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 FY 2002 included the following:

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 repertories of the American Society of Composers, Authors and Publishers (ASCAP); the Society of European Stage Authors and Composers (SESAC); and Broadcast Music, Inc. (BMI). On November 30, 2001, the Office published the new rates, adjusting for a 2.1 percent cost of living increase. The revised rates went into effect on January 1, 2002.

Copyright Restoration of Works in Accordance with the Uruguay Round Agreements Act

In *Alameda Films, S.A.* v. *H. Jackson Shirley II*, the United States District Court for the Southern District of Texas ordered Authors Rights Restoration Corporation (ARRC) to retract notices of intention to enforce (NIEs) certain restored copyrights filed under 17 U.S.C. §104A. The court held that ARRC improperly filed NIEs as the copyright owner of 81 Mexican motion pictures. The Office does not have cancellation procedures for NIEs, but, where applicable, filers may correct errors recorded in the Office's public record of NIEs. A major NIE correction of this type, however, was untimely and could not be made for Mexican works, because the NIE filing eligibility for works from that country had expired.

As an appropriate measure in this unique circumstance, on December 3, 2001, the Office issued public notice of the District Court Order regarding the 81 films and the ARRC's response to the order.

Mechanical and Digital Phonorecord Delivery Compulsory License

On March 9, 2001, the Office published a Notice of Inquiry (NOI) requesting comments regarding the interpretation and application of section 115 to musical works that are part of certain kinds of digital transmissions, namely, on demand streams and limited downloads. Specifically, the notice sought information for the purpose of defining an incidental phonorecord delivery. While considering the comments and replies to the NOI, the Recording Industry of America, Inc. (RIAA), the National Music Publishers' Association, Inc. (NMPA), and the Harry Fox Agency, Inc. (HFA), submitted a joint statement to the Copyright Office on December 6, 2001, advising the Office of certain developments relevant to the Copyright Office's March 9 NOI. In order to assess fully the relevance of the subsequent filing, the Copyright Office issued a second notice on December 14, 2001, in which it requested additional public comment on its March 9 NOI in light of the RIAA/NMPA/HFA agreement filed in this proceeding. The Office continues to consider the comments filed in this proceeding.

Notice and Recordkeeping for Use of Sound Recordings Under Statutory License

On February 7, 2002, the Copyright Office initiated a rulemaking proceeding to determine the requirements for giving copyright owners reasonable notice of the use of their works under the section 112 and 114 statutory licenses and for how records of such use shall be kept and made available to copyright owners. Because of the widely disparate viewpoints of the commenting parties and the complexity of the issues, the Copyright Office held a public roundtable on May 10, 2002, to elicit more specific information regarding the adoption of such a regulation. The Office made a third and final request for written proposals regarding data format and delivery on September 23, 2002. The Copyright Office hopes to announce interim notice and recordkeeping regulations to establish transitional reporting requirements for services making digital transmissions of sound recordings under the section 112 and 114 licenses during the first half of the next fiscal year.

Registration of Claims to Copyright: Group Registration of Contributions to Periodicals

On March 7, 2002, the Copyright Office published a final rule adopting an existing practice that expands the number of acceptable formats for a deposit accompanying a single application to register groups of contributions to periodicals. Section 408(c)(2) of title 17, *United States Code*, authorizes the Register of Copyrights to establish a procedure permitting a single registration for groups of contributions to periodicals published by the same author within a twelve-month period. Expanding the number of acceptable formats reduces hardships to applicants and simplifies administrative processing.

Fees for Copyright Office Services

The Copyright Office may propose a change in fees to Congress. The Register must conduct a study of costs incurred in providing services. When the Register determines that fees should be adjusted, the Register prepares and submits to Congress a proposed fee schedule along with the cost study. If Congress does not enact legislation within 120 days to disapprove the proposed schedule, the Copyright Office may institute the changed fees by regulation. An adjusted fee schedule was submitted to Congress in February 2002 and became effective on July 1, 2002. The basic fee for registration of an original work of authorship was not affected. However, the fees for a supplementary or renewal registration, document recordation, registration of an original vessel hull design, search and preparation of a report from Copyright Office records, and recordation of a designated online service provider agent were increased to cover more of the costs incurred in providing these services. The Office eliminated the fee for inspection of Office records and also reduced the minimum cost for the first 15 pages of photocopying. Other statutory fees remained the same.

[Docket numbers and dates of *Federal Register* documents issued during Fiscal Year 2002 are listed in an appendix of this Report.]

REPORTS AND LEGISLATION

The U.S. government relies on the Copyright Office for legal and technical advice on copyright matters. The Office advises Congress on proposed changes in U.S. copyright law, analyzes and assists in the drafting of copyright legislation and legislative reports, and undertakes studies on current issues for Congress. Copyright-related legislative activity during this fiscal year included the following:

The Register of Copyrights testified at three Congressional hearings during Fiscal Year 2002. The Senate Committee on the Judiciary held a hearing on the Intellectual Property Protection Restoration Act (S.1611). The House Subcommittee on Courts, the Internet, and Intellectual Property held two hearings: a two-day hearing regarding the Copyright Office's Digital Millennium Copyright Act (DMCA) Section 104 report, and one on reform of the Copyright Arbitration Royalty Panels (CARPs).

State Sovereign Immunity and the Intellectual Property Restoration Act

The Intellectual Property Protection Restoration Act (S.1611) addressed issues raised by two 1999 rulings in which the Supreme Court determined that the doctrine of sovereign immunity prevents states from being held liable for damages for violations of the federal intellectual property laws even though states enjoy the full protection of those laws. Under current law, copyright owners are unable to obtain monetary relief under the copyright law against a state, state entity, or state employee unless the state waives its immunity. The Register testified on February 27, 2002, in support of S.1611 and its three main components: a system to encourage states to waive their immunity by granting fully enforceable intellectual property rights only to those states that do so; a circumscribed abrogation of state sovereign immunity in the intellectual property field to provide a remedy against states that choose not to waive their immunity; and a codification of the judicially-made rule that, notwithstanding a state's sovereign immunity, the employees of a state may be enjoined by a federal court from engaging in illegal action. The Office worked closely with Congressional staff on the impact of state

State Sovereign Immunity

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

sovereign immunity on copyright. At the request of Congressional staff, the Copyright Office moderated negotiations between intellectual property owners and public universities over the proposed legislation. The Register convened a series of meetings over a period of several weeks. Although the affected parties were able to reach tentative agreement on some issues, no final agreement was reached on the legislation before the end of the fiscal year.

Digital Millennium Copyright Act Section 104 Report

In December 2001, the Register testified before the House Subcommittee on Courts, the Internet, and Intellectual Property on each of the two days of hearings on the August 2001 report prepared by the Office as required by section 104 of the DMCA. The report evaluated the impact of advances in electronic commerce and associated technologies, as well as the amendments to title 17 made in the DMCA, to sections 109 and 117 of the copyright law.

The report made recommendations regarding three issues: (1) *Digital first sale doctrine*: section 109 of the copyright law permits a person who lawfully owns a copy of a work to sell or dispose of that copy as he or she chooses. In her testimony, the Register noted that section 109 at this time applies to tangible copies of work in digital form and that expansion of the section to permit retransmission of such works could do harm. (2) *Incidental "buffer" copies*: buffer copies are created incidentally as part of the process of streaming. Such copies exist only for a brief time and only as a portion of the entire work. The Register noted that the making of a buffer copy in the course of licensed streaming should be considered a fair use of the work, and recommended legislation of a narrow exemption for such incidental or buffer copies. (3) *Archival copies*: section 117 of the copyright law permits users to create archival copies of computer programs that they legally own. The Register found that making an archival copy of other types of digital works should be considered a fair use. However, the Register observed that section 109 permits the owner of a particular copy lawfully made to distribute

Digital Millennium Copyright Act (DMCA)

The DMCA, (Public Law 105-304 (1998)), was enacted into law on October 28, 1998. This Act revised the copyright law (title 17 of the *United States Code*) in a number of ways, including adding a new chapter 12 which, among other things, prohibits circumvention of access control technologies employed by copyright owners to protect their works. The DMCA implemented two World Intellectual Property Organization treaties; created certain new limitations on liability for copyright infringement by online service providers; expanded the existing exemption relating to computer programs in section 117 of the copyright law; and contained several miscellaneous provisions regarding the functions of the Copyright Office, distance education, webcasting, and other issues. The enactment of the DMCA was the beginning of an ongoing effort by Congress to address the relationship between technological change and U.S. copyright law.

that copy without the copyright owner's permission. This would appear to permit the user to sell or otherwise dispose of the archival copies, which would harm the copyright owner. The Register recommended that Congress close this gap.

Copyright Arbitration Royalty Panel (CARP) Reform

CARPs are temporary bodies composed of hired arbitrators who set or adjust royalty rates and terms of statutory licenses, and determine royalty distributions. These panels have been operating under the auspices of the Copyright Office and the Library of Congress since Congress eliminated the Copyright Royalty Tribunal (CRT) in 1993. The purpose of a June 13 hearing before the House Subcommittee on Courts, the Internet, and Intellectual Property was to consider how effective the CARP process has been thus far and ways in which it can be improved. The Register addressed a report on CARP reform that the Office had prepared in 1998 at the request of the Subcommittee and commented on the need to reform the CARP process. She noted the Office's willingness to work with the Subcommittee and the parties to produce a system that would address four critical elements: the hiring of full-time employees who are well-versed and experienced in the pertinent fields; the need for ensuring that there are no periods of inactivity as there were with the CRT; the need for the Register to have a substantial role during the process to address important policy and substantive matters that might arise; and the question of funding in rate setting proceedings.

Distance Education

The Technology, Education and Copyright Harmonization (TEACH) Act was passed by the Senate in June 2001 and placed on the House of Representatives calendar late in FY 2002 as part of the Department of Justice Appropriations Authorization. The TEACH Act promotes digital distance education by implementing the recommendations made in the Register's report to Congress in May 1999 titled "Report on Copyright and Digital Distance Education." At the request of the Senate Judiciary Committee, the Copyright Office played a key role in bringing about the compromise reflected in the legislation by facilitating negotiations between the affected parties.

The TEACH Act expands the coverage of the exception in section 110(2) to allow the delivery of authorized performances and displays by nonprofit accredited educational institutions through digital technologies, expands the categories of works exempted from the performance right but limits the amount that may be used in these additional categories to "reasonable and limited portions," and emphasizes 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 Act requires that institutions availing themselves of the expanded exception apply technological measures to prevent prolonged retention or further distribution of the work and that the institutions not interfere with technological protection measures applied by the right holders in the work.

Protection of Authentication Features

Recent legislative discussions have considered criminalization of illicit authentication features affixed to or embedded in a phonorecord, a copy of a computer program, or a copy of a motion picture or other audiovisual work. Current anticounterfeiting laws make it a crime to traffic in counterfeit labels or copies of certain forms of intellectual property, but not authentication features such as the hologram that a software maker uses to ensure that copies of its software are genuine.

Copyright Office staff advised Congressional staff on the implications of the copyright law's provisions on proposed legislation to criminalize the trafficking in counterfeit authentication features used by copyright owners to detect piracy of their works.

Piracy in Peer-to-Peer Networks

The underlying issue in peer-to-peer networks piracy is "file sharing" which entails unauthorized distribution and copying of copyrighted works. Pioneered in the late 1990s by companies such as Napster, file sharing initially enabled users to "share" digital copies of songs after being indexed on a central computer. Because file sharing enables widespread distribution of copyrighted material without payment of royalties to the creators, Napster's activities were ruled illegal in 2000 in *A&M Records, Inc.* v. *Napster* before the Ninth Circuit Court of Appeals.

File sharing continues, however, through peer-to-peer networks that do not use a centralized server for indexing. This decentralization makes it more difficult to pursue copyright violators in court.

Recent legislative approaches have considered allowing copyright owners to use digital self-help measures to protect their own intellectual property. The legal concept of self-help against theft permits homeowners, for instance, to take reasonable action to stop burglars found in their homes. In the case of intellectual property, the principle remains the same. If, under the relevant copyright laws, intellectual property is being distributed without the owner's consent, the owner can be allowed to impede the theft. Specifically, legislation

proposed in the 107th Congress would protect the owners from liability for blocking, diverting, or otherwise impairing the unauthorized distribution of their copyrighted work on a publicly accessible peer-to-peer file trading network.

The Copyright Office advised House staff on copyright and legislative drafting issues concerning legislation to permit copyright owners to engage in self-help to disrupt infringing file-trading activities on peer-to-peer networks.

Technical Amendments Bill

The Office began work in FY 2001 on various technical amendments to the copyright law that Congress wanted to pass together with technical amendments related to other federal agencies' work. These technical amendments were added to the "21st Century Department of Justice Appropriations Authorization Act." The conference on the bill was completed in September 2002. The House passed the conference report on September 26, 2002. The conference report was awaiting Senate consideration as the fiscal year ended.

INTERNATIONAL ACTIVITIES

National laws of each country are the primary protection against unauthorized use of a copyrighted work in that country. Most countries offer protection to foreign works under the aegis of international copyright treaties and conventions.

The Copyright Office continued to assist executive branch agencies on international matters, particularly the United States Trade Representative (USTR), the Patent and Trademark Office (PTO), and the Departments of State and Commerce.

Copyright Office staff participated in numerous multilateral, regional, and bilateral negotiations in Fiscal Year 2002. Office staff were part of the U.S. delegation in the May 13–17, 2002, meetings of the World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights, which considered issues relating to a possible treaty on the protection of broadcasting organizations. In cooperation with the PTO, staff prepared a proposed treaty text to present at the next Standing Committee meeting. The Copyright Office also participated in the meetings of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore December 10–12, 2001, and June 17–21, 2002.

Staff served as part of the U.S. delegation in the World Trade Organization (WTO) Council on TRIPS (trade-related aspects of intellectual property rights), which convened in November 2001 and March, June, and September 2002. The TRIPS Council is responsible for monitoring the operation of the TRIPS Agreement, and, in particular, how members comply with their obligations under it. The Council reviews the intellectual property laws of member countries for compliance with TRIPS obligations.

The Office 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.

Copyright Office staff were members of the U.S. delegation to the November 2001 and September 2002 meetings of the Intellectual Property Negotiating Group of the Free Trade Area of the Americas and were instrumental in preparations, including the redrafting of U.S. treaty proposals. The goal of the negotiating group is to prepare and finalize an intellectual property chapter for a Free Trade Area of the Americas Agreement. The overall agreement is due to be completed by 2005.

Policy and International Affairs (PIA) staff participated in the drafting and negotiation of the intellectual property provisions of bilateral Free Trade Agreements with Chile and Singapore, including the drafting of proposed text, and have also taken part in preliminary

discussions concerning a possible bilateral agreement with Morocco and multilateral agreements with groups of nations in Central America and southern Africa.

The Office participated in numerous additional bilateral negotiations and consultations during the year, including those held with the Bahamas, Bahrain, Canada, Chile, China, Colombia, Egypt, Georgia, Indonesia, Japan, the Kyrgyz Republic, Macau, Mexico, New Zealand, Poland, Romania, Russia, Singapore, South Africa, South Korea, Taiwan, Turkey, Ukraine, Uruguay, and Vietnam 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 countries such as Armenia, Canada, Egypt, South Africa, and Ukraine. For the USTR, staff provided assistance to nations such as Armenia, Azerbaijan, Cambodia, China, Macedonia, Palau, Russia, Saudi Arabia, Taiwan, Uzbekistan, Vanuatu, and Vietnam in their WTO accession processes and provided responses regarding U.S. copyright law and policy to the WTO Trade Policy Review queries.

Staff represented the Copyright Office 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 used by the U.S. government to improve global protection for U.S. authors, inventors, and other holders of intellectual property rights.

International Copyright Institute

The Copyright Office carries out an international educational program through its annual International Copyright Institute (ICI) symposium. The ICI is designed to further international understanding and support of strong copyright protection, including the development of effective copyright laws and enforcement overseas. The program is conducted jointly with WIPO's educational arm.

The Register participated in a number of symposia and conferences outside the United States, including programs in Ghana and Switzerland. Staff also participated in symposia and conferences sponsored by WIPO, the United States Information Agency, the U.S. Agency for International Development, and the Commerce Department's Commercial Law Development Program, and provided training on copyright to the State Department's Foreign Service Institute.

The International Copyright Institute held an International Symposium on the Effect of Technology on Copyright and Related Rights for nineteen copyright experts and government officials from fourteen countries on November 13–16, 2001. Participants discussed international treaties and legislation that relate to the Internet and technology.

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

Sonny Bono Copyright Term Extension Act

On October 27, 1998, President Clinton signed this Act into law, extending for an additional 20 years the term of copyright protection in the United States [Pub. L. No. 105-298, 112 Stat. 2827 (1998)]. This extends the term of copyright for most works to the life of the author plus 70 years. It similarly extends for an additional 20 years the terms of anonymous and pseudonymous works, works made for hire, and works in their renewal terms.

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

The Plaintiffs, who used works on which copyright had expired, challenged the constitutional validity of the Sonny Bono Copyright Term Extension Act of 1998. The Act extended the copyright term by an additional 20 years for all works, including those still under copyright protection in the United States on the effective date of the Act. Plaintiffs argued that the extension unlawfully took works that would have gone into the public domain out of the reach of the public for additional time. Both the district court and the United States Court of Appeals for the District of Columbia Circuit found the Act constitutional. The United States Supreme Court granted the Appellants' petition for a *writ of certiorari*. Copyright Office staff provided assistance to the Solicitor General's Office in drafting Respondent's briefs and in preparing for oral argument. The Court was set to hear oral arguments on October 9, 2002.

Bonneville* v. *Peters

As reported in Fiscal Year 2001, the Broadcasters of AM/FM radio stations appealed the decision of the United States District Court for the Eastern District of Pennsylvania upholding the Copyright Office's final rule that AM/FM broadcast signals transmitted

simultaneously over a digital communications network, such as the Internet, were not exempted by 17 U.S.C. §114(d)(1)(A) from the digital performance right for sound recordings. During FY 2002, the Copyright Office worked with the Department of Justice in preparing the appellee's brief defending the district court's decision. The case is scheduled for oral argument on December 2, 2002, and should be decided in FY 2003.

Paul Morelli Design, Inc. v. *Tiffany and Company*

The Copyright Office continued to review all copyright cases filed where the Register of Copyrights has the right to intervene under 17 U.S.C. §411(a). The Register chose to intervene in one case where registration was refused—*Paul Morelli Design Inc.* v. *Tiffany and Company*—in order to defend the Examining Division's decision and the Office's practices and procedures regarding registration. The Copyright Office refused registration of 18 pieces of jewelry created by Paul Morelli Design, Inc., finding that the jewelry contained an insufficient level of creative authorship to sustain a registration. After this refusal of registration by the Office and a subsequent first appeal, Paul Morelli Design, Inc., brought a copyright infringement action against Tiffany & Co. for copying this jewelry. The Register intervened in the suit in order to counter inaccuracies regarding Office policies and practices contained in the expert report of the Plaintiff and in order to support the decisions of the Examining Division. The trial before a jury in the Eastern District of Pennsylvania resulted in a finding that the works were not copyrightable.

The case addressed numerous issues affecting the Office, including the limits on the Register's ability to intervene beyond the statutory time frame, the appropriate level of deference to be accorded to the Copyright Office's determination of insufficient creative authorship in an infringement suit in which the allegedly copied works were denied registration, the proper considerations for evaluating sufficient creative authorship, and the meaning of the statutory requirement that an application for registration be received by the Office "in proper form."

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

In FY 2001, the Copyright Office assisted and consulted with the Solicitor General's Office and the United States Attorney for the Southern District of New York in an intervention defending the constitutionality of 17 U.S.C. §1201. In this fiscal year, the Second Circuit affirmed the decision of the District Court and held that the Digital Millennium Copyright Act did not violate the constitutional rights of the defendants.