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# Foreword

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## FOREWORD

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Rapidly developing technologies over the past twenty years have increased both the demand for and the easy access to copyrighted works. While increased demand and access should be beneficial for both creators and users of these works, such easy access has led to the creators' contributions being devalued under the guise of the public good. This access defies the traditional paradigm of permissions and licenses mandated under the Copyright Act. Instead, such access has bred a culture that expects immediate, free access to the works. At Volunteer Lawyers for the Arts in New York, we witness firsthand the hardships that individual creators face in order to exploit their works and support their artistic endeavors. For many, the current copyright regime gives no practical answer.

With an active debate brewing as to whom the Copyright Act should serve, law must follow and lawmakers should seek new legal structures to manage the changing landscape. Beginning in 2013, the Copyright Register, Maria A. Pallante, called to update the U.S. Copyright Law and urged Congress to make it more functional in the 21<sup>st</sup> century.<sup>2</sup> Emphasizing the need to serve the public interest, the Register has stated that Congress has a duty to provide for authors, as part of the public, and should focus on the creators needs:

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<sup>2</sup> Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J. LAW & ARTS 315, 324 (2013).

Thus, [the next copyright act] must confirm and rationalize certain fundamental aspects of the law, including the ability of authors and their licensees to control and exploit their creative works, whether content is distributed on the street or streamed from the cloud.<sup>3</sup>

To that end, Congress is conducting hearings<sup>4</sup> and has directed the Copyright Office to prepare a number of formal studies<sup>5</sup> on issues related to copyright owners' control of their works. For example, in 2014, the House Judiciary Committee, Subcommittee on Courts, Intellectual Property, and the Internet, held a hearing to address the debate regarding the expansion of fair use that followed emerging technologies.<sup>6</sup> The hearing further called to reexamine the application of the “transformative use” standard,<sup>7</sup> which has been in the center of the fair use expansion debate. The Subcommittee also held a hearing covering moral rights, termination rights, resale royalty, and copyright term.<sup>8</sup> At this

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<sup>3</sup> *Id.*, at 323.

<sup>4</sup> *Moral Rights, Termination rights, Resale Royalty, and Copyright Term: Hearing before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) [hereinafter *Moral Rights*]; *Copyright Remedies: Hearing before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014); *Chapter 512 of Title 17: Hearing before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014). For roundtable examples, see Study on the Right of Making Available Comments and Public Roundtable, 79 Fed. Reg. 10571 (U.S. Copyright Office Feb. 25, 2014); Music Licensing Study, 79 Fed. Reg. 25626 (U.S. Copyright Office May 5, 2014).

<sup>5</sup> OFFICE OF THE REG. OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS (2013); OFFICE OF THE REG. OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, RESALE ROYALTIES: AN UPDATED ANALYSIS (2013); OFFICE OF THE REG. OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE (2015).

<sup>6</sup> *The Scope of Fair Use: Hearing before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014).

<sup>7</sup> *Id.*

<sup>8</sup> See *Moral Rights*, *supra* note 4, at 4.

hearing, Congressman Jerrold Nadler introduced the American Royalties Too (ART) Act, incorporating recommendations from the Copyright Office report on resale royalties. This report recognized that current law does not provide the same protections to visual artists that exist for other creators protected through current copyright law.<sup>9</sup> Further, the Subcommittee held two hearings in June 2014 addressing music licensing under the Copyright Act.<sup>10</sup> In conjunction with these hearings, Representative Doug Collins, along with many supporting co-sponsors, introduced the Songwriter Equity Act (SEA) proposing revisions to Sections 114 (i) and 115 of Title 17.<sup>11</sup> Moreover, the Copyright Office recently released an extensive music licensing study after receiving public comments and holding roundtables to debate current issues facing the industry.<sup>12</sup>

This volume of Cybaris®, an Intellectual Property Law Review, presents a range of issues that serve to inform those debating the next great Copyright Act.

Alma Robinson discusses the recent developments in the effort of promoting a regulatory scheme for resale royalties in California and its effects on transactions in the United States. Robinson further draws the justifications for enacting a federal resale royalty act. California's experience with enforcing its resale royalty act and the pending Ninth Circuit decision of its constitutionality will serve to inform the national debate.

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<sup>9</sup> Press Release, Representative Jerrold Nadler, Rep. Nadler Welcomes New Report on Resale Royalties for Artists (Dec. 13, 2013), *available at* <http://nadler.house.gov/press-release/rep-nadler-welcomes-new-report-resale-royalties-artists>.

<sup>10</sup> *Music Licensing Under Title 17: Part One: Hearing before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014); *Music Licensing Under Title 17: Part Two: Hearing before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014).

<sup>11</sup> See Songwriter Equity Act of 2014, H.R. 4079, 113<sup>th</sup> Cong.

<sup>12</sup> COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 5.

Niels Schaumann, following up on his earlier work on the subject, provides a strong opinion in favor of the legitimacy of appropriation art as a non-infringing practice, building on its “transformative” nature. The fair use doctrine, as Schaumann explains, has undergone significant change, particularly in the area of appropriation art. Schaumann suggests that Courts should give deference to appropriation art when analyzing its legitimacy to appropriation artists’ lack of protections, which applies narrowly to works of visual art.

Amanda Schreyer’s article highlights the expansion of creative works that require the protections of the Copyright Act. Schreyer brings a thorough analysis of the protection for fictional characters, and describes the legal protections available to creators of fictional characters, as well as the limitations on the owner’s rights in his characters. With Internet fan blogs and comic cons becoming increasingly popular, the effectiveness of the legal protections for fictional characters comes into question, and should also be considered as part of the broader copyright reform.

Jared R. Sherlock further demonstrates how far copyright protection might go, as he brings an in-depth discussion on whether a magic performance can be copyrightable. Sherlock explains that magicians have been struggling to protect their creative works—the secret behind their illusions—through intellectual property law, and at the same time attempting to keep it secret, in order to maintain their profession. This has led to lack of protection, as traditional intellectual property law requires public exposure. Thus, Sherlock proposes that instead of protecting the secret, a magician’s performance should be protected under copyright law.

Mihajlo Babovic identifies a growing concern for many engaging in social media websites’ Terms of Service agreements that affect the exclusive rights granted to authors by the Copyright Law. Babovic argues that since such agreements counter the

purposes of the U.S. copyright law, they should be declared unconstitutional and thus prohibited.

Caitlin Kowalke explores the legal ramifications of the music industry's recent shift into the online distribution market. Kowalke relates the inadequacies artists face in lowered royalty compensation to the newfound accessibility consumers are presented with through digital downloading. While statutory changes have been presented, no reformation efforts have stemmed artist losses at a pace quick enough to keep up with changes in technology. Additionally, Kowalke addresses the likelihood future online music markets will be structured as more widespread streaming services, in following current television trends such as Hulu and Netflix.

Creators from the various art disciplines greatly contribute to society, and thus, their works should be valued accordingly. Unfortunately, the Internet diminishes the value of creative works, as it lacks proper protective mechanisms for online content. Many view creative work available online as free for use without recognition that such use infringes upon copyrighted work. To prevent this growing misconception, a copyright reform is necessary, both from a legal perspective as well as from a social one. The initiatives of the Copyright Register, and the fact that it is taking into account all sides to the current issues, are important and crucial steps in the reform. This *Cybaris*® issue adds to this review highlighting the need for better legal protections for artists, and the positive social implications such protection will have.