COPYRIGHT'S ADMINISTRATIVE LAW

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While a robust body of scholarship considers the regulatory dimensions of patent and copyright, there remains a puzzling absence of writing about copyright's administrative law. This Article remedies this lacuna in the literature. It begins by tracing the history of regulatory copyright, which dates to the first Copyright Act in 1790. This analysis shows that — despite the absence of scholarly attention to the topic — there is a longstanding connection between copyright and administrative law. The Article then considers the stakes of relying on agency governance in the absence of a theory of copyright's administrative law, which risks overdelegation, underdelegation, and institutional design flaws. It uses these failings to sketch out principles for identifying what copyright duties should (and should not) be committed to agencies. The Article then uses these principles to take a twofold normative turn. First, it suggests several operational reforms to the work of copyright agencies that would take best advantage of its core competencies. Second, it analyses the doctrinal administrative law issues that would be raised by such reform. In so doing, this Article seeks to sketch out the heretofore unexplored territory of copyright's administrative law so that scholars and policymakers may better navigate it.

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INTRODUCTION

The administrative law of copyright is at best an afterthought, if not a total nonentity. The handful of writers who have written about aspects of this topic[1] have remarked on the conspicuous absence of scholarly interest in it.[2] And no work in the secondary literature assays a detailed treatment of the copyright/administrative law nexus.[3] This is particularly surprising because analysis of intellectual property (IP) through the lens of administrative law has otherwise proven to be a fruitful exercise. One of the most important developments in IP scholarship in the past quarter-century has been the emergence of a literature considering both patents[4] and trade-

[1] *See, e.g.*, Dan Burk, *DNA Copyright in the Administrative State*, 51 U.C. DAVIS L. REV. 1297, 1300 (2018) (considering the problem of DNA copyright in the context of administrative law); Andy Gass, *Considering Copyright Rulemaking: The Constitutional Question*, 27 BERKELEY TECH. L.J. 1047 (2012) (examining the constitutionality of Copyright Office rulemakings pursuant to the DMCA); Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 109 (2004) (discussing the emergence of more copyright lawmaking by regulation since 1978).

[2] Shyam Balganesh, *Copyright as Legal Process: The Transformation of American Copyright Law*, 168 U. PA. L. REV. 5 (2020) ("Copyright jurisprudence has itself spent surprisingly little time addressing the substantive integration of the Office into the skein of copyright law."); Burk, *supra* note 1, at 1300 (calling scholarship on the subject "sparse").

[3] Balganesh, *supra* note 2, at 79 ("It is about time . . . to develop a body of administrative law dealing with its working, a body of 'administrative copyright law' so to speak."); Burk, *supra* note 1, at 1300 (observing that the turn toward IP and administrative law "has not yet considered the intersection of administrative law with copyright").

[4] *See, e.g.*, Jonathan Masur, *Regulating Patents*, 2010 SUP. CT. REV. 275 (2010) (arguing that the USPTO should be endowed with substantive rulemaking author-

marks[5] as species of regulation and in particular as products of the U.S. Patent and Trademark Office (USPTO).[6]

Nor is the absence of academic interest in copyright's administrative law due to the lack of any regulatory action relating to copyright. While the import of agency action is more consequential for patents and trademarks than it is for copyright,[7] Congress frequently delegates to entities: The Copyright Office (the Office) and the Copyright Royalty Board (the Board). Congressional delegations to these bodies, though, tends to be haphazard because there is no clear vision of the appropriate scope of their administrative mandate, and because Congress does not see either body as capable of being delegated robust lawmaking authority. As a result, Congress allocates to the Office and the Board in some cases unreflectively, solely because a subject matter relates to copyright, without considering the Office's resources or other agencies' potentially greater expertise.[8] In other cases, it delegates to the Office precisely because Congress sees it as a weak agency over which it can maintain influence.[9]

Not surprisingly, this ongoing delegation without a clear vision of copyright's administrative law produces an incoherent patchwork of regulatory duties that frustrates the abilities of the Office and the Board to

ity); Michael D. Frakes & Melissa F. Wasserman, *Does Agency Funding Affect Decisionmaking? An Empirical Assessment of the PTO's Granting Patterns*, 66 VAND. L. REV. 67 (2013) (using the USPTO to study the relationship between agency funding and outcomes of decisional processes); Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 FLA. L. REV. 529 (2009) (warning of the dangers of multiple administrative bodies making patent law); Saurabh Vishnubhakat, Arti Rai, & Jay Kesan, *Strategic Decision Making in Dual PTAB and District Court Proceedings*, 31 BERKELEY TECH. L.J. 45 (2016) (arguing that 2011 patent reform transformed the relationship between Article III patent litigation and the administrative state).

[5] *See*, *e.g.*, Melissa F. Wasserman, *What Administrative Law Can Teach the Trademark System*, 93 WASH. U. L. REV. 1511 (2016) (importing insights from administrative law into the trademark context); Saurabh Vishnubhakat *Administrative Revocation in Trademark Law*, *in* RESEARCH HANDBOOK ON THE LAW & ECONOMICS OF TRADEMARKS (Glynn S. Lunney, Jr., ed.) (Edward Elgar Publishing, forthcoming) (applying the court-agency substitution thesis of patent revocation to the trademark context).

[6] The USPTO itself has also been the subject of considerable inquiry from the perspective of administrative law doctrine. *See, e.g.*, Craig Allen Nard, *Deference, Defiance, and the Useful Arts*, 56 OHIO ST. L.J. 1415 (1995) (exploring the relationship between the Federal Circuit and the USPTO).

[7] USPTO action determines whether patent and trademark rights vest. By contrast, copyrights vest automatically upon fixation in a tangible medium of expression and Copyright Office action only registers the copyrights or records transfers of them.

[8] The signal example of satellite retransmissions is discussed *infra* at Part II.B.

[9] Here, the best example is the triennial rulemaking for exceptions to DMCA § 1201, also discussed *infra* at Part II.B.

maximize their expertise and smoothly administer regulatory copyright. Congress has both over- and underused the Office. It has required the Office to administer complex statutory licenses as well as to undertake novel responsibilities that sap the Office's strained resources and exceed its narrow but deep expertise. Congress has struggled so mightily to create a body to adjudicate copyright's regulatory matters that it has had to scrap its first two tries (the now-defunct Copyright Royalty Judges and Copyright Arbitration Royalty Panel), while the current iteration (the Copyright Royalty Board) has weathered constitutional challenges to its composition.

This Article is the first to map the uncharted territory of copyright's administrative law. In contrast to previous work that looks at piecemeal aspects of this topic, we take a satellite-level overview. Our goal is twofold. First, we seek to spark a conversation that will bring academic attention to regulatory copyright on par with similar developments in patents and trademarks. Second, by sketching out a coherent vision of how copyright's administrative law should proceed, we will provide a blueprint for optimal design of the Office and Board that can replace their slapdash development to date.

We undertake this effort in three stages. In Part I, we look back to the surprisingly rich historical intersection of copyright and regulation, which dates to the dawn of the Republic. By the early to mid-1900s, the Copyright Office was efficiently processing copyright registration and recordation applications and sharing its expertise of copyright law with the public and with the U.S. government. In 1976, Congress passed an entirely new Copyright Act, expanding the Office's regulatory duties and creating the predecessor to the current Board. In Part II, we examine the problems that arose when Congress began to expand regulatory copyright without a coherent plan for doing so. Many of these delegations placed undue burdens on the Office in terms of both resources and expertise, while in other respects Congress failed to take full advantage of the capacities the Office did have. As to the Board in particular, this story is one of failure and reinvention that continues today. Finally, in Part III, we explore a pair of claims. First, we probe the variety of possible futures of regulatory copyright, from stripping the Office of many of its duties and eliminating the Board entirely to expanding their functions to approximate those of a traditional agency. Second, we catalogue and briefly comment on the legal issues that will arise, regardless of which version of copyright's administrative law Congress embraces.

I. A BRIEF HISTORY OF ADMINISTRATIVE COPYRIGHT

Our examination of copyright's administrative law begins with an exegesis of the robust but unappreciated history of American copyright regu-

lation. Copyright has been the subject of administration since the nation's earliest days. The aim of this regulation was not, as with traditional agencies, to solve a coordination problem or ameliorate a market failure. Instead, it was to distribute and manage IP rights effectively to support the growth of domestic creative industries. The Office had established competence with this property-management function by the mid-1900s. It had also acquired extensive knowledge of copyright doctrine that it often shared with other branches of government and with the public. In 1976, though, a major revision to the Copyright Act changed the agency from one that served two specific functions well to one that played host to a mishmash of administrative responsibilities that Congress delegated without any unified vision of the Office's distinctive role.

A. 1790–1870: Weak Hamiltonianism

Most histories of U.S. administrative law date to the Gilded Age, when industry was growing at such a pace that the federal government saw fit to create independent regulatory bodies to rein them in.[10] But the earliest independent American agency was actually the Patent Office (established 1790),[11] followed soon after by the General Land Office (established 1812).[12] These agencies emerged at a time when the United States faced a heavy burden of war debt, with both a low population base and a paucity of industry that made it difficult to generate the capital to pay it off.[13]

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[10] *E.g.*, LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 439 (2d ed. 1985) ("In hindsight, the development of administrative law seems mostly a contribution of the 20th century . . . . The creation of the Interstate Commerce Commission, in 1887, has to be taken as a kind of genesis."); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986) (similarly dating the inception of the American administrative state to the creation of the ICC).

[11] Jerry Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1260 (2006) ("[T]he first independent agency at the national level was not the ICC but the Patent Office, created ninety-seven years earlier.").

[12] Robert P. Merges, *The Hamiltonian Origins of the U.S. Patent System, and Why They Matter Today*, 104 IOWA L. REV. 2559 (2019). As Merges of course acknowledges, cabinet-level executive departments also existed upon the establishment of the federal government, such as the Department of State, Department of the Treasury, and the Office of the Attorney General, and are agencies in their own right. *Id.* at 2560.

[13] ALEXANDER HAMILTON, REPORT ON MANUFACTURES (1791) ("The smallness of the population of the United States compared with [the states'] territory . . . [combined with] similar causes conspires to produce . . . a scarcity of lands for manufacturing occupation, and dearness of labor generally."); *see also* H.J. HABAKKUK, AMERICAN AND BRITISH TECHNOLOGY IN THE NINETEENTH CENTURY 188 (1962) (detailing the paucity of labor and manufacturing capital generally during the late 1700s and early 1800s).

Alexander Hamilton imagined one solution for this dilemma: Use the newly created federal government to get capital cheaply into the hands of those eager to use it industriously.[14] The young republic was wealthy in one resource — land — and thanks to the Constitution's Progress Clause,[15] its Congress had the power to pass patent and copyright laws to create intangible property rights as well. Moved by the imperative to motivate the young nation's economy, Congress created two agencies — the Patent Office and General Land Office — that it tasked with distributing federal property as widely and as quickly as possible in order to stimulate economic activity. Hence Rob Merges designates the Patent Office and General Land Office not regulatory but "Hamiltonian" agencies because they served the purpose of generating commerce rather than constraining it.[16]

With patents and with land, the goal of the federal government was to get as much property into the hands of as many owners as possible, and then get out of the way of the owners so they could help create, in Merges's felicitous phrasing, "the strands in the sturdy rope that pulled the early Republic into prosperity."[17] The purpose of the administrative bodies that governed this allocation of ownership was to facilitate and encourage economic activity, not to constrain it via regulation as would be the case with the future Interstate Commerce Commission (ICC) and other, more modern regulatory agencies.

Accordingly, the early Patent Office and General Land Office both engaged mostly in ministerial tasks designed to effectuate these aims. The preconditions to acquire these rights were administratively thin and not costly. From 1793–1837, the Patent Office did not substantively examine patents, instead granting rights to anyone who filed a procedurally sufficient application for rights in an invention.[18] The price of federal land was

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14 *See* HAMILTON, *supra* note 13 ("[T]he establishment and diffusion of manufactures have the effect of rendering the total mass of useful and productive labor in a community greater than it would otherwise be[.]").

15 U.S. CONST. art. I, § 8, cl. 8.

16 Merges, *supra* note 12, at 2561 (arguing that the goals of the early Patent Office and General Land Office were "Hamiltonian" in the sense that they sought to promote the economy and facilitate the growth of the state "by granting government sanctioned property rights to dispersed actors in a wide variety of industries," rather than by seeking to constrain industry via regulation).

17 *Id.* at 2562. While the state took a laissez-faire approach to the uses of its property, this does not mean the property was inspired by libertarian underpinnings. Merges emphasizes that the aim of this policy was to advance the state via the creation of commerce rather than to hold it back for fear of infringement on individual liberties. *Id.* at 2577.

18 Merges, *supra* note 12, at 2567-68.

set at a mere $1 per acre in 1784 and did not vary much after.[19] In 1832 alone, the General Land Office allocated over 40,000 land patents.[20]

The Hamiltonian theory of early American agencies explains the role and function of the Patent Office and General Land Office. Copyright, by contrast, represents a curious anomaly. One would assume that copyright would fit well with this Hamiltonian narrative. The fledgling United States could benefit from creative and informational as well as inventive industries as relatively low-cost ways to create capital. This would suggest that the federal government would, as it did with patents, dole out copyrights widely and cheaply in order to enhance the nation's intellectual infrastructure.

And yet this was not the case. While the federal government saw fit to create, staff, and fund centralized agencies located in Washington dedicated to allocating land and patents, it did not establish a similar agency dedicated to administering copyrights.[21] Instead, it left the administration of the early copyright system to a disparate assemblage of entities that was ever changing by statute, including U.S. district court clerks, the Patent Office, the State Department, and later the Smithsonian Institution and the Library of Congress. On the eve of the 1870 reorganization of U.S. copyright law, there were between forty and fifty different authorities involved in the issuance and administration of copyrights.[22]

Moreover, in contrast to patent law's freewheeling system of pure registration and the cheap and easy allocation of federal territory, the Copyright Act of 1790 created a series of onerous requirements in order for authors' rights to vest. First, authors had to enter the title and deposit a copy of their work — before publication — in the office of the Clerk of the U.S. district court where the author resided.[23] Second, authors had to pay an entry fee and a record copy fee totaling $1.20.[24] Third, authors had to publish notice of their application for copyright registration in "some

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[19] *Id.* at 2572 (citing ANDRO LINKLATER, MEASURING AMERICA 73 (2002)).

[20] *Id.* at 2573 (citing MALCOLM J. ROHRBOUGH, THE LAND OFFICE BUSINESS, 1789-1837 at 38-39 (1968)).

[21] It did not in fact do so for over 100 years, finally establishing the Copyright Office within the Library of Congress in 1897.

[22] AINSWORTH R. SPOFFORD, THE COPYRIGHT SYSTEM OF THE UNITED STATES—ITS ORIGIN AND GROWTH, 149-50 (1892).

[23] Copyright Act of 1790, 1 Stat. 124, § 3. The Act imposed these requirements on "authors or proprietors." *Id.* The latter included, for example, publishers authorized to register the copyright on behalf of the author.

[24] *Id.* This amount equates to about $34 in 2020 dollars. In inflation-adjusted terms, the base copyright registration fee was still cheaper than it is now, when it runs at least $45. The real cost of copyright registration under the 1790 Act came from the search and other costs necessary to comply with the requisite formalities.

newspaper" for four weeks.[25] And finally, within six months of the work's publication, the author had to deposit a copy of the work in the Washington offices of the Secretary of State.[26]

This system, perhaps unwittingly, imposed heavy burdens on authors who sought to secure federal copyrights.[27] Chief among these were the search costs and uncertainty imposed by the requirement that authors register with the nearest district court clerk in their state. Early America was a predominantly rural and less educated nation. Most authors likely did not understand what a federal court clerk was, and even if they did there were few resources available to allow them to find the one located nearest to them.[28] And even if authors managed to solve that geographical puzzle, only about 20% of them lived in the vicinity of a district court. Most authors seeking to secure a copyright either had to travel to the clerk's office to register and deposit their pre-publication copy, or (more commonly) pay a messenger to do so.[29] Either option was costly, often prohibitively so, in terms of both time and money. This geographical distribution also frustrated other participants in the copyright system. Consider the challenges for someone seeking to verify an owner's assertion of copyright or attempting to ascertain the content of a work for litigation purposes. They would have to determine with which district court clerk the author would have registered, travel to that location to find the records they sought, and finally hope that the records were complete and accurate.

This hope, too, was often frustrated. Because of the undue complexity of the early copyright registration system, the records it produced were rife with errors. Entries in early copyright registers were often procedurally flawed from authors providing incomplete or incorrect information; from clerks failing to record that information accurately (or at all); or from either party misunderstanding in good faith the technical registration requirements of the 1790 Act. The deposit requirements proved a particular source of frustration.[30] Since registration typically issued before publication, authors often failed to submit the requisite published deposit copy

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[25] *Id.*

[26] *Id.* § 4.

[27] Under the 1790 Act, authors secured federal copyrights only upon successful registration. This approach persisted until the passage of the 1909 Act, which vested copyrights upon publication of a work with proper notice.

[28] Spofford, *supra* note 22, at 149 (discussing the challenges for authors trying to ascertain the location of their nearest district court clerk, which typically required a costly and time-consuming "special inquiry").

[29] *Id.* at 150 (observing that the 1870 Act saved authors the trouble of "dispatching a messenger with each title for entry and each book for deposit").

[30] *Id.* at 149 (lamenting the "expense and trouble" of securing copyrights under the 1790 Act scheme).

afterward. Even when they did, poor recordkeeping frequently failed to reflect that they had done so. The pervasiveness of these procedural mistakes created a general sense that all copyrights suffered from clouds on their title. Some of these mistakes resulted in copyrights not vesting or being voided *ex post*. One result of this widespread insecurity about copyrights was strategic behavior by unscrupulous publishers who would scour the registration records for flaws and then publish cheap competing copies of works knowing that the owner could not file a valid infringement action against them.[31]

And though the 1790 Act created a welter of regulatory hurdles for authors' copyrights to vest, it did not invest in any infrastructure to administer them. Securing copyrights was thus equal parts costly and confusing. Whether and how much this reduced creative production in early America is unclear, but it is clear that relatively few authors bothered to register copyrights. Of the 15,000 books known to be published in America from 1790–1800, only 779 of them — a mere 5% — were secured by federal copyrights. A century later, Ainsworth Spofford, the sixth Librarian of Congress, remarked that "under the old law the copyright was an annoyance at times, and not an advantage — incomplete in its provisions and awkward in its administration. It was difficult for the owner of a title to protect his rights."[32]

This underinvestment in copyright infrastructure may have been due to the absence of a significant literary publishing industry in the U.S. at the time of the founding, or really until the mid-1800s.[33] In any event, while under the pre-1790 state copyright laws, most registrants had been authors of literary or musical works,[34] under the 1790 Act, most registered works were "practical or commercially useful books, such as works of instruction, textbooks, manuals, geographical atlases, and commercial directories."[35]

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[31] *See id.* at 151 ("There were so many points to be complied with to perfect a copyright . . . that it might be said of most copyrights taken out that they rested under a cloud, which an ingenious or unscrupulous person might take advantage to invalidate them.").

[32] WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:19 (2021).

[33] Melissa J. Homestead, *When I Can Read My Title Clear: Harriet Beecher Stowe and the Stowe v. Thomas Copyright Case*, 27 PROSPECTS: ANN. AM. CULTURAL STUD. 201, 203 (2002) (dating the emergence of the first truly robust American literary publishing industry to about 1850).

[34] The 1790 Act could not have covered the full panoply of creative works, such as music or art, since it offered federal copyright only to "books, maps, and charts." This was a pared-down version of the original proposed text, which would have extended much more generously to "books, maps, charts, and other writings." PATRY, *supra* note 32, § 1:19.

[35] PATRY, *supra* note 32, § 1:19. For example, the first federal copyright issued was for an instructional text, John Barry's *The Philadelphia Spelling Book*. *See* Spofford, *supra* note 22, at 154. This trend is consistent with the federal govern-

For the first seventy years of the nineteenth century, copyright was marked by two opposed trends. In terms of the subject matter covered by copyright, Congress became ever more liberal. While the 1790 Act extended copyright only to three types of works (books, maps, and charts), later legislative revisions expanded the scope of copyright to include "historical and other prints" (1802),[36] musical works as well as all types of cuts and engravings (1831),[37] and photographs (1865).[38] Congress also granted owners an exclusive right of public performance (1856) alongside the preexisting exclusive rights of reproduction and publication.[39] And due in large part to pressure from Noah Webster, concerned about preserving monopoly rights in his famous dictionary, Congress also extended the initial term of copyright from fourteen to twenty-eight years.[40]

But in terms of copyright administration — and in particular the costs it imposed on owners to acquire federal rights in their creative property — Congress grew ever stingier. In 1802, Congress revised the 1790 Act to require that owners also include extensive copyright notice statements on all copies of works released to the public.[41] Courts raised the stakes of this requirement by holding that failure to meet this notice requirement — or any other statutory formalities — caused the owner's copyright to fail to vest.[42] Congress also ratcheted up deposit rules and penalties in an attempt to both populate the nation's young research institutions and to spur subpar compliance with the deposit requirement. In 1846, Congress required that copyright registrants send deposit copies not only to the Secretary of State, but also to the Smithsonian Institution and the Library of

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ment's approach toward patents at least in the respect that there is a shared aim of promoting practical knowledge. It could be that the imperative of generating commerce in the very early republic required prioritizing such endeavors at the expense of, say, developing a literary publishing industry. That said, the legislative history of the 1790 Act reflects a general desire to encourage "science and literature" alike rather than just the former. PATRY, *supra* note 32, § 1:19; *cf.* Sean M. O'Connor, *The Overlooked French Influence on the Intellectual Property Clause*, 82 U. CHI. L. REV. 733 (2015) (showing that during the Founding Era, "science" meant "knowledge" rather than what we think of now as science).

36 Act of Apr. 29, 1802, ch. 36, 2 Stat. 171.

37 Act of Feb. 3, 1831, ch. 16., 4 Stat. 436.

38 Act of Mar. 3, 1865, ch. 230, 16 Stat. 198.

39 Courts, by contrast, were less author-friendly. The major copyright litigated during this period — Wheaton, Folsom, Stowe — all resulted in wins for defendants based on narrow interpretations of author's rights under the Act.

40 Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; DAVID MICKLETHWAIT, NOAH WEBSTER AND THE AMERICAN DICTIONARY 216-18 (2000) (discussing Webster's lobbying and its influence on passage of the 1831 Act).

41 Act of Apr. 29, 1802, ch. 36 2 Stat. 171.

42 Ewer v. Coxe, 8 F. Cas. 91 (C.C/E.D. Pa. 1824) (No. 4,584).

Congress.[43] Just over a decade later, difficulty in enforcing the onerous triplicate deposit submissions[44] had grown great enough that Congress retooled the requirement in 1859, requiring authors to submit just a single deposit copy to the Patent Office.[45] Soon after, Congress reversed course again, this time reinstituting deposit of an additional copy with the Library of Congress as a condition of vesting a registrant's copyright, and backing it up two penalties for failure to comply: a $25 penalty and the loss of the exclusive right of publication.[46]

While some changes during this period smoothed the road toward acquiring copyrights — an 1831 amendment obviated the requirement to post notice of new registration applications in local publications[47] — the marked trend was for Congress to increase, often haphazardly, the costs to authors of registering a copyright. At the same time, in the absence of a federal agency dedicated to the administration of these tasks, Congress delegated them to a variety of different entities (U.S. district courts, the State Department, the Patent Office, the Library of Congress, and the Smithsonian Institution). Due to this burdensome disorder, even as the American literary publishing industry experienced explosive growth in the mid-1800s, the number of registration applications continued to lag behind the number of published works.

In light of all this, the federal copyright system on the eve of the 1870 revision remained Hamiltonian in design only, not in execution. Like the patent and federal land distribution systems, it had the potential to distribute federal property in ideas broadly and efficiently to facilitate commerce, but unlike them, its burdensome processes and lack of administrative coordination scuttled these aims. Hence we refer to this

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[43] Act of Aug. 10, 1846, ch. 178, 9 Stat. 106. These increased deposit obligations were animated by the positive goal of populating the nation's leading library and research institutions, but the onus they placed on registrants was no less heavy for being well-intended. An 1855 enactment made these deposit submissions postage-free, Act of Mar. 3, 1855, 33d Cong., 2d Sess., 10 Stat. 685, which lowered — but by no means eliminated — the cost of complying with them.

[44] Another factor that led to Congress rolling back these deposit requirements was a court decision holding that failing to comply with them did not forfeit an owner's copyright. Jollie v. Jacques, 13 F. Cas. 910 (C.C.S.D. N.Y. 1850) (No. 7,437).

[45] Act of Feb. 5, 1859, ch. 22, 11 Stat. 380.

[46] Act of Mar. 3, 1865, ch. 230. 16 Stat. 198 (loss of right of exclusive publication for failure to deposit); Act of Feb. 18, 1867, 39th Cong., 2d Sess. 14 Stat. 395 ($25 fine for failure to deposit). Ainsworth Spofford, the Librarian of Congress from 1864 to 1897, urged the passage of both penalties, due to his frustration at authors and publishers flouting the deposit requirement. PATRY, *supra* note 32, §§ 1:31, 1:32.

[47] Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

early period of copyright administration as characterized by "weak Hamiltonianism."

B. 1870–1977: Competent Hamiltonianism

As the Gilded Age dawned, the American literary publishing world had for decades been a robust and highly profitable industry.[48] Yet the copyright system still administered authors' federal rights in their literary property with the same distributed inefficiency that it had 80 years prior. External industry pressure and internal drive to reform ultimately culminated in the second major overhaul of the Copyright Act. The 1870 revision, among other reforms, centralized[49] and reformed laws affecting copyright, and in so doing fundamentally changed their administration. Spofford characterized this moment as "an epoch in the copyright system of the United States."[50] The legislation created a new Copyright Department within the Library of Congress, and consolidated all registration and vesting operations within it.[51] This single move solved the twin problems that had dogged copyright administration since 1790.[52] With registration located in the Copyright Department rather than U.S. district courts, authors no longer had to engage in research and guesswork to determine which court was nearest them. And by offloading the technical work of registration to specialists within a dedicated agency, federal district court clerks eliminated a ministerial duty outside their expertise, creating a comparative efficiency advantage as well as more accurate centralized registration records.

The 1870 revision also cleaned up 80 years' worth of confusion and costs related to deposit. Now instead of having to deposit a copy with

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[48] By the 1850s, there were more literate people in America than anywhere else in the world. This decade saw the emergence of the truly national "best-seller," with sales of a successful title in the tens of thousands, and occasional blockbusters like Harriet Beecher Stowe's *Uncle Tom's Cabin* reaching the six figures. Hence it was only until the mid-1800s that copyright became a "truly valuable property." Homestead, *supra* note 33, at 203.

[49] Prior to the Act's passage, copyright laws were scattered in different parts of the federal statutes; the 1870 Act consolidated them for ease of reference. Spofford, *supra* note 22, at 149 ("In 1870 a new copyright code, to take place of all existing and scattered statutes, was enacted[.]").

[50] *Id.* at 148.

[51] Act of July 8, 1870 § 77 et seq., ch. 230, 16 Stat. 210; Spofford, *supra* note 22, at 149 ("The law of copyright, as codified by act of July 8, 1870, . . . transferred the entire registry of books and other publications, under copyright law, to the city of Washington, and made the Librarian of Congress sole register of copyrights, instead of the clerks of the District Courts of the United States.").

[52] Spofford, *supra* note 22, at 149 (emphasizing that "a cardinal point" about the 1870 Act was that it "concentrate[d] and simplif[ied] the business" of copyright registration).

their nearest federal district court as well as possibly also the Secretary of State, the Library of Congress, the Patent Office, and/or the Smithsonian Institution, authors could simply submit their deposit copy with their registration application directly to the Copyright Department.[53] This not only reduced costs for applicants but also regularized copyright administration by eliminating the confusion associated with registration through district court clerks scattered throughout the large territory of the United States.[54] The new system led to more efficient recordkeeping and management of deposited works thanks to the expertise of its staff and its location within the Library of Congress. Centralizing deposit also meant that parties and courts who sought to examine both registration records and deposit copies of works could do so without having to engage in guesswork about which agency housed which records and copies.[55] Finally, relocating all copyright registration records and deposit copies relieved the Patent Office of the burden of housing the deposit system,[56] and provided a foundation for the collection that populated the Library of Congress.[57]

Centralizing and streamlining the registration process through the newly formed Copyright Department was quickly heralded as a major success.[58] The clearest indication of this was the immediate and substantial

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53 *Id.* at 150 (noting that under the new system, "this double duty" of deposit "would be diminished by half").

54 *Id.* at 150 (observing that the new system "would simplify and facilitate reference to the greatest possible degree").

55 "All questions as to literary property, involving a search of records to determine points of validity, such as priority of entry, names of actual owners, transfers or assignments, timely deposit of the required copies, etc., could be determined upon inquiry at a single office of record. These inquiries are extremely numerous, and obviously very important[.]" *Id.* at 152.

56 At the time of the 1870 Act's passage, the Patent Office was the entity responsible for housing deposit copies, many of which were sent from earlier agencies responsible for deposit (e.g., the State Department) or district court clerks who had no room to house their deposit copies. This eighty-year buildup of material numbered about 23,070 volumes by the time it was transferred to the Library of Congress. *Id.* at 153.

57 "The advantage of having all American publications thoroughly catalogued and accessible upon inquiry . . . would be an invaluable aid to thousands. Its effect would be to build up at Washington a truly national library, approximately complete and freely open to all the people." *Id.* at 151. Bill Patry has argued that this was the primary goal of the 1870 Act, and that its administrative upsides were an afterthought. Spofford's contemporaneous observations suggest the reverse is true. His 1892 lecture on the 1870 Act describes the reform of the registration system as the "cardinal point" of the Act, and discusses populating the Library of Congress as an ancillary aim.

58 "[T]he test of experience during twenty years [since passage of the 1870 Act] has established the system so thoroughly that none would be found to favor a return to the former methods." *Id.* at 153.

increase in the volume of applicants. The Department received over five thousand registration applications in the first six months of its existence.[59] In 1871, the first full year of the Department's operation, it received over 19,000 applications, and over 22,000 in 1872. Just two years after passage of the Revision, Ainsworth Spofford, the Librarian of Congress, reported being overwhelmed by the increased demand for registration and asked Congress for more funding and staff to handle the workload. The demand for registration increased even though the Revision had made the deposit requirements more numerous: authors were now required to submit two deposit copies a mere ten days after publication, and failure to do so resulted in forfeiture of their copyright. This suggests that noncompliance with earlier deposit requirements was attributable not to the onerousness of the deposit requirements themselves but to the haphazard way they were administered.

Congress finally answered Spofford's request for support in 1897 with the creation of the Copyright Office.[60] While Spofford, apparently tired of the additional administrative burdens of registering copyrights, had asked that the Office be established outside the Library, Congress located it there over the Librarian's objections.[61] The 1897 Act also created the role of Register of Copyrights, to be appointed by the Librarian, and Spofford chose as the first Register Thorvald Solberg, who held the post until his retirement in 1930.[62] This reorganization did not initially come with much staff expansion to address the increasing onslaught of registration applications; the Act authorized the Office to employ twenty-nine clerks, compared to the twenty-four who had already been working in the Copyright Department. Shortly after, though, Congress finally met this demand as well and by 1901, had grown the Office staff to comprise forty-seven clerks and a messenger.[63]

One of Solberg's first major initiatives was to lobby Congress to pass a new — not merely revised — copyright law. His efforts succeeded, win-

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[59] The character of these works differed markedly from the mostly technical and scientific texts that were initially registered under the 1790 Act. The books in particular consisted of many more literary works; the first application submitted to the Department was for a travel book.

[60] Act of Feb. 19, 1897, ch. 265, 29 Stat. 545.

[61] PATRY, *supra* note 32, § 1:41 n.4 ("The Librarian of Congress had requested that the Library be relieved of all copyright responsibilities and protested (to no avail) the legislation's creation of a Copyright Office in the Library.").

[62] Act of Feb. 19, 1897, ch. 265, 29 Stat. 544 (establishing post of Register of Copyrights to head newly formed Copyright Office); PATRY, *supra* note 32, § 1:31 (noting that Solberg served until April 21, 1930).

[63] PATRY, *supra* note 32, § 1:41 n.5.

ning the support of public figures like President Teddy Roosevelt[64] and creative giants like Samuel Clemens,[65] and in 1909 Congress passed an entirely novel Copyright Act.[66] The 1909 Act, as it became uncreatively known, implemented a number of foundational changes in the copyright laws, such as increasing the renewal term to twenty-eight years[67] and extending copyright protection to "all the writings of an author."[68] It also changed the moment when copyrights vest from the issuance of a registration certificate from the Copyright Office to the first publication of a work with proper notice.[69] With this, the work of the Office turned from granting federal rights in creative production — something that authors now controlled entirely on their own — to administering those rights.

This administrative turn is a less appreciated but highly significant feature of the 1909 Act. The reforms of the later 1800s had created regulatory infrastructure, most notably the Copyright Office, its leadership and staff,[70] but the 1909 Act invested these actors with specific responsibilities dictating the regulation of copyrights at a new and highly granular level. With respect to registration, for example, the Act not only stated that the Register "shall issue" a certificate upon submission of a valid application,[71] but also detailed the information that such certificates were to include.[72] The Act also spelled out the fees to be charged not only for registration ($1 per work) but also for any of the other services one might seek from the Office, such as filing for recordation of transfers (from $1 to $3 or more per document, depending on its length), filing for renewal of a copyright term (fifty cents per work), or requesting a search of copyright office records or deposits (fifty cents per hour of work by an Office employee).[73]

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64 In a 1905 message to Congress, Roosevelt lent his support for complete revision of the copyright law rather than successive amendments, asserting that "Our copyright laws urgently need revision." (From the House Report on 1909 Act.)

65 Clemens testified in favor of what became the 1909 Act, appearing before Congress in his trademark white suit, and advocating in particular that copyright term limits be eliminated to equalize the value of literary with other kinds of property.

66 Copyright Act of Mar. 4, 1909, ch. 320, § 1(e), 35 Stat. 1075 (1909) (effective July 1, 1909) [hereinafter "1909 Act"].

67 1909 Act § 23.

68 *Id.* § 4.

69 *Id.* § 9.

70 The 1909 Act spoke to the issue of staffing, authorizing the Register of Copyrights to hire an Assistant Register, as well as "such subordinate assistants to the register as may from time to time be authorized by law." *Id.* § 48.

71 *Id.* § 10.

72 *Id.* § 55.

73 *Id.* § 61.

With the regulatory apparatus created by the 1909 Act, the Office finally had the physical infrastructure, staff support, and legislative direction necessary to make it an effective regulator of creative property — nearly a hundred years after the Patent Office and General Land Office had each enjoyed that status with respect to the federal property they administered. And while the 1909 Act can be understood as the moment when the Copyright Office finally became a fully fledged federal agency, it was still a very different agency than traditional regulatory entities like the ICC or the newly created Food and Drug Administration (FDA, 1906). Unlike these entities, the Office's task was not to rein in industry in order to solve a market failure or coordination problem. If anything, it was to further empower creative industries by efficiently registering and recording their works to assure statutory protection.

Indeed, the Copyright Office could not have regulated industry in this manner even had it been so inclined. The 1909 Act delegated to the Register only the authority to "make rules and regulations for the registration of claims to copyright."[74] In contrast to the ICC or the FDA, the Office enjoyed no general authority to craft policy by passing regulations. And even within this narrow ambit of regulatory authority, there was little need for the Register to do anything, since the 1909 Act spelled out in extensive detail how registration and other internal operations should proceed, leaving far less gap-filling for the Office as compared with the broad delegation to other agencies of the time and to future agencies still to come. Indeed, it was not until almost three decades later that the Register exercised rulemaking authority under the Act and issued any regulations at all.[75]

Thus, from its inception and for most of the 1900s, the Copyright Office's core functions of registration and recordation were ministerial.[76] Its scope of responsibility was highly specified, and its discretion was commensurately narrow: it received applications for registration and recordation and issued certificates, and it managed the deposit of registered works. It resembled a register of real property deeds more than it did a federal agency with a broad mandate to regulate industry. But while its

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[74] *Id.* § 53. This language could be read to prevent the Register even from passing regulations related to other ministerial duties like renewal or recordation of transfers.

[75] Joseph P. Liu, *Copyright Rulemaking: Past as Prologue*, 33 BERKELEY J.L. & TECH. 627, 629-30 (2018) (observing that the first copyright regulations appeared in the C.F.R. in 1938).

[76] Some of its functions were not, most notably the Office's practice of advising Congress on substantive issues related to copyright. *See* Aaron Perzanowski, *The Limits of Copyright Office Expertise*, 33 BERKELEY TECH. L.J. 733, 737-38 (2018) (discussing the early Copyright Office's issuance of Congressional reports and their impact on reform).

ambition and authority may have been comparatively modest, it performed these tasks well even as creative industry grew over the course of the 1900s and the kinds of works that needed to be registered multiplied and strained the categories of works suggested in the 1909 Act.[77] In so doing, the Copyright Office did eventually achieve parity with the Patent Office and General Land Office, effectively distributing and administering federal rights in creative production. With the passage of the 1909 Act, and up until the next major revision of copyright in 1978, the Copyright Office (finally) functioned as a competent Hamiltonian agency.

Also during this period, the Office served a secondary function of advising other branches of government and the public about copyright law. One of the Office's earliest tasks was to guide Congress through the revision process that led to the 1909 Act. A half-century later, the Office spearheaded the much more elaborate work of creating a new copyright law altogether, ultimately culminating in the 1976 Act. The Office was by a wide margin the leading governmental expert on copyright during this period. Accordingly, its leaders and staff provided substantive advice to all branches of government when copyright issues arose, and represented the United States at international IP-related meetings.[78]

C. 1978–Present: The Frankenstein Agency

From the passage of the 1909 Act through until the later twentieth century, the Copyright Office focused almost exclusively on these narrowly defined tasks. Even within its narrow ambit of authority to pass regulations regarding internal operations and registration, it rarely acted, issuing only a handful of rules over the course of seven decades.[79] By the mid-1950s, though, a need arose to update the Copyright Act. The first half of the twentieth century had seen seismic changes not only in forms of creative production but also the entities that controlled their distribution. The emergence of film, for example, had seen the rise of wealthy produc-

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[77] The 1909 Act listed eleven poorly conceived categories of registrable works, stressing that these were non-exclusive and that the Register had authority to register works outside the listed categories. 1909 Act § 5. In practice, however, the practice was to extend copyright to works falling into those categories and to deny it to works falling outside them. *See* CRAIG JOYCE, TYLER T. OCHOA & MICHAEL CARROLL, COPYRIGHT LAW 140 (11th ed. 2019) ("[C]ourts tended not to accept a work as copyrightable unless if fit into one of the specified categories—and sometime to accept it uncritically if it did.").

[78] *See* Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 316-18 (discussing the advising roles of the Copyright Office during this period); *see also infra* at Part III.A (detailing the role of the Office in creating the 1976 Act).

[79] *See* Liu, *supra* note 75, at 630 (showing that the Copyright Office passed very few regulations from 1909 until the effective date of the 1976 Act).

tion companies that not only managed the creation of motion pictures but also traded in the rights to distribute and publicly perform them. The relatively lean 1909 Act, which implicitly delegated much interpretation to the federal courts, had become increasingly strained in application to these emergent industries.[80]

In contrast to the relatively brief run-up to the 1909 Act, the creation of the 1976 Act was twenty-one years in the making. Beginning in 1955, this process encompassed 35 studies commissioned by Register of Copyrights Abe Kaminstein; years of negotiation between affected industries; and numerous committee meetings that produced a "flood" of committee reports.[81] The goal was not just to revise copyright law by updating it and streamlining its location within the U.S. Code, but to reimagine basic features of copyright law both substantively and institutionally. To that end, the Copyright Office played a central role in the two decades of negotiations that led to the 1976 Act. Five of the thirty-five reports Kaminstein commissioned dealt with core functions of the Office.[82]

When it finally passed in 1976, the new Copyright Act achieved its framers' ambition of reimagining copyright law. Register of Copyrights Barbara Ringer reflected upon the Act's passage that it "is as radical a departure as was our first copyright statute, in 1790."[83] This was true in a number of substantive respects but also with the basic structure of the Copyright Office itself. Under the 1976 Act, the Office would continue to perform the same ministerial duties related to registration and recordation as it had since its inception. The major innovation, though, was that the new statute charged the Office with administering several statutory license schemes in a manner that much more closely approximated traditional the work of traditional agencies.

The Act contained three new statutory licensing schemes to be administered by the Office. Two of these — compulsory licenses for mechanical recordings[84] and for coin-operated machines such as jukeboxes[85] — were relatively simple.[86] The third, governing cable television retransmissions, was not. The product of protracted negotiations between

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80 *See* Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 857-58 (1987) (due to technological development, "[c]ourts 'stretched the limits of statutory language' in order to make the obsolete 1909 Act serviceable") (quoting 1965 House Hearings on Copyright Law Revision).

81 *Id.* at 871-72 (describing this process).

82 *E.g.*, No. 17, "The Registration of Copyright," No. 20, "Deposit of Copyrighted Works."

83 Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L.S. L. REV. 477, 479 (1977).

84 17 U.S.C. § 115.

85 17 U.S.C. § 116. This compulsory license scheme was abandoned as part of the 1993 Copyright Royalty Tribunal Act.

broadcast and cable companies, the statute required cable companies to provide detailed biannual reports to the Copyright Office; pay a rate set either by statute or by the relevant tribunal within the Office;[87] and then deposit the relevant fee with the Office. The Office then distributed these proceeds to the relevant copyright owners who had filed claims for royalties. Finally, the Office annually considered any objections to how the scheme was administered, including to rates, all of which could be challenged by a tribunal established within the Office.[88] The unsurprising result of these new delegations of administrative responsibility to the Copyright Office was a dramatic uptick in its issuance of regulations. On the eve of the effective date of the 1976 Act, the body of Copyright Office regulations totaled some 8,500 words. By the end of 1978, the first year in which the 1976 Act was effective, these regulations had nearly quadrupled to 40,000 words — eclipsing for the first time the size of the Copyright Act itself.[89]

Congress delegated to the Office additional responsibility to administer statutory license schemes on several subsequent occasions as well. In 1988, Congress passed the Satellite Home Viewer Act, which added a compulsory license for the secondary transmission of content for private viewing by satellite dish owners. This Act included elephantine fee provisions with rates to be set by arbitration panels reviewable by the Copyright Royalty Tribunal.[90] These provisions have served to be a site of endless battle between content owners and satellite carriers, one that has caused some commentators to lament the involvement of the Office in this ongoing dispute.[91]

In 1994, Congress passed the Digital Performance Rights in Sound Recordings Act (DPRSRA), which established a limited public performance right for owners of sound recordings and extended the § 115 compulsory license in mechanical reproductions to cover digital distribution and reproduction as well.[92] The DPRSRA delegated authority to set compulsory license rates under the DPRSRA to the Copyright Arbitration Roy-

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[86] Liu, *supra* note 1, at 109 (reflecting on the simplicity of these two licensing schemes in the 1976 Act compared to the cable television retransmission scheme).

[87] At the time the 1976 Act was passed, the rate setting entity was the Copyright Royalty Tribunal. The Tribunal was later disbanded and replaced by the Copyright Arbitration Royalty Panel. The Panel was found unconstitutional, and replaced by the current rate setting entity, the Copyright Royalty Board.

[88] *See generally* 17 U.S.C. § 119 (outlining the administration of cable television licenses).

[89] Liu, *supra* note 75, at 631 (evidencing these numbers).

[90] 17 U.S.C. § 119.

[91] PATRY, *supra* note 32, § 1:90 (opining that it was a disaster for copyright law to be entangled with satellite companies).

[92] Pub. L. No. 104-39, 109 Stat. 336 (codified at 17 U.S.C. §§ 114, 115).

alty Panels (CARPs) that were then the administrative adjudicative body within the Office.[93] Here, too, commentators have lamented the inordinate complexity of the DPRSRA's compulsory license scheme, calling it "impenetrable" and comparing it disfavorably to the internal revenue code.[94]

Most recently, Congress passed the Music Modernization Act of 2018, which established *sui generis* exclusive rights for owners of sound recordings that were created prior to the date those recordings were first federally protected in 1972.[95] This statute contemplates a still to be created quasi-public collecting society to administer many of these rights, one that will operate outside the ambit of the Copyright Office. Yet many of the rights to which these pre-1972 sound recordings will enjoy are subject to preexisting compulsory license schemes, such as §§ 114 and 115, that will be administered by the Office.

Congress, by delegating responsibility to the Copyright Office to administer these numerous complicated statutory licensing regimes, deviated from the Office's character as a Hamiltonian agency focused on managing claimants' rights in their works. The Office's responsibilities related to these licensing schemes have resembled managing a settlement between industry players than filling in the gaps of broad legislative delegations — even though the Office had no particular experience or expertise directly regulating industry. These statutes did, in fact, represent negotiated agreements between competing industry interests — agreements crafted at the Congressional level — and high detail of those agreements left little for the Office to interpret. To that end, the work of administering these compulsory licenses remained mostly ministerial: reviewing reports and fees owed from users, managing databases of information, distributing revenue

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93 The 1976 Act had established the five-member Copyright Royalty Tribunal (CRT) for this purpose. Soon after its establishment, though, the CRT was marked by internal dissension and a sense that its episodic workload did not justify the presence of five full-time judges. After reducing its number from five to three in 1991, Congress scrapped the CRTs in 1993, replacing them with the CARPs, which the Librarian of Congress had authority to convene on an *ad hoc* basis. *See* Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304. Dissatisfaction with the *ad hoc* nature of the CARPs led to the 2004 creation of the current ratemaking body, the Copyright Royalty Board (CRB). *See* Copyright Royalty Distribution and Reform Act of 2004. The Board consists of three copyright royalty judges who the Librarian of Congress appoints to serve staggered six-year terms. *See* www.crb.gov (outlining the structure of the CRB); *cf.* Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.2d 1332 (D.C. Cir. 2012) (invalidating original structure of CRB under the Appointments Clause and ordering modification of the 2004 Act to cure constitutional infirmity).

94 Lon Sobel, *A New Music Law for the Age of Digital Technology*, 17 ENT. L. REP. 3, 3 (1995).

95 17 U.S.C. § 1401.

to owners, and so on. Still, the amount of regulation these ministerial tasks required was substantial, so much so that the Office now issues more regulations related to administering statutory licenses than as to all other subject matters combined.[96]

Finally, in 1998, Congress invested the Office with authority to undertake a broad substantive rulemaking when it passed the Digital Millennium Copyright Act (DMCA). This Act, among other things, created civil and criminal penalties for circumventing technical measures that protected access to and precluded copying works of authorship. These broad anti-circumvention provisions received criticism from groups concerned that they would suppress technical innovation and free expression.[97] To mediate these concerns, the DMCA's framers included a series of exemptions from § 1201 as well as a triennial review process to allow affected individuals to broaden or create new exceptions. In early versions of the DMCA, the Department of Commerce was charged with undertaking this triennial review, but a last-minute statutory revision allocated the process to the Copyright Office instead. The overt rationale for this move was that the DMCA was a copyright-related statute, so the Office was the body with the expertise to administer it. Skeptical commentators have suggested that the real motivation was that congresspeople wanted to locate the review process in a less powerful agency over which they could have more influence. When it passed, the DMCA charged the Register of Copyrights with the responsibility of holding a triennial rulemaking to review and consider exceptions to § 1201, which would then be expressed as recommendations for the Librarian of Congress to consider.[98] This delegation represents a different kind of expansion of the Office's regulatory role. In crafting exceptions to the DMCA's anti-circumvention provisions, it is making substantive, public-facing law, rather than just administering a compulsory license that pertains to a particular industry.[99]

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[96] Liu, *supra* note 75, at 635 (showing that Office regulations related to the statutory licenses it administers comprise 64% of its total regulations, as opposed to 28% related to registration and recordation, and 7% for all other categories).

[97] For a fascinating view of the interest group dynamics behind the passage of § 1201, see Pam Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 537-43 (1999) (showing that entertainment industry representatives argued against any exceptions to the DMCA on the theory that there were no valid reasons to circumvent a technology protection measure).

[98] The Librarian thus has the formal authority to pass these proposed rules, but the process is little more than a rubber stamp. The Librarian has passed wholesale all rules proposed by the Register pursuant to this process. Commentators have charged that this structure amounts to constitutionally invalid congressional delegation of executive power to an Article I agency. *See generally* Gass, *supra* note 1.

[99] *Id.* at 1049 (referring to the authority delegated to the Office by the DMCA as "enhanced, public-facing, lawmaking authority").

The contemporary Copyright Office, in contrast with its Hamiltonian predecessors, does not have a clear mission or jurisdictional scope. It has been called alternately a largely ministerial body by some authorities,[100] and a leading source of law and expertise on copyright by others.[101] Neither is quite right. The Office does far more than just the ministerial work of processing applications for registration and recordation. Beyond administering statutory licenses and making public law pursuant to DMCA § 1201, the Office regularly advises Congress on copyright-related issues (and has since its formation), created and proposed draft legislation, and reported about the state of copyright affairs both domestic and international.[102] It also increasingly convenes with other agencies to develop policy strategies on copyright and allied fields. DMCA § 1201, for example, requires the Office to consult with the Department of Commerce as well as the Patent and Trademark Office before issuing final rules.

Yet the Office remains far more constrained than independent agencies like the Federal Communications Commission (FCC) or the FDA. The bulk of its regulatory work on compulsory licenses entails only application of detailed statutory schemes reflecting industry compromises already resolved at the Congressional level.[103] Nor has Congress delegated broad substantive or even interpretive rulemaking authority over the Copyright Act to the Office,[104] as it so often does with the leading regulatory bodies. The Office's authority to make copyright law remains circumscribed, and its influence in shaping interpretations of that law remains largely advisory.[105]

D. The USPTO as Rival

Importantly, the constraints on the modern Copyright Office also include substantial crowding-out from the USPTO, which has long been an institutional rival even on matters of copyright law and policy. In some respects, the USPTO may serve as a model for the Copyright Office to emulate — such as in the context of regulation by adjudicating though not as much by rulemaking, and of executive branch decision making. Yet

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100 *See* Gass, *supra* note 1, at 1051 ("The Copyright Office is and always has been largely a ministerial agency.").

101 *See* Balganesh, *supra* note 2, at 72 ("[The] Office is today quite legitimately an independent institutional source of copyright law.").

102 *See* Copyright Office website, intro and history sections.

103 The public-facing rules the Office passes pursuant to DMCA § 1201 comprise only about 1% of its workload. *See* Liu, *supra* note 75, at 635.

104 *See id.* at 627 (observing that Congress has not delegated general authority to the Office to make substantive rules, and that its institutional authority remains limited relative to other agencies).

105 One rare exception is APA review of Copyright Office denials of registration, which we discuss in Part III.B, *infra*.

even after such lessons have been learned, the USPTO may simply remain in competition with the Copyright Office on matters that implicate the policy jurisdictions of both agencies.

Looking to the USPTO as a model, the agency has much recent experience both with regulating by adjudication and with taking part in executive branch deliberation. Unlike the Copyright Office, the USPTO has never had substantive rulemaking authority and, as a result, has never received judicial deference for its rule-based pronouncements about patent or trademark law.[106] What rulemaking the agency does perform has necessarily been procedural, and past USPTO efforts to aggrandize its power by exerting pressure at the boundary between procedural and substantive rules have been unsuccessful.[107] As a result, USPTO regulations — which can "govern the conduct of proceedings" in the agency but can go no further[108] — have provided only an indirect way to influence the patent and trademark systems.

Adjudicatory authority is a different matter. Over the past decade, the USPTO's inability to promulgate substantive rules has been mitigated by its new ability to speak with the force of law in another way: by engaging in adjudication that is sufficiently formal to get deference from the courts on substantive questions of patent and trademark law.[109] Administrative adjudication in patent law has, since 1980, allowed third parties to seek the revocation of issued patents in a USPTO tribunal called the Patent Trial and Appeal Board.[110] The story in trademark law runs even longer. Since 1958, such adjudications been conducted in formalized pro-

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106 *See* Merges, *supra* note 12, at 2578 n.66 (noting the leading cases that document the USPTO's lack of substantive rulemaking authority).

107 *See*, *e.g.*, Arti K. Rai, *Growing Pains in the Administrative State: The Patent Office's Troubled Quest for Managerial Control*, 157 U. PA. L. REV. 2051, 2070-72 (2009) (discussing a decisive rejection by the Eastern District of Virginia of substantive rulemaking by the USPTO in *Tafas v. Dudas*, 541 F. Supp. 2d 805 (E.D. Va. 2008), and elaborating on the peculiar appellate history that followed).

108 35 U.S.C. § 2(b)(2)(A).

109 *See* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141 (2019); Stuart Minor Benjamin & Arti K. Rai, *Administrative Power in the Era of Patent Stare Decisis*, 65 DUKE L.J. 1563 (2016); Melissa F. Wasserman, *The Changing Guard of Patent Law: Chevron Deference for the PTO*, 54 WM. & MARY L. REV. 1959 (2013).

110 *See generally* Saurabh Vishnubhakat, *Disguised Patent Policymaking*, 76 WASH. & LEE L. REV. 1667, 1737-41 (2019); Vishnubhakat, Rai & Kesan, *Strategic Decision Making*, *supra* note 4, at 56-57. The particular adjudicatory systems have grown from the first, *ex parte* form in 1980 to a second-generation *inter partes* form in 1999 and most recently to a suite of adversarial proceedings in 2011. *See* Bayh-Dole Act, Pub. L. No. 96-517, 94 Stat. 3015 (1980); American Inventors Protection Act, Pub. L. No. 106-113, 113 Stat. 1501 (1999); Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

ceedings before three-judge panels in a USPTO tribunal called the Trademark Trial and Appeal Board both to oppose *ex ante* the issuance of trademark registrations and to cancel *ex post* those registrations that have already been issued.[111] The ascendancy of administrative adjudication in the USPTO reflects a substantial regulatory power that currently outpaces that of the Copyright Office. Thus, if Copyright Office power were to be expanded, the USPTO's tribunals for patent and trademark rights can offer templates for that expansion.

Beyond its role as a regulator — albeit one that makes regulatory policy by adjudication — the USPTO has also grown in prominence within the executive branch. That growth has made the agency a considerable force in domestic and international IP policy making. As a result, the USPTO's work both as a traditional advisor and as a convenor offers a valuable template for the Copyright Office as well. The modern arc of this growth began in 1975, when the Patent Office was renamed the Patent and Trademark Office and the Commissioner of Patents was re-designated the Commissioner of Patents and Trademarks.[112] This was not a mere cosmetic change but rather one that reflected a political consensus that "the interest of the general public in trademark protection today and the economic significance of trademarks may equal or exceed that of patents."[113] There was, accordingly, real political significance in recognizing formally the dual role of the agency in administering both the patent and trademark systems.

A similar change came in 1999, setting an executive leadership structure for the USPTO that remains in place today. This reform departed from the long-held model of a single commissioner who, over time, had been joined by an assistant commissioner and three examiners-in-chief from the 1870 reforms[114] — and, later, by a first assistant commissioner, two assistant commissioners, and nine examiners-in-chief from the 1952 reforms.[115] From the 1999 reforms on, the agency's head would be the Director of the USPTO rather than a Commissioner, and would be an Under Secretary of Commerce for Intellectual Property rather than an Assistant Secretary.[116]

The upshot of the USPTO's institutional history and its broad remit of policy making is that the agency is relatively well-evolved and sophisticated at carrying out traditional executive branch advising functions.

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111 Pub. L. No. 85-609, §?1(a), Aug. 8, 1958, 72 Stat. 540.

112 Pub. L. No. 93-596, Jan. 2, 1975, 88 Stat. 1949.

113 H. REP. NO. 93-523 (1973); ?S. REP. . NO. 93-1399 (1974).

114 Act of July 8, 1870 § 2, 41 Cong. Ch. 230, 16 Stat. 198.

115 82 Cong. Ch. 950, July 19, 1952, 66 Stat. 792.

116 Pub. L. No. 106-113 § 4713, Nov. 29, 1999, 113 Stat. 1501.

Moreover, the scope of that advising has, by statute, spanned all areas of intellectual property law and policy.

Little wonder, then, that the USPTO has long been a policy rival to the Copyright Office and is likely to remain so. Indeed, both the zero-sum nature of political authority in general and the modern preference in administrative law for efficiency through agency specialization in particular push in the same overall direction, toward the predominance of a single agency or only a few agencies in a shared regulatory space.[117] The USPTO's growth into predominance in domestic as well as international IP policy making, the elevation of its political leadership to greater levels of executive decision making, and even more prosaic indicia of institutional importance such as personnel and budget all share a common thread. They all arise from the perception that the USPTO's policy jurisdiction covers intellectual property as a whole.[118]

Historically, the displacement of Copyright Office operations by the USPTO was not even necessarily an unwelcome intrusion. For example, soon after the sweeping reforms in 1870 of the Copyright Act and the start of U.S. copyright's period of Competent Hamiltonianism,[119] Librarian of Congress Ainsworth Spofford sought increasing help from Congress to manage the influx of new business of the Copyright Office.[120] The influx was a measure of Spofford's own success at centralizing and streamlining the process of registration and deposit within the Library of Congress;[121] still, the workload had grown. Congress responded by reallocating some of the Copyright Office's registration duties to the Patent Office, specifically the issuance of copyright registrations upon industrial labels, a type of work that made up a notable share of the new registration applications flooding the Copyright Office.[122] The rationale for this reallocation elegantly summarizes how natural, and even sensible, otherwise incongruous conflicts can be between the policy jurisdictions of the USPTO and the Copyright Office. The need was operational, the solution pragmatic, and the result fairly resilient over time.

The problem was that, from the 1874 Print and Label Act onward, it was unclear whether labels and commercial prints were eligible for copyright protection. There was good reason to believe they were not, not only

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117 *See generally* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012).

118 *See* 35 U.S.C. §§ 2(b)(8)-(13) (referring to throughout to "intellectual property" policy, rights, and institutions). *See also infra* notes 166-168 and accompanying text.

119 *See supra* Part I.B.

120 *See supra* notes 58-60 and accompanying text.

121 *Id.*; *see also* Perzanowski, *supra* note 76, at 736-37.

122 1874 Print and Label Act, S. 876, 43d Cong. (as introduced June 1, 1874).

for statutory reasons but also potentially for constitutional ones.[123] To divest the Copyright Office of this work was the start of a solution. The Patent Office was a sensible substitute. By then, Patent Office reform of 1870 had enlarged the agency's jurisdiction, its budget, and the powers of its commissioner to administer the newly enacted trademark laws. And while labels and commercial prints were of questionable eligibility for copyright, they were certainly closer to trademarks because of their commercial purpose — and properly distanced from the "more exalted works of the mind" that belonged in the copyright system.[124] To be sure, there was confusion over the institutional conflict, but the confusion was not about why the Patent Office was doing Copyright Office work. The Supreme Court later addressed the copyright subject matter eligibility of advertising materials such as labels and commercial prints in the 1903 *Bleistein* case.[125] Still, the decision had little effect on Patent Office management of these registrations, which would continue until 1940 when they were returned to the Copyright Office's purview.[126]

This policy competition between the USPTO and Copyright Office has continued into the modern era — to the point that various proposals have arisen in recent decades to explore merging the Copyright Office with the USPTO.[127] Indeed, this competition has only intensified from the USPTO's plenary mandate to "advise the President, through the Secretary of Commerce, on national and certain international intellectual property policy issues."[128]

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123 *See* Zvi S. Rosen, *Reimagining Bleistein: Copyright for Advertisements in Historical Perspective*, 59 J. COPYRIGHT SOC'Y 347, 352-53 (2012) (discussing the statutory and constitutional misgivings of the Librarian); *see also* ANNUAL REPORT OF LIBRARIAN OF CONGRESS EXHIBITING THE PROGRESS OF THE LIBRARY (1872) (Misc. Doc. 13). .

124 Rosen, *supra* note 123, at 353.

125 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).

126 84 CONG. REC. 9,378, 10,939 (1939).

127 Two recent instances of this debate include the mid-2010s and the mid-1990s. The House Judiciary Committee took testimony on the issue in early 2015. *See The U.S. Copyright Office: Its Functions and Resource*: *Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (2015), http://www.govinfo.gov/content/pkg/CHRG-114hhrg93529/pdf/CHRG-114hhrg93529.pdf. Leading IP commentators debated consolidation in the press as well. *Compare* Peter C. Pappas, A Copyright Office for the Digital Age, THE HILL (Feb. 26, 2015), http://www.thehill.com/blogs/congress-blog/technology/233846-a-copyright-office-for-the-digital-age *with* Dina LaPolt, *The Copyright Office: Our Bastard Stepchild Six Times Removed*, THE HILL (Feb. 27, 2015), http://www.thehill.com/opinion/op-ed/234035-the-copyright-office-our-bastard-stepchild-six-times-removed. Two decades earlier, the Senate introduced omnibus legislation to the same effect, see United States Intellectual Property Organization Act of 1996, S. 1961, 104th Cong. (1996), with corresponding hearings and debate of its own.

128 35 U.S.C. § 2(b)(8).

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In all, despite academic silence on the topic, copyright's administrative law has a lineage that dates to the inception of the Republic. For its first two centuries, the administration of copyright focused narrowly on its core Hamiltonian function of distributing IP rights in creative production, and later in sharing its expertise on copyright law as well. The 1976 Act stands as an inflection point, as Congress began to pile administrative duties on the Office without any core theory about the optimal scope of its capacities or expertise. And just as these changes weakened the Copyright Office, the USPTO was growing in size and influence, ever poised to overtake as much of the Copyright Office's substantive work and policy influence as possible.

II. THE COSTS OF UNDERTHEORIZING COPYRIGHT REGULATION

The radical change in regulatory copyright introduced by the 1976 Act is not a mere historical artifact. It has had profound consequences for how copyright law is administered, which this Part explores. Congress's repeated delegations to the Office and Board[129] in the absence of a coherent organizing principle has taxed these entities operationally and resulted in fractured decision making. In other respects, Congress has failed to fully leverage the value of the Office in the core areas of its expertise. And all the while, the USPTO has remained in the offing, ready to take up as much of copyright's regulatory domain as it can. Tracing these shortfalls is a constructive as well as a critical exercise. By detailing where Congress got things wrong, we can begin to construct a parsimonious theory of copyright's administrative law.

A. Overdelegation to the Copyright Office

The Copyright Office was not conceived, as most other agencies were, to regulate industry in order to solve a coordination problem or market failure. Instead, its core function was Hamiltonian: to distribute and manage owners' copyrights in the interest of creating a robust creative economy. Starting with the 1976 Act, Congress began to deviate from that vision, putting the Office in a position of regulating industry in two ways, each of which exceeded its expertise and capacities and produced predictably suboptimal outcomes. This Subpart describes both of those species of overdelegation. First is the constrained industry regulation that the Office and Board undertake with respect to administering the Act's compulsory

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[129] We refer throughout this Part to the Board for simplicity of reference, though there have been various adjudicatory bodies to which the Act has delegated authority.

license provisions. Second is the public-facing rulemaking that the Office has begun to undertake pursuant to the DMCA's triennial rulemaking for exceptions to § 1201.

1. Constrained Industry Regulation

The 1976 Act first introduced one of two administrative models of the Office and Board that transcended the traditional Hamiltonian role: *constrained industry regulation*.[130] The bulk of the regulatory activities of the Office and the Board to date fit this mold. These activities include administering compulsory licenses for cable television retransmissions, satellite television retransmissions, and the reproduction and distribution of musical works in phonorecords.[131]

In each of these cases, the Office and Board regulate only a narrowly defined slice of the music and broadcast industries. Whereas it may be fair to say broadly, for example, that the Federal Energy Regulatory Commission (FERC) regulates the energy industry, the Office and Board by contrast regulate only the prices of the licenses entities must pay to retransmit audiovisual works or to reproduce and distribute phonorecords. Neither the Office nor the Board has any authority over the content of the transmissions or works in the way that the FCC, for example, has some authority over the subject matter of the communications it regulates.

The authority of the Office and that of the Board are further constrained by the scope of th eir delegation. The sections of the Copyright Act relating to compulsory licenses are famously — some would say infamously[132] — complicated. As a result, the Office and the Board wield relatively narrow discretion. This is due in part to the distinctive origin of the Act's compulsory license provisions, which reflect a carefully negotiated statutory compromise among industry factions. So while the traditional model of agencies is one of broad delegation of authority to allow

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130 The Office had also administered the compulsory licenses for reproduction and distribution of musical works in phonorecords that originated with the 1909 Act. *See* 1909 Act § 1(e); *see generally* Howard Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA HIGH TECH. L.J. 215 (2009).

131 The 1976 Act initially included a compulsory license for public performances of musical works on jukeboxes, 17 U.S.C. § 116, and for the performance of nondramatic musical works and pictorial, graphical, and sculptural works by public broadcasting entities. *Id.* § 118. The jukebox compulsory license was repealed in 1989 as part of the Berne Convention Implementation Act's move toward negotiated licenses. The Audio Home Recording Act also amended the Copyright Act to require manufacturers and importers of certain digital recording devices to pay a compulsory license as well. 17 U.S.C. §§ 1001–1010.

132 For an entertaining account of the mind-numbing complexity of one such scheme, see David Nimmer, *Ignoring the Public Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189 (2000).

subject matter experts to fill in gaps intentionally left by the legislature, the work of the Office and Board looks more like administering a finely detailed settlement agreement between parties who negotiated very precise terms with relatively little room for interpretation.[133]

The Act in some cases goes so far as to prescribe fixed price formulas for these licenses that leave neither the Office nor the Board with any meaningful discretion at all.[134] As to cable retransmissions, for example, the Act requires broadcasting entities to submit "statements of account" on a semiannual basis.[135] The broadcaster's fee is then based on a set percentage of gross receipts for different kinds of transmissions specified in the statute.[136] The Copyright Office has the primary responsibility of receiving and distributing fees.[137] The Copyright Royalty Board has the primary responsibility for reviewing claims to the collected royalties by copyright owners and of resolving disputes about those fees.[138]

The Act's compulsory licenses are in some instances also situated as backstops to be invoked only when private ordering does not work out. The Board has authority to set the statutory fee for public performance of sound recordings via digital non-interactive subscription services only after it has initiated "voluntary negotiation proceedings" among the parties.[139] And a private clearinghouse, the Harry Fox Agency, has largely usurped the Office's role in setting rates for reproduction and distribution of musi-

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133 We recognize, of course, that interest-group influence even up to the point of capture is a pervasive possibility at the agency level, too — as the legal, economic, and political science literatures have long and extensively documented. *See*, *e.g.*, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975); Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q.J. ECON. 1089 (1991); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987). Nevertheless, we see this account of agency-level capture as different in kind from the even stronger entrenchment that comes from resolving interest-group bargains at the level of organic legislation.

134 This is not always the case. The compulsory license for non-interactive subscription services delegates the Board greater discretion, though requiring them to consider "economic, competitive, and programming information presented by the parties" in a formal adjudication. 17 U.S.C. § 114(f)(1)(B)(i).

135 *Id.* §§ 111(d)(1), 111(d)(1)(A).

136 *Id.* §§ 111(d)(1)(B), 111(d)(1)(C). The Act allows for some modifications to the license terms where a cable system has gross receipts from subscribers of less than $527,600. *Id.* §§ 111(d)(1)(E), 111(d)(1)(F).

137 *Id.* §§ 111(d)(2), 111(d)(3).

138 *Id.* § 111(d)(4).

139 *Id.* § 803(b)(3). Similarly, parties entitled to payouts of royalties under the cable retransmission statutory license may "agree among themselves as to the proportionate division of statutory licensing fees among them" rather than submit to the Board's determination of that amount. *Id.* § 111(d)(4).

cal works in phonorecords, largely because the procedures for doing so via the Office proved cumbersome for recording artists to navigate on their own.[140]

The practice of delegating ratemaking authority to the Office and Board has become routine enough that it obscures a basic question: why is the Office an appropriate entity to engage in these duties at all? The framers of the 1976 Act and subsequent amendments allocated this authority to the Office's various administrative tribunals because the licensing schemes were located in Title 17 of the U.S. Code. But the Office, especially on the eve of the 1976 Act's passage, had no particular expertise with, for example, the cable television industry. On the contrary, the Office's expertise was deep but narrowly focused on registration and recordation of copyright claims. Its knowledge of the best practices in managing such claims suggested nothing about whether the Office was capable of understanding how to determine the best rates a cable TV carrier should pay a content provider. Indeed, through the 1960s the Federal Communications Commission had been the principal regulator of the cable industry, and so would have seemed like the best fit to administer the Act's statutory license governing that industry's practices. The expansion of the Office's administrative role in this respect is thus doubly notable. It expanded the Office's workload, straining its resources and precluding it from focusing exclusively on the Hamiltonian property-distribution function that had previously been its sole focus. And it charged the Office with administering a scheme that was outside the scope of the agency's traditional expertise, and that would more naturally have belonged within the jurisdiction of one or more other federal agencies.

The 1988 expansion of the Office's jurisdiction from cable retransmission compulsory licenses to satellite retransmission compulsory licenses has been particularly problematic. The rationale for delegating this duty to the Office appears to have been nothing more than that since the Office administers licenses for cable retransmission, it should administer those relating to satellite retransmission as well.[141] And a particular cost of overdelegation in this case is underenforcement. Section 119 places clear limits on when and where satellite companies can broadcast their signals.

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[140] *See* CRAIG JOYCE ET AL., COPYRIGHT LAW § 7.02[C], at 470 (11th ed. 2020) (explaining that HFA provides forms that "streamline[ ] the cumbersome reporting and accounting procedures that otherwise would be required by the statute"); *see also* Jonathan Widran. *Up Close: Harry Fox Agency*, MUSIC CONNECTION, (Sept. 15, 2014) https://www.musicconnec.com/closeup-harry-fox-agency (providing overview of HFA's role in the music industry).

[141] PATRY, *supra* note 32, § 1:110 (observing that "the [Direct Broadcast Service] industry has very effectively used the existence of § 111 as a perpetual justification for their Section 119").

For example, some signals may be sent to only to private homes, not commercial establishments.[142] Yet satellite companies regularly flout such limitations, a practice of which Congress is well aware.[143] These violations are unsurprising since the Office does not have the authority or the resources to cite violators for exceeding the terms of statutory licenses; its jurisdiction is limited to collecting and distributing retransmission royalties. This is an instance where an agency with robust enforcement authority — e.g., the FCC or the Federal Trade Commission (FTC) — would likely be better suited to administer this statute and root out such violations.

In sum, the rationale for Congress to transform the Office and Board into constrained industry regulators seems to have been nothing more than a presumption that since the compulsory licenses live in Title 17 of the U.S. Code (governing copyrights), they need to be administered by copyright-related entities. This reflexive decision overlooked the possibility that other agencies with superior existing expertise on the industries affected by these licenses would have been better suited for administering the relevant compulsory licenses. Yet since the passage of the 1976 Act, regulations relating to compulsory licenses comprise the majority of the Office's (and all of the Board's) administrative workload.[144] This persists despite pervasive criticism of delegating this form of industry regulation to the Office and Board, which one authority has called a "disaster,"[145] and which the Office itself has concluded was a costly and inferior approach.[146]

2. Public-Facing Rulemaking

In contrast to the Office and Board as constrained industry regulators is the model of *public-facing rulemaking*.[147] This role is emblematized by

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142 17 U.S.C. § 119(a)(1).

143 H.R. REP. NO. 660 (2004) ("The Committee is concerned by allegations that DBS operations have been retransmitting superstation signals to commercial establishments in violation of Section 119, which unambiguously restricts such retransmissions to private homes.").

144 Liu, *supra* note 75, at 635 (concluding that 64% of the regulations issued by the Office and Board relate to compulsory licenses).

145 PATRY, *supra* note 32, § 1:90 (bemoaning Congress's decision to involve the Office and Board with satellite retransmission licenses).

146 U.S. Copyright Off., A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, at iv(Aug. 1, 1997) ("[T]he Copyright Office finds that . . . the better solution is through negotiation between collectives representing the owner and user industries, rather than by a government administered compulsory license.").

147 *Cf.* Gass, *supra* note 1, at 1049 (referring to the Library's triennial rulemakings as creating "public-facing rules").

the Copyright Office's triennial rulemakings on exemptions to § 1201(a)(1) of the DMCA. That section of the Act proscribes circumvention of technology protection measures (TPMs) that copyright owners may implement to protect their works from infringement.[148] TPMs may range from something as simple as a password to something as complicated as encryption. In either case, though, there may be a number of valid reasons that someone may want to circumvent these TPMs: to further law enforcement goals, to engage in research designed to understand how the TPM works, or to reverse-engineer the TPM to create a more competitive product. As such, Congress created a safety valve in this part of the DMCA. It required the Library of Congress to hold triennial rulemakings to allow for the review of the current exceptions to § 1201(a)(1) and the proposal of new ones.[149] The Office has undertaken rulemaking proceedings pursuant to this mandate and, every three years, has recommended revisions to § 1201 of the DMCA. The Library, in turn, has implemented the Office's recommendations verbatim on each of those occasions.

The model of the Office as a public-facing rulemaker represents the opposite of constrained industry regulators along every dimension. While the statutory compulsory licenses are narrow and detailed, the statute delegating authority to engage in DMCA rulemaking is capacious. The guidelines for the rulemaking invite a profoundly broad variety of open-ended considerations related to potential exceptions, one of which is "such other factors as the Librarian considers appropriate."[150] Accordingly, it confers much more policy making discretion on the Office.

For its part, the Office typically responds only to concerns raised by user groups in the rulemakings, but retains full decisional authority to recommend proposed exceptions and revisions to the statute. Thus, the triennial rulemakings are not limited to any particular industry. The Office's charge relates to any "persons who are users of a copyrighted work" who have been "adversely affected . . . in their ability to make noninfringing uses of a particular class of copyrighted works."[151] The Office has, in turn, defined "class" broadly by reference to the type of user who may take advantage of the work.[152] As a result, the exemptions affect anyone who sought to circumvent TPMs in order to make a documentary film, or repair a computer in a vehicle, make an eBook compatible with assistive

148 17 U.S.C. § 1201(a)(1).
149 *Id.* § 1201(a)(1)(C).
150 *Id.* § 1201(a)(1)(C)(v).
151 *Id.* § 1201(a)(1)(C).
152 U.S. Copyright Off., *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 71 FED. REG. 68472.

technology, or engage in any of the other relatively commonplace activities encompassed by the recent round of rulemaking.[153]

Finally, the motivation behind the Office's grant of authority to engage in the triennial rulemakings is different than the grant of authority to administer compulsory licenses. The leading theory of the compulsory licenses is that Congress created them to solve market failure that would otherwise have resulted from the outsized transaction costs that would have afflicted attempts by content owners to bargain with users and transmitters for individual licenses.[154] By contrast, the DMCA's framers were motivated by concern that the exceptions to § 1201(a)(1) could fall into irrelevance given the rate of technological change, so sought a flexible mechanism by which they could be regularly updated.

Delegation of this rulemaking represented a major conceptual expansion of the Copyright Office's administrative authority. Allowing the Office to make regulations related to registration and recordation made sense since those had been its core duties since its 1897 founding. Charging the Office with administering complicated statutory license provisions pushed past its narrow experience but in a constrained way due to the lack of discretion in these heavily detailed statutory license portions of the Act. But considering whether to revise or add exceptions to the DMCA entrusted the Office with making broad policy decisions in a way it never had before. The Act's compulsory license provisions represented detailed industry compromises that had already been hashed out and needed only to be implemented. The triennial rulemaking, by contrast, was an open-ended grant of authority that demanded that the Office weigh in on how § 1201's anticircumvention provisions interacted with new technological developments. Moreover, these rules are public-facing regulations that govern general conduct and are not limited to a particular sector of the communications or entertainment industry.[155] Nor are the questions the Office must answer within its expertise. The statutory factors sweep so

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153 U.S. Copyright Off., *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 83 FED. REG. 54,010, 54,029-31 (summarizing results of 2018 DMCA triennial rulemaking).

154 *See*, *e.g.*, Robert Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2661-662 (1994) ("[A] common rationale for the several statutory licenses in copyright law is that they are needed in order for certain types of exchange to take place. Transaction costs preclude the formation of a market for certain types of rights; in the absence of statutorily mandated transactions, none would take place."). For an interesting alternative to this theory of the compulsory license, *see* Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915 (2020) (arguing that compulsory licenses advance several important copyright policies apart from addressing market failure).

155 Gass, *supra* note 1, at 1049 (referring to the authority delegated to the Office by the DMCA as "enhanced, public-facing, lawmaking authority").

broadly that they require the Office to make cost-benefit analyses about the impact of proposed rules in fields as disparate as wireless device competition and vehicle safety.[156] And the triennial timing of the review process further torpedoes the Office's ability to develop expertise in these areas, as it has occasion to consider these issues only sporadically.[157]

Numerous critics from academia and industry have observed that the Office seems out of its depth when undertaking the DMCA rulemakings. Aaron Perzanowski has detailed the ways in which these rulemakings unwisely mandate that the Office make law on "matters beyond any reasonable definition of its expertise."[158] Perzanowski has shown that these rulemakings require the Office to engage in at least three areas that are unrelated to its core expertise: consideration of the harm to industries that results from allowing access to copyrighted works; assessing the social value of permitting certain access as a form of fair use; and the importation of myriad considerations from the DMCA's final catch-all factor for evaluating whether to create exceptions to the anticircumvention provisions.[159]

B. Underdelegation to the Copyright Office

The main social cost of Congress's rudderless delegation to the Office and Board has assigning those entities tasks that they lack both the resources and the expertise to execute well. A less appreciated, but no less significant, problem occasioned by the lack of any theory of copyright's administrative law is *under*delegation: Congress's failure to take full advantage of the Office's core competencies to better regulate copyrights.

As Part I illustrated, the Copyright Office grew over the course of the twentieth century to do two things well: administer property rights in works of authorship and share its depth of expertise on substantive copyright law. In neither respect has Congress explored the full capacity of the Office to leverage these skills. With respect to the Office's core Hamiltonian function, its work remains ministerial. The Office reviews registration applications only for basic statutory compliance, and as a result approves the overwhelming majority of such applications as a matter of course. Despite its well over a century of experience in rendering registration decisions, federal courts do not uniformly afford the Office's regis-

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156 *See* Perzanowski, *supra* note 76, at 19-24 (detailing how the DMCA § 1201 review process requires the Office to engage questions it has "no business" answering, and showing that the Office has struggled both substantively and procedurally with this responsibility).

157 *See id.* (arguing that the intermittent nature of the § 1201 rulemakings undermines the Office's ability to develop mastery of their substance).

158 Perzanowski, *supra* note 76, at 30.

159 *Id.* at 24.

tration decisions any deference in subsequent litigation. And the cramped scope of registration work means that most of the serious work of interpreting the Act's copyrightability provisions remains with generalist judges, despite the Office's greater institutional expertise. In Part III, we consider a pair of creative ways to better leverage the Office's longstanding expertise in managing copyrights.

The Office has also situated itself since the early 1900s as the nation's leading public authority on substantive copyright law. Pursuant to its statutory authority, the Office regularly briefs Congress on pending copyright-related legislation and composes policy studies to guide future legislative efforts.[160] The Office serves as an important source of copyright advice for the public. It issues two kinds of publications designed to advise on the content of the Copyright Act. Since its inception, the Office has published copyright circulars, which provide briefer and more accessible guidance on the same topics, more appropriate for laypeople looking to navigate these topics.[161] More. Starting in 1967, the Office began publishing the *Compendium of U.S. Copyright Practices*, which provides detailed commentary about its internal procedures, oriented toward an audience of specialists.[162] The Public Information department of the Office fields general inquiries from the public about copyright law and practice,[163] and the Office also engages in numerous outreach activities designed to inform the public about copyright law and policy.[164]

Despite the Office's unparalleled expertise as an expositor of copyright law, this competency remains a source of underdelegation, too. Just as with its registration decisions, the Office's considered interpretation of copyright law, as expressed in its substantive publications, have earned no deference from courts. And unlike most other agencies, the Office itself has no occasion to issue authoritative interpretations of the law it administers. Its authority to issue rules is limited to those adjacent to its internal

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160 U.S. COPYRIGHT OFF., 2019 ANNUAL REPORT, *infra* note 202, at 20-22 (discussing the Office's advice to Congress on the MMA and the CASE Act); *id*. at 22-25 (describing the Office's policy studies on topics such as moral rights and registration fee increases). These activities too are required by statute. 17 U.S.C. § 701(b)(4) ("[T]he Register of Copyrights shall . . . [c]onduct studies and programs regarding copyright, other matters arising under this title, and related matters").

161 *Circulars*, COPYRIGHT.GOV, http://www.copyright.gov/circs (last visited Jan. 30, 2022).

162 For the latest edition, see U.S. COPYRIGHT OFF., COPYRIGHT COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES (3d ed. 2021), http://www.copyright.gov/comp3 [hereinafter COMPENDIUM].

163 In 2019, the department fielded over 130,000 requests for information via phone, email, and in-person visits. U.S. COPYRIGHT OFF., 2019 ANNUAL REPORT, *infra* note 202, at 13.

164 *Id.* at 12-19 (cataloguing these outreach efforts).

operations, the compulsory licenses it administers, or the triennial DMCA rulemaking. In Part III, we consider ways to enlarge the Office's institutional prerogative to better take advantage of this font of expertise as well.

A different kind of underdelegation arises where Congress confers authority on agencies other than the Office. This happens most often with the USPTO. As we detail *supra*,[165] the Copyright Office has long existed in the shadow of the USPTO (and before it, the Patent Office). The USPTO has more resources, more employees, and serves a more salient role with respect to patents and trademarks by determining whether they come into existence (rather than merely registering existing IP rights, as the Copyright Office does). Part of the story of the USPTO's growth, therefore, is its gradual encroachment on the role of the Copyright Office as an authority on copyright, an encroachment that Congress has done much to abet. In recent decades, Congress has conferred on the USPTO authority to advise the executive broadly on IP matters, including copyright.

Most of these implicit delegations involve Congressional requirements that the USPTO advise the executive or international entities on intellectual property generally, effectively giving the USPTO — not the Copyright Office — pride of place as the leading interbranch authority on copyright law as well as patent and trademark law. Within its direct line of executive supervision, the USPTO must "advise the President, through the Secretary of Commerce, on national and certain international intellectual property policy issues."[166] With regard to foreign technical assistance by U.S. agencies, the USPTO must "provide guidance, as appropriate, with respect to proposals by agencies to assist foreign governments and international intergovernmental organizations on matters of intellectual property protection."[167] To these are added a host of discretionary powers to conduct programs, carry out studies, and advise domestic, foreign, and intergovernmental bodies on intellectual property.[168]

One especially acute illustration comes from the internal hierarchy of the USPTO. In its current form, the Office of Policy and International Affairs consists of nearly a dozen teams with particularized policy expertise across the range of intellectual property-related subjects. Thus, there are dedicated teams for patents, trademarks, copyrights, geographical indi-

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165 *See supra* Part I.D.

166 35 U.S.C. § 2(b)(8). Across the executive branch more generally, the USPTO must "advise Federal departments and agencies on matters of intellectual property policy in the United States and intellectual property protection in other countries." *Id.* § 2(b)(9).

167 *Id.* § 2(b)(10).

168 *Id.* §§ 2(b)(11)–(13).

cations, trade, and enforcement.[169] Beyond the subject matter teams, there is a legislative team in the Office of Governmental Affairs.[170] There is an economic analysis team headed by the Office of the Chief Economist.[171] There is a team of Intellectual Property Attachés who serve as technical advisors on IP law and policy at foreign embassies of strategic importance in partnership with the Office of the U.S. Trade Representative, the State Department, and the Foreign Commercial Service of the Department of Commerce.[172] And there is a training and education arm of the policy division that resides in the USPTO's Global Intellectual Property Academy.[173] These teams regularly grapple with copyright as a matter of law and policy, as a matter of economic analysis, and as matter of bilateral and multi-lateral negotiations with foreign trade partners and with intergovernmental organizations such as the World IP Organization.[174] And they do so often with little or no direct or necessary involvement from the Copyright Office, within with a framework of Congressionally granted authority.

The USPTO's growth into predominance in domestic as well as international IP policy making, the elevation of its political leadership to greater levels of executive decision making, and even more prosaic indicia of institutional importance such as personnel and budget all share a common thread. They all arise from the perception that the USPTO's policy

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169 *Office of Policy and International Affairs*, USPTO, httpz://www.uspto.gov/about-us/organizational-offices/office-policy-and-international-affairs (last visited Feb. 8, 2021).

170 *Office of Governmental Affairs*, USPTO, http://www.uspto.gov/about-us/organizational-offices/office-policy-and-international-affairs/office-governmental-affairs (last visited Feb. 8, 2021).

171 *Office of the Chief Economist*, USPTO, http://www.uspto.gov/about-us/organizational-offices/office-policy-and-international-affairs/office-chief-economist (last visited Feb. 8, 2021).

172 *IP Attaché Program*, USPTO, http://www.uspto.gov/gallery/ip-attaches (last visited Feb. 8, 2021).

173 *The Global Intellectual Property Academy*, USPTO, http://www.uspto.gov/ip-policy/global-intellectual-property-academy (last visited Feb. 8, 2021).

174 Notably, the Copyright Office also has its own — albeit smaller — Office of Policy and International Affairs. *See Leadership*, COPYRIGHT.GOV, http://www.copyright.gov/about/leadership (last visited Jan. 30, 2022). Quite recently, the Office also undertook to hire its first Chief Economist. *See Oversight of the U.S. Copyright Office, Hearing Before the H. Comm. on the Judiciary*, 117th Cong. (2021) (statement of Shira Perlmutter, Register of Copyrights), http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=112565. Though these organizational choices are undoubtedly important institutional steps toward fuller participation in the U.S. interagency dialogue, we do not yet regard them as sufficient to overcome the underdelegation problem discussed here.

jurisdiction covers intellectual property as a whole.[175] That broad remit, in turn, portends a continual displacement of Copyright Office participation even though its own statutory mandate is no less explicit.[176] For better or worse, this trend toward greater delegation of copyright-related authority to the USPTO represents an underdelegation to the Copyright Office. It overlooks the depth of expertise of the Copyright Office, which has been the major authority in these areas since its 1897 creation and, thus, may be the superior agency to advise the executive on copyright-related matters.

C. Flawed Institutional Design

The absence of a well-theorized vision of regulatory copyright has also resulted in serious institutional design flaws in Congress's attempts to create entities to administer copyright law . Consider, example, the four-plus decades of false starts and restarts Congress has had to make with respect to the body charged with reviewing and adjusting the fees charged under the Act's various compulsory license schemes. As early as 1968, it was clear that the revision would contain some kind of compulsory license provision, including for cable television retransmissions.[177] Industry representatives expressed concern that the rates would be flexible over time and that they would have the opportunity to challenge rates perceived to be unfair. The proposed solution — articulated in many forms before the final Act — was to have a panel of copyright royalty judges who would entertain challenges to rates and have the authority to adjust them to meet statutory standards.

The idea of a board with ratemaking authority under a statute was hardly novel and had been effectuated successfully before in numerous other regulatory contexts. Yet these judges have proven to be one of the most troublesome parts of copyright's turbulent interface with administrative law. The 1976 Act created a five-member Copyright Royalty Tribunal with the power to adjust all compulsory licenses created pursuant to the Act.[178] It was an independent agency within the legislative branch (not part of the Copyright Office), and its decisions were reviewable under the Administrative Procedures Act.[179]

Nothing about the CRT initially seemed remarkable, but only a few years into its existence, the CRT became a site of conflict. Its own chair

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[175] *See* 35 U.S.C. §§ 2(b)(8)–(13) (referring to throughout to "intellectual property" policy, rights, and institutions). *See also supra* notes 166–168 and accompanying text.
[176] *See infra* notes 247–252 and accompanying text.
[177] PATRY, *supra* note 32, §1:78.
[178] The number of Tribunal members was reduced to three in 1990. *Id*. § 1:93 n.6.
[179] *Id.* § 1.82.

testified before Congress in 1981 that the body should be abolished, followed by a House bill seeking to do just that in 1985. The consensus was that the CRT suffered from a lack of qualified commissioners, and that it did not have the workload to sustain a five-member (or even three-member) panel even if qualified members were found.[180] What decisions it did make were controversial, especially during the early 1980s when it substantially increased rates for cable retransmission.[181] By the early 1990s, though, the CRT itself was characterized by pernicious internal disagreement among the judges themselves, a state of affairs that observers attributed to leadership too weak to achieve consensus.[182] Amid these failings, Congress abolished the CRT via the Copyright Royalty Tribunal Act of 1993.[183]

Congress replaced the CRT with Copyright Arbitration Royalty Panels (CARPs). These were *ad hoc* bodies selected as needed by the Librarian of Congress, rather than a standing tribunal like the CRT. The CARPs thus avoided the CRT's problem of underuse, but its substantive decisions regularly ran afoul of both Congress and industry. In 1997, a CARP set satellite retransmission fees at market rates.[184] While this rate-setting seemed to faithfully reflect the CARP's statutory task, Congress took a dim view of it, and quickly passed legislation revising § 119 to lower satellite retransmission royalties.[185] The 1994 DPRSRA had allocated to the CARPs authority to engage in ratemaking for digital transmission of sound recordings. In 2002, Congress overturned a ratemaking relating to small webcasters[186] stemming from a CARP proceeding that had met with dissatisfaction from both copyright owners and small webcasters.[187] The ratemaking was met with such derision on all sides that even a partisan Congress agreed that the CARP process required revision.[188] Industry

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180 H.R. REP. NO. 286 (1993). From 1978–93, the CRT conducted less than a month's worth of hearings per year on average. In some years, it conducted no hearings at all.

181 The CRT increased the cable retransmission rates after the FCC repealed its syndicated exclusivity rules. *See* Malrite TV of New York v. FCC, 652 F.2d 1149 (2d Cir. 1981).

182 *See Copyright Reform Act of 1993: Hearings on H.R. 897 Before the H. Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. On the Judiciary*, 103d Cong., 101-105 (1993).

183 Act of Dec. 17, 1993, Pub. L. No. 103-198, 107 Stat. 2304.

184 *See* 62 FED. REG. 55,742 (Oct. 28, 1997).

185 Act of Nov. 29, 1999, Pub. L. No. 106-113, 113 Stat 1501.

186 Small Webcasters Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780.

187 148 CONG. REG. H7046-47 (Oct. 7, 2002) (remarks of Cong. Berman that all parties roundly rejected the CARP's ratemaking).

188 148 CONG. REC. S11726-S11727 (Nov. 14, 2002) (Sen. Leahy urging that "next year, we should focus attention on reforming the CARP process").

piled on, objecting to the CARPs as inconsistent, incompetent, and too expensive.[189]

Thus, Congress in 2004 tried once again to constitute a body of copyright royalty judges with the Copyright Royalty and Distribution Reform Act,[190] which abolished the CARP system and replaced it with a Copyright Royalty Board (CRB). The Board is comprised of three judges appointed by the Librarian of Congress for six-year terms, and it does largely the same substantive work as the CARPs and the CRTs did before it: adjust compulsory license rates and divide royalties pursuant to statutory directives. The CRB avoided past critiques of the CRT (goldbricking) and of CARPs (incompetence and undue expense) but ran into another problem: unconstitutionality. In 2012, the D.C. Circuit held that the CRB violated the Appointments Clause because its judges were principal officers of the United States but were improperly nominated by the Librarian of Congress — rather than by the President with Senate confirmation.[191] The D.C. Circuit remedied that constitutional infirmity by severing the judges' statutory protections against removal without cause by the Librarian,[192] a cloud of constitutional doubt still hangs over the CRB, as we detail *infra* in Part III.B.

Flawed institutional design is another consequence of creating regulatory bodies in the absence of a clear vision of what those bodies are supposed to do. Had Congress had a sharp notion of the quantity of work that the judges would need to undertake, it would not have formed an unnecessary five-member panel like the CRT. Had Congress had a clear vision of what degree of expertise was needed to undertake rulemakings, it would not have delegated this responsibility to an *ad hoc* body like the system of CARPs. And had Congress more carefully reflected on the distinctive status of the Library and the Office within our constitutional scheme, it would not have created a panel of CRJs that offended the Appointments Clause.

D. Principles for Optimally Delegating Copyright

Congress's failures to delegate effectively to the Copyright Office, and to create a workable panel of copyright royalty judges, illustrate that there are concrete stakes to the historical analysis of Part I. Some of these are errors of commission, such as where Congress allocated authority to the Office outside of its core competencies. Others are errors of omission, such as where Congress failed to fully leverage the Office's core compe-

189 H.R. Rep. No. 108-408, at 18 (2004).
190 Pub. L. No. 108-419, 118 Stat. 2341.
191 Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332 (D.C. Cir. 2012).
192 *Id.* at 1336.

tencies. And flawed institutional design, epitomized by the ongoing copyright royalty judge problem, stands as a *sui generis* example of the folly of constructing a regulatory body without a clear vision of how (or whether) it should ideally regulate.

Considering the ways Congress has erred with respect to regulatory copyright is not a purely negative effort, though. On the contrary, tracing these missteps can help us craft a positive vision of optimally delegating copyright lawmaking. Indeed, the lesson of the foregoing discussion is simple and powerful. The Office uniquely possesses expertise in two areas: administering rights in works of authorship and expounding the substance of copyright law. Delegation of regulatory responsibility in these areas is desirable, as the entire conceit of administrative agencies is that they should govern in (and only in) their areas of expertise. By contrast, the Office is not at its best when regulating industry, not even as a constrained industry regulator and certainly not as a public-facing rulemaker. Delegation in these areas is ill-advised. And where Congress seeks to expand the traditional domain of regulatory copyright, it should be mindful of the unexpected institutional-design challenges of this task, lest it face another series of fiascoes like its ongoing troubles with copyright royalty judges.

Congress's recent passage of the Copyright Alternative in Small Claims Enforcement Act of 2020 (CASE Act)[193] provides an opportunity to illustrate these principles in action. The CASE Act mandates that the Copyright Office establish within one year a Copyright Claims Board (CCB) to hear copyright infringement matters with a damages cap of $30,000.[194] Unlike previous delegations, the CASE Act does not charge the Office with undertaking work that lies outside its core competencies. On the contrary, the CCB will consider copyright infringement actions, which lies in the heartland of the Office's expertise — its longstanding role as the nation's leading governmental expert on substantive copyright law. Indeed, it was the Office itself that considered (at Congress's request) the notion of creating a small-claims tribunal,[195] so it has already had the opportunity to imbue the legislative process with its insights on how best to craft such a body.

This is not to say that the CCB's institutional design as outlined by the CASE Act raises no concerns. The foregoing discussion illuminates to a

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193 The CASE Act will amend Title 17 of the U.S. Code to add Chapter 15, "Copyright Small Claims." For a copy of the full text of the bill, see CASE Act of 2020, sec. 212, http://www.copyright.gov/legislation/copyright-small-claims.pdf (passed Dec. 21, 2020).

194 17 U.S.C. § 1501(d)(1)(D).

195 *See Copyright Small Claims*, COPYRIGHT.GOV (Sept. 2013), http://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf.

pair of potential problems, one operational, the other constitutional. As the history of the Board highlights, optimizing the number of administrative personnel is a challenge, especially since it is difficult to predict how a newly created entity should be comprised. But even given this difficulty, the CASE Act seems to have the opposite problem of the original, overstaffed Copyright Royalty Tribunal.[196] With a provision for only three copyright claims officers and two staff attorneys,[197] the CCB would be sorely understaffed if, as commentators have suggested, it were met with a flood of claims.[198] As well, the constitutional infirmities of the current Board should put Congress on notice of similar problems with the in-process CCB. In addition to similar Appointments Clause issues that have hamstrung the Board,[199] the CCB has its own potential constitutional pitfalls, including whether its work would usurp the Article III authority of federal judges,[200] and whether its processes would adequately afford litigants due process.[201] So while the CASE Act does not represent an inapposite delegation according to the principles we have articulated, the CCB may raise concerns for other reasons exposed by the history of copyright's administrative bodies.

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This Part has detailed the practical consequences of delegating copyright lawmaking to agencies without a coherent vision of copyright's administrative law. The major social cost occasioned by this practice is overdelegation both in terms of excess quantity of administrative work and rulemakings outside the scope of the Office's expertise. This practice threatens underdelegation as well, whether that means failing to take advantage of the Office's core expertise or locating with the USPTO responsibilities that the Office would be better at discharging. Meanwhile, the ongoing copyright royalty judge challenges illustrate the costs of poor in-

196 *See supra* notes 180-183 and accompanying text (discussing how the major objection to the original CRT was that it had far too many judges for the paucity of hearings it needed to undertake).
197 17 U.S.C. § 1502(b)(1), 1501(b)(2).
198 *See* Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Copyright Small Claims Tribunal*, 33 BERKELEY TECH. L.J. 689, 703-04 (2018) (discussing possible overuse of a small claims tribunal).
199 *See* Part III.B.3, *infra*.
200 Samuelson & Hashimoto, *supra* note 198, at 692-94 (discussing structural constitutional problems with a copyright small-claims tribunal). *But see* Oil States Energy Servs. v. Green's Energy Grp., 138 S. Ct. 1365 (2018) (rejecting an argument that inter partes review by the Patent Trial and Appeal Board usurped federal courts' Article III authority).
201 Samuelson & Hashimoto, *supra* note 198, at 694-97 (discussing due process objections to a copyright small-claims tribunal).

stitutional design when creating new copyright-related administrative bodies. Taken together, these cautionary tales point in the direction of core principles for optimal delegation of copyright lawmaking, with the recently passed CASE Act providing a convenient illustration.

III. REFORMING COPYRIGHT'S ADMINISTRATIVE LAW

Since 1976, Congress has saddled the Office and Board with increasing responsibility in the absence of any clear vision of copyright's administrative law. Part II illustrated the costs of that approach and gestured in the direction of a parsimonious theory of appropriate delegation to these bodies, ever mindful of institutional design pitfalls. Part III makes two normative moves. First, it explores the various directions that regulatory reform of copyright could take in light of these principles. Second, it highlights the legal issues raised by each of these directions, sketching the contours of a substantive administrative law of copyright.

A. Imagining Copyright's Regulatory Futures

This Subpart considers several pathways for regulatory reform of copyright as guided by Part II's rubric. We argued in that Part that Congress should delegate to the Office and Board only within the contours of its core expertise as a Hamiltonian property allocator, or a font of substantive copyright wisdom. Our framework allows for the possibility of expanding the functions of the Office and Board, but only where such delegations were accompanied by appropriate allocation of resources in terms of both personnel and expertise. This Subpart proceeds to consider specific reform proposals in light of these principles.

1. The Office as Property Allocator

a) The (Largely) Ministerial Work of Registration

While the scope of copyright regulation expanded beyond registration and recordation with the passage of the 1976 Act, these ministerial functions comprise the core of the Office's functions today. Most of its day-to-day work still relates to registration and recordation, and the examining division that undertakes these duties remains the largest section within the Office. And despite being saddled with a variety of additional responsibilities and suffering budget cutbacks, the Office continues to discharge this core function relatively well. In 2019, the Office reduced its average time for processing registrations by 42% and reduced its open claims significantly as well.[202]

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[202] U.S. COPYRIGHT OFF. 2019 ANNUAL REPORT: FISCAL 2019, at 37, https://www.copyright.gov/ reports/annual/2019/ar2019.pdf .

As we further discuss below, there are plausible arguments to scale other administrative duties of the Office up or down. The same is not entirely true of its property allocation functions. One could, for example, argue that the Office is undertaking substantive rulemaking under the DMCA poorly and that it lacks the expertise to take on more such rulemakings. By contrast, the Office is only getting better at allocating rights and administering registration and recordation, and it alone among federal agencies has unique history and expertise in this regard. Whatever changes one may wish to see going forward in copyright administration, property allocation is surely one of the core functions of the Office that should not be diminished.

b) Scaling Up Property Allocation

In fact, the Copyright Office's role as property allocator may warrant specific and perhaps substantial expansion in at least two respects. One is in the set of fees that the Office charges. The other is in the ability of third parties to intercede in the otherwise *ex parte* nature of copyright registration, either before rights are granted or after, or both. Precedents for these reforms may be found in other domains of intellectual property, though their suitability for copyright as a matter of cost-benefit analysis invites careful study.

Dynamic fee schedules. The fee schedule of the Copyright Office is easy to overlook. As a matter of scale and structure it is quite rudimentary, consisting of low amounts that are generally payable up front to obtain registration.[203] The other major property allocation-related service for which the Office charges fees, the recordation of documents, is similarly inexpensive.[204] A few other ancillary functions, such as the retrieval and copying of records and what the Office terms "special services" are reckoned merely in the tens and hundreds.[205] And the Office levies no back-end fees at all — akin to maintenance fees for patents[206] or renewal

[203] The basic fee for registering a claim in an original work of authorship is $125, with a 50% discount or more for electronic filing. *Fees*, Copyright.gov, http://www.copyright.gov/about/fees.html (last visited Feb. 8, 2021). Fees are only slightly higher for certain other types of works, e.g., a group of contributions to periodicals ($85), a mask work ($150), a database that predominantly consists of photographs ($250), or a vessel design ($500). *Id.*

[204] *Id.*

[205] *Id.*

[206] The U.S. patent laws have required the payment of quadrennial post-issuance maintenance fees since 1980. *See* Pub. L. No. 96-517, § 2, 94 Stat. 3015 (1980).

fees for trademark registrations[207] — to keep copyright registrations in force.

As a policy lever, too, the use of fees for regulatory aims may seem inconsonant with the prevailing Hamiltonian view of the Copyright Office,[208] at least where the issuance of copyrights in the first instance is concerned. The effectiveness of fee setting in this regard is, at most, something to be assessed in operational terms. If fee revenue, when considered alongside legislative appropriations and other foreseeably stable inflows, is generally enough to cover the expenditures of the Copyright Office, then one might well conclude that present fees are set correctly in the Hamiltonian sense — even if other equilibria may be possible and even if present fees do not create optimal incentives in the regulatory sense. On this view, broader social welfare effects are simply beside the point.

Yet even for the Office acting only as a property allocator, fee setting may be a highly effective means for administering the copyright system. Naturally, to the extent that the Office is tasked with a mission that is more broadly or more overtly regulatory, fees may also play quite a powerful role. Indeed, Robert Brauneis recently made a just such a proposal in favor of Copyright Office fees that are more differentiated in amount and over time, as well as across category.[209] The principal aim of that proposal is to ensure sufficient funding for the Copyright Office rather than any especially normative reform to the copyright system, and so it accords with our present discussion of the Office as property allocator.

As to the amount of fee revenue, there is little room to change them except upward, and this may be done in two ways. One is to raise the levels of fees that the Office already charges, especially for registration and recordation. The other is to create new fees, especially over time such as *ex post* for maintenance or renewal without which a copyright registration would expire and lapse in the public domain.[210]

As Brauneis points out, the relatively greater administrative power of *ex post* fees is that they generate less-elastic demand whereas a rise in *ex ante* fees would almost certainly lead to fewer applications and lower reve-

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[207] The U.S. trademark laws have required the payment of decennial post-issuance renewal fees since 1988. *See* Trademark Law Revision Act, Pub. L. No. 100-667, §§ 110-111, 102 Stat. 3935 (1988).

[208] *See supra* Part I.B.

[209] Robert Brauneis, *Properly Funding the Copyright Office: The Case for Significantly Differentiated Fees*, 64 J. COPYRIGHT SOC'Y 451 (2017). Larry Lessig also suggested such a policy, see Lawrence Lessig, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY 252-56 (2004), which was reflected in a congressional bill, the Public Domain Enhancement Act, *see* H.R. 2601 (108th Cong.), H.R. 2408 (109th Cong.). The Act, which would have required authors to pay $1 fifty years after the date of first publication to maintain their copyrights, died in committee.

[210] *Id.* at 461-63.

nue.[211] Lessons from patent and trademark law are at the heart of this argument, as already discussed.[212]

Meanwhile, the differentiation of Copyright Office fees across category might also take multiple forms. One possibility is to set fees based on applicant type and size, with higher rates for larger and more well-resourced firms and discounted rates for smaller or younger firms and individual applicants.[213] Indeed, the Office already does this in charging a slightly lower registration fee for a single registration (i.e., a single author and claimant registering a single work of her own, not made for hire).[214] Another possibility is to set fees based on the type of work.[215] This, too, has precedents in other intellectual property domains, including econometric work by Michael Frakes, Melissa Wasserman, Neel Sukhatme, and others on patent fees and pricing.[216]

Taken together, the upshot of all of these fee policy approaches is generally the same. They can increase the overall fee collections of the Copyright Office and thus better enable it to carry out its functions as an allocator and administrator of property rights, including long-needed modernizations of its electronic search systems and other infrastructure.[217] Moreover, they can also leave the affordability of copyright registration, and thus its ease of access, relatively undisturbed through cross-subsidy and other forms of mean-tested adjustment.[218]

Third-party registration opposition. As compared with robustly differentiated fees in copyright administration, the use of third-party opposition is at once less familiar but also more obviously a potent policy instrument. It is certainly true that issued copyright registrations are legally susceptible to cancellation.[219] The constraints on that possibility, however, are quite

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211 *Id.* at 462.

212 *See supra* Part I.D.

213 Brauneis, *supra* note 209, at 463-64.

214 *Fees*, COPYRIGHT.GOV http://www.copyright.gov/about/fees.html (last visited Feb. 8, 2021).

215 *See* Brauneis, *supra* note 209, at 452 (questioning "why an applicant should pay the same amount in registration fees for a song that continues to generate substantial revenue eighty years after it was first published, and for a song that was never commercially successful, or to pay the same to register a motion picture with a budget of $200 million and first week box office receipts of $220 million, and to register a short story created by one person in a week").

216 *See*, *e.g.*, Michael D. Frakes & Melissa F. Wasserman, *Does Agency Funding Affect Decisionmaking: An Empirical Assessment of the PTO's Granting Patterns*, 66 VAND. L. REV. 65 (2013); Neel Sukhatme, *Regulatory Monopoly and Differential Pricing in the Market for Patents*, 71 WASH. & LEE L. REV. 1855 (2014).

217 Brauneis, *supra* note 209, at 453.

218 *Id.*

219 *See generally* 37 C.F.R. § 201.7 (promulgated pursuant to 17 U.S.C. §§ 702, 409, 410).

strong. The authority to cancel registrations "resides exclusively with the Copyright Office" — even to the exclusion of the courts.[220] The Office, for its part, usually makes decisions about cancellation solely acting on its own initiative,[221] though voluntary cancellation by request of the copyright claimant is also possible.[222]

Conspicuously absent from this process are third parties who may often have private information that is adverse to the validity of copyright registrations, information that copyright claimants themselves may lack or may have little incentive to discover or disclose. Meanwhile, the Copyright Office has espoused a general policy view of "cancellation of invalid claims as a necessary measure to ensure the integrity of the copyright registration system and to ensure consistent application of its regulations and practices."[223] This view implicates and, indeed, invites consideration of more robust third-party involvement in the almost entirely *ex parte* system of securing and vetting rights in creative expression.[224]

As with fee-setting, other intellectual property domains offer precedent. Patent rights have been subject to third-party requests for administrative cancellation since 1980 and to adversarial agency revocation proceedings since 1999 (such proceedings were made much stronger in 2011).[225] More foundationally, courts have been empowered to cancel issued patents from the founding.[226] Similarly invalidatory powers have historically attended trademark law, which has allowed third parties the right

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220 Brownstein v. Lindsay, 742 F.3d 55, 75 (3d Cir. 2014).

221 *See* COMPENDIUM, supra note 162, § 1807.4 ("The decision to cancel a registration under 37 C.F.R. § 201.7(c)(1) or (c)(4) will be made by the Associate Register and Director of Registration Policy & Practice. The decision to cancel a registration under 37 C.F.R. § 201.7(c)(2) or (c)(3) will be made by an appropriate member of the Office's staff.").

222 *Id.* § 1807.4(E) ("As a general rule, the decision to cancel a registration will be made solely by the U.S. Copyright Office acting on its own initiative. However, the Office may consider a request to cancel a registration, provided that the request is made by the copyright claimant named in the registration record or the claimant's duly authorized agent . . .").

223 Cancellation of Completed Registrations, 50 FED. REG. 40,833, 40,834 (Oct. 7, 1985).

224 Even the chief exception — i.e., the chief mechanism for third-party involvement in testing the validity of copyright registrations — is rather an attenuated one. Litigants in a judicial proceeding may challenge a registration and succeed, but even then, all that the court can do is direct the losing copyright claimant to seek voluntary cancellation before the Copyright Office. COMPENDIUM, *supra* note 162, § 1807.4(F) (citing *Brownstein*, 742 F.3d 55, 75).

225 *See generally* Vishnubhakat, Rai & Kesan, *Strategic Decision Making*, *supra* note 4.

226 Patent Act of 1790, ch. 7, § 5, 1 Stat. 109,111 (repealed 1793); Patent Act of 1793, ch. 11, § 10, 1 Stat. 318, 323 (repealed 1836); *see also* Christopher Beauchamp, *Repealing Patents*, 72 VAND. L. REV. 647 (2019).

to seek administrative cancellation after a registration has issued,[227] and even the right to seek administrative *opposition* before it has issued,[228] since 1946.[229]

To be clear, these mechanisms for preventing the creation of legal rights *ex ante* and for revoking them *ex post* create significant institutional complexity and strategic behavior in the courts, in the administrative state, and at the intersection where the two compete for primacy.[230] Thus, in the patent and trademark contexts where they have been deployed, they reflect ongoing calculations of cost, benefit, and social welfare. Our invocation of these systems here is a not argument for their wholesale adoption in copyright law; such an argument would be entirely premature. Instead, it is a call for a comparably sophisticated cost-benefit debate over the role of the Office as a guardian of "the integrity of the copyright registration system"[231] — i.e., as an effective property allocator.

2. Scaling Copyright Industry Regulation

How might the industry-regulation functions of the Office and Board be reformed? As Part II showed, these activities fall outside the Office's traditional expertise and Congress delegated them to the Office and Board due to a failure to consider appropriate delegation carefully or a desire to maintain influence over an agency perceived as weak. Neither of these is a sound justification for allocating authority to the Office, and so our framework warrants skepticism of the Office and Board as industry regulators. We thus consider how to operationalize this critique with respect to the industry-regulation functions of the Office and of the Board.

a) Constrained Industry Regulation

Begin with constrained industry regulation. This function could be scaled down or even eliminated entirely. Critics of the Copyright Act's compulsory license provisions are numerous, aiming their ire at the undue complexity of the statutory terms[232] as well as at the inaptitude of the Office and the Board for being dragooned into implementing those provi-

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227 15 U.S.C. § 1064.
228 *Id*. § 1063.
229 Act of July 5, 1946, ch. 540, title I, §§?13–14, 60 Stat. 433. *See* Vishnubhakat, *Administrative Revocation*, *supra* note 5.
230 *See generally* Saurabh Vishnubhakat, *Patent Inconsistency*, 97 IND. L.J. __ (forthcoming); Saurabh Vishnubhakat, *The Porous Court-Agency Boundary in Patent Law*, 51 AKRON L. REV. 1069 (2018); Vishnubhakat, Rai & Kesan, *Strategic Decision Making*, *supra* note 4.
231 *See supra* note 223.
232 *See,* e.g., David Nimmer, *Ignoring the Public Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189 (2000).

sions.[233] Indeed, the Office itself has issued reports contemplating the elimination of statutory licenses for cable and satellite retransmission.[234] Some critics argue that compulsory licenses depress prices and harm all market participants economically. A different concern is that forcing owners to allow uses for a fixed rate is an affront to their property rights.[235] Neither the Office nor the Board has any enforcement powers beyond collecting and distributing royalties, which gives cable and especially satellite companies nearly *carte blanche* to exceed statutory limits on their transmissions.[236] A final objection sounds in history, that responsibility for administering compulsory licenses should not be foisted on a small agency that has dealt for most of its existence only with registration and recordation.[237]

The proposed solution depends on which critique one favors. For critics who are skeptical of compulsory licenses themselves, the best approach would be to eliminate them entirely. For those whose concern is only that administering these licenses overburdens the Office and Board, their administration could simply be shifted to another federal agency with more funding and infrastructure and a similar subject-matter jurisdiction, such as the FCC or the FTC. These agencies also have enforcement arms that could tackle noncompliance in a way the Office has not been able to. Operationally, this would entail eliminating the Board completely, since its only function is to resolve ratemaking disputes that arise under the compulsory licenses. Once freed of the obligation to issue numerous technical rulemakings mandated by Title 17's compulsory license provisions, the Office would also save significant resources.

Even though these functions lie outside the optimal scope of copyright's regulatory domain, there is also an argument for freezing the status quo rather than excising industry regulation from the Office and Board's portfolio. Administering these compulsory licenses entails more ministerial work than policy judgment.[238] Implementing them well is more a mat-

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[233] PATRY, *supra* note 32, § 1:90 (decrying the involvement of the Copyright Office and Board with cable and satellite rebroadcast licenses).

[234] U.S. COPYRIGHT OFF., SATELLITE TELEVISION EXTENSION AND LOCALISM ACT, § 302 REPORT (2011), http://www.copyright.gov/reports/section302-report.pdf.

[235] This objection, rooted in the Berne Convention, was the reason the jukebox compulsory license was eliminated from the Copyright Act.

[236] *See supra* Part II.B (discussing overdelegation and underenforcement).

[237] *See* PATRY, *supra* note 32, § 1:110 (making this argument with respect to retransmission licenses).

[238] Again, there is variation within the compulsory licenses the Office and Board administer. The cable and satellite retransmission licenses present mostly workmanlike number-crunching efforts, while the license for digital transmission of sound recordings invites more discretion in setting rates.

ter of experience and sufficiency of resources than specialized knowledge. And to the extent that this work does require expertise simply to understand and administer the Act's technical details, the Office and Board have been engaging in this kind of constrained industry regulation for well over four decades. So while Congress may have been unwise initially to allocate to the Office and Board the work of administering compulsory licenses, after decades of experience doing so, the Office and Board may nevertheless have developed into the best entities to undertake these tasks. Thus, there is at least a plausible case that while Congress should not delegate additional industry-regulation responsibility to the Office and Board, it also should not take away what it has already allocated.

b) Public-Facing Rulemaking

Turn now to public-facing rulemaking, and in particular to the triennial rulemakings to consider exceptions to § 1201 of the DMCA. As explained in Part II, this is a different kind of regulation entirely, and those distinctions tend to counsel more strongly in favor of scaling back — indeed, sunsetting entirely — the Office's role in this process. The compulsory license provisions of the Copyright Act relate largely to single industries rather than many and they require mostly ministerial work to apply formulas for license rates listed in the Act. By contrast, the DMCA rulemakings have involved industries ranging from wireless devices to vehicle safety, and with the increasing ubiquity of technology in everyday devices, their breadth will continue to increase.[239] Moreover, these rulemakings require industry-specific knowledge as much as interpretation of the Act itself.[240] The meaning of §1201 is typically not central to the Office's decisions; instead, these decisions are driven by practical issues raised by affected industry players and other stakeholders. The DMCA rulemakings thus require a degree of policy judgment about new technology and related industries that the Office — which lacks any technologists or economists, and is staffed largely by lawyers and librarians — is ill-equipped to undertake.[241] And while the work of administering the compulsory licenses takes place steadily and has allowed the Office and Board to acquire expertise in those areas it did not have, the DMCA rulemaking

[239] Perzanowski, *supra* note 76, at 20 (cataloguing the disparate technical subject matter engaged by the DMCA rulemakings).

[240] *Cf.* Gass, *supra* note 1, at 1049 (referring to the authority delegated to the Office by the DMCA as "enhanced, public-facing, lawmaking authority").

[241] *See* Perzanowski, *supra* note 76, at 19-24 (detailing how the DMCA 1201 review process requires the Office to engage questions it has "no business" answering, and showing that the Office has struggled both substantively and procedurally with this responsibility).

happens only once every three years, and this sporadic character hamstrings any similar acquisition of specialized knowledge.[242]

Moreover, while administering compulsory license provisions imposes a nontrivial workload on the Office and Board, the bandwidth required by the DMCA rulemakings is extraordinarily more costly. The Act requires that the Office hold full hearings for all interested parties — which, in turn, require exceptions to be drafted, reviewed, and revised and which create burdens for the Office in terms of both expertise and personnel.[243] A final point against the Office continuing to undertake DMCA rulemakings is that Congress delegated it these duties not because of any recognition of its expertise, but because it likely wanted to keep as much control over the processes as possible by giving them to a weak agency.[244] This suggests that the proceedings would be better housed with a more independent body.

In light of all this, we conclude that Congress should relieve the Office of its obligation to manage exceptions to § 1201 of the DMCA. One approach would be to supplant administrative process with Congressionally created statutory exceptions.[245] Or, as an alternative, Congress could delegate this responsibility to the Department of Commerce, which was the original agency slated to undertake the triennial rulemaking process. Commerce has a fuller roster of experts with knowledge more germane to the industries affected by the DCMA's anticircumvention provisions. It also enjoys a greater degree of independence from Congress as an executive rather than a legislative agency. This argument does not cast doubt on the Office's ability to undertake public-facing rulemakings generally. On the contrary, we argue *infra* in Part III.B that it would be well-suited to issue rules interpreting the Act. This critique illustrates our claim that delegation is appropriate only where it relates to the Office's core competencies of managing copyrights themselves or interpreting the terms of the Act itself.

3. The Office as Advisor

The Office (though not as much the Board) regularly provides information to other branches of government and to the public about the Copyright Act and copyright-related policy. This Subpart explores possible futures of this function along two axes: first, its traditional advising roles

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242 *See id.* (arguing that the intermittent nature of the § 1201 rulemakings undermines the Office's ability to develop mastery of their substance).

243 *See id.* at 771 (identifying limiting the burdens on the Office as one rationale for locating the work of creating exceptions to 1201 elsewhere).

244 *See supra* Part II.A.2.

245 *See id.* at 771 ("Congress should consider crafting new permanent statutory exemptions.").

related to Congress, the Executive, and the public; and second, a potentially expanded interagency advising role that we term "convening."

a) The Traditional Advising Function

The Copyright Office has, since its inception, engaged in the substantive and consequential work of advising other entities within the federal government as well as the public about the content and interpretation of the Copyright Act as well as copyright-related policy matters. Indeed, the Act *requires* that the Office "advise Congress on national and international issues related to copyright."[246] Within its direct line of executive supervision, the Copyright Office must "[a]dvise Congress on national and international issues relating to copyright, other matters arising under this title, and related matters."[247]

And while not explicitly mandated by statute, the Office has also been, since its inception, an important source of copyright advice for the public. It issues two kinds of publications designed to advise on the content of the Copyright Act: the *Compendium of U.S. Copyright Practices*, which provides detailed commentary about the Office's practices, oriented toward an audience of specialists,[248] and Copyright circulars provide briefer and more accessible guidance on the same topics, more appropriate for laypeople looking to navigate these topics.[249]

While it may be worth considering scaling up or down some of the Office's current duties, that is not the case with respect to its traditional advising activities. Rather, as with administering registration, there is no agency that is better suited to serve in this role. The Office has been advising Congress, the judiciary, and the public about copyright since its creation. This gives it unique expertise on these issues that do not invite restructuring.

b) Interagency Convening

But the Act does not mandate that the Office serve only as an advisor. In other respects, it suggests that the Office should also serve as a partner in interagency efforts designed to further copyright-related ends. The Act requires that the Office must "[p]rovide information and assistance to Federal departments and agencies and the Judiciary on national and international issues relating to copyright, other matters arising under this title, and related matters."[250] As to foreign technical assistance and

246 17 U.S.C. § 701(b)(1).
247 *Id.* § 701(b)(1).
248 COMPENDIUM, *supra* note 162.
249 *Circulars*, COPYRIGHT.GOV, http://www.copyright.gov/circs (last visited Jan. 31, 2022).
250 17 U.S.C. § 701(b)(2).

partnership, the Office must "[p]articipate in meetings of international intergovernmental organizations and meetings with foreign government officials relating to copyright, other matters arising under this title, and related matters, including as a member of United States delegations as authorized by the appropriate Executive branch authority."[251] To these are added additional mandates to "[c]onduct studies and programs regarding copyright, other matters arising under this title, and related matters, the administration of the Copyright Office, or any function vested in the Copyright Office by law, including educational programs conducted cooperatively with foreign intellectual property offices and international intergovernmental organizations."[252]

These various provisions point to an approach for scaling up the Office's traditional advising function, taking further advantage of its unique expertise on the substance of copyright law. We suggest that the Office could serve as a convenor: an agency that coordinates discussions between and among other agencies in order to draw from their shared expertise. One way in which Congress can harness the expertise of different agencies is to mandate that the agency vested with regulatory authority on any topic confer with other agencies as part of the rulemaking process.[253] The DMCA's anticircumvention provisions are an example. The Act vests the Librarian of Congress with authority to pass triennial regulations revising § 1201(a)(1) of the Act on recommendation of the Register of Copyrights but requires that the Register consult with members of the Department of Commerce and reflect the content of that consultation in making its final recommendations to the Librarian.[254]

This model shows promise as a way to leverage the narrow but important expertise of the Office in combination with the expertise and re-

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[251] *Id.* § 701(b)(3).

[252] *Id*. § 701(b)(4).

[253] For an overview of interagency collaboration in areas of overlapping expertise, see Frederick M. Kaiser, *Interagency Collaborative Arrangements and Activities: Types, Rationales, Considerations*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS No. 7-7500 (May 31, 2011).

[254] 17 U.S.C. § 1201(a)(1)(C) ("[T]he Register of Copyrights . . . shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation."). The statutory mandate is also a way to address the concern that the Office's ability to convene interagency colloquies would be limited by its lack of political and institutional capital compared to larger independent agencies like the FCC or the FTC. It may also do much to invite the Copyright Office itself to build internal capacity for enga ging more fully in interagency dialogue akin to that of the USPTO. *See supra* note 169-173 and accompanying text. The Copyright Office's recent and ongoing internal structural reforms suggest that it does, indeed, see such capacity-building as valuable. *See supra* note 174.

sources of other agencies.[255] Assuming the Office and Board were to continue administering the Act's compulsory license provisions, one ongoing concern would be that even the Office's extensive understanding of the statute does not necessarily mean that it has any meaningful expertise in the industries regulated. So, rather than having the Office go it alone with respect to rate setting, the Act could instead mandate that, as part of the rate-setting process, the Office had to convene other relevant agencies to inform its decisional process. For example, when setting rates for digital transmissions of sound recordings, the Act could mandate that the Office consult with the Federal Communications Commission, the Federal Trade Commission, and (as with the DMCA 1201 triennial rulemaking), the Assistant Secretary for Communications and Information of the Department of Commerce in order to draw from those agencies' knowledge of the technological and economic aspects of digital sound recording transmissions.

The convenor model could also offer a way to scale down the responsibilities of the Office without losing its valuable perspective on copyright-related issues. If Congress were to relieve the Office of its industry-regulation functions, either as to compulsory licenses or as to DMCA rulemaking, it would then become necessary to delegate those responsibilities to agencies with more expertise and resources. Simply cutting loose the Office, though, would deprive the process of the Office's expertise in the substantive law of copyright as well as their forty years' experience administering statutory licenses. So, if the FCC, FTC, or Department of Commerce were to undertake these responsibilities instead, one way to avoid losing that expertise would be to mandate that those entities consult with the Copyright Office prior to issuing any regulations.

B. Toward an Administrative Law of Copyright

This final Subpart explores the legal dimensions of the various reform routes outlined thus far. Because the options for reform are many, we consider three broad categories of reform. One is to return to the pre-1976 Act world in which there was only an Office, not a Copyright Royalty Board, and it was concerned primarily with registration and recordation. Another is to freeze the authority of the Office and that of the Board in their current places. Still another is to expand the work of these entities to approximate that of a full-scale regulatory agency. Within these categories, this Part also considers the administrative law issues that each of

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[255] This function is contemplated in the Act. *See* 17 U.S.C. § 701(b)(2) ("[T]he Register of Copyrights shall . . . [p]rovide information and assistance to Federal departments and agencies . . . on national and international issues relating to copyright[.]").

these approaches would raise. The result is a roadmap for navigating the legal issues that would arise regardless of copyright's regulatory future.

1. Rollback

One path forward could be to roll back those functions to what they were prior to the 1976 Act: an Office concerned almost entirely with registration and recordation, with no Copyright Royalty Board at all. Under this approach, the current duties of the Office and of the Board could be allocated to agencies that have expertise on the respective issues, such as the FCC, FTC, or even the USPTO. To be clear, we do not take the naïve view that this approach would eliminate any thorny legal issues simply because less administration would be happening via the Copyright Office. To the contrary, even an Office concerned predominantly with registration and recordation, and freed of the obligation to administer compulsory licenses, would still have to wrestle with the substantive issues arising out of the denial of copyright registrations.

The overwhelming majority of applications for copyright registration are resolved uncontroversially. Most are accepted. Of those that are rejected, very few applicants seek any form of review. For disappointed applicants who do seek review, the primary avenue is internal to the Copyright Office. Applicants can seek a first, then a second, request for reconsideration from the Office.[256] Denial of the second request is a final agency action, which may be reviewed under the Administrative Procedure Act (APA) by filing an action in U.S. district court.[257]

The availability of review prior to final agency action raises a slight tension between the position of the Copyright Office and general administrative law principles. The Office's guidance suggests that a rejected registrant must exhaust all of its internal review options before seeking judicial review under the APA.[258] Yet the Copyright Act nowhere makes exhaustion a prerequisite for such appeals. And the Supreme Court held nearly

[256] 17 C.F.R. §§ 202.5(b)(4), 202.5(c)(4) (2021) (setting forth procedures for first and second review requests, respectively). The first review is undertaken by a staff attorney in the Office's Registration Division. *Id.* § 202.5(b)(4). the second review is undertaken by the Review Board, a three-member panel consisting of the Register of Copyrights, the General Counsel, and one other member to be designated by the Register. *Id.* § 202.5(f).

[257] 17 U.S.C. § 701(e) (subjecting actions of the Copyright Office to APA review).

[258] COMPENDIUM, *supra* note 162, § 1706 ("If the . . . Office upholds the refusal to register following a request for reconsideration, an applicant my appeal that decision under the [APA]."). This language could be clearer; it does not say "only if" the Office issues final action may rejected applicants file an APA appeal. But it does frame the exhaustion of intramural Office process as an if-then prerequisite for filing such an appeal, suggesting that the Copyright Office, at least, may consider such exhaustion to be necessary.

thirty years ago that requiring such exhaustion was impermissible absent some clear requirement in the agency's organic statute.[259]

A thornier issue is what deference courts should show to a Copyright Office determination once an applicant files such an appeal. Courts have been clear that they defer to the Office on its decisions to reject registrations.[260] Courts have been far less clear on why such deference is proper.[261] Some have held that the Office's registration decisions warrant *Chevron* deference as authoritative agency interpretations of law.[262] Others have held that this deference may be a product of the APA's arbitrary and capricious standard.[263] Still others have held that the deference is merely a product of the *Skidmore* weight that courts may show to persuasive agency decisions.[264]

The distinction matters. Of the three options, *Chevron* would result in the most deferential posture by courts to the Office. Unless the Office's action were barred by the plain language of a statute, courts would owe their interpretation deference.[265] By contrast, APA arbitrary and capricious review requires that courts take a "hard look" at the agency action,[266] but that they uphold it so long as that look results in a rational connection between the record and the agency's choice[267] — a more searching inquiry than courts would make under *Chevron* step 2. Finally, and in contrast to the aforementioned two frameworks, the *Skidmore* standard does not require courts to defer at all, but rather allows them the

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259 Darby v. Cisneros, 509 U.S. 137 (1993) (interpreting APA § 704).

260 *See, e.g.*, Bonneville Int'l Corp. v. Peters, 347 F.3d 485, 490 (3d Cir. 2003) (expressing indifference as to form of review because "whichever standard of deference is accorded, we defer to the Copyright Office").

261 *See* Burk, *supra* note 1, at 1326 (showing that courts "typically leave[ ] unclear whether deference is a matter of the APA abuse of discretion standard, or the *Chevron* test, or a sort of *Skidmore* recognition of the Office's superior expertise).

262 *See*, *e.g.*, Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc., 836 F.2d 599, 607-08 (reversing lower court's failure to show deference to Copyright Office regulation, and showing such difference on *Chevron* theory).

263 *Cf.* Custom Chrome, Inc. v. Ringe*r*, 35 U.S.P.Q.2d (BNA) 1714, 1717 (D.D.C. 1995) (invoking the arbitrary and capricious standard, but conflating it with the Chevron deference).

264 *See* Morris v. Bus. Concepts, Inc., 283 F.3d 502, 505-06 (2d Cir. 2002) (deferring to interpretation of Copyright Act in Copyright Office circular on a *Skidmore* theory).

265 Chevron, USA v. Nat. Res. Def. Council, Inc. 467 U.S. 837, 842-43 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

266 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40-41 (1983).

267 *Id.* at 43.

option of upholding agency action if they feel the agency's determination is persuasive enough to warrant decisional weight.[268]

We do not assay a detailed answer here to the deference question, which is highly fact-intensive and context-sensitive. Rather, our goal is to highlight the various administrative issues of copyright reform, and full resolution of this one — or any of them — lies well beyond the scope of the project.[269] We conclude this discussion instead by highlighting three issues that full resolution of the judicial review problem would necessarily entail.

First, what is the content of the Office's denial of a given registration application? Due to the sheer volume of submissions, review of registration applications is necessarily limited. The Office does not look beyond the application itself or consider all aspects of copyrightability, instead focusing on a finite set of issues,[270] of which the most ambiguous is whether the work comprises copyrightable subject matter.[271] In light of this, the appropriate level of deference would depend on how the Office framed its final refusal. If the Office framed the refusal as a policy decision within statutory vagueness, this would implicate APA arbitrary and capricious review. If instead the Office based its refusal on a construction of copyright-eligible subject matter categories under § 102(a), that refusal would likely reflect a legal interpretation triggering a *Chevron* or *Skidmore* analysis. This illustrates that there is not necessarily one appropriate form of deference to registration refusals, and that the deference that courts ultimately give must fit the content of the Office's justification.

Second, even if the Office's refusal to register did entail an interpretation of the Act, would courts deem Congress to have delegated the Office sufficient interpretive authority to warrant deference? *Chevron*'s rationale rests on the stylized assumption that ambiguity in a statute reflects an implicit delegation to the agency to resolve that ambiguity.[272] That said, the Court's post-*Chevron* precedents have held that not all agency interpretations carry the force of law that warrants judicial deference, particularly

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268 Skidmore v. Swift Co., 323 U.S. 134, 140 (1944).

269 For a useful overview of this issue, *see generally* Burk, *supra* note 1.

270 Many of these considerations, such as whether the work has a human author or whether the applicant submitted a bona fide copy of the work, are simple ministerial inquiries. COMPENDIUM, *supra* note 162, § 1702.

271 *Id.* at 1702 (including as possible ground for denying registration "[t]he applicant asserts a claim to copyright in a work that is not covered by U.S. copyright law").

272 Chevron, USA v. Nat. Res. Def. Council, Inc. 467 U.S. 837, 843-44 (1984) (explaining that "sometimes the legislative delegation to an agency on a particular question is implicit.").

where the agency action is merely ministerial and is not formulated via adequately formal agency procedures.[273]

Whether a refusal to register in a given case warrants deference would depend first on whether the applicant's demand were a direct appeal from the registration itself (which is permissible, if inadvisable) or whether it took place after both intramural stages of review. Initial refusals are ministerial and typically accompanied by scant reasoning. Accordingly, they are quite unlikely to count as the kind of agency action that reflects the "lawmaking pretense" necessary for *Chevron* deference.[274] By contrast, though, the intramural review process — while far short of the kind of "relatively formal agency procedure" that might more decisively warrant *Chevron* — includes detailed consideration of the rationale for refusal in the opinion of the Register, Associate General Counsel, and one other Office employee.[275] This carries the kind of authority that, even if it did not merit *Chevron* deference, would likely warrant at least *Skidmore* treatment.[276]

Third, is the Copyright Office even an agency at all? The animating assumption of this Article — and of most courts that have addressed the issue — is that it is. But agencies are typically thought of as executive departments whereas the Office is located in the Library of Congress, hence the legislative branch. In some instances, moreover, the Office itself has issued rulemaking notices stating that it, like the Library, is not an agency for APA purposes.[277] This issue obviously matters. If the Office were not an agency, that might sweep aside entirely the question whether courts owed it deference. On the other hand, while it seems well-settled that the Library itself is not an agency for APA purposes,[278] courts have held that the Office itself does comprise an agency because its status is

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[273] *See generally* United States v. Mead Corp., 533 U.S. 218 (2001); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

[274] They may also lack finality in the sense relevant to court-agency review, depending on the relevant authority of the Copyright Office official who has issued the refusal to register.

[275] *But cf.* Burk, *supra* note 1, at 1344 (arguing that in the case of DNA copyright, Chevron is not warranted because the subject matter clearly fell outside the scope of the statute).

[276] *See*, *e.g.*, *id.* at 1346-47 (observing that the Office's refusal to register DNA copyright merited deference on either a *Chevron* or *Skidmore* theory).

[277] *See, e.g.*, 50 Fed. Reg. 33065, 33066 n.17 (1985) ("The Copyright Act does not make the Office an 'agency' as defined in the [APA]."); 66 Fed. Reg. 37142, 37149 (2001) ("[T]he Copyright Office, located in the Library of Congress and part of the legislative branch, is not an 'agency.'").

[278] Ethnic Emps. of the Libr. of Cong. v. Boorstin, 751 F.2d 1405, 1416 n.15 (D.C. Cir. 1985).

separate from that of the Library.[279] The paucity of authority on this issue means that the agency status of the Office remains disputed, which has other implications that we further discuss below.

2. Status Quo

A second path for reform would be to freeze the current copyright administrative status quo in place. This would mean that the Copyright Office and the Copyright Royalty Board would continue to administer existing statutory licenses and adjudicate related matters, respectively, as required by statute and that the Office would keep on with triennial DMCA rulemakings, but that no more regulatory work would be added.[280]

Here, matters of deference and judicial review are at least somewhat more straightforward. Where the Board acts pursuant to explicit statutory authority to make regulations, such as for collecting and distributing royalties under the Act's compulsory license schemes, there is judicial consensus that these decisions are entitled to deference.[281]

A harder issue is the legality of Office rulemakings. The Office is a peculiar entity because as a formal matter it is clearly an agency that is located in the legislative, rather than the executive, branch. This means that any delegation by Congress of executive authority to the Office may be seen as an unlawful aggrandizement of the legislative branch itself at the expense of the executive. Indeed, this issue has been percolating since the passage of the DMCA,[282] when President Clinton glossed over it in his signing statement by asserting that, "for constitutional purposes," the Office was an executive agency.[283] At least one commentator has taken up part of this issue, raising serious questions about the legality of the Copyright Office's public-facing rulemakings under the DMCA.[284] Yet this

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279 *See*, *e.g.*, Eltra Corp. v Ringer, 578 F.2d 294, 301 (4th Cir. 1978); *Ethnic Emps.*, 751 F.2d at 1416 n.15; *see also* APA § 551(1) (defining "agency" broadly to include any "authority of the Government of the United States" other than a handful of specified entities).

280 This status quo is already in flux. In late 2020, as part of a coronavirus relief package, Congress required the Office to create a small claims tribunal, implementation of which will require the Register to promulgate a substantial package of rules to govern the conduct of proceedings in the tribunal.

281 *See, e.g.*, Bonneville Int'l Corp. v. Peters, 347 F.3d 485 (3d Cir. 2003).

282 In fact, it was signaled even earlier in an OLC memo written by Walter Dellinger, in which Dellinger questioned the legality of rulemaking by any legislative agency, including the Library of Congress, the Smithsonian Institution, and the Office of the Architect of the Capitol. *See* Walter Dellinger, *The Constitutional Separation of Powers Between the President and Congress*, 63 LAW & CONTEMP. PROBS. 513 (2000).

283 William J. Clinton, *Statement on Signing the Digital Millennium Copyright Act*, 2 PUB. PAPERS 1902 (Oct. 28, 1998).

284 Gass, *supra* note 1.

problem threatens to infect other Office rulemakings, too — if not those governing its own internal procedures, then certainly its ratemakings, which comprise actions that in other settings are typically carried out by executive agencies such as FERC and the FCC.

One possible resolution might be to leverage the reasoning of the Clinton signing statement and one federal court that the Copyright Office formally sits in the legislative branch but is functionally an executive agency because it performs duties typically associated with an "executive office."[285] This sort of functionalism, even if agreeable, may prove difficult to sustain. Cases holding that the Congress cannot aggrandize itself at the expense of the executive express concern about the formal location of duties in the respective branches. And because the animating concern of these cases is that the legislative branch will usurp executive functions by placing them under congressional control, this formal concern has a strong practical underpinning.[286]

Another constitutional issue that has dogged the Copyright Office in its increasingly regulatory guise since the 1976 Act has been the composition of the Copyright Royalty Board. The Board, created in 2004 to replace the Copyright Royalty Arbitration Panel, was made up of three copyright royalty judges appointed by the Librarian of Congress to administer royalty disputes under the Act's various compulsory license provisions.[287] In 2011, the D.C. Circuit held in *Intercollegiate v. Copyright Royalty Board* that the copyright royalty judges were principal officers of the United States, who under the Appointments Clause must be appointed by the President and confirmed by the Senate — not inferior officers whose appointment Congress could permissibly vest in the Librarian of Congress.[288] The court sought to remedy this constitutional infirmity as parsimoniously as possible by severing the statutory provision that barred the Librarian from removing the judges without cause.[289] This removal of limits on the Librarian's authority changed the status of the judges from principal to inferior officers and cured the Appointments Clause problem — at least for future parties.

After the Librarian appointed three new judges subject to the statute as newly understood, the court granted Intercollegiate a rehearing in front

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285 *Eltra*, 579 F.2d at 298.

286 *See* United States v. Brooks, 945 F. Supp. 830, 833 (Ed. Pa. 1996) (rejecting the argument that the Copyright Office's status as a legislative entity meant that it was not an agency); Gass, *supra* note 1, at 1059 (dismissing these arguments as "likely wrong").

287 Pub. L. No. 108-419, 118 Stat. 2341 (codified at 17 U.S.C. § 801).

288 Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332 (D.C. Cir. 2015).

289 *Id.* at 1336.

of the new Board.[290] An unexplored issue arising out of this litigation, though, is the validity of other royalty proceedings adjudicated by the Board prior to its reorganization. If the Appointments Clause violation rendered the Board's *Intercollegiate* decision void, was the same true of its earlier decisions as well?

This issue has now played out in the patent context as well, with the Supreme Court holding that decisions rendered in *inter partes* review proceedings by administrative patent judges (APJs) in the USPTO Patent Trial and Appeal Board (PTAB) violated the Appointments Clause.[291] Rather than sever the removal protections of APJs, however, the Court's remedy was to make panel decisions of the PTAB unilaterally reviewable by the agency head.[292] Scholars disagreed sharply over the implications of such challenges, with some arguing that the remedies for constitutional violations should have prospective effect only,[293] and others arguing that they may be understood retroactively as well.[294] Because the Court largely avoided this issue in its particular resolution of *Arthrex*, uncertainty remains for the validity of decisions that the Copyright Royalty Board issued prior to its judicially imposed reorganization under *Intercollegiate*.

3. Expansion

A third, and the most ambitious, future for copyright regulation would be to expand the Office and Board substantially, transforming them into a more robustly staffed and funded agency like the USPTO or even a full-scale regulatory agency like FERC or the FCC. American copyright industries now total over 7% of GDP, and having an agency on that scale to regulate them carries some intuitive appeal. Scaling up the roles of the Office and the Board in this manner could also be seen as the culmination of a trend that began with the 1976 Act's allocation of regulatory responsibility to the Office, and continues in the recent Congressional approval of a Copyright Small Claims Tribunal. Scholars, too, have called for the expansion of copyright lawmaking in the regulatory setting, observing that many foreign countries use agencies rather than courts to administer copyright law.

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290 Intercollegiate challenged the validity of this rehearing, arguing that it was entitled to an entirely new proceeding from scratch, but the D.C. Circuit disagreed. *Id.*

291 *See* United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021).

292 *Id.* at 1986-88.

293 *See* Jonathan S. Masur & Adam K. Mortara, *Patents, Property, and Prospectivity*, 71 STAN. L. REV. 963 (2019).

294 *See* Andrew C. Michaels, *Retroactivity and Appointments*, 52 LOY. U. CHI. L.J. 627 (2020).

Effectuating such a change would confront several hurdles. The first is logistical. As Part I explained, the Copyright Office was not created as a full-scale regulatory agency meant to be a partner in lawmaking with the legislature as the more familiar New Deal-era agencies were. Rather, the Office was conceived as a body chiefly dedicated to one task — administering property rights in works of authorship — that warranted relatively lean staffing. As a result, the Office now continues to suffer from a lack of personnel, both in numbers and in expertise. Aaron Perzanowski has shown how these shortfalls have led to many of the problems that have afflicted the Office's DMCA 1201 rulemakings, which require a much broader depth of expertise than the Office possesses.

Second, as a conceptual matter, the copyright statute itself is poorly suited to a massive expansion of the Office and Board's regulatory role. The 1976 Act and subsequent amendments expanded that authority but only by adding sections that delegated particular authority to those entities. Congress wrote the remainder of the Act granularly so that little space remains for agency gap-filling via rulemaking. This again contrasts with the major organic statutes passed during the New Deal era, which were intentionally left open-ended to facilitate agency implementation and, perhaps just as important, agency discretion. This is not to say that the Copyright Office, once expanded, could not have a robust rulemaking function, only that such a change would require overhauling not only the Office and the Board but also the Copyright Act itself.

Third, an expanded administrative footprint would be further exposed to concerns about agency capture. Critics have argued in recent years that the Office and Board are both strongly influenced by rightsholders, and in particular well-heeled entertainment industries.[295] As a result, the claim runs, these entities tend to decide controversies in favor of the dominant copyright industries, advocate for stronger copyrights, and enter public debates on behalf of rightsholders, all without considering the interests of

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[295] *See generally* Meredith Rose, et al., *Captured: Systemic Bias at the Copyright Office*, PUBLIC KNOWLEDGE (2016), http://www.publicknowledge.org/policy/captured-systemic-bias-at-the-u-s-copyright-office. Concerns about the risks of, and potential for, Copyright Office capture are also a recurring theme in academic discussions that rely in varying degrees on the agency's institutional competence either to implement reforms or simply to implement existing copyright legislation. *See, e.g.,* Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 870-79 (1987); Liu, *Regulatory Copyright*, *supra note* 1, *passim*; Liu, *Copyright Rulemaking: Past as Prologue*, *supra* note 75, at 640-41. *See also* Kristelia A. García, *Copyright Arbitrage*, 107 CALIF. L. REV. 199, 260 (2019); Sonia K. Katyal & Jason M. Schultz, *The Unending Search for the Optimal Infringement Filter*, 112 COLUM. L. REV. SIDEBAR 83, 95 (2012); David A. Simon, *Teaching Without Infringement: A New Model for Educational Fair Use*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 453, 553 (2010).

stakeholders such as consumers, technology providers, or the public interest more generally.[296]

In light of these challenges, there are two ways to scale up the Copyright Office that would not require a wholly new Copyright Act. One would be to enlarge the expertise of the Office to approximate more closely that of the USPTO. The USPTO employs over 10,000 people, including large segments of staff with dedicated expertise in particular fields of technology. The Copyright Office, by contrast, has only several hundred employees, most of whom tend to be legal experts or generalists. Adding to the Office's current eight divisions a ninth and tenth focused on economics and technology, headed by a chief economist and a chief technologist, respectively, could begin to help the Office compete with the USPTO's depth of expertise, especially in policy matters.[297] This, in turn, could give the Office more credibility as an advisor in interagency dialogues on IP issues, especially if the formal definition of the USPTO's portfolio were changed from advisory jurisdiction over "intellectual property" generally to a more precise remit of "patent and trademark" matters.

The second scale-up strategy that would not require a significant build-out of infrastructure would be for Congress to delegate to the Office the authority to issue regulations interpreting the Copyright Act.[298] Delegations of interpretive authority are often understood as an implicit corollary of entrusting an agency to administer a statute.[299] Indeed, courts have held that where the Office or the Board does have responsibility for administering a statute, these entities' statutory interpretations are due *Chevron* deference.[300]

However, Congress could amend the Act and grant the Office explicit authority to issue interpretive rules regarding the Act's ambiguous provisions. These interpretive rules would not be binding but would do much to shape the behavior of those who come to the Office's door.[301] And

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296 Rose et al., *supra* note 295 at 11-44.

297 *See* Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1205-06 (2010) (recommending that the Copyright Office create the positions of Chief Economist and Chief Technologist, as well as enhance its staff's expertise more generally).

298 *Cf.* Masur, *Regulating Patents*, *supra* note 4, at 32-54 (arguing that the USPTO should be given full-scale authority to issue substantive regulations relating to patent law).

299 *See* F. Andrew Hessick, *Remedial* Chevron, 97 N.C. L. REV. 1, 3 (2019) (observing that the "legal justification for *Chevron* [is] that Congress implicitly delegates interpretive authority by enacting statutes for agencies to administer").

300 *See* Chevron, USA v. Nat. Res. Def. Council, Inc. 467 U.S. 837, 844 (1984) (explaining that "an agency with the authority to administer a statute is given "controlling weight" for its interpretations).

301 *See*, *e.g.*, Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 400 (2007) (explaining that even interpre-

they would allow the Office to leverage its considerable existing expertise on the Act itself in a way that could effectuate consequential policy changes by, for example, including or excluding certain works from the scope of copyright-eligible subject matter.[302]

To be sure, authority to issue interpretive rules is not often specifically delegated to agencies, and the wide usage of interpretive rules and guidance documents usually comes simply as a less participatory application of the agency's general rulemaking power. In other words, agencies authorized to undertake notice-and-comment rulemaking may do so (and receive *Chevron* deference as a result), or they may issue lesser interpretive rules instead — under the same statutory authority — and simply forgo *Chevron*. Separate authority to issue only interpretive rules is quite uncommon.

A notable exception is the FTC, which has specific authority to "prescribe interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce."[303] Such authority has appeal as a matter of institutional design because it offers a tailored middle way between an agency with too little power to effectuate its aims and one with more power than Congress is comfortable delegating. Indeed, the case of the FTC seems to reflect just this sort of tailoring, as the same statutory section expressly limits the Commission's power to prescribe rules about unfair or deceptive acts only to what the statute provides.[304]

One substantive caution remains about an agenda of expanding the Office. The current debate over the Appointments Clause also suggests that a robust expansion of Copyright Office power should come with careful attention by Congress to the mechanisms for installing and removing the officials who will ultimately be entrusted with these growing powers. The Copyright Royalty Board's judicially imposed restructuring by the

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tive rules and guidance documents that disclaim any binding legal effect "will, in practice, prompt a regulated entity to change its behavior").

302 The Office weighs in on such issues now when it can via the registration process, as it did with DNA copyright as well as with its denial of copyright in yoga sequences. *See Registration of Claims to Copyright*, 77 Fed. Reg. 37605 (June 22, 2012) (articulating the Copyright Office view that "a claim in a compilation of exercises or the selection and arrangement of yoga poses will be refused registration"); *see also* Bikram's Yoga Coll. of India, L.P. v. Evolation Yoga, LLC, 803 F.3d 1032 (9th Cir. 2015) (noting the contested issue of deference owed to the Copyright Office view but deciding on other grounds).

303 15 U.S.C. § 57a(a)(1).

304 *Id.* § 57a(a)(2) (providing that "[t]he Commission shall have no authority under this subchapter, *other than its authority under this section*, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce") (emphasis added).

D.C. Circuit in *Intercollegiate* and the USPTO's narrow survival before the Supreme Court in *Arthrex* make this a salient issue for adjudication, but the problem is not limited to that context.

Within the realm of agency adjudication, a Copyright Office of expanded powers, potentially including a more highly empowered Copyright Royalty Board — or any tribunal, such as the Copyright Claims Board — might certainly be forced to repeat the dispute in *Intercollegiate*. Though the considerable power of Board judges in the first instance was primarily what rendered them principal officers in *Intercollegiate*, the D.C. Circuit's remedy for restoring their supposed inferior officer status relied on taking away their protections against removal.[305] If a problem of enlarged powers arises again, however, the same safety valve of removability will not be available to cure the Appointments Clause defect.

Similarly, beyond the distinction between principal and inferior officers, caution is also warranted at the distinction between officers and non-officers. This latter issue concerns whether the Appointments Clause is implicated at all, as only "Officers of the United States" require one of the constitutionally prescribed procedures.[306] Those who do not exercise "significant authority pursuant to the laws of the United States" are "lesser functionaries" who may be hired and fired in accordance with statutory requirements and the agency's discretion, as appropriate.

As the powers of the Office and of its functionaries grow, it is likely that mid-level employees who were previously non-officers may reach tipping points of "significant authority" and become inferior officers with constitutionally specified appointment. This very problem confronted the USPTO a decade and a half ago as to its administrative patent judges, who had been considered mere employees but turned out to inferior officers requiring a targeted legislative reform.[307] (The same judges, their powers enlarged even more by the 2011 America Invents Act, were most recently deemed principal officers in *Arthrex*.[308]) Indeed, as mere employees generally far outnumber inferior officers in agencies, the risk of a misidentified inferior officer is likely far greater.

CONCLUSION

This Article has given content to the substantial gap that lies at the intersection of copyright and administrative law. By tracing the unappreciated history of these two fields, it showed the richness of copyright's regulatory past, and identified the inflection point when Congress started

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305 684 F.3d 1332, 1340-41.
306 Buckley v. Valeo, 424 U.S. 1, 126 (1976).
307 *See generally* John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 77 GEO. WASH. L. REV. 904 (2009).
308 141 S. Ct. 1970, 1985-86.

excessively delegating to the Office. The increasing practice of delegation in the absence of a clear theory has inflicted numerous social costs, including overdelegation, underdelegation, and institutional design flaws. Identifying these shortfalls helps shed light on a parsimonious theory of optimal copyright delegation that is limited to the Office's core competencies of regulating rights in creative works of authorship and advising about the content of copyright law. These principles in turn enable a reform agenda in two parts: operational reforms to the work of the Office and Board; and a series of substantive administrative law problems that these reforms will engage. The domain of copyright's administrative law is too broad to cover in a single article. Our hope has been to sketch out the rough contours of this promising but unexplored territory to enable future scholars and policymakers better navigate it.