

2-5-2019

Copyright Rulemaking: Past as Prologue

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Recommended Citation

Joseph Liu. "Copyright Rulemaking: Past as Prologue." *Berkeley Technology Law Journal* 33, no.3 (2019): 627-642.

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COPYRIGHT RULEMAKING: PAST AS PROLOGUE

Joseph P. Liu[†]

ABSTRACT

In deciding what rulemaking authority the Copyright Office should have, it may be helpful to take a close and careful look at how the Office has historically exercised its rulemaking powers. This article undertakes this task and makes a number of observations: (1) the Office's rulemaking activity increased dramatically after passage of the 1976 Act; (2) the rules issued fall into a number of identifiable categories; (3) by far the largest category consists of rules administering statutory licenses set forth in the Act; and (4) the smallest category consists of precisely the kinds of substantive rules that some commentators propose the Copyright Office issue in the future. While Congress may, of course, change the balance of copyright regulation in the future, this Article argues that any future delegations of substantive rulemaking authority must take into account the fact that the Office's regulatory efforts to date have largely involved a very particular and unique kind of rulemaking, one that focuses on administering legislative compromises between large industries rather than on furthering specific copyright policies. Care must be taken to ensure that this unusual regulatory perspective does not unduly influence or affect future substantive rulemaking.

DOI: <https://doi.org/10.15779/Z38T43J32Q>

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TABLE OF CONTENTS

I.	INTRODUCTION	628
II.	RULEMAKING PAST AND PRESENT	629
III.	OBSERVATIONS AND IMPLICATIONS	635
IV.	CONCLUSION	641

I. INTRODUCTION

It is probably fair to say that copyright rulemaking has not until recently been a subject of sustained or intense scholarly interest. Few, if any, copyright courses or casebooks spend any real time going through the regulations promulgated by the Copyright Office and the Librarian of Congress (which are found, for those who are wondering, at 37 C.F.R. §§ 200 and 300). Few scholarly articles take copyright rulemaking as their primary focus of study or analysis. Ask most copyright scholars or practitioners what their favorite copyright regulation is, and you are likely to draw a blank stare.

To some extent it is easy to see why. The substantive law of copyright is found almost exclusively in the text of the Copyright Act and in the many federal judicial opinions interpreting and building upon that text. By contrast, very little substantive copyright law is found in the regulations. Unlike some other areas of federal law, Congress has not generally delegated to the Copyright Office the authority to promulgate substantive rules.¹ Instead, copyright regulations largely consist of technical or procedural rules surrounding registration, notice, deposit, and the administration of various complex industry-specific statutory licenses. Unless you happen to engage in one of these activities, you might never need to refer to copyright regulations at all.

Yet this relative lack of interest in copyright rulemaking is changing. As the Copyright Act has grown more complex, more attention has been paid to the relative lack of substantive regulatory authority in this area, at least as compared to other areas of federal law. Commentators have begun to ask whether, as in other areas of federal law, granting greater substantive

1. In some cases, Congress has delegated rulemaking authority directly to the Copyright Office (typically subject to approval by the Librarian of Congress). In other cases, it has delegated the authority directly to the Librarian (subject to advice from the Copyright Office). Since in either case, the Copyright Office appears to be the primary locus of initial rulemaking competence (and to avoid unnecessary repetition), I will refer in this Article generally to rulemaking by the Copyright Office in both instances.

rulemaking authority to the Copyright Office might be warranted as a way of dealing with increased complexity and the dynamic nature of copyright and technology markets.² A number of commenters have proposed specific delegations of such authority, for example the authority to craft specific fair use exemptions or safe harbors.³ As movement builds towards a possible comprehensive redrafting of the Copyright Act, interest in this form of copyright lawmaking has increased.⁴

In light of these developments, it may be helpful to take a closer look at the history and current state of copyright rulemaking. How has the Copyright Office historically exercised its regulatory authority? What do current copyright regulations look like? And what, if anything, does this tell us about the potential for future delegations of rulemaking authority? Although past experience need not dictate or limit what is possible in the future, since Congress can always decide to alter the scope of existing rulemaking authority, past rulemakings may highlight both risks and opportunities as we consider venturing into a brave new world of copyright rulemaking.

II. RULEMAKING PAST AND PRESENT

Prior to the enactment of the Copyright Act of 1976 (the 1976 Act), copyright regulations were rather scant. Indeed, the Copyright Office itself was not created until 1897 as a separate federal department within the Library of Congress. Before 1897, specifically from 1870–1896, the Library of Congress itself administered the copyright registration system, and, before then, from 1790–1869, copyrights were recorded in the U.S. District Courts. Throughout this period (essentially the first century of copyright law in the U.S.), the primary and almost exclusive administrative function in copyright involved registration and recordation of copyrights.

This focus on registration is reflected in the very first sets of copyright regulations promulgated by the Copyright Office. The Copyright Act of 1909 (the 1909 Act) expressly delegated to the Copyright Office the power, subject

2. See, e.g., Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 148 (2004).

3. See *id.*; Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 398–99 (2009); cf. Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007) (proposing fair use no-action letters).

4. Note that there are tricky and complex questions about whether the Copyright Office is constitutional or can constitutionally exercise such rulemaking authority. See, e.g., Andy Gass, *Considering Copyright Rulemaking: The Constitutional Question*, 27 BERKELEY TECH. L.J. 1047 (2012). Similarly, there are very interesting questions about whether the Copyright Office should ideally be placed under a different agency or be a freestanding agency. These questions are beyond the scope of this Article.

to approval by the Librarian of Congress, “to make rules and regulations for the registration of claims to copyright as provided by the Act.”⁵ The earliest codified version of those regulations appears in the very first version of the Code of Federal Regulations in 1938. Comprising 30 sections and approximately 6,500 words in total, the regulations focused almost exclusively on the procedures for registering copyrights.⁶ The size, scope, and nature of copyright regulations remained quite stable over the next 40 years until passage of the 1976 Act. Indeed, the 1977 version of the regulations, published shortly before the effective date of the 1976 Act, similarly focused almost exclusively on registration and weighed in at approximately 8,500 words.

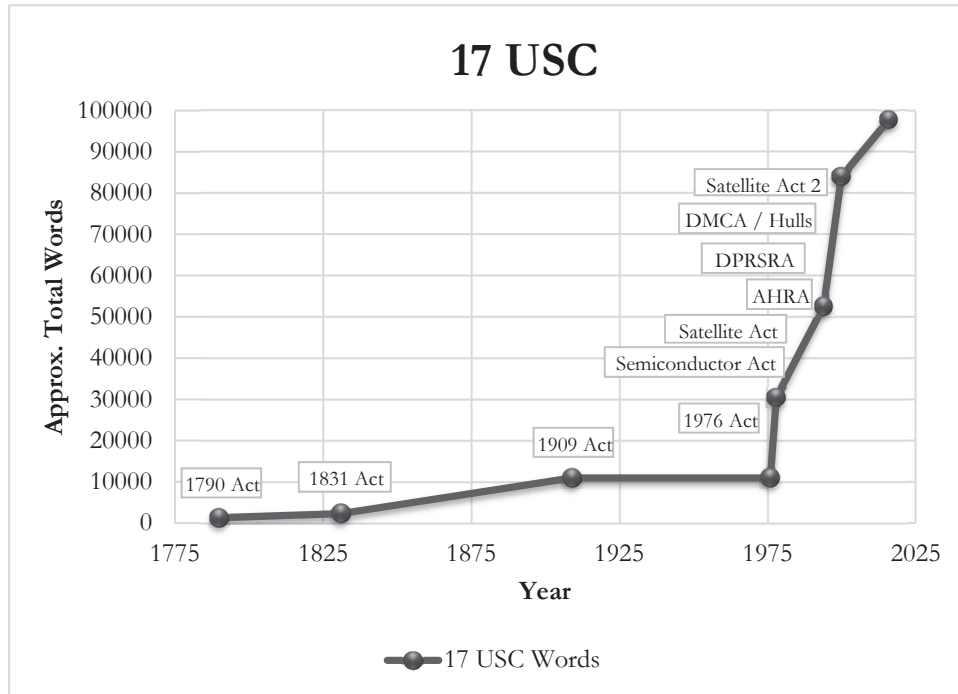
The relatively modest size and scope of copyright regulations radically changed after passage of the 1976 Act. Before describing this change, it is important to note that the 1976 Act itself represented a significant departure from the relatively more modest 1909 Act, in terms of size, scope, and complexity. Prior to passage of the 1976 Act, the Copyright Act weighed in at approximately 11,000 words. After the effective date of the Act, the Copyright Act nearly tripled in size, weighing in at approximately 30,000 words. Earlier work has analyzed this dramatic change in the statute and sought to explain the implications that flow from it.⁷

5. Pub. L. No. 60-349, § 53, 35 Stat. 1075, 1085 (repealed 1976).

6. A small portion of the regulations, Part 2, contained proclamations of copyright relations, dealing with copyright claims of authors from various foreign countries.

7. See Liu, *supra* note 2, at 129–66; David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1320 (2004). To a large (though not exclusive) extent, the increase was driven by complicated provisions dealing with statutory licenses for cable, satellite TV, and digital public performances of sound recordings.

Figure 1
Historical Development of the 17 U.S.C. Word Count⁸



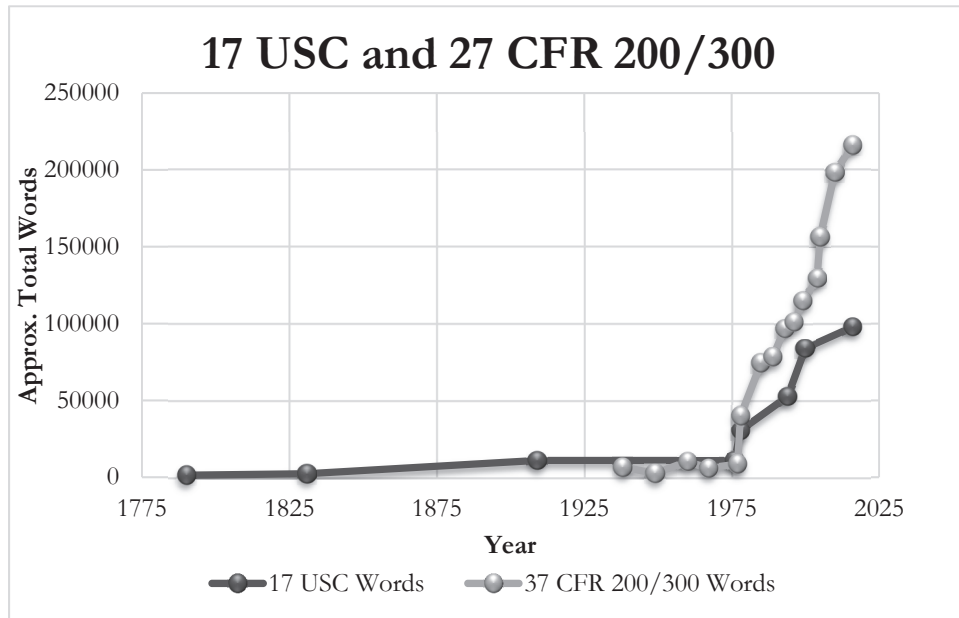
Less recognized was a parallel, and even more dramatic, increase in the size and scope of copyright regulations. Immediately after passage of the 1976 Act, copyright regulations increased in size from approximately 8,500 words in 1977 to nearly 40,000 words in 1978, essentially quadrupling in size and exceeding the size of the 1976 Act itself. Thus, by 1978, copyright regulations were more extensive, at least in terms of raw size, than the Copyright Act itself. The size gap between copyright statutes and copyright regulations has only increased since passage of the 1976 Act. While the size of the Copyright Act has increased dramatically since 1978, essentially tripling in size (to nearly 100,000 words today), the size of copyright regulations has increased even more dramatically, weighing in at more than 200,000 words today.

Thus, despite the relative lack of attention paid to copyright rulemaking, the sum of that rulemaking dwarfs the size of the underlying statute. There is

8. Approximate word counts for the Copyright Act were derived by importing the text of the Copyright Act at various points in time into Microsoft Word, deleting any words that were not part of the Act itself, and using the word count tool to calculate the total number of words. Sources of statutory text include the following: 1790 Act; 1831 Act (4 Stat. 436); 1909 Act (35 Stat. 1075); Title 17 as of 1976, 1994, 2000 (Heinonline.org); Title 17 as of 1978 (90 Stat. 2541); Title 17 as of 2016 (Westlaw.com).

far more copyright “law” (defined in terms of raw word count) in the regulations than in the Copyright Act itself.

Figure 2
17 U.S.C. and 37 C.F.R. §§ 200 and 300 Word Count Development⁹



Of course, bare word counts tell us very little about the nature, importance, or significance of the Copyright Office’s regulatory output. We know that there are a lot of copyright regulations, but what do these regulations consist of? While acknowledging that categorizations are somewhat arbitrary, copyright regulations can broadly be broken down into five different categories:

Administrative/ministerial regulations. These regulations deal with basic agency procedures, such as how to contact the agency, how to serve legal process, how to handle Freedom of Information Act requests, privacy policies, etc.

9. Approximate word counts for Copyright regulations were derived by importing the text of 37 C.F.R. §§ 200 and 300 at various points in time into Microsoft Word, deleting any words that were not part of the regulations, and using the word count tool to calculate the total number of words. Sources of text for the C.F.R. at various points in time were taken from Heinonline.org, which provides full text versions of the C.F.R. at various points in time beginning in 1938.

These are regulations that are not unique to the copyright system, but rather arise from the basic functions of an agency.¹⁰

Registration, deposit, notice regulations. These regulations deal with the historic functions of the Copyright Office, e.g., the process and fees for applying for registration, deposit requirements, form and placement of copyright notice, etc. This category made up most of the pre-1976 Act regulations.¹¹

Specific statutory provisions or exemptions. These are regulations for administering specific provisions in the Copyright Act, typically involving exceptions, where Congress has expressly delegated to the Office a role in managing the particular provision, e.g., receiving notices of objection to certain non-commercial performances of literary or musical works,¹² specifying the content of copyright warnings posted by libraries and archives,¹³ etc.

Statutory license regulations. These are regulations for administering the various statutory licenses in the Copyright Act for cable television, satellite television, digital public performances, the mechanical license, the Audio Home Recording Act, etc. These highly complex and detailed provisions include reporting requirements, verification of statements of account, etc., as well as the results of periodic adjustments to the statutory royalty rates.¹⁴

Substantive regulations. These are regulations that create substantive copyright law pursuant to an express delegation of authority by Congress to issue such regulations after notice and comment. The primary example of this is the triennial § 1201 rulemaking for identifying classes of works exempted from the anti-circumvention provisions of the Digital Millennium Copyright Act.¹⁵

As mentioned above, this is a rough and somewhat arbitrary categorization, and one could break down the regulations into different categories, or into more specific subcategories. In addition, some provisions straddle multiple categories, and placing such provisions in one or another category may be somewhat arbitrary. That said, the categorization provides us

10. See, e.g., 37 C.F.R. §§ 203.1–205.23 (2016) (FOIA requests, privacy act compliance, and legal process).

11. See, e.g., *id.* §§ 201.1–201.3 (general provisions, fees, registration, recordation); *id.* § 202 (preregistration). Note that this category includes regulations dealing with termination of transfers, since these are related to the recordation function of the Office, although they could also be placed in the next category. *Id.* § 201.10. Note also that included in this category are provisions for the registration of mask works (§ 211) and boat hulls (§ 212), even though these are not, strictly speaking, copyright registrations.

12. *Id.* § 201.13.

13. *Id.* § 201.14.

14. See, e.g., *id.* §§ 210, 253.1–253.11.

15. *Id.* § 201.40.

with a quick snapshot of the existing regulatory output of the Copyright Office.

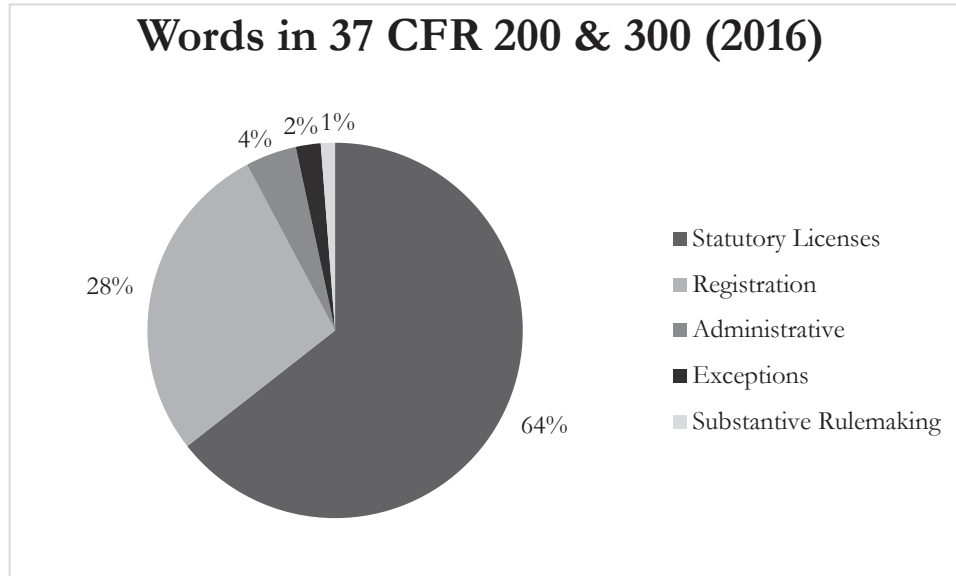
Under the categorization scheme above, by far the largest category of regulations consists of the provisions administering the various statutory licenses.¹⁶ These regulations currently represent approximately 64% of the total size of copyright regulations. A number of these regulations are specific to a particular statutory license, whereas others apply to the statutory license system more generally. These are extensive and extremely complex regulations dealing with all of the many details surrounding the licenses, such as eligibility for licenses, reporting requirements, filing statements of account, proceedings before the Copyright Royalty Board, royalty rate revision proceedings, royalty distribution procedures, etc.

The next largest category consists of regulations involving registration, deposit, notice, and other traditional Office functions, making up approximately 28% of the total word count. As noted above, these and similar provisions made up the bulk of the regulations prior to passage of the 1976 Act.

At the other end of the spectrum, the smallest category consists of substantive copyright regulations promulgated by the Librarian of Congress after notice and comment, accounting for just about 1% of the total regulatory word count. This category consists of a single section, 37 C.F.R. § 201.40, which lists the categories of works exempted from anticircumvention liability under 17 U.S.C. § 1201.

16. 17 U.S.C. § 111 (2012) (secondary transmission for cable systems); § 112 (ephemeral recordings); § 114 (performance of sound recordings by digital audio transmission); § 115 (making and distributing phonorecords); § 119 (secondary transmissions for satellite carriers); § 122 (secondary transmissions for satellite carriers for local retransmissions); § 1003 (digital audio recording devices and media).

Figure 3
37 C.F.R. §§ 200 and 300 Word Count Breakdown



III. OBSERVATIONS AND IMPLICATIONS

So what observations or conclusions, if any, can we draw from the simple descriptive analysis above? Initially, of course, we should be cautious about drawing too many conclusions from simple word counts and basic descriptive analysis. Word counts are an imperfect proxy for importance, significance, or regulatory effort. That said, the descriptive account does offer a picture of the current regulatory output of the Copyright Office, and there are a number of observations we can make.

First, copyright rulemaking has evolved significantly over time. Copyright rulemaking effectively began after passage of the 1909 Act, and for the first 70 years almost exclusively consisted of relatively modest procedural and technical regulations dealing with the traditional Copyright Office functions of registration, deposit, notice, etc. After passage of the 1976 Act, however, copyright rulemaking increasingly dealt with management of the complex statutory licenses created by Congress in the 1976 Act and subsequent amendments. Although these regulations intervened more directly in the structure of certain markets, they were still largely aimed at implementing substantive statutory provisions enacted by Congress. Finally, and most recently, in 1998, Congress, for the first time, delegated substantive rulemaking

authority to the Copyright Office under § 1201.¹⁷ The story is thus one of not only increasing regulatory authority, but a dramatic shift in the nature of that authority, as Congress has entrusted the Copyright Office with greater authority over copyright policy.

Second, it is worth observing that certain other kinds of regulations are missing from the Copyright Office's regulatory output, at least as it is found in 37 C.F.R. In particular, the Copyright Office does not generally issue the kinds of interpretive regulations that other agencies sometimes issue. The one exception is in the area of registration, where some regulations do expressly interpret the provisions in the Copyright Act dealing with originality and fixation.¹⁸ In addition, the Copyright Office's Compendium of U.S. Copyright Office Practices¹⁹ contains a significant amount of interpretive guidance on these same subjects. The Compendium is not expressly a regulation issued by the Office, but rather a manual that "provides expert guidance to copyright applicants, practitioners, scholars, the courts, and members of the general public regarding institutional practices and related principles of law."²⁰ While the interpretations in the Compendium are not entitled to *Chevron*²¹ deference, courts may consider and weigh them to the extent they are persuasive.²² Similarly, the Office has for some time issued studies and reports on various aspects of copyright law, in its capacity as an advisor to Congress on copyright legislation. However, regulations containing interpretive guidance do not make up a substantial portion of the Copyright Office's regulatory output.

Third, it is interesting to note the dominance of the statutory licensing provisions, and the comparatively small size of substantive rulemaking, in the overall regulatory output of the Copyright Office. Copyright regulations primarily concern statutory licensing and traditional registration functions. Only a minuscule portion of the Office's current regulatory output consists of substantive copyright regulation. This is not to say that the substantive

17. 17 U.S.C. § 1201(a)(1)(C). See Liu, *supra* note 2, at 98, 110–12 (describing and analyzing this trend).

18. See, e.g., 37 C.F.R. § 202.1 (2016) ("Material not subject to copyright.").

19. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES (3d ed. 2017), <https://www.copyright.gov/comp3/> [<https://perma.cc/C9ZK-AXT8>].

20. See *id.* at 1; see also 37 C.F.R. § 201.2(b)(7).

21. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that where statute is ambiguous, courts should defer to agency's reasonable interpretation).

22. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (agency interpretations of statute may be followed if sufficiently persuasive). Note that there is a generally unsettled question regarding what kind of deference Copyright Office interpretations are due in its registration determinations. See Dan Burk, *DNA Copyright in the Administrative State*, 51 U.C. DAVIS L. REV. 1297, 1301 (2018).

regulations are unimportant, or that they require comparatively little effort to promulgate. Indeed, because these provisions, unlike some of the other regulations, require notice and comment and must be re-promulgated every three years, they occupy significant agency resources.²³ That said, the relatively small size and recent provenance of this kind of regulatory activity are interesting to note, given that many proposals suggest expanding upon precisely this category of rulemaking.

With respect to this last observation, it is worth considering how the dominance of statutory licensing in the Office's current regulatory output might affect how we think about copyright regulation in the future. On the one hand, just because an agency has undertaken certain forms of rulemaking in the past does not mean that it must continue to do so in the future. After all, Congress can always alter the mix of regulations that the Office promulgates. At the same time, as we think about what role copyright rulemaking might play in the future, it is important to acknowledge that we do not write on a blank slate or a blank agency. Accordingly, it is worth asking how the Office's existing regulatory output might affect, influence, or limit what we ask it to do in the future.

In particular, how might the existing regulatory activity of an agency shape its priorities, its worldview, and its capabilities? For example, a Copyright Office focused exclusively on registering copyrights (as was the case for many decades) might have a certain outlook or perspective. Its primary responsibility would be to ensure that copyright claims are properly registered and recorded, that the records are easily searched, and that information about copyright entitlements is made available for purposes of licensing. The primary constituencies might be the authors, publishers, and others who wish to license or use copyrights. The substantive copyright doctrines of most concern might be those dealing with validity, e.g., originality and fixation, as well as formalities, and less (if at all) with doctrines outside of registration, such as infringement and fair use. The model here is of an agency as a recorder of claims and a facilitator of transactions.

By contrast, a Copyright Office focused extensively on managing and administering various statutory licenses might have a different perspective or orientation. Such an Office would, like the Office mentioned in the previous paragraph, be focused on facilitating transactions. But unlike the Office in the previous paragraph, such an Office would not be facilitating transactions struck in the market, but transactions struck through the legislative process and enacted into law. Such an Office might be engaged more deeply in the structure of the particular industries subject to statutory licensing (e.g., cable

23. *See* 17 U.S.C. § 1201(a)(1)(C); 5 U.S.C. § 553 (2012).

television, satellite television, recorded music, etc.), and indeed might be particularly sensitized to the interests of such industries. The model here would be of an agency as an administrator of industry agreements and settlements.

Finally, a Copyright Office focused extensively on promulgating substantive copyright regulations might have yet another outlook or perspective. For example, imagine the Copyright Office were given significant substantive regulatory authority, like some other federal agencies, to promulgate broad exceptions to copyright liability or issue broad substantive and binding regulations regarding copyrightability. Imagine the Office were delegated such authority by Congress in furtherance of a specific statutory policy such as ensuring broad public access to copyrighted works. Such an Office might view its constituency differently and might be more focused on a particular normative policy goal, rather than simply on facilitating market transactions or administering a statutory license. The model here would be of an agency as promoter of a particular substantive policy or set of policies.²⁴

Of course, the Copyright Office currently engages in all of the above activities and thus reflects all of these different perspectives and orientations, is responsive to many different constituencies, and pursues many different (and sometimes inconsistent) policies. Yet the point is that it may not engage in all of these activities in equal degree. To the extent that certain activities, such as the Copyright Office's rulemaking activities, reflect a particular distribution of such concerns, such a distribution might affect how it issues regulations in the future. More specifically, the overwhelming dominance of statutory licensing, and the relatively smaller size of substantive rulemaking, should inform future delegations of rulemaking authority.

One implication of the current distribution of regulatory output is that, as we consider delegating more rulemaking authority to the Copyright Office, we should keep conceptually distinct the different kinds of rulemaking the Office has engaged in in the past. For example, if Congress were to delegate more and broader substantive rulemaking authority to the Office, it should ensure that the authority is accompanied by a clearly articulated policy goal or statement of purpose.²⁵ This would signal clearly that the operative model of agency action is the agency as promoter of substantive policy, rather than as facilitator of transactions or settler of industry disagreement. The role is not to broker agreement, but to further a normative policy.

24. Cf. Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) (exploring agency institutional design features as a way of reducing the risk of industry capture).

25. See, e.g., 17 U.S.C. § 1201(a)(1)(C) (specifying the criteria that the Librarian of Congress must apply in exempting categories of works from anticircumvention liability).

The crafting of copyright exceptions highlights the potential dangers of confusion as to role. If the Copyright Office were given the power to promulgate exceptions to copyright liability (as some commentators have proposed),²⁶ the Copyright Office could adopt two very different perspectives: exceptions as furthering a normative copyright policy, or exceptions as a compromise between the interests of competing groups. Under the former perspective, the Office would take comments, undertake studies, and apply its own expertise to determine exceptions that in its view best further the normative policy.²⁷ Under the latter perspective, the Office would convene industry groups, facilitate negotiations, and endorse exceptions that reflect compromise between the interests of the parties. As with legislation, the line between policy and compromise may not be a clear one, and the interests of various parties will be considered in either case. Yet the orientation or emphasis adopted by the agency may make a real difference in the kinds of regulations promulgated.²⁸

Some past discussions of exceptions have reflected a kind of “dispute resolution” perspective. For example, in the run-up to passage of the 1976 Act, there was much disagreement about the proper scope of a photocopying privilege for in-class educational uses. Various interested groups gathered to negotiate and agree upon certain guidelines for such uses, which were eventually incorporated into the legislative history of the Act, though they appeared nowhere in the Act itself.²⁹ More recently, the Copyright Office has helped convene interested groups to discuss potential revision of 17 U.S.C. § 108 exceptions for libraries and archives, in light of the vast changes in technology since passage of the Act. Such discussions might be viewed as helping to inform a particular normative policy or as dictating the terms of a compromise between industry groups, or, of course, a bit of both.³⁰

The experience with the § 1201 rulemaking provides yet another illustration of the importance of clarity as to role. Congress delegated to the

26. See, e.g., Liu, *supra* note 2, at 148; Mazzone, *supra* note 3, at 399.

27. See generally Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537 (2009) (identifying clusters of policy justifications for fair use in the existing case law).

28. Note that even in the absence of substantive regulatory authority, the Office has done something arguably similar in recent years when issuing advisory reports on substantive copyright policy issues—e.g., ISP safe harbors, orphan works, mass digitization—after issuing a notice of inquiry soliciting input and comments from various stakeholders. Although the final product is a publication rather than substantive regulation, the process resembles in some ways the process of notice and comment for rulemaking.

29. H.R. REP. NO. 94-1476, at 66–67, *reprinted in* 1976 U.S.C.C.A.N. at 5680; see Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 *VA. L. REV.* 1899, 1918–19 (2007).

30. See generally Rothman, *supra* note 29.

Librarian of Congress the authority to exempt certain classes of works from anticircumvention liability. In so doing, Congress articulated a normative standard—whether technological protection measures “adversely affect[]” the ability of persons to engage in noninfringing uses—and set forth a list of factors the Librarian was to consider in making that substantive determination.³¹ Thus, Congress clearly signaled the desire to pursue a substantive policy goal. Notably absent, at least expressly, was any consideration of compromise between various interests. Initially, the Librarian took a relatively limited view of its regulatory authority, but it has expanded that authority somewhat in subsequent rulemakings, reflecting a greater comfort with the delegation of substantive authority.

Closely related to the concern about the perspective the Office adopts when issuing regulations is a concern about the resources and particular competences of the Office. The vast majority of the Office’s current resources are focused on registration and the administration of the statutory licenses. By contrast, Office resources devoted to policy analysis (whether legal, economic, or technological) are comparatively limited. This distribution of resources made sense in a world where the Office’s primary administrative responsibilities focused on registration and the statutory licenses. However, if the agency is to be given expanded substantive regulatory authority going forward, it must also be equipped with the resources and expertise necessary to properly exercise that authority. These concerns have been raised elsewhere, but are worth repeating here.³²

Finally, any delegation of additional substantive regulatory authority to the Copyright Office must grapple with the broader concern about industry capture. This is a particular concern in areas like copyright law, where focused interests have much to gain by lobbying for protection, while the public interest is diffuse and has a more difficult time organizing itself in opposition.³³ Even if the Copyright Office were given the resources and expertise to fulfill a broader regulatory role, a real concern exists that the exercise of such power could be skewed in favor of private interests at the expense of the broader public interest.

To some extent, the concerns expressed in this Article exist whether or not industry capture exists. Even in the absence of any evidence of capture, the Office’s existing regulatory authority and output could shape its

31. 17 U.S.C. § 1201(a)(1)(C) (2012).

32. See Liu, *supra* note 2, at 156–58; Aaron Perzanowski, *The Limits of Copyright Expertise*, 33 BERKELEY TECH. L.J. 735 (2018).

33. See Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 870–79 (1987).

experience, orientation, and expertise. That said, such concerns would, of course, be exacerbated in an environment where industry capture was a real risk. Thus, steps should be taken to reduce the risk of capture and ensure that any exercise of additional regulatory authority be informed by a concern about the public interest.³⁴ This is an important issue that is beyond the scope of this Article.

IV. CONCLUSION

In the end, this Article argues that, as we consider delegating more rulemaking authority to the Copyright Office, we must take seriously the history of copyright rulemaking and the peculiar path-dependence of that rulemaking to date. We do not write on a blank slate or a blank agency. Over the past century, the Office has developed its own expertise and perspective, and as we consider conferring more substantive rulemaking authority on the Office, we must think carefully about how that expertise and perspective will affect future exercises of regulatory authority.

34. See Barkow, *supra* note 24, at 17, 19 (suggesting that policy makers should avoid “prioritizing narrow short-term interests at the expense of long-term public welfare”).

