OPERATIONS OF THE U.S. COPYRIGHT OFFICE

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
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OPERATIONS OF THE U.S. COPYRIGHT OFFICE

THURSDAY, JUNE 3, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 1:10 p.m., in Room 2141, Rayburn House Office Building, Hon. Lamar Smith (Chair of the Subcommittee) Presiding.

Mr. SMITH. The Subcommittee on Courts, the Internet, and Intellectual Property will come to order.

And without objection, we will recognize the former Chairman of this Subcommittee, the Honorable Howard Coble, for any remarks he may want to make.

Mr. COBLE. Mr. Chairman, I will be very brief.

Mr. Berman just told me you all were meeting, and I said, I have to say hey to my favorite Register.

And Lamar, I told Howard, this is not to say that I don't like my present Subcommittee, but I do evermore miss this one.

It is real good to be back. Good to see you and Howard again.

And Register, always good to see you.

Mr. SMITH. Thank you, Howard.

As is known by probably everybody in the room, I am going to recognize myself for an opening statement, then the gentleman from California. Then, we will look forward to seeing what our witness has to say.

Today's hearing focuses on the operations of the U.S. Copyright Office. The Copyright Office is a division in the Library of Congress. It performs several functions aside from its primary responsibility to examine and register copyright claims. These other functions include maintaining records regarding transfers and terminations of copyright, administering Copyright Arbitration Royalty Panels, providing information to the public about Copyright Law and registration procedures and providing technical assistance to Congress.

The Copyright Office receives most of its funding from fees and the balance from appropriations. The Subcommittee will learn how this money is allocated among its various functions of that Office. Also the Subcommittee will be interested in the progress of the Office in becoming user-friendly.

Almost 4 years ago, the Register embarked on a multi-year reengineering program to improve the efficiency and effectiveness of

its public services. In addition to its other administrative responsibilities that are statutorily defined, the Office is evaluating the demand for its services, particularly if offered online, in identifying new processes for performing its work.

Finally, the Office's fiscal year 2005 budget submission contains a request for more than $59 million to construct a copyright deposit facility in Fort Meade, Maryland. This project will ensure that copyright deposits not selected for the Library's Washington collection are stored in a preservation-friendly environment. The Subcommittee will receive its status report on this facility as well.

Of course, this list of topics is by no means exhaustive, but it does point out the importance of the Copyright Office.

The Ranking Member, the gentleman from California, Mr. Berman is recognized for his opening statement.

Mr. BERMAN. Thank you very much, Mr. Chairman, and I am pleased to join you for this oversight hearing on the U.S. Copyright Office.

I anticipate this hearing will reconfirm my perceptions of the U.S. Copyright Office as a highly effective, well-run agency. I have the utmost respect for the Register and her able staff. They are a valued resource to me on copyright policy issues. They ably perform a wide variety of functions on a comparatively limited budget.

I want to briefly touch on three issues raised in the Register's written testimony. First, the Copyright Office is engaged in an effort to re-engineer its information technology infrastructure. As part of that project, the Office is exploring the feasibility of converting analog copyright records, which cover 1790 through 1977, into a digital and easily accessible form. I fully support this effort, encourage the Copyright Office to expansively study the feasibility of making all registration ownership and transfer of rights records electronically available to the public and encourage the Office to explore the feasibility of ensuring that such records are accurate and updated.

I note with approval the Register's testimony on the triennial rulemaking she recently completed with regard to the anti-circumvention provisions of the Digital Millennium Copyright Act. The Copyright Office has twice now exhaustively examined concerns that the DMCA would impair noninfringing uses of copyrighted works and has found the vast majority of these concerns to be utterly unsubstantiated. In the four narrow circumstances in which the Copyright Office found concerns to be justified, the Copyright Office adopted specific exemptions. Thus, the triennial rulemaking demonstrates that the DMCA is working as intended. It is stimulating the dissemination availability of copyrighted works without any appreciable negative effect on noninfringing uses.

And finally, as the Register notes, even should the Senate pass the CARP reform legislation which passed the House earlier this year, its effective implementation still depends on the appropriation of necessary funds. Members of the Subcommittee and the full Committee and all interested parties need to start working together to ensure that, once the legislation is enacted, CARP reform will be funded in an adequate and timely manner.

Thank you, Mr. Chairman. I yield back.

Mr. SMITH. Thank you, Mr. Berman.

Our only witness today is the honorable Marybeth Peters, the Register of Copyrights for the United States. She has also served as acting general counsel and chief of both the Examining and Information and Reference Divisions within the Copyright Office.

Ms. Peters is the author of the General Guide to the Copyright Act of 1976 and has lectured extensively on Copyright Law. She received her undergraduate degree from Rhode Island College and her law degree with honors from George Washington University Law Center.

We welcome you, Ms. Peters, to the hearing today, and I note, either from your testimony or from our memo, that you haven't appeared since 19—I mean since 2001. So we are eager to hear from you and get an update on the Copyright Office.

Let me say that I also noticed your testimony ran to 24 pages. And without objection, the entire testimony will be made a part of the record.

We probably, though, will limit you maybe to a little bit more than 5 minutes. But if you will keep within bounds, and then we will get to our questions.

And please proceed.

STATEMENT OF THE HONORABLE MARYBETH PETERS, REGISTER OF COPYRIGHTS, COPYRIGHT OFFICE OF THE UNITED STATES

Ms. PETERS. Mr. Chairman, Congressman Berman, I am pleased to have the opportunity to report to you on the state of the Copyright Office. Because my full written testimony, as you said, has been submitted for the record, I will limit my remarks to one operational and one policy issue.

For the record, I am accompanied by my colleagues, David Carson, general counsel of the Copyright Office, Jule L. Sigall, associate register for policy and international affairs, and Julia Huff, who is our business process reengineering manager but who is also acting chief operating officer.

There are approximately 520 employees in the Copyright Office and as you noted, they provide—they perform a wide variety of tasks. Our major operational processes have been in place for decades. For almost 4 years, we have been engaged in a major reengineering program of these processes. Full implementation is scheduled for 2006. At that time, most of our services will be online. They certainly will be more efficient and timely.

Much work has been done. Much more work remains. For more than two-thirds of our staff, significant elements of their jobs will change. New application forms are being designed. Significant changes in our regulations will be needed. New practices will have to be developed.

This year, we are focusing on three fronts: One, our information technology systems; two, reorganizing the Office in line with the newly designed processes; three, redesigning our facilities, our space, which will require the Office to move out of its present space into rental space for at least 6 months.

The key challenge over the next 2 years will be to coordinate all of our efforts so that we will be fully ready to switch over to the new systems in 2006 while, at the same time, we continue to reg-

ister claims, record documents, administer the statutory licenses, acquire works for the use of the Library of Congress and perform our policy and legal work. Obviously, this is a massive undertaking, but one I believe we are up to. Although I am in my 39th year with the Library, I intend to remain on the job until the task is completed.

In the policy and legal areas, our work continues to grow. Digital technology regularly raises challenges that must be carefully identified and considered. For example, at present, we are struggling with, what are the best practices? What should they be with respect to registration and deposit of websites which change constantly and are available only online and with regulations concerning the scope of the section 115 compulsory license with respect to digital phonorecord deliveries?

As Mr. Berman mentioned, in October, we completed our second 1201(a)(1) triennial rulemaking. And as you know, this is a major undertaking, but all the fears and concerns that were raised about our digital future were not borne out. I believe the evidence presented throughout this lengthy proceeding shows that the use of technological measures that control access to copyrighted works has not negatively affected fair use or other exceptions of the law.

The digital marketplace is providing the public with access to an ever-increasing array of copyrighted works in ways that were never before possible. A few problems, as Mr. Berman noted, were presented, and exemptions tailored to alleviate these problems were granted to four narrow classes of works. No party seeking an exemption sought review of the determination, no doubt because there was no evidence of present or likely adverse effect. So my experience leads me to conclude that the 1201(a)(1) rulemaking does serve a useful purpose, and I am optimistic about the digital future.

The Copyright Office is committed to excellence in all that it does. We believe that attitude is everything. Our staff is simply outstanding. I personally feel extremely privileged to have the opportunity to work with such dedicated people on such a wonderful mission, promoting creativity by administering, sustaining an effective copyright system.

Finally, I thank you, Mr. Coble, Mr. Smith and Mr. Berman as well as your dedicated staffs for your consistent and generous support of our work. We consider service to you a most important part of our mission. And my colleagues and I look forward to continuing to work with you. Thank you.

[The prepared statement of Ms. Peters follows:]

PREPARED STATEMENT OF MARYBETH PETERS

Mr. Chairman, Representative Berman, Members of the Subcommittee, I am pleased to have the opportunity to report to you on the state of the U.S. Copyright Office and our work in fulfilling the Office's mission to promote creativity by administering and sustaining an effective national copyright system.

I will review the Office's current operations, how we are transforming these operations for the future through our Reengineering Program, and the policy and legal work the Office is undertaking.

I. OPERATIONS

Improvements in Processing Times

In 2001, when I last reported to the subcommittee in an oversight hearing, I noted that we were experiencing significant processing delays in our public services. Today, I can report much progress in this area. Since that last hearing, the time it takes between receipt of a work for copyright registration and issuance of a registration certificate has been cut by more than half—from an average of more than 6 months to about 90 days. The time required to record documents submitted to the Office has been reduced by almost two-thirds—from 20 weeks to 7. Requests for copies of works for the Library of Congress under the mandatory deposit provisions of the Copyright Act have been reduced from a high of nearly 2,500 requests awaiting action to a current level of just over 100.

We achieved these results even with the major disruption caused by the October 2001 anthrax incidents and a lengthy suspension of U.S. Postal service mail. When mail service resumed after the suspension, we received 9 months of held mail in a 4-month period—all the while continuing to receive new incoming mail.

That we were able to make this progress is a tribute to the Copyright Office staff and its commitment to providing exemplary public service.

Registration and Recordation

During FY 2003, the Copyright Office received 607,492 claims to copyright covering more than a million works. Of these, we registered 534,122 claims and created cataloging records for 543,105 registrations. We also recorded 16,103 documents covering approximately 300,000 titles of works. 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, and notices of termination of grants of rights. Documents are indexed under the names of the parties involved and by titles of works.

Works for the Collections of the Library of Congress

Copyright deposits, through both registration and mandatory deposit, remain an important source of works for the Library of Congress. Last year, the Copyright Office transferred almost one million copies of works to the Library of Congress for its collections. The estimated value of these works was nearly $34 million.

Licensing Activities

As part of our responsibilities for administering the copyright law's statutory licenses, we administered six Copyright Arbitration Royalty Panel proceedings last fiscal year. Four of the proceedings involved adjustments to the rate structures previously adopted for use of sound recordings in digital transmissions; one set rates for use of certain nondramatic works by noncommercial broadcasters. None of these proceedings required the Office to convene an arbitration panel to consider the adjustments. In each case, industry representatives were able to negotiate a settlement agreement which was adopted by the Librarian after giving the public an opportunity to comment. The Office, however, did convene one arbitration panel to consider the distribution of cable royalty fees.

We continued to encourage the use of electronic funds transfer, including the Treasury Department's "Pay.gov" Internet-based remittance collection system, in the payment of royalties. The percentage of remittances made via EFT is now about 95 percent. Of the funds available, more than $65 million in copyright royalties were distributed. The Licensing Division deducts its full operating costs from the royalty fees.

Public Information and Education

In FY 2003, the Office responded to 371,446 in-person, telephone, and e-mail requests for information. Last year was the third consecutive year that email inquiries to our Public Information Section doubled. The Office web site received 16 million hits, a 23 percent increase. We inaugurated new Spanish-language web pages on our site; they include basic information on copyright and application forms and instructions on how to register a work.

The Office also provides access to and copies of its records. Additionally, under certain conditions it provides copies of works that have been submitted for registration. Upon request, the Office will search its records and provide search reports of its findings. Last year we searched 11,066 titles and prepared 719 search reports. Nine thousand people used our onsite Copyright Catalog.

In addition, Copyright Office staff gave presentations at scores of educational conferences and symposia in both the United States and abroad on copyright matters. For example, in March we conducted our third annual "Copyright Office Comes to

California" program in association with the Intellectual Property Law Section of the California State Bar, which provides two day-long conferences, one in Los Angeles and one in San Francisco, covering the activities of the Office, registration procedures, and current legal and policy issues related to copyright. The program has been very successful, which prompted us to hold the first annual "Copyright Office Comes to New York" program with the Intellectual Property Law Section of the New York State Bar Association held in New York City in April. That program was also very well received.

We developed a new official seal and an updated logo for the Office, which became effective on January 1, 2004.

Increasing Public Access to Historical Records

The Office's registration and recordation records made after 1977 are in electronic form and available through our website. To ascertain the copyright status or current ownership of a work the public often needs the pre–1978 records. We have initiated a feasibility study to conduct an alternative business assessment for converting the analog copyright records (1790 through 1977) to digital form and providing electronic access to those records to facilitate copyright research, particularly rights clearance activities. We also hope to determine technical approaches for integrating the resultant digital records with post–1977 records that are already in digital form, and potentially, the costs and feasibility of delivering a digital application that provides retrieval access to all copyright records from 1790 to the present.

This is not a simple task. For example, there are an estimated 45 million catalog cards representing some 16.4 million works. However, creation of digital forms of these records will meet a compelling preservation need and will provide public access to a valuable body of data. The study, expected to take 12 months, should be completed next February.

Mail Situation

The mail situation continues to affect our operations. The recent ricin scare in the Senate, as you know, stopped U.S. Postal Service mail delivery for weeks. This, of course, affects our ability to maintain a consistent workflow and timely services.

In addition to this disruption on operations, irradiation continues to damage some materials submitted for registration or mandatory deposit. While only about 2 percent of works or applications submitted are damaged to the extent that they cannot be processed or examined, that still requires us to ask thousands of submitters for replacements.

II. REENGINEERING OUR PUBLIC SERVICES

I am also pleased to report that we are maintaining steady progress in our Reengineering Program and plan for full implementation of our new processes in Fiscal Year 2006. This effort is developing the Copyright Office of the future—it will mean more efficient and timely public services, with more of these services, including registration, available online.

We embarked on this effort in September 2000. Our objectives are to provide Copyright Office services online, ensure prompt availability of new copyright records, provide better tracking of individual items in the workflow, and increase acquisition of digital works for the Library of Congress collections. Over the past three years we identified and reengineered seven new processes for performing our work: register claims, record documents, acquire deposits, answer requests, receive mail, maintain accounts, and administer statutory licenses. Our current processes have been in place for almost half a century and processing time for a registration can take several months with handling by as many as 24 staff members. In the future, a registration will be completed in two to three weeks with only two or three people handling the case. All of the new processes will use new technology and online workflow management. More than half of our staff participated in the work for redesign and implementation of these principal processes.

In order for the new processes to be implemented, extensive change is required on three fronts: information technology (IT), organization, and facilities.

On the IT front, a contract was awarded last August to SRA International, Inc. to build a new integrated IT systems infrastructure which will support our new processes and public services. SRA began work in September. Since then we have:

1 defined the systems architecture;

2. refined the selected software environment; and

3. completed the preliminary design of user screens and the system's data model.

We plan to implement the first of several pilots of the system in November 2004.

On the organization front, the Office has completed much of the work of reviewing and revising the more than 135 position descriptions for the jobs that will change as a result of the new processes. A reorganization proposal will be finalized this summer. After the Library approves the reorganization, we will bargain impact with the labor organizations. After analyzing the skill sets that will be required for the new job roles, we developed a comprehensive training plan and have initiated hiring of a Training Officer to implement the plan.

On the facilities front, the Office completed essential steps to redesign the existing facilities to accommodate the new processes. We have completed a facilities project plan, a program report identifying facilities and requirements across the Office, adjacency and blocking diagrams, and have begun detailed design work for each division. The space plans, along with interior architectural construction documents, will be completed and delivered to the Architect of the Capitol by the end of June.

The key challenge over the next two years is to coordinate our execution across these three reengineering fronts of IT, organization, and facilities. Since our processes are changing so dramatically, our Office structure in each of these areas will change dramatically as well—to the point that our new processes cannot begin without full implementation of each front.

At the same time we are making this dramatic transition to our new processes, we need to make sure that we continue to provide our services to the public—including registration, recordation, licensing activities, and acquisition of copyrighted works for the Library's collections. We realize that the most significant impact on our public services, in terms of the Office's transition, will be in the area of facilities redesign. As such, we need to complete our facilities work as quickly as possible. We determined that under the fastest construction schedule, this redesign would take at least six months. We then concluded that, in order to keep providing our services to the public, the best option is to move off site into rental space during the construction period, which is scheduled to begin October 2005 and end in April 2006. At that time we will move back into the Madison Building and begin using the new processes supported by new technology systems.

III. POLICY, REGULATORY AND LEGAL WORK

As the primary source of copyright expertise in the federal government, the Copyright Office continues to work closely on copyright issues with Members and committees, executive branch agencies and the federal judiciary. Our work in the policy and legal arena is growing. As this committee knows, digital technology regularly raises challenges to copyright law that must be carefully identified and deliberately considered. Internationally, we are participating as part of U.S. delegations to a growing number of free trade agreements being negotiated around the world, each of which contains important intellectual property provisions. The committee is very familiar with the Office's work on legislative issues this Congress. We have also been and continue to be active on the regulatory front, especially involving the statutory licences such as those found in sections 114 and 115 of the Copyright Act. These regulatory activities have drawn the attention of the committee in recent hearings and, I understand, a hearing to be held in the near future. Therefore, I will focus on some of the international and legal work that we have recently undertaken and in which we are now involved.

International Activities

The Copyright Office=s international activities advance the economic health of the United States by promoting development and adherence of effective copyright systems, which ensure compensation to American creators, thereby encouraging creation and dissemination of works throughout the world.

The Office works particularly closely with the United States Trade Representative (USTR), the United States Patent and Trademark Office (USPTO) and other parts of the Department of Commerce, and the Department of State, providing expertise in negotiations for international intellectual property agreements and assisting other countries in developing their own copyright laws.

The United States has prepared and submitted to the World Intellectual Property Organization (WIPO) a proposed treaty text on the protection of broadcasting organizations. The U.S. drafting team consisted of Copyright Office attorneys and attorneys from the USPTO. The U.S. proposal has been considered at meetings of the WIPO Standing Committee on Copyright and Related Rights.

Our staff also participated in delegations led by USTR in negotiations of Free Trade Agreements with several countries, including Chile, Singapore, Australia, Morocco, and a group of Central American countries. These agreements contain comprehensive intellectual property provisions, including copyright. Our staff is also

participating in the Intellectual Property Negotiating Group of the Free Trade Area of the Americas and was instrumental in preparations, including the redrafting of U.S. treaty proposals.

The Copyright Office also participated in the meetings of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, and in the annual meeting of the WIPO Advisory Committee on Enforcement and the annual meeting of the Assemblies of WIPO Member States.

We also actively participated in numerous additional bilateral negotiations and consultations during fiscal 2003, including those held with Australia, Bahrain, the Dominican Republic, Egypt, Germany, Hong Kong (People=s Republic of China), Japan, Korea, Malaysia, Mexico, New Zealand, Pakistan, Paraguay, People=s Republic of China, the Philippines, Poland, Republic of China (Taiwan), Russia, Spain, Sri Lanka, Thailand, Ukraine, and Vietnam, on issues ranging from enforcement to revision of copyright laws.

For the USTR, Copyright Office staff provided assistance to nations such as Algeria, Bosnia, Cambodia, Cape Verde, Nepal, Russia, Saudi Arabia, Serbia, Sudan, Ukraine, and Vietnam in their World Trade Organization accession processes. They also responded to WTO Trade Policy Review queries regarding U.S. copyright law and policy.

The Office participates in the interagency Special 301 review process, 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.

Although the Copyright Office is not a law enforcement agency and has no direct role in law enforcement liaison, many of the Office=s obligations and responsibilities intersect with activities in the law enforcement arena. The Office works with the Department of Justice, the Federal Bureau of Investigation and the Bureau of Customs and Border Protection to provide information and documentation pertaining to specific copyright claims that are the subject of those agencies= investigations. In the past year, the Office advised and assisted the Bureau of Customs and Border Protection in resolving issues and developing new procedures related to border enforcement.

The Copyright Office conducts or participates in a range of intellectual property training to assist countries to comply with international agreements and enforce their provisions. Such training is in the areas of: awareness of international standards and the U.S. legal and regulatory environment; substantive legal training in U.S. copyright law; legal reform; and statutory drafting assistance.

The Office also conducted symposia as part of its International Copyright Institute (ICI). The ICI is designed to further international understanding and support of strong copyright protection, including the development of effective copyright laws and enforcement overseas. In March we hosted a delegation of 14 officials from China led by a deputy director general of the National Copyright Administration of China. The delegation included officials from various Chinese provinces who have authority in the area of copyright enforcement, as well as judges who hear copyright cases. Frequently we work with WIPO. In May, the Office in cooperation with WIPO hosted a group of government officials from a number of nations for an AInternational Symposium on Emerging Issues In Copyright And Related Rights For Developing Countries And Countries In Transition.@

1201 Rulemaking

Last October we completed the second Section 1201 rulemaking to determine whether any particular classes of copyrighted works should be exempted from the protection afforded by the prohibition on circumventing technological protection measures that control access to such works. We started the process a year out, in October 2002. We received 51 comments, with proposals for 83 exemptions, in response to our Notice of Inquiry. There were 338 reply comments supporting or opposing those proposed exemptions. We held four days of hearings in Washington and two in Los Angeles. Forty–four witnesses representing over 60 groups testified at these hearings. As a result of this process, four such classes of works were exempted.

I believe it is important to address some of the criticisms of the Copyright Office's triennial rulemaking that were made at a recent hearing before another Committee. It has been alleged that section 1201 provides a draconian mechanism to protect the interests of copyright owners in a way that adversely affects the legitimate interests of consumers. These claims overlook the purpose, process and results of the 1201

rulemaking. The voluminous record [1] of the two rulemakings conducted by the Copyright Office over the last six years stands in stark contrast to these claims. The record of the rulemaking reveals a thriving marketplace that is operating largely as Congress anticipated. Abundant "use–facilitating" business models now provide the public with a staggering array of digital choices—choices that are, in most cases, in addition to the traditional forms of distribution available to consumers. To say that the balance of copyright has shifted to the detriment of the public ignores this empirical evidence about the marketplace as a whole.

Our most recent section 1201 rulemaking fully and carefully considered evidence of present and likely future impediments to noninfringing uses, and we concluded that the record warranted a finding that the prohibition against circumvention shall not apply to persons who engage in noninfringing uses of four relatively narrow classes of copyrighted works. It has been suggested that since only four exceptions were recommended, the rulemaking has not fulfilled its promise, either quantitatively or qualitatively. I believe this view is inconsistent with the purpose of the rulemaking proceeding and the DMCA itself.

In enacting the DMCA, it is clear that Congress expected the development of the digital information marketplace to benefit the public without the necessity of regulatory intervention. Rather, the rulemaking proceeding was created as a "fail–safe" mechanism.[2] As the Section-by-Section Analysis published by this Committee stated at the time, "In any particular 3-year period, it may be determined that the conditions for the exemptions do not exist. Such an outcome would reflect that the digital information marketplace is developing in the manner which is most likely to occur, with the availability of copyrighted materials for lawful uses being enhanced, not diminished, by the implementation of technological measures and the establishment of carefully targeted legal prohibitions against acts of circumvention." [3] The drafters of Section 1201 did not expect the rulemaking proceeding to result in numerous and broad exemptions. For example, the Commerce Committee explained that the rulemaking proceeding "would monitor developments in the marketplace for copyrighted materials, and allow the enforceability of the prohibition against the act of circumvention *to be selectively waived, for limited time periods, if necessary* to prevent a diminution in the availability [of works]." [4] In addition, the Commerce Committee noted that any such exemption should be "fully considered and fairly decided on the basis of real marketplace developments." [5]

The body of evidence established in the first two rulemakings does not support the view that fair use, or other noninfringing uses, have been constrained in the marketplace. While fears and concerns for the future were plentiful, the evidence of present or likely adverse effects was quite limited. In many ways, the evidence elicited in the second rulemaking tended to prove that the digital marketplace has been developing in a manner which has enhanced public access to copyrighted works. The fears of copyright owner abuse of section 1201 have not become a reality in any significant respect. Where real problems were presented, and where existing statutory exceptions would not resolve those problems, we defined exempted classes of works in ways tailored to alleviate the problem. The fact that there were few exemptions is not a sign of the failure of the rulemaking. Rather, it is a sign of the success of a digital marketplace that is providing the public with access to an ever-increasing array of copyrighted works in ways that

were never before possible. As Congress anticipated, the strongest check on overzealous protection by copyright owners is the marketplace itself. While I have no way of knowing what the future will hold, there is reason for optimism.

Even though technological change in the digital marketplace has created significant benefits to the public in terms of new and varied means of access and use of copyrighted works, some people seem to believe that any limitation on access or use is an abridgement of the public's rights. For instance, at a recent hearing before another Committee, some witnesses argued that the fact that DVDs cannot be copied is a limitation on the consumer's so-called "fair use right" to make a back-up copy. They have asserted that when section 1201 is invoked to prevent the marketing of software that circumvents access controls to enable people to make "back-up" copies of motion pictures on DVDs, it deprives people of the ability to engage in fair use. Proponents of that point of view sought an exemption in the Section 1201 rule-

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[1] *http www.copyright.gov/1201/*

[2] H.R. Rep. No.105–551 Part 2, at 36 (July 22, 1998).

[3] House Committee on the Judiciary, 105th Cong., Section-By-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, at 8 (August 4, 1998) ("House Manager's Report").

[4] *Id.* (emphasis added).

[5] *Id.*

making last year. However, they utterly failed to make their case either legally or factually, offering no legal support for the proposition that the making of a "back-up" copy of a motion picture on a DVD is a noninfringing use[6] and failing to demonstrate that DVDs are so susceptible to damage and deterioration that a convincing case could be made that the practice of making preventive backup copies of audiovisual works on DVDs should be noninfringing.[7]

At the same hearing, proponents of a right to make "back-up" copies of DVDs asserted that my DMCA Section 104 Report, which I delivered to Congress in August, 2001, supports the position that the making of a back up of a motion picture is a fair use. In fact, the Section 104 Report came to no such conclusion.[8]

I also think it is necessary to respond, once again, to the criticisms raised concerning that required showing of proof in the rulemaking. It has been repeatedly stated—most recently in a hearing last month before another Committee—that the Copyright Office raised the burden of proof for proponents of exempted classes in a manner that is contrary to the plain language of the statute, thereby eliminating the possibility of an exemption for most proposals. As I stated in my Recommendation to the Librarian of Congress, this claim is unfounded.[9] I concluded in 2000 and again in 2003 that a determination to exempt a class of works from the prohibition on circumvention must be based on a showing that the prohibition has a *substantial* adverse effect on noninfringing uses of a particular class of works. However, the term "substantial" was not used to heighten the burden, but to clarify that adverse effects must have substance to be considered. By way of guidance, our initial notice of inquiry in the rulemaking informed the public that insubstantial effects, whether de minimis or the result of inconvenience, do not represent a sufficient basis for an exemption.[10] The use of the term "substantial" simply imposes the requirement found throughout the legislative history, which is variously stated as "substantial adverse impact,"[11] "distinct, verifiable, and measurable impacts,"[12] and more than "de minimis impacts."[13] As is apparent from the dictionary definition of "substantial" and the Supreme Court's treatment of the term (*e.g.,* in its articulation of the substantial evidence rule), requiring that one's proof be "substantial" simply means that it must have substance. The requirement of substance rather than speculation was not a deviation from the statute and fully coincides not only with Congressional intent but also with simple common sense.

The fact that I found that only four narrow classes of works qualified for exemption from the prohibition on circumvention is not evidence of a failed rulemaking proceeding; rather, that fact is due to the failure of proponents of other classes of works to come forward with any showing of a substantial adverse impact on noninfringing uses. But you do not have to take my word for it. The entire record of the rulemaking is available on-line,[14] and I have yet to see any criticism of the results of the rulemaking that has shown that we overlooked or disregarded any evidence of substantial adverse impacts on noninfringing uses. The extensive record developed in the rulemaking is devoid of evidence to support the claims made by the critics of the DMCA.

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[6] Recommendation of the Register of Copyrights, pp.106–108 (October 27, 2003) ("The proponents of an exemption bear the burden of proving that their intended use is a noninfringing one. No proponent has offered a fair use analysis or supporting authority which would allow the Register to consider such a basis for the exemption, and the Register is skeptical of the merits of such an argument.").

[7] *Id.* at 106.

[8] In the Section 104 Report, I presented recommendations on whether amendment of 17 U.S.C. § 117, the provision permitting the making of a back-up copy of a computer program, was advisable. I concluded that there was a fundamental mismatch between the law and accepted, prudent practices among most system administrators and other users regarding the back up procedures for works residing on a computer. An entire industry of hardware, software and media manufacturers had developed in the marketplace to accommodate the legitimate needs of users, which were otherwise unmet in the marketplace, *i.e.,* one could not easily replace the contents of one's hard drive. Although I recommended an expansion of § 117 to include works of digital media that are subject to accidental erasure, damage or destruction in the ordinary course of use, the context of the discussion related to works, other than computer programs, that are stored on computers. As I stated in the Report, "the exception would be limited primarily to backups made from copies of a hard drive, floppy disk, or other magnetic medium." *Id.* at 160 n. 471. I did not and do not believe that such an exemption should extend to making backups of DVDs or CDs, given the lack of demonstrated fragility in "the ordinary course of use."

[9] Recommendation of the Register of Copyrights, pp.16–20 (October 27, 2003).

[10] Notice of Inquiry, 67 F.R. 63578, 63580 (October 15, 2002).

[11] See House Manager's Report, at 6.

[12] See, e.g., H.R. Rep. No.105–551 Part 2, at 37 (July 22, 1998).

[13] See *id.*

[14] *http://www.copyright.gov/1201/*

The limited number and scope of exemptions in the section 1201 rulemaking is a testament to the availability of access and use of digital works in the marketplace. Although I had reservations about the rulemaking when we embarked upon the process in 2000, I have come to believe that it serves a useful purpose. As Congress intended, it gives us the opportunity to monitor developments in the marketplace to determine whether copyright owners are using the legal protections offered by the DMCA in ways that will enhance or hinder the availability of their works to the public. I assume that copyright owners recognize that if they apply access controls in ways that prevent people from making noninfringing uses of certain types of works, they run the risk that the rulemaking will be used to deprive them of the protection of the anticircumvention provisions for those works. I would like to think that one of the reasons we identified only four narrow classes of works is that copyright owners, mindful of the triennial rulemaking, have by and large refrained from using access controls in a heavy-handed manner. Of course, the Copyright Office will continue to fully and carefully monitor developments in the digital market for copyrighted works in future triennial proceedings.

Litigation

In the past 18 months, we have worked closely with the Solicitor General and the Department of Justice on a number of important cases, providing advice on issues of copyright law and policy and assisting in the preparation of documents. We advised and assisted the Solicitor General in a number of cases pending in the Supreme Court, the courts of appeals and district courts, including Eldred v. Ashcroft, which upheld the constitutionality of the Sonny Bono Copyright Term Extension Act, as well as a number of cases involving challenges to the Digital Millennium Copyright Act and cases involving issues such as copyrightability of parts numbers and model laws.

Sonny Bono Copyright Term Extension Act: Unfinished Business

A key component of the Sonny Bono Copyright Term Extension Act, which extended copyright terms by twenty years, was an exception to help ensure public access to works in the last twenty years of their copyright term. During consideration of the issue, the Chairman of this Subcommittee asked the Office to facilitate negotiations between libraries, educational institutions and copyright owners with a goal of reaching agreement on the scope of a possible exemption. There were numerous meetings over a span of many months. Although there was some disagreement on the language of the exemption, there was no disagreement that the exemption would apply to all types of works.

The exemption, which became 17 U.S.C. 108(h), essentially permits a nonprofit library, educational institution or archive to reproduce or distribute copies of a work, including in digital format, and to display or perform a work during the last twenty years of the copyright term as long as that work is not commercially available. Unfortunately, the terms of section 108(i) make this exception inapplicable to motion pictures, musical works and pictorial, graphic and sculptural works. I am hopeful that this error will be remedied and would be pleased to work with the Subcommittee to correct it.

IV. FY05 BUDGET REQUEST

Given the attention the Fiscal Year 2005 budget process is receiving, I will briefly review the Office's request. We are very appreciative of this committee's support of our budget requests in recent years.

For FY 2005, the Copyright Office is seeking a total budget of $53,518,000 for the BASIC, Licensing and CARP appropriations. The budget request is funded from $19,369,000 in net appropriations and $34,149,000 in offsetting collections authority. Besides mandatories and price level increases for each appropriation, we are seeking approval of two specific requests: $3,660,000 in new offsetting collections authority and spending authority (no new net appropriations) to be used to redesign our office space, which is required to support our reengineered business processes; and $59.2 million for a Copyright Deposit Facility at Ft. Meade. As the Ft. Meade facility is important to our ability to fulfill our responsibilities under the Copyright Act, I wanted to provide the committee with a fuller description of this request.

Ft. Meade Copyright Deposit Facility

The Copyright Deposit Facility at Ft. Meade will, for the first time, ensure that copyright deposits of registered works not selected by the Library are stored for certain periods in environmental conditions that allow us to meet our legal requirements to retain, and be able to produce copies of, these works.

The imperative for the Copyright Deposit Facility at Ft. Meade is to fulfill the requirement under the Copyright Act for the Office to provide for long-term preservation of copyright deposits. The Copyright Office is required by statute to retain unpublished copyright deposits for the full term of copyright, which is the life of the author plus 70 years, and to retain published deposits for the longest period considered practicable and desirable by the Register. A retention period of 120 years has been established to fulfill this legal requirement for unpublished deposits, and I have concluded that a retention period of 20 years should be established for the published deposits.

Deposits serve as evidence of what was registered; they reflect the nature and in most cases the extent of the material that has been registered. The Office retrieves approximately 2,500 works from its offsite storage each year. Copies of copyright deposits, certified by the Copyright Office, are used in a variety of legal proceedings. If we continue to hold deposits under the conditions that have been in place since then, some works will deteriorate to such an extent that we would not be able to either ascertain the full work or make a copy.

The Office currently stores about 50,000 cubic feet of deposits at the Landover Center Annex, a GSA leased facility. In addition, the Office stores more than 85,000 cubic feet of deposits at a commercial records management storage facility in Sterling, Virginia run by Iron Mountain.

The legal deposits consist of a variety of formats and types, including: paper in varying quality and size such as books, architectural drawings, sheet music, and computer code printouts; magnetic tape (both audio and video); photographs; CD-ROMs, CDs, and LPs; and fabric.

The current storage space, both at the leased facility and the commercial records storage facility, fails to provide the appropriate environmental conditions necessary to ensure the longevity of the deposit materials. The storage space at the Landover Annex is subject to wide temperature variances, high humidity levels and water leaks. The commercial records storage facility is also subject to seasonal temperature fluctuations and uncontrolled humidity levels.

Continued storage under present substandard environmental conditions will accelerate the aging of the deposit material and reduce the useful life span by 75 percent, i.e., deterioration that would ordinarily occur in 100 years occurs in 25 years. These conditions place legal deposits at risk in the long term. This is particularly applicable to the video and audio magnetic tapes in storage which are especially sensitive to environmental conditions. In addition, the current storage space at the Landover Annex and the commercial records storage facility does not meet the NARA fire protection requirements for storage of long-term records which must be in place by FY 2009.

In September 2002, a task group was formed to prepare design specifications and construction documents. The group comprised representatives from the Copyright Office, Library of Congress support divisions, the AOC, and an outside architectural firm. Last August, this group completed facility design and construction documents.

The Ft. Meade facility would be a highly secured, environmentally controlled, high-density storage building with sufficient space for retaining current and future deposits. It would be in full compliance with the NARA regulations for records storage facilities, and would bring together all copyright deposits in a single location, improving retrieval time and our service to the public.

The Ft. Meade facility will allow for 245,000 cubic feet of storage. When the building is ready for occupancy in FY 2007, we would immediately occupy about two-thirds of that space. Currently, the Copyright Office is adding an average of 3,500 cubic feet of deposits of published works and records and 3,500 cubic feet of deposits of unpublished works annually. Although it is difficult to estimate the volume of copyright deposits that we will receive in the future, we project that the facility would provide adequate storage space at least through 2020.

We consulted with the Library's Preservation Directorate to determine the climate control requirements to ensure that the useful life of the legal deposits would be sufficient to meet the legally mandated retention periods. Because published and unpublished deposits retention periods are different, the necessary environmental requirements are different as well. Published deposits need to be stored in a temperature of 68 degrees Fahrenheit (F), and 45 percent relative humidity (RH). Unpublished deposits must be stored in a climate-controlled area maintained at 50 degrees F and 30 percent RH.

We have briefed the Appropriations Committees staff on our current storage problems and our need for this facility. The staff has asked us to ascertain whether there are acceptable alternative storage options. Our staff visited three alternative facilities and they are being evaluated based on our requirements in the areas of

environmental conditions, security and retrieval of deposits. We will provide our analysis shortly.

CARP Reform Legislation

I also note the budget impacts of H.R. 1417, the proposed Copyright Royalty and Distribution Reform Act of 2004, which has passed the House and is awaiting action in the Senate. The current system authorizes the Copyright Office to deduct CARP administrative costs from royalty fees collected by the Office. H.R. 1417 provides that these costs be paid for out of appropriated funds so that copyright owners, who are entitled to the royalty fees collected by the Copyright Office, will receive all the royalties collected under the statutory licenses to which they are entitled, and so that no one with a stake in the outcome of rate-setting proceedings will be unable to participate due to a requirement that they bear the high costs of such proceedings. If the legislation is enacted, the Copyright Office will be need to request an estimated $1 million in additional net appropriations to cover these new funding requirements. It is possible that, depending on the timing of enactment of H.R. 1417, it will be difficult if not impossible to secure that funding for Fiscal Year 2005. If that is the case, it may be necessary to defer the effective date of the provision providing for public funding of the new system until Fiscal Year 2006. I hope that I can count on your support with respect to these funding issues.

V. CONCLUSION

The Copyright Office has a full agenda before it in terms of our policy work, in carrying out our responsibilities under the Copyright Act, and in reengineering our work processes for even better public service in the future. We aim to be forward-looking and committed to exemplary service. I thank the staff of the Copyright Office for the accomplishment reflected in this testimony.

I also express my gratitude to this committee for its consistent support of the Office's work. We consider service to this committee a most important part of our mission, and look forward to continuing to work with the Members of the Committee and your very able staff.

Mr. SMITH. Thank you, Ms. Peters.

A couple of questions, and I am going to key off your written testimony before I comment on something you just mentioned in your oral testimony. And I thought—and it was actually the first paragraph of your written testimony which I thought was very interesting and I did not hear you mention a minute ago. That is, you said that the time it takes between receipt of a work for copyright registration and issuance of a registration certificate has been cut in half, I think, from 6 months to 90 days. You didn't explain why that happened or how that happened or what is instructive about that great progress.

Ms. PETERS. Dedicated staff. The truth is, we built up a large number of backlogs, and through a very organized effort that involved the staff trying to solve the problems, we basically cut down the number of claims that we had on hand. We built up large correspondence. Again, it was the leaders of the Office and the staff that figured out a way to resolve that and, at the same time, to look at new ways to reduce it. So I am very, very fortunate to have a very, very talented, dedicated staff who want to provide the best possible public service.

Mr. SMITH. Fair enough.

In 2003, fiscal year 2003, the Copyright Office received over 600,000 claims to copyright. How does that compare to previous years? I wanted just a sense of trajectory here.

Ms. PETERS. It is interesting. A claim actually can represent one or more works.

Mr. SMITH. Right. So for instance, the 600,000 represented a million works.

Ms. PETERS. Actually, yeah. So, the number is more or less—has been even for a number of years. More and more people are using the group registrations, so we have not had an increase. But it maybe is a little bit less this year, but for the last few years, it has been pretty steady.

Mr. SMITH. So roughly the same. In a way, that maybe helped you cut the time because you were working with a given workload that was not increasing, perhaps.

This is a little bit of a loaded question, but you all—the Copyright Office has worked well with the Patent and Trademark Office for a number of years. And yet the PTO seems to need to increase its responsiveness and efficiency, and perhaps you set an example for them. What suggestions do you have for PTO?

Mr. BERMAN. Put the Patent Office under congressional control.

Mr. SMITH. And other than a dedicated staff.

Ms. PETERS. No. Actually, you know, the truth is that the functions and the size——

Mr. SMITH. I am sorry.

Ms. PETERS. The functions of the Patent and Trademark Office are very different than the Copyright Office. And I think that, way before my time, the leaders of the Copyright Office have always been dedicated to public service.

One of the things that I think helps us is I have been in my job for almost 10 years, and most of the people who work for me have, too. So there is stability in leadership. There is the same management team. I think it helps us with the fact that we are in the Library of Congress, which probably is more dedicated to looking at digital issues in making information available to the public than most other places.

One of the things that we do is, no matter what we are doing, any project, we involve every stakeholder in trying to solve that. And that includes the public as well as the labor unions as well as anybody who is going to either be part of our process or a beneficiary of our process. I don't know that I would have suggestions for them. They are so much larger and more complex. And I am really excited about our reengineering.

But we are still in the planning and initial implementing stage, so I am going to wait until 2006 and see whether or not we have useful suggestions, because the proof will be in the pudding on how our methods work.

Mr. SMITH. Okay. Well, I promise we won't wait as long as we have this time to have you back to find out those good suggestions.

Now, you mentioned a while ago and said in your oral testimony that the 1201 rulemaking does serve a useful purpose. And as you are aware, there is another Committee that has had a hearing on that general subject fairly recently. And during that hearing, there was some mention that the act of producing a backup copy of a DVD was fair use under the Copyright Law. Would you disagree or agree with that?

Ms. PETERS. I would disagree.

Mr. SMITH. Observation and why?

Ms. PETERS. I would disagree for many reasons. First of all, I know of no authority, not in the law itself or in case law with regard to making backup copies of DVDs, which is what they were

actually focusing on in that hearing. And in fact, 321 Studios, which was the proponent of the backup copy, sought an exemption and basically did not produce any evidence, legal or otherwise, that there was a right or there was a problem.

It is true that under section 117 of the Copyright Law, with regard to computer programs, there is the ability to make a backup copy. And it is true that, in a study that we did, known as the section 104 study, that we noted that, with respect to works that are stored on computers, that many people back up those copies. And we recommended that the law recognize that when you are in an electronic environment and not a hard-copy environment, that prudent people tend to back up what they have on their computer. But we went out of our way to say that, with regard to physical copies, DVDs, CDs, that there was no issue with regard to losing the data, and that you didn't need backup copies.

Mr. SMITH. Okay. Thank you, Ms. Peters.

The gentleman from California, Mr. Berman.

Mr. BERMAN. Just following up on that, thank you, Mr. Chairman.

But if fair use allowed a backup copy, why did we need to pass section 117 regarding computer programs and backup copies?

Ms. PETERS. I think maybe at the time you were—there was an implementation of the recommendations of CONTU, and it was clarifying that computer programs were covered and what the scope of protection would be and maybe it wasn't quite so clear. It was added in 1980.

A lot has happened from 1980 to today, and even in our study, we said that, looking at it today, I don't think we would have come to that conclusion in 1980, that we thought that fair use would apply, but it is determined on a case-by-case basis. So any time, you know, that you really want to make sure that they can make a backup copy, all of the time, I would think legislation is a preferable way of approaching it.

Mr. BERMAN. But the bill that that Committee is holding a hearing on that affects Copyright Law, H.R. 107, is there anything in that bill that restricts the circumvention to enable one backup copy?

Ms. PETERS. At the moment, I don't remember.

David?

No. My able counsel says no.

Mr. BERMAN. That is the answer I was thinking was the case.

Ms. PETERS. I was thinking, but I wasn't sure.

Mr. BERMAN. Okay. A couple of other questions. The Chairman got me off track.

I want to ask you about transfer of rights. I mean, a huge amount of—I think a majority of the 16,000-plus documents received by the Copyright Office involved transfer of rights from one copyright owner to another. It seems like these documents would be useful to prospective licensees who might want to clear rights to use the copyrighted works that are covered by such documents.

In your IT reengineering project, are you looking into the feasibility of making these documents accessible online? Is there any legal requirement that copyright owners file such transfer-of-rights documents? If not, what is their current incentive for doing so?

Why are they doing it if they aren't required to? And is there any way that Congress, consistent with the Berne Convention, could create a requirement or increase the incentive for filing transfer-of-rights documents?

Ms. PETERS. I will start with the easiest one first. I think requiring documents to be recorded in the Copyright Office would violate Berne. And in fact, there was a provision in the law that said that you really had to record a document if, in fact, you were relying on that document or your ownership with regard to suits that you were bringing in court. That was eliminated when we joined Berne.

People record documents because there is a provision that says that, if a document is recorded before a certain date, then it is entitled—and the work is registered—it is entitled to constructive notice. So there are many people who believe that the constructive notice provision is an important one, that everybody is going to be held to know what the facts of that document are.

Many people today record documents because the records of those documents, at least the current ones, are online so you actually can do a search today to try to determine whether or not there has been a transfer and who the current owner is.

You are absolutely right that because there is no mandatory requirement, it is an incomplete database. And a database actually is worth much more when it is complete because can you never rely on that one database. There must be some additional incentives that could be built in.

With respect to putting the documents online, we do, in fact, image the documents. They are available on CDs and people can come in and look at them. Before, it was microfilm. And we are looking at whether or not—and we probably would make those documents available for people to search online.

What is interesting, we met with all of the stakeholders who file documents and who search documents. And the filers, the ones who submit them, did not express much interest in submitting them electronically. But we will work on that. Our process is, even if they submit it on paper, we are going to image it as soon as it hits the Office, and it will be processed electronically.

Mr. BERMAN. Mr. Chairman, I have two more questions. They should be fairly short.

Mr. SMITH. The gentleman from California continues to be recognized, and we will turn off the clock for you.

Mr. BERMAN. All right. Thank you.

The courts, I am told, are requiring registration certificates as a predicate to filing an infringement lawsuit. It takes usually 6 months to get a certificate from—of registration—from the Copyright Office. Even with an expedited registration process, that requirement could cause major litigation problems if the Copyright Office isn't able to keep up with the volume of expedition requests. Do you think we need a change in the Copyright Act? Or is it possible to institute a smoother, faster system for expedited filing?

Ms. PETERS. Well, let me start with that. As far as I am aware, the expedited system that we have generally works. We guarantee it in a matter of days.

With respect to the Incredible Hulk, where they said they needed it the same day, we issued it the same day. And we are willing to do that. Obviously——

Mr. BERMAN. So that, basically, if you are going to have to do this for litigation purposes, you can get it pretty quickly.

Ms. PETERS. Absolutely. So, you know, eventually, in our system, we hope to be able to issue certificates in less than 2 weeks, maybe even less than that. But as far as I am concerned, you know, if people come to us and tell us they have a problem, we will do everything in our power to make sure that they get a certificate when they need it.

Mr. BERMAN. Okay. My last question. Your testimony mentions that section 108(i) appears to deny libraries, educational institutions and archives the ability to rely on section 108(h) to protect them from copyright liability when they engage in certain preservation, scholarship and research activities relating to motion pictures, musical works and some other works. I am concerned that this problem may impair preservation in scholarship efforts that involve orphan films and music that have been contemplating legislation to fix this problem. Do you think it would be fair and correct to characterize such legislation as a technical fix?

Ms. PETERS. I would like to tell you yes. Clearly, the intent at the time was to include all classes of works.

For me, the issue about being technical is that, since 1998, they haven't had that exemption. So if you are willing to consider it technical, because that was the intent at the time, I am happy to say it is technical.

Mr. BERMAN. I think it is technical if the three of us would agree.

Ms. PETERS. Well, then, I certainly agree.

Mr. BERMAN. Okay. Mr. Chairman, I yield back.

Mr. SMITH. Thank you, Mr. Berman.

Ms. Peters, thank you again for your testimony. As you know, we will be in touch with you and to stay in touch and appreciate your good suggestions along the way.

With that, we stand adjourned.

[Whereupon, at 1:40 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Mr. Chairman:

I am pleased to join you for this oversight hearing on the U.S. Copyright Office. Oversight of agencies under our jurisdiction is a key responsibility of this Subcommittee.

I anticipate that this hearing will re-confirm my perceptions of the U.S. Copyright Office. Namely, that it is a highly effective, well-run agency.

I have the utmost respect for the Register and her able staff. They are a valued resource to me on copyright policy issues. They ably perform a wide variety of functions on a comparatively limited budget. They are to be commended for their record of service to this Congress, American creators, users of the Library of Congress, and the United States public at large.

Because the Register may not be able to address these in her oral testimony today, I want to briefly touch on three issues raised in the her written testimony.

First, the Copyright Office is engaged in an effort to reengineer its Information Technology infrastructure. I understand that, as part of this project, the Copyright Office is exploring the feasibility of converting analog copyright records, which cover 1790 through 1977, into a digital and easily accessible form. I fully support this effort, and encourage the Copyright Office to expansively study the feasibility of making all registration, ownership, and transfer of rights records electronically available to the public. I also encourage the Copyright Office to explore the feasibility of ensuring that such records are accurate and up-to-date. I believe the Copyright Office could perform an invaluable and unique role in facilitating rights clearance activities if it became the repository of accurate, up-to-date, relatively complete, and electronically accessible copyright records. I want to work with the Copyright Office to remove any legal, financial, or other obstacles that prevent accomplishment of this goal.

Secondly, I note with approval the Register's testimony on the triennial rulemaking she recently completed with regard to the anti-circumvention provisions of the Digital Millennium Copyright Act. The Copyright Office has twice now exhaustively examined concerns that the DMCA would impair non-infringing uses of copyrighted works. It has found the vast majority of these concerns to be utterly unsubstantiated. In the four narrow circumstances in which the Copyright Office found concerns to be justified, the Copyright Office adopted specific exemptions. Thus, the triennial rulemaking demonstrates that the DMCA is working as intended: it is stimulating the dissemination and availability of copyrighted works without any appreciable negative effect on non-infringing uses.

Third, the Register notes that, even should the Senate pass the CARP reform legislation, which earlier this year passed the House, its effective implementation still depends on appropriation of necessary funds. Members of this Subcommittee and the full Committee, and all interested parties, need to start working together to ensure that, once the legislation is enacted, CARP reform will be funded in an adequate and timely manner.

Thank you, Mr. Chairman, and I yield back the balance of my time.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

I would like to commend the Copyright Office for its tremendous efforts over the past few years to enforce the copyright laws. The lines in copyright used to be in black and white, but the advent of technology has turned them gray.

While the Internet provides limitless opportunities for the spread of information, it also allows the unlimited copying and distribution of copyrighted works without the payment of royalties. And thanks to services like Napster and KaZaA, the public has become addicted to obtaining music and other content for free off the Internet and may not easily give up that privilege. Despite this pressure to let content roam free, the Copyright Office has done a remarkable job in the past few years of studying this issue.

The Office also is playing an instrumental role in helping Congress ensure that the copyright laws apply equally to private citizens and the States. Sovereign immunity can no longer be used as an excuse for infringement.

The Office was instrumental in passage of legislation reforming the Copyright Arbitration Royalty Panels. We learned in hearings and in meetings that the CARP's were too costly and inefficient. The Office helped us draft and move a bill to revamp them into government-funded Copyright Royalty Judges that should make the system smoother for copyright owners and users.

On a final note, thanks in part to this Subcommittee and the explosion of technology, the Copyright Office's workload has increased dramatically. I hope we can all work with congressional appropriators to give the Office the additional resources it needs to continue serving its customers in a timely and professional manner.