

The Register

# Regulatory activities, policy assistance, & litigation

*The United States Capitol  
as seen from the Ralph Waldo  
Emerson Collection in the  
Library's Jefferson Building*

## COPYRIGHT OFFICE REGULATIONS

The Register of Copyrights is authorized under 17 USC §702 to establish regulations for the administration of the copyright law. In addition to regulatory activities discussed elsewhere in this report, regulations issued during Fiscal Year 2005 included the following:

### Reconsideration Procedure

On December 28, 2004, the Copyright Office issued a final rule governing requests that the Office reconsider decisions to refuse registration (69 FR 77636). With a few modifications, the rule codifies the procedures that have governed these requests since the Office implemented them internally in 1995, by incorporating these practices specifically into the *Code of Federal Regulations*.

Under the new rule, as has been the practice, applicants for registration have two sequential opportunities to seek reconsideration of a Copyright Office decision to refuse registration. At the first level of reconsideration, the Copyright Office's Examining Division reviews its initial decision to refuse registration after considering the arguments advanced by the applicant. If not satisfied with the Office's decision at this level, the applicant can request a second and final reconsideration by the Review Board (formerly known as the Appeals Board). The Register of Copyrights, the General Counsel (or their respective designees) and a third member designated by the Register compose the Review Board.

The rule also addresses applicable deadlines and delivery requirements for requests for reconsideration. Moreover, it clarifies that the procedures for reconsideration apply to the Office's



refusals to register not only copyright claims, but also mask works and vessel hull design claims, and it changed the name of the Copyright Office “Board of Appeals” to the “Review Board.”

### Preregistration of Certain Unpublished Copyright Claims

On July 22, 2005, pursuant to the Artists’ Rights and Theft Prevention Act of 2005 (the ART Act), Title I of the Family Entertainment and Copyright Act of 2005, the Copyright Office proposed regulations for the preregistration of unpublished works that are being prepared for commercial distribution in classes of works that the Register of Copyrights determines have had a history of prerelease infringement (70 FR 42286). As part of this process, the Register must determine the classes of works eligible for preregistration based on whether they have had a history of infringement prior to authorized release and whether they meet the other statutory requirements. The initial proposed rule and a Supplemental Notice of Proposed Rulemaking (70 FR 44878, August 4, 2005) elicited 10 comments on the proposed classes and preregistration procedures, and 230 comments on the utility of employing the web browser that had been tested for filing preregistration forms in the Copyright Office, an issue which had been raised in the supplemental notice.

### Group Registration of Published Photographs

Copyright Office regulations permit group registration of certain photographs taken by an individual photographer in a calendar year. On March 28, 2005, the Copyright Office amended its final regulations governing such group registration to limit to 750 the number of photographs that may be identified on continuation sheets submitted with a single application form and filing fee (70 FR 15587). The amendments only affect registrations utilizing continuation sheets, and were implemented in response to the submission of a number of group registration applications containing many hundreds of continuation sheets with thousands of photographs, creating a tremendous administrative burden. The regulation continues to place no limit on the number of photographs that may be included in a single group registration when the applicant elects not to use continuation sheets and instead it requires the identification of the date of publication for each photograph on the deposit image and that the

applicant meet the other regulatory requirements for group registration of published photographs. The amended regulation also clarifies that the date of publication given for each photograph may be identified in a text file on a CD-ROM or DVD that contains the photographic images or on a list that accompanies the deposits and provides the publication date for each image.

### Acquisition and Deposit of Unpublished Audio and Audiovisual Transmission Programs

On October 26, 2004, the Copyright Office issued final regulations amending its rule governing the Library of Congress's authority to record unpublished transmission programs (69 FR 62411). The amended regulations extended the Library's authority to record television programs to include unpublished radio and other audio and audiovisual transmission programs. The Library of Congress may now record or demand unpublished radio transmission programs and unpublished cable, satellite, and Internet transmission programs. Copyright owners whose programs are recorded or demanded may use the recordings so acquired by the Library to satisfy the deposit requirements to register their copyright claims.

In response to comments, the Office further amended its rule to require the Library to maintain on its website, at [www.loc.gov/rr/record](http://www.loc.gov/rr/record) for audio recordings or [www.loc.gov/rr/mopic](http://www.loc.gov/rr/mopic) for audiovisual recordings, a list of the transmission programs that it has recorded under this authority. The amended rule also requires the Library to add to this list the name of each audio, cable, satellite, or Internet transmission program that it has recorded and to do so within fourteen days of recording the program. Copyright owners may use this list to challenge the Library's presumption that a particular transmission program has been fixed and is unpublished, and to receive notice that a recording made by the Library is available for use as a deposit for registration.

### Registration of Claims to Copyright: New Format for Certain Copyright Registration Certificates

On January 21, 2005, the Copyright Office announced a policy decision modifying the format of copyright registration certificates issued for certain works under a pilot project designed to test reengineered business processes (70 FR 3231; see also

70 FR 9111). A work processed in the reengineered system is issued a registration certificate generated from data stored in an electronic information base, and while the content is almost identical to the current certificate based on the paper application, its general appearance is significantly different. Until the Office adds other classes to its information technology pilot programs, certificates in the new format will be issued only for motion pictures and other audiovisual works registered in class PA.

### Inspection and Copying of Records

On December 6, 2004, the Copyright Office issued a technical amendment to its regulations governing the inspection and copying of public records (69 FR 70377). The amended rule removes from the regulatory text the hours of direct public use of computers intended to access the automated equivalent of portions of the in-process files in the Records Maintenance Unit of the Copyright Office. This change allowed the Office to adopt new, reduced hours to allow (1) ample time for the small staff in the Unit to both open and close the public area each day and adequately serve the public and (2) sufficient time for public use of the files. For administrative reasons, the new hours of operation have not been included in the regulation. Hours are posted on the Copyright Office website under the “About” tab.

### Statements of Account

On July 1, 2005, the Copyright Office amended its regulations to require cable operators, satellite carriers, and manufacturers and importers of digital audio recording technology and media to file with the Licensing Division an additional copy of their statements of account together with the original statement (70 FR 38022). The change will eliminate the costs associated with creating a separate copy for the public records and it will expedite the creation of the public file.

### Filing of Claims for Cable, Satellite, and DART Royalties

Copyright owners must file claims with the Copyright Office each year in order to claim and receive a portion of the royalties collected the preceding calendar year under 17 USC §111, §119, and chapter 10. The Office’s regulations require that a claimant either

mail or hand deliver its claim to the Office during the prescribed filing period. Each year since 2002, however, the Office had waived its mailing requirement and offered several additional means for delivering a cable, satellite, or DART claim to the Office, including online submission of the claim, or in the case of DART claims, facsimile submission. The Office took this action in response to a disruption in mail delivery caused by the threat of anthrax-contaminated mail and the continued delays in receipt of mail due to the diversion of mail to an off-site location for screening.

Because of the continuing delays in mail receipt and other problems associated with untimely filings of claims by mail, the Office, on October 18, 2004, published a notice in the *Federal Register* proposing to amend its regulations governing the filing of claims to allow for the online submission of these claims as well as requiring that claimants filing their claims by mail or hand delivery use forms created by the Office (69 FR 61325). For the sake of uniformity, the proposed amendments eliminated the option for filing DART claims by facsimile transmission. The Office also proposed the use of a Personal Identification Number (PIN), to be selected by the claimant either before the requisite filing period or at the time of filing, to replace the current signature requirement.

Although the comments supported revising the rules to provide for electronic filing of royalty claims, the comments received by the Office raised several issues concerning the proposed PIN system. Specifically, commenters questioned the effectiveness of such a system in deterring the filing of fraudulent claims and argued that a PIN system would be unduly burdensome on claimants. In light of the controversy over the use of a PIN system, the Office was unable to issue final regulations before the next filing period for DART claims. Consequently, on November 29, 2004, the Office again waived its mailing requirement for the filing of DART claims, offering the same alternative means of filing: either online submission or facsimile transmission (69 FR 69288).

Immediately thereafter, on November 30, 2004, the President signed into law the Copyright Royalty and Distribution Reform Act of 2004, which phases out the Copyright Arbitration Royalty Panel (CARP) system and replaces it with three permanent Copyright Royalty Judges (the Copyright Royalty Board). Consequently, the Copyright Royalty Board will carry out the functions previously performed by the CARPs, including the taking in and processing of claims to royalty fees collected under §111, §119, and chapter 10 of the copyright law. Jurisdiction over such claims

passed to the CRJs on May 31, 2005, the effective date of the Act, and shortly thereafter, the Copyright Royalty Board issued its own regulations governing the filing of claims. Consequently, on July 1, 2005, the Office published a notice in the *Federal Register* removing from the CARP rules the sections pertaining to the filing of cable, satellite, and DART claims (70 FR 38022).

### Notice and Recordkeeping for Use of Sound Recordings Under Statutory License

In 2004, the Copyright Office published interim regulations governing the records that must be maintained and delivered by digital audio services making use of the statutory licenses in §112 and §114 of the copyright law, the type and nature of those records, and the requirements for serving notices of use of the licenses (69 FR 11515). These regulations specified the content of the records, but they did not include regulations on format and delivery.

In the continuing effort to adopt regulations on these exceedingly controversial issues, the Office published a further notice of proposed rulemaking on April 27, 2005, seeking another round of comments from the interested parties on format and delivery (70 FR 21704). However, pursuant to the Copyright Royalty and Distribution Reform Act of 2004, authority over this matter passed to the Copyright Royalty Judges on May 31, 2005, before the Office could act on the comments received in response to the notice. Since that time, the Copyright Royalty Board has considered the comments filed in response to the April 2005 notice and has sought supplemental comment on the proper format and delivery requirements. It will publish appropriate regulations at a future date.

### Reports of Use of Sound Recordings Under Statutory License

On May 9, 2005, the Copyright Office adopted amendments to its rules governing the filing of reports of use of sound recordings by preexisting subscription services at the joint request of the preexisting subscription services and the organizations that represent the copyright owners of the sound recordings (70 FR 24309). The amended rules require the preexisting subscription services to report the copyright notice, i.e., the “P” line, accompanying the record albums or sound recordings, where it is available; extend the period for filing the reports of use so that the filing period

covers the payment periods; and make technical changes to clarify that these filing requirements apply only to preexisting subscription services.

### Cost of Living Adjustment for Performance of Musical Compositions by Colleges and Universities

Each year, the Copyright Office adjusts the rates for the public performance of musical compositions in the repertoires of the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Inc. (BMI) and the Society of European Stage Authors and Composers (SESAC) by public broadcasting entities licensed to colleges and universities to reflect the change in the Consumer Price Index. On December 1, 2004, the Office published the new rates, adjusting for a 3.2 percent cost of living increase (69 FR 69822). The revised rates became effective on January 1, 2005.

[Docket numbers and dates of *Federal Register* documents issued during Fiscal Year 2005 are listed in an appendix of this report.]

## REPORTS AND LEGISLATION

The Copyright Office provides reliable advice and testimony to Congress on copyright matters and proposed copyright legislation, and undertakes studies and provides authoritative reports on current issues affecting copyright.

### Hearings

The Register of Copyrights testified in four congressional hearings during Fiscal Year 2005. The subjects of these hearings were:

*Before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary —*

- Music licensing reform on June 21, 2005

*Before the Senate Committee on the Judiciary —*

- Protecting copyright and innovation in a post-*Grokster* world on September 28, 2005

*Before the Subcommittee on Intellectual Property of the Senate Committee on the Judiciary —*

- Piracy of intellectual property on May 25, 2005
- Music licensing reform on July 12, 2005

### *Piracy of Intellectual Property*

The Register testified on May 25, 2005, before the Subcommittee on Intellectual Property of the Senate Judiciary Committee on the issue of “piracy of intellectual property.” The Register stated that piracy is one of the most enduring copyright problems and that Congress should strive to reduce piracy to the lowest levels possible.

The Copyright Office has a long history of working toward this goal. The Copyright Office has used several avenues to assist in the strengthening of international copyright treaties and the laws of countries. The Register stressed that better laws are not, in themselves, a guarantee against piracy. There must also be effective enforcement of those laws. Treaties, no matter how well negotiated, cannot compel enforcement.

The Register explained the current state of affairs regarding international copyright, in particular the lax enforcement in countries like China and Russia, which contributes to piracy problems. Criminal syndicates carry out piracy for profit in factories throughout China, southeast Asia, Russia, and elsewhere, churning out millions of copies of copyrighted works, sometimes before they are even released by the rightsholders.

International piracy poses a tremendous threat to the prosperity of one of America’s most vibrant economic sectors: its creative industries. Accordingly, it deserves consistent and long-term attention. While it is not realistic to expect to eliminate all piracy, the United States can continue to improve the global situation.

### *Music Licensing Reform: Modernization of §115 of the Copyright Act*

Continuing discussions from previous fiscal years, the Copyright Office assisted Congress in exploring whether §115 of the Copyright Act should be modernized and how best to accomplish such modernization. Section 115 provides a compulsory license

to reproduce and distribute musical works as embodied in phonorecords, including digital phonorecord deliveries. The Copyright Office believes that §115, as currently written, is insufficient to address, and in some cases incompatible with, the practical realities of online music distribution and the continuing fight against piracy. Most of the music industry agrees. On March 8, 2005, representatives of record labels, songwriters, music publishers, and digital music service providers testified before the House Subcommittee on Courts, the Internet, and Intellectual Property in an oversight hearing on §115 to inform the Subcommittee on the progress of private sector negotiations to remedy perceived deficiencies in the licensing processes. The Chairman of the Subcommittee then asked the Copyright Office to explore in model legislation the possibility of permitting music rights organizations to license on a consolidated basis both the public performance right of a musical work as well as its reproduction and distribution rights. The Register of Copyrights testified about this potential avenue for reform before the Subcommittee on June 21, 2005.

Subsequently, the Register of Copyrights met with numerous members of the music industry to learn about their specific concerns regarding potential reform. The Senate Judiciary Committee's Subcommittee on Intellectual Property then asked the Register of Copyrights, as well as members from various sectors of the music industry, to testify before it on July 12, 2005, as to the need for reform and the possible avenues for achieving it. The Register presented several possible solutions, including a blanket statutory license for digital phonorecord deliveries.

The result of the hearings and meetings described above is a substantial agreement that §115 should be modernized to reflect the needs and realities of the online world. However, substantial contention exists as to how such modernization should be structured and implemented. This debate will continue at least into the next fiscal year. No relevant legislation was introduced in Fiscal Year 2005.

### *Protecting Copyright and Innovation in a Post-Grokster World*

On September 28, 2005, the Senate Judiciary Committee held a hearing on “protecting copyright and innovation in a post-*Grokster* world,” examining legal and policy issues in the wake of the Supreme Court's June 27 decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* The Register of Copyrights testified, calling the *Grokster* decision “one of the most significant developments in copyright law in the past twenty years.” She said the decision clarified that those who offer products and services in a way that

induces others to engage in copyright infringement can be held secondarily liable for that infringement, thereby encouraging productive negotiations and agreements within the music industry that will ultimately benefit the music consumer by making it easier to obtain music online legitimately. She noted that subsequent U.S. and foreign court decisions demonstrate a growing acceptance of the *Grokster* ruling that those who induce infringement can be held responsible for what they have unleashed and that the ruling had also helped to raise the public consciousness as to the legal status of unauthorized peer-to-peer file-sharing of copyrighted works. While she did not believe that there was an immediate need for legislation to clarify the rules regarding secondary liability, she repeated the theme of her July 12, 2005, testimony that the opportunity presented to the music industry by *Grokster* will be squandered if Congress does not modernize the existing §115 statutory licensing regime so that legitimate music services can take advantage of the blow the Court has struck against illegitimate offerings.

## Other Legislation

### *Copyright Royalty and Distribution Reform Act of 2004*

On November 30, 2004, the President signed the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419. This law, which became effective on May 31, 2005, phases out the Copyright Arbitration Royalty Panels (CARPs) and replaces them with a new Library program, which is independent of the Copyright Office, and employs three full-time Copyright Royalty Judges (CRJs) and three staff. This organization is known as the Copyright Royalty Board. The Librarian of Congress, after consultation with the Register of Copyrights, appoints the CRJs.

As with the Copyright Royalty Tribunal and the CARPs which preceded the CRJ program, the primary responsibilities of the CRJs are to set rates and terms for the various statutory licenses contained in the Copyright Act and determine distribution of royalty fees collected by the Copyright Office pursuant to certain of these licenses. The CRJs have the additional responsibility to promulgate notice and recordkeeping regulations to administer some of the statutory licenses.

The Register of Copyrights retains a role in the process, which requires that the CRJs seek a written determination from the Register on any novel question of copyright law and permits the CRJs, on their own initiative or at the request of

the parties, to seek a written determination from the Register on other material questions of substantive law. In such cases, the CRJs are to apply the Register's legal interpretation. The Register may also review the final determinations of the CRJs for legal error in the resolution of material questions of substantive law. Although the Register's review may not affect the result in a particular proceeding, conclusions of substantive law made in the Register's review shall be binding as precedent upon the Copyright Royalty Judges in subsequent proceedings.

Unlike the CARP program, which had required the participants in a ratesetting proceeding to pay the arbitrators directly for their service, the CRJ program will be funded fully through appropriations with funds acquired from the royalty pools. As a result, cost will no longer be a barrier to participation in the process. Moreover, the use of CRJs, who serve for extended periods, will ensure consistent decision-making and preserve institutional expertise.

The Act also changed the process for adjusting royalty rates. The Act requires the CRJs to reconsider the rates and terms for the statutory licenses every five years, establishes a new procedure for considering voluntary agreements that would set rates and terms applicable to all users, grants the CRJs continuing jurisdiction to correct any technical or clerical errors or to modify any terms in response to unforeseen circumstances, and establishes new rules of discovery for rate setting proceedings.

The first rate adjustment proceeding under the new Act, to establish rates and terms for the statutory license which provide for the public performance of sound recordings by means of a digital audio transmission, commenced with the publication of a *Federal Register* notice on February 16, 2005. The notice published under the transitional provisions of the Act requests petitions to participate in this rate setting proceeding and explains the structure of the proceeding under the CRJs. The transition provisions also allow the Library of Congress to retain jurisdiction over any proceeding that had commenced prior to the effective date of the Act. The Copyright Office is reviewing the status of each such proceeding and intends to make any further distributions possible or conclude any necessary rate adjustments before terminating these proceedings as near as possible to the end of calendar year 2005.

### *Family Entertainment and Copyright Act of 2005*

On April 27, 2005, the President signed into law the Family Entertainment and Copyright Act (FECA), Pub. L. No. 109-9. The Office assisted in the drafting of many parts of FECA. FECA consists of four titles.

Title I, the Artists' Rights and Theft Prevention Act of 2005, or "ART Act," amends the criminal code (title 18 of the *United States Code*) to add a new §2319B, which makes it a criminal offense to knowingly film or record a motion picture or other audiovisual work from a performance of such work in a motion picture exhibition facility (such as a movie theater). It also amends 17 *USC* §506, governing criminal copyright infringement, to add a new ground for imposing criminal liability: the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, when the person making the distribution knows or should know that the work is intended for commercial distribution. Additionally, it provides for preregistration of certain unpublished works that are being prepared for commercial distribution. Preregistration satisfies the requirements of 17 *USC* §411(a) and §412, permitting a copyright owner to file a suit for prerelease infringement of a preregistered work and to obtain an award of statutory damages and attorneys fees for a work preregistered prior to the commencement of infringement, so long as the copyright owner registers the work within three months after the work has been first published or within one month after the copyright owner has learned of the infringement, whichever is earlier. Preregistration is to be made available for classes of works that the Register of Copyrights determines have had a history of infringement prior to authorized commercial distribution.

Title II of FECA is the Family Movie Act, which amends 17 *USC* §110 to add a new exemption from liability for copyright infringement. This exemption covers instances when a member of a private household makes imperceptible limited portions of audio or video content of an authorized copy of a motion picture, e.g. by skipping (i.e., fast-forwarding) past certain audiovisual content or muting portions of the soundtrack. It also applies when a company creates or provides a computer program or other technology that enables such activity and that is designed and marketed to be used by a member of a private household for this purpose, provided the computer program or other technology does not create a fixed copy of the altered version of the motion picture. This legislation was enacted to protect the makers and users of software products that permit persons viewing motion pictures on DVD players to omit from

the performances portions of the audio and/or video contents of the motion pictures that they believe would be offensive.

Title III of FECA consists of the National Film Preservation Act of 2005, which reauthorizes the activities of the Library of Congress's National Film Preservation Board, and the National Film Preservation Foundation Reauthorization Act of 2005, which reauthorizes the activities of the National Film Preservation Foundation.

Title IV of FECA, the Preservation of Orphan Works Act, amends §108 of the Copyright Act to extend the exemption in §108(h) to include all types of works. The §108(h) exemption permits libraries and archives to reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of a work for purposes of preservation, scholarship, or research during the last twenty years of copyright protection if the work is not subject to normal commercial exploitation and a copy or phonorecord of the work cannot be obtained at a reasonable price. Previously, the exemption did not apply to musical works, pictorial, graphic or sculptural works, or motion pictures or other audiovisual works other than audiovisual works dealing with news. The Register had urged Congress to correct this exclusion, which was not what the framers of the §108(h) exemption had intended.

#### *Individuals with Disabilities Education Improvement Act of 2004*

On December 3, 2004, the President signed the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446. While this legislation, which reauthorized the Individuals with Disabilities Education Act, primarily addresses issues having nothing to do with copyright, §306 of the Act amended §121 of the Copyright Act, which permits reproduction and distribution of copies of nondramatic literary works in special formats for use by blind or other persons with disabilities. Among other things, the new law instituted a program requiring publishers of print instructional materials, such as textbooks for elementary and secondary schools, to give electronic versions of those textbooks to a new National Instructional Materials Access Center (NIMAC). The amendment to §121, which was drafted with the assistance of the Copyright Office, exempts publishers from liability for providing those electronic files to NIMAC, defines "print instructional materials" as "printed textbooks and related printed core materials that are written and published primarily for use in elementary school and secondary school instruction and are required by a State educational agency or local educational agency for use by students in the

classroom,” and modified the existing definition in §121 of “specialized formats,” but only with respect to print educational materials, to include large print formats when such materials are distributed exclusively for use by blind or other persons with disabilities.

#### *Satellite Home Viewer Extension and Reauthorization Act of 2004*

On December 8, 2004, the President signed the Satellite Home Viewer Extension and Reauthorization Act (SHVERA), a part of the Consolidated Appropriations Act of 2005, Pub.L. No. 108-447. SHVERA extends by five years the statutory license for satellite carriers retransmitting over-the-air television broadcast signals to their subscribers, as well as making several changes to the license to provide greater parity between it and the statutory license applicable to cable television operators. Specifically, SHVERA allows satellite companies to offer certain “significantly viewed” distant signals, thus, in effect, expanding the programming satellite companies can offer their subscribers. Staff of the Copyright Office actively assisted the Congress in drafting this legislation.

#### *Intellectual Property Protection and Courts Act of 2004*

In December 2004, the Intellectual Property Protection and Courts Act of 2004 became law. Copyright Office staff, primarily from the Office of Policy and International Affairs, worked with both Senate and House staff for over 2 years to achieve this result. The Act amends 18 USC §2318 to prohibit trafficking in an “illicit authentication feature.” That term is defined as an authentication feature that: (1) without the authorization of the respective copyright owner, has been tampered with or altered so as to facilitate the reproduction or distribution of a phonorecord, a copy of a computer program, a copy of a motion picture or other audiovisual work, or documentation or packaging, in violation of the rights of the copyright owner; (2) is genuine, but has been distributed, or is intended for distribution, without the authorization of the respective copyright owner; or (3) appears to be genuine but is not. The law also authorizes a copyright owner who is injured by a violation of this Act or is threatened with injury to bring a civil action in an appropriate U.S. district court, and sets forth remedies for violations.

### *Study on Statutory Licensing*

The Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, requires the Copyright Office to conduct two studies regarding statutory licensing and report its findings to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate. The first, due at the end of 2005, requires the Office to examine select portions of §119 of the copyright law to determine what, if any, effects it and §122 have had on copyright owners whose programming is retransmitted by satellite carriers. To obtain public comment from the interested parties on these issues, the Office published a notice of inquiry in the *Federal Register*, 70 FR 39343 (July 7, 2005), seeking public input and is in the process of evaluating the submitted comments in preparation of completing the study.

The second study, which requires an examination and consideration of the entire copyright statutory licensing scheme for retransmission of over-the-air broadcast stations, is due in 2008.

### *Study on Orphan Works*

In January 2005, Senators Orrin Hatch, then chairman, and Patrick Leahy, ranking member of the Senate Judiciary Committee, requested that the Copyright Office prepare a study of the problems raised when users are unable to identify and locate the copyright owner of a work they wish to use. There are concerns that the uncertainty surrounding ownership of such works might needlessly discourage subsequent creators and users from incorporating such works in new creative efforts, or from making such works available to the public. The Office began the study with a request for written comments from all interested parties. The Office asked specifically whether there are compelling concerns raised by orphan works that merit a legislative, regulatory or other solution, and if so, what type of solution could effectively address these concerns without conflicting with the legitimate interests of authors and right holders. The Office collected over 800 written comments from the public and held roundtable meetings with dozens of interested parties in the summer of 2005 in both Washington, DC, and Berkeley, California, as part of an effort to produce a report and recommendations on orphan works in January 2006.

### *Section 108 Study Group*

The Copyright Office and the Library of Congress National Digital Information Infrastructure and Preservation Program (NDIIPP) are sponsoring this group, which began its work in mid-2005. The Section 108 Study Group is a select committee of public-sector and private-sector copyright experts charged with updating for the digital world the copyright law's balance between the rights of creators and copyright owners and the needs of libraries and archives.

Digital technologies are radically transforming how copyrighted works are created and disseminated, and also how libraries and archives preserve and make those works available. Cultural heritage institutions, in carrying forward their missions, have begun to acquire and incorporate large quantities of “born digital” works (those created in digital form) into their holdings to ensure the continuing availability of those works to future generations.

Yet it has been observed that §108 of the copyright law, which provides limited exceptions for libraries and archives, does not adequately address many of the issues unique to digital media, either from the perspective of rights owners or libraries and archives.

The Section 108 Study Group is reexamining the exceptions and limitations applicable to libraries and archives under the copyright law, specifically in light of the changes wrought by digital media. The group is studying how §108 may need to be amended to address the relevant issues and concerns of libraries and archives, as well as creators and other copyright holders. The group will provide findings and recommendations on how to revise the copyright law in order to ensure an appropriate balance among the interests of creators and other copyright holders, libraries and archives in a manner that best serves the national interest. The findings and recommendations will be submitted by mid-2006 to the Librarian of Congress.

## INTERNATIONAL ACTIVITIES

The Copyright Office undertakes international copyright activities by offering advice to Congress on compliance with multilateral agreements, such as the Berne Convention for the Protection of Literary and Artistic Works, and by working with executive branch agencies to promote copyright principles and protection worldwide.

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

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

The Office participated in numerous multilateral, regional, and bilateral negotiations in FY 2005. International affairs staff were part of the U.S. delegation in a meeting of the World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights considering issues related to a possible treaty on the protection of broadcasting organizations, as well as regional consultations on such protection in Kenya and Belgium. The Copyright Office also participated in other copyright-related meetings at WIPO headquarters in Geneva, such as the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, and various meetings related to the “Development Agenda” considering how WIPO should address issues related to the role of intellectual property in developing countries.

*The Copyright Office's international activities advance the economic health of the United States by promoting adherence to copyright protections that ensure compensation to American creators, thereby encouraging the creation and dissemination of works to the public throughout the world.*

Copyright Office staff were instrumental in drafting and negotiating the intellectual property provisions of bilateral Free Trade Agreements (FTAs) between the United States and Oman and Thailand, as well as several multilateral agreements, including with a group of Andean nations. Staff also provided technical assistance in the implementation of various FTA obligations related to copyright, for example, with Australia and Morocco.

Staff actively participated in the U.S. delegation to the World Summit on the Information Society, the first phase of which was held in Geneva in 2003, and the second phase of which will take place in Tunis in November 2005. Staff likewise were part of the U.S. delegations to various meetings at UNESCO, including meetings on

the Convention on Cultural Diversity, the Intergovernmental Committee on Copyright and Related Rights, and the Intergovernmental Committee on the Rome Convention.

Throughout the year, staff actively participated in numerous additional bilateral negotiations and consultations with dozens of countries around the world, including those held with Brazil, Canada, China, Japan, Oman, Paraguay, Poland, Russia, South Korea, Taiwan, Thailand, Ukraine, and the United Arab Emirates, on issues ranging from enforcement to copyright law revision. For USTR, staff additionally provided assistance to nations such as Brazil, Ecuador, Egypt, Iraq, Jamaica, Japan, Mongolia, Nigeria, Norway, Paraguay, the Philippines, Qatar, Sierra Leone, Trinidad and Tobago, and Tunisia in their World Trade Organization accession processes and provided responses regarding U.S. copyright law and policy to the WTO Trade Policy Review queries.

The Copyright Office sent representatives to the interagency Special 301 Committee, which evaluates the adequacy and effectiveness of intellectual property protection and enforcement throughout the world. This annual process, established under U.S. trade law, is one of the tools used by the U.S. government to improve global protection for U.S. authors, inventors, and other holders of intellectual property rights.

The Office also promotes the international protection of copyrights by engaging foreign government officials in training sessions, educational conferences, and meetings. The Copyright Office conducts or participates in a range of intellectual property training to assist countries to comply with international agreements and to enforce their provisions. Such training is in the areas of awareness of international standards and the U.S. legal and regulatory environment, U.S. copyright law, legal reform, and statutory drafting assistance.

Among the Office's responsibilities is engaging in the public debate about copyright and educating the public about copyright law. To this end, staff gave presentations and participated in a number of international conferences on copyright.

In May 2005, the Register of Copyrights gave two presentations at a program of the External University of Colombia in Bogotá, on "the social function of copyright" and "global copyright issues resulting from new technologies."

At the invitation of the State Department Speakers Program, the Register attended the Fourth German–American Copyright Law Summit in Potsdam, Germany, from August 30 to September 3, 2005. She spoke on recently enacted copyright legislation in the United States and the licensing of online uses and online music services in the United States.

For five days beginning September 8, the Register gave six speeches and two press interviews in Brazil as part of the State Department Speakers Program. She made a presentation at the National Library of Brazil on the challenges of digital technology to copyright law. At SENAC University in Sao Paulo, the Register participated in a two-day seminar on intellectual property for 350 representatives of the academic, library, media, publishing, and author communities. At the seminar the Register made a major presentation on copyright and digital issues, and participated in a panel discussion of protection of databases and access to digital information. In Brasilia, the Register conducted two sessions for 300 members of the Brazilian Congress, staff, and guests.

On September 18–21, 2005, the Register attended the Congress of the Association Littéraire et Artistique Internationale in Paris, the subject of which was “exploring sources of copyright.” The Register was also a member of the U.S. delegation at the September 2005 meeting of the Assemblies of the Member States of WIPO in Geneva.

Other staff appearances included the WIPO Asia-Pacific Regional Symposium on Digital Copyright Issues in New Delhi, India, where staff presented papers on copyright legislation in the United States and implementation of the WIPO Internet Treaties; a presentation at a conference in Ottawa among Canadian officials and professors on legislative efforts in the United States to address copyright infringement on peer-to-peer services; discussion of “developments before national copyright offices” at the annual meeting of the Intellectual Property Institute of Canada; “developments in U.S. copyright law” at a program on current developments in U.K., European, U.S., and international copyright law in London; presentations in New York at the Fordham University International Intellectual Property Conference and Symposium on Asian Intellectual Property Issues; and presentations in Geneva, Switzerland, at the WIPO Symposium on intermediary liability on the United States experience with online service provider liability. In addition to these presentations, staff met on a regular basis throughout the year with scores of foreign officials and visitors interested in learning about the U.S. copyright system and exchanging information about topics of mutual concern. Other staff also gave presentations on copyright to State Department economic officers in Brussels and Hong Kong.

Although there were no International Copyright Institute symposia in FY 2005, the Office hosted an eight-member delegation of Egyptian copyright officials and journalists in February as part of USAID-sponsored study tours on “copyright in the United States: principles and practices.”

## LITIGATION

Although the Office does not enforce the provisions of title 17, it may be involved in litigation in several ways. It can choose to intervene under §411(a) in a case where registration has been refused. It may be sued under the Administrative Procedure Act. It may be asked to participate in litigation by assisting in the preparation of an *amicus curiae* brief in support of a particular position; by assisting the Department of Justice in defending a particular action; or by asking the Justice Department to bring a suit under §407 to compel the deposit of copies of the best edition of a work.

The Office was involved in several cases where the Office was a party, and it continued to respond to requests for assistance from the Department of Justice relating to copyright litigation.

### *MGM v. Grokster*

The Copyright Office assisted the Solicitor General's Office in drafting the government's brief and in preparing the Solicitor General for oral argument before the Supreme Court. This case represents one of the most significant developments in copyright law in the past two decades. The case raised the question of whether a distributor of products or services could be shielded from secondary liability for copyright infringement simply by showing that its product or service was "capable" of substantial noninfringing uses, even if the predominant use of the product was for infringing purposes.

In 1984, the Supreme Court had held, in *Sony Corp. of Am. v. Universal City Studios, Inc.*, that the manufacturer of a VCR could not be found liable solely on the basis of distribution of a product that was capable of substantial noninfringing use. Relying on the *Sony* decision, the U.S. Court of Appeals for the Ninth Circuit ruled that the *Sony* decision precluded the imposition of liability against peer-to-peer software manufacturers, because their programs were capable of substantial noninfringing uses.

The United States government disagreed with the court of appeals' decision and filed an *amicus curiae* brief arguing that this case was different from *Sony*, and that the Ninth Circuit had misconstrued the *Sony* decision as a *per se* rule. The government argued that courts must examine all of the relevant facts to determine whether secondary liability should be imposed. The government argued that when the Ninth

Circuit misconstrued *Sony* as a *per se* rule, the court failed to consider critical facts. Alternatively, the government argued, liability could be predicated on the defendants' active inducement of infringement by the users of their software.

On June 27, 2005, the Supreme Court reversed the Ninth Circuit and remanded the case for further findings of fact. The Court found that the Ninth Circuit misconstrued the *Sony* decision when it failed to consider evidence that the distributor of the product or services induced infringement by users. The Court held that secondary liability for copyright infringement may be established by proving that a distributor of products or services induced others to engage in copyright infringement.

### *Illinois Tool Works v. Independent Ink*

The Copyright Office assisted the Solicitor General's Office in drafting the government's *amicus curiae* brief to the Supreme Court in support of the petitioners. The case raises the question of whether, in an action under §1 of the Sherman Act, an antitrust plaintiff alleging improper tying of a patented product or copyrighted work to another product must prove that the defendant has "appreciable market power" in the tying product market or whether market power is presumed based solely on the existence of a patent or copyright on the tying product.

In the specific case before the Court, Illinois Tool Works is a manufacturer of a patented ink jet printhead, a patented ink container, and a nonpatented ink specially formulated for use in its patented printhead system. Independent Ink is a distributor and supplier of printer ink and printer products, and the plaintiff in an antitrust tying claim against Illinois Tool Works. Independent Ink brought the antitrust claim against Illinois Tool Works for conditioning use of its patented product on use of its nonpatented ink. Independent Ink offered no proof of market power in the printhead market, but rather relied on a presumption of market power based on Illinois Tool Works' ownership of a patent.

Although a series of Supreme Court precedents have stated that there is a presumption of market power in tying cases where the owner of the tying product is the owner of a patent or copyright, the U.S. government has not relied on this presumption in antitrust enforcement actions. The government argued in its brief that no presumption should exist, but rather an antitrust plaintiff should be required to establish market power in the tying product market.

The Supreme Court granted *certiorari* on June 20, 2005. The government filed its *amicus* brief on August 4. Oral arguments will be heard on November 29, 2005.

### *Recording Industry Association of America, Inc. v. Charter Communications, Inc.*

The Recording Industry Association of America, Inc. (RIAA) sought an order to compel Charter Communications, an online service provider, to comply with subpoenas to identify subscribers who allegedly infringed issued pursuant to 17 USC §512(h). On November 17, 2003, the United States District Court for the Eastern District of Missouri issued an order granting the RIAA's request. Charter appealed to the United States Court of Appeals for the Eighth Circuit.

The government entered the case as an intervener and *amicus curiae* to defend the applicability of §512(h) to “mere conduit” online service providers covered by §512(a) of the Copyright Act and to defend the constitutionality of §512(h). The Copyright Office assisted the Department of Justice in presenting the U.S. government's position.

On January 4, 2005, the Court of Appeals reversed the district court and held that §512(h) does not allow a copyright owner to request a subpoena for an online service provider which merely acts as a conduit for data transferred between two internet users, and adopted the reasoning of the United States Court of Appeals for the District of Columbia Circuit in *Recording Industry Association of America, Inc. v. Charter Communications, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), *cert. denied*, 160 L. Ed. 2d 222, 125 S. Ct. 309 (2004). The Eighth Circuit found no need to reach the constitutional arguments.

### *Southco v. Kanebridge*

This case involved a claim that individual part numbers for fasteners are protected by copyright. In 2000, the Office assisted the Department of Justice in preparing an *amicus curiae* brief urging a panel of the Third Circuit that individual part numbers cannot be copyrighted. That panel agreed, reversing a grant of a preliminary injunction, and remanded the case to the district court for further proceedings. The district court then granted summary judgment in favor of the defendant, despite the plaintiff's submission of a new declaration purporting to show the creativity involved in the assignment

of the part numbers. On appeal early in 2003, a different panel of the Third Circuit distinguished the earlier panel's decision and held that the new declaration could support a finding of copyrightability in the part numbers, reversing the district court's decision. The entire court of appeals then granted rehearing of the case *en banc*. The Office again assisted the Justice Department in preparing an *amicus* brief in support of the defendant, reiterating the position that individual part numbers are not copyrightable.

On December 3, 2004, the court of appeals issued its opinion, holding that the part numbers are not protected by copyright and affirming the summary judgment for the defendant. The court, noting that "Southco does not assert any claim of copyright in its numbering system, but instead focuses on the part numbers themselves," held that the part numbers did not meet copyright's originality requirement because they were not sufficiently creative, each number being "rigidly dictated by the rules of the Southco system." The court also concluded that the part numbers "are analogous to short phrases or the titles of works" and gave deference to the Office's longstanding practice of denying registration to words and short phrases.

### *Metro-Goldwyn-Mayer Studios, Inc. v. Peters*

### *Universal City Studios, LLP v. Peters*

As reported in Fiscal Year 2004, the United States District Court for the District of Columbia, in separate opinions, granted the Copyright Office's motions for summary judgment, upholding the Office's rejection of the cable and satellite claims filed by Metro-Goldwyn-Mayer Studios, Inc. (MGM) and Universal City Studios LLP (Universal), respectively, for their shares of the compulsory royalty fees collected in 2000 due to the studios' failure to file their claims on a timely basis in accordance with the Office's regulations. MGM and Universal each appealed the district court's decisions to the United States Court of Appeals for the District of Columbia Circuit. MGM and Universal argued, as they had before the district court, that the Register's denial of their requests for a waiver was arbitrary and capricious as well as an abuse of discretion because, they asserted, the Office had not consistently enforced its regulations regarding timely filing. MGM also argued that the Office had incorrectly interpreted its regulations regarding timely submission of claims. Finally, both studios contended that the Office violated due process by refusing to accept any evidence, other than a stamped postal receipt, that their claims were mailed in July.

The case was argued on February 17, 2005, and the court issued its decision on April 8, 2005, affirming the district court's decision in each case that the Register's rejection of their claims was not arbitrary, capricious, or an abuse of discretion. The court also found "no basis on which to set aside the Office's reading of the pertinent regulations to bar the studios' claims as untimely." Finally, the court dismissed as "entirely unpersuasive" the studios' arguments that the Office had violated their due process rights.

### *Program Suppliers v. Librarian of Congress*

As reported in Fiscal Year 2004, the Motion Picture Association of America (MPAA), on behalf of Program Suppliers (copyright owners of motion pictures and syndicated television series), and the Public Broadcasting Service (PBS), on behalf of copyright owners of public television programming, each sought review, in the United States Court of Appeals for the District of Columbia Circuit, of the Librarian's decision setting forth the distribution of royalty fees collected under the §111 cable statutory license for calendar year 1998 and 1999.

The MPAA's appeal centered on the Librarian's acceptance of the Copyright Arbitration Royalty Panel's (CARP) decision to rely solely on an economic study conducted by Bortz Media, Inc., which values programming based on cable operators' perceptions of its value, and to disavow reliance on an opposing economic study conducted by Nielsen Media Research, Inc., which values programming based on viewing. The MPAA argued that this decision violated the statutory scheme, inexplicably departed from precedent, and occurred without sufficient notice to the parties. PBS argued that the Bortz study was not the proper methodology to use in assessing whether circumstances had changed since 1992 (the most recent year for which a distribution determination had been made) to affect the relative market value of public television programming. Moreover, PBS contended that the CARP misapplied the Bortz survey when assessing the relative market value of public television programming.

Oral argument was held on April 8, 2005, and the Court issued a decision on May 31, 2005, upholding in full the Librarian's determination.

### *Beethoven.com v. Librarian of Congress*

On July 8, 2002, the Librarian announced a final rule in the *Federal Register* setting copyright license rates for eligible nonsubscription transmissions (webcasters) and transmissions by new subscription services made by persons who operate under the statutory license that provides for public performances of sound recordings by means of digital audio transmissions. Three separate groups challenged the final rule in the United States Court of Appeals for the District of Columbia Circuit. One group consisted of small webcasters who did not participate in the CARP proceeding but who nevertheless sought to petition for review of the decision or, in the alternative, to intervene in order to challenge the rates set by the Librarian. This group also argued that the CARP process itself violated their rights to due process and freedom of expression because it excluded small webcasters who could not afford to pay the costs of the arbitrators. The two remaining groups divided along ownership/user lines. The copyright owners argued that the Librarian's failure to consider adequately certain past agreements resulted in rates that were arbitrarily low; whereas the users took the opposite position, maintaining that the Librarian's rates were too high because they did not reflect actual market value.

The case was argued on October 13, 2004, and the court issued its decision on January 14, 2005. In making its decision, the court first considered the case of the Nonparticipants-Interveners and found that they had no standing to appeal directly the Librarian's decision. The statutory language limits appeals to "any aggrieved party," and the court held that, consistent with prior decisions construing such language, the use of the word "party" refers only to parties who participated in the agency proceeding giving rise to the order, and that had Congress intended to extend the right to others it would have said so, using the phrase, "person aggrieved," instead of restricting the right to appeal to an aggrieved party. The court also denied the Nonparticipants-Interveners' petition to intervene because they sought to raise new issues for the first time on appeal.

As to those issues properly before the court, the court reviewed the Librarian's determination under the deferential standard of review adopted by Congress and found no reversible error.

### *Luck's Music Library, Inc. v. Gonzalez*

As is related in the Annual Report for Fiscal Year 2004, the United States District Court for the District of Columbia dismissed this declaratory judgment action against the Attorney General and the Register of Copyrights in June 2004. The action claimed that §514 of the Uruguay Round Agreement Act, which restored copyrights in foreign works (as codified in 17 USC §104A), violated the Copyright Clause of the Constitution and the First Amendment.

On May 24, 2005, the United States Court of Appeals for the District of Columbia affirmed the dismissal. *Luck's Music Library, Inc., v. Gonzalez*, 407 F.3d 1262. The plaintiffs's appeal raised only the Copyright Clause issue, and the court of appeals rejected the plaintiffs' argument that the Copyright Clause forbids Congress from removing works from the public domain.

### *Golan v. Gonzalez*

As is reported in the Annual Report for Fiscal Year 2004, this case filed against the Attorney General and the Register of Copyrights in the United States District Court for the District of Colorado is similar to the *Luck's Music* case. Plaintiffs challenged the Sonny Bono Copyright Term Extension Act and the restoration provisions of the Uruguay Round Agreements Act (URAA). The term extension claims were dismissed in 2004. On April 20, 2005, the court granted summary judgment dismissing the remaining claims, concluding that Congress acted within its authority and had a rational basis for enacting §514 of the Uruguay Round Agreement Act, and that §514 did not violate the First Amendment and was not unconstitutionally retroactive. The plaintiffs have appealed the decision to the United States Court of Appeals for the Tenth Circuit.

### *Kahle v. Ashcroft*

As reported in the Annual Report for Fiscal Year 2004, this lawsuit in the United States District Court for the Northern District of California challenges the constitutionality of four copyright statutes: the 1976 Copyright Act, the Berne Convention Implementation Act, the Copyright Renewal Act of 1992, and the Sonny Bono Copyright Term Extension Act, arguing that, among other things, the removal of

various formalities such as copyright notice and renewal violate the First Amendment and the Copyright Clause of the Constitution. On November 19, 2004, the court granted the government's motion to dismiss for failure to state a claim upon which relief may be granted, rejecting all of the plaintiffs' constitutional challenges. The plaintiffs are appealing that decision to the United States Court of Appeals for the Ninth Circuit.

### *Kay Berry v. Taylor Gifts*

The United States Court of Appeals for the Third Circuit requested the views of the United States government on registration issues in connection with an appeal from an order granting summary judgment to the defendant in this copyright infringement suit. The case involved infringement of a "garden rock," a fabricated rock on which a public domain poem was inscribed, and which had appeared in a catalog containing images of over one hundred garden rocks. The plaintiff had submitted the catalog as the deposit accompanying an application for registration of "Garden Accent Rocks," describing the nature of the work as "[s]culptural works with design and text," and the Office issued a certificate of registration.

The court of appeals sought the government's views on two questions: (1) whether Kay Berry properly registered a copyright in each of its Garden Accent Rocks by filing a single registration statement and a catalog of its products, and (2) whether 37 CFR §202.3(b)(3) provides an avenue for group registration of sculptural works. The General Counsel's Office worked closely with the Civil Division of the Department of Justice in preparing a letter brief in response to the court's questions. The letter brief explained that (1) The Copyright Office has a longstanding practice of issuing a single certificate of registration to cover multiple copyrightable works where the multiple works are first published together, but such a registration covers only copyrightable material first published in the deposited work; and (2) 37 CFR §202.3(b)(3) does not provide an avenue for "group registration," but does permit registration for multiple works that are first published together in a single unit of publication. Although the Office wanted to advise the court of appeals that it did not consider the particular garden rock at issue to be copyrightable, the Solicitor General's Office declined to so advise the court in the letter brief because the court had not expressly asked that question.

On August 30, 2005, the court of appeals issued its opinion. *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199. The court concluded that the garden rocks were not registrable under the Office’s group registration provisions, but were registrable as a “single work” because they were included in a single unit of publication. The court also concluded that the particular garden rock at issue in the case was copyrightable, and reversed the judgment of the district court.

### *Coach, Inc. v. Peters*

In 2003, Coach Inc. sued the Register of Copyrights in the Southern District of New York under the Administrative Procedure Act (APA) to challenge a decision by the Copyright Office Review Board denying registration to Coach’s “Signature CC Fabric Design.” The design consists of two C’s facing each other and two C’s facing the same direction, repeated symmetrically. The Examining Division examined the work and refused registration twice, and in a final reconsideration, the Review Board refused registration, having determined that the designs did not contain the required amount of original pictorial or graphic authorship.

On cross-motions for summary judgment, the district court granted the Register’s motion and denied Coach’s motion on September 6, 2005. The court determined that under the APA the Copyright Office decision could be overturned only if “the Register fails to intelligibly account for her ruling or if her decision is not the product of reasoned decisionmaking.” [Internal quotations omitted.] The court observed that the Register’s decision “is explained in a thorough, well-reasoned and well-articulated letter.” After analyzing plaintiff’s assertions, the court concluded that Coach had “failed to overcome the substantial deference that the Court must afford to the Register’s decision denying registration because Coach had not shown that the Register acted arbitrarily and capriciously.”

### *New York Mercantile Exchange v. Intercontinental Exchange*

In this copyright infringement suit, the plaintiff commodities exchange sued a competitor for using its “settlement prices” for oil to clear transactions involving futures contracts, alleging that such use constituted copyright infringement. After being advised by the Examining Division that applications for copyright registration

expressly claiming authorship in settlement prices would be rejected, the plaintiff withdrew those applications and submitted new applications alleging compilation authorship. However, the subsequent infringement suit alleged infringement of the individual prices. At the hearing on the defendant's summary judgment motion, it was suggested that the Register of Copyrights should have been notified of the lawsuit and given an opportunity to intervene under 17 *USC* §411(a) because the Examining Division had indicated it would not register the individual settlement prices. Accordingly, the Register was given notice under §411(a). The Office declined to intervene, but instead filed a Statement of Interest pursuant to 28 *USC* §517, which permits the Department of Justice "to attend to the interests of the United States in a suit pending in a court of the United States." The Statement of Interest asserted that individual settlement prices are not copyrightable, but represent facts or ideas rather than copyrightable expression and are uncopyrightable short phrases. The district court agreed, granting summary judgment to the defendant on September 29, 2005.

### *Darden v. Peters*

On September 7, 2004, William Darden brought suit against the Register of Copyrights in the U.S. District Court for the Eastern District of North Carolina for refusing to register his copyright claims in two works. Darden asked the district court to order the Copyright Office to register his works, alleging violations under the Administrative Procedure Act. On May 17, 2002, Darden had submitted applications to the Copyright Office to register copyright claims in two works; one consisted of pages from a website and the second, in a separate application for registration, consisted of maps that appeared in those pages. The Office refused registration on the basis that Darden's claim in the website pages was for the formats in the pages, which is not copyrightable subject matter, and that Darden's maps do not have sufficient creativity to be copyrightable. On June 6, 2005, the district court held a hearing on the Register's motion for summary judgment, but it has not yet issued a final ruling.

### *United States v. Martignon*

On September 24, 2004, the U.S. District Court for the Southern District of New York dismissed an indictment against Jean Martignon, who was accused of violating 18 *USC*

§2319A, the antbootlegging statute that makes it unlawful to record a live musical performance without the consent of the performer or to distribute or offer to distribute copies or phonorecords of such recordings. Martignon was accused of selling such recordings at his record store. The district court held that §2319A is unconstitutional because it violates the Copyright Clause by granting exclusive rights to non-“Writings” (live performances) for an unlimited time and because it violates the First Amendment by altering the “traditional contours of copyright protection” in a speech-inhibiting manner by granting perpetual protection to unfixed performances. The General Counsel’s Office assisted the Department of Justice in its appeal defending the constitutionality of §2319A, which was argued in June 2005. The appeal was still pending at the end of the fiscal year.

### *Kiss Catalog, Ltd. v. Passport International Productions, Inc*

On December 21, 2004, the United States District Court for the Central District of California held that 17 USC §1101, the civil analog to 18 USC §2319A, is unconstitutional. The court agreed with the reasoning of the court in *Martignon* that perpetual protection for live performances violates the “limited Times” provision of the Copyright Clause and that Congress did not have the power to avoid that result by relying on its powers under the Commerce Clause. Although the court was required under 28 USC §2403(a) to give the Attorney General notice that the constitutionality of §1101 was being challenged, the court had failed to do so. The General Counsel’s Office assisted the Department of Justice in its decision to intervene in the case to seek reconsideration of the order and in its preparation of papers in support of reconsideration. At the end of the year, the motion for reconsideration was still pending.

### *Lowe’s Companies, Inc. v. Chevro International, Inc.*

The Copyright Office was notified by Chevro International, Inc. that it had filed counterclaims against Lowe’s Companies, Inc. in the United States District Court for the Western District of North Carolina alleging copyright infringement of works that the Copyright Office had denied registration. This case involved the copying of ornamental pot hangers, and, although the Copyright Office had no particular interest in the litigation on the merits, Chevro requested the court to declare that the works were copyrightable and to direct the Register of Copyrights to issue a certificate of

registration. Based on this requested relief, the Register decided to intervene to defend her decision to deny registration. Shortly after the Register entered the litigation, the defendants decided to settle the litigation and dismiss the claim against the Register.

### *Planesi v. Peters*

Ronald Planesi, representing himself, filed suit in the United States District Court for the Eastern District of California in 2003, seeking relief against other private parties for alleged copyright and trademark infringement but also naming the Register of Copyrights as a defendant and asking the court to invalidate Copyright Office rules and regulations that deny copyright registration for individual words. Planesi claimed copyright protection for the word “Kingmaster,” which was the name he gave to a board game that he had created, and alleged that defendants who used the word “Kingmaster” in connection with their fishing rods and reels, fishing tournaments, and other products and services infringed his copyright. The district court dismissed the complaint in September 2004, accepting the magistrate judge’s conclusion that the “words and short phrases” doctrine barred Planesi’s copyright claim.

On August 15, 2005, the United States Court of Appeals for the Ninth Circuit affirmed the dismissal in an unpublished opinion, concluding that “[t]he district court properly dismissed Planesi’s copyright infringement claim because the one-word name of Planesi’s board game is not entitled to copyright protection.”

### *Aharonian v. Gonzales*

The Office of the General Counsel is assisting the Civil Division of the U.S. Department of Justice in defending the constitutionality of certain portions of the Copyright Act relating to copyright protection for computer programs. Specifically, Gregory Aharonian, a *pro se* plaintiff, claims: (1) the Copyright Act is unconstitutionally vague because it fails to differentiate with mathematical precision an uncopyrightable idea from copyrightable expression and fails to define the terms “concept” and “computer program”; (2) computer programs cannot be afforded both patent and copyright protection; and (3) Congress failed to satisfy the requirements of bicameralism and presentment in affording copyright protection to computer programs. In essence, the plaintiff seeks to overturn the applicability of copyright law to computer programs.

The plaintiff filed this action in December 2004 in the United States District Court for the Northern District of California. The U.S. government filed a motion to dismiss, or in the alternative for summary judgment, in June 2005. The government argues that the plaintiff lacks specific injury to confer standing, and the court lacks jurisdiction to decide the issues presented. The government further argues that the plaintiff's claims fail as a matter of law because the availability of copyright protection for computer programs has appropriately been long recognized by the courts and Congress. The court is scheduled to hear this motion on November 7, 2005. The Register of Copyrights has not been named as a defendant in this action.

### *Cooper v. Library of Congress*

The Office of the General Counsel assisted the U.S. Attorney's Office for the District of Columbia in defending the Copyright Office in litigation filed by a federal prisoner alleging that the Office failed to register a collection of unpublished songs. Copyright Office records revealed that the Copyright Office received but returned plaintiff's submission due to plaintiff's failure to pay the associated fee. On October 12, 2004, the United States District Court for the District of Columbia granted summary judgment and concluded that since the Register of Copyrights was following a statutory mandate in requiring the payment of the fee, the decision not to process the plaintiff's application was not an abuse of discretion. The court dismissed the case the following day.

### *Borset v. Copyright Arbitration Royalty Panels*

On August 4, 2005, Trudy Ann Borset, a *pro se* litigant, filed suit in the United States District Court for the Eastern District of Michigan challenging the Library's dismissal of her 2003 and 2004 DART claims to royalty fees allocated to the Copyright Owners Subfund. Borset, whose claims were dismissed for failure to provide adequate information that would identify her as the owner of the exclusive right to reproduce the identified sound recording, sought to have the court review her evidence *de novo* and make a ruling on what should be her share of the royalty fees.

The court, however, never reached the merits of the suit. Instead, it granted codefendant American Association of Recording Artists' motion to dismiss for lack of subject matter jurisdiction even before the government filed its answer to the

complaint. The court held that Congress had vested exclusive jurisdiction to appeal such decisions in the United States Court of Appeals for the District of Columbia Circuit and stated that if Ms. Borset wished to pursue this action, she would have to seek relief in that court.

### *Register of Copyrights v. Kenneth Hornak, dba Editorial Castilla La Vieja*

In a case concerning failure to deposit after a demand for mandatory deposit, a default judgment was entered in August 2005 in the sum of \$6,122.50 against defendant Hornak, the Philadelphia-based publisher of Spanish language dictionaries. The Copyright Acquisitions Division had demanded seven titles that were wanted by the Library for its collections. The defendant contested the right of the Copyright Office to demand deposit, but he failed to appear in court to defend his position. Under §407(d) of the copyright law, failure to deposit is punishable by a fine of not more than \$250 for each work, as well as the total retail price of the copies demanded.

### *Potential Copyright Office Intervention Pursuant to 17 USC §411(a)*

The Copyright Office continued to review all copyright cases in which the Register of Copyrights received notice of her right to intervene pursuant to 17 USC §411(a). Of the three cases received under §411(a), the Register chose to intervene in one case, *Lowe's Companies, Inc. v. Chevro International, Inc.*, which is discussed above.

### *Section 508 Notices*

Section 508 of the Copyright Act requires the clerks of the courts to send written notification to the Register of Copyrights of any action filed under the Copyright Act and of any final order or judgment issued thereon. The Office is collecting and reviewing data regarding the federal courts' compliance with §508's requirements. The Office will use such data to determine what changes should be made to this section, including the possibility of permitting electronic filing of §508 notices and the possibility of repealing the requirement. Staff attorneys will monitor the current practices for a one-year period, and plan to meet with the Administrative Office of the U.S. Courts to discuss any proposed changes.