

THE COPYRIGHT OFFICE: A PROPOSED DIRECTION

RICHARD WEISGRAU*

As an individual author, I subscribe to the fact that all original expression arises from individual intellect. It may be jointly, collaboratively, or collectively produced, but it is individual intellect nonetheless. So when I want to speak about the role of the Copyright Office, I have to speak from that perspective.

Article I, Section 8 of the Constitution sets up the delicate balance that has been maintained for the last 200 years. It has been quite successful, as we have one of the greatest copyright systems in the world. However, if the system is to continue to achieve that balance for the next 200 years, it is going to need a little help.

Under the current copyright system, based on property rights theories, the government could basically stand back and let the interests within the system dynamically adjust the forces to maintain the balance. Within that system, authors tugged, publishers pulled, and the public consumed.

I would agree with the previous speakers, who said that lawyers write laws based upon the compromises which they negotiate in their clients' best interests.

It used to be that what the public received as information from the system was decided by publishers and broadcasters. In the case of broadcasters, they not only decided what people would receive, but *when* they could receive it. Technology has changed that. In the case of broadcasters, technology brought us the VCR and timeshifting; the Supreme Court has said that this technology is legal, and you may timeshift.¹ Consequently, you no longer have to view information when the broadcaster wants you to—you can view it when *you* want to view it. VCR technology, then, empowered people by eliminating one element of control which the broad-

* Executive Director of The American Society of Media Photographers, Inc. ("ASMP") since 1988. Mr. Weisgrau has represented ASMP in the Senate copyright hearings on moral rights and works for hire, as well as in the 1993 House and Senate hearings on the Copyright Reform Act. In addition, he has represented ASMP in discussions, aimed at and accomplishing changes in regulations, with the Copyright Office and the U.S. Park Service. Mr. Weisgrau co-authored ASMP's *COPYRIGHT GUIDE FOR PHOTOGRAPHERS*, and has authored ASMP's *COPYRIGHT REGISTRATION GUIDE*, as well as its *ASSIGNMENT PHOTOGRAPHY* and *NEGOTIATING* monographs. In his role as Executive Director of ASMP, he developed the strategy and start up plans for ASMP's recently created Media Photographer's Copyright Agency, a copyright licensing agency representing ASMP members.

¹ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

caster traditionally had. Digital technology is today's greatest empowerment tool.

We sit on the cusp of a technological evolution—not a revolution—of the greatest dimension. All of the major scientific advances made in the first fifty years of the twentieth century dwarfed those advances made in all previous recorded history. The advances of the next ten years will probably dwarf those of the first fifty. For example, tomorrow I have to leave for Seattle. I will have to keep in touch with our thirty-six chapter offices, my twenty directors, our national office in Princeton, and various organizations that we are working with along the Pacific Rim and in Europe. In my pocket is everything I need to do that. I can access the Internet and receive faxes, communicate over networks, and download Compuserve.

I could take a small memory card and download an entire book on it, then place it right in this Personal Information Manager and either read it at my convenience or transmit it to someone else. I can run my portable computer from this device over a phone line.

Bill Gates wants each of us to have one of these in our pockets by the year 2005.

This is power. This is the power to do whatever I want, to communicate with whomever I want at will around the world—to extract information from phenomenal digital libraries and to pass that information on to other people.

Point one about the role of the Copyright Office: If I have this power, some day everyone will have this power. How do we keep them from falling into the old trap of power corrupting? The answer, I believe, is a responsive and involved Copyright Office.

Education. I certainly subscribe to Eric Schwartz's notion that you cannot educate elementary or junior high school students about the complexities of Title 17.² Still, if we can teach students in school that it is not permissible to steal tangible property, we should be able to convey the concept that it is not right to steal intellectual property. Regardless of the difficulty of doing that, I think it is important that it be taught.

The Copyright Office has a wonderful publication program, but publication is information, not education. Education requires touching the people to whom you are providing this information, with the hope that they will understand it and act upon it.

² Eric Schwartz, *The Role of the Copyright Office in the Age of Information*, 13 CARDOZO ARTS & ENT. L.J. 69 (1994).

The copyright officer should conduct a study of the effects on students' perceptions of copying, in light of fair use activity in the classroom.

Every day millions of students sit down in classrooms and are handed materials that have been freely copied—but they are not told that this is an exception to the rule.³ As I see it, this is a reinforcement of behavioral patterns that may emerge later on. It says: "Copying is okay, it's done in school all the time."

I support fair use, but think it has its place. If you are going to give special license to people, then you should give special education to the people that exercise that special license. The Copyright Office is the only organization that can do that under the present structure. Certainly, trade associations like the ASMP cannot do it. It would require too massive a program to bring that into the schools across this country.

Earlier I heard the speaker on the multimedia panel speak about getting access to content, and the problems of transactional costs.⁴ Three years ago, my organization, which represents perhaps the 5,000 most accomplished publication photographers in the world, became totally aware of the problems that multimedia producers and developers were having in acquiring content. We decided that something had to be done to allow easy access to photographic works for electronic and other forms of publication, including software. We looked to other industries; it did not take us long to find the music industry, and the collective licensing that was done in the print industry through the Copyright Clearance Center ("CCC"). We went to the Copyright Office, and had a very, very official meeting. We explained what we wanted to do, and asked for help and certain information, which I might say we were promised.

That was three years ago. I have not gotten the information, but the licensing agency is currently negotiating its first deals with major software publishers. The first deal that it is doing involves acquiring hundreds of images for forty different products in one transaction worth \$150,000. This will all be covered under one contract and be taken care of with one check, with the negotiations creating a protocol for all future transactions with that particular publisher.

We learned about this because of the good efforts of ASCAP, BMI, the Harry Fox Agency, and the CCC. As members of the

³ 17 U.S.C. § 107 (1988).

⁴ See Jon Baumgarten, —, 13 CARDOZO ARTS & ENT. L.J. (forthcoming 1995).

copyright community, they shared their knowledge with us, and helped us to establish our agency. I am sorry to say that we did not get any cooperation from the government—even though the government's own studies say that collecting societies and industry licensing schemes of this nature are probably necessary in an age of new technologies.

Enforcement. We do not expect the Copyright Office to enforce copyrights. Certainly, they cannot do that. But we do need the tools with which we can enforce our copyrights.

Two years ago, I asked the Copyright Office for information on international trends in enforcement of copyright laws. Photographers are increasingly engaging in projects in foreign countries, and many will not sign with foreign publishers unless there is vigorous enforcement of the copyright laws in their country. The Copyright Office said it did not have such information. Well, we cannot argue about that—you cannot give what you do not have. They did say that they would seek, through the State Department, to conduct a survey to find out what we wanted to know.

It is now two years later. In the interim, we set up a series of meetings with the Pacific Rim photographers' associations in October 1993, and in July 1994 with the European photographers' associations. The theme of these meetings is that we will inform one another, create our own database of information about enforcement in various countries, and then share this information, hopefully with the rest of the author community, and I promise I will send it to the Copyright Office.

If it sounds like I am picking on the Copyright Office, I am.

Let's move on to copyright registration. This is my favorite story.

We asked the Copyright Office for relief under the registration regulations. As an ex-magazine photographer, I can assure you that you can create two or three hundred copyrightable works in a couple of hours. You will have no idea which of these will be published; you send them to a client, and there's no way to tell, in advance, what they will select.

In any event, we asked for relief. Bulk registration of unpublished works is difficult, because assignment deadlines do not allow photographers to keep their work on hand long enough to copy it, not to mention the cost of such copying.

We suggested a number of possibilities, within the regulations. One of them was to take twenty photographic transparencies, put them into a page that holds twenty slides neatly, and then photo-

graph that page on one thirty-five-millimeter transparency, thus recording twenty photographs in one, 1.5" × 1" space.

We were thrilled with that idea. It was accomplishable with the equipment we all had, and would be simple to do. Photographers could do it with no expenditure for equipment.

We could not do it. They told us that it was against regulations; it was cumbersome, and it would be difficult. When I asked why, I was told that examiners did not have the equipment to look at a small thirty-five-millimeter transparency. Then they proceeded to bring in the viewing device which they used to look at thirty-five-millimeter transparencies. I had one when I was a high school student. I bought it in Woolworths for \$2.98. You push the slide in, the batteries make the light go on, and you look through the little magnifier.

I said to the staff of the Copyright Office that I would be happy to buy a device that would allow them to examine such a deposit without difficulty, and make it a gift to the government. I would pay for it personally. I was told that this was not going to work, because, you see, these transparencies would be a handling problem.

We left that meeting after having reached certain other agreements, which would at least help photographers to register their works in bulk. Our next stop was Capitol Hill, where we proceeded to lodge our complaint with the appropriate congressional representatives. That ultimately helped lead to the Copyright Reform Act of 1993.⁵ If the people who had been at that table had been a little bit more responsive, we might have never turned in the direction we did when we walked out the door. But that is all water over the dam.

In the future, intellectual property transactions will take place with the speed of light—millions of transactions in a day. Last week, I spent time negotiating how much to charge when an individual downloads an image into their home on a cable-network television set for twenty seconds. Do you charge them more or less than the person that downloads that famous image into their homes for a minute? And if you charge more or less, how much?

If cable providers are actually talking about these problems, then we are talking about millions of pieces of copyrightable information being shown and used in the system. The question is, how will this multitude of transactions be tracked? How will we know

⁵ H.R. 897, 103d Cong., 1st Sess. (1993).

who bought it, who downloaded it, who transferred it? As far as I can tell, no one is working on the systems that will track that.

This problem needs to be studied carefully, but it is beyond the scope of self-interested players to do an adequate and fair study of tracking mechanisms and systems. Some people tell me this kind of tracking is impossible and it is not worth studying. That is nonsense—the banking industry tracks billions of transactions every night that were made in the preceding day. Billions of transactions, and generally they do not lose one. If they can do that in the banking industry, we should be able to do something like that in a digital copyright industry.

I said earlier that technology empowers people. Technology empowers authors. Authors can micropublish. Virtual creative communities are being established, where information is built layer upon layer by different people. Eventually they will routinely be able to create information, publish it, and disseminate it simultaneously.

This will create some upheaval in the traditional balance of power within the copyright industries. It will no longer be the fact that if you control the high-speed presses and the distribution systems, that you have control of the system. At the same time, we will need new arrangements between the author, the publisher, and the distributor in the system. From these new arrangements will come the inevitable disputes which will have to be resolved.

What we need in this emerging industry is a facilitator to help resolve disputes—not a judge, a facilitator. I cannot think of a better party to play that role than the Copyright Office.

The last point I would like to make is that the Copyright Office should be separated from the Library of Congress. I do support the Library of Congress; in meetings with them I have said that my organization will do anything within its power to help them acquire whatever works they need. However, I do not think that the Copyright Office should be part of that effort.

In the networked environment of the future, acquisition of works will almost be instantaneous. All the Library will have to do is plug the appropriate wires into the computers in the Copyright Office to access Copyright Office holdings. Let the Library of Congress create its own acquisitions department and go out and acquire works. It has such a department now, and it goes out and acquires works—they do not need the Copyright Office to do it.

Rather than stamp registration forms and file them in cabinets, I would hope to see the Copyright Office collect information, make it available to the copyright community, and assist in devel-

oping copyright industries in the same spirit that Article I, Section 8 was written. The Office would do all of this in the public interest.

Finally, I offer this mission statement to the Copyright Office: Further the public interest in keeping with the harmonious balance established by Article I, Section 8 of the U.S. Constitution. The Office can further this interest in several ways. It can actively participate in industry affairs by researching and evaluating issues. It can facilitate the resolution of conflicts within the system. It can educate the public and support copyright owners and authors. It can respond to the needs of various interests within the system—the public, the individual author and the corporation.