need to make it work in the digital environment.²³
2. There is no need for a complete rewrite of U.S. copyright law—its fundamentals are still sound.²⁴
3. A well-functioning copyright system is consistent with a vibrant and innovative Internet, and we can find the “sweet spot” where we have the benefit of both.²⁵

Second, the Task Force wanted to provide an objective and balanced overview of the issues involved in digital copyright.²⁶ This included looking at where we are now as well as setting out a framework for ongoing analysis. Given the recent levels of controversy, we sought to lay the groundwork for moving forward in a productive way.

B. COVERAGE

The Green Paper represents the most thorough analysis of digital copyright issues by a U.S. administration since 1995.²⁷ It focuses on the copyright system in the United States, but recognizes the importance of the international context. This

Judiciary, 113th Cong. (2013), available at <http://perma.cc/4VTP-UD4M>.

21. See, e.g., *Compulsory Video Licenses of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014), available at <http://perma.cc/ZC9Y-SVD8>.

22. See *Active Policy Studies*, U.S. COPYRIGHT OFFICE, <http://perma.cc/XP5R-FK7F> (last visited Oct. 2, 2014); *Public Inquiries*, U.S. COPYRIGHT OFFICE, <http://perma.cc/H678-PR58> (last visited Oct. 2, 2014).

23. DOC TASK FORCE GREEN PAPER, *supra* note 18, at 5.

24. *Id.* at 8.

25. *Id.* at 1.

26. *Id.* at 4.

27. See INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995), available at <http://perma.cc/9LME-SQDW>.

context includes relevant treaty obligations, thinking taking place around the world on cutting-edge issues, experiences elsewhere that we can learn from (notably, but not only, in the European Union) and the increasingly global nature of the digital marketplace.

In terms of the relationship of this DOC paper to the copyright review in Congress, our coverage is both narrower and broader. It is narrower in that it looks only at the Internet environment, not the full range of the Copyright Act. It is broader in that it does not focus on legislation, but gives equal attention to practical enforcement and market issues.

C. STRUCTURE

The paper is divided into three main sections, fairly comparable in weight and focus: (1) maintaining an appropriate balance between rights and exceptions as the law is updated to deal with technological change; (2) ensuring that the appropriately balanced rights remain meaningful in today's Internet environment and (3) ensuring an efficient online marketplace—here, the question is how best to realize the full potential of the Internet both as a legitimate marketplace for works and as a vehicle for streamlining licensing transactions.²⁸

The Green Paper describes what has been done in the past twenty years—by treaty, by legislation, by the courts and by private action. It identifies the issues that now require or merit new consideration and suggests which forums are appropriate for each. Congress and the Copyright Office are already focusing attention in some of these areas. In other areas, the Task Force proposes that the Department of Commerce play a leading role in moving forward.

D. RECOMMENDATIONS

At the outset, the Green Paper makes the point that no single approach to the open issues will be sufficient.²⁹ Rather, one should look to a mix of legislation, regulation, judicial interpretation, voluntary initiatives and public education. The guiding principles should be effectiveness and the ability to achieve results, given today's complex environment. In other words, what is doable?

1. Balance of Rights and Exceptions

After describing the ways in which copyright rights and exceptions have already been adapted in response to digital technologies, the Green Paper identifies several areas where we believe new attention is warranted.

a. Public Performance Right for Sound Recordings

First, we urge Congress to better rationalize the public performance right for

28. DOC TASK FORCE GREEN PAPER, *supra* note 18, at vi–viii.

29. *Id.* at iii.

sound recordings. Specifically, this would involve providing an over-the-air broadcasting right (a call that has been made for many years—unsuccessfully—by previous administrations and the Copyright Office), and considering the appropriateness of the current different rate-setting standards in the statute for different types of digital music services.³⁰

b. Orphan Works, Mass Digitization and the Library Exception

We support work on three topics being examined by the Copyright Office (on the first two of which public roundtables were held in March 2014³¹):

i. Orphan Works

The renewal of past efforts to pass legislation enabling legal use of works where the copyright owner cannot be identified or located.³²

ii. Mass Digitization

The Copyright Office is following up on its 2011 report analyzing the issues and is expected to make recommendations.³³ Since the Green Paper was written, the *Google Books* decision—now on appeal—seems to broaden the scope of fair use for this type of activity.³⁴ If it is upheld, licensing-based approaches may be less promising.

iii. Library Exception

Updating the law to take into account the current capabilities of digital technology.³⁵

c. Fair Use

We support efforts to provide greater clarity to the fair use doctrine, such as the proposal by the Intellectual Property Enforcement Coordinator (IPEC) to have the

30. *See id.* at 11 & n.43.

31. *See* Orphan Works and Mass Digitization; Request for Additional Comments and Announcement of Public Roundtables, 79 Fed. Reg. 7706 (Feb. 10, 2014), *available at* <http://perma.cc/NJ7M-L8LF>.

32. DOC TASK FORCE GREEN PAPER, *supra* note 18, at 33; *see also* *Active Policy Studies*, U.S. COPYRIGHT OFFICE, <http://copyright.gov/policy> (last visited Oct. 2, 2014).

33. *See* OFFICE OF THE REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT (2011), *available at* <http://perma.cc/EP5R-KNW8> (the 2011 Copyright Office report); Orphan Works and Mass Digitization, 79 Fed. Reg. at 7707 (following up on the issues analyzed in the 2011 Copyright Office report).

34. *See* *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013); *see also* Brief for Plaintiff-Appellant, *Authors Guild, Inc. v. Google Inc.*, No. 13-4829 (2d Cir. Apr. 11, 2014), ECF No. 55.

35. DOC TASK FORCE GREEN PAPER, *supra* note 18, at 24.

Copyright Office provide guidance on existing case law.³⁶

d. Remixes and the First Sale Doctrine

We identify two areas in which the Task Force will take work forward, soliciting public comment:

i. The Legal Status of Remixes

Is the current combination of licensing options such as YouTube Content ID and reliance on fair use leading to adequate results, or is greater clarity advisable, such as through microlicensing directly to consumers or enacting a specific exception?³⁷

ii. The Scope and Relevance of the First Sale Doctrine (Exhaustion) in the Digital Environment

The question posed is not simply yes or no—that is, whether the doctrine should or should not apply—but rather, what benefits does the doctrine provide in the physical world, and how can similar benefits be achieved in the digital world?³⁸

2. Enforcement

The Green Paper describes the full array of enforcement mechanisms available to rights holders, as well as government actions to improve online enforcement. The specific recommendations are as follows:

a. Penalties for Criminal Acts of Streaming to the Public

We repeat the Administration's prior calls to make available to law enforcement authorities the same range of penalties for criminal acts of streaming to the public as for criminal acts of reproduction and distribution (correcting a historical anomaly in U.S. law).³⁹

b. Voluntary Initiatives to Improve Online Enforcement

We support the further development of voluntary initiatives to improve online enforcement. This includes work done by the IPEC to encourage and support such efforts by online advertisers, advertising networks and payment providers, and the graduated response approach to peer-to-peer infringement established by a number of major rights holders and Internet service providers (ISPs) through the Copyright

36. *Id.* at 23; *see also* U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR, 2013 JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT 18 (2013) [hereinafter 2013 IPEC STRATEGY REPORT], *available at* <http://perma.cc/4H95-YA2R>.

37. DOC TASK FORCE GREEN PAPER, *supra* note 18, at 29.

38. *Id.* at 37.

39. *See* DOC TASK FORCE GREEN PAPER, *supra* note 18, at 45.

Alert System.⁴⁰ The USPTO will be assessing the effectiveness of such initiatives to determine any need for further action, and we have already solicited public comments on the appropriate methodology.⁴¹

c. Specialized Small Claims Procedures

We support work by the Copyright Office on providing specialized small claims procedures for individuals and small- and medium-sized enterprises.⁴² In fact, the Office issued a recommendation to establish such procedures in September 2013, which Congress has not yet taken up.⁴³

d. Public Education and Outreach

We encourage enhanced public education and outreach, which are critical to the legitimacy and acceptance of any proposed enforcement approach (especially after the experience with SOPA and the PROTECT IP Act).⁴⁴

e. Statutory Damages and the DMCA Notice and Takedown System

We identify two items that the Task Force will take forward with public input:

i. Statutory Damages for Individual File-Sharers and Online Services

Examining the appropriate calibration of statutory damages awards in two specific contexts:⁴⁵ (1) individual file-sharers, two of whom have been the target of large jury damages awards and (2) potential secondary liability for online services providing access to entire catalogs of works, where damages calculated on a per-work basis can mount up into the billions.⁴⁶

ii. Stakeholder Dialogue on the DMCA Notice and Takedown System

Establishing a stakeholder dialogue on the DMCA notice and takedown system for removing infringing material from the Internet.⁴⁷ This system has generally been effective, and has worked well in the context for which it was designed. But operational difficulties have been raised by users of the system on all sides,

40. *Id.* at 67–74.

41. See Request of the United States Patent and Trademark Office for Public Comments: Voluntary Best Practices Study, 78 Fed. Reg. 37,210 (Jun. 20, 2013), available at <http://perma.cc/35QA-HN6U>.

42. DOC TASK FORCE GREEN PAPER, *supra* note 15, at 58.

43. U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS (2013), available at <http://perma.cc/UVN3-VNNK>.

44. DOC TASK FORCE GREEN PAPER, *supra* note 15, at 64–76.

45. Statutory damages are an alternative to actual damages in U.S. law, calculated within a range set by statute. 17 U.S.C. § 504 (2012).

46. DOC TASK FORCE GREEN PAPER, *supra* note 15, at 52.

47. *Id.* at 76.

including rights holders, ISPs and consumers—particularly relating to volume, repostings of taken-down content, abusive notices and the feasibility of the system's use for small entities and individuals.⁴⁸ Although significant fears have been expressed over the years about the risks of reopening the carefully-struck DMCA balance, we conclude that much can be done to alleviate these difficulties through voluntary cooperation, without requiring legislation.

3. Online Marketplace

The third and final section of the Green Paper describes the state of play in the online marketplace and the areas where there are still gaps or barriers.⁴⁹ There has been tremendous growth over the past five to ten years in the United States, and today there is an impressive availability of a wide range of content in multiple diverse formats. The main areas of weakness relate to the comprehensiveness of available ownership and licensing information, connections across different creative sectors and geographical borders, and interoperability. Our recommendations here are as follows:

a. Music Licensing

We support congressional efforts to simplify music licensing, primarily relating to compositions rather than sound recordings.⁵⁰ This involves anachronisms in the American system of compulsory licensing and the administration of different rights that may be involved in the same use by different collective management organizations, which are in turn subject to long-standing antitrust consent decrees.⁵¹ The Copyright Office is now examining these interrelated issues in order to make recommendations to Congress.⁵²

b. Access to Rights Ownership Information

We stress the importance of access to rights ownership information as a fundamental building block for licensing. Accordingly, we support improvements to the Copyright Office registration and recordation systems and enhancements to existing incentives to use them,⁵³ short of those that amount to formalities prohibited by international treaties.⁵⁴ This could well involve public/private

48. *Id.* at 56–58.

49. *Id.* at 77.

50. *Id.* at 81–86.

51. *Antitrust Consent Decree Review*, U.S. DEP'T OF JUSTICE, <http://perma.cc/4PVB-XLDE> (last visited Oct. 2, 2014).

52. *Music Licensing Study*, U.S. COPYRIGHT OFFICE, <http://perma.cc/CFV3-5VTP> (last visited Oct. 2, 2014).

53. DOC TASK FORCE GREEN PAPER, *supra* note 15, at 92.

54. *See, e.g.*, WIPO Copyright Treaty, art. 3, Dec. 20, 1996, 2186 U.N.T.S. 121; WIPO Performances and Programs Treaty, art. 20, Dec. 20, 1996, 2186 U.N.T.S. 203; Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9, Apr. 15, 1994, 1869 U.N.T.S. 299; Berne

partnerships to link the Copyright Office databases to those of private organizations such as collecting societies. The Copyright Office is working on modernizing and reengineering its databases, but is challenged by resource constraints.⁵⁵

c. Streamlined Online Licensing Transactions

We note the tremendous potential for streamlined online licensing transactions, which, so far, are offered only in certain limited areas, notably through the Copyright Clearance Center (CCC), Creative Commons and some individual publishers.⁵⁶

We conclude that development of the online marketplace is primarily the responsibility and preserve of the private sector.⁵⁷ The question posed is whether there is an appropriate role for the government in helping to improve the online licensing environment, and if so, what it should be. We give as examples of what might be done two European examples—the U.K. Copyright Hub and the Linked Content Coalition—and ask whether similar initiatives could be worthwhile in the United States.⁵⁸

E. WORKPLAN

The Task Force issued a request for written comments in the fall of 2013, and received well over a hundred (a number dwarfed by the European Union's thousands).⁵⁹ In December, we held a full-day public meeting at the USPTO to kick off the process.⁶⁰

We have now divided our work into three categories: (1) "policy" issues—those

Convention for the Protection of Literary and Artistic Works, art. 5(2), July 21, 1971, S. Treaty Doc. No. 99-27.

55. See *Technological Upgrades to Registration and Recordation Functions*, U.S. COPYRIGHT OFFICE, <http://perma.cc/BFF6-W29X> (last visited Oct. 2, 2014).

56. DOC TASK FORCE GREEN PAPER, *supra* note 15, at 87; see COPYRIGHT CLEARANCE CENTER, *DIRECTPATH* (2014) available at <http://perma.cc/9HT5-LCK6>; *About*, CREATIVE COMMONS, <http://perma.cc/S859-72JP> (last visited Oct. 4, 2014).

57. DOC TASK FORCE GREEN PAPER, *supra* note 18, at 98.

58. *Id.* at 96–98; see LINKED CONTENT COALITION, <http://perma.cc/UU77-LGGB?type=image> (last visited Oct. 2, 2014); THE COPYRIGHT HUB, <http://perma.cc/4Y8N-ALUM?type=source> (last visited Oct. 2, 2014).

59. See Request for Comments on the Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, 78 Fed. Reg. 66,337 (Nov. 5, 2013), available at <http://perma.cc/XJP4-VRBS>. Compare *Comments Received on the Department of Commerce Green Paper 01/17/2014*, NAT'L TELECOMM. & INFO. ADMIN. (Jan. 23, 2014), <http://perma.cc/4J6Q-ALCP>, and *Comments Received on the Department of Commerce Green Paper 11/13/2013*, NAT'L TELECOMM. & INFO. ADMIN. (Oct. 15, 2013), <http://perma.cc/X52U-VTBJ>, with *Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules*, at 3 (July 2014) [hereinafter *EU Public Consultation Responses Report*], available at <http://perma.cc/B3UQ-KTL4>.

60. See DEP'T OF COMMERCE, PUBLIC MEETING: COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2013), available at <http://perma.cc/XM83-B9HQ> (agenda for Dec. 12, 2013 public meeting).

that examine legislative solutions (such as the legal treatment of remixes, the relevance and scope of the first sale doctrine in the digital environment and the appropriate calibration of statutory damages); (2) a stakeholder dialogue on improving the operation of the DMCA notice and takedown system and (3) considering the government's role in facilitating the further development of the online marketplace.

1. Policy Issues

We will be holding roundtables over the coming months on the policy issues in four U.S. cities that are centers of copyright activity (Nashville, Cambridge, Los Angeles and Berkeley).⁶¹ We expect to issue a paper setting out our conclusions and recommendations on these issues as an outcome of the public comments and consultations.

2. Multistakeholder Forum

On March 20, 2014, we held an initial public meeting to establish the multistakeholder forum on the DMCA notice and takedown system, which will continue with periodic meetings approximately every six weeks at least through the end of 2014.⁶² At the initial meeting, we made the parameters clear:

1. The topic is not legislative change, but rather what can be done to improve the notice and takedown system within the context of current law.⁶³
2. Our goals are inclusiveness and transparency.⁶⁴
3. We will be looking for an outcome by the end of 2014, whether in the form of best practices or some other type of agreement.⁶⁵
4. Success will be defined as establishing a constructive process enabling discussion among stakeholders and making at least some improvements in the system's operation.⁶⁶

I believe there are good reasons for optimism. First, since all sides have raised their own concerns, a number of tradeoffs may be possible. Second, technology

61. Notice of Public Meetings on Copyright Policy Topics (as Called for in the Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy), 79 Fed. Reg. 21,439 (Apr. 16, 2014), *available at* <http://perma.cc/6PTN-L6CU>.

62. *See* Notice of First Public Meeting on the Establishment of a Multistakeholder Forum on Improving the Operation of the Notice and Takedown System Under the DMCA, 79 Fed. Reg. 13,644 (Mar. 11, 2014), *available at* <http://perma.cc/9C5A-KAMV>.

63. U.S. PATENT & TRADEMARK OFFICE, DEPARTMENT OF COMMERCE MULTISTAKEHOLDER FORUM: IMPROVING THE OPERATION OF THE DMCA NOTICE AND TAKEDOWN POLICY: FIRST PUBLIC MEETING 15–16 (2014), *available at* <http://perma.cc/E54M-A4LR> (transcript of the first public multistakeholder forum meeting, held on Mar. 20, 2014).

64. *Id.* at 21.

65. *See id.*

66. *Id.* at 18.

may be able to help address some of these concerns. And critically, there is congressional pressure as a backdrop. The House review of the Copyright Act has already included a hearing on the relevant DMCA provision, at which members of Congress expressed interest in seeing whether voluntary improvements could be made before considering legislative change.⁶⁷

The open, multistakeholder process has encouraged wide participation: we have heard from rights holders and ISPs of all types and sizes, consumer and public interest groups and various technology providers. The stakeholders have decided to begin by addressing the topic of standardization of notices of infringement, including their delivery and processing.⁶⁸ A smaller working group will meet in between the plenary sessions to discuss options from an operational and technical perspective, and will report to the larger group.⁶⁹

3. Online Marketplace Issues

In the public comments we received in response to the Green Paper notice of inquiry, considerable caution was expressed on the appropriate scope of the government's role. We are now engaging in internal cross-agency discussions, including with the Copyright Office and the National Institute for Standards and Technology (NIST), to brainstorm about the best way to channel future work before holding additional public consultations. We are likely to focus particularly on issues of standard identifiers in different sectors, their interoperability, their relationship to the Copyright Office public databases and the desirability of some form of copyright hub as has been established in the United Kingdom.

All of this amounts to a promising start. I personally believe that the multistakeholder forum, and the furthering of cross-sector licensing work, offer the best chances to produce meaningful results in the near future. Legislative change will take time and face the usual political difficulties. Meanwhile, we may be able to make progress with practical steps that can offer a real contribution.

III. OVERLAPS AND DIVERGENCES

There is considerable overlap between the current EU consultation and the U.S. review processes. There are also of course areas of divergence, both in the topics and in the nature of the concerns. This section will begin by describing the major differences in the legal and political backdrops against which both reviews are set.

67. *Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 3 (2014) (statement of Rep. Jerrold Nadler, Ranking Member, H. Subcomm. on Courts, Intellectual Prop., and the Internet), available at <http://perma.cc/N87P-RNND>.

68. U.S. PATENT & TRADEMARK OFFICE, DEPARTMENT OF COMMERCE MULTISTAKEHOLDER FORUM: IMPROVING THE OPERATION OF THE DMCA NOTICE AND TAKEDOWN POLICY: SECOND PUBLIC MEETING 3-4 (2014), available at <http://perma.cc/763B-25CE> (transcript of the second public multistakeholder forum meeting, held on May 8, 2014).

69. *Id.* at 4, 6.

From the perspective of legal and drafting technique, one obvious difference is that a regional directive by definition involves the establishment of a framework for national laws, and therefore must leave room for national variations and at least in some respects be less prescriptive.⁷⁰ This is complicated by the fact that the EU member states have differing legal systems, some based on common law and some on civil law.

Most fundamentally, the co-existence in the European Union of separate copyright rights in separate member states with the policy of promoting a single market produces complexities that the United States does not have to face. Our single national system means that consumers can access content anywhere in the country on identical terms, and carry it with them from state to state.

In terms of the substance of the law, the U.S. model has two key attributes that do not exist in the European Union: the Copyright Office's public registration and recordation systems and the broad and flexible fair use doctrine.⁷¹ On the other side, most EU member states have established a regime of private copying levies that is virtually nonexistent in the United States.⁷²

In the area of music licensing, our systems are quite different. The U.S. model exhibits the idiosyncrasies noted above, including competition law constraints, a narrower public performance right for sound recordings and different statutory rate-setting standards for various types of online services. And while collective management is firmly ensconced in both regions, its reach and impact across sectors and rights is considerably more extensive in the European Union.

Finally, while political realities and lobbying influences are converging to some extent with the growth of multinationals (both business entities and civil society networks), distinct local interests still play a meaningful role.

I will divide my comparison of the topics being addressed into four broad categories: rights, exceptions, enforcement and licensing.

A. RIGHTS

Both sides of the Atlantic are examining the scope of the newest of the copyright owner's rights—the right of “making available.”⁷³ But the nature of the examination differs. In the United States, the Copyright Office and Congress are now asking whether existing law requires clarification, in particular to address

70. See generally Consolidated Version of the Treaty on the Functioning of the European Union, art. 288, Dec. 13, 2007, O.J. (C 326) 47, 171–72.

71. See 17 U.S.C. §§ 205, 407–10, 701–09 (2012) (setting out the Copyright Office's public registration and recordation systems); *id.* § 107 (codifying the fair use doctrine).

72. Compare Information Society Directive, *supra* note 5, art. 5, with Audio Home Recording Act of 1992 17 U.S.C. §§ 1003–07 (2012).

73. See *The Scope of Copyright Protection: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) [hereinafter *Scope of Copyright Protection Hearing*], available at <http://perma.cc/M9L4-64VQ>; U.S. COPYRIGHT OFFICE, *Existing Exclusive Rights Under Title 17 (Part One)*, in PUBLIC ROUNDTABLE ON THE RIGHT OF MAKING AVAILABLE (2014), available at <http://perma.cc/A7QH-MT2V>; *EU Public Consultation*, *supra* note 14, at 10.

whether a mere online offering is sufficient or evidence of actual downloads is needed.⁷⁴ In the European Union, the primary focus is on cross-border issues: where does the act of making available take place?⁷⁵

The European Union is also looking at the scope of the reproduction right, specifically with respect to linking and browsing.⁷⁶ These questions are not currently being raised with the same urgency in the United States. Providing information location tools is an act covered by our ISP safe harbors—unlike in the European Union—and browsing has not been challenged as infringement, perhaps due to interpretations of the fair use doctrine.⁷⁷

In the United States, as described above, there is also considerable attention to the scope of the public performance right. The Green Paper renewed prior Administration calls for expansion of the right to cover broadcasts of sound recordings;⁷⁸ the Supreme Court is about to determine when a service streaming free television broadcasts over the Internet requires a license.⁷⁹

B. EXCEPTIONS

The area of exceptions is where a lot of the action is taking place in both regions. The overarching concern for the European Union relates to the competing goals of harmonization and member state flexibility: Should the exceptions listed in Article 5 of the Information Society Directive, most of which are now optional for member states, be made mandatory?⁸⁰ How detailed and prescriptive should they be? In the United States, the relationship between specific exceptions and fair use looms large. Nevertheless, many of the policy considerations at stake are the same.

1. Remixes and User-Generated Content (UGC)

Both the U.S. Green Paper and the EU Public Consultation ask whether existing law is adequate in enabling this form of creativity.⁸¹ The main difference again is the potential availability of the fair use defense in the United States, providing

74. See *Scope of Copyright Protection Hearing*, *supra* note 73, at 1–2 (statement of Rep. Howard Coble, Chairman, H. Subcomm. on Courts, Intellectual Prop., and the Internet); Study on the Right of Making Available; Comments and Public Roundtable, 79 Fed. Reg. 10,571 (Feb. 23, 2014), available at <http://perma.cc/8HCY-GM5Z>.

75. See, e.g., Case C-173/11, *Football Dataco Ltd. v. Sportradar GmbH*, 2012 EUR-Lex CELEX 62011CJ0173 (Oct. 18, 2012).

76. *EU Public Consultation*, *supra* note 14, at 12–13.

77. Compare 17 U.S.C. § 512(d) (2012), with E-Commerce Directive, *supra* note 7, arts. 11–14.

78. DOC TASK FORCE GREEN PAPER, *supra* note 18, at 12–13.

79. Since this lecture was given, the Supreme Court handed down its decision in *Aereo*, holding that the on-demand transmission of the television programming from separate antennas assigned to each individual subscriber still constituted a public performance. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2499–2501 (2014).

80. See *EU Public Consultation*, *supra* note 14, at 17.

81. See DOC TASK FORCE GREEN PAPER, *supra* note 18, at 28–29; *EU Public Consultation*, *supra* note 14, at 28–30.

additional leeway.

2. The First Sale Doctrine or Exhaustion

Both question the doctrine's appropriate scope of application in the digital environment.⁸² One wrinkle in the European Union is the Court of Justice of the European Union's 2012 decision in *UsedSoft GmbH v. Oracle International Corp.*, which suggested that different rules might apply in the context of software than for other types of works.⁸³

a. Library Exceptions

Both the United States and the European Union are considering whether there is a need to update their specific exceptions.⁸⁴ Again, the backdrop of fair use in the United States may alter the perspective to some extent, as uses not falling within the exception might still be held lawful.⁸⁵

b. Mass Digitization

In the United States, the Copyright Office is preparing a recommendation on this issue, following up on its 2011 legal analysis. In the European Union, a Commission-brokered memorandum of understanding on out-of-commerce works has addressed some aspects of the issue.⁸⁶

c. Orphan Works

In the United States, the Copyright Office is considering this issue again and will make recommendations to Congress.⁸⁷ In the past, the Office proposed legislation based on a limitation of remedies approach—that is, no monetary remedies for past infringement by a defendant who made a good faith diligent search to find the copyright owner.⁸⁸ In the European Union, a directive on the topic is in the process of being implemented, providing for an exception permitting certain uses of certain categories of orphan works.⁸⁹

82. See DOC TASK FORCE GREEN PAPER, *supra* note 18, at 35–37; *EU Public Consultation*, *supra* note 14, at 13–14.

83. Case C-128/11, *UsedSoft GmbH v. Oracle Int'l Corp.*, 2012 EUR-Lex CELEX 62011CJ0128 (July 3, 2012).

84. See DOC TASK FORCE GREEN PAPER, *supra* note 18, at 23–24; *EU Public Consultation*, *supra* note 14, at 20–22.

85. See, e.g., *Authors' Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

86. See *Memorandum of Understanding: Key Principles on the Digitisation and Making Available of Out of Commerce Works* (Sept. 20, 2011), available at <http://perma.cc/T8JN-6WE3>.

87. See *Orphan Works*, U.S. COPYRIGHT OFFICE, <http://perma.cc/SGP6-W9GQ> (last visited Oct. 19, 2014).

88. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 96 (2006), available at <http://perma.cc/S3E5-5FUD>.

89. See *Orphan Works Directive*, *supra* note 9, at 7–8.

d. Teaching and Distance Education

In the United States, the Register of Copyrights has suggested that the U.S. exception may need updating, although there is no study currently underway.⁹⁰ In the European Union, the question has been posed whether a broader or more specific exception is needed than that set out in the Information Society Directive.⁹¹

3. Disabilities

In both regions, work is being done to implement the WIPO Marrakesh Treaty.⁹² In the United States, the Register of Copyrights has also recommended a technological update to the Chafee amendment for the visually impaired.⁹³ In contrast, in the European Union the primary concern relates to cross-border issues.⁹⁴

4. Text and Data Mining

In the United States, this issue has not yet been raised as a major concern (perhaps due to existing license terms or fair use arguments, based on the internal use of unprotectable facts). In the European Union, it has been the subject of intense debate, turning on the question of whether a specific exception is needed (as the United Kingdom has recently adopted).⁹⁵

C. ENFORCEMENT

On the enforcement issues, the obvious question is whether more needs to be done, whether by the government, the private sector or both. Both regions are proceeding with caution in this now-sensitive area. What is *not* being proposed at this point is clear: there is no new enforcement legislation in the United States; and no reopening of the Enforcement Directive in the European Union.⁹⁶

The EU Consultation asks about “respect for rights”—what should be the role of intermediaries, and how should privacy and data protection concerns be handled?⁹⁷ In the United States, the focus so far is on improving the functioning of the existing

90. See Pallante, *supra* note 15, at 333.

91. See *EU Public Consultation*, *supra* note 14, at 23–24.

92. See Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, July 31, 2013, WIPO Doc. VIP/DC/8 Rev., 53 I.L.M. 6.

93. U.S. COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: FIFTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION (2012), available at <http://perma.cc/R3EF-X35B>.

94. *EU Public Consultation*, *supra* note 14, at 25–26.

95. See U.K. INTELLECTUAL PROP. OFFICE, EXCEPTIONS TO COPYRIGHT: RESEARCH 7 (2014), available at <http://perma.cc/V7A9-HHN3>; *EU Public Consultation*, *supra* note 14, at 27–28.

96. Since this talk was given, the European Commission has issued two papers on enforcement. See Press Release, European Comm’n, Commission Presents Actions to Better Protect and Enforce Intellectual Property Rights (July 1, 2014), <http://perma.cc/7L8C-SPMU>.

97. *EU Public Consultation*, *supra* note 14, at 34.

legal framework through the DOC-led stakeholder forum on the operation of the notice and takedown process.⁹⁸ If this is successful, the results could be helpful in the European Union as well. In addition, the United States is evaluating the impact of the existing voluntary best practices, and encouraging more of the same.⁹⁹

Both sides share an interest in voluntary approaches generally. So far, there has been a greater focus on this in the United States, with the IPEC and DOC actively promoting and encouraging them,¹⁰⁰ and the cross-industry Copyright Alert System now in operation.¹⁰¹

Another distinction is the greater availability of injunctive relief against ISPs in Europe under Article 8(3) of the Information Society Directive.¹⁰² A number of member states' courts have issued injunctions requiring the blocking of infringing websites—with their power to do so just confirmed by the European Court of Justice.¹⁰³ In contrast, the scope of injunctive relief in the United States is limited under the DMCA, and is only available if the rights holder sues the ISP itself for infringement—not an appealing or easy option.¹⁰⁴

Finally, in the United States, the DOC Green Paper process is also focusing on the appropriate calculation of statutory damages in two specific contexts, as described above.¹⁰⁵

D. LICENSING

Here the basic question is also the same: how can online licensing be improved? In the European Union, the main concerns relate to territoriality and portability—the availability of pan-European licenses, and consumers' ability to enjoy content they have legally accessed when traveling from country to country. The Consultation also asks about the value of adopting a copyright registration system, and raises the question of possible payment for double rights for the same use.¹⁰⁶

The United States shares that last concern—it is one of the issues that the Green Paper urges should be resolved.¹⁰⁷ While portability and cross-border licensing can affect U.S. consumers as well, the already-established large single market limits those concerns to a narrower set of travelers. The goal of streamlining the licensing

98. See discussion *supra* notes 62–69 and accompanying text.

99. See *Role of Voluntary Agreements in the U.S. Intellectual Property System: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 3–4 (2013), available at <http://perma.cc/H4LP-RE6V> (statement of Rep. Melvin L. Watt, Ranking Member, H. Subcomm. on Courts, Intellectual Prop., and the Internet).

100. See DOC TASK FORCE GREEN PAPER, *supra* note 18, at 4; 2013 IPEC STRATEGY REPORT, *supra* note 36, at 3.

101. See *What Is a Copyright Alert?*, CTR. FOR COPYRIGHT INFO., <http://perma.cc/8QC5-6322> (last visited Oct. 4, 2014).

102. Information Society Directive, *supra* note 5, at 18.

103. See Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, 2014 EUR-Lex CELEX 62012CJ0314 (Mar. 24, 2014).

104. 17 U.S.C. § 512 (j)(2) (2012).

105. See *supra* Part II.C.2.e.i.

106. *EU Public Consultation*, *supra* note 14, at 7–9.

107. DOC TASK FORCE GREEN PAPER, *supra* note 18, at 91–92.

structure for music is United States-specific. And the Green Paper process will consider possible government contributions to help facilitate the further development of the online market, looking to ongoing U.K. and EU projects for inspiration and ideas.

E. OTHER

The EU Consultation raised a number of additional issues that are not part of the current American discussion for various reasons. One of these issues, remuneration for creators,¹⁰⁸ tends to be an area where our traditions vary markedly, including the use of techniques such as statutory rules limiting contractual freedom, and statutory remuneration rights. Note too that U.S. law provides a nonwaivable termination right for authors, and contracts between individual creators or performers and producers in some industries are negotiated collectively—altering relative bargaining power.¹⁰⁹

IV. CONCLUSION

If you remove the single market issues, levies and idiosyncratic music licensing structures, there are considerable commonalities in our parallel copyright reviews. We share an attention to ensuring a sufficiently clear making available right, and determining the appropriate and up-to-date treatment of orphan works, mass digitization, UGC, library activities and exhaustion of rights. On the enforcement side, we recognize the need to improve the system and an interest in encouraging voluntary approaches. And when it comes to licensing, we are committed to facilitating private sector progress and removing unnecessary barriers.

Each region is ahead in consideration of some of these issues, and slower in others. It is not a competition, but The European Union has a broadcasting right for sound recordings, has already moved forward on orphan works and mass digitization, provides a broader range of remedies for online infringement and has done considerable work on online rights information and licensing. The United States, on the other hand, has a single copyright title, in the UGC area has the benefit of industry-agreed principles, has the fair use doctrine that can address many cases without the need for specific exceptions, has promoted more extensive voluntary best practices to address online infringement and is engaged in a process to improve the operation of the notice and takedown system.

As we attempt to formulate new policy, three core tensions can be identified as affecting both sides:

1. Enabling Global Markets Versus Maintaining the System of Territorial Rights: I believe territoriality will endure for the foreseeable future, but will need to be supported through the bridges of multiterritorial licensing.

108. Other additional issues include copyright term, levies and the possibility of a single European Union-wide copyright title. See *EU Public Consultation*, *supra* note 14, at 15–16, 31–34, 36.

109. 17 U.S.C. § 203(a)(5) (2012).

2. Clear Legal Rules Versus Flexibility: this is particularly relevant to the issue of the scope of exceptions and limitations. Both specificity and flexibility have value—the challenge of course is finding the right balance.

3. Private Ordering Versus Public Rules of Law: the long-term future may be in the direction of more general principles in public rules, with more nimble and detailed adaption of those principles through private ordering. Legislation may be directed to setting boundaries and limits on stakeholder action, as today's world moves fast, and legislating is increasingly difficult. But policy constraints will always be needed to avoid extremes and abuses, and to protect those without a meaningful voice in negotiations.

Given our shared interests and concerns, close transatlantic communication is important for making copyright work for a global market. We can learn from each other's analyses and experiences. Our approaches and techniques need not be identical, but the outcomes should be as congruent as possible. For example, the DMCA and the E-Commerce Directive differ in many respects, but both provide highly coordinated approaches to ISP safe harbors.¹¹⁰ Areas that are particularly important include: (1) the core coverage of exceptions (whether accomplished through fair use or otherwise); (2) the availability and interoperability of rights information allowing cross-border licensing and (3) effective cooperation in enforcement efforts by public authorities and industries. Congruence in these areas should be positive for all of our stakeholders—providing greater efficiency and fewer burdens in transactions across the Atlantic. It can also serve as an example for other countries, and a model for global development in the future.

In taking forward our respective copyright reviews, whether today's or tomorrow's, I would describe the overall goals as follows:

1. To update the legal framework as needed—to give enough room for market-based solutions, to preserve the value of rights, to ensure the ability to make new and beneficial uses and to safeguard against overreaching from all sides.
2. To provide forums for and encourage voluntary best practices and agreements.
3. To educate the public in order to develop legitimacy and acceptance as copyright evolves.

In my view, the approach should be pragmatic and incremental, with a willingness to consider a variety of techniques. In the United States, we are committed to finding solutions: there is no choice, given what is at stake for all of our stakeholders and for society as a whole. We look forward to working closely with Europe—we have much to learn from each other, and much to gain from coordination. I am optimistic that we *will* make copyright work for the global market.

110. See 17 U.S.C. § 512 (2012); E-Commerce Directive, *supra* note 7, arts. 12–15.