As part of the Legislative Branch, the Copyright Office works closely with the Congress in providing policy analysis and recommendations on national and international copyright issues.

Policy Assistance, Regulatory Activities, and Litigation

LEGISLATION

The Copyright Office provides expert assistance to Congress on copyright matters; advises Congress on anticipated changes in U.S. copyright law; analyzes and assists in the drafting of copyright legislation and legislative reports; and undertakes studies for Congress.

Intellectual Property and Communications Omnibus Reform Act of 1999

The Office advised Congress on many aspects of the Intellectual Property and Communications Omnibus Reform Act of 1999 (IPCORA). A key provision of this law renewed for another five years the statutory license of section 119 of title 17 in the Satellite Home Viewer Improvement Act (SHVIA). Numerous modifications to the licensing scheme were adopted, including allowing satellite companies to retransmit local network broadcasts. IPCORA also made permanent the Vessel Hull Protection Act by removing the two-year sunset provision that had originally been included in that law. Also, a requirement that the Office produce a short-term study on the Vessel Hull Protection Act appeared in the original Act but was deleted by this amendment. Another study on this form of protection was postponed until 2003.

At the request of the Copyright Office, Congress amended section 1201 of the Digital Millennium Copyright Act (DMCA) to permit the Office to conduct the anticircumvention rulemaking through the widely-used informal notice-and-comment rulemaking process instead of the cumbersome formal "on the record" process that the statute, as originally enacted, appeared to require. Congress also included in IPCORA a provision adding sound recordings to the list of commissioned works that may be works made for hire. The amendment later became controversial and spawned new legislation, which is discussed below.

Another issue considered was whether retransmissions of network broadcasts on the Internet are covered by the statutory license in section 111 of title 17. Language was proposed clarifying that they are not; others proposed language that would include such retransmissions in the

111 license. The Copyright Office worked with congressional staff and advised them that retransmissions of broadcasts on the Internet are not and should not fall within the 111 license. Congress chose not to enact either proposal, allowing the language of section 111 to stand as it was.

State Sovereign Immunity

At the end of 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*. Taken together, these opinions reshaped the scope of state sovereign immunity and Congress's 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, Congress has been addressing the issue of how to reinstate full enforceability of the copyright law. The Office has worked closely with congressional staff, the Patent and Trademark Office, and industry representatives in analyzing this problem and searching for a solution. The House Judiciary Committee's Subcommittee on Courts and Intellectual Property held a hearing on this issue on July 27, 2000, at which the Register testified. The matter is likely to remain under discussion in the next Congress.

Copyright Office: General Responsibilities

Title 17, U.S. Code, describes the functions and duties assigned to the Register of Copyrights to include:

- Advise Congress on national and international issues relating to copyright, other matters arising under this title, and related matters.
- Provide information and assistance to federal departments and agencies and the Judiciary on national and international issues relating to copyright, other matters arising under this title, and related matters.
- Participate in meetings of international intergovernmental organizations and meetings with foreign government officials relating to copyright, other matters arising under this title, and related matters, including as a member of United States delegations as authorized by the appropriate executive branch authority.
- Conduct studies and programs regarding copyright, other matters arising under this title, and related matters, the administration of the Copyright Office, or any function vested in the Copyright Office by law, including educational programs conducted cooperatively with foreign intellectual property offices and international and intergovernmental organizations.
- Perform such other functions as Congress may direct, or as may be appropriate in furtherance of the functions and duties specifically set forth in this title.

Sound Recordings as Works Made for Hire

As noted previously, in IPCORA Congress added sound recordings to the categories of specially-commissioned works that are eligible to be works made for hire. Subsequent to that enactment, a significant controversy arose concerning both the procedural history of the provision as well as its effect. On May 25, 2000, the Register testified at a hearing of the House Judiciary Committee's Subcommittee on Courts and Intellectual Property. In September 2000, a bill (H.R. 5107) to repeal the provision without prejudice to any viewpoint was introduced and passed by the House of Representatives. At the end of the fiscal year, the bill was pending in the Senate.

Distance Education

On July 20, 2000, the Register urged the Congressionally-established Web-Based Education Commission to recommend to the President and Congress changes in the copyright law to allow the use of copyrighted materials in distance education courses similar to uses now allowed in section 110(2).

The Register summarized the Copyright Office's findings in its 1999 report to Congress on "Copyright and Digital Distance Education," including the Office's recommended amendments to the Copyright Act to update the current educational exemptions to cover certain educational activities taking place through digital technologies. She also provided the members with a brief update of developments that have occurred in the year since the Office submitted its report.

The Register's appearance before the 16-member commission was at the fourth of five hearings the commission held. Established in November 1999 to develop specific policy recommendations geared toward maximizing the educational promise of the Internet for pre-K, elementary, and post-secondary education leaders, the commission planned release of a final report in late November 2000. It was chaired by Senator Bob Kerrey (D-NE), with Representative Johnny Isakson (R-GA) as the vice chair.

Copyright Technical Corrections and Housekeeping Amendments

Two bills introduced in the House during the Second Session of the 106th Congress contained amendments requested by the Copyright Office. H.R. 5106 contained purely technical corrections to title 17. H.R. 5107, in addition to the sound recording language discussed earlier, contains certain amendments to clarify existing provisions in title 17. For example, it amended section 708 to remove the dollar amounts listed as fees because those amounts are no longer current. The other changes were similarly non-substantive and non-controversial. Both bills had passed the House of Representatives and were pending in the Senate at the end of the fiscal year.

Transmitting Sound Recordings on the Internet

In the past year, certain Internet sites offering visitors the opportunity to hear or even copy popular music have become widely used. Two of those sites, MP3.com and Napster (further discussed in this report) are defendants in much publicized copyright infringement cases. In addition, there has been discussion of legislation that would expressly permit these types of services to avoid copyright liability. This could become a major issue in the coming year in Congress. The Office expects to play a substantial role in advising Congress as the issue progresses.

Oversight Hearing

On May 25, 2000, the Register testified at a Copyright Office oversight hearing held by the House Judiciary Committee's Subcommittee on Courts and Intellectual Property. Her statement reviewed the Office's operations, major accomplishments, and challenges during the past year. She emphasized the increased workload due to new legislative mandates and the adoption of new fees. She reviewed the Office's response to new congressional directives, especially those contained in the DMCA. She noted the Office's progress in providing a higher level of security for material submitted for copyright registration, developments in CORDS, and steps being taken to reduce arrearages in some essential copyright services.

Loan Guarantees for Satellites to Serve Rural Areas

A Copyright Office Senior Attorney testified before the Senate Banking Committee on a proposal to provide federal loan guarantees for satellite television companies to construct and deploy new satellites that would serve people living in rural areas. The proposal was not enacted into law.

Digital Millennium Copyright Act (DMCA) Studies

The Copyright Office and the National Telecommunications and Information Administration (NTIA) were directed by Congress to study the effects of section 1201(g) of title 17 (added by the DMCA) on encryption research. That section created very limited exceptions to the anti-circumvention prohibition for encryption research that were aimed at research targeting flaws and vulnerabilities in cryptographic systems for controlling access to copyrighted works. Comments from the public were solicited. None identified a current, discernable impact on encryption research and the development of encryption technology. Every concern expressed was prospective and speculative. Consequently, the joint report issued in May 2000 concluded that it was premature to draw conclusions or to suggest any legislative changes.

The Copyright Office and the NTIA are also required to examine the effects made by the DMCA and the development of electronic commerce on the operation of sections 109 and 117 of the copyright law (title 17, United States Code), as well as the relationship between existing and emerging technology and the operation of those sections. Section 109 permits the owner of a particular copy to sell or otherwise dispose of that copy without the authority of the copyright owner. Commonly known as the "first sale doctrine," it is this section that permits lending of books by libraries as well as the sale of used books. Section 117 permits the owner of a copy of a computer program to make a copy or adaption of the program for archival purposes or as an essential step in utilizing the program. Public comment was sought, and a public hearing was scheduled for November 2000.

INTERNATIONAL ACTIVITIES

Protection against unauthorized use of a copyrighted work in a particular country depends, principally, on the national laws of that country. Most countries offer protection to foreign works under certain conditions, and these conditions have been greatly simplified by international copyright treaties and conventions.

The Copyright Office continued to work cooperatively with the executive branch on international matters — most often with the United States Trade Representative (USTR), the Patent and Trademark Office, and the Department of State.

The primary activity on the multilateral front in FY 2000 was an effort to seek international protection for audiovisual performers, principally television and screen actors. Work on a new treaty has continued for more than three years. Agreement was reached to hold a Diplomatic Conference in Geneva, Switzerland, in December 2000 under the auspices of the World Intellectual Property Organization (WIPO). WIPO is a specialized agency of the United Nations that administers a number of international unions or treaties in the area of intellectual property, such as the Paris and Berne Conventions. The Register and the Policy and International Affairs (PIA) staff were involved in U.S. preparations for the Diplomatic Conference and in bilateral and multilateral meetings in advance of the conference. The purpose of these meetings was to try to achieve consensus around proposals that were acceptable to the United States.

The Copyright Office represented the United States in the World Trade Organization (WTO), working closely with USTR, to defend section 110(5) of the U.S. Copyright Act against a challenge by the European Union (EU) that this exception for the public performance of copyrighted works in small businesses violated U.S. treaty obligations — the Berne Convention and the TRIPS Agreement (WTO Agreement on Trade-Related Aspects of Intellectual Property Rights). The briefs and oral arguments were partially successful — subsection (a) was found to comply with U.S. treaty obligations but the new subsection (b) was deemed to violate them. The United States has been asked to remedy the violation by July 27, 2001.

The PIA staff participated, as part of the U.S. delegation, in the continuing work of the World Trade Organization Council on TRIPS. The TRIPS Council is responsible for monitoring the operation of the TRIPS agreement, and, in particular, how members comply with their obligation under it. This included the continuing effort to review the intellectual property laws of developing countries for compliance with TRIPS obligations.

PIA staff were members of the U.S. delegation to the Intellectual Property Negotiating Group of the Free Trade Area of the Americas held throughout FY 2000. 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. In addition, PIA staff were instrumental in the drafting of U.S. treaty proposals.

Staff members participated in negotiating the intellectual property provisions of a Free Trade Agreement with representatives of the Kingdom of Jordan.

PIA staff represented the Copyright Office on the inter-agency Special 301 Committee which considers and evaluates the adequacy and effectiveness of intellectual property protection and enforcement throughout the world. This annual process, which is established under U.S. trade law, is one of the tools used by the U.S. Government to improve protection for creators, inventors, and other holders of intellectual property rights worldwide.

Copyright Office staff also actively participated in many bilateral negotiations and consultations during the year, including those held in Mexico, Paraguay, the Dominican Republic, the People's Republic of China, South Korea, Bulgaria, the Bahamas, Malaysia, Taiwan and Japan. They met almost weekly with foreign officials and visitors interested in learning about the U.S. copyright system and exchanging information about topics of mutual concern.

The Copyright Office participated in many symposia and conferences sponsored by the WIPO, the United States Information Agency (USIA), and U.S. Agency for International Development (USAID). The Register made presentations on the challenge of new technology and the enforcement provisions of TRIPS at a WIPO symposium for Asia and Pacific Countries held in New Delhi, India. An attorney on the PIA staff made similar presentations at WIPO programs held for Indian officials in Hyderabad and Calcutta, and the Register participated in the WIPO-IP Australia Regional Symposium on Strategic Management of Intellectual Property in the 21st Century held in Sydney, Australia.

In November 1999, the Copyright Office hosted worldwide participants at the <Indecs> Conference, "Names, Numbers, and Networks: Metadata, Intellectual Property, and E-Commerce: the Way Ahead." <Indecs>, an international collaborative project, seeks to foster the global exchange of information about electronic information and works in digital form to facilitate electronic commerce.

COPYRIGHT OFFICE REGULATIONS

In addition to the other regulatory activities discussed in this report, regulatory actions issued during FY 2000 included the following:

Section 1201 Notice of Inquiry

Pursuant to section 1201 of the Digital Millennium Copyright Act (DMCA), the Copyright Office began the process of its rulemaking to determine what (if any) particular classes of works would be exempt from the general prohibition on circumvention of technological measures that control access to works protected by copyright.

On November 24, 1999, the Office initiated the rulemaking proceeding with publication of a Notice of Inquiry. The Notice of Inquiry requested written comments from all interested parties, including representatives of copyright owners, educational institutions, libraries and archives, scholars, researchers and members of the public. The Office devoted a great deal of attention in this Notice to setting out the legislative boundaries and developing questions related to the criteria Congress had established. The Office was determined to make the comments it received available immediately in order to elicit a broad range of public comment; therefore, it stated a preference for submission of comments in electronic formats. On March 17, the Office set two hearings, one in Washington D.C. on May 2-4, and one in Palo Alto, California at Stanford University on May 18-19; and set a June 23, 2000, deadline for submission of post-hearing comments. All of these notices were published in the *Federal Register,* and also on the Office's website.

In response to the Notice of Inquiry, the Office received 235 initial comments and 128 reply comments. Thirty-two witnesses representing over 50 groups testified at the five days of hearings held in Washington, D.C. and California. The Office placed all initial comments, reply comments, optional written statements of the witnesses and transcripts and audio recordings of the two hearings on its website shortly after their receipt. Following the hearings, the Office received 28 post-hearing comments, which were also posted on the website. All of these commenters and witnesses are identified in the indexes that appear on the Office's website.

The comments received represent a broad perspective of views ranging from representatives or individuals who urged there should be broad exemptions to those who opposed any exemption; they also included a number of concerns about various other aspects of the DMCA. The Copyright Office exhaustively reviewed and analyzed the entire record, including all of the comments and the transcripts of the hearings in order to determine its recommendation to the Librarian of Congress whether any class of copyrighted works should be exempt from the prohibition against circumvention during the next three years. The rulemaking was ongoing at the end of the fiscal year.

Information Given by the Copyright Office

The Office proposed amendments to its regulations governing information given to the public for litigation purposes in cases where the application for registration is still in-process (meaning not finalized and placed in a closed file). It is anticipated that the final regulation will also publish in regulatory text the existing requirement for submission of a Litigation Statement when a qualified third party needs copies of material accompanying a registration claim under these regulations. The amendments will allow a qualified party to get a copy of in-process registration materials and will also provide information about how one may access these materials. The Office received comments in response to its proposals, and plans to publish the final regulations in the next fiscal year.

Notice of Intent to Enforce (NIE) Publications of Corrections

Although copyright is restored automatically in eligible works, the Uruguay Round Agreements Act (URAA) directs the owner of such work to notify *reliance parties* if the owner of the rights in a restored work plans to enforce those rights. A reliance party is typically a business or individual who, relying on the public domain status of a work, was already using the work prior to the date of enactment of the URAA.

Although copyright owners from many countries are no longer eligible to serve constructive notice by filing a NIE with the Copyright Office because the statutory period for recordation by the Office has expired, NIE error correction may continue, if such correction would not nullify the NIE on record. On August 1, 2000, the Office published in the *Federal Register* one such NIE filing correcting the authorship of a previously filed NIE.

LITIGATION

The Copyright Office becomes involved in litigation in five different contexts: (1) when it is asked to assist the Department of Justice in defending a lawsuit in which the constitutionality of a federal copyright statute is challenged (as in *Eldred v. Reno*, discussed below); (2) on the rare occasions when the Office is sued; (3) when the Office elects to intervene, pursuant to 17 U.S.C. §411 (a) in a copyright infringement suit filed by a claimant whose application for copyright registration has been refused; (4) when the Office files suit pursuant to 17 U.S.C. §407 to compel the deposit with the Library of Congress of a work published in the United States; and (5) when the Office works with the Department of Justice in connection with an *amicus curiae* brief in litigation involving important issues of copyright law and policy.

Eldred v. Reno

The Copyright Office assisted the Department of Justice in its defense of a lawsuit filed by parties who asserted that Congress's passage of the Sonny Bono Copyright Term Extension Act, which amended chapter 3 of the 1976 Copyright Act, constituted, among other things, a taking of works that would have, but for enactment of term extension, fallen into the public domain upon the effective date of the Act (October 27, 1998). The parties, both commercial and non-commercial, were in the business of taking public domain works and making them available to the public, e.g. via the Internet. The Act generally extended the protection for works of authorship under U.S. law by twenty years. The U.S. District Court for the District of Columbia ruled in favor of the defendant. The case was appealed to the U.S. Court of Appeals for the District of Columbia Circuit. The Office assisted the Department of Justice on the appeal which was briefed and argued during the fiscal year.

Raquel v. Education Management Corp.

On its application for registration, the petitioner in this case described the nature of the work as "audiovisual" when the actual work registered was a musical work that was fixed on a videotape submitted to the Office with the application form. The application form also gave the nature of authorship as being "all music & lyrics & arrangements." The Copyright Office issued a registration. When the applicant sued for copyright infringement of the performance of the song, the respondent attacked the certificate of registration as relating to a copyright in the videotaped commercial rather than the song in the commercial. The district court dismissed the complaint.

Petitioner appealed to the Third Circuit, which held that the description of the nature of the work as an "audiovisual work" was a material misstatement and that it was not inadvertent. Applying the principle that a knowing failure to advise the Copyright Office of facts, which might have occasioned the rejection of the application, constitutes reason for holding the registration invalid and incapable of supporting an action for infringement, the Third Circuit affirmed the decision of the district court.

The Solicitor General filed an *amicus* brief on behalf of the Copyright Office asserting that the Third Circuit was in error, in that the Office was not misled by the information contained in the registration form. While the Office did not believe the case warranted plenary review, it requested that the Third Circuit's decision be summarily vacated under a practice known as "GVR'ing" (or grant, vacate, and remand) in light of the Office's intervening Notice of Policy Decision published in the *Federal Register* on July 5, 2000. In this Policy Decision, the Office explained that it is not an error to describe the physical nature of the deposit in the "nature of the work" space. It is the "nature of authorship" space that the Office uses to determine the nature of the copyright claim, as stated in the *Compendium of Copyright Office Practices*.

A&M Records, Inc. v. Napster

The Copyright Office proposed and 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. The defendant operates 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 insulated it from liability in this case. The government's brief was filed solely to address that issue and argued that the Act does not cover the defendant's activities. At the end of the fiscal year, the case was pending before the court.

Southco v. Kanebridge

The Copyright Office assisted the Department of Justice in drafting an *amicus* brief which the government filed with the Third Circuit Court of Appeals. Both 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 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 uses. The Department of Justice was given the opportunity to partake in the oral argument and staff from the Copyright Office assisted in the preparations for that task. The case was pending before the court at the end of the fiscal year.

SmithKline Beecham v. Watson

The Copyright Office participated in numerous inter-agency discussions concerning this unusual case. The defendant is a generic drug manufacturer who sought an abbreviated drug approval pursuant to the Hatch-Waxman Act from the Food and Drug Administration (FDA). The plaintiff is the pharmaceutical company that held the patent on the drug (nicorette gum) for which the defendant sought to market a generic equivalent. The FDA settled on a policy requiring the defendant to market its drug with a document virtually identical to the plaintiff's narrative regarding both proper use of the gum and how to quit smoking, generally. The plaintiff sued for infringement of its copyright in that document. Ultimately, the FDA refused to allow the defendant to modify the language of the document so as to avoid infringement, and the Justice Department chose to defend the FDA's position. The Second Circuit ruled that the Hatch-Waxman Act implicitly created an exception to general copyright law and found no infringement.

Peters v. Khayyam Publishing Co.

On behalf of the Library of Congress, the Department of Justice filed a civil action under section 407 of the copyright law to compel deposit of a serial. The publisher, Khayyam Publishing Company, had refused repeated requests to deposit certain issues of *Advances In Differential Equations*, and due to the lack of cooperation, the government was forced to take the unusual step of filing an action in federal court. Under the statute, failure to comply with a demand for deposit may result in a fine of $250 per work plus the retail cost of acquiring the copies.

Schwarz v. Register

The Register and the FOIA Officer were named as parties in this pro se suit against more than 20 defendants. The plaintiff seeks records on Nazi infiltration and alleges that she is the daughter of L. Ron Hubbard and the granddaughter of Dwight D. Eisenhower. Despite the fact that the Office keeps no such records, Ms. Schwarz alleged that the Office's response that it had no records violated her rights under FOIA. The Department of Justice has filed an answer to the complaint on behalf of all named defendants.