A Revue of Review:
Update on U.S. Copyright Law
Review and Studies

The Fourth Annual U.S.-China IP Conference:
Best Practices for Innovation and Creativity

October 8-9, 2015
Berkeley, California
Today’s Revue

- Copyright Review
- Office Modernization
- Copyright Office Studies and Reports
“The law is showing the strain of its age and requires [Congress’s] attention.”

“Authors are not a counterweight to the public interest but instead are at the very center of the equation.”

“Ultimately if the law does not serve authors, it is not working and it doesn’t deserve the respect of the public.”
Congressional Copyright Review
Announced in April 2013

“It is my belief that a wide review of our nation’s copyright laws and related enforcement mechanisms is timely.”

“The House Judiciary Committee will hold a comprehensive series of hearings on U.S. copyright law in the months ahead.”

“The goal of these hearings will be to determine whether the laws are still working in the digital age.”
Copyright Review Hearings: 20 hearings, 100 witnesses, 2 years

A Case Study for Consensus Building: The Copyright Principles Project
Innovation in America: The Role of Copyrights
Innovation in America: The Role of Technology
The Role of Voluntary Agreements in the U.S. Intellectual Property System
The Rise of Innovative Business Models
The Scope of Copyright Protection
The Scope of Fair Use
Section 512 of Title 17

Preservation and Reuse of Copyrighted Works
Compulsory Video Licenses of Title 17
First Sale Under Title 17
Music Licensing Under Title 17 (two hearings)
Moral Rights, Termination Rights, Resale Royalty, and Copyright Term
Copyright Remedies
Chapter 12 of Title 17 (Circumvention/TPMs)
Copyright Issues in Education and for the Visually Impaired
The U.S. Copyright Office: Its Functions and Responsibilities
Copyright Review Hearings: Participating Stakeholders

- Amazon.com
- Americana Music Association
- American Association of Community Colleges
- American Association of Independent Music
- American Association of State Colleges and Universities
- American Cable Association
- American Council on Education
- American Foundation for the Blind
- American National Standards Institute
- American Society of Composers, Authors and Publishers
- American Society of Media Photographers
- Association of American Publishers
- Association of American Universities
- Authors Guild
- Association of Public and Land-grant Universities
- Automatic Inc.
- Authors Guild
- Benetech (Technology non-profit)
- BSA—The Software Alliance
- BMI
- Center for Copyright Information
- Center for Democracy and Technology
- Center for Internet, Communication and Technology Policy, American Enterprise Institute
- Columbia University
- Computer & Communications Industry Association
- Copyright Alliance
- Copyright Clearance Center
- Digital Media Association
- DISH Network
- Electronic Frontier Foundation
- Elsevier Inc.
- Entertainment Software Association
- Film Independent and International Documentary Association
- Future of Music Coalition
- Getty Images
- Graphic Artists Guild
- Google Inc.
- Yep Roc Records, Red Eye Distribution (Independent Record Companies)
- Indiegogo
- Independent Creators
- Roseanne Cash (singer/songwriter/performer)
- David Lowery (singer/songwriter/lecturer)
- Naomi Novik (author)
- Maria Schneider (GRAMMY Award Winning Composer)
- International AntiCounterfeiting Coalition
- Interactive Advertising Bureau
- John Wiley & Sons, Inc.
- Knowledge Ecology International
- Law Professors/Scholars
  - June Besek
  - Annemarie Bridy
  - Michael W. Carroll
  - Laura Gasaway
  - Daniel J. Gervais
  - Peter Jaszi
  - Glynn Lunney, Jr
  - David Nimmer
  - Sean O’Connor
  - Pamela Samuelson
  - Mark F. Schultz
  - Steven Tepp
  - John Villasenor
- Library of Congress
- Microsoft Corporation
- Motion Picture Association of America
- Nashville Songwriters Association International
- National Association of Broadcasters
- National Association of Independent Colleges and Universities
- National Federation for the Blind
- National Music Publishers Association
- Newspaper Association of America
- New York Public Library
- One House LLC
- Organization for Transformative Works
- Owners’ Rights Initiative
- PACA/Digital Media Licensing Association
- Pandora Media Inc.
- PharmacyChecker.com
- PLUS Coalition
- PreEmptive Solutions
- Public Knowledge
- Public.Resource.org
- Rackspace
- Radio Music License Committee Inc.
- The Recording Academy
- Recording Industry Association of America
- ReDigi
- Sirius XM Holdings Inc.
- SnapStream Media
- Stereo D
- Songwriters Guild of America
- SoundExchange Inc.
- SparkFun Electronics, Inc.
- TV Music License Committee
- U.S. Copyright Office
- U.S. Department of Justice
The Register’s Perspective on Copyright Review (April 29, 2015)

Eight Policy Issues Ready for Legislative Development

Copyright Office Modernization
Music Licensing
Small Claims
Felony Streaming
Section 108
Orphan Works
Resale Royalty
Improvements for Persons with Print Disabilities
Section 1201 – Regulatory Presumption

Four Issues Ripe for Study

Section 1201 – Other Issues
Section 512
Mass Digitization
Moral Rights
Modernization of the Copyright Office

• Information Technology

• Presidential Appointment/Senate Confirmation of the Register

• Office Location in the Government
Technology Upgrades

Independent infrastructure
Additional expert staff
Enterprise solution
Mobile capabilities
Better public record
Sophisticated data management
Security practices
Some Statistics about the Office

- Approximately 360 current employees, below the authorized number of 475
- Funded by fees and appropriations
- Budget of $50 million in 2014

Registration Snapshot
- 476,000 registration applications received in 2014
  - 219,000 applications for literary works
  - 65,000 applications for sound recordings
- Receive ~ 9,000 applications a week
- Application processing time for electronic applications is ~4 months
Recent Reports for Congress & Other Documents (2011-2015)

- Orphan Works and Mass Digitization (2015)
- Fair Use Index (2015)
- Technical Upgrades (2015)
- Compendium of Copyright Office Practices (2014)
- Document Recordation (2014)
- Resale Royalties (2013)
- Small Claims (2013)
- Fee Study (2013)
- Satellite Retransmission (2011)
- Mass Digitization Analysis (2011)
- Pre-1972 Sound Recordings (2011)
Orphan Works and Mass Digitization

- **Orphan work**: work for which a good-faith user cannot identify and/or locate copyright owner where permission is necessary as a matter of law

- Potential infringement liability/statutory damages/attorneys’ fees/injunction if copyright owner reemerges

“The orphan works problem is perhaps the single greatest impediment to creating new works . . . . The United States desperately needs a workable solution.”

--Michael C. Donaldson, Int’l Documentary Association/Film Independent

- Federal Register notices issued in October 2012 and February 2014.
- Three rounds of public comments – 346 comments received.
- Public roundtables: March 10-11, 2014
June 2015 Report

With separate recommendations on

Orphan Works

and

On Mass Digitization
For Orphan Works ...

Recommendations

• **Limitation on remedies** for uses who can prove that they engaged in **good faith diligent search** for copyright owner

• **Diligent search** would include:
  – Copyright Office records
  – Sources of authorship, ownership, and licensing
  – Technology tools
  – Databases
On Orphan Works ...

Recommendations (continued)

• **Injunctive relief** must account for harm caused by reliance on orphan works legislation
  
  — *E.g.*, enjoin new copies, but permit sale of existing copies

• **Derivative works:** Where an orphan work is combined with “significant original expression,” user can continue to prepare and use work if he provides reasonable compensation and attribution where requested
  
  — But, court may impose injunctive relief if harm is reputational in nature and not otherwise compensable
Conclusions/Recommendations

- Fair use/voluntary licensing unlikely to provide a comprehensive solution.

- France, Germany, and the U.K. have adopted forms of extended collective licensing (ECL) to address mass digitization.
  - Longstanding use in Nordic countries
  - Collective management organizations (CMOs) are authorized by government to negotiate and administer licenses. Terms are “extended to” all members of class, unless rightsholders opt out.
  - Proposed Google Books class settlement adopted similar model.
Conclusions/Recommendations (cont’d)

• Office recommends ECL “pilot program” for certain mass digitization projects
  – CMOs could apply to Copyright Office for authorization to license works on behalf of members and non-members
  – Limited to (1) literary works, (2) pictorial or graphic works published as illustrations, etc. in literary works, and (3) photographs
  – Copyright owners could opt out
  – Limited to nonprofit educational or research uses
Notice of Inquiry on Pilot Project

- Office has issued Federal Register notice seeking public comment to assist in developing legislation.
- Issues to be considered, *e.g.*:
  - Qualifying collections (minimum number of works, commercial availability, publication date)
  - User eligibility and access
  - Security requirements
  - Dispute resolution
- Comments are due October 9
Fair Use Index

• The Fair Use Index tracks a variety of judicial decisions to help both lawyers and non-lawyers better understand the types of uses courts have previously determined to be fair—or not fair. The decisions span multiple federal jurisdictions.

• Provides brief summary of facts, question(s) presented and court’s determination

• Provides citations to cases (but not the cases themselves)

• Searchable

• Available at http://copyright.gov/fair-use

“... something [the Copyright Office Fair Use Index] that finally came out just a few months ago and is actually pretty damn good.”
- Mike Masnick, Techdirt, Sept. 8, 2015
The Compendium III

- Technical manual for the Office’s staff
- Also a Guidebook
  - Authors
  - Licensees
  - Practitioners
  - Scholars
  - Courts
  - The Public
- Addresses fundamental principles of copyright law and routine questions

Available at: http://copyright.gov/comp3/
Ongoing: Notice of Inquiry regarding Visual Works

• Topics include:
  – Monetizing and/or licensing visual works
  – Enforcement challenges
  – Registration challenges
  – Challenges for users

• Initial comments are posted on USCO website; reply comments were due October 1
Forthcoming: Report on Making Available

- USCO held one day of public roundtables on May 5, 2014
  - Licensing associations
  - Legal scholars
  - Technology entities
- Participants representing diverse viewpoints
- Discussed existing exclusive rights, benefits of clarification, and foreign implementation and interpretation.
Forthcoming: Sixth Triennial Section 1201 Rulemaking

Triennial process to identify exemptions of certain classes of works from the prohibition against circumvention of technological measures that control access to copyrighted works.

- **September 2014:**
  - **Notice of Inquiry**
  - 44 petitions for exemptions
  - Office created 27 proposed classes of exemptions for consideration
- **Received nearly 40,000 comments** (including many form comments)
Other U.S. Initiatives

• **U.S. Department of Commerce Internet Policy Task Force**
  – July 2013: Released “Copyright Policy, Creativity, and Innovation in the Digital Economy”
  – Held roundtables and public comment on issues relating to copyright law in the digital environment

• **U.S. Intellectual Property Coordinator (IPEC)**
  – June 2013: Released 2013 Joint Strategic Plan (JSP) on IP Enforcement
  – Facilitated several voluntary initiatives between various stakeholders
    • Copyright Alert System
    • Voluntary Best Practices
  – Public comments for next JSP due on October 16
A Revue of the Review ....
Xie xie

Maria Strong
Deputy Director of
Policy and International Affairs
United States Copyright Office

www.copyright.gov