

The Year in Review: Accomplishments and Objectives of the U.S. Copyright Office

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INTRODUCTION

It is always a pleasure to be here at the Conference on International Intellectual Property Law and Policy at Fordham Law School. This conference is always well attended, the speakers always have a lot to say, and I always learn a lot. This morning's seminar concerning online service liability was no exception, as I now realize that the moral rights issue may be a little different than I had originally thought.¹

I. GENERAL SERVICES PROVIDED BY THE LIBRARY OF CONGRESS

I would like to tell you a little about the activities of the U.S. Copyright Office ("Copyright Office" or "Office") over the past year. As most of you know, the Copyright Office is in the Library of Congress ("Library"), thus making it a Legislative Branch agency. The Office, which has been located in the Library for 125 years, has a staff of more than 500 and does a great deal of work for Congress. The bulk of what we do is paperwork: we registered over 700,000 claims in works last year, and recorded documents concerning transfers of

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1. Jane Ginsburg & Jon Baumgarten, *Panel Discussion: Are There Moral Rights in Cyberspace?*, in 3 INT'L INTELL. PROP. L. & POL'Y (Hugh C. Hansen ed., forthcoming 1997).

ownership and security interest, of which there were over 17,000 with several hundred thousand titles. We also have a vast information service: more than 30,000 people walk in, more than 350,000 people call in, and approximately 200,000 people write in.

II. COPYRIGHT ARBITRATION ROYALTY PANEL

In addition to paperwork and information services, the Copyright Office collects money for the compulsory licenses that cable operators and satellite carriers pay in order to retransmit broadcast programming, and that individuals pay in order to manufacture and import digital audio recording equipment—both the hardware and the tapes. We collected approximately \$200 million in these payments last year. Individuals who think they are entitled to that money file claims with us. If the parties agree, the money is allocated to the individuals in the proportion to which they have agreed. If the parties do not agree, then a controversy exists and we convene a Copyright Arbitration Royalty Panel (“CARP”).²

A CARP proceeds as follows: the Library of Congress chooses two arbitrators—submitted from arbitration associations—who pick a third from a pre-approved, published list. After receiving the evidence, the three arbitrators submit a decision to the Copyright Office. The Register of Copyrights (“Register”) reviews the decision and recommends that the Library either accept or reject the decision. The United States Court of Appeals for the District of Columbia Circuit can review the Librarian’s decision.

We have the very first of those panels in process right now.³ It involves more than \$550 million in cable television royalties for 1990-92. The Copyright Office recommended

2. See 17 U.S.C. §§ 801(a), (b)(3) (1994) (establishing the purposes of CARPs).

3. On June 3, 1996, subsequent to the delivery of this Address, the chairperson of this CARP delivered a written report to the Librarian. 61 Fed. Reg. 55,653, 55,655-56 (1996).

two local arbitrators, each of whom charges \$250 an hour, in the interest of keeping the cost as low as possible. Those two chose a third person from Chicago, who charges \$300 an hour. For those of you who know that the intent of the CARP process was to reduce the cost of the Copyright Royalty Tribunal (“Tribunal”),⁴ I can tell you that a CARP proceeding is far more expensive than anything the Tribunal did. If you are looking for good employment, try to get one of the arbitrator’s slots on a cable panel—you can make a lot of money. We anticipate the cost of these arbitrators, for essentially 180 days’ worth of deliberations, to be more than \$800,000.

In any case, the good news is that the parties have said that the quality of the arbitration is very good. All of the selected arbitrators are former judges; they know how to marshal evidence, and they know how to ask questions. The proceedings have been very timely and orderly. Their decision is due in June.⁵

The second CARP proceeding is about to take place, unless the controversy is settled first. This second proceeding involves music royalties in the digital audio recording fund. The amount of money that is at stake is only \$300,000. Four parties held out while the rest settled. The parties who settled agreed that the amount of money they thought these four were owed was \$27, and yet it looked like we were going to have to convene an entire CARP. Of those four people, however, three of them did not follow the rules: one did

4. See Introducing the Copyright Royalty Tribunal Reform Act of 1993, 139 CONG. REC. E1961, E1961 (daily ed. Aug. 3, 1993) (statement of Rep. Hughes) (“The genesis of the legislation lies in [an] effort[] to eliminate wasteful bureaucracy and thereby create a more efficient Government.”).

5. The report was delivered on June 3, 1996. See *supra* note 3. On October 28, 1996, the Librarian adopted in part, and rejected in part, the decision of the CARP. Distribution of 1990, 1991 and 1992 Cable Royalties, 61 Fed. Reg. 55,653, 55,653 (1996). The rejection took the form of making some adjustments to the distribution percentages. *Id.*

not file on time;⁶ one did not state a claim;⁷ and I forgot what the third problem was. Therefore, I think we are down to one party, and maybe it can be resolved. So much for the new system.

What we do know is that there are a lot of flaws in this system, and we are asking all the participants—our arbitrators and the people in our Office working with it—to comment on the pluses and minuses of the CARP system. We have talked to both the House and the Senate about introducing remedial legislation to correct some of the defects. More on that later.

III. GROUP PHOTOGRAPH REGISTRATION

Last year, I talked about a number of things we were doing with respect to registration. Our biggest undertaking so far this year was proposing a new group registration procedure for photographs that would have included both published and unpublished works and, for the very first time, would not have required deposit of any photograph being registered. Instead, it would require much more identification, although the Library of Congress was entitled to request up to ten archival-quality prints from one of these groups.⁸

The proposed group registration procedure has proven to be unbelievably controversial.⁹ There were forty-four

6. See Filing with Claims to Digital Audio Recording Devices and Media Royalty Payments, 37 C.F.R. § 259.2 (1996) (setting the required time for filing and noting that failure to make a timely filing will result in non-payment of royalties for the specified period of the claim).

7. See 37 C.F.R. § 259.1 (1996) (noting that an interested party must claim to be “entitled to royalty payment made for the importation and distribution within the United States or the manufacture and distribution in the United States, of digital audio recording devices and media”).

8. Registration of Claims to Copyright, Group Registration of Photographs, 60 Fed. Reg. 62,057, 62,057 (1995) (to be codified at 37 C.F.R. § 202).

9. See, e.g., *Discovery Nightmare? Is Depositless Copyright Registration Wise?*, INFO. L. ALERT, Feb. 23, 1996 (suggesting that photography does not warrant special treatment, given new digital technology which makes authorship more diffi-

comments, seventeen reply comments,¹⁰ and a very organized effort on the part of photo finishers who have argued that I am bringing more litigation into the world. We will have to see where we go with the new group photo registration, as we have yet to review those comments.

IV. APPEALS PROCESS

This year, we also created a Board of Appeals (“Board”), made up of the Register, the Office’s General Counsel, and the Chief of the Examining Division, to look at all final appeals. Almost all of these appeals concern pictorial, graphic, and sculptural works. In addition, most involve the issue of whether there is any separable authorship of utilitarian objects. For those of you who thought that the Board would reject all appeals, we have not. Rather, we have registered a number of jewelry designs and have asked a number of questions before making a final determination. We are, therefore, definitely not rubber-stamping the work of the Examining Division.

V. RESTORATION OF COPYRIGHT

Perhaps the majority of the effort in the Copyright Office during the past year has been devoted to implementing the

cult to prove); *Photo Wars: Copyright Regs on Photo Registration Has Photographers, Finishers at Odds*, INFO. L. ALERT, Jan. 26, 1996 (emphasizing the threat that the new regulations may pose on photo finishers, who fear they will have to pay statutory damages and legal fees for reproduction of easily registered photos); *PIA Testifies Before U.S. Copyright Office Against Group Registration*, PRINTINGNEWS E., Aug. 12, 1996, available in Westlaw, ALLNEWSPLUS File (reporting that the Printing Industries of America testified that printers, to protect themselves from potential violations of the proposed regulation permitting group registration of photographs, would have to assume that the photographs customers provide are not the property of the customer).

10. The Copyright Office sought public comment on whether it should adopt proposed regulations for the group registration of photographs. See 61 Fed. Reg. 28,829, 28,829 (1996). The Office extended the original deadline for such comments by two months because of the inordinate number of responses. *Id.*

Uruguay Round Agreements Act (“URAA”)¹¹ provision on restoration of copyright for foreign works. This was the provision that on a date certain—or perhaps not so certain¹²—automatically restored, or, in some cases, actually created, copyright in original works of authorship by members of the Berne Convention (“Berne”)¹³ and the World Trade Organization (“WTO”).¹⁴

The Copyright Office took the position that the URAA’s automatic copyright restoration provision went into effect on January 1, 1996,¹⁵ a date which is consistent with a proclama-

11. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 514(a), 108 Stat. 4809, 4976-81 (1994) (codified as amended at 17 U.S.C. § 104A (1994)) [hereinafter URAA]. The URAA implements the latest changes to the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. GATT, the principal international norm of trade, was intended to allow its members to apply remedies against unfair international trade behavior. Peter D. Ehrenhaft, *Remedies Against “Unfair” International Trade Practices*, in GOING INTERNATIONAL: FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS 465 (ALI-ABA ed., 1996).

12. See URAA, § 514(a), 108 Stat. at 4981 (codified as amended at 17 U.S.C. § 104A(h)(2)) (defining the date of restoration as the effective date of the TRIPs agreement in the U.S.); *infra* notes 15-18 and accompanying text (discussing the difficulty of establishing the actual date of restoration); see also Agreement on Trade-Related Aspects of Intellectual Property Rights, 33 I.L.M. 1197, in General Agreement on Tariffs and Trade: Multilateral Trade Negotiation Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, Annex 1C [hereinafter TRIPs].

13. Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on Nov. 13, 1908, completed at Berne on Mar. 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967 (with Protocol regarding developing countries), completed at Stockholm on July 14, 1967, art. 7(1), 828 U.N.T.S. 221 [hereinafter Berne Convention].

14. URAA, § 514(a), 108 Stat. at 4976 (codified as amended at 17 U.S.C. § 104A(a)(1)(A)) (granting copyright in restored works); *id.* § 514(a), 108 Stat. at 4980 (codified as amended at 17 U.S.C. § 104A(a)(6)) (listing criteria for “restored works,” including authorship by a national or domiciliary of an eligible country); *id.* § 514(a), 108 Stat. at 4980 (codified as amended at 17 U.S.C. § 104A(a)(3)) (defining eligible country as a WTO or Berne member).

15. Notice of Policy Decision and Public Meeting, 60 Fed. Reg. 7,793, 7,793 (1995). As explained in the *Federal Register*: “[t]he Copyright Office sought public comment concerning the implementation of the URAA both prior to and after publication of its Notice of Proposed Rulemaking (NPRM).” Restoration of Certain Berne and WTO Works, 60 Fed. Reg. 50,414 (1995). Subsequently, comments

tion that President Clinton issued.¹⁶ Even that did not appear to answer all of the questions regarding the ambiguity of this date, however, so the Copyright Clarifications Bill,¹⁷ which has cleared the House Judiciary Committee,¹⁸ contains an amendment to make it absolutely clear that January 1, 1996 is the date of restoration for these works.

The works that qualify for copyright restoration probably number in the millions. These are works that are not in the public domain in their source countries by expiration of the copyright term,¹⁹ and are unprotected in the U.S. because of: (1) noncompliance with formal requirements that were formerly in the U.S. copyright law,²⁰ such as lack of notice,²¹ failure to renew,²² or failure to manufacture a work in the U.S.;²³ (2) lack of subject matter protection if the work was a

were received from, among others, William Patry (currently an Associate Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, and formerly counsel, Subcommittee on Intellectual Property & Judicial Administration, Committee on the Judiciary, U.S. House of Representatives) and Irwin Karp (Counsel to the Committee for Literary Property Studies): “Mr. Patry stated that January 1, 1995, is the initial date of copyright restoration. . . . Mr. Karp asserted that the effective date of 104(A) is December 8, 1994, but that first restoration of copyrights will occur on January 1, 1996.” *Id.* at 50,416 (citations omitted).

16. Proclamation No. 6780, 60 Fed. Reg. 15,845, 15,845 (1995).

17. Copyright Clarifications Act of 1996, H.R. 1861, 104th Cong., 2d Sess. (1996); *see infra* part VII.C (discussing the Copyright Clarifications Act).

18. H.R. 1861 was sent from the House Judiciary Committee to the full House on May 6, 1996. *See infra* note 86.

19. URAA, § 514(a), 108 Stat. at 4980 (codified as amended at 17 U.S.C. § 104A(h)(6)(B)).

20. *Id.* § 514(a), 108 Stat. at 4980 (codified as amended at 17 U.S.C. § 104A(h)(6)(C)(i)).

21. Formerly, U.S. law predicated copyright protection upon the fixation of notice. Act of July 30, 1947, ch. 391, 61 Stat. 656 (1947) (repealed 1976). Fixation became a recommendation, not a requirement, in 1988. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7(a)(2), 102 Stat. 2853, 2857 (1988) (codified at 17 U.S.C. § 401(a) (1994)).

22. U.S. law also formerly mandated renewal of copyright after the expiration of the first 28-year term. Act of July 30, 1947, 61 Stat. at 659. The renewal requirement for new or previously-unpublished works was eliminated by the Copyright Act of 1976 (“1976 Act”). Copyright Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2572, 2573 (1976) (codified as amended at 17 U.S.C. §§ 302-303 (1994)).

23. A third formality of the previous U.S. law was the requirement that the

sound recording that was fixed before February 15, 1972;²⁴ or (3) lack of national eligibility because the U.S. failed to have any copyright relations with the source country.²⁵

Two countries that qualify under this third criteria are the People's Republic of China ("P.R.C.") and Egypt. Any work by a P.R.C. citizen published in that country before March 17, 1992, the effective date of the first U.S.-P.R.C. bilateral agreement, was in the public domain in the U.S. Similarly, any work by an Egyptian author published in Egypt before March 1, 1989, the effective date of U.S. adherence to the Berne Convention, was in the public domain in the U.S.

To qualify for copyright restoration, not only must the work satisfy these requirements, but the author must have been either a national or a domiciliary of a Berne or a WTO country at the time of the work's creation.²⁶ Last but not least, if the work is published, it has to have been first published in an eligible country, and cannot have been published within thirty days in the U.S.²⁷

The end result is that U.S. works are not subject to restoration. Because the copyright restoration provision was part of an implementing package that was fast-tracked for the URAA, the U.S. was not required to, and did not, restore

work be manufactured in the U.S. Act of July 30, 1947, 61 Stat. at 656. After several extensions, the manufacturing clause finally expired in 1986. Act of July 13, 1982, Pub. L. No. 97-215, 96 Stat. 178 (1982) (codified at 17 U.S.C. § 601(a) (1986)).

24. URAA, § 514(a), 108 Stat. at 4980 (codified as amended at 17 U.S.C. § 104A(h)(6)(C)(ii)). Sound recordings were not protected by copyright in the U.S. prior to February 15, 1972, the effective date of the Sound Recording Act. *See* Sound Recording Act, Pub. L. No. 92-140, 85 Stat. 391 (1971) (codified as amended at 17 U.S.C. § 102 (1994)).

25. URAA, § 514(a), 108 Stat. at 4980 (codified as amended at 17 U.S.C. § 104A(h)(6)(C)(iii)).

26. *Id.* § 514(a), 108 Stat. at 4980-81 (codified as amended at 17 U.S.C. § 104A(h)(6)(D) (requiring at least one author to be a national or domiciliary of an eligible country); *id.* § 514(a), 108 Stat. at 4980 (codified as amended at 17 U.S.C. § 104A(h)(3) (defining "eligible country" as one which is a member of WTO or Berne, or which is subject to a proclamation under § 104A(g)).

27. *Id.* § 514(a), 108 Stat. at 4980-81 (codified at 17 U.S.C. § 104A(h)(6)(D)).

copyright in works by U.S. citizens.

An interesting provision of the law is that the newly-restored rights are given to the author, as determined by the law of the source country.²⁸ For example, until now, French film applications have always indicated the production company as the author. We now have a French film application for registration, however, listing the director as the author. That is the very first for us: people usually have taken advantage of the work-made-for-hire definitions of our statute.

One may wonder why the Copyright Office is involved at all if restoration is automatic. There are two reasons. First, when the protection is automatically restored, those who qualify can register a claim in their works, so new registration practices are necessary.²⁹ The Office adopted special registration practices that were published on September 29, 1995 in a notice in the *Federal Register*,³⁰ which is also available on the Internet.³¹

We also created separate forms, including a GATT form and a group GATT form.³² We have a twenty dollar registration fee, which is the same as for everything else, and very relaxed deposit requirements.³³

The second reason the Copyright Office is involved with

28. *Id.* § 514(a), 108 Stat. at 4976 (codified at 17 U.S.C. § 104A(b)).

29. *Id.* § 514(a), 108 Stat. at 4978-79 (codified as amended at 17 U.S.C. § 104A(e)(1)(D)(i)) (requiring the Copyright Office to issue and publish regulations to enforce restored copyright). The resulting regulations are codified at 37 C.F.R. § 202.12 (1996).

30. See 60 Fed. Reg. 50,414, 50,414 (1995) (codified at 37 C.F.R. § 202.12).

31. See *Restoration of Certain Berne and WTO Works* (visited Dec. 27, 1996) <<http://lcweb.loc.gov/copyright/fedreg/uraa.509>>.

32. See *Filling Out Application Form GATT* (visited Dec. 27, 1996) <<ftp://ftp.loc.gov/pub/copyright/forms/formgatt.pdf>> (supplying Form GATT); *Filling Out Application Form GATT/GRP* (visited Dec. 27, 1996) <<ftp://ftp.loc.gov/pub/copyright/forms/formgatg.pdf>> (supplying Form GATT/GRP).

33. 60 Fed. Reg. 50,414, 50,422-23 (1995) (amending 37 C.F.R. § 202 (1994) by adding a new § 202.12). Section 202.12(c)(3) sets the registration fee, while section 202.12(c)(4) sets the deposit requirement. 37 C.F.R. §§ 202.12(c)(3)-(4).

automatic restoration, and probably the most time-consuming issue that we had to deal with, concerns Notices of Intent to Enforce Copyright (“Notice of Intent”) that involve U.S. reliance parties.³⁴ Reliance parties are essentially entities which have used or acquired copies of certain works before the effective date of the URAA.³⁵ One example of a reliance party is a motion picture company that chose to use a musical composition by a Russian composer because the work was in the public domain in the U.S. and therefore did not require licensing or royalties. Reliance parties will be affected by the automatic restoration of the copyright term because they now will have to license the previously public domain materials in their existing works.

It was decided that there had to be special rules for reliance parties, because the legislation would otherwise be unconstitutional.³⁶ The special rules include a notice requirement that mandates notification of intent to enforce rights against reliance parties. Notice may be effected either through actual notice—by finding the reliance party and serving them—or through constructive notice—by filing with the Copyright Office.³⁷

34. URAA, § 514(a), 108 Stat. at 4976-77 (codified at 17 U.S.C. § 104A(d)(2)).

35. See *supra* notes 12, 15-18 and accompanying text (discussing the effective date of the URAA); see also URAA, § 514(a), 108 Stat. at 4980 (codified at 17 U.S.C. § 104A(h)(4)) (defining reliance party).

36. 60 Fed. Reg. 50,414, 50,416 (1995). As explained in the *Federal Register*: Reliance parties have invested capital and labor in the lawful exploitation of public domain property; the sudden restoration of copyright divests them of these investments. Without some provision addressing this potential loss, there could be challenges based on the ‘taking’ clause of the Fifth Amendment of the U.S. Constitution. . . . The U.S. Justice Department in its review of the URAA legislation concluded that under existing precedents interpreting the Fifth Amendment, the Notice of Intent to Enforce the Restored Copyright avoided an unconstitutional ‘taking.’ Thus, the Justice Department considered these provisions as critical.

Id. (citations omitted).

37. URAA, § 514(a), 108 Stat. at 4976 (codified as amended at 17 U.S.C. § 104A(c)).

There is a two-year period for filing with the Copyright Office for the works that were restored on January 1, 1996.³⁸ We realized that we might get a lot of these filings, because there are an awful lot of restored works out there, so we had to put in place filing regulations and internal practices and standards.³⁹

There is no special form for filing a Notice of Intent. There is, however, a suggested format available in the Copyright Office's Circular 38b, which is available on the Internet to download and use.⁴⁰ All the law requires is: (1) an identification of the work by its title, and, if the title is foreign, an English translation; (2) the name, address, and telephone number of the owner; and (3) the signature of the owner. The law permits the Copyright Office to require more, but provides that any additional requirements will not affect the validity of the notice.⁴¹

Although we chose not to require anything more, we certainly suggested other information that would be helpful to people who were trying to identify which restored works were going to be enforced. We suggested that the owner of the restored rights tell us: (1) the name of the author of the work, if it is not already required; (2) the type of the work, such as "motion picture" versus "music;" (3) the year and country of publication; and (4) the type of rights the owner had, such as all rights or distribution rights.⁴² The fee for a

38. *Id.* § 514(a), 108 Stat. at 4976-77 (codified as amended at 17 U.S.C. § 104A(d)(2)(A)(i)).

39. *Id.* § 514(a), 108 Stat. at 4978-79 (codified as amended at 17 U.S.C. § 104A(e)(1)(C) (authorizing the Register to fix fees based on costs)); *id.* § 514(a), 108 Stat. at 4978-79 (codified as amended at 17 U.S.C. § 104A(e)(1)(D) (requiring the Copyright Office to promulgate filing regulations)).

40. *Circular 38b, Highlights of Copyright Amendments Contained in the Uruguay Round Agreements Act (URAA)* (visited Nov. 17, 1996) <<http://lcweb.loc.gov/copyright/circs/circ38b>>.

41. URAA, § 514(a), 108 Stat. at 4978 (codified at 17 U.S.C. § 104A(e)(1)(A)(i)). These statutorily-required regulations are codified at 37 C.F.R. § 201.33(d)(3)(i) (1996).

42. 37 C.F.R. § 201.33(d)(3)(ii) (1996).

Notice of Intent to Enforce that contains one title is thirty dollars; each additional work costs another dollar.⁴³

The procedure is as follows: on May 1, and every four months thereafter, the Copyright Office will publish in the *Federal Register* a list of all of the works for which it has received Notices of Intent to Enforce. From the time of publication, there is a one-year sell-off period.⁴⁴ Thus, the date of publication becomes critical because it is the starting point for the one-year sell-off.

We have to date approximately 1500 Notices of Intent to Enforce, with many, many titles beyond that. As soon as we get a Notice of Intent, we put it up on the Internet, where it can be located in something called Volume 8000 and Volume 8001.⁴⁵ The online record will show whatever information we have been given. Accordingly, if a notice contains the name of an author, the type of work, or the rights claimed, the online records will reflect that information.

It is interesting to note what has come in so far. By far, the majority of Notices of Intent to Enforce have been for motion pictures. Interestingly enough, they are generally Mexican films that were published without copyright notices before 1978. Owners of these Mexican films originally were under the impression that they were already protected under NAFTA,⁴⁶ but subsequently discovered that they were

43. 60 Fed. Reg. 50,414, 50,421 (1995) (codified as amended at 37 C.F.R. § 201.33(e) (1996)).

44. URAA, § 514(b), 108 Stat. at 4981 (codified as amended at 17 U.S.C. § 109(a) (1994)) (providing for a one-year sell-off, measured from date of publication of the Notice of Intent to Enforce in the *Federal Register*, or from date of receipt of actual notice).

45. Notices of Intent to Enforce can be found through the Library of Congress Information System ("LOCIS"). See *Copyright Office Home Page* (visited Dec. 27, 1996) <<http://lcweb.loc.gov/copyright>>. LOCIS is available Monday-Friday 8am-9pm, Saturday 8am-5pm and Sunday 12pm-5pm, but is not available on Federal holidays.

46. North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, Dec. 17, 1992, 32 I.L.M. 605, 681, art. 1721, Intellectual

not.⁴⁷ We have also received many notices concerning Spanish motion pictures. In effect, the subject matter of the Notices of Intent to Enforce reveal the segments of the U.S. population in which works can be exploited. We are starting to receive notices for films from the United Kingdom, France, and Russia. In fact, Russian filmmakers contacted the Office with approximately 40,000 films to register.

We are also getting notices for Russian music. Owners of rights to most of the works by major Russian composers, like Shostakovich and Kachaturian, have filed Notices of Intent to Enforce their works.

In the art world, we received a filing from the estate of Picasso named on behalf of "Succession Picasso," with 247 works listed. To test you on what is wrong with this filing, note that the list for Picasso stated: "Date of publication: 1891, 1892, 1903, 1906." What is wrong with that? Those dates are impossible, because there is no way, if the works were published in that year, that they would have any term left in the U.S. They would have had to be published on or after 1921.⁴⁸

When you examined the filing, and looked at the description of the work, it said something like "Drawing of Girl in Room." Such a title offers a clue as to whether the work has even been published. For example, the work could be a drawing that is in a museum, making it unclear whether it was published under the 1909 law.⁴⁹ So, we have to wait

Property Conventions, annex 1705.7 (1993) ("The United States shall provide protection to motion pictures produced in another Party's territory that have been declared to be in the public domain pursuant to 17 U.S.C. § 405."); *see also* 17 U.S.C. § 405 (1994).

47. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 2115 (codified as amended at 17 U.S.C. § 104A(b)) (requiring a copyright owner to file a statement of intent to have copyright protection enforced).

48. 17 U.S.C. § 304 (1994) (providing a 75-year term for copyrights subsisting on January 1, 1978).

49. *Compare* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.09, at 4-49 to 4-51 (1996) (arguing that displayed works should not be consid-

and see whether or not that really is the case—was it published, and if so, when? If it has not been published, it was not restored because it was never in the public domain: we protect all unpublished works, regardless of the citizenship of the author.⁵⁰ Thus, there is a lot of confusion out there, but it is interesting for us to watch what is coming in.

VI. STUDY OF VARA WAIVER PROVISION

Let me now turn to the Office's second major undertaking during this past year. Jane Ginsburg talked about the Visual Artists Rights Act ("VARA")⁵¹ during the copyright session.⁵² When this law was going through Congress, the Senate concluded that moral rights are a personal right which cannot be transferred, and suggested that an artist should not be permitted to waive them.⁵³ The House agreed that an artist's moral rights should not be transferred, but argued that the rights *could* be waived.⁵⁴ In their compromise, both houses agreed that moral rights can be waived, but that such rights must be viable; otherwise, artists would always be forced to waive their moral rights during negotiations, which would undermine the purpose of granting the right in the first place.⁵⁵

ered "published" under the Copyright Act of 1909 ("1909 Act"), but noting cases holding that they should) *with* Paul Goldstein, 1 COPYRIGHT § 3.3.3, at 3:37-38 (2d ed. 1996) (arguing that displayed works should be considered "published" under the 1909 Act). *See generally* Act of March 4, 1909, ch. 320, 9-12, 35 Stat. 1075.

50. 17 U.S.C. § 104(a) (1994).

51. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, §§ 601-10, 104 Stat. 5089, 5128-33 (1990) (codified at 17 U.S.C. § 106A (1994)) [hereinafter VARA] (providing authors of certain works of visual art with the rights of attribution and integrity).

52. *See* Ginsburg & Baumgarten, *supra* note 1.

53. *See* S. 1198 § 3(a), 101st Cong., 1st Sess. (1989).

54. 136 CONG. REC. H12606, H12606 (daily ed. June 5, 1990) (reading into the record H.R. 2690, which states that § 106A(e) should prevent transfer of rights, but allow waiver); *see generally* H.R. 2690, 101st Cong., 1st Sess. (1989).

55. VARA, § 603, 104 Stat. at 5129 (codified at 17 U.S.C. § 106A(e)(1)) (providing that moral rights may not be transferred but may be waived); *id.* (codified at 17 U.S.C. § 106A(e)(2)) (providing that transfer of ownership of a copy or of the copyright of the work does not constitute a waiver, and that a waiver does

The Copyright Office was, consequently, required to deliver a study of the waiver provisions of VARA.⁵⁶ Although the study was completed a little late, we had received permission to file it on March 1 of this year. The study's conclusion was no surprise. After the study, the hearing, and our massive survey, we concluded that most artists are unaware of their moral rights. Specifically, we discovered that artists who earn less than \$25,000 a year typically do not know they have such rights. In contrast, artists who earn more than \$25,000, and artists who have agents, generally are aware that they have moral rights. Clearly, those who do not know they have such rights cannot exercise them. Interestingly enough, however, it really was not as much of a problem as we had anticipated; people who were buying the visual art did not know the artists had the rights either. As a result, the buyers did not know enough about moral rights to ask for a waiver.

Two important issues came out of this study. First, there is a real problem regarding sculpture and artwork that goes into buildings. For example, there was a case in New York that was reversed because the artwork at issue was found to be a work-made-for-hire. The artwork had been created in a building in Queens, and essentially took over the lobby.⁵⁷ When the lessee of the building went bankrupt, the lessors took back the property and tried to get rid of the artwork. At this point, the artists argued, "moral rights, you can't get rid of it." The district court ruled in favor of the artists, deciding that the lessors could not dispose of the artwork unless they tore down the building.⁵⁸ This decision, of course,

not constitute a transfer unless the author so agrees in writing).

56. VARA, § 608, 104 Stat. at 5132 (codified at 17 U.S.C. § 106A).

57. *Carter v. Helmsley-Spear*, 861 F. Supp. 303, 315-22 (S.D.N.Y. 1994) (holding the artwork in the building was a single work of art, not a work-made-for-hire, and was therefore protected by VARA), *rev'd*, 71 F.3d 77, 87-88 (2d Cir. 1995) (reversing on the grounds that the artwork was a work-made-for-hire, and therefore was not protected by VARA).

58. *Carter*, 861 F. Supp. at 329 (granting the plaintiff-artists an injunction preventing the defendants from distorting, mutilating, modifying, or removing

course, did not go over very well with the Helmsley people who owned the building.

The artists were not satisfied, either, because they had not finished the work. The Helmsley people replied, “Guess what? You cannot get into the building anymore. It is finished.” Apparently, the artists had thought that this project was going to be their lifetime work: when they finished with the lobby, they were going to the roof, and then to different floors. The artists who testified at our hearings said that had they known about the moral rights provisions, they would never have designed the work the way they did. Rather than making the artwork really part of the building, they would have made it movable. In sum, building owners need to be very, very careful when it comes to immovable art.

The second issue arising from the moral rights study concerned waiver provisions involving multiple authors. The current law allows one author to waive the rights of all authors.⁵⁹ That provision just does not match with a personal right. Simply stated, a personal right of attribution and integrity should not be able to be waived by other authors. We really found that provision objectionable, and made a recommendation to Congress for change. Whether Congress will do anything about this, I cannot say.⁶⁰ Unfortunately, based on previous studies by the Copyright Office and other government agencies, I do not think we will see any action—but one can remain ever optimistic. We did not recommend anything beyond that because there was insufficient information to form any firm conclusions.

VII. LEGISLATION

Let me turn now to recent and pending legislation that

the artwork from the building).

59. VARA, § 603, 104 Stat. at 5129 (codified at 17 U.S.C. 106A(e)(1)).

60. As of November 27, 1996, Congress had taken no action on the issue.

affects copyright and to the role that the Office has played in the legislative process.

A. *Digital Performance Right in Sound Recordings Act*

Certainly, we were not thrilled that the Digital Performance Right Act (“DPRA”)⁶¹ is such a narrow bill—it only covers digital transmissions and subscription and interactive services, and has a compulsory license for the non-interactive subscription services.⁶² It still is, however, a huge accomplishment in the U.S.⁶³ This is Public Law 104-39, which went into effect on February 1, 1996.⁶⁴

On the compulsory license side, we started a rate-making proceeding on December 1, 1995, looking for voluntary agreements. If parties cannot voluntarily agree, a CARP sets the rates.⁶⁵ We have a notice coming out soon in the *Federal Register* that sets forth the kinds of records that people should be keeping if they are using the compulsory license

61. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) [hereinafter DPRA].

62. DPRA, § 3(3), 109 Stat. at 339 (to be codified at 17 U.S.C. §§ 114(d)(1)) (exempting certain subscription and nonsubscription transmissions and retransmissions); *id.* § 3(3), 109 Stat. at 339 (to be codified at 17 U.S.C. § 114(d)(2)) (1994) (requiring compulsory licensing of non-interactive subscription services).

63. See Adam P. Segal, *Dissemination of Digitized Music on the Internet: A Challenge to the Copyright Act*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 97, 124 (1996) (arguing that DPRA will be “a valuable asset to sound recording owners if the future of music distribution does gravitate toward digital transmission”); Jay L. Bergman, *Digital Technology Has the Music Industry Singing the Blues: Creating a Performance Right for the Transmissions of Sound Recordings*, 24 SW.U. L. REV. 351, 363 (1995) (discussing the need for preventive measures “in order to ensure that performers and producers of sound recordings will have sufficient economic incentives to create the works that consumers demand”); see generally Julie Arthur Garcia, *An Analysis of the Digital Performance Right in Sound Recordings Act of 1995*, 8 J. PROPRIETARY RTS. 13 (1996) (discussing major features and implications of the DPRA).

64. DPRA, § 6, 109 Stat. at 342 (stating that the DPRA will take effect three months after enactment). The DPRA was enacted on November 1, 1995. See 61 Fed. Reg. 65,243, 65,243 (1996); 61 Fed. Reg. 37,213, 37,214 (1996).

65. DPRA, § 4, 109 Stat. at 340 (to be codified as amended at 17 U.S.C. §§ 114(f)(1) (discussing voluntary agreements); *id.* § 4, 109 Stat. at 340 (to be codified at 17 U.S.C. § 114(f)(2)) (providing that statutory rates are to be determined by a CARP).

provisions—after all, people cannot take advantage of a compulsory license if they do not know what the terms and conditions of that license are going to be.⁶⁶

B. *Copyright Term Extension Act*

A bill which, until recently, looked like it was going to pass Congress without any trouble is the Copyright Term Extension Act (“Extension Act”).⁶⁷ The Extension Act lengthens the copyright term by twenty years,⁶⁸ thereby matching the European Community’s term.⁶⁹ The Extension Act originated with bills in both the House and the Senate, and hearings with support more or less across the board—the Library community was not opposed, although copyright professors were.

The Extension Act was held up because of the Fairness in Musical Licensing Act (“Fairness Act”),⁷⁰ which some people refer to as the Unfairness in Musical Licensing Act. These were bills that were introduced in the House and the Senate to exempt music played in bars and restaurants from

66. Notice and Recordkeeping for Subscription Digital Transmissions, 61 Fed. Reg. 22,004, 22,004 (1996).

67. Copyright Term Extension Act of 1995, H.R. 989, 104th Cong., 1st Sess. (1995) (sent to the House Committee on the Judiciary on February 16, 1995); S. 483, 104th Cong., 1st Sess. (1995). The Senate Judiciary Committee suspended the legislation after Senators Strom Thurmond (R-SC) and Hank Brown (R-Colo.) supported an amendment that would make it non-infringing to transmit musical performances if no fees are charged. *Commerce and Labor: Copyright Term Extension*, CONG. Q. NEWS, May 20, 1996. As of July 10, 1996, S. 483 came from the Senate Judiciary Committee with an amendment in the nature of a substitution and was placed on the Senate schedule.

68. See H.R. 989, *supra* note 67; S. 483, *supra* note 67.

69. For a discussion of the Extension Act’s possible ramifications, see Lisa M. Brownlee, *Recent Changes in the Duration of Copyright in the United States and European Union: Procedure and Policy*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 579 (1996) (arguing that harmonizing U.S. and E.U. laws regarding copyright duration would simplify the creation and marketing of products containing pre-existing works, and would reduce the current laws’ prejudicial effect on U.S. authors who first publish in the U.S.).

70. Fairness in Musical Licensing Act of 1995, H.R. 789, 104th Cong., 1st Sess. (1995); S. 1137, 104th Cong., 1st Sess. (1995).

copyright infringement.⁷¹ Basically, the proponents of those bills said that they would not approve a term extension until the Fairness Act was addressed. Deals were struck with bars, but not with restaurants; we hope that it is resolved soon.

In the meantime, Senator Hatch,⁷² in an effort to get the Extension Act moving, introduced the Musical Licensing Reform Act of 1996,⁷³ which, not to my great joy, gives a lot of work to the Copyright Office. The bill creates a small business exemption, but assigns the responsibility of defining this term to the Copyright Office.⁷⁴

I love what Senator Hatch says—that the Copyright Office, unlike Congress, should be able to respond to changes in sound and video equipment in the years ahead more quickly, with more expertise, and with far less cost by engaging in other rule-making proceedings.⁷⁵ Then he goes on to give the Copyright Office the task of setting the code of conduct for performing rights organizations and bars and restaurants,⁷⁶ and again states: “The Copyright Office is also

71. H.R. 789, *supra* note 70, at 2; S. 1137, *supra* note 70, at 2 (both proposing amendments to 17 U.S.C. § 110(5) (1994), which would exempt commercial establishments from copyright infringement under certain circumstances).

72. Sen. Orrin Hatch (R-Utah).

73. Musical Licensing Reform Act of 1996, S. 1619, 104th Cong., 2d Sess. (1996). On March 15, 1996, the bill was sent to the Senate Judiciary Committee, and, as of November 24, 1996, the bill was still in committee.

74. *Id.* at 2 (proposing an amendment to 17 U.S.C. § 110(5)(B), which would create an exemption for small commercial establishments); *id.* (proposing an amendment to 17 U.S.C. § 110, which would add a new sub-section (b)(1) requiring the Register to define “small commercial establishment”).

75. 142 CONG. REC. S2192, S2192-93 (daily ed. Mar. 15, 1996) (statement of Sen. Hatch) (“The Copyright Office is in a much better position than Congress to study the business practices that prevail in order to identify improvements that would make the practices fairer and more efficient.”).

76. *Id.* at S2193 (statement of Sen. Hatch) (explaining that the Fairness Act “directs the Register of Copyrights to promulgate regulations to establish a code of conduct”); *see also* S. 1619, *supra* note 73, § 3 (proposing 17 U.S.C. § 1202(a), which would require the Register to establish a code of conduct for licensing negotiations and practices between performing rights societies and proprietors of bars and restaurants).

in a much better position to modify these regulations as times change.”⁷⁷ Finally, Senator Hatch gives the Copyright Office the oversight of the antitrust decrees,⁷⁸ asks for a report on them,⁷⁹ and gives the Office the responsibility of ensuring that the repertory of these organizations is available to the public.⁸⁰

C. *Copyright Clarifications Act*

The last bill that I am going to mention—I am not going to talk about the NII⁸¹ because it will be covered tomorrow⁸²—is the Copyright Clarifications Act (“Clarifications Act”).⁸³ The Clarifications Act started as a technical amendments bill proposed by the Copyright Office,⁸⁴ but now has some major pieces of legislation in it.⁸⁵ It has cleared the

77. 142 CONG. REC. at S2192-93 (statement of Sen. Hatch).

78. S. 1619, *supra* note 73, § 4.

79. *Id.* (requiring the Register to report to the House and Senate Judiciary Committees on the district court’s administration of *United States v. ASCAP*, 1950 Trade Cas. (CCH) 62,595 (S.D.N.Y. 1950), and *United States v. BMI*, 1966 Trade Cas. (CCH) 71,941 (S.D.N.Y. 1966)).

80. *Id.* § 3(a) (proposing 17 U.S.C. § 1203(a), which would require the Register to promulgate regulations that would allow the public reasonable access to a performing rights society’s repertoire).

81. The National Information Infrastructure (“NII”) is a “convergence of communications industries into a seamless web of communications networks, computers, databases and consumer electronics” providing the American people with almost immediate access to a wealth of information. 58 Fed. Reg. 49,025, 49,025 (1993).

82. See generally Hon. Bruce A. Lehman, *Global Intellectual Property Protection in the Twenty-First Century*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 9 (1996); Paul Waterschoot, *The European Union Perspective*, in 3 INT’L INTELL. PROP. L. & POL’Y, *supra* note 1; Morton David Goldberg, *The Digital Agenda in the United States and WIPO*, in 3 INT’L INTELL. PROP. L. & POL’Y, *supra* note 1; Pamela Samuelson, *A Critical View of the White Paper*, in 3 INT’L INTELL. PROP. L. & POL’Y, *supra* note 1; Robert Hart, *The Perspective in Japan, Australia and Canada*, in 3 INT’L INTELL. PROP. L. & POL’Y, *supra* note 1; Jack Krumholtz, *A Regulatory Framework for the Internet: The Road Ahead*, in 3 INT’L INTELL. PROP. L. & POL’Y, *supra* note 1; Maurits J.F.M. Dolmans, *Copyright Protection on the Internet: Legal and Technological Developments*, in 3 INT’L INTELL. PROP. L. & POL’Y, *supra* note 1.

83. Copyright Clarifications Act of 1996, H.R. 1861, 104th Cong., 2d Sess. (1996).

84. 142 CONG. REC. at H5783 (statement of Sen. Moorhead).

85. Since the original bill’s introduction on June 15, 1995 in the House of Representatives, see H.R. 1861, 104th Cong., 1st Sess. (1995), the Clarifications

cleared the Judiciary Committee and is expected to be voted on by the House very shortly.⁸⁶

One of the major pieces of legislation in the Clarifications Act requires the Register, not Congress, to set all Copyright Office fees.⁸⁷ This was not our suggestion; it was Congress that wanted to get out of the fee-setting business.

The second part of the Clarifications Act would essentially overturn the Ninth Circuit's decision in *La Cienega v. ZZ Top*,⁸⁸ thereby reinstating the prior general understanding that distribution of phonorecords before 1978 does not constitute publication of the musical compositions embodied therein.⁸⁹ The Clarifications Act also has GATT clarification language, not only of the date, but also of the derivative work provision, making it clear that U.S. derivative works can continue to utilize the restored works.⁹⁰

The last part of the Clarifications Act is an amendment to Section 117,⁹¹ which would ensure that independent service

Act has been amended by the House Judiciary Committee, H.R. REP. NO. 554, 104th Cong., 2d. Sess. (1996), the House Subcommittee on Courts and Intellectual Property, 141 CONG. REC. D1460, D1460 (daily ed. Dec. 13, 1995), and twice more in the House of Representatives, H.R. REP. NO. 554, 104th Cong., 2d Sess. (1996) (modifying the Satellite Home Viewer Act of 1994 and other provisions of federal copyright law regarding subscriber charges, royalty fees, jukebox license arbitration, registration and infringement actions, Copyright Office fees, and CARPs).

86. Subsequent to the delivery of this Address, H.R. 1861 passed the House on June 4, 1996. H.R. 1861, *supra* note 85. Although the bill was sent to the Senate Judiciary Committee on July 12, 1996, as of November 24, 1996, there was no Senate version of the bill.

87. *Id.* § 10(a) (amending 17 U.S.C. § 708(b) (1994)).

88. 53 F.3d 950, 953 (9th Cir.), *cert. denied*, 116 S. Ct. 331 (1995).

89. H.R. 1861, *supra* note 85, § 13(2) (amending 17 U.S.C. § 303 by adding a new subsection (b)); *see also* *Rosette v. Rainbo Mfg. Corp.*, 354 F. Supp. 1183 (S.D.N.Y. 1973), *aff'd*, 546 F.2d 461 (2d Cir. 1976) (holding that commercial distribution of phonograph records of musical compositions does not constitute publication).

90. H.R. 1861, *supra* note 85, § 3(1) (amending 17 U.S.C. § 104A(d)(3)(A)) (concerning existing derivative works); *id.* § 3(3) (amending 17 U.S.C. § 104A(h)(2)) (concerning date of restoration).

91. Currently, 17 U.S.C. § 117 states that the owner of a copy of a computer program may make further copies as long as: (1) the making of the copy is necessary to use the program, or (2) the copy is made for archival purposes. 17

organizations are not inadvertently held liable for copyright infringement when they merely have turned on a machine in order to service it.⁹² There is a very long statutory history concerning that amendment, which was basically negotiated between the parties. It is unbelievably narrow and its exemption does not cover diagnostic software, only operations software.⁹³ So, we will see what happens to the Clarifications Act. It is expected to pass the House; I'm not sure about the Senate.⁹⁴

VIII. CORDS: COPYRIGHT OFFICE ELECTRONIC REGISTRATION, RECORDATIONS, AND DEPOSIT SYSTEM

I will conclude with an update of an idea that we had talked about last year:⁹⁵ our electronic registration system. It is called CORDS, for the Copyright Office Electronic Registration, Recordations, and Deposit System.⁹⁶ It incorporates some of the technology that Jon Baumgarten spoke about this morning in the copyright session concerning caching.⁹⁷ CORDS uses public key/private key encryption technology, digital signatures, and privacy-enhanced e-mail in order to get messages back and forth.⁹⁸ We have already made the

U.S.C. § 117 (1994). Copies may only be leased or sold along with the first copy of the program. *Id.*

92. H.R. 1861, *supra* note 85, § 7(3) (amending 17 U.S.C. § 117 by adding a subsection (c) to clarify that, under certain circumstances, it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program for purposes of computer maintenance and repair); *see also* 142 CONG. REC. at H5783.

93. 142 CONG. REC. at H5784.

94. *See supra* note 86 (discussing legislative action on the Copyright Clarifications Act subsequent to the delivery of this Address).

95. *See* Marybeth Peters, *The Copyright Office's Perspective on the NII*, in 2 INT'L INTELL. PROP. L. & POL'Y (Hugh C. Hansen ed., forthcoming 1997).

96. *See* Copyright, Freedom of Information Act, Mask Works, Privacy Act, Registration, and Royalties, 60 Fed. Reg. 34,167, 34,167 (1995) (codified at 37 C.F.R. §§ 201-04, 211, 255 (1996) ("The Associate Register of Copyrights for National Programs is primarily responsible for initiating, planning, and implementing projects and activities related to the Copyright Office electronic registration, recordations, and deposit system (CORDS).").

97. *See* Ginsburg & Baumgarten, *supra* note 1.

98. *Id.*

first electronic registration. It came on February 27, 1996 from a student at Carnegie Mellon University who submitted a doctoral thesis through the Internet. We received and registered it, thereby putting CORDS in business.

CORDS is an exciting system. As soon as the Copyright Office gets an application, we acknowledge its receipt. All the correspondence is through e-mail, and the certificate is made automatically.

CORDS will be deployed very, very slowly. The only way that you can ever receive acceptance for a new system is to make sure the system has no bugs. Practically speaking, then, you have to start with small groups. Only when the system looks like it is operating well do you add additional groups. Consequently, CORDS will be deployed gradually over the next five years. This year, we will be sticking largely to textual material with a few graphics, but then will be expanding into illustrations and photographs, sound recordings, and, ultimately, motion pictures.

We think the day is coming when total electronic registration is both possible and popular. We would have a repository to ensure that the work is authentic and a rights management component to ensure that people can make their terms and conditions available. As a result, there is great hope for CORDS, although, for now, the system has made only its first registration.

Thank you very much.