

# Washington Journal of Law, Technology & Arts

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Volume 12 | Issue 2

Article 2

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1-1-2017

## From Monkey Selfies to Open Source: The Essential Interplay of Creative Culture, Technology, Copyright Office Practice, and the Law

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### Recommended Citation

Maria A. Pallante, *From Monkey Selfies to Open Source: The Essential Interplay of Creative Culture, Technology, Copyright Office Practice, and the Law*, 12 WASH. J. L. TECH. & ARTS 123 (2017).

Available at: <https://digitalcommons.law.uw.edu/wjlta/vol12/iss2/2>

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WASHINGTON JOURNAL OF LAW, TECHNOLOGY & ARTS  
VOLUME 12, ISSUE 2 WINTER 2017

FROM MONKEY SELFIES TO OPEN SOURCE:  
THE ESSENTIAL INTERPLAY OF CREATIVE CULTURE,  
TECHNOLOGY, COPYRIGHT OFFICE PRACTICE, AND THE  
LAW

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CITE AS: 12 WASH. J.L. TECH. & ARTS 123 (2017)  
<http://digital.law.washington.edu/dspace-law/handle/1773.1/1703>  
ABSTRACT

*The 2016 Distinguished Roger L. Shidler Lecture was delivered on July 22, 2016 at the University of Washington School of Law, Center for Advanced Study & Research on Innovation Policy during the 2016 Global Innovation Law Summit.*

INTRODUCTION

It is a tremendous honor to join you for this global summit and to deliver the distinguished Shidler lecture. I have read about Mr. Shidler's life and legacy, and I imagine he would be gratified to see the experts who have gathered here today in the name of innovation policy. It seems to me that Seattle is the perfect backdrop for this discussion, doubly blessed as it is with breathtaking natural beauty and world class entrepreneurs. One nourishes and informs the human spirit, and the other expresses our relentless drive to create, compete, and progress.

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\* Maria A. Pallante served as United States Register of Copyrights from June 1, 2011 to October 29, 2016. She would like to thank Catherine Zaller Rowland for her assistance with the lecture.

What is the role of copyright law in this inspiring but frenetic world we share? As a primary goal, copyright recognizes the importance of authors and confirms that, in a civilized society, creative expression is valuable and should be supported and built upon. Authors have spoken to us for centuries through a variety of art forms, and we would all agree that without authors, society would be profoundly poorer and less aware of both the history and potential of the human condition.

But authors also are catalysts. Thus, while the law incentivizes and seeks to protect the contributions of authors as writers, artists, performers, producers, designers, and documentarians—and justly so—it also recognizes the downstream investment and innovation of those who build upon their creativity. These actors, including publishers and technologists, also will find motivations and accommodations in the law. Copyright is inherently innovative in this way. It starts from the premise that creativity begets creativity, and—appropriately—offers both short term and long-term rewards.

In terms of economic impact, the copyright framework is forceful, with multiple sectors contributing billions in revenue and combined trillions to the balance of trade while drawing on both the rights and limitations in the law.<sup>1</sup>

Of course, innovation does not stand still—and sometimes it is in the eye of the beholder—which brings me to monkey selfies.

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<sup>1</sup> See STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2014 REPORT 7(2014); See also COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, COPYRIGHT REFORM FOR THE DIGITAL ECONOMY 8 (2015).

### I. *Monkey Selfies*

Selfies, in general, are such a part of modern life that the Oxford Dictionaries named “selfie” the Word of the Year for 2013.<sup>2</sup> On Instagram alone, over 270 million photos have been tagged as #selfie.<sup>3</sup> Both men and women take part: for example, 50% of men and 52% of women have taken a selfie, with selfies accounting for 30% of the photos taken by people between the ages of 18 and 24.<sup>4</sup> Selfies are so popular, it is no wonder that the animal kingdom has gotten in on the act, monkeys in particular.

Indeed, no ordinary person could have predicted the legal debate of 2012 involving an Indonesian monkey, a British wildlife photographer, Wikimedia, and PETA, an animal rights organization based in the United States. But copyright lawyers have embraced the case—*Naruto v. Slater*<sup>5</sup>—which presents issues of copyright ownership, choice of law, attribution, and compensation, not to mention the joyful selfies taken by a curious six-year old crested macaque.

David Slater, a British citizen, photographer, and wildlife enthusiast, gave the monkeys his camera as an experiment.<sup>6</sup> The

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<sup>2</sup> *The Oxford Dictionaries Word of the Year 2013 is 'selfie'*, OXFORD DICTIONARIES (Nov. 18, 2013), <http://blog.oxforddictionaries.com/2013/11/word-of-the-year-2013-winner/>.

<sup>3</sup> #selfie, INSTAGRAM, <http://www.instagram.com/explore/tags/selfie/> (last visited Sept. 22, 2016).

<sup>4</sup> Shea Bennett, *The Year of the Selfie – Statistics, Facts & Figures [INFOGRAPHIC]*, SOCIALTIMES (Mar. 19, 2014, 12:00 PM), <http://www.adweek.com/socialtimes/selfie-statistics-2014/497309>.

<sup>5</sup> No. 15-cv-04324-WHO, 2016 WL 362231, at \*1 (N.D. Cal. Jan. 28, 2016).

<sup>6</sup> See Louise Stewart, *Wikimedia Says When a Monkey Takes a Selfie, No One Owns It*, NEWSWEEK (Aug. 21, 2014), <http://www.newsweek.com/lawyers-dispute-wikimedias-claims-about-monkey-selfie-copyright-265961>; Lauren

monkeys took some blurry images, and some good ones, which Slater sent to a news agency.<sup>7</sup> Slater also published a book and claimed copyright in the images.<sup>8</sup> Some of the images were uploaded to Wikipedia without the consent of Slater (or any animal).<sup>9</sup>

And here is where the law—and the Copyright Office—fits in. When Slater objected to Wikipedia’s use, Wikipedia first took the images down but quickly put them back up.<sup>10</sup> TechDirt ran an article on the dust-up, and Slater also objected to that site’s use of the images.<sup>11</sup> Both Wikipedia and TechDirt maintained that Slater did not have the copyright in the images because Slater did not take the pictures, the monkeys did, and copyright law requires human

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Raab, *Monkey Selfies Can’t Be Copyrighted, Federal Office Decides*, LATIMES (Aug. 21, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-monkey-selfie-copyright-20140821-story.html>.

<sup>7</sup> See Matthew Sparkes, *Wikipedia Refuses to Delete Photo as “Monkey Owns It”*, THE TELEGRAPH (Aug. 6, 2014), <http://www.telegraph.co.uk/technology/news/11015672/Wikipedia-refuses-to-delete-photo-as-monkey-owns-it.html>; Mike Masnick, *Monkeys Don’t Do Fair Use; News Agency Tells Techdirt to Remove Photos*, TECHDIRT (July 12, 2011), <https://www.techdirt.com/articles/20110712/01182015052/monkeys-dont-do-fair-use-news-agency-tells-techdirt-to-remove-photos.shtml>.

<sup>8</sup> Complaint for Copyright Infringement and Demand for Jury Trial at 1, *Naruto v. Slater*, No. 15-cv-04324-WHO (N.D. Cal. Sept. 21, 2015).

<sup>9</sup> Matthew Sparkes, *Wikipedia Refuses to Delete Photo as “Monkey Owns It,”* THE TELEGRAPH (Aug. 6, 2014), <http://www.telegraph.co.uk/technology/news/11015672/Wikipedia-refuses-to-delete-photo-as-monkey-owns-it.html>.

<sup>10</sup> Matthew Sparkes, *Wikipedia Refuses to Delete Photo as “Monkey Owns It,”* THE TELEGRAPH (Aug. 6, 2014), <http://www.telegraph.co.uk/technology/news/11015672/Wikipedia-refuses-to-delete-photo-as-monkey-owns-it.html>.

<sup>11</sup> Mike Masnick, *Monkeys Don’t Do Fair Use; News Agency Tells Techdirt to Remove Photos*, TECHDIRT (July 12, 2011), <https://www.techdirt.com/articles/20110712/01182015052/monkeys-dont-do-fair-use-news-agency-tells-techdirt-to-remove-photos.shtml>.

authorship.<sup>12</sup>

During this time—in 2014—my staff and I happened to issue a long awaited, multiyear revision of the *Compendium of U.S. Copyright Office Practices*, nearly 1,300 pages thick and updated for the digital environment. The *Compendium* included, “[a] photograph taken by a monkey” as an example of something that the Office will not register (along with works produced by nature, plants, or divine or supernatural beings).<sup>13</sup> No less than the Los Angeles Times took note, announcing that a “public draft of the Compendium of U.S. Copyright Office Practices, Third Edition says the office will register only works that were created by human beings.”<sup>14</sup> Keep in mind that no one sought to actually register a monkey selfie in this case, and because the images are not U.S. works, registration is not a requirement of bringing suit in the United States.<sup>15</sup>

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<sup>12</sup> See Mike Masnick, *Can We Subpoena the Monkey? Why the Monkey Self-Portraits Are Likely in the Public Domain*, TECHDIRT (July 13, 2011), <https://www.techdirt.com/articles/20110713/11244515079/can-we-subpoena-monkey-why-monkey-self-portraits-are-likely-public-domain.shtml>; *Wikimedia Foundation Transparency Report*, WIKIMEDIA FOUNDATION (2014), [https://meta.wikimedia.org/wiki/Wikimedia\\_Foundation\\_Transparency\\_Report/2014/Requests\\_for\\_Content\\_Alteration\\_%26\\_Takedown/en](https://meta.wikimedia.org/wiki/Wikimedia_Foundation_Transparency_Report/2014/Requests_for_Content_Alteration_%26_Takedown/en).

<sup>13</sup> U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, § 313.2 (2014).

<sup>14</sup> Lauren Raab, *Monkey Selfies Can't Be Copyrighted, Federal Office Decides*, LATIMES (Aug. 21, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-monkey-selfie-copyright-20140821-story.html>; see also David Karvets, *Monkey's Selfie Cannot Be Copyrighted, US Regulators Say*, ARSTECHNICA (Aug. 21, 2014), <http://arstechnica.com/tech-policy/2014/08/monkeys-selfie-cannot-be-copyrighted-us-regulators-say/> (noting that the “US Copyright Office, in a 1,222-page report discussing federal copyright law, said that a photograph taken by a monkey is unprotected”).

<sup>15</sup> Complaint for Copyright Infringement and Demand for Jury Trial at 9, *Naruto v. Slater*, No. 15-cv-04324-WHO (N.D. Cal. Sept. 21, 2015).

This is when PETA entered the jungle. It claimed to act as a next friend and filed suit against Slater for using the monkeys' images in his book.<sup>16</sup> In a lawsuit filed in the Northern District of California for copyright infringement, PETA alleged that Naruto, the monkey it befriended, indeed owned the copyright in the works because "authorship" under the Copyright Act is sufficiently broad so as to permit the protections of the law to extend to any original work, including those created by Naruto."<sup>17</sup> Slater shot back with a motion to dismiss for lack of standing because there was no human authorship, noting that "[m]onkey sue, monkey sue is not good law."<sup>18</sup> You don't get facts like this in patent law! The district court dismissed the case, in part pointing to the Copyright Office's expertise on copyrightability issues.<sup>19</sup> But the story is not over—yet—because PETA has appealed to the Ninth Circuit.<sup>20</sup>

The case is entertaining, but it raises some additional legal questions. For example, what would happen in foreign jurisdictions? There was a question as to whether Indonesian law might possibly provide for ownership of the images, perhaps by the Indonesian government, because the images were captured in a government

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<sup>16</sup> Complaint for Copyright Infringement and Demand for Jury Trial at 1-2, *Naruto v. Slater*, No. 15-cv-04324-WHO (N.D. Cal. Sept. 21, 2015).

<sup>17</sup> Complaint for Copyright Infringement and Demand for Jury Trial at 2, *Naruto v. Slater*, No. 15-cv-04324-WHO (N.D. Cal. Sept. 21, 2015).

<sup>18</sup> Motion to Dismiss the Complaint for Lack of Standing and Failure to State a Claim upon Which Relief Can Be Granted at 2, *Naruto v. Slater*, No. 15-cv-04324-WHO (N.D. Cal. Nov. 6, 2015).

<sup>19</sup> *Naruto v. Slater*, No. 15-cv-04324-WHO, 2016 WL 362231, at \*1, \*4 (N.D. Cal. Jan. 28, 2016).

<sup>20</sup> Notice of Appeal and Representation Statement of Plaintiff Naruto at 1, *Naruto v. Slater*, No. 15-cv-04324-WHO (N.D. Cal. Mar. 20, 2016).

park which may or may not have owned the monkey.<sup>21</sup>

And why all the attention on the monkey? Mr. Slater is the one who trekked into the wilderness, engendered trust with a group of primates, and created the ambience and technical props that were arguably designed to facilitate a monkey taking a selfie. Does this foresight and activity qualify as authorship? It fails under the U.S. Supreme Court Case, *Feist Publications, Inc. v. Rural Telephone Service Co.*, which rejected sweat of the brow labor as a legal basis for copyright protection.<sup>22</sup>

On the other hand, *Feist* affirmed low thresholds for securing copyrightability in general, and compilations of uncopyrightable facts, in particular.<sup>23</sup> Did Mr. Slater arrange Naruto's photo? Did he design or produce it? What are the factual standards? Naruto toyed around with the camera and, by all accounts, took a handful of accidental photos. But, as some have observed, more exceptional animals might be capable of purposeful arrangement or expression.<sup>24</sup> If so, this would seem to work against the role of the human photographer as master creator, producer and author, all of which for now goes well beyond the simple statement in the Copyright Office Compendium.

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<sup>21</sup> Aurelia J. Schultz, *Monkey See, Monkey Do, Monkey Get Copyright, too?*, 1709 BLOG (July 13, 2011, 3:05 AM), <http://the1709blog.blogspot.com/2011/07/monkey-see-monkey-do-monkey-get.html>.

<sup>22</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 354-61 (1991).

<sup>23</sup> *Id.* at 345, 348.

<sup>24</sup> Aurelia J. Schultz, *Monkey See, Monkey Do, Monkey get Copyright, too?*, 1709 BLOG (July 13, 2011, 3:05 AM), <http://the1709blog.blogspot.com/2011/07/monkey-see-monkey-do-monkey-get.html>.



## II. Performers

Moving to performers, *Google v. Garcia* is another case in which Copyright Office practice intersected with somewhat provocative facts. The case involves an actress claiming that she had a copyright claim in the dramatic performance she delivered and which was fixed in tangible form, although not by her, when it was filmed during the production of a low budget film *Desert Warrior*.<sup>25</sup>

The actress was paid \$500 for a few days' work, but her lines were thereafter redubbed (viewable on a YouTube trailer under the title, *Innocence of Muslims*).<sup>26</sup> In the revised version, she appears to be asking, "Is your Mohammed a child molester?"<sup>27</sup> When the trailer appeared on YouTube, Garcia received death threats, including a *fatwa*.<sup>28</sup> The case has an extended procedural history, and it happened to emerge just after the World Intellectual Property Organization (WIPO) concluded an international treaty in Beijing, in which member states agreed to protect performances, albeit with some flexibility as to national laws, and to which the United States is a signatory.<sup>29</sup>

Under Copyright Office practice, an "actor or actress in a motion picture is either a joint author in the entire work or, as most often is the case, is not an author at all by virtue of a work made for

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<sup>25</sup> *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015).

<sup>26</sup> *Id.* at 737-38.

<sup>27</sup> *Id.* at 737.

<sup>28</sup> *Id.* at 738.

<sup>29</sup> Beijing Treaty on Audiovisual Performances, *adopted* June 24, 2012, 51 I.L.M. 1214 (2012).

hire agreement.”<sup>30</sup> If a separate stand-alone work that is independently authored, fixed and sufficiently creative is incorporated into a motion picture, it can be considered a discrete work. Taking note, the appeals court eventually held that granting Garcia a copyright in her particular performance would result in a “legal morass” and splinter a movie “into many different ‘works,’ even in the absence of an independent fixation.”<sup>31</sup> Here, the court refers to the problems such a scheme would cause for films like *Ben-Hur* or *Lord of the Rings*, which each reportedly had tens of thousands of actors.<sup>32</sup>

Some of the practical issues will be of ongoing interest to the Copyright Office, including: how registration practices might better accommodate or at least document the contributions or intellectual property interests of performers, including foreign or independent performers who do not routinely agree to transfer their rights to the producer.

### III. Software and Computer Programs

I now turn to software, which has its own fair share of emerging issues. Software is protected in the United States as form of literary property, but it is unique because it is, by its very nature, functional, something that is fatal to copyright protection for other types of works.

Over the years, the Copyright Office has had to dig deeply

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<sup>30</sup> *Garcia*, 786 F.3d at 752.

<sup>31</sup> *Id.* at 742.

<sup>32</sup> *Id.* at 742-43.

into what constitutes “software” or “computer programs.” The Register of Copyright has the authority to make differentiations for registration requirements and has consistently done so for software—applicants need not provide the entire code to the Office for examination, but may instead provide a sample (known as identifying material), a practice linked to earlier times and concerns about trade secrets.<sup>33</sup>

This kind of flexibility is important, but it has to be rationalized with the government’s interest in creating a meaningful public record, especially when users of copyright rely on the public record for transactions and liability assessments. The Copyright Office anticipated this when we issued the 2014 Compendium, noting that in the years ahead, we will introduce a number of public discussions to address the registration and public indexing of digital works, including software, which may have multiple authors, multiple dates of creation, multiple dates of publication, and proprietary content.<sup>34</sup>

Software also presents policy questions aside from copyright registration because it is so ubiquitous in modern life, from our phones to our home thermostats. This may at times create certain practical tensions between copyright law and the operation of a

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<sup>33</sup> U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §§ 102.2(B), 1509.1(C), 1509.1(C)(4)(a)-(b) (3d ed. 2014) (“COMPENDIUM (THIRD)”).

<sup>34</sup> U.S. COPYRIGHT OFFICE, *U.S. Copyright Office Releases the Compendium of U.S. Copyright Office Practices, Third Edition*, COPYRIGHT.GOV (Dec. 22, 2014), <http://copyright.gov/newsnet/2014/564.html>; COMPENDIUM (THIRD) § 721.8.

modern world. Among other questions, the Office is reviewing whether and to what extent the design, distribution, and legitimate uses of everyday products are enabled and/or frustrated by the application of copyright law.<sup>35</sup>

Most in the copyright community (both copyright owners and software users) acknowledge that software embedded in everyday products presents a unique scenario, far afield from the origins of copyright law. But there is also acknowledgment of the importance of copyright to innovation. In the words of Microsoft, “[f]orty years of software innovation have generated massive benefits for software creators, consumers and the economy” and “[a]t the same time, the U.S. copyright regime has proved remarkably adept at balancing the interests of creators, consumers, and the public...”<sup>36</sup>

Nevertheless, issues have arisen in recent years. These include definitional issues (what is embedded software), the role of technological protection measures, the application of the merger doctrine and *scenes a faire* to software, and confusion over the value or identification of ownership in a license-heavy software market, and how that impacts digital first sale and therefore exhaustion.

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<sup>35</sup> Software-Enabled Consumer Products Study: Notice and Request for Public Comment, 80 Fed. Reg. 77,668 (Dec. 15, 2015) (“Software Study NOI”).

<sup>36</sup> Microsoft Corp. Comments in Response to the Software Study NOI at 2 (Feb. 16, 2016), *available at* <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0011-0019&attachmentNumber=1&disposition=attachment&contentType=pdf>.

#### IV. *Anti-circumvention of TPMs*

As we look at software policy, we also are reviewing the policies around technological protection measures (TPMs) in a separate public study. As many of you know, U.S. law bars most circumvention of TPMs because, according to the U.S. Congress, these measures prevent piracy and support new ways of disseminating copyrighted material to users.<sup>37</sup> The law also directs a rulemaking process designed by Congress to protect non-infringing uses, including fair use, which the Supreme Court has held is a fail-safe for free expression.<sup>38</sup> The rulemaking process provides the public with an opportunity to request limited exemptions, in other words, to make the case as to why circumvention may be warranted in any given case.<sup>39</sup>

This rulemaking has grown exponentially since it was implemented a decade and a half ago. In 2000, the Copyright Office received about 400 comments, resulting in two exemptions.<sup>40</sup> Contrast this with the sixth rulemaking, completed in 2015, during which we received nearly 40,000 comments resulting in exemptions for twenty-two types of circumvention categories out of twenty-seven requests.<sup>41</sup>

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<sup>37</sup> STAFF OF H. COMM. ON THE JUDICIARY, 105TH CONG., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUGUST 4, 1998, at 7 (Comm. Print 1998).

<sup>38</sup> *Golan v. Holder*, 132 S. Ct. 873, 889-91 (2012).

<sup>39</sup> H.R. REP. NO. 105-551, pt. 2, at 36 (1998).

<sup>40</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, 64,557, 64,574 (Oct. 27, 2000).

<sup>41</sup> U.S. COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON

In conducting the rulemaking, the Copyright Office has repeatedly highlighted the limitations and permeations of both the rulemaking process and underlying law. For example, in the most recent rulemaking, we noted that the statute's anti-trafficking provisions, while useful in curbing bad actors, may hinder the ability of third parties to provide assistance to the exemptions' intended beneficiaries and can be addressed through a statutory change in the rulemaking process.<sup>42</sup> In the same recommendation, we suggested it would be beneficial to have a presumption of renewal in instances where proposals are resubmitted from the previous cycle and face no meaningful opposition, a change that would lessen the burden on proponents and make the process more efficient.<sup>43</sup> Keep in mind that this is now a process that governs the software found in automobiles, tractors, and pacemakers, as well as more traditionally creative expression, such as that found in film.

But once again the story has some twists and turns. The Electronic Frontier Foundation has filed suit against the U.S. government (including the Attorney General and the Register of Copyrights), challenging the constitutionality of making non-infringing activities (and free expression in particular) subject to a triennial rulemaking process.<sup>44</sup>

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CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS 1-2, 5-6 (2015).

<sup>42</sup> *Id.* at 4-5.

<sup>43</sup> *Id.* at 4.

<sup>44</sup> Complaint for Declaratory and Injunctive Relief at 2-4, *Green v. U.S. Dep't of Justice*, No. 1:16-cv-01492-EGS (D.D.C. July 21, 2016); *See also* Motion to Dismiss the Complaint, 1:16-cv-01492-EGS (D.D.C. September 29, 2016) filed after the date of the Shidler Lecture.

## V. Open Source

Of course TPMs are but one of many business models employed by copyright owners. At the other end of the spectrum, open source software draws on traditional copyright protections while offering flexible rules for collaboration. It has become so prevalent that a 2016 survey found 78 percent of businesses ran open source software.<sup>45</sup> Indeed, the Copyright Office's own set of strategic plans calls for the agency to heavily utilize open source platforms.<sup>46</sup>

Open source is popular in part because it offers developers fairly clear rules, for example placing limitations on subsequent distribution methods requiring users to share the original code, providing notice of modifications, providing appropriate attribution, and agreeing to license the new work to others.<sup>47</sup> Models like these are effective; however, it would be wrong to equate this with a weakening of copyright law. More precisely, copyright is critical for their success. For example, in one case, *Jacobsen v. Katzer*, the Federal Circuit found that exceeding the scope of an open source license could constitute an infringement, not merely a contractual

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<sup>45</sup> Steven J. Vaughan-Nichols, *It's An Open-Source World: 78 Percent of Companies Run Open-Source Software*, ZDNET (Apr. 16, 2015), <http://www.zdnet.com/article/its-an-open-source-world-78-percent-of-companies-run-open-source-software/>.

<sup>46</sup> See U.S. COPYRIGHT OFFICE, PROVISIONAL INFORMATION TECHNOLOGY MODERNIZATION PLAN AND COST ANALYSIS 5 (2016).

<sup>47</sup> See, e.g., Cameron Chapman, *A Short Guide to Open-Source and Similar Licenses*, SMASHINGMAGAZINE (Mar. 24, 2010), <https://www.smashingmagazine.com/2010/03/a-short-guide-to-open-source-and-similar-licenses/>; *GNU General Public License*, GNU OPERATING SYSTEM (June 29, 2007), <https://www.gnu.org/licenses/gpl-3.0.en.html>.

violation, after the defendants failed to comply with, among other things, the copyright owner's attribution and modification notice requirements.<sup>48</sup> The court said that “[c]opyright licenses are designed to support the right to exclude,” and that “money damages alone do not support or enforce that right.”<sup>49</sup>

## VI. *Video Games*

One copyright industry that employs open source platforms to the tremendous enjoyment of consumers is the video game industry. Video games perhaps offer the best example of how creativity, technology, and the law work together to advance new art forms—and new Copyright Office practices. And they are incredibly creative.

Today, video games go far beyond software—many have sophisticated scripts, musical scores, animation, and design elements that are as richly creative as any expressive work on the market. Even the Supreme Court has weighed in on the significance, explaining that “[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the

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<sup>48</sup> *Jacobsen v. Katzer*, 535 F.3d 1373, 1376, 1382 (Fed. Cir. 2008) (remanded and was later settled).

<sup>49</sup> *Id.* at 1381-82.



virtual world).”<sup>50</sup>

Today’s video and computer games also challenge gender and age assumptions. For example, the average U.S. game player is 35 years old, and “[w]omen age 18 or older represent a significantly greater portion of the game-playing population (31%) than boys age 18 or younger (17%).”<sup>51</sup> Forty-eight per cent of the most active gamers play social games, and games are played on a variety of devices, from dedicated handheld systems to phones to personal computers.<sup>52</sup> Games are not just for the players—they have ballooned to become a spectator sport. The website Twitch.tv allows people to watch and engage with tournaments and boasts 100+ million unique viewers per month (and 1.7 million unique broadcasters per month).<sup>53</sup>

Because video games provide such complex and interrelated copyright claims, the Copyright Office Compendium allows registration of audiovisual and computer program components separately.<sup>54</sup> But ownership and authorship can be complicated. Employee/employer relationships are common, but a whole host of people bring the product to market—from producers to game

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<sup>50</sup> *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 790 (2011). In this case, the Court found that video games qualify for First Amendment protection and affirmed the Ninth Circuit Court of Appeal’s decision to enjoin a California law relating to the sale of “violent video games” to minors. *Id.* at 790, 804-05.

<sup>51</sup> ENTERTAINMENT SOFTWARE ASSOCIATION, ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAME INDUSTRY 3 (2016), *available at* <http://essentialfacts.theesa.com/Essential-Facts-2016.pdf>.

<sup>52</sup> *Id.* at 5.

<sup>53</sup> *About*, TWITCH, <https://www.twitch.tv/p/about> (last visited Aug. 12, 2016).

<sup>54</sup> COMPENDIUM (THIRD) § 807.7(A)(1).

designers to artists to engineers and audio designers.<sup>55</sup> This can lead to confusion when the employment relationship is unclear,<sup>56</sup> or garner new practices for attribution. For example, it is not only that the sound track is critical to a game, but also that games have become a prominent vehicle, one of the very few, in which composers may be commissioned to write original scores and provided an orchestra budget to do so.

### VII. Attribution

Attribution, also known as the paternity right, is part of the moral rights tapestry under copyright law and related regimes, an area where the United States mostly has watched foreign jurisdictions. This past spring, the Copyright Office sponsored a Public Symposium, in which one noted professor, Jane Ginsburg of Columbia Law School, stated that “[o]f all the many counter-intuitive features of US copyright law—and they abound—the lack of an attribution right may present the greatest gap between perceived justice and reality.”<sup>57</sup> A best-selling book author and former president of the Authors Guild, Scott Turow, emphasized the importance of being known, explaining that if attribution is not a

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<sup>55</sup> ANDY RAMOS ET AL., THE LEGAL STATUS OF VIDEO GAMES 9-10 (2013), available at [http://www.wipo.int/export/sites/www/copyright/en/creative\\_industries/pdf/video\\_games.pdf](http://www.wipo.int/export/sites/www/copyright/en/creative_industries/pdf/video_games.pdf).

<sup>56</sup> *Id.* at 10.

<sup>57</sup> Jane Ginsburg, *The Most Moral of Rights: The Right to be Recognized as the Author of One's Work*, 8 GEO. MASON J. OF INT'L COM. L. 44, 45 (2016).

right that is valued, “you have diminished the glory of authorship.”<sup>58</sup> And Professor Sean O’Connor here at the University of Washington, noted the important role of attribution in incentivizing publication, that is, not only the commitment to create but also to publish in order to build a robust public discourse.<sup>59</sup>

Attribution can have financial consequences, as well, which brings me to the music industry. When licensing music, the inability to correctly identify the owners of a work leads to inefficiencies and economic losses for the many parties involved in creating songs. This view is strongly held by stakeholders and was a focus of our 2015 study, *Copyright and the Music Marketplace*.<sup>60</sup> Among other findings, our report recommended that the government regulate the collection of, and access to, authoritative ownership data.<sup>61</sup>

More systemically, our report addressed the unprecedented impact of technology on the music business and the need for significant across the board reform (as the age of mechanical reproductions give way to a world in which music is predominantly streamed).<sup>62</sup> As policy reports go, my staff and I thought this one was a long time coming, but it seemed to hit a popular nerve.

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<sup>58</sup> Symposium, *Session 4: The Importance of Moral Rights to Authors*, 8 GEO. MASON J. OF INT’L COM. L. 87, 104 (2016) (Scott Turow, Author).

<sup>59</sup> Symposium, *Session 4: The Importance of Moral Rights to Authors*, 8 GEO. MASON J. OF INT’L COM. L. 87, 104 (2016) (stating that attribution “gets people putting their stuff out there, publically releasing it—not necessarily free, economically, but putting it out there so it could be part of a robust public discourse”).

<sup>60</sup> See U.S. COPYRIGHT OFFICE, *COPYRIGHT AND THE MUSIC MARKETPLACE* 123 (2015).

<sup>61</sup> *Id.* at 183-84.

<sup>62</sup> *Id.* at 12-14, 133-34.

The press called it “a bombshell of a report” calling for “dramatic changes in the way royalty rates are set and recorded music is licensed.”<sup>63</sup> Another called it a “rare instance of a government agency getting out in front of moving technology.”<sup>64</sup> Innovative government!

### VIII. *Orphan Works and Small Claims*

Of special concern to the Copyright Office is the protection of small creators, without whom music wouldn't be music and innovation would be the singular domain of corporations. But solutions need to further the goal of a fair and balanced copyright system. Ten years ago the Copyright Office published a major report on orphan works, works for which copyright owners cannot be identified and/or located.<sup>65</sup> Among other things, the Report proposed limiting the remedies available to a copyright owner if the user has performed a diligent search for the copyright owner, and it also encouraged the user to name the author and copyright owner of the work, if reasonably possible.<sup>66</sup>

We viewed attribution as “an essential and important part of

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<sup>63</sup> Susan Butler, *U.S. Copyright Office Proposes Big Licensing Reform*, MUSIC CONFIDENTIAL, Feb. 6, 2015.

<sup>64</sup> Miles Raymer, *The U.S. Copyright Office Wants to Update Our Music Licensing Laws*, ENTERTAINMENT WEEKLY (Feb. 5, 2015), <http://www.ew.com/article/2015/02/05/us-copyright-office-wants-update-our-music-licensing-laws>.

<sup>65</sup> U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 1-2 (2006).

<sup>66</sup> *Id.* at 8-13.

preserving the author's interests in the work."<sup>67</sup> And, in fact at the time of the report, "for those authors who adopt one of the many forms of Creative Commons licenses, about 94% of them opt for a license that requires attribution."<sup>68</sup>

But as is often the case, our study of one policy issue uncovered another policy issue, because it was during this orphan works discussion that the issue of small claims came to the fore. Frustrated copyright owners, including a large number of photographers, testified that their by-lines were frequently stripped from their works, especially on digital works.<sup>69</sup>

We launched a separate study, which by its nature involved not only copyright and contract issues, but also questions about the Constitutional requirements for judicial proceedings.<sup>70</sup> There was an outpouring of interest from creators of every kind, who stressed the fact that traditional lawsuits are impractical and out of reach for many disputes, but that the consequences are significant.<sup>71</sup> Songwriters testified that while "small claims and random infringements may seem unimportant, taken in the aggregate, they have an effect on the livelihoods of individual creators akin to the infamous torture 'death by a thousand cuts.'"<sup>72</sup>

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<sup>67</sup> *Id.* at 111.

<sup>68</sup> *Id.*

<sup>69</sup> *Remedies for Small Copyright Claims, Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of U.S. Copyright Office), available at <http://www.copyright.gov/docs/regstat032906.html>; see also U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION 51-52 (2015).

<sup>70</sup> U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS 5-7 (2013).

<sup>71</sup> *Id.* at 1-2.

<sup>72</sup> *Id.* at 2.

In 2013, my staff and I recommended the creation of an alternative and voluntary forum for small claims—to be operated by the Copyright Office—for disputes valued at no more than \$30,000 dollars.<sup>73</sup> The process would offer copyright owners, as well as defendants, the opportunity to resolve small infringement matters and related claims, without or without the aid of attorneys.<sup>74</sup>

Just last week, a bill was introduced in the House of Representatives,<sup>75</sup> and I will leave the topic with this thought. This development is a terrific example of an expert agency working to dissect policy issues, over a period of several years, and crafting recommendations that not only lead Congress, but also the agency itself, to consider innovative improvements to the copyright system.

#### CONCLUSION

In conclusion, I note that the technology revolution has brought us many things, but one of the best things is a reminder that innovation thrives on creative expression—whether or not that is reserved to the human race.

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<sup>73</sup> *Id.* at 3, 97-99, 102-03, 109-110.

<sup>74</sup> *Id.* at 103-07, 119-20.

<sup>75</sup> CASE Act of 2016, H.R. 5757, 114th Cong. (2016).

