

# Regulatory Activities, Policy Assistance, and Litigation

## **COPYRIGHT OFFICE REGULATIONS**

THE REGISTER OF COPYRIGHTS IS AUTHORIZED under 17 U.S.C. §702 to establish regulations for the administration of the copyright law. In addition to regulatory activities discussed elsewhere in this report, regulations issued during fiscal 2003 included the following:

### Section 1201 Triennial Rulemaking on Exemption from Prohibition on Circumvention of Technological Protection

The Copyright Office initiated its second rulemaking pursuant to 17 U.S.C. §1201 to determine whether any particular class of copyrighted works should be exempted from the protection afforded by the prohibition on circumventing technological protection measures that control access to such works.

#### *Anticircumvention Rulemaking*

When Congress passed the Digital Millennium Copyright Act in 1998, it made it illegal for anyone to circumvent the access controls that a copyright owner had put on the work. Access means to get to the work, as opposed to using a work, e.g. making a copy, performing, or adapting—activities that fall within a copyright owner's exclusive rights. Because of concern that there might be particular classes of works that could not be accessed by users who have legitimate noninfringing uses for the works, Congress provided that the Copyright Office should periodically hold a rulemaking on the issue and make a recommendation to the Librarian of Congress, who would decide if an exemption to the anticircumvention prohibition was needed.

On October 15, 2002, the Office published a Notice of Inquiry in the *Federal Register* requesting those who wish to propose a particular class of works where noninfringing uses have been, or are likely to be in the next three years, adversely affected as a result of the prohibition on circumvention.

The Office received 51 comments that proposed 83 exemptions to the prohibition and 338 reply comments supporting or opposing those proposed exemptions.

The Office held four days of hearings in Washington, D.C. and two days of hearings in Los Angeles, California. Forty-four witnesses representing over 60 groups testified at these hearings.

Subsequent to the hearings, the Office sent follow-up questions to a number of the witnesses requesting additional clarification for the record.

The Register of Copyrights consulted with the Assistant Secretary for Communications and Information, Director of the Department of Commerce's National Telecommunications and Information Agency (NTIA), as required by §1201. The entire record was expeditiously made available on the Copyright Office website.

After the Register reviews the record, she will present her written recommendation to the Librarian of Congress. The Librarian will publish any classes of works exempted from the prohibition on circumvention by October 28, 2003, and those exemptions will be in effect until October 27, 2006.

#### Section 304 Notices of Termination Covering the Extended Renewal Term

The Office published a final regulation governing notices of termination of transfers and licenses covering the extended renewal term provided by the Sonny Bono Copyright Term Extension Act (CTEA) of 1998.

The original regulation addressed notices of termination made under 17 U.S.C. §304(c) regarding the additional nineteen years added to the renewal term by the 1976 copyright law. The CTEA added twenty years to the extended renewal term, and added 17 U.S.C. §304(d), which created a new termination right covering the additional twenty-year period, limited to those who had not exercised their termination rights under §304(c). The final regulation establishes procedures for terminating transfers and licenses under §304(d) and amends the procedure under §304(c).

These requirements include a statement identifying the section of the law under which termination is being made and, with respect to a termination under §304(d), an affirmative statement that rights being terminated are not the subject of a previous termination.

The regulation makes it clear that termination under §304(d) is available only if federal copyright was originally secured from January 1, 1923, to October 26, 1939.

#### *Digital Millennium Copyright Act (DMCA)*

The DMCA was enacted into law on October 28, 1998. This Act revised the law in a number of ways, including adding a new chapter 12 which implemented two World Intellectual Property Organization treaties by prohibiting (1) the making and selling of devices that are primarily used to circumvent access and copy controls used by copyright owners to protect their works, and (2) the circumvention of access controls. In addition, to accommodating service providers' wishes, the DMCA created limitations on secondary liability for certain activities. It also expanded the existing exemption relating to computer programs in §117 of the copyright law; and contained several miscellaneous provisions regarding the functions of the Copyright Office, distance education, webcasting, and other issues. The enactment of the DMCA was the continuation of an ongoing effort by Congress to address the relationship between technological change and U.S. copyright law.

### Section 203 Notices of Termination

Under §203 of the copyright law, termination of grants by an author may be made during a five-year period commencing 35 years after the execution of the grant, or, if the grant included the right of publication, the earlier of 35 years after publication pursuant to the grant or 40 years after the execution of the grant.

Termination is accomplished by serving a notice of termination on the grantee or the grantee's successor in title, and recording the notice of termination in the Copyright Office prior to the effective date of termination. The notice must be served no more than ten years and no later than two years before the effective date of termination.

The Office published proposed, interim, and final regulations governing the form, content, and manner for serving notices of termination of transfers or licenses of copyright that were granted on or after January 1, 1978.

### Technical Amendment for Works Excluded from Architectural Protection

The Office adopted a technical amendment to clarify the requirements of 37 CFR 202.11, the regulation governing registration of architectural works. Subsection 202.11(d) specifies categories of architectural works that cannot be registered for protection.

The amendment adds language to the effect that unpublished plans or drawings of architectural works created before December 1, 1990, may not be registered if the works were not constructed by December 31, 2002.

### Cost of Living Adjustment for Performance of Musical Compositions by Colleges and Universities

Each year the Copyright Office adjusts rates for the public performance, by public broadcasting entities licensed to colleges and universities, of musical compositions in the repertoires of the American Society of Composers, Authors and Publishers (ASCAP); Broadcast Music Inc. (BMI); and the Society of European Stage Authors and Composers (SESAC). The rate adjustment reflects the changes in the Consumer Price Index.

On November 29, 2002, the Office published the new rates, adjusting for a two percent cost of living increase. The revised rates went into effect on January 1, 2003.

### Waiver of Mailing Requirement for Cable, Satellite, and DART Claims

Copyright owners must file claims with the Copyright Office each year in order to receive their shares of the royalties collected the preceding calendar year under 17 U.S.C. §111, §119, and chapter 10.

The regulations require that a claimant either mail the claim or hand-deliver it to the Office of the General Counsel during the appropriate filing period.

In fiscal 2002, the Copyright Office waived its mailing requirement and offered several additional means for delivering a cable, satellite or DART claim to the Office. The Office took this step in response to the severe disruption of mail delivery caused by the threat of anthrax-contaminated mail.

By fiscal 2003, mail delivery to the Office had resumed. However, incoming mail continued to be irradiated and diverted to an off-site location for screening. This procedure resulted in mail delivery delays.

Because of these continuing delays in fiscal 2003, the Copyright Office again waived its mailing requirement.

The Office offered additional means for delivering a cable, satellite or DART claim to the Office, including online submission of the claim or, in the case of the DART claims, facsimile submission.

[Docket numbers and dates of *Federal Register* documents issued during Fiscal Year 2003 are listed in an appendix of this Report.]

## REPORTS AND LEGISLATION

THE COPYRIGHT OFFICE PROVIDES reliable advice and expert testimony to Congress on copyright matters and proposed copyright legislation, and undertakes studies and provides authoritative reports on current issues affecting copyright.

### Hearings

The Register of Copyrights participated in five Congressional hearings during fiscal 2003. They were:

*The House Subcommittee on Courts, the Internet, and Intellectual Property:*

- The “broadcast flag” issue on March 6, 2003;
- The Copyright Royalty and Distribution Reform Act of 2003 (H.R. 1417) on April 1, 2003;
- The Intellectual Property Protection Restoration Act of 2003 (H.R. 2344) on June 17, 2003.

*The Senate Committee on the Judiciary:*

- “Pornography, Technology, and Process: Problems and Solutions on Peer-to-Peer Networks” on September 9, 2003.

*The House Subcommittee on Courts, the Internet, and Intellectual Property and the Subcommittee on Commerce, Trade, and Consumer Protection:*

- The “Database and Collections of Information Misappropriation Act of 2003” (H.R. 3261), September 23, 2003, at which the General Counsel testified on the Register’s behalf.

### *What is a “Broadcast Flag”?*

A broadcast flag—digital bits of information—is a technological solution to the problem of piracy of broadcast digital television (DTV) content. It addresses the issue of redistribution of broadcast content over the Internet. Specifically, it is designed to prevent unauthorized redistribution of digital broadcasts outside a home or other similar local environment.

### **Broadcast Flag**

During fiscal 2003, the Federal Communications Commission considered a proposal to use a broadcast flag to regulate devices used to receive digital television broadcasts.

When a broadcast flag is employed, a few bits of information appended to a digital television signal tell a compliant device that the broadcast is protected by copyright. The flag indicates whether the content may be copied or retransmitted.

The proposal emerged from Congressional roundtables on digital TV at which representatives of the content, information technology, and consumer electronics industries discussed potential technological measures to combat piracy.

The Register of Copyrights stated that producers of television programming have grounds for concern. She said digital broadcasting provides an opportunity for massive piracy similar to that perpetrated by file-sharing services on recording artists.

The Register clarified the relationship between the broadcast flag proposal and important principles of copyright law, and shed light on “fair use” and “first sale” doctrines as they affect the broadcast flag discussions. With respect to fair use, she said that many of the comments in the ongoing FCC proceeding misstated the nature of fair use because the commentators had misread the Supreme Court’s 1984 decision, *Sony v. Universal City Studios*. The Court found that “time-shifting” of broadcast television programs was fair use primarily because time-shifting merely enables a viewer to see what he was invited to see free of charge. She noted that the Supreme Court did not consider whether other activities related to home taping of broadcasts—such as creating a library of recorded shows, making further copies from the initial recording, or distributing recorded shows to friends or others—would qualify as fair use. Thus, she said, the Sony decision did not establish a fair use right for individuals to engage in a wide variety of reproduction and distribution activities. She stressed that fair use should not be confused with consumer expectations, which often go far beyond fair use.

### **Copyright Arbitration Royalty Panel (CARP) Reform**

The House Subcommittee on Courts, the Internet, and Intellectual Property held a hearing on April 1, 2003 on H.R. 1417, the Copyright Royalty and Distribution Reform Act of 2003.

The Register testified that the proposed legislation addresses the concerns of cost, stability, and institutional expertise. She noted that participants in proceedings should not be excluded because they are unable to pay a share of the costs of the proceeding.

The Register also recommended the following in her testimony: that parties be empowered to ask the Copyright Royalty Judges to reconsider their decision before appealing to a court of law; that the judges have continued jurisdiction over rates and terms after they render a decision so that they can address unanticipated matters immediately, rather than delay these matters to the next scheduled proceeding; and, in cases where a rate adjustment proceeding has not concluded before a royalty rate has expired, that royalties be paid at the old rate until the new rate is set.

After the hearing, Copyright Office staff attorneys continued to work with the subcommittee staff on the bill.

On September 24, 2003, the House Judiciary Committee approved and reported the legislation, which was subject to an amendment in the nature of a substitute that made numerous adjustments to the bill as introduced on March 25, 2003, and as reported in May by the Subcommittee.

This bill would replace Copyright Arbitration Royalty Panels (CARPs) with three full-time independent Copyright Royalty Judges appointed by the Librarian of Congress. CARPs are ad hoc panels composed of arbitrators which determine royalty rates, distributions, and conditions of payment. Panels have been operating under Copyright Office auspices since Congress eliminated the Copyright Royalty Tribunal in 1993.

Other provisions of the Act would set a five-year schedule for adjusting the statutory rates for the various licenses; provide a new process for considering voluntary agreements; impose a \$150 filing fee; grant the Copyright Royalty Judges authority to reconsider their decisions and make adjustments during the license period when circumstances warrant a change; and provide for a right of appeal to the United States Court of Appeal for the District of Columbia under the standard set forth in the Administrative Procedure Act.

The current system authorizes the Copyright Office to deduct CARP administrative costs from royalty fees collected by the Office. The new program would be funded primarily by appropriations.

### *State Sovereign Immunity*

During its 1999 term, the U.S. Supreme Court issued opinions in *Alden v. Maine*, *College Savings v. Florida Prepaid*, and *Florida Prepaid v. College Savings*. These opinions reshaped the scope of state sovereign immunity under the U.S. Constitution and Congress's constitutional authority to abrogate that immunity. Under the new framework, by invoking their immunity, states can escape monetary liability for copyright infringement. Ever since those decisions, the issue of how to reinstate full remedies has been pending before Congress.

### **State Sovereign Immunity and the Intellectual Property Protection Restoration Act**

The Intellectual Property Protection Restoration Act of 2003, H.R. 2344, addresses issues raised by two 1999 Supreme Court rulings. The Court had ruled that under the doctrine of sovereign immunity states cannot be held liable for damages for violations of the federal intellectual property laws even though

states enjoy the full protection of those laws.

Under current law, copyright owners are unable to obtain monetary relief against a state, state entity, or state employee unless the state waives its immunity.



The Register testified on June 17, 2003, in support of H.R. 2344 and its three main components:

- A system to encourage states to waive their immunity by granting fully enforceable intellectual property rights only to those states that do so;
- A circumscribed abrogation of state sovereign immunity in the intellectual property field to provide a remedy against states that choose not to waive their immunity; and
- A codification of the judicially-made rule that, notwithstanding a state's sovereign immunity, the employees of a state may be enjoined by a federal court from engaging in illegal action.

The Register testified that the ability of copyright owners to protect their property and to obtain relief when their rights are violated is central to the balance of interests in the Copyright Act.

The Register noted that making copyright owners endure future infringements without the ability to recover damages from states dilutes the incentive for authors to create and disseminate works for the benefit of the public.

### Peer-to-Peer Networks

The Register testified as part of a panel addressing the subpoena provisions of Title I of the Digital Millennium Copyright Act (DMCA), now codified as § 512(h) of title 17.

This section created safe-harbor provisions that protect Internet Service Providers (ISP) from secondary liability for copyright infringement. In exchange for this protection, § 512 requires an ISP to provide specific assistance to creators who allege that someone is using the ISP's services or systems to host, locate, or transmit infringing content.

Section 512(h) permits copyright owners or their designated agents to obtain subpoenas from the clerk of U.S. district courts. The subpoenas require the ISP to provide information identifying an alleged infringer. Verizon and others have refused to comply with subpoenas from

### *File-Sharing*

The underlying issue in peer-to-peer network piracy is file sharing, which entails unauthorized distribution and copying of copyrighted works. Pioneered in the late 1990s by companies such as Napster, file sharing initially enabled users to "share" digital copies of songs after being indexed on a central computer. Because file sharing enables widespread distribution of copyrighted material without payment of royalties to the creators, Napster's activities were ruled illegal in 2000 in *A&M Records, Inc. v. Napster* before the Ninth Circuit Court of Appeals. File sharing continues, however, through peer-to-peer networks that do not use a centralized server for indexing. As *Metro-Goldwyn-Mayer Studios, Inc. v. Grosser, Ltd.* has shown, this decentralization makes it more difficult to pursue copyright violators in court.



the Recording Industry Association of America arguing that this section of the law does not apply when the infringing material does not reside on the service provider's computers and the service provider is performing "mere conduit" activities. Verizon has also claimed that § 512(h) violates personal privacy by disclosing an Internet user's personal information without any judicial review and without notifying the Internet user of the disclosures.

In her testimony, the Register defended the relevant provisions of the DMCA. She described them as carefully crafted and said they are a balanced bargain. She said the provisions encourage all stakeholders to work cooperatively to realize the potential of the Internet while respecting legal rights.

The Register said: "The law is unambiguous. Using peer-to-peer networks to copy or distribute copyrighted works without permission is infringement, and copyright owners have every right to invoke the power of the courts to combat such activity."

She noted that if the judiciary fails to enforce the DMCA, Congress must step in to provide protection for copyright owners.

### *Databases and "Sweat of the Brow"*

Databases are protected by copyright as compilations. The selection and/or arrangement must represent some creative expression. A list of the top 10 American poets would be copyrightable because the selection is the result of judgment and choice. The individual facts are not protected, so anyone may copy a particular fact from the list. Copying of the list as a whole is not permitted. If there is no original, creative selection involved, the database is not protected. A telephone "white pages" of subscriber information is not protected by copyright, as it represents a collection of facts, compiled without any of the creativity required for copyright protection. Before the Supreme Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*, courts had granted copyright protection to a collection of facts, if the creator of the compilation expended a lot of effort to collect the facts ("sweat of the brow" protection). This "sweat of the brow" doctrine under copyright law was explicitly set aside in the Feist decision.

### **Database Protection**

H.R. 3261, the Database and Collections of Information Misappropriation Act of 2003, prohibits any person from making available in commerce to others a substantial part of the information in a database generated, gathered, or maintained by another person, without the authorization of that person or that person's licensee.

The legislation is intended to close a gap in protection of databases, which can be copied and disseminated easily and rapidly using today's digital and scanning capabilities.

Without legislation, publishers may react by investing less in database production or disseminating databases less broadly. The public would then lose access to important information.

The General Counsel reiterated the Register's recommendation to restore, under a suitable constitutional power, the general level of protection once provided under copyright "sweat of the brow"

doctrine. Such action would provide a level of protection with built-in flexibility for public interest use similar to the fair use doctrine. Balanced legislation could optimize the availability of reliable information to the public.

## Other Legislation

### Distance Education

The Technology, Education and Copyright Harmonization (TEACH) Act became law on November 2, 2003, when the President signed the 21st Century Department of Justice Appropriations Authorization Act (Pub. Law No. 107-273).

The TEACH Act provides an exemption for teachers in accredited, nonprofit educational institutions to use the Internet in delivering instruction to enrolled students. It applies to performance and displays made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of systematic, mediated instructional activity.

The TEACH Act created a new ephemeral copy exemption in § 112 and replaced § 110(2) with a much broader exemption. For example, § 110(2) now does the following: allows the delivery of authorized performances and displays through digital technologies; allows reproduction and distribution to the extent technologically necessary to complete a transmission of a work over a computer network; and expands the categories of works exempted from the public performance right but limits the amount that may be used in these additional categories to “reasonable and limited portions.”

The TEACH Act is based on recommendations contained in the Register’s “Report on Copyright and Digital Distance Education,” which was delivered to Congress in May 1999.

### Vessel Hull Design Protection Act Study

The Copyright Office administers the Vessel Hull Design Protection Act, which was enacted as Title V of the DMCA and took effect on October 28, 1998.

This law requires the United States Copyright Office and the United States Patent and Trademark Office (USPTO) to submit to Congress a joint report by November 1, 2003, on the Act’s effectiveness. The law specifies certain issues that are to be examined, in addition to any other relevant considerations.

On February 13, 2003, notice was published in the *Federal Register* seeking public comment on the issues and announcing a March 27, 2003, public hearing.

At the end of fiscal 2003, the Copyright Office and USPTO were preparing the report.

### Small Webcaster Settlement Act of 2002

On December 4, 2002, the President signed into law the Small Webcaster Settlement Act of 2002 (SWSA), Pub. L. No. 107-321, 116 Stat. 2780. The law amended the §112 and §114 statutory licenses as they relate to small webcasters and noncommercial webcasters.

The Librarian designated SoundExchange as the Receiving Agent in the initial rate setting proceeding that established rates and terms of the webcasting statutory licenses. This law authorized SoundExchange to enter into agreements on behalf of all copyright owners and performers to establish an alternative payment structure for small commercial webcasters and noncommercial webcasters operating under the §112 and §114 statutory licenses.

The Copyright Office is required to publish in the *Federal Register* any agreement entered into pursuant to the SWSA. In fiscal 2003, the Copyright Office published two such agreements.

### Technical Amendments Bill

The Office began work in fiscal 2001 on various technical amendments to the copyright law. These technical amendments, along with technical amendments related to the work of other federal agencies, were included in the “21st Century Department of Justice Appropriations Authorization Act” (Pub. Law No. 107-273), which the President signed into law on November 2, 2002.

## INTERNATIONAL ACTIVITIES

THE COPYRIGHT OFFICE UNDERTAKES its activities in international copyright matters by offering advice to Congress on compliance with multilateral agreements, such as the Berne Convention for the Protection of Literary and Artistic Works, and by working with executive branch agencies to promote copyright principles and protection throughout the world.

Protection against infringement of a copyrighted work in a country depends primarily on that country's laws. Most countries offer protection to foreign works under the aegis of international copyright treaties and conventions.

The Copyright Office's international activities advance the economic health of the United States by promoting adherence to copyright protections that ensure compensation to American creators, thereby encouraging the creation and dissemination of works to the public throughout the world.

The Office works particularly closely with the United States Trade Representative (USTR), the United States Patent and Trademark Office (USPTO) and other parts of the Department of Commerce, and the Department of State, providing expertise in negotiations for international intellectual property agreements and assisting other countries in developing their own copyright laws.

Although the Copyright Office is not a law enforcement agency and has no direct role in law enforcement liaison, many of the Office's obligations and responsibilities intersect with activities in the law enforcement arena. The Office works with the Federal Bureau of Investigation and the Bureau of Customs and Border Protection to provide information and documentation pertaining to specific copyright claims that are the subject of those agencies' investigations.

The Office's staff also promotes the international protection of copyrights by engaging foreign government officials in multilateral and bilateral forums, training sessions, and educational conferences and meetings.

The Copyright Office conducts or participates in a range of intellectual property training to assist countries to comply with international agreements and enforce their provisions. Such training is in the areas of awareness of international standards and the U.S. legal and regulatory environment; substantive legal training in U.S. copyright law; legal reform; and statutory drafting assistance.

The Copyright Office staff participated in numerous multilateral, regional, and bilateral negotiations in fiscal 2003.

The U.S. prepared and submitted to the World Intellectual Property Organization (WIPO) a proposed treaty text on the protection of broadcasting organizations. The U.S.

drafting team consisted of Copyright Office Policy and International Affairs (PIA) attorneys along with attorneys from the USPTO. The U.S. proposal was considered at meetings of the WIPO Standing Committee on Copyright and Related Rights.

The Copyright Office also participated in the meetings of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, and in the annual meeting of the WIPO Advisory Committee on Enforcement.

PIA staff participated in the U.S. delegation to the Intellectual Property Negotiating Group of the Free Trade Area of the Americas and was instrumental in preparations, including the redrafting of U.S. treaty proposals. The goal of the negotiating group is to prepare and finalize an intellectual property chapter for a Free Trade Area of the Americas Agreement. The overall agreement is due to be completed by 2005.

Staff actively participated in the U.S. delegation to preparatory meetings for the World Summit on the Information Society to be held in Geneva in 2003 and Tunis in 2005.

The Office continued to participate on the U.S. team that has been considering a draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters under the auspices of the Hague Conference on Private International Law.



*Participants from eighteen countries at the November 2002 International Copyright Institute.*

Copyright Office staff were instrumental in the drafting and negotiating of the intellectual property provisions of bilateral Free Trade Agreements (FTAs) with Chile and Singapore signed in 2003. They also took part in negotiations of FTAs with Australia, Central America, Morocco, and the Southern Africa Customs Union.

Staff also actively participated in numerous additional bilateral negotiations and consultations during fiscal 2003, including those held with Australia, Bahrain, the Dominican Republic, Egypt, Germany, Hong Kong (People's Republic of China), Japan,

Korea, Malaysia, Mexico, New Zealand, Pakistan, Paraguay, People's Republic of China, the Philippines, Poland, Republic of China (Taiwan), Russia, Spain, Sri Lanka, Thailand, Ukraine, and Vietnam, on issues ranging from enforcement to revision of copyright laws.

Office staff met on a regular basis with foreign officials and visitors interested in learning about the U.S. copyright system and exchanging information about topics of mutual concern.

Staff completed reviews of draft copyright laws for countries such as Australia, Bahrain, Bulgaria, Canada, Egypt, Germany, Hong Kong (People's Republic of China), the Philippines, Poland, Qatar, Republic of China (Taiwan), Russia, Thailand, Ukraine, and Uruguay.

For the USTR, Copyright Office staff provided assistance to nations such as Algeria, Bosnia, Cambodia, Cape Verde, Nepal, Russia, Saudi Arabia, Serbia, Sudan Ukraine, and Vietnam in their World Trade Organization accession processes. They also responded to WTO Trade Policy Review queries regarding U.S. copyright law and policy.

The Copyright Office participated on the interagency Special 301 Committee which evaluates the adequacy and effectiveness of intellectual property protection and enforcement throughout the world. This annual process, established under U.S. trade law, is one of the tools used by the U.S. government to improve global protection for U.S. authors, inventors, and other holders of intellectual property rights.

In the past year, the Office advised and assisted the Bureau of Customs and Border Protection in resolving issues and developing new procedures related to border enforcement.

The Register participated in a number of symposia and conferences outside the United States, including programs in Germany, Greece, Hungary, Panama, and South Korea. Staff also participated in symposia and conferences sponsored by WIPO and the USPTO Visiting Scholars Program.

The Office's International Copyright Institute (ICI) held a five-day International Symposium on the Effect of Technology on Copyright and Related Rights for nineteen copyright experts and government officials from around the world on November 18–22, 2002. Participants came from Argentina, Belarus, Bolivia, Cambodia, Chile, People's Republic of China, Costa Rica, Egypt, Georgia, Ghana, India, Republic of Korea, Lithuania, Mongolia, Mozambique, Pakistan, Poland, and Thailand. Participants discussed treaties and legislation that relate copyright principles to cyberspace and the digital age. The ICI is designed to further international understanding and support of strong copyright protection, including the development of effective copyright laws and enforcement overseas.

## LITIGATION

ALTHOUGH THE OFFICE does not enforce the provisions of title 17, it may be involved in litigation in several ways.

- It can choose to intervene under §411(a) in a case where registration has been refused.
- It may be sued under the Administrative Procedure Act.
- It may be asked to participate in litigation in a number of ways: by assisting in the preparation of an *amicus curiae* brief in support of a particular position; by assisting the Department of Justice in defending a particular action; or by bringing a suit under §407 to compel the deposit of copies of the best edition of a work.

The Copyright Office continued to respond to requests for assistance from the Department of Justice relating to copyright litigation, including three cases before the U.S. Supreme Court.

### ***Eldred v. Ashcroft (formerly Eldred v. Reno)***

The Copyright Office assisted the Solicitor General in successfully defending the constitutionality of the Sonny Bono Copyright Term Extension Act of 1998. As detailed in the fiscal 2002 report, the plaintiffs, who exploited works in the public domain, challenged the constitutional validity of the Sonny Bono Copyright Term Extension Act.

#### ***Sonny Bono Copyright Term Extension Act***

President Clinton signed this Act into law [Pub. Law No. 105-298, 112 Stat. 2827 (1998)], extending for an additional 20 years the term of copyright protection in the United States. The copyright term for most works became life of the author plus 70 years.

Plaintiffs argued that the extension unlawfully deprived them of the ability to use works that would have gone into the public domain but for the extension.

Both the district court and the United States Court of Appeals for the District of Columbia Circuit found the Act constitutional. The United States Supreme Court granted the Appellants' petition for a *writ of certiorari*.

The Copyright Office assisted the U.S. Solicitor General's Office at the Department of Justice in drafting the government's briefs and in preparing the Solicitor General for oral argument.



After hearing oral arguments on October 9, 2002, the Supreme Court issued its opinion on January 15, 2003, upholding the constitutionality of the twenty year term extension.

### ***Veck v. Southern Building Code Conference International***

The Solicitor General's recommendations to the Supreme Court in *Veck v. Southern Building Code Conference International* (SBCCI) involved the question of whether a model building code is entitled to copyright protection after it is enacted into law in a particular jurisdiction. When the U.S. Supreme Court invited the Justice Department to comment on whether it should grant *certiorari* in this case, the Copyright Office assisted the Solicitor General in developing the response.

SBCCI is a nonprofit organization that facilitates public and private involvement to develop model building codes. Peter Veck is a resident of North Central Texas where the cities of Anna and Savoy enacted SBCCI's building codes into law by incorporating them by reference. Mr. Veck then placed SBCCI's model codes on his website as the building codes for the two cities.

The U.S. Court of Appeals for the Fifth Circuit held that the copyright in a privately developed model law does not give the copyright owner the right to restrict the reproduction and dissemination of copies of the law of a jurisdiction which was enacted by incorporating the model law by reference, even when the copier made copies from the model law itself.

Since, in the Copyright Office's view, the Court of Appeals reached the correct result, the Office recommended to the Solicitor General that the Supreme Court not accept the case for review. On June 27, 2003, the Supreme Court denied SBCCI's petition for a *writ of certiorari*.

### ***Dastar Corporation v. Twentieth Century Fox Film Corporation***

The Copyright Office urged the Solicitor General to file an *amicus curiae* brief with the Supreme Court in *Dastar Corporation v. Twentieth Century Fox Film Corporation*, a Lanham Act case involving a claim of misattribution of the origin of a public domain work, expressing concern that the Court's ruling should not adversely affect U.S. treaty obligations to protect the moral rights of authors.

The issues before the Court concerned Twentieth Century Fox's Lanham Act claim against Dastar for copying and distributing *Campaigns in Europe*, a slightly altered version of *Crusade in Europe*, a television series subsequently released in videotape format. The television series was based on General Eisenhower's book of the same title.

Fox claimed that Dastar's distribution of *Campaigns in Europe* under its own name, without attribution to Fox, was reverse passing off, a form of unfair competition actionable under §43(a) of the Lanham Act.

The district court and the U.S. Court of Appeals for the Ninth Circuit agreed and awarded Fox damages that were double Dastar's profits from the sale of the videos.

The Office informed the Solicitor General that §43(a) of the Lanham Act is an important component of the United States' compliance with its international copyright law obligations. When the United State acceded to the Berne Convention, §43(a), which forbids false designations of origin, was one of the ways in which an author's moral right of attribution was protected, thereby avoiding the necessity to enact specific moral rights legislation in order to comply with Berne. The Office expressed concern that if the Supreme Court were to rule against Fox, it should be careful to do so in a manner that would not adversely affect U.S. treaty obligations to protect moral rights.

The Solicitor General's *amicus* brief took the position that §43(a) should not be construed as barring uncredited copying of public domain works, but observed that "in acceding to the Berne Convention, Congress carefully considered the United States' obligations to protect moral rights under Article 6bis and concluded that the protections available under then-existing domestic law, including the Lanham Act, were sufficient to meet those obligations."

The Supreme Court held in *Dastar* that §43(a) does not prevent the unaccredited copying of an uncopyrighted work and that its protection against "false designation of origin" does not extend to false designations of authorship.

### ***Southco, Inc. v. Kanebridge***

This case involved claims of copyright in individual part numbers. The Office assisted the Department of Justice in preparing an *amicus curiae* brief taking the position that part numbers cannot be copyrighted.

A panel of the Third Circuit agreed, reversing a grant of preliminary injunction, and remanded the case to the district court for further proceedings. The district court granted summary judgment in favor of the defendant, despite the plaintiff's submission of a new declaration purporting to show the creativity involved in the assignment of the part numbers.

On appeal, early in 2003, a different panel of the Third Circuit distinguished the earlier panel's decision and held that the new declaration could support a finding of copyrightability in the part numbers, reversing the district court's decision. The entire Court of Appeals then granted rehearing of the case *en banc*. The Office again assisted the Justice Department

in preparing an *amicus* brief in support of the defendant, reiterating its position that part numbers cannot be copyrighted. Oral argument before the *en banc* court was scheduled for October 2003.

### ***Metro-Goldwyn-Mayer Studios Inc. v. Peters and Universal City Studios LLP v. Peters***

In these cases, the Copyright Office defended its rejection of cable and satellite claims filed by two motion picture studios on the basis of the studios' failure to file their claims on a timely basis in accordance with the Office's regulations.

On December 2, 2002, the Copyright Office rejected the cable and satellite claims filed by Metro-Goldwyn-Mayer Studios Inc. (MGM) and Universal City Studios LLP (Universal) for their shares of the cable and satellite royalty fees collected in 2000.

On February 4, 2003, and May 16, 2003, MGM and Universal filed suits, respectively, against the Register. They sought judicial review of the Office's decisions. They claimed that the Register's decision was arbitrary, capricious, contrary to law, and a denial of due process.

The Office moved to dismiss their cases or, in the alternative, for summary judgment. The Office argued that the Office properly rejected their claims in accordance with the Office's rules and that the complainants had been extended a meaningful opportunity to be heard.

The studios each opposed the Office's motions and filed cross-motions for summary judgment. Copyright Office staff worked with the Department of Justice to prepare briefs defending the Office's decision.

A hearing was scheduled in the MGM case for December 1, 2003. Both cases should be decided in fiscal 2004.

### ***Bonneville Broadcasting v. Peters***

As reported in Fiscal Years 2001 and 2002, AM/FM radio broadcasters appealed the decision of the United States District Court for the Eastern District of Pennsylvania upholding the Copyright Office's final rule that AM/FM broadcast signals transmitted simultaneously over a digital communications network, such as the Internet, were not exempted by 17 U.S.C. § 114(d)(1)(A) from the digital performance right for sound recordings.

During fiscal 2003, the case was argued before the United States Court of Appeals for the Third Circuit. As of September 30, 2003, the case was still pending before the Third Circuit.