

Copyright Law Administration

RECOVERY FROM POSTAL DISRUPTION

AS DESCRIBED IN THE FISCAL 2002 REPORT, the anthrax-related postal disruption seriously affected the Copyright Office's processing throughout that fiscal year. Fiscal 2003 was a year of recovery. Though the Office logged in nine months worth of delayed mail delivered between March and July 2002, the mail delivered after that date accumulated while the delayed mail was being processed.

Budget uncertainty in the early months of fiscal 2003 delayed Office processing of the backlog of received mail. When the budget for fiscal 2003 was passed, the Office was able to devote additional resources to mail processing.

The postal disruption regulation, 37 CFR §201.8, permits a filer to be assigned a receipt date based on the date on which the claims or documents would have been received in the Office but for the delays.

The mail disruption created a number of other challenges: a significant increase in inquiries received by mail, phone, and email; record amounts of undeliverable mail and uncollectible checks; duplicate filings requiring reconciliation; many stale-dated checks; and thousands of "no reply" correspondence cases to be closed, which had been held open long past their 120-day limit to allow time for replies to be delivered. Concerted efforts to process work quickly brought these areas to acceptable levels at the end of the fiscal year.

The Office is accommodating the new and apparently permanent reality of mail screening and irradiation.

REGISTRATION OF COPYRIGHTED WORKS

DURING FISCAL 2003, the Copyright Office received 607,492 claims to copyright covering more than a million works. Of these, it registered 534,122 claims.

The Office worked diligently to improve the timeliness of its registrations and to decrease the time needed to make an online record of registrations available.

Two years ago, the Office required an average of about 200 days between receipt of a claim and the issuance of a certificate. Despite the influx of delayed and current mail, the

Office had reduced the processing workload significantly by fiscal 2003, shortening the average processing time to approximately 130 days. In January 2003, the Office began a focused effort, reducing the number of claims awaiting processing by nearly a third over the course of the last nine months of the fiscal year. At year end, the average time to process a claim was 90 days.

Timely availability of records serves copyright owners, users of copyright works, and the wider public with information on copyright ownership. The Cataloging Division made significant progress during the fiscal year in decreasing the time needed to prepare a cataloging record. A combination of processing changes and work efficiencies resulted in the progress. The Office assigned staff to catalog across registration classes and established specific target goals. Throughput time from receipt in the division until the appearance of a public record was reduced from over seven weeks to less than five.

The Examining Division had successfully completed a claims reduction effort in fiscal 2002 and continued to hold its work on hand at manageable levels. In fiscal 2003, the Division reduced its registration work on hand by half and continued toward a goal of currency in correspondence.

Mask Works

Mask works are defined in the Semiconductor Chip Protection Act of 1984 as a series of related images (1) having or representing the predetermined three-dimensional pattern of metallic, insulating, or semiconductor material present or removed from the layers of a semiconductor chip product; and (2) in which the relation of the images to one another is that each image has the pattern of the surface of one form of the semiconductor chip product.

The Office received 352 mask works in fiscal 2003. Mask works registered totaled 397.

Vessel Hull Designs

The Vessel Hull Design Protection Act was signed into law on October 28, 1998, as part of the Digital Millennium Copyright Act (DMCA). The vessel hull law grants an owner of an original vessel hull design certain exclusive rights, provided that application for registration of the design with the Copyright Office is made within two years of the design being made public.

The Office received 70 vessel hull designs this fiscal year. The Office registered 45 and either rejected or corresponded on the others.

Appeals of Denial of Registration

From October 2002 through September 2003, the Examining Division handled 217 first appeals covering 479 claims. Of the 479 initial refusals to register, 22 percent were reversed upon first appeal.

The Board of Appeals met five times during the fiscal year and heard sixteen requests

for reconsideration involving 40 works. The Board issued decisional letters responding to fifteen second appeals involving 39 works. It agreed to register one work and upheld the refusal to register the other 38.

Appeals Process

Under title 17, the Register of Copyrights may determine that the material deposited for copyright registration does not constitute copyrightable subject matter or that the claim is invalid for other reasons. In such cases, the Register refuses registration and notifies the applicant in writing of the reason(s) for such refusal. Applicants whose claims for registration are rejected can appeal such decisions in a two-stage process.

The claimant first appeals to the Examining Division. If the Division upholds the refusal, the claimant may make a second appeal to the Copyright Office Board of Appeals. The Register of Copyrights, the General Counsel, and the Chief of the Examining Division, or their designees, comprise the Board of Appeals.

Cataloging

The Cataloging Division created cataloging records for 543,105 registrations in fiscal 2003, including 21,579 submitted electronically.

The Division also processed online service providers' designations of agents. The DMCA amended the law to limit potential liability for monetary and injunctive relief for infringing uses of their services.

To take advantage of this limitation on liability, the service provider must designate an agent for notification of claimed infringement and provide contact information to the Copyright Office.

A directory of agents is maintained on the Office website. During fiscal 2003, the Division posted 880 designations of agent to the website.

The Division also catalogs mask work registrations and vessel hull design registrations.

Copies of Deposits and Certifications

The Information and Reference Division's Certifications and Documents Section produced 3,899 copies of certificates of registration. During the fiscal year, the section produced 2,107 copies of copyright deposits and 1,113 certifications of deposits or records.

Contributions to Library of Congress Collections

The Library of Congress may select for its collections copies of works submitted for registration or to fulfill the mandatory deposit provision of the law. Copyright deposits form the core of the Library's "Americana" collections and serve as a primary record of American creativity.

During the fiscal year, the Office transferred 962,119 copies of registered and non-registered works valued at \$33,749,004 to the Library of Congress for its collections.

Copyright Cataloging

The copyright law requires that the Register of Copyrights keep records of all deposits, registrations, recordations, and other copyright-related matters; make these records available to the public; and prepare indexes of all the records. The Cataloging Division records a bibliographic description and the copyright facts of all works registered in the Copyright Office. The Division also creates a record for all recorded documents.

Records of copyright registrations are important to users and owners of copyrighted works.

Portions of copyright cataloging data are used by some divisions of the Library of Congress.

RECORDATION

THE COPYRIGHT OFFICE CREATES records of documents relating to a copyrighted work, a mask work, or a vessel hull design that have been recorded in the Office. These documents frequently reflect a work of significant economic value.

The majority of documents involve transfers of rights from one copyright owner to another. Other recorded documents include security interests, contracts between authors and publishers, notices of termination of grants of rights, and notices of intent to enforce a restored copyright.

During fiscal 2003, the Documents Recordation Section recorded 16,103 documents covering approximately 300,000 titles of works. The section cut its processing time by more than half.

Public Meeting on Document Processing

As part of the Office's reengineering program, various issues arose relating to the process of recording documents. The Register decided to consult stakeholders—those who submit the documents and those who use the records related to recorded documents.

The Office identified the most frequent filers and those whose businesses relied on the document records. The Office sent a questionnaire to 47 filers and eleven users. Many responded. In addition, the Office convened a discussion on the issues and shared information gathered from the questionnaire.

The Register and several Copyright Office staff discussed the scope of the verification process in recording documents: What should the office review and question? Does this differ depending on the type of document, e.g., a notice of termination of transfer of rights versus a notice to enforce a copyright under the Uruguay Round Agreements Act? Document submitters wanted the Office's verification confined to what is required in the law and the existing regulation—verification of completeness, legibility, original signature, and fee.

The attendees discussed the issue of electronic submission of documents. There was little enthusiasm for this. Filers do not have the documents in electronic form and there was concern about the requirement of original signatures. Additionally, it is the transferor of rights who must sign the document; it is the transferee who submits the document.

The meeting discussed the usefulness of the current document cover sheet, which was created to expedite the process of recording a document. Many filers find the cover sheet confusing. Others use it in unacceptable ways to edit what is in the document or to supplement the document, for example, by attaching a list of titles to a document that when

executed did not contain any titles. Based on the feedback received, the Office decided to redesign the cover sheet and to rewrite the instructions. The new cover sheet will change its focus. It will be used to give information not contained in the document, such as contact information, and to provide certification concerning the authenticity of required signatures on photocopies of documents.

MANDATORY DEPOSIT

THE COPYRIGHT OFFICE IS ENTITLED to receive copies of every copyrightable work published in the United States within three months of publication, as provided by the mandatory deposit provision in §407 of the copyright law.

These copies are deposited with the Library of Congress for its collections, or for exchange or transfer to other libraries. The Copyright Acquisitions Division (CAD) uses the mandatory deposit requirement and Copyright Office regulations to acquire works needed for Library of Congress collections when those works have not been obtained as registration deposits.

CAD encourages copyright owners to deposit or register works regularly and voluntarily immediately after publication; however, the copyright law authorizes the Register to issue demands for the required copies any time after publication.

CAD made demands for 5,208 works, based on recommendations by CAD librarians and Library of Congress recommending officers, and in response to Congressional requests.

Of the 962,119 copies of works the Office transferred to the Library of Congress for its use, more than half—491,219—arrived under the mandatory deposit provisions of the copyright law. The value of these mandatory deposits was \$11,403,673 or one-third of the estimated value of all materials transferred to the Library.

STATUTORY LICENSES AND OBLIGATIONS AND THE CARP SYSTEM

THE COPYRIGHT OFFICE OVERSEES the statutory licenses and obligations in the copyright law. The Licensing Division:

Statutory Licenses and Obligations

These licenses and obligations deal with secondary transmissions of radio and television programs by cable television systems; the making of ephemeral recordings; the noninteractive digital transmission of performances of sound recordings; the making and distribution of phonorecords of nondramatic musical works; the use of published nondramatic musical, pictorial, graphic, and sculptural works and nondramatic literary works in connection with noncommercial broadcasting; secondary transmissions of superstations and network stations by satellite carriers for private home viewing; secondary transmissions by satellite carriers for local retransmissions; and the importation, manufacture, and distribution of digital audio recording devices or media.

- Collects royalty fees from cable operators, satellite carriers, and importers and manufacturers of digital audio recording technology (DART);
- Invests the royalty fees, minus operating costs, in interest-bearing securities with the U.S. Treasury for later distribution to copyright owners;
- Records voluntary licensing agreements between copyright owners and specified users of their works; and
- Examines licensing documents submitted for a statutory license or obligation to determine that they meet the requirements of the law.

Royalty Fee Distributions

The Copyright Office distributes royalties collected under sections 111 and 119 and chapter 10 of the copyright law.

In Fiscal Year 2003, the following distributions were made:

- On October 24, 2002: \$61,112,007.88 comprising 50 percent of year 2000 cable royalties.
- On December 19, 2002: \$4,097,272.58 comprising a partial distribution of 95 percent of the Digital Audio Recording Technology (DART) 1999, 2000, and 2001 Musical Works Fund, Writers and Publishers Subfunds.
- On March 27, 2003: \$216,378.97 comprising a further final distribution of the 1999, 2000, and 2001 Musical Works Fund.
- On March 27, 2003: \$164,775.27 comprising National Public Radio's 0.18 percent of the 1998 and 1999 cable royalty fees adjusted to account for two prior partial distribu-

tions amounting to 75 percent of its share of the 1998 cable fund and 50 percent of its share of the 1999 cable fund.

Financial statements for royalty fees available for distribution in the cable and satellite statutory licenses and in the digital audio recording technology statutory obligation are reported and audited on a calendar-year basis. The calendar year 2002 financial statements are included in the appendices.

Electronic Remittance Collection and Investment

The Licensing Division continued to increase its royalty collection through electronic funds transfer (EFT), including the Treasury Department's "Pay.gov" Internet-based remittance collection system. The remitter gives the Treasury permission to take funds from the remitter's bank account.

This Automated Clearing House (ACH) debit allows remitters to pay a cable television system, satellite carrier, or DART royalty fee from an office computer without contacting the remitter's financial institution. The percentage of remittances made via EFT was 94.5 percent at the end of fiscal 2003.

The Division now uses the Department of the Treasury, Bureau of the Public Debt, online investment website known as FedInvest. FedInvest replaces the old system of faxing investment authorizations to the Bureau of the Public Debt. Any possibility of transcription error is eliminated, since the Licensing Division directly inputs the investment/redemption information into the Bureau of the Public Debt's investment system.

Once the day's market values are input by the Bureau of the Public Debt, the Licensing Division can see immediately the results of the investment authorization.

Licensing Information Technology Systems

The Licensing Division developed a correspondence flag for its automated systems to notify users when a Licensing Examiner has initiated contact with a cable system to obtain or clarify reported information and royalty fee calculations.

The Office completed testing for inclusion of cable subscriber data in its automated systems, which would more quickly provide essential information to authorized users.

The Division facilitated the microfilming of an increased number of official statements of account and associated correspondence. There was increased internal and public usage of automated cable system data, which further streamlined public access to certain records by reducing dependency on paper processes.

Copyright Arbitration Royalty Panels (CARPs)

During fiscal 2003, the Copyright Office administered six CARP proceedings. Five involved rate adjustments and one was a distribution proceeding. Four of the five rate adjustment proceedings involved setting rates and terms for the §114 license for digital performance right in sound recordings and the §112 statutory license for the making of ephemeral recordings to facilitate these transmissions.

The fifth proceeding involved setting rates and terms for the §118 statutory license for the use of certain copyrighted works in connection with non-commercial broadcasting.

The distribution proceeding dealt with distribution of royalty fees collected in accordance with the §111 cable compulsory license.

Below is a summary of the six proceedings conducted this fiscal year and an update on the 1997 distribution proceeding for cable royalties. That proceeding, which began in fiscal 2002, has not been concluded.

Rate Adjustments

Public Performance of Sound Recordings:
Docket Nos. 2002-1 CARP DTRA3 and 2001-2
CARP DTNSRA

As outlined in the fiscal 2002 report, the Copyright Office began the proceeding to set rates and terms of payment for the public performance of sound recordings by means of eligible nonsubscription

Copyright Arbitration Royalty Panels (CARPs)

CARPs determine distribution of royalties collected by the Licensing Division for the cable and satellite licenses and for DART when copyright owners cannot resolve controversies among themselves. They also set and adjust royalty rates and set terms and conditions of payment. A CARP panel consists of three arbitrators. Rate adjustments and royalty distribution proceedings under CARPs are divided into two phases. Phase I is the 45-day pre-controversy discovery period during which the parties exchange their documentation and evidence in support of their cases, in preparation for the hearings before a CARP. Phase II is the CARP proceeding itself, including the presentation of evidence through hearings and submission of proposed findings by all parties. CARPs submit their final decision to the Register of Copyrights. The Librarian of Congress, on the recommendation of the Register of Copyrights, must either accept or reject the panel's determination. If the Librarian rejects the CARP's decision, he shall substitute his own determination within a specified time period.

transmissions and the making of ephemeral recordings in furtherance of these performances for the next license period. The Office also began the proceeding to set rates and terms of payment for the public performance of sound recordings under §114 for new types of subscription services.

In fiscal 2003, the Office consolidated the two proceedings because many of the parties participating in the two proceedings were the same. Rates and terms would apply equally to parties in both proceedings.

After months of negotiations, the parties reached settlement and submitted joint proposals to the Office setting the rates and terms of payment for this license's royalties. Following publication of proposals for notice and comment, objections were reduced to one that concerned the selection and responsibilities of the Designated Agent(s).

The Office issued an Order limiting the scope of the proceeding to resolving the dispute over contested terms in the proposed agreement, published on May 20, 2003, about the selection and responsibilities of the Designated Agent(s), and to making any necessary conforming changes to the uncontested terms of payment set forth in that agreement. Hearings will be conducted during fiscal 2004.

Use of Sound Recordings by Preexisting Subscription Services:

Docket No. 96-5 CARP DSTRA

On May 8, 1998, the Librarian of Congress issued his decision setting the rates and terms of payment for the use of sound recordings by preexisting subscription services pursuant to the §114 statutory license.

During the proceeding, the parties proposed and the CARP adopted a term which gave the Recording Industry Association of America (RIAA) the responsibility for collecting and distributing the royalty fees to all copyright owners.

The Librarian adopted this term and crafted additional regulations relating to RIAA's responsibility including:

- Verifying the accuracy of the royalty payments;
- Establishing the value of each performance;
- Specifying the nature of the costs that may be deducted from the royalty fees prior to distribution; and
- Setting forth a procedure for handling royalty fees in the case where the collective is unable to identify or locate a copyright owner who is entitled to receive royalties collected under the statutory license.

RIAA appealed both the rate set by the Librarian and the additional conditions imposed on the RIAA collective. The United States Court of Appeals for the District of Columbia Circuit upheld the rate set by the Librarian and found that the Librarian has the authority to

impose terms on copyright owners or their agents. However, the court remanded for further consideration certain terms imposed on RIAA because the CARP had not considered them.

On February 13, 2001, the Copyright Office initiated a new proceeding to consider the terms remanded by the court.

In lieu of filing a written direct case, RIAA filed a petition to establish proposed terms governing the RIAA collective under 37 CFR 260. It subsequently revised the petition in order to remove a reference to the §112 statutory license and to clarify terms of membership in the collective.

The Copyright Office published the proposed terms in the *Federal Register* for notice and comment on July 23, 2001. In response to the notice, the American Federation of Musicians (AFM) and the American Federation of Television and Radio Artists (AFTRA) filed a Notice of Intent to Participate and objections to certain of the proposed terms. This caused RIAA to begin discussions with AFTRA and AFM in hopes of addressing union objections.

Subsequently, Congress passed the Small Webcaster Settlement Act of 2002 (SWSA), which among other things, amended §114 in ways that addressed specific issues involved in this proceeding.

RIAA again revised its proposed amendments to 37 CFR 260 to conform the terms in dispute to the new law and, in doing so, addressed the concerns of AFM and AFTRA. In light of these revisions, AFM and AFTRA subsequently withdrew their objections to the proposed terms and their Notice of Intent to Participate in a CARP proceeding.

On April 21, 2003, the Copyright Office published proposed terms that would govern the RIAA collective in its role as the sole agent designated to receive royalty payments from the three preexisting subscription services that were parties to the original proceeding for notice and comment.

The Office received no objections in response to the notice, and therefore adopted the terms as final regulations on June 18, 2003. The regulations became effective on July 18, 2003, and apply to the license period which began on November 1, 1995.

Use of Sound Recordings by Preexisting Subscription Services:

Docket No. 2001-1 CARP DSTRA2

The Copyright Office set a hearing schedule for the proceeding to establish rates and terms of payment for the public performance of sound recordings under §114 for preexisting subscription services, including satellite digital audio radio services, for the period January 1, 2002, through December 31, 2007.

Prior to the filing of written direct cases, the parties reached a settlement and requested that the Office publish the proposed rates and terms for notice and comment. On January 30, 2003, the Office published the proposed rates and terms and stated that these rates and terms would become final unless the Office received objections from a party with a significant interest who also filed a Notice of Intent to Participate in a CARP proceeding.

One party objected to a proposed term concerning designated agents. The Office determined that the company did not have a specific interest because it did not represent copyright owners entitled to royalties from preexisting subscription services under these licenses at the time it filed its objection. It also did not have authorization to lodge the objection and participate in a CARP proceeding from any copyright owners eligible to receive such royalties.

The Office, having received no other objections, adopted the rates and terms as final regulations on July 3, 2003. The rates and terms cover the license period January 1, 2002, through December 31, 2007, and became effective on August 4, 2003.

Non-Commercial Educational Broadcasting:

Docket No. 2002-4 CARP NCBRA

On April 1, 2002, the Copyright Office initiated a rate adjustment proceeding to establish the rates and terms for the §118 noncommercial educational broadcasting compulsory license by announcing a six-week voluntary negotiation period.

The following entities participated in these proceedings and succeeded in negotiating voluntary settlements submitted to the Copyright Office: Broadcast Music, Inc.; National Religious Broadcasters Music License Committee; WCPE-FM; the National Federation of Community Broadcasters; the Harry Fox Agency; SESAC, Inc. (formerly the Society of European Stage Authors and Composers); the American Society of Composers, Authors, and Publishers; National Public Radio; the Public Broadcasting Service; the Corporation for Public Broadcasting; and the American Council on Education.

During fiscal 2003, the Copyright Office published the negotiated rate adjustments and sought comments. Having received no objections to these proposed rates, the Copyright Office adopted the rates as final regulations on December 17, 2002. The rates went into effect on January 1, 2003.

Webcasting:

Docket No. 2000-9 CARP DTRA1&2

The Librarian of Congress issued a decision in 2002 setting the rates and terms for two statutory licenses that allow for the performance of a sound recording publicly by means of digital audio transmission (webcasting) and the making of ephemeral recordings to facili-

tate these transmissions for the license period between October 28, 1998, and December 31, 2002. This decision was the subject of a number of appeals to the U.S. Court of Appeals for the District of Columbia Circuit.

At the end of fiscal 2003, appeals by the following were still pending: the Recording Industry Association of America, the American Federation of Television and Radio Artists, and the American Federation of Musicians; Salem Communications and the National Religious Broadcasters Music License Committee; and five non-party interveners.

Distribution Proceedings

The Office also administered several CARP distribution proceedings:

1998 and 1999 Cable Royalty Fees:

Docket No. 2001-8 CARP CD 98-99

During fiscal 2003, a CARP proceeding was initiated for the distribution of royalties collected under the copyright compulsory license for cable television under 17 U.S.C. §111 during calendar years 1998 and 1999.

The parties to the distribution represented the copyright owners of television programming performed on over-the-air broadcast stations carried by cable systems in 1998 and 1999. They filed their written direct cases with the Copyright Office on December 2, 2002.

The Office oversaw discovery and motions practice on the written direct cases. On April 24, 2003, proceedings were initiated before the CARP arbitrators. They conducted extensive hearings on those cases.

The CARP will deliver a written decision on the division of royalties by October 21, 2003. Then the Register of Copyrights will make her recommendation to the Librarian on whether to accept or reject the CARP's determination. The Librarian's decision will be announced during fiscal 2004.

1997 Cable Royalty Fees:

Docket No. 2000-2 CARP CD 93-97

The Motion Picture Association of America and the Independent Producers Group each filed petitions with the United States Court of Appeals for the District of Columbia Circuit. Petitioners asked the Court to review the decision of the Librarian of Congress to reject both the initial and revised reports of the CARP convened to determine the distribution of 1997 cable royalty fees in the program suppliers category and to remand the case for a new proceeding before a new CARP.

In fiscal 2003, the parties continued to discuss settlement. As of September 30, 2003, no settlement had been finalized.

Claims Filed for Royalty Fees

The Copyright Office received and processed claims from copyright owners who are entitled to receive royalty fees generated from the use of their copyrighted works during 2002 under the terms of the compulsory licenses for cable and satellite, and the Digital Audio Recording Technology (DART) statutory obligation.

In January and February of 2003, the Office received 77 claims for DART royalty fees. In July 2003, it received 631 claims for cable royalty fees and 252 claims for satellite royalty fees.

Distribution proceedings will begin for these royalty funds some time after the Office ascertains whether a controversy exists concerning the distribution of the funds among the claimants.

[Regulations related to statutory licenses and obligations are listed in the Regulatory Activities portion of this report.]