

I believe the adoption of such an approach will better serve the goals of copyright in dealing with the difficult problems of appropriation. Useful appropriators who do not pass the fair use test unquestionably owe compensation, but the public may be entitled to the survival of their works.

In *2 Live Crew* the Supreme Court has reoriented the doctrine of fair use to serve the central goal of copyright—to promote the growth and dissemination of knowledge. This same reorientation promises also to enlighten our understanding of copyright's remedies.

Join me in a toast to fair use which, like Odysseus, suffered ten storm-tossed years, lost and wandering, but has now refixed its compass on its goal.

## THE ROLE OF THE COPYRIGHT OFFICE: AN INTRODUCTION

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Copyright in 1994 is in a time of stress and transition, and the Copyright Office is no less so.

Any number of issues come to mind. Notwithstanding the modernization represented by the 1976 Copyright Act<sup>1</sup> subsequent developments in international relations, technology, business practices, and other areas are testing the viability of the copyright system. The Berne Convention's challenge to our protection of author's moral rights has at best only been partially answered by the Visual Artists Rights Act of 1990.<sup>2</sup> Such technologies as satellite broadcasting and digital sound recording have left problems, legislation, and litigation in their wake,<sup>3</sup> and the looming presence of the national information superhighway promises to force a fundamental reexamination of the balance between the rights of authors, publishers, and consumers of copyrighted works.<sup>4</sup> The issue of when photocopying for corporate research is fair use has come to the fore,<sup>5</sup> and the same issue applied to academic research cannot be far behind.

The duties of the Copyright Office, both formal and informal, are under similar stress. Perhaps most obviously, the Copyright Office is charged with keeping records of copyright ownership and transfers, and has accumulated what is clearly the world's premier and authoritative data in this area. But has reality kept up with its promise? The backlog of registrations and filings has left the Copyright Office weeks and often months behind in fulfilling its basic

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<sup>1</sup> General Revision of Copyright Law, Pub. L. No. 94-553, tit. I, § 101, 90 Stat. 2541 (1976) (effective Jan. 1, 1978) (codified as amended at 17 U.S.C. §§ 101-810 (1988 & Supp. V 1993)).

<sup>2</sup> Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. VI, § 603(a), 104 Stat. 5089, 5128-5130 (1990) (effective June 1, 1991) (codified at 17 U.S.C. § 106A (Supp. V 1993)).

<sup>3</sup> See, e.g., Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, tit. II, § 202(2), 102 Stat. 3935, 3949-3957 (1988) (codified at 17 U.S.C. § 119 (1988 & Supp. V 1993)); Audio Home Recording Act of 1992, Pub. L. No. 102-563, § 2, 106 Stat. 4237, 4237-4247 (1992) (codified at 17 U.S.C. §§ 1001-1010 (Supp. V 1993)).

<sup>4</sup> See Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994).

<sup>5</sup> See, e.g., *American Geophysical Union v. Texaco Inc.*, No. 92-9341, 1994 U.S. App. LEXIS 30437 (2d Cir. Oct. 28, 1994) (2-1), *aff'g* 802 F. Supp. 1 (S.D.N.Y. 1992).

function as a usable public record. Is this acceptable in a world of computer technology easily capable of on-line real-time information?<sup>6</sup> Is improvement possible in the light of the continuing budget cuts which have hindered the Copyright Office as much as any other branch of government? Complicating the goal of a more efficient and thus more usable recording system is the demand for reduction or elimination of formalities as a prerequisite for enjoying the benefits of the Copyright Act,<sup>7</sup> thus lessening the need for copyright owners to register their works with the Copyright Office. Finally, and perhaps most basically, it must be asked whether the Copyright Office is adequately serving its most basic functions, and will it be able to do so in the future.<sup>8</sup>

Currently, there are serious political pressures on the Copyright Office. It is no secret that the United States Patent and Trademark Office has long cast covetous eyes on the Copyright Office in the never-ending Washington turf wars. Although this author believes this would be detrimental to copyright, it is an issue that should at the least be brought into the open and debated on its merits.<sup>9</sup> On an external level the Copyright Office has to increasingly represent American copyright interests in the international arena as well as continue its role as an advisor to Congress on the national scene.

As we move from an era of trade between nations to multinational trading blocs, from the Cold War to an uncertain future, it is no surprise that the Copyright Office is subject to the same types of stresses and tensions that effect copyright and even society generally. I submit to the reader that the following papers do an admirable, insightful, and provocative job of illuminating these issues, and, individually and collectively, are well worth the reading.

<sup>6</sup> To take a relatively straight-forward example, consider a bank or other lender financing a motion picture or sound recording on a secured basis. How long should they reasonably be expected to wait before they can determine the priority of their security interest?

<sup>7</sup> Bills have been introduced in Congress that would reduce or eliminate the registration provisions of the Copyright Act. See H.R. 897, 103d Cong., 1st Sess. (1993); S. 373, 103d Cong., 1st Sess. (1993).

<sup>8</sup> The papers submitted by Eric Schwartz and Richard Weisgrau both address different aspects of this issue from different perspectives. Eric Schwartz, *The Role of the Copyright in the Age of Information*, 13 CARDOZO ARTS & ENT. L.J. 69 (1994); Richard Weisgrau, *The Copyright Office: A Proposed Direction*, 13 CARDOZO ARTS & ENT. L.J. 81 (1994).

<sup>9</sup> Professor Pamela Samuelson's exploration of this issue in her paper is a much needed step in the right direction. Pamela Samuelson, *Will the Copyright Office be Obsolete in the Twenty-First Century?*, 13 CARDOZO ARTS & ENT. L.J. 55 (1994).

## THE EXCLUSIVE RIGHT TO READ

JESSICA LITMAN\*

*For what the king fundamentally insisted upon was that his authority should be respected. He tolerated no disobedience. He was an absolute monarch. But, because he was a very good man, he made his orders reasonable.*

— THE LITTLE PRINCE<sup>1</sup>

The hottest of hot topics in the copyright community these days is the information superhighway, officially dubbed the National Information Infrastructure.<sup>2</sup> Copyright specialists are attending conferences, writing articles and speeches, convening advisory councils, holding public hearings, and caucusing over the Internet about how the information superhighway will, indeed must, be paved with copyright asphalt.<sup>3</sup> Some view the coming of the information superhighway as an opportunity to redesign intellectual property policy before stakeholders acquire vested interests;<sup>4</sup> others see an occasion to consolidate the advantages they currently enjoy under the copyright law or to close copyright "loop-holes" that they feel have inadvertently sprung up in their way.<sup>5</sup>

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<sup>1</sup> ANTOINE DE SAINT-EXUPERY, *THE LITTLE PRINCE* 42 (1943).

<sup>2</sup> See Request for Comments on Intellectual Property Issues Involved in the National Information Infrastructure Initiative, 58 Fed. Reg. 53,917 (1993).

<sup>3</sup> See, e.g., UNITED STATES PATENT & TRADEMARK OFFICE, UNITED STATES DEPARTMENT OF COMMERCE, *National Information Infrastructure Task Force Working Group on Intellectual Property, Public Hearing on Intellectual Property Issues Involved in the National Information Infrastructure Initiative* (Nov. 18, 1993) [hereinafter *NII Hearing*]. A transcript of the November 18, 1993 Hearing, along with other relevant documents, is available in a compilation of material related to the work of the Working Group, which is collected on the University of South Dakota gopher server, sunbird.usd.edu., in the Academics Divisions directory, School of Law subdirectory, under the heading NII Working Group on Intellectual Property. URL: gopher://sunbird.usd.edu:70/11/Academic%20Divisions/School%20of%20Law/NII%20Working%20Group%20on%20Intellectual%20Property.

<sup>4</sup> See, e.g., SOFTWARE 2000: A VIEW OF THE FUTURE 2-16 to 2-20 (Brian Randell et al. eds., 1994); David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 LAW & CONTEMP. PROBS. 139 (1992); John P. Barlow, *The Economy of Ideas: A framework for rethinking patents and copyrights in the Digital Age (Everything you know about intellectual property is wrong)*, WIRED, Mar. 1994, at 84.

<sup>5</sup> See, e.g., *NII Hearing*, supra note 3, at 107-21 (testimony of Hilary B. Rosen, Recording Industry Association of America); *id.* at 193-201 (testimony of Ronald J. Palenski, Information Technology Association of America); *id.* at 211-20 (testimony of Thomas M. Lemberg, Business Software Alliance and Alliance to Promote Software Innovation).