



The Copyright

Office is the primary source in the U.S. government for legal and technical advice on copyright matters. It assists the Congress, executive branch agencies, and the judiciary on copyright and related issues.

Regulatory Activities, Policy Assistance, and Litigation

COPYRIGHT OFFICE REGULATIONS



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egulations issued during FY 2001 included the following:

SECTION 1201 RULEMAKING

Pursuant to 17 U.S.C. §1201 of the Digital Millennium Copyright Act (DMCA), in October 2000 the Copyright Office issued its rulemaking to determine whether any particular classes of works would be exempt from the general prohibition on the conduct of circumvention of technological protection measures used to protect access to copyrighted works. After an exhaustive review and analysis of the comments, reply comments, post-hearing comments, hearing testimony, and consultation with the National Telecommunications and Information Agency of the Department of Commerce, the Register recommended, and the Librarian of Congress approved, two exemptions for: (1) compilations consisting of lists of websites blocked by filtering software applications; and (2) literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence. The Office posted the entire record of the rulemaking on its website. This regulation concluded the first of the reviews mandated by Congress in the DMCA and covers the period of October 28, 2000, through October 27, 2003. Under the law, the Office must undertake this review every three years.

GROUP REGISTRATION OF PHOTOGRAPHS

On August 16, 2001, the Office issued final regulations to establish a new procedure for group registration of published photographs, resolving a lengthy and controversial rulemaking proceeding designed to address complaints photographers had raised with the Office and Congress about the registration process. The Office's goals were to facilitate the registration process for photographers who want to register their published photographs, while at the same time increasing the accuracy of the public record.



The new group registration procedures permit registration of an unlimited number of photographs published within the same calendar year on one application with one fee, provided the photographs were all taken by the same photographer and that the copyright claimant is the same for all. This new rule expands on the formats permitted as deposit copies accompanying applications for registration and also liberalizes the deposit requirements for unpublished photographs registered as an unpublished collection. Although the Library of Congress does not rely on deposits submitted for registration to sustain its collection of photographs, the regulations identify acceptable formats in terms of the Library's preference.

Another feature of the regulation designed to make registration easier is the elimination of the requirement of a specific date of publication for each photograph, provided that each photograph within the group was first published within three months before the date on which an application is received by the Office. This regulation has made it easier for photographers to register their works, which ultimately results in a better public record of copyrighted photographs.

NOTICES OF TERMINATION OF TRANSFERS AND LICENSES COVERING THE EXTENDED RENEWAL TERM

The Office published a proposed modification to its regulation governing notices of termination of transfers and licenses covering the extended renewal term to include changes introduced by the Sonny Bono Copyright Term Extension Act (CTEA). The original regulation was limited to notices of termination made under 17 U.S.C. §304(c) regarding the additional 19 years added to the extended renewal term by the 1976 Copyright Revision Bill. The CTEA added 20 years to the extended renewal term, and added 17 U.S.C. §304(d), creating a new termination right covering the additional 20-year period. The proposed new regulation would establish procedures for terminating under either 17 U.S.C. §304(c) or §304(d). While the requirements for notices of termination under either section were similar, the Office proposed that notices issued under 17 U.S.C. §304(d) contain a reference to 17 U.S.C. §304(c) and affirmatively state that the rights being terminated were not the subject of a previous termination. Comments were due by June 18, 2001.



NOTIFICATION TO REGISTER OF COURT ACTIONS

Before a copyright owner or the author of a U.S. work can bring an action for copyright infringement, he or she must have a certificate of registration or a refusal to register from the U.S. Copyright Office. When registration is refused, the applicant is entitled to institute an action for infringement if he or she has served a notice of the action, with a copy of the complaint on the Register in accordance with 17 U.S.C. §411(a). In cases where registration has been refused, the Register of Copyrights has the option to become a party to the action with respect to the issue of registrability of the copyright claim. In such cases, the Register has 60 days to enter an appearance after service of the notice.

In order for the Register to make a determination whether to intervene, timely service is critical. In 1994 the Office published an address where such notices could be served. Thereafter, some parties failed to use the proper address, resulting in delays in notice to the Office. Consequently, the Office published a final rule establishing that proper service would either be first class mail to a designated address, or by hand delivery to the General Counsel of the Copyright Office. The rule also provides an address for service of a second copy to the U.S. Department of Justice.

TECHNICAL AND HOUSEKEEPING AMENDMENTS

The Office amended its regulations to make them consistent with the term extension provisions enacted in the Sonny Bono Copyright Term Extension Act. In the course of its annual housekeeping review, it also updated addresses given to the public, eliminated regulations no longer necessary because of changes in the law, and corrected errors.

Statutory Licensing Regulations

During Fiscal Year 2001, the following regulations relating to statutory licenses were issued:

COST OF LIVING ADJUSTMENT FOR PERFORMANCE OF MUSICAL COMPOSITIONS BY COLLEGES AND UNIVERSITIES

Each year, the Office adjusts the rates for the public performance of musical compositions in the ASCAP, BMI, and SESAC repertories by public broadcasting entities licensed to colleges and universities to reflect the change in the Consumer Price Index. On December 1, 2000, the Office published the rates, adjusting for a 3.4 per cent cost of living increase that went into effect January 1, 2001.



DEFINITION OF A SERVICE FOR THE PUBLIC PERFORMANCE OF SOUND RECORDINGS

The RIAA filed a petition with the Office requesting a rulemaking to determine the scope of the definition of a “service” under 17 U.S.C. §114 of the Copyright Act, which grants the copyright owners of sound recordings a limited digital performance right. The Office conducted the rulemaking and issued its final rule amending the regulatory definition of a “service” for purposes of the statutory license under 17 U.S.C. §114 to clarify that broadcasters who transmit their over-the-air radio signal over the Internet are not exempt from copyright liability under 17 U.S.C. §114 (d)(1)(A). The Office determined that to exempt such transmissions from copyright liability under the statutory license would thwart Congress’s intent in enacting the Digital Performance Right in Sound Recordings Act of 1995.

DEFINITION OF AN INTERACTIVE SERVICE FOR THE PUBLIC PERFORMANCE OF SOUND RECORDINGS

The Digital Media Association (DiMA) requested that the Office interpret the definition of an “interactive service” in 17 U.S.C. §114 of the Copyright Act to exclude webcasters of recorded music who allow some degree of consumer influence on programming decisions. The Office sought public comment on how to proceed with DiMA’s petition and whether a rulemaking proceeding was necessary or appropriate. After reviewing the public comments, the Office determined that DiMA did not present a persuasive case that a rulemaking on this issue was necessary, feasible or desirable, and thus denied its petition for rulemaking.

MECHANICAL AND DIGITAL PHONORECORD DELIVERY COMPULSORY LICENSE

The Office issued a notice of inquiry regarding a petition for rulemaking received from the RIAA. RIAA requested that the Office resolve, through a rulemaking proceeding, the issue of what types of digital transmissions of prerecorded music are general digital phonorecord deliveries (DPDs) and what types are incidental DPDs. The RIAA petition focuses on two types of digital music deliveries: On Demand Streams and Limited Downloads. At the end of the fiscal year, the Office was considering the comments filed in response to the notice of inquiry.

CABLE AND SATELLITE STATUTORY LICENSES

The Office conducted a rulemaking proceeding to clarify the requirements for the submission of claims for royalties under the cable statutory license, 17 U.S.C. §111, and the satellite statutory license, 17 U.S.C. §119. The Office decided to reconsider the question of who may file a cable or satellite claim and under what circumstances a joint claim may be filed. The necessity for the rulemaking resulted from the discovery of certain reporting problems in the claim-filing process that came to light in a recent cable distribution proceeding. After consideration of



public comments, the Office issued a final regulation requiring that each claim filed must identify the copyright owner and that a party who files a joint claim on behalf of multiple copyright owners must list the name and address of each copyright owner to the joint claim.

DETERMINATION OF REASONABLE RATES AND TERMS FOR THE DIGITAL PERFORMANCE OF SOUND RECORDINGS

The Office issued a notice of proposed rulemaking requesting comment on proposed regulations that will govern the RIAA collective when it functions as the designated agent receiving royalty payments and statements of accounts from nonexempt, subscription digital transmission services which make digital transmissions of sound recordings under the provisions of 17 U.S.C §114 of the Copyright Act. On May 8, 1998, the Librarian of Congress issued a final rule setting the rates and terms for the 17 U.S.C. §114 license for preexisting subscription services. The RIAA appealed the Librarian's decision to the United States Court of Appeal for the District of Columbia Circuit. The court upheld the rate set by the Librarian but remanded for further consideration certain terms imposed on RIAA. Upon remand, the RIAA filed a petition to establish terms governing the RIAA collective. Since none of the other parties to the rate adjustment proceeding objected to the petition, the Office published the notice of proposed rulemaking to seek comment on the regulations proposed by RIAA. The Office extended the period to file comments to the proposed regulations to next fiscal year.

COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS, INCLUDING DIGITAL PHONORECORD DELIVERIES

The Office issued a notice of proposed rulemaking in order to improve the efficiencies associated with the service and filing of a Notice of Intention to Use the 17 U.S.C. §115 license. This section permits the use of a nondramatic musical work, including the distribution of a phonorecord by means of a digital phonorecord delivery, without the consent of the copyright owner if certain conditions are met and royalties are paid. One of the conditions is that the person intending to use the 17 U.S.C. §115 license must provide notice to the copyright owner of a musical work of his or her intent to use the copyright owner's work under the statutory license. The notice of proposed rulemaking sought comments on proposed amendments to the regulations governing the content and service on copyright owners of such notices of intent to use the license. At the end of the fiscal year, the Office was considering the comments received in response to the notice of proposed rulemaking.

[Docket numbers and dates of *Federal Register* documents issued during Fiscal Year 2001 are listed in an appendix of this Report.]



REPORTS AND LEGISLATION

The Copyright Office provides expert assistance to Congress on copyright matters by advising Congress on proposed changes in U.S. copyright law; analyzing and assisting in the drafting of copyright legislation and legislative reports; and undertaking studies on current issues for Congress. Congressional action on copyright legislation during this fiscal year included the following:

Digital Millennium Copyright Act (DMCA) Section 104 Report

In August 2001, the Register delivered to Congress the Report required under section 104 of the DMCA.

The Office’s mandate in this study was to evaluate “the effects of the amendments made by [title 1 of the DMCA] and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17 U.S.C.; and the relationship between existing and emergent technology and the operation of sections 109 and 117...”

The Report was the product of two rounds of written comments from the public, a day-long public hearing, and extensive deliberations by the Register in conjunction with the Policy and International Affairs (PIA) staff and the General Counsel’s staff.

The Report focused specifically on three proposals that were put forward during consultations with the public: creation of a “digital first sale doctrine”; creation of an exemption for the making of certain temporary incidental copies; and the expansion of the archival copying exemption for computer programs in section 117 of title 17 U.S.C.

Digital Millennium Copyright Act (DMCA)

The DMCA, (Public Law 105-304 (1998)), was enacted into law on October 28, 1998. This Act added a new Chapter 12 to title 17 of the U.S. code which among other things, prohibits circumvention of access control technologies employed by copyright owners to protect their works. The DMCA was the foundation of an effort by Congress to implement United States treaty obligations and to move the nation’s copyright law into the digital age. The enactment of the DMCA was only the beginning of an ongoing evaluation by Congress on the relationship between technological change and U.S. copyright law.

Section 104 of the DMCA requires the Register of Copyrights and the Assistant Secretary for Commerce for Communications and Information jointly to evaluate (1) the effects of title 1 of the DMCA and the development of electronic commerce and associated technology on the operation of sections 109 (first sale doctrine) and 117 (exemption allowing owners of copies of computer programs to reproduce and adapt them for use on a computer), and (2) the relationship between existing emergent technology and the operation of those sections.



In the Report, the Register declined to endorse recommendations by some of the public commenters to expand the first sale doctrine into a “digital first sale doctrine” that would permit the owner of a digital copy of a work to transmit the work to another person, provided the first digital copy was deleted. Although it was argued that transmitting and deleting a work in digital form is just the same as disposing of a book, the Report identifies a number of significant differences that warrant the different treatment currently accorded to these activities under the law. Even assuming that the deletion step in “forward and delete” proposals for a digital first sale doctrine could be enforced — which the Register found unlikely — a secondary market in downloads of works would have a far greater impact on the legitimate interests of copyright holders than the sale of used books. In short, concerns about likely harm to authors and publishers were more compelling than speculative benefits to the general public of a digital first sale doctrine.

Regarding temporary incidental copies, the specific problem that was brought to the attention of the Office was the demands made by music publishers for royalties based on the temporary buffer copy of a portion of a sound file that is made in computer memory while decoding certain music streams on the Internet. The Report concluded that while these buffer copies are reproductions under the Copyright Act, they should not give rise to liability when they are made in order to carry out a licensed performance of the music. The Report went on to recommend that, although the fair use doctrine would apply to many — if not most — buffer copies made during a licensed stream, the law should be amended to preclude liability in these circumstances.

The final subject discussed in the Report was the archival exemption under section 117. It was pointed out during the Copyright Office hearing that section 117 is out of step with the way that computer users back up their systems. The Office agreed with this assessment and recommended that the law be amended.

Hearings on the Report had been scheduled in the House Subcommittee on Courts, the Internet, and Intellectual Property in September and October 2001, but were postponed until later in the year as a result of the events of September 11, 2001.



Distance Education

S. 487, the Technology, Education and Copyright Harmonization (TEACH) Act, was introduced in the Senate on March 7, 2001, to promote digital distance education and implement the recommendations made in the Register's report to Congress on Distance Education in May 1999. The Register testified before the Senate Committee on the Judiciary on March 13, 2001, along with representatives of copyright owners and educational institutions. In her testimony, the Register said “[p]art of the challenge for this Office in formulating recommendations addressing digital distance education was to remove technologically obsolete legal provisions as an impediment to carrying forward the distance education activities sanctioned by Congress in 1976 into the twenty-first century, without killing a nascent and potentially important market for right holders. We concluded that this could best be accomplished by using the policy line drawn by Congress in 1976 as the point of reference for a technological updating of section 110(2) that would take account of the nature and capabilities of digital networks.”

After the Senate Judiciary Committee hearing on the bill, the Committee asked the Register to facilitate negotiations between the affected parties in order to craft legislation that all the affected parties could support. The Office convened discussions among the parties to obtain consensus on outstanding issues. Over a period of several weeks, representatives of copyright owners, nonprofit educational institutions and nonprofit libraries met at the Office to negotiate these issues.

On June 7, 2001, a bill representing the outcome of those negotiations was passed by the full Senate. The Register testified before the House of Representatives Subcommittee on Courts, the Internet, and Intellectual Property on S. 487 on June 27, 2001, expressing support for the bill as passed by the Senate. On July 11, 2001, the Subcommittee moved the bill forward and referred it to the full Judiciary Committee without amendment.

The Technology, Education and Copyright Harmonization (TEACH) Act

would update sections 110(2) and 112 of the Copyright Act to allow the same activities to take place using digital delivery mechanisms that were permitted under the policy balance that was struck by Congress when the law was enacted in 1976, while introducing safeguards to minimize the additional risks to copyright owners that are inherent in exploiting works in a digital format.

Section 403 of the DMCA directed the Copyright Office to make recommendations to Congress on how to promote distance education through digital technologies. The Office was specifically directed to consider the following issues: 1) the need for a new exemption; 2) the categories of works to be included in any exemption; 3) appropriate quantitative limitations on the portions of works that may be used under any exemption; 4) which parties should be eligible for any exemption, which parties should be eligible recipients of distance education material under any exemption; 5) the extent to which use of technological protections measures should be mandated as a condition of eligibility for any exemption; and 6) the extent to which the availability of licenses should be considered in assessing eligibility for any exemption, and other issues as appropriate.

The bill would, *inter alia*, expand the coverage of rights in section 110(2) to allow the delivery of authorized performances and displays through digital technologies, expand the categories of works exempted from the performance right but limit the amount that may be used in these additional categories to “reasonable and limited portions,” and emphasize the concept of “mediated instruction” to ensure that the exemption is limited to what is, as much as possible, equivalent to a live classroom setting.

The Work Made for Hire and Copyright Corrections Act of 2000

The Work Made for Hire and Copyright Corrections Act of 2000, which was enacted on October 27, 2000, amended the definition of “work made for hire” to restore it to the way it was before. This legislation also made noncontroversial corrections to the copyright law, removed expired sections, and clarified miscellaneous provisions governing fees and record keeping procedures.

Sovereign Immunity

The Office advised congressional staff on legislative drafting, monitored case law developments, and actively participated in discussions with congressional staff, the Patent and Trademark Office, and affected private parties regarding the issue of whether or not States should be held accountable for infringement.

Oversight Hearing

On May 2, 2001, in an oversight hearing, the Register of Copyrights provided testimony to the House of Representatives Subcommittee on Courts, the Internet, and Intellectual Property on two major Copyright Office initiatives, reassessment and planning regarding information technology (IT) and the business process reengineering (BPR) effort.

[Additional information and topics covered at the oversight hearing are contained in the Management section of this report.]



INTERNATIONAL ACTIVITIES



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

The Office continued to work in tandem with executive branch agencies on international matters, particularly with the United States Trade Representative, the Patent and Trademark Office, and the Departments of State and Commerce.

International Copyright Relations

A map of international copyright treaties and conventions is included in the Appendices and Tables portion of this report.

The Policy and International Affairs (PIA) staff participated in numerous multilateral negotiations in FY 2001. The Register and a PIA staff attorney were members of the U.S. delegation to the December 2000 Diplomatic Conference held in Geneva, Switzerland under the auspices of the World Intellectual Property Organization (WIPO) to seek international protection for audiovisual performers, principally television and screen actors. The Copyright Office also assisted with preparations for the meetings of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore.

The Office participated, as well, as part of the U.S. delegation, in meetings of the WIPO Standing Committee on Copyright and Related Rights, which considered issues relating to possible treaties on the protection of broadcasting organizations and producers of non-copyrighable databases.

PIA staff were part of the U.S. delegation to the World Trade Organization Council on TRIPS. The TRIPS Council is responsible for monitoring the operation of the TRIPS Agreement (the intellectual property component of the WTO agreements), and, in particular, how members comply with their obligations under it. The Council is in the process of reviewing the intellectual property laws of developing countries for compliance with TRIPS obligations.



In June 2001, PIA staff also participated on the U.S. delegation to a diplomatic conference, under the auspices of the Hague Conference on Private International Law, which met to consider a draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. As part of the U.S. government's process of public consultation in preparation for the diplomatic conference, the Copyright Office sponsored a day-long roundtable discussion which focused upon intellectual property aspects of the draft Convention. The Convention would create harmonized rules of jurisdiction in international civil cases among its parties, as well as common rules for recognizing and enforcing the resulting judgments in other member countries.

A PIA staff member was part of the U.S. delegation to the Intergovernmental Copyright Committee meeting which was held in June 2001 at the UNESCO headquarters in Paris. The main questions under the Committee's consideration were to (1) determine copyright liability of service and access providers in the context of electronic transmissions; (2) examine the experience in settling copyright conflicts in the digital environment; and (3) consider various practical aspects of the artists resale right (*droit de suite*).

Office staff were members of the U.S. delegation to the Intellectual Property Negotiating Group of the Free Trade Area of the Americas in October 2000, and were instrumental in preparations, including the drafting of U.S. treaty proposals. The goal of the negotiating group is to prepare and finalize an IP chapter for a Free Trade Area of the Americas Agreement. The overall agreement is due to be completed by 2005.

PIA staff participated in the drafting and negotiation of the intellectual property provisions of a bilateral Free Trade Agreement with the Kingdom of Jordan. The Office is currently involved in the negotiation of intellectual property chapters of bilateral Free Trade Agreements with Chile and Singapore, including the drafting of proposed text.

The Office also actively participated in numerous additional bilateral negotiations and consultations during the year, including those held with China, Hong Kong, Israel, Japan, Korea, Macau, Malaysia, the Philippines, Russia, Taiwan, and Ukraine, on issues ranging from enforcement to copyright law revision. 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. They completed reviews of draft copyright bills for other countries. The Office additionally provided assistance to the United States Trade Representative in the World Trade Organization (WTO) accession processes for nations such as China and Vanuatu and provided responses regarding U.S. copyright law and policy to the WTO Trade Policy Review queries.



The Copyright Office was represented 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.

The Register participated in a number of symposia and conferences outside the United States, including programs in China and Canada. The Office also participated in symposia and conferences sponsored by WIPO, the United States Information Agency (USIA), the U.S. Agency for International Development (USAID), and the Commerce Department's Commercial Law Development Program. Training on copyright was provided for the State Department's Foreign Service Institute.

The Register led a Copyright Office delegation to China, at the invitation of the National Copyright Administration of China. The delegation discussed China's implementation of its WTO commitments, copyright enforcement, and developments in U.S. copyright law.

In conjunction with WIPO, the Office's International Copyright Institute (ICI) held an International Symposium on the Effect of Technology on Copyright and Related Rights from October 30 – November 3, 2000, in Washington, DC. Seventeen copyright experts and government officials from around the world attended. 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 section 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 either 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 section 407 to compel the deposit of copies of the best edition of a work.

Bonneville v. Peters

In response to a final rule published on December 11, 2000, broadcasters of AM/FM radio stations brought an action against the Register seeking judicial review of the Office's determination 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). The Recording Industry Association of America, Inc. (RIAA) intervened as a defendant. The broadcasters claimed that the final rule exceeded the Office's statutory authority, and if within the Office's authority, was arbitrary. The Office and RIAA moved for summary judgment, claiming that the final rule was within the Office's authority and reasonable. The radio station owners cross-moved for summary judgment. The court granted summary judgment, holding that the Office had sufficient statutory authority to issue its final rule; moreover, the court observed that the Office's rule was not just reasonable, but that after full examination of the statute, its legislative history, and congressional intent, the court would have reached the same conclusion as the Office in the absence of its required deference to it. Plaintiffs have appealed.

New York Times v. Tasini

The only copyright case heard by the Supreme Court this term was one where the Court had to grapple with the question of what a provision enacted in 1976 meant in a digital environment. Freelance authors sued the petitioners, who are newspaper publishers and data base owners, for copyright infringement. The authors had given the newspaper and periodical publishers permission to publish their articles but argued that the publishers exceeded the scope of that permission when the publishers and database owners also put or authorized copies of the articles in both CD ROM databases and NEXIS, an online database. The publishers argued that they were permitted to reproduce the articles in the databases under the limited presumptive privilege of in 17 U.S.C. §201(c). The district court had ruled in favor of the publishers and the appellate court in favor of the freelance authors.



The Office participated in discussions with the Justice Department and the Patent and Trademark Office about whether the U.S. government or the Copyright Office should file an *amicus* brief. The Justice Department determined that no government brief should be filed.

Ultimately, the Supreme Court agreed with the Court of Appeals and ruled in favor of the freelance authors finding that the newspaper publishers and database owners exceeded the scope of the limited privilege to reproduce articles published in periodicals when they put or authorize the use of the articles in the databases. The Court left the remedial issues open for initial airing and decision in the District Court.

Universal City Studios, Inc., v. Corley (formerly Universal City Studios, Inc., v. Reimerdes)

The defendant operates and publishes a magazine and website for computer hackers that posted decryption software known as DeCSS for downloading by the public. The computer code was capable of decrypting the Content Scrambling System (CSS) employed as a technological protection measure which protects access to motion pictures embodied in digital versatile disks (DVDs). The defendant's website also established links to several other websites that claimed to offer DeCSS for download. Plaintiffs brought suit under 17 U.S.C. §1201 claiming that the defendant's posting of DeCSS violated the provisions prohibiting the trafficking or distribution of circumvention devices to the public. The district court preliminarily enjoined the defendants from posting the DeCSS software on their Internet website. Following a trial on the merits, the district court held that CSS effectively controls access to copyrighted works within the meaning of 17 U.S.C. §1201(a)(2). Having determined that defendants violated the anti-trafficking provision of 17 U.S.C. §1201(a)(2), the court additionally enjoined the defendant from linking to other websites offering DeCSS. The defendant appealed to the United States Court of Appeals for the Second Circuit arguing, *inter alia*, that 17 U.S.C. §1201 was unconstitutional.

The Office assisted the Department of Justice and the United States Attorney for the Southern District of New York with the Government's intervention defending the constitutionality of the statute. The Second Circuit heard oral arguments in the case, and a decision is pending.

CSU, L.L.C., v. Xerox Corporation

This antitrust suit was brought by a group of independent service organizations against Xerox for its refusal to sell or license copyrighted and patented parts, manuals, and diagnostic software. CSU competed with Xerox in the repair of its copiers and printers. The question presented was whether the unilateral refusal to sell or license intellectual property protected by a



patent or copyright was absolutely immune from a claim of monopolization and attempted monopolization under Section 2 of the Sherman Antitrust Act. The United States Court of Appeals for the Federal Circuit held that in the absence of any indication of illegal tying, fraud on the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws. In the copyright context, the Federal Circuit agreed with other courts that a valid copyright creates a rebuttable presumption that a refusal to deal is for a legitimate business purpose and that subjective motivation alone is insufficient to rebut this presumption in the absence of evidence that the copyrights were obtained by unlawful means or were used to gain monopoly power beyond the statutory copyright granted by Congress. CSU petitioned the United States Supreme Court for *certiorari*.

The Office participated along with the Patent and Trademark Office in a brief by the Solicitor General that argued against the Court's grant of *certiorari* in this case, arguing that this case was not the appropriate vehicle for consideration of an issue with such broad potential implications. The Supreme Court, without comment, denied *certiorari*.

Pope v. LOC

In *Pope v. Library of Congress*, a *pro se* action filed in the Northern District of California, the plaintiff alleged that the Copyright Office failed to issue a certificate of registration within a designated time period. Search of Copyright Office records revealed no submissions were received from the plaintiff during this time period. The Office, represented by the U.S. Attorney's Office of the Northern District of California, prepared a motion for summary judgement.

Eldred v. Ashcroft (formerly Eldred v. Reno)

Plaintiffs challenged the constitutional validity of the Copyright Term Extension Act of 1998. The Act extended the copyright term for all works, including those still under copyright protection in the United States on the effective date of the Copyright Term Extension Act of 1998. Plaintiffs argued that the extension took works that would have gone into the public domain out of the reach of the public for additional time, unlawfully. The U.S. Court of Appeals for the D.C. Circuit held that the statutory extension of copyright duration was constitutional, since there was no free speech right to exploit copyrighted works and the Copyright Clause preamble did not limit extension of the copyright term. Appellants filed a motion for reconsideration and an en banc hearing. Staff attorneys drafted most of the response to this motion. The court dismissed the motion, and appellants have filed a petition for *certiorari*.



A&M Records, Inc., v. Napster

In this case, the defendant operated a file-trading service that provides a forum for its users to exchange digital files of sound recordings. The plaintiffs sued, claiming that their copyrighted sound recordings had been copied on the defendant's system and that the defendant is vicariously liable and a contributory infringer of the plaintiff's copyrights. The defendant argued, *inter alia*, that section 1008 of the Audio Home Recording Act (AHRA) insulated it from liability in this case. The Office participated in the Department of Justice's filing of an *amicus* brief for the government with the Ninth Circuit Court of Appeals in this case. In this fiscal year, the Ninth Circuit affirmed in part, reversed in part, and remanded the case to the district court. On the particular issue of the applicability of the AHRA to this case addressed in the government's *amicus* brief, the Ninth Circuit agreed that the AHRA does not cover the downloading of MP3 files to computer hard drives.

Southco v. Kanebridge

Parties in this case are manufacturers of nuts, screws, and other hardware. The plaintiff filed a copyright infringement suit, claiming that the defendant's use of its hardware part numbers in advertising and comparison charts infringed the copyright in the part numbers. The district court agreed and issued an injunction against the defendant. The Office assisted the Department of Justice in drafting an *amicus curiae* brief that was submitted to the Third Circuit Court of Appeals. The government's brief argued that the part numbers at issue did not possess sufficient creativity to support copyright protection, that even if they did, the part numbers are analogous to titles and therefore not entitled to protection, and that even if the part numbers are copyrightable, the defendant's proposed use was within permitted fair use. The U.S. Court of Appeals for the Third Circuit has now reversed the district court and held that parts numbers used by a hardware manufacturer to designate various retractable captive-screw assemblies are not protected by copyright.

Peters v. Khayyam Publishing Co.

A settlement was secured in *Peters v. Khayyam Publishing Co.*, an enforcement action relating to mandatory deposit under 17 U.S.C. §407 of the copyright law. The government instituted an action following the publisher's repeated refusal to comply with the law and deposit certain issues of *Advances in Differential Equations*. Under the terms of the settlement agreement, the publisher agreed to comply with the law, deposit the issues which were the subject of the demand, and make timely deposit of future issues. The Library has received the demanded issues.



Schwarz v. United States General Accounting Office, *et al.*

This case involved a suit filed against the Register and more than 20 other defendants regarding rights under the Freedom of Information Act (FOIA). Following the Office's preparation of an affidavit detailing its compliance with the provisions under the FOIA, the attorney from the Department of Justice, representing the Office and all other defendants, secured dismissal of this case.

