

be acting in a manner consistent with the historical purpose of copyright law—facilitating the dissemination of knowledge. Because I believe that this purpose should have as much importance in the future as it has had in the past, I applaud the Office's efforts to redefine its role in a manner that will keep the historical function of copyright law vital. This is one strategy that promises to keep the Office alive in the twenty-first century. I wish it well in its efforts.

## THE ROLE OF THE COPYRIGHT OFFICE IN THE AGE OF INFORMATION

ERIC SCHWARTZ\*

For some, the new world of electronic information is cause for a full-scale review of the fundamental principles of copyright. Fortunately, the assignment of each panel member today was limited to addressing the role of the Copyright Office in this new age of information. As a Copyright Office employee with fifteen years of government service, let me begin by applauding this process of public self-examination. It is healthy for every government agency to periodically review and redefine its mission, to reexamine present and future services, and to reassess its client base.

In fact, the recently completed work of the Copyright Office by the Advisory Committee on Copyright Registration and Deposit was just such an exercise.<sup>1</sup> Because of an obsession with the future of §§ 411(a) and 412 of the copyright code,<sup>2</sup> at the time of its formation ACCORD members may not have realized that this would be their role. Underlying a review of those sections of the code was a broader mission to reexamine the present and future role of the Copyright Office and the Library of Congress.<sup>3</sup> This process was driven by a vision of the future of copyright and the role of librar-

\* At the time of this presentation, Eric Schwartz was a Policy Planning Advisor to the Register of Copyrights, United States Copyright Office. Mr. Schwartz is currently Special Counsel to the law firm of Proskauer Rose Goetz & Mendelsohn in Washington, D.C., and former Acting General Counsel of the United States Copyright Office. Mr. Schwartz previously served as Staff Director to the Advisory Committee on Copyright Registration and Deposit. Edited from spoken remarks.

<sup>1</sup> ROBERT WEDGEWORTH & BARBARA RINGER, ADVISORY COMMITTEE ON COPYRIGHT REGISTRATION AND DEPOSIT, THE LIBRARY OF CONGRESS, REPORT OF THE CO-CHAIRS (Sept. 1993)[hereinafter ACCORD].

<sup>2</sup> 17 U.S.C. §§ 411(a) and 412 (1988) read in pertinent part:

§ 411. Registration and infringement actions

(a) Except for actions for infringement of copyright in Berne Convention works whose country of origin is not the United States, and subject to the provisions of subsection (b), no action shall be instituted until registration of the copyright claim has been made in accordance with this title . . . .

§ 412. Registration as prerequisite to certain remedies for infringement

In any action under this title, other than an action instituted under section 411(b), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for—

(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or

(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

<sup>3</sup> ACCORD, *supra* note 1, at 6.

ies, enunciated by Barbara Ringer and Bob Wedgeworth.<sup>4</sup>

Once underway, the ACCORD process blossomed into a customer survey of the Copyright Office and Library of Congress. ACCORD's representatives were the various users of the Library's collections and Copyright Office services: individual authors, corporate copyright owners, educators, and librarians.<sup>5</sup> During the course of its deliberations, ACCORD examined the resources of, and the services provided by, the Copyright Office.<sup>6</sup> ACCORD's mission included practical and public policy considerations of the current and future role of the Office.

At today's forum, expectations of the Copyright Office's future have been expressed by many, including individual photographers and graphic artists, as well as corporate entertainment conglomerates. The Copyright Office, and therefore the law, must serve them all. For some, the central function of the Copyright Office is copyright registration and its legal and commercial benefits. For others, the Office is relied upon for the information received as a result of registrations and recordations, including both the data and the deposit copies.

In my introductory remarks this morning,<sup>7</sup> I defined some of the problems of the information superhighway; a considerable amount of time and effort will be expended on redefining the rights of reproduction, distribution, and public performance. However, a larger, more practical policy matter looms. In order for the information superhighway to be successful it will be necessary to resolve the problems of licensing and voluntary rights management of copyrighted materials. A system must be developed that will use a combination of technical, legal, and commercial methods to self-police the day-to-day use of copyrighted works by copyright users to the satisfaction of copyright owners.

Most of this will be achieved by the free market, but the government can assist its development. The Copyright Office will be essential because of the unique value of its registration and recordation database—currently the database contains information pertaining to ownership and assignments, but ultimately it can expand to include pricing, licensing, and rights clearances. Already the Copyright Office's post-1977 registration and recordation information is on the Internet, as is the bibliographic information of the Library of Congress. The Library will provide its own unique role

<sup>4</sup> See generally ACCORD, *supra* note 1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 10, 12.

<sup>7</sup> Eric Schwartz, *Introduction*, 13 CARDOZO ARTS & ENT. L.J. 13 (1994).

as an information provider for researchers, scholars, and communities unable to access information. However, this role will have to be developed cautiously, with the consent, or at least the acquiescence, of copyright owners.

ACCORD viewed the Copyright Office's database as its primary asset. It recommended strengthening that database by expanding its information and increasing the speed and accuracy of its entries.<sup>8</sup> Many argued against boosting legal incentives to registration, instead urging more commercial incentives. To present and future users of the copyright registration system, the database will be most valuable for ownership, licensing, and pricing information, especially in a post-Berne, formality-free world.

Currently, the database is limited to registration and recordation information and does not include licensing and pricing information. However, this information would be easy to add at the time of registration, and could subsequently be updated or amended for a minimal fee. By merging this information—registration, pricing, licensing, assignments, and transfers—ACCORD will have created the most valuable tool for the wholesale clearance of rights for works placed on the information superhighway.

The future of copyright registration is the Electronic Copyright Management System (ECMS) being developed by Mr. Robert Kahn and his company, Corporation for National Research Initiatives (CNRI).<sup>9</sup> Mr. Kahn was instrumental in the technological advancements of the Internet and is now working with the Library and the Copyright Office on ECMS, a testbed project with five major research universities. The project seeks to electronically register unpublished journal articles in the field of computer science with the Copyright Office.

Under this system, the copyright author will create a work in a research university. She will e-mail the work, the copyright application, and the twenty dollar fee to the Copyright Office. The application and work will appear on a computer screen in the Examining Division where all three elements will be reviewed for sufficiency. Once accepted, the Copyright Office will electronically deliver a copyright registration certificate back to the author. The work will be stored in an electronic repository and will be accessi-

<sup>8</sup> See ACCORD, *supra* note 1, at 20-21.

<sup>9</sup> Robert Kahn is President of CNRI, a non-profit corporation working with the Library of Congress and Advanced Research Projects Agency (ARPA) on the ECMS. For more information on ECMS, contact Mary Berghaus Levering, Associate Register for National Programs, Copyright Office, at (202) 707-8350 or fax (202) 707-8366.

ble in the same way that other registration deposits are available to the public.

Obviously, rules must be formulated to restrict access and provide assurances of security to authors, especially for works that enter the Library's collections from this copyright deposit system.

Prior to the development of electronic registration, many complained that registration was obsolete. For several reasons, I believe that this electronic system may turn out to be the strongest incentive to register with the Copyright Office. First, if an author can encode a work in electronic form at the moment of fixation, the technical encoding information can identify the work to the byte. Many will want to register simply to prove authorship, in addition to obtaining valuable legal presumptions regarding the validity of the copyright.<sup>10</sup>

Second, the commercial benefits of registration may outweigh the legal benefits. For example, using this database, a foreign author can "advertise" his work on-line, including information on pricing, licensing, and terms and conditions for use, in every country that has access to the Internet. Perhaps, in the future, electronically registered works will include unencrypted samples of a work to advertise it to potential users. More likely the terms and conditions will accompany the work requiring the users to consent before a fee is debited and the work is decrypted. In this way, many will use the registration system as a prospective marketplace for buying and selling works.

I think the current examination process for many works will become less important in the future. We may see the development of a multi-tiered registration system, with different legal and commercial incentives for various types of registrations. Works may continue to be registered, but will they require the same type of examination that is currently being used? For example, is it necessary for printed works to be examined for copyrightability? And, can or should the Copyright Office look beyond the registration application to assure that the work is made for hire, or actually was created by the claimant?

The challenge for the Copyright Office is to create greater efficiency in registration. Efficiency should permit basic information regarding licensing, pricing, and rights clearances, to be immediately scanned into the database, even without a full-scale examination. A higher tier of examination and registration could allow for

<sup>10</sup> Registration within five years constitutes prima facie evidence of the copyright's validity. 17 U.S.C. § 410(c) (1988).

a more thorough process and for more detailed information to be entered into the database. Where the owner wants to assure authorship, copyrightability, or some other fact on the registration certificate, a thorough examination of the work would be made. The rewards to the author could be stronger legal or commercial benefits. For example, a standard of proof higher than prima facie evidence could be applied where a higher standard of examination was incurred. Other legal benefits, such as stronger enforcement remedies, could also be used to reward the author who seeks the higher tier registration. This area should be driven by the principal users of the Copyright Office, not by the Office itself, and would require us to see what the copyright community seeks in terms of greater protection for their works.

Let me now discuss some of the specific ACCORD recommendations and enumerate some of the other roles of the Copyright Office.

ACCORD recommended strengthening copyright registration and mandatory deposit. The aim was to improve the copyright database and expand the collections of the Library. ACCORD proposed ways to induce copyright registration because doing so would simultaneously improve the database and mandatory deposit system which adds to the Library's collections.<sup>11</sup>

These recommendations were made separate from considerations regarding the retention or repeal of sections 411(a) and 412 of the copyright code, although some ACCORD members felt that the strongest incentive to copyright registration is the current section 412. Close to ninety percent of the ACCORD recommendations made to the Librarian and subsequently offered by the Librarian to Congress, were incorporated in the revised Copyright Reform Act passed by the House of Representatives on November 20, 1993.<sup>12</sup>

As part of our national library, the Copyright Office has the responsibility to collect and preserve a comprehensive record of American creativity. While the creation and maintenance of a national library may have been a byproduct of our unforgiving formality-based copyright and mandatory deposit system, we now have the greatest national library in the world, consisting of the largest collection of books and other materials. It is not widely known that the Library of Congress has the largest film collection in the world,

<sup>11</sup> ACCORD, *supra* note 1, at 20-25, 27-31.

<sup>12</sup> H.R. REP. NO. 897, 103d Cong., 1st Sess. (1993) [hereinafter *Copyright Reform Act of 1993*]. For the Senate version of the Act, see S. 373, 103d Cong., 1st Sess. (1993).

including the great works of the major film studios. This is due in part to the laws of copyright and mandatory deposit, as well as to a strong gift collections policy (which added important archival preprint film material to the collection).<sup>13</sup>

The current mandatory deposit requirement applies to all classes of published works,<sup>14</sup> unlike the deposit required by the legal systems of other countries which are generally limited to printed materials. Even though mandatory deposit is a separate legal and policy matter from copyright registration and deposit, ACCORD looked at the relationship of the two systems to meet the dual goals of improving the collections and the copyright database.<sup>15</sup> Mandatory deposit is very labor intensive and it only applies to published works. However, when a copyright registration and deposit is made, the requirements of mandatory deposit are met. Thus, the first goal should be to stimulate voluntary copyright registration for published and unpublished works so that works can be added to the Library collection (especially the unpublished ones which are particularly desirable). In addition, voluntary registration would avoid the cost and administration of mandatory deposit.

Second, ACCORD understood that to be successful, mandatory deposit must be automatic.<sup>16</sup> The Library cannot chase after individual authors and publishers to add works piecemeal to its collections. Instead, a macro-collections policy must focus on the development of large-scale negotiations, with copyright creators and owners of published works automatically depositing. In this way, the Library would collect materials from the major publishing houses and other copyright owners in bulk. ACCORD recommended that the Library make regular and frequent announcements as to what it is and is not interested in obtaining.<sup>17</sup> Through voluntary agreements with copyright owners, the Library could negotiate terms for accepting and receiving materials. This would also spare copyright owners from the burden of depositing materials that the Library would not keep in its collections.

Third, ACCORD made a very simple suggestion which, surprisingly, had not been made before. It suggested creation of an on-line database of the works collected under mandatory deposit.<sup>18</sup>

<sup>13</sup> See 1 REPORT OF THE LIBRARIAN OF CONGRESS, FILM PRESERVATION A STUDY OF THE CURRENT STATE OF AMERICAN FILM PRESERVATION 23-27 (Gordon P.R. 1993).

<sup>14</sup> 17 U.S.C. § 407 (1977).

<sup>15</sup> ACCORD, *supra* note 1, at 6-7.

<sup>16</sup> *Id.* at 20, 28.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 23, 29.

There is already a database for copyright registration, but not for mandatory deposit. As a result, it is difficult for users of the Library to know what is available to them, especially when works have not yet been cataloged or put on the shelves.

Fourth, ACCORD raised the issue of erasing the line between published and publicly disseminated works subject to mandatory deposit.<sup>19</sup> Does it make sense to exclude from mandatory deposit a television program seen by millions of viewers because a "copy" is never disseminated? Under § 407 of the existing copyright law, that work would be considered an unpublished work, beyond the scope of mandatory deposit.<sup>20</sup>

When we start to examine whether or not the Library should collect every work that is publicly disseminated, owners of works in electronic form, or works that are widely but privately disseminated, rightfully become very fearful. They have both privacy and copyright concerns, as well as considerable anxiety about the further dissemination of these works once they are part of the Library's collection. ACCORD recommended that this issue be studied further, with the participation of private sector representatives<sup>21</sup>—the information industry, electronic publishers, academicians, the library community and the like.

In the area of copyright registration ACCORD made several "user-friendly" recommendations. These basic suggestions of ways to improve and simplify the registration system were later adopted in the bill passed by the House of Representatives.<sup>22</sup>

First, ACCORD suggested the creation of a simple short form for registrations.<sup>23</sup> The hope was to make registration simple, in order to induce registrations from natural authors. The most valuable and unique additions to the Library's collections received through copyright registration are not the published materials, but the unpublished manuscripts, poems, screenplays, and dramatic plays of individual authors. To reach this audience, ACCORD recommended simplifying registration, and advertising the benefits of the registration system to these authors.<sup>24</sup>

Second, to encourage authors and publishers of multiple works, improvements in group registration practices were suggested.<sup>25</sup> For works that were unlikely to be incorporated into the

<sup>19</sup> *Id.*

<sup>20</sup> 17 U.S.C. § 407 (1988).

<sup>21</sup> ACCORD, *supra* note 1, at 20 n.13.

<sup>22</sup> Copyright Reform Act of 1993, *supra* note 12.

<sup>23</sup> ACCORD, *supra* note 1, at 20, 30.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

Library's collections, more flexibility was urged with respect to registration without deposit requirements.<sup>26</sup> However, any materials or descriptive matter submitted with a registration in lieu of a deposit copy has to allow users, publishers, and others, to clearly identify the work and the author for the purpose of rights clearances. Some were concerned that in the absence of notice and the inclusion of strong remedies against infringers, registered unpublished works should be clearly identifiable to protect users. This is also true for group registrations where a single work can be "lost" in a collection, and unidentifiable for the purposes of finding or identifying it. The availability of registering large collections of unpublished photographs in a single collection is very helpful to the photographer, but without clear cataloging or other identification tools, it will frustrate subsequent users of the materials. Current group registration identifiers may not be sufficient to help researchers or commercial users locate the particular work they are seeking.

Another recommendation was to include voluntary licensing and pricing information at the time of registration.<sup>27</sup> This would allow a copyright claimant to indicate, for example, the name, address, and phone number of a contact person, which could be used by someone seeking permission to license the registered work. Alternatively, it might involve adding actual pricing information.<sup>28</sup> Perhaps in the future, an entire rights and permissions page will be added to the registration record. The copyright registration system would then be useful once the work is placed on a networked system for public users by the copyright owner. Anyone calling up a work on their computer screen would get both the work, and, in hypertext, the permissions requirements. They would then be required to consent to the terms and conditions listed in the permissions requirements before decryption would permit access to the work.

Third, ACCORD recommended a clarification for the treatment of mistakes or omissions made during copyright registrations.<sup>29</sup> Earlier speakers described how some courts have gotten very aggressive in the application of sanctions against copyright claimants for misrepresentations on applications. Some courts not only struck down copyright registration information, but even questioned the validity of the copyright. Since the copyright regis-

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 21, 30.

<sup>28</sup> *Id.* at 30.

<sup>29</sup> *Id.* at 21, 31.

tration system is voluntary, the goal is to induce registrations, not to drive potential claimants away. Copyright claimants fearing retribution for errors made during registration may prefer not to even attempt to register their works in the first place. ACCORD recommended a straightforward solution. Any good faith error or omission would not affect the validity of the registration and could never invalidate the copyright.<sup>30</sup>

Finally, ACCORD recommended a more formalized appeals process for adverse actions by the Copyright Office, and a clear application of the "rule of doubt."<sup>31</sup> With regard to the rule of doubt, ACCORD recommended that if there is any genuine uncertainty regarding registrability in a particular case, a "reasonableness" standard should be used, and the doubt should be resolved in favor of the copyright applicant.<sup>32</sup> In essence, a voluntary registration system seeking as much copyright data as possible should err on the side of registering, not rejecting claims. Nevertheless, it should strive to maintain the integrity of the registration system and its database.

ACCORD did not make recommendations regarding the tiering of the future registration process; however, I think this is an issue worthy of further consideration by the Office and copyright community. This is not a new idea. For many years Irwin Karp and others have been advocating a two-tiered registration system in various configurations with an emphasis on looking behind the registration application to issues such as ownership and authorship.<sup>33</sup>

Perhaps, as I mentioned earlier, inducements to registration could be scaled to different legal and commercial presumptions and benefits, and if a more thorough examination process were used, better and stronger benefits would accrue. For example, there could be a system in which there would be registrations without any examination. Perhaps rudimentary information could go into the copyright database for works registered without the standard legal presumptions which currently attach to "registered" works.<sup>34</sup> However, the risk of fraudulent or incorrect information may be formidable.

The universe of copyrightable subject matter, even excluding commercially unexploitable materials, is enormous compared with

<sup>30</sup> *Id.* at 31.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 21, 31.

<sup>33</sup> See Irwin Karp, *Reflections on the Copyright Revision Act*, 34 J. COPYRIGHT Soc'y 53 (1986).

<sup>34</sup> 17 U.S.C. § 410(c).

the number of registrations made. There are many ways to increase registrations. The best way for the Office to proceed is to ask the copyright community what they want to see in a future registration system. The Office must survey the community of owners and users to find the changes that will induce registrations. The Office must also encourage the use of the database of registration and other related information.

Finally, a few thoughts on the additional roles played by the current and future Copyright Office. The Office is in a unique position as a facilitator responsible for bringing parties together in the copyright community in the formulation of policy. I am frequently amused when told that the Office is considered to be too much in the pocket of copyright proprietors; just as often I am told that it is too much in the pocket of copyright authors, or librarians, and not proprietors. If all of these statements are partially true, then we are on the right course towards bringing the parties together—individual authors, corporate copyright proprietors, librarians (including our representation of our own national library), educators, and researchers. The ACCORD proceedings fairly represented all of these interests. Unlike other government agencies, the Office does not merely represent commercial interests with domestic or international trade consequences. Neither are we bound to the user community. Given the history of the Office during copyright revisions in the 1960s and 1970s, and our accumulated experience, we can remain important formulators of domestic and international copyright policy.

The Office's expertise in registration and examination greatly assists judicial determinations about authorship, ownership, and copyrightability. I am surprised we got through all of our panelists today without anyone even mentioning the role of the Office as a "gatekeeper" in the examination process. There is no question that there has been some hostility towards the Office for coming down too hard on some applicants. The Office has unparalleled experience, however, in determining questions of copyrightability which may assist the courts, even when they conduct their own *de novo* review of the same issues. The Office's expert opinion, whether it turns out ultimately to be correct, is a useful starting point for judges and juries.

Some of the other panelists have spoken with more than a note of pessimism about the future of the Copyright Office. I would like to end on a positive note. The Office has played a significant role in the development of copyright to this point. It will continue to do so if it sticks to the four basic roles I enumerated:

(1) improving the registration, recordation, and rights clearance database; (2) maintaining and developing the collections of our national library; (3) facilitating the copyright community's formulation of domestic and international copyright policy and (4) assisting courts and litigants in judicial determinations regarding ownership, copyrightability and related matters. If it does so, the Copyright Office will continue to play an essential role in the new age of information.