

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 Year 2004 included the following:

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

The Copyright Office completed 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.

During Fiscal Year 2003, the Office published a Notice of Inquiry in the *Federal Register* requesting that those who wished to do so could propose a particular class of works where noninfringing uses had been, or were likely to be in the next three years, adversely affected as a result of the prohibition on circumvention.

The Office received comments that proposed 83 exemptions to the prohibition and more than three hundred reply comments supporting or opposing those proposed exemptions. The Office held several days of hearings in Washington, DC, and Los Angeles, California, and sent follow-up questions to a number of the witnesses requesting additional clarification for the record.

On October 28, 2003, the Librarian of Congress, on the recommendation of the Register of Copyrights, announced the classes of works subject to the exemption from

the prohibition against circumvention of technological measures that control access to copyrighted works. The four classes of works exempted were:

- (1) Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites, or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of email.
- (2) Computer programs protected by dongles (security or copy protection devices for commercial microcomputer programs) that prevent access due to malfunction or damage and which are obsolete.
- (3) Computer programs and video games distributed in formats that have become obsolete and that require the original media or hardware as a condition of access. A format is considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.
- (4) Literary works distributed in e-book format when all existing e-book editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the e-book's read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format.

Anticircumvention Rulemaking

As part of the Digital Millennium Copyright Act, Congress prohibited the circumvention of access controls placed on works by copyright owners. By protecting access to works, Congress sought to encourage copyright owners to make their works available online in new and varied ways to benefit the public. Access entails authorized entry into a work as distinct from various protected uses. Because there were concerns that this new prohibition might adversely affect noninfringing uses of works in unforeseeable ways, Congress created a recurring rulemaking proceeding to monitor the marketplace every three years. As a result of the rulemaking, the Register of Copyrights is required to make a recommendation to the Librarian of Congress on whether any particular classes of works should be exempted from the general prohibition on circumvention for the ensuing three-year period.

These exemptions will remain in effect through October 27, 2006.

Adoption of Regulations Governing Legal Processes

On February 23, 2004, the Copyright Office published in the *Federal Register* a notice seeking comment on a proposed new rule to govern various legal processes, including service of process upon the Office, requests for production of documents, and requests for testimony by Office personnel. Because the Office had previously operated without any centralized processing mechanism or a published regulation addressing this topic, requests requiring timely responses were frequently misdelivered. The proposed rule sought to make the process more efficient and effective by providing comprehensive guidelines for the Office and its employees, outside agencies, and other persons regarding the appropriate procedures.

In crafting its proposed rule, the Office consulted with the Department of Justice and evaluated similar rules in other federal agencies. The Office received and considered one comment.

On June 30, 2004, the Office published an announcement that it was adopting the proposed rules substantively as published, and that the new rules would be effective July 30, 2004. Since then, representatives of the Office of the General Counsel have worked with the operating divisions to ensure the Copyright Office staff's adherence to the new rules.

Request for Reconsideration Rulemaking

On July 13, 2004, the Copyright Office proposed a regulation to govern an applicant's request that the Office reconsider its decision to refuse an application for copyright registration. With a few modifications, this notice of proposed rulemaking incorporates the procedures the Office implemented in 1995.

Applicants for registration have two sequential opportunities to seek reconsideration of a Copyright Office decision to refuse registration. At the first level of reconsideration, the Copyright Office's Examining Division will review its initial decision to refuse registration. If not satisfied with that response, the applicant can file for the second level of reconsideration, at which time the Review Board will review the refusal to register the subject work. The proposed regulation provides that the Register of Copyrights, the General Counsel, and the Chief of the Examining Division, or their respective designees, constitute the Review Board.

The notice of proposed rulemaking would codify these procedures in the *Code of Federal Regulations*, as well as address applicable deadlines and mail and hand-

delivery requirements. It would clarify that the procedures for reconsideration also apply to the Office's refusals to register mask works and vessel hull designs. The name of the Copyright Office "Board of Appeals" would change to the "Review Board." The Copyright Office received no comments from the public regarding the proposed rulemaking by the September 13, 2004, deadline for initial comments.

Acquiring Materials for the Library of Congress

Best Edition

Works deposited with the Copyright Office constitute a significant portion of Library of Congress collections. The Copyright Office's regulations specify the acceptable form for a mandatory deposit, as well as the deposit requirements for copies and phonorecords deposited in connection with registration of claims to copyright. Where more than one edition has been published, the best edition is the one that best meets the Library of Congress's collection needs. In general, the Library is entitled to receive two best edition copies or phonorecords of works published in the United States regardless of the quantity or quality of other U.S. editions that may also have been published before the time of deposit. When the deposit requirement for a particular work has been met under section 407, the Library cannot claim deposit of future editions unless they represent newly copyrightable works under section 103.

Motion Pictures

In matters relating to the best edition requirement, owners of published motion pictures must also submit copies of their works for the Library of Congress to use and include in its collections. Copyright owners may satisfy this mandatory deposit requirement concurrently with filing an application for copyright registration. On February 26, 2004, the Copyright Office issued a final rule to amend the guidelines for "best edition" of published motion pictures. This rule accounts for recent technological developments and clarifies the requirements. There are two significant changes to the best edition statement. One is that 70-millimeter positive print is added as the most desirable film format where the original production negative size is greater than 35 millimeters. The other is that the DVD format has been added to the list of acceptable video formats. The Office issued the rules with a request for comments that were due by March 29, 2004. Since the Copyright Office received no comments, the rule became

effective on April 26, 2004. One film, *NASCAR 3D: The Imax Experience*, has already been deposited under this new film preference.

Audio and Audiovisual Transmissions

At the time Congress considered the 1976 Copyright Act, it recognized the need for the Library to acquire for its collections, in addition to published works, certain widely disseminated, unpublished works, namely radio and television programs. To that end, Congress enacted the American Television and Radio Archives Act (ATRA Act) to enable the Library of Congress to collect both published and unpublished transmission programs of “public or cultural interest, historical significance, cognitive value, or otherwise worthy of preservation” (Transitional and Supplementary Provisions of the Copyright Act of 1976, §113(a)(1)). The ATRA Act authorizes the Librarian of Congress to reproduce, compile, and distribute television and radio transmission programs of regularly scheduled newscasts and on-the-spot coverage of news events under certain circumstances. On July 1, 2004, the Library’s Office of the General Counsel issued enabling regulations prescribing terms and conditions under which such reproduction, compilation, and distribution may occur (LCR 321-10, 69 FR 39837, July 1, 2004).

The Register of Copyrights is charged, under section 407(e) of the Copyright Act, with establishing regulations to govern the recording and acquiring by other means of unpublished audio and audiovisual transmission programs to enable the Library further to augment its collection of transmissions to the public. On August 5, 2004, the Copyright Office published a Notice of Proposed Rulemaking on Library Recording of Audio and Audiovisual Transmission Programs (69 FR 47396, August 5, 2004). This notice proposed the amendment of existing Copyright Office regulations to broaden the scope of the types of unpublished transmission programs the Library of Congress is authorized to acquire. Under the proposed regulation, the Library may record fixed, unpublished radio, cable, and satellite television programs as well as unpublished Internet transmission programs that have been fixed in a copy or phonorecord. The Copyright Office regulations already provide for the Library to obtain copies of unpublished television transmission programs, either by recording fixations or by demanding copies in the form of a transfer, loan, or sale at cost. The revised regulation makes similar provisions for radio transmission programs and includes programs made available by digital communications networks such as the Internet.

The proposed regulation would establish a presumption that radio programs are unpublished and are fixed simultaneously with transmission. The presumption of nonpublication regarding radio programs is based on empirical Copyright Office experience, factual information from surveys conducted in the Office, and surveys of databases covering registered works. The proposed regulation would provide a procedure for any copyright owner whose work is recorded to overcome the presumption of nonpublication.

Announcement about Mail Delivery

Consistent with the latest developments for screening materials that come to congressional offices and the Library of Congress, the Copyright Office published in the *Federal Register* new procedures for delivering materials to this Office. On December 16, 2003, it announced that effective December 29, 2003, the Library of Congress, including the Copyright Office, would no longer accept on-site deliveries from nongovernmental, in-person, commercial couriers or messengers. Instead, such deliveries will be directed to the Congressional Courier Acceptance Site for screening. These procedures do not apply to large commercial carriers such as Federal Express or United Parcel Service, which will continue to deliver to the off-site mail facility.

On February 4, 2004, the Office announced that effective February 9, 2004, all hand deliveries from private parties intended for the Copyright Office General Counsel, including all comments in rulemaking proceedings, all filings in a Copyright Arbitration Royalty Panel (CARP) proceeding, and all litigation-related materials, must be delivered to the Public Information Office (PIO) located in room 401 of the James Madison Memorial Building (LM-401). This announcement emphasized that such documents still needed to contain “Office of the General Counsel, U.S. Copyright Office” in the address for PIO to route the material properly.

Notice and Recordkeeping under Statutory Licenses

On March 11, 2004, the Copyright Office issued an interim regulation specifying the records that services, such as webcasters and retransmitters of broadcast radio stations, must maintain with respect to their use of copyrighted sound recordings on the Internet pursuant to the compulsory licenses provided by sections 112 and 114 of

the Copyright Act. In addition, the interim regulation set forth the requirements for the notification that a service must give to sound recording copyright owners of the service's intention to make use of the compulsory licenses. The purpose of the notice and recordkeeping interim regulation is to provide the designated agent that collects the statutory royalties with sufficient information to determine how those royalties are to be divided among copyright owners.

Those interim regulations, however, apply only prospectively to the use of sound recordings commencing during the second calendar quarter of 2004, leaving unanswered the question of what records must be maintained for the use of sound recordings for the "historic period" from October 28, 1998 (the date the statutory licenses first became available for services other than preexisting subscription services) to March 31, 2004.

On October 8, 2003, the Office published a notice of inquiry seeking public comment on the form and content that such regulations should take in light of the fact that few records had been kept. The submitted comments confirmed that data for the historic period simply did not exist to any meaningful degree. The commenters suggested the use of a proxy in lieu of reporting requirements for the historic period. The proxy most favored by the commenters was the data that preexisting subscription services had provided to SoundExchange (the designated agent responsible for distributing royalties to copyright owners and performers) in accordance with the notice and recordkeeping requirements imposed for transmissions made under 17 U.S.C. §114(f). The Office agreed that the data provided by preexisting subscription services for the corresponding period would be the most appropriate proxy. The Office received no comments opposing the proposed amendment to allow for the use of this proxy, and published the final rule at the end of Fiscal Year 2004. The Office expects to issue future regulations regarding the acceptable formats for maintaining and transmitting electronic records about the use of sound recordings.

Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries

Section 115 of the Copyright Act offers a statutory license to make and distribute phonorecords of a nondramatic musical work once authorized phonorecords of that work have been distributed to the public in the United States. Under the terms of this

license, licensees must adhere to notice and recordkeeping regulations issued by the Copyright Office. The rules as originally adopted required a licensee to serve a separate notice directly on the copyright owner for each work the licensee intended to use. Although somewhat cumbersome, these rules served the needs of those who made and distributed physical phonorecords.

In 1995, however, Congress amended the scope of the section 115 license to include the distribution of a phonorecord of a nondramatic musical work by means of a digital phonorecord delivery. Concomitantly, the Office amended its notice and recordkeeping regulations to reflect the change in the law, but these initial changes did not go far enough to address the needs of certain digital music providers that anticipated using most, if not all, of the musical recordings embodied in the sound recordings currently on the market. Consequently, the Office again considered amendments to its regulations and, on June 22, 2004, adopted final rules to address the needs of both the copyright owner and the user in a digital environment. In addition to minor changes to the fee structure for filing notices with the Copyright Office, the new rules now allow a licensee to serve notice on either the copyright owner or an authorized agent of the copyright owner, to list multiple titles in a single notice, to use an address other than the one listed in the public records of the Copyright Office, and to submit the notice electronically.

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

To reflect the change in the Consumer Price Index, the Copyright Office each year adjusts the 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, Broadcast Music, Inc., and SESAC, Inc. On December 1, 2003, the Office published the new rates, adjusting for a 2 percent cost of living increase. The revised rates became effective on January 1, 2004.

Waiver of Regulation for Filing Claims to Cable, Satellite, and DART Royalty Fees

Copyright owners must file claims with the Copyright Office each year to receive a portion of the royalties collected the preceding calendar year under 17 U.S.C. §111, §119, and Chapter 10. The Office's regulations require that a claimant either mail or hand-deliver the claim to the Office of the General Counsel during the prescribed filing period. In Fiscal Year 2002, the Copyright Office waived its mailing requirement and offered several additional means for delivering a cable, satellite, or DART claim. The Office took this action in response to a severe disruption of mail delivery caused by the threat of anthrax-contaminated mail.

By Fiscal Year 2003, mail delivery to the Office had resumed. However, incoming mail continued to be irradiated and diverted to an off-site location for screening. Because this procedure resulted in delays, the Copyright Office again waived its mailing requirement.

These delays in mail delivery continued into Fiscal Year 2004, requiring the Copyright Office once again to waive its mailing requirement and to offer additional means for delivering a cable, satellite, or DART claim to the Office. Copyright owners were allowed to submit their claims on-line, or, in the case of the DART claims, via a facsimile submission.

[Docket numbers and dates of *Federal Register* documents issued during Fiscal Year 2004 are listed in an appendix of this report.]

REPORTS AND LEGISLATION

The Copyright Office provides reliable advice and 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 seven congressional hearings during Fiscal Year 2004. The subjects of these hearings were:

Before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary:

- The section 119 cable and satellite carrier statutory license on February 24, 2004 [related to the Satellite Home Viewer Extension and Reauthorization Act of 2004 (H.R. 4501)]
- The section 115 compulsory license on March 11, 2004
- Oversight of the operations of the U.S. Copyright Office on June 3, 2004
- The Family Movie Act of 2004 (H.R. 4586) on June 17, 2004
- Internet streaming of radio broadcasts on July 15, 2004, at which the General Counsel testified on the Register's behalf

Before the Senate Committee on the Judiciary:

- The Satellite Home Viewer Extension and Reauthorization Act of 2004 (S. 2013) on May 12, 2004, at which the General Counsel testified on the Register's behalf
- The Inducing Infringement of Copyrights Act of 2004 (S. 2560) on July 22, 2004

The Satellite Home Viewer Extension and Reauthorization Act of 2004

Section 119 of the Copyright Act currently makes a compulsory license available to satellite carriers who retransmit distant over-the-air television broadcast stations. However, this license will expire at the end of calendar year 2004. The Register of Copyrights testified on February 24, 2004, before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary, and the General Counsel testified before the Senate Judiciary Committee on May 12, 2004.

The Register and General Counsel testified in favor of a five-year reauthorization of the section 119 satellite license, which helps satellite providers deliver programming to millions of Americans and compensates the owners of the content of that programming.

The Register and General Counsel spoke in favor of harmonizing the examination requirements of the section 119 satellite license with the section 111 cable license. They noted that the Office has generally “opposed statutory licensing for copyrighted works,” preferring that licensing “be determined in the marketplace by copyright owners through the exercise of their exclusive rights.” However, as long as there is such a license for the cable industry, there should also be one for the satellite industry.

In addition, the Register supported amendments to the section 119 license, including excising outdated provisions. She also spoke in favor of congressional

recognition that the section 119 license applies to satellite carriers of over-the-air *digital* broadcast TV stations. This would protect local network broadcasters whose station is not provided by a satellite carrier from having their viewers watch another affiliate of the same network on their satellite TV service, rather than the local network affiliate.

The Senate's version of the legislation, S. 2013, was reported out of the Senate Judiciary Committee on June 17, 2004. The House version, H.R. 4518, was reported out of the House Judiciary Committee on September 7, 2004. The proposed legislation would extend the section 119 statutory licenses for an additional five years.

Section 115 Compulsory License

The section 115 compulsory license allows for the making and distribution of physical phonorecords and digital phonorecord deliveries. The United States is one of only two countries that have a compulsory license for these works.

On March 11, 2004, the Register of Copyrights testified before the Subcommittee on Courts, the Internet, and Intellectual Property in a hearing to examine whether the compulsory license for making and distributing phonorecords promotes or hinders the rollout of digital music services, especially those that offer digital downloads.

Her testimony focused on the inadequacies of the current licensing scheme to accommodate new business models in a digital marketplace, noting that the current law is cumbersome and expensive to utilize and lacks specificity with respect to its coverage.

Although the Register offered no concrete legislative solutions, she did suggest replacing the current statutory licensing scheme with a blanket collective licensing system similar to the one used by the performing rights organizations throughout the world. She noted that a collective licensing system allows a user to obtain a license for use of hundreds

Statutory Licenses Governing Over-the-Air Broadcast Signals

Cable Statutory License:

- *The section 111 license allows a cable system to retransmit both local and distant over-the-air radio and TV broadcast stations to its subscribers, who pay a fee for such service. This license is permanent.*

Satellite Statutory Licenses:

- *The section 119 license permits a satellite carrier to retransmit distant over-the-air TV broadcast stations (but not radio) to its subscribers for private home viewing. This license was set to expire at the end of 2004.*
- *The section 122 license permits satellite carriers to retransmit local over-the-air TV (but not radio) broadcast stations to their subscribers for commercial and private home viewing. This license is permanent.*

of thousands of songs, often with a single payment and without the administrative burdens placed upon a statutory licensee.

The Register recognized that other parties may favor different approaches, and proposed that the matter be studied further before settling upon a particular approach. The Register also identified other issues in her written testimony that merit serious consideration for legislative action, including clarification of the types of reproductions that fall within the scope of the license, expansion of the license to cover both reproductions and performances of musical works in the course of either digital phonorecord deliveries or transmissions of performances, establishment of a single entity to receive and disburse royalties collected under the section 115 license, and revision of the payment provisions to require quarterly payments rather than monthly payments.

In light of the issues raised during this hearing and the need for change voiced by the Register and the users of this license, the Chairmen and Ranking Members of the Judiciary Committee and its Subcommittee on Courts, the Internet, and Intellectual Property asked the Register to host a series of informal meetings during the summer with parties interested in discussing ways to modernize section 115. However, given the short time frame in which the meetings occurred, the parties were not able to agree upon any concrete legislative proposals. Nevertheless, the parties identified principal issues of concern and agreed that further discussions were needed in order to formulate a workable legislative solution.

The Family Movie Act of 2004

This bill would provide that the making of limited portions of audio or video content of a motion picture imperceptible by or for the possessor of an authorized copy of that motion picture for private use in a household is not an infringement as long as no fixed copy of the altered version of the movie is created.

This legislation was prompted by a lawsuit involving motion picture studios, directors, and companies that provide filtering software that skips past or mutes material in DVDs of motion pictures that some people may find objectionable. Studios and directors argued that the software violates the exclusive right to prepare derivative works (*i.e.*, changed versions). The Register testified on June 17, 2004, based on her understanding of the technology and how it worked, that there was no infringement of any copyright rights. Thus, legislation was neither necessary nor desirable.

The Family Movie Act of 2004 nevertheless passed the House of Representatives on September 28, 2004, as part of the Piracy Deterrence and Education Act of 2004 (H.R. 4077) (see page 32).

Internet Streaming of Radio Broadcasts

On July 15, 2004, the Subcommittee on Courts, the Internet, and Intellectual Property convened an oversight hearing to explore issues related to the streaming of copyrighted sound recordings over the Internet and to begin an examination of the potential impact of new technologies and devices, such as digital radio, upon the balance of interests embodied in the copyright law.

The General Counsel testified on behalf of the Office. He recounted the Office's recent experiences in administering the section 112 and 114 statutory licenses that allow a webcaster to stream music over the Internet. Specifically, he discussed the CARP proceeding that established the initial rates and payment terms for webcasters operating under a statutory license, the ongoing rulemaking proceeding to establish notice and recordkeeping requirements, and the rulemaking proceeding that concluded that simulcasts of AM/FM radio programs over the Internet are not exempt from the digital performance right.

The testimony also addressed issues associated with digital radio. While voicing strong support for the continued rollout of digital radio, the Office raised concerns about new digital radio recorders and computer software programs that are capable of making perfect, digital copies of sound recordings from over-the-air digital radio broadcasts. The testimony specifically noted that, should copying of digital radio broadcasts become commonplace, it would threaten legitimate record sales in the marketplace and disrupt the careful balance that Congress has already struck between the record industry and the purveyors of new digital technologies.

While the Office offered no discrete solutions to combat these specific dangers, it did recommend that Congress grant an exclusive and unlimited performance right to the copyright owners of sound recordings or, in the alternative, consider requiring use of new technological methods to prevent unlawful copying.

The Inducing Infringement of Copyrights Act of 2004

This bill would make intentional inducement of infringement unlawful. It is intended to permit enforcement against infringement to move from multiple lawsuits against

Peer-to-Peer Infringement

The underlying issue in peer-to-peer network piracy is so-called 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 that were 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. Grokster, Ltd. has shown, this decentralization makes it more difficult to pursue copyright violators in court.

individuals toward suits against the businesses such as peer-to-peer file-sharing services that are facilitating and profiting from the infringement.

At a hearing on July 22, 2004, the Register testified in support of this bill, because it improves the existing law of secondary liability for copyright infringement, although she stated that the bill solved only part of the problem. This area of the law is essential for effective copyright protection, but it has become confused as courts have struggled to apply the existing common law doctrines to the new peer-to-peer services, with conflicting results.

After the hearing, Senate sponsors of the bill asked the Register to meet with interested parties to discuss alternatives, evaluate whether such parties could reach a consensus on an approach to this legislation, and provide her recommendations to the Senators. After the parties failed to reach a consensus, the Register recommended an approach that she believed accommodated the legitimate concerns of all parties and would provide a basis for developing a consensus while meeting the goals expressed by the bill’s cosponsors. The Register’s recommended approach focused on the business model of the alleged infringer

and on the extent to which the alleged infringer relied on infringement to support the business, rather than focusing on the technology the defendant chose to employ. This approach would render the bill technologically neutral. However, despite lengthy discussions among interested parties, no further action was taken on the bill.

Other Legislation

Vessel Hull Design Protection Act Study

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

law required the United States Copyright Office and the United States Patent and Trademark Office to submit to Congress a joint report by November 1, 2003, on the Act's effectiveness.

The study specifically considered issues and questions posed by Congress, and gathered information via a request for public comment as well as by means of a public hearing. The report included, in part, the following findings and conclusions:

- Only “scant and anecdotal” evidence exists that the VHDPA suppresses infringement;
- The Copyright Office registered 156 claims to vessel hull protection between 1999 and 2003, which represents an unknown, but suspected small, percentage of the total new designs eligible for protection under the VHDPA;
- The extent to which the VHDPA has encouraged creation of new vessel hull designs is debatable;
- The effect that the VHDPA has had on the price of protected vessel hulls is unknown;
- The marine industry opposes a requirement for detailed engineering drawings and depictions of protected designs to be included with the registration application for fear of facilitating infringement;
- The present 10-year term of protection is not objectionable, although one witness suggested extending it to 15 years;
- Industry representatives expressed concern that Internet publication of their designs could facilitate infringement, although no one cited any actual example of infringement; and
- Publishing protected designs on the Internet is the best means of creating a publicly available record as required by the VHDPA.

Copyright Royalty and Distribution Reform Act of 2004 (H.R. 1417)

As passed in the House, this legislation would replace the Copyright Arbitration Royalty Panels (CARPs) with three full-time Copyright Royalty Judges (CRJs) whom the Librarian of Congress would appoint after consultation with the Register of Copyrights. The CRJs would set rates and terms for all statutory licenses except the satellite license, and would determine distributions of royalty fees collected by the Copyright Office for all licenses.

In the new program, the CRJs, as Library of Congress employees, would serve six-year renewable terms, funded through appropriations. As a result, cost would no longer be a barrier to participation in the process. This is in contrast to the current *ad hoc* CARP arbitrators who are funded by the participants. The intent of this legislation is to remove cost barriers to participation in the rate-setting process, ensure consistent decision making, and preserve institutional expertise.

The use of CRJs would also significantly change the process for adjusting royalty rates by requiring the CRJs to reconsider the rates and terms for the statutory licenses every five years, establish a new procedure for considering voluntary agreements that would set rates and terms applicable to all users, grant CRJs continuing jurisdiction to correct any technical or clerical errors or to modify any terms in response to unforeseen circumstances, establish new rules of discovery for rate setting proceedings, and allow (and, with respect to novel questions of copyright law, require) the CRJs to seek the interpretation of the Register of Copyrights on points of law.

The Copyright Royalty and Distribution Reform Act of 2004 (H.R. 1417) passed the House of Representatives on March 3, 2004. The Register of Copyrights had testified on the bill in April 2003. On September 29, 2004, the Senate Judiciary Committee approved the bill with some significant changes in the discovery procedures and a provision for review of final determinations of the CRJs by the Register of Copyrights for errors of law. The full Senate is expected to take up the bill early in Fiscal Year 2005.

Piracy Deterrence and Education Act of 2004 (H.R. 4077)

This Act passed the House of Representatives on September 28, 2004. It would amend the copyright law to provide for, among other things: (1) criminal penalties for unauthorized recording of motion pictures in a motion picture exhibition facility (e.g., a theater); (2) enhancement of the criminal and civil provisions with respect to “pre-release” works; and (3) removal of the copyright registration requirement as a prerequisite for the United States to file suit. On September 8, the House Judiciary Committee appended the Family Movie Act of 2004 (H.R. 4586) to this legislation (see page 28).

The Artists’ Rights and Theft Prevention Act (S. 1932)

This Act, which passed the Senate on June 25, 2004, would provide criminal penalties for unauthorized recording of motion pictures in a motion picture facility. It would

also create a new “preregistration” process in the Copyright Office for works being prepared for commercial distribution and provide criminal and civil penalties for the unauthorized distribution of such “pre-release” copyrighted works.

The Protection of Intellectual Rights Against Theft and Expropriation (PIRATE) Act (S. 2237)

This Act, which passed the Senate on June 25, 2004, would amend the copyright law to authorize the Attorney General to commence a civil action against anyone who violates section 506 of the Copyright Act. The proposed law would clarify that imposition of a civil penalty under this section does not preclude any other relief, including a criminal remedy. It also would direct the Attorney General to create training programs on intellectual property and to designate at least four U.S. Attorney’s Offices to implement this law.

The Enhancing Federal Obscenity Reporting and Copyright Enforcement Act of 2004 (S. 1933)

This Act was reported out of the Senate Judiciary Committee on May 20, 2004. It addresses the effect of harmless errors in a certificate of copyright registration, the computation of statutory damages in cases involving compilations and derivative works, and the prosecutions of criminal copyright infringement by the Department of Justice.

The Database and Collections of Information Misappropriation Act of 2003 (H.R. 3261)

This bill 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.

The House Judiciary Committee approved this bill in January 2004, but the House Energy and Commerce Committee, to which it was subsequently referred, reported it unfavorably and approved a bill (H.R. 3872) taking another approach.

Digital Media Consumers' Rights Act (H.R. 107)

This legislation would, among other things, permit users to defeat a technological lock that controls access to and use of a copyrighted work if doing so would enable fair use and other noninfringing activities. The bill also would allow entities to traffic in devices or services that circumvent technological controls on access if such devices or services enabled noninfringing uses. It was referred to the House Committee on Energy and Commerce, which conducted a hearing but took no further action on the bill.

Public Domain Enhancement Act (H.R. 2601)

This Act would amend the copyright law to require the Register of Copyrights to charge a one dollar fee for maintaining the copyright in a published U.S. work commencing 50 years after the date of first publication or on December 31, 2004, whichever occurs later. Payment would be required every ten years thereafter. If the maintenance fee is not received within six months after the stated due date, copyright protection would be terminated.

The Benefit Authors without Limiting Advancement of Net Consumer Expectations (BALANCE) Act (H.R. 1066)

This Act focuses on fair use. It would allow first sale rights for online content and would provide for circumvention to enable fair use and meet consumer expectations.

Oversight of the Copyright Office

On June 3, 2004, the Register provided testimony on the Office's operations, reengineering program, policy and legal work, and Fiscal Year 2005 budget request. She highlighted the Office's significantly improved processing time for registrations and recordations, a feasibility study for converting hardcopy records to digital format, the steady progress on all reengineering fronts, assistance in the drafting of a WIPO-proposed treaty text on the protection of broadcasting organizations, the decisions in the second section 1201 rulemaking, the funding request for construction of a new depository facility at Fort Meade, and the costs of CARP reform legislation (H.R. 1417).

INTERNATIONAL ACTIVITIES

The Copyright Office undertakes international copyright activities 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 worldwide.

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 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 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 to enforce their provisions. Such training is in the areas of awareness of international standards and the U.S. legal and regulatory environment; U.S. copyright law; legal reform; and statutory drafting assistance.

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 participated in numerous multilateral, regional, and bilateral negotiations in Fiscal Year 2004. Office staff formed part of the U.S. delegation in meetings of the WIPO Standing Committee on Copyright and Related Rights, which considered issues relating to a possible treaty on the protection of broadcasting organizations, as well as a meeting of the WIPO Ad Hoc Committee on Enforcement and an *ad hoc* informal meeting regarding the Protection of Audiovisual Performers. The Copyright Office also participated in the meetings of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore.

Staff were instrumental in the drafting and negotiation of the intellectual property provisions of bilateral Free Trade Agreements recently signed between the United States



Participants in the March 2004 International Copyright Institute gather in the Madison Building mezzanine.

and Australia, Bahrain, a group of Central American nations and the Dominican Republic, Morocco, Panama, and Thailand. Staff were also involved in ongoing negotiation of agreements with a group of Andean nations and the South African Customs Union, and work on the Free Trade Agreement of the Americas.

The Office actively participated in the U.S.

delegation to the World Summit on the Information Society, the first phase of which was held in Geneva in December 2003. The second phase of the Summit is to be held in Tunis in 2005.

Staff continued to participate in 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.

The Office also actively participated in numerous additional bilateral negotiations and consultations during the year, including those held with Brazil, China (the People's Republic of China), the Dominican Republic, Germany, India, Japan, Korea, Kuwait, Mexico, Pakistan, Paraguay, the Philippines, Poland, Qatar, Russia, South Korea, Sri

Lanka, Taiwan (Republic of China), Thailand, Ukraine, and the United Arab Emirates, among others, on issues ranging from enforcement to copyright law revision.

For the USTR, the Office provided assistance to nations such as Algeria, Andorra, Azerbaijan, Bahamas, Belarus, Bhutan, Bosnia Herzegovina, Cape Verde, Ethiopia, Kazakhstan, the Lao People's Democratic Republic, the Lebanese Republic, the Russian Federation, Samoa, Saudi Arabia, Serbia and Montenegro, the Seychelles, Sudan, Tajikistan, Tonga, Ukraine, Uzbekistan, Vietnam, and Yemen in their World Trade Organization (WTO) accession processes and provided responses regarding U.S. copyright law and policy to the WTO Trade Policy Review queries.

The Copyright Office participated in March 2004 on the interagency Special 301 Committee that 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 the U.S. government uses to improve global protection for U.S. authors, inventors, and other holders of intellectual property rights.

The Register participated in a number of symposia and conferences outside the United States, including programs in Canada, Ireland, Germany, and Mexico.

In March 2004, the Register visited Hong Kong to participate as the expert from the United States in a world-wide symposium sponsored by WIPO and the Hong Kong Intellectual Property Office on Copyright in Educational Institutions and Libraries. She presented two papers, one titled "Copyright Protection Systems and Digital Rights Management: Exceptions for Educational Institutions and Libraries," and another titled "Internet and Digital Licenses for Educational Institutions and Libraries."

At the behest of the U.S. Department of State, the Register visited Chile and Uruguay in May 2004. In Santiago, Chile, the Minister of Culture invited her to speak at a two-day conference on copyright. She also spoke to professors in higher education, teachers, and librarians at the Chilean Library of Congress in Valparaiso, and to students, faculty, and the public at the University of Chile law school. The Register met with a committee of Chilean senators who focus on intellectual property, a member of the House of Representatives, government officials who deal with criminal enforcement of copyright, and various copyright owner groups. She then visited Montevideo, Uruguay, where she met with a senator who championed recent copyright amendments. She gave a two-hour presentation at a program sponsored by the Uruguayan Copyright Society and the U.S. Embassy. In both countries, interviews and press conferences resulted in significant newspaper features.

The Office also participated in symposia and conferences in Egypt and Belgium on digital copyright issues, Italy on audiovisual works and digital copyrights, Washington, DC, on China copyright issues, and the European Union symposium on copyright and creativity in Ireland.

The Office, through its International Copyright Institute (ICI), hosted two symposia during the year. The first, on March 8 through 12, 2004, for a 14-member delegation from the People's Republic of China, was titled "The Effect of Technology on the Protection of Copyright and Related Rights." China is a focus for copyright education to improve compliance with international copyright obligations. The second was a five-day international symposium on May 3 through 7, 2004, co-sponsored with WIPO, for representatives from 17 developing countries and countries in transition titled "Emerging Issues in Copyright and Related Rights for Developing Countries and Countries in Transition."

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 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 Office was involved in several cases where the Office was a party, and it continued to respond to requests for assistance from the Department of Justice relating to copyright litigation.

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

As reported in Fiscal Year 2003, in these cases the Copyright Office defended its rejection of cable and satellite claims filed by Metro-Goldwyn-Mayer Studios, Inc. (MGM) and Universal City Studios, LLP (Universal) respectively for their shares of compulsory royalty fees collected in year 2000 on the basis of the studios' failure to file their claims on a timely basis in accordance with the Office's regulations.

MGM and Universal each filed suits against the Register of Copyrights seeking judicial review of the Office's decision. Each studio claimed that the Register's decision was arbitrary, capricious, contrary to law, and a denial of due process. The Office moved to dismiss the cases or, in the alternative, for summary judgment. The Office argued that it had properly rejected the claims in accordance with the Office's regulations, 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. Oral argument in the MGM case occurred on December 1, 2003; the court denied Universal's request for oral argument because of the duplication of the issues and arguments in the two cases.

On March 24, 2004, the district court issued opinions in both cases granting the Register's motions for summary judgment and denying MGM's and Universal's cross-motions. The court found that in each case the Register's regulations regarding the timely filing of cable and satellite claims were a "model of clarity and brevity." Therefore, her application of these regulations to MGM's and Universal's claims was not arbitrary, capricious, or contrary to law. Similarly, the court found that MGM and Universal had been afforded an ample opportunity to be heard, and therefore were not denied due process. MGM and Universal each have appealed the decisions to the United States Court of Appeals for the District of Columbia Circuit.



The statue "The Contemplation of Justice" seated before the United States Supreme Court

Coach, Inc. v. Peters

Coach, a manufacturer of expensive leather and twill products such as purses and briefcases, filed a complaint in the Southern District of New York against the Register of Copyrights under the Administrative Procedure Act (APA). This suit constituted the first challenge to a refusal to register a work under the APA since the Office implemented its present system for reconsideration of a refusal. Coach alleged that the Copyright Office's refusal to register its signature "CC" fabric design was arbitrary and an abuse of discretion. The design was a simple arrangement of pairs of the letter "C" on a plain background, one version black on black, the other brown on tan.

Following oral argument on cross-motions for summary judgment, Judge Sprizzo announced that he was denying both motions without prejudice and putting the case on the suspense calendar, without prejudice to Coach's filing an infringement action against an alleged infringer, at which point the issues could be raised again.

Bonneville Broadcasting v. Peters

As reported in Fiscal Years 2001, 2002, and 2003, 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. In other words, the process of webcasting or streaming of broadcast signals is copyright infringement unless it is done with the copyright owners' permission or pursuant to the section 114 statutory license.

In 2003, the case was argued before the United States Court of Appeals for the Third Circuit. On October 17, 2003, the court upheld the United States District Court's decision, indicating that "the Copyright Office's arguments are persuasive."

Kahle v. Ashcroft

Plaintiff Kahle challenged the constitutionality of four copyright statutes: the 1976 Copyright Act, the Berne Convention Implementation Act, the Copyright Renewal Act of 1992, and the Sonny Bono Copyright Term Extension Act, arguing that among other things the removal of various formalities such as copyright notice and renewal violate

the First Amendment and the copyright clause of the Constitution. The Government has filed a motion to dismiss, which is scheduled to be heard in October 2004.

Luck's Music Library, Inc. v. Ashcroft and Peters

The plaintiffs brought a declaratory judgment action claiming that section 514 of the Uruguay Round Agreements Act, which restored copyrights in foreign works, violated the copyright clause of the Constitution and the First Amendment. The court granted the Government's motion to dismiss.

The court found that Congress did not overstep its bounds, because there was ample legislative precedent, starting with the very first Congress, for Congress to grant retroactive copyright protection for works in the public domain. The court concluded that the copyright restoration provision was consistent with the constitutional purpose to promote the progress of science, and that it did not run afoul of the copyright law's constitutional requirement of originality.

With respect to the First Amendment argument, the court rejected the plaintiffs' claim by relying on the Supreme Court's decision in *Eldred v. Ashcroft*, in which the court stated that while the "First Amendment protects the freedom to make one's own speech, it bears less heavily when speakers assert the right to make other people's speeches."

The plaintiffs have appealed this decision to the United States Court of Appeals for the District of Columbia.

Golan v. Ashcroft and Peters

This case challenges the Sonny Bono Copyright Term Extension Act and the restoration provisions of the Uruguay Round Agreements Act. The Uruguay Round Agreements Act claim is essentially the same as the one argued in *Luck's Music Library v. Ashcroft*.

The Government filed a motion to dismiss the complaint for failure to state a claim upon which relief may be granted. The court granted the motion to dismiss the claim challenging the Sonny Bono Copyright Term Extension Act, but denied the remainder of the motion. On September 2, 2004, the plaintiff filed a second amended complaint adding as a defendant Register of Copyrights Marybeth Peters. The defendants' motion for summary judgment is pending.

*Recording Industry Association of America, Inc. v.
Verizon Internet Services, Inc.*

Section 512(h) of the Copyright Act, added by the Digital Millennium Copyright Act, permits a copyright owner to obtain a subpoena directing an online service provider to identify an alleged infringer. Verizon challenged the applicability of section 512(h) to online service providers who act as “mere conduits” under section 512(a), and also objected to the applicability of section 512(h) on various constitutional grounds. The Government intervened in this action to defend the constitutionality of section 512(h). In December 2003, the U.S. Court of Appeals for the District of Columbia Circuit held that the subpoena provision of the Digital Millennium Copyright Act did not apply to section 512(a) service providers, and did not reach the constitutional issues.

*Recording Industry Association of America, Inc. v.
Charter Communications, Inc.*

The Recording Industry Association of America, Inc. (RIAA) sought an order to compel Charter Communications, an Internet service provider, to comply with subpoenas issued pursuant to 17 U.S.C. §512(h). On November 17, 2003, the United States District Court for the Eastern District of Missouri issued an order granting RIAA’s request. Charter appealed.

The Government has entered the case as intervener and *amicus curiae* to defend the applicability of section 512(h) to “mere conduit” online service providers covered by section 512(a) and to defend the constitutionality of section 512(h).

The Office also assisted the Department of Justice in a number of other, similar cases involving applicability of section 512(h) to “mere conduit” service providers covered by section 512(a).

321 Studios v. Metro-Goldwyn-Mayer Studios, Inc.

321 Studios, a manufacturer and distributor of software that decrypted and copied copyrighted content on DVDs, sued several motion picture studios for declaratory relief, seeking a declaration that it did not violate 17 U.S.C. §1201, part of the Digital Millennium Copyright Act of 1998, and that section 1201 is unconstitutional. The Government intervened to defend the constitutionality of section 1201. The district

court granted summary judgment against 321 Studios, holding that it had violated section 1201 and that section 1201 is constitutional.

Paramount Pictures Corp. v. 321 Studios

Motion picture studios not parties to *321 Studios v. Metro-Goldwyn-Mayer Studios, Inc.* sued 321 Studios for violation of 17 U.S.C. §1201. In defense, 321 Studios challenged the constitutionality of section 1201, and the Government intervened to defend the constitutionality of the Digital Millennium Copyright Act. The district court granted a preliminary injunction against 321 Studios' manufacture and distribution of its DVD-copying software. On September 10, 2004, 321 Studios withdrew its challenge, and the court dismissed the action with prejudice.

Cooper v. Library of Congress

The Copyright Office General Counsel assisted the U.S. Attorney's office for the District of Columbia in defending the Copyright Office in litigation filed by a federal prisoner alleging that the Office failed to register a collection of unpublished songs. Copyright Office records revealed that the Copyright Office received but returned plaintiff's submission due to plaintiff's failure to pay the associated fee. A motion to dismiss is currently pending.

508 Notices

Section 508 of the Copyright Act requires the clerks of the courts to send written notification to the Register of Copyrights of any action filed under the Copyright Act and of any final order or judgment issued thereon. The Office is collecting and reviewing data regarding the extent to which federal courts comply with section 508's requirements. The Office will use such data to determine what changes should be made to this section, including the possibility of permitting electronic filing of section 508 notices and the possibility of repealing the requirement. Staff attorneys will monitor the current practices for a one-year period, and plan to meet with the Administrative Office of the U.S. Courts to discuss any proposed changes.