

COPYRIGHT, ACT IV: A Discussion of What's Been and the Next Paradigm Shift

Intellectual Property Committee, Florida Bar Business Law Section Retreat

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The Big US Copyright Act Milestones:

- 1790: The First US Copyright Act, The Copyright Act of 1790
1909: First Major Revision of the U.S. Copyright Act, The 1909 Copyright Act
1976: Second Major Revision of the U.S. Copyright Act, The 1976 Copyright Act, effective January 1, 1978

Congressional Hearings related to the Registrar's Call for the Next Great Copyright Act (<http://copyright.gov/laws/hearings>):

7/24/14	Copyright Remedies	11/19/13	The Rise of Innovative Business Models: Content Delivery Methods in the Digital Age
7/15/14	Moral Rights, Termination Rights, Resale Royalty, and Copyright Term	9/18/13	The Role of Voluntary Agreements in the U.S. Intellectual Property System
6/25/14	Music Licensing Under Title 17 Part Two	8/1/13	Innovation in America: The Role of Technology
6/10/14	Music Licensing Under Title 17 Part One	7/25/13	Innovation in America: The Role of Copyrights
6/2/14	First Sale Under Title 17	5/16/13	A Case Study for Consensus Building: The Copyright Principles Project
5/8/14	Compulsory Video Licenses of Title 17	3/20/13	The Register's Call for Updates to U.S. Copyright Law
4/2/14	Preservation and Reuse of Copyrighted Works		
3/13/14	Section 512 of Title 17		
1/28/14	The Scope of Fair Use		
1/14/14	The Scope of Copyright Protection		

Some fun guidance from the just-released 1222-page Copyright Compendium III draft

(<http://copyright.gov/comp3>)

The U.S. Copyright Office will register an original work of authorship, provided that the work was created by a human being. The copyright law only protects "the fruits of intellectual labor" that "are founded in the creative powers of the mind." Trade-Mark Cases, 100 U.S. 82, 94 (1879). Because copyright law is limited to "original intellectual conceptions of the author," the Office will refuse to register a claim if it determines that a human being did not create the work. *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 58 (1884). The Office will not register works produced by nature, animals, or plants. Likewise, the Office cannot register a work purportedly created by divine or supernatural beings, although the Office may register a work where the application or the deposit copy(ies) state that the work was inspired by a divine spirit.

- A photograph taken by a monkey.
- A mural painted by an elephant.
- A claim based on the appearance of actual animal skin.
- A claim based on driftwood that has been shaped and smoothed by the ocean.
- A claim based on cut marks, defects, and other qualities found in natural stone.
- An application for a song naming the Holy Spirit as the author of the work.

Cases Most Likely to Inspire Legislation (all related to the right of public performance):

American Broadcasting Cos. Inc., et al v Aereo Inc, No. 13-461 (June 25, 2014) re internet streaming of live programs on local television by rebroadcast to the consumer's selected device.

Petition of Pandora Media Inc., No. 12 Civ. 8035 (DLC) (S.D.N.Y. 2013) and *Broadcast Music, Inc. v Pandora Media, Inc., No 13 C 4037 (LLS) (S.D.N.Y. 2013)* re organizations collecting for the terrestrial and digital public performance of compositions.

PENDING LEGISLATION

Songwriter Equity Act of 2014

Senate Bill 2321/HB 2321 - Senate Bill introduced, read twice, and referred to the Committee on the Judiciary on 05/12/2014; House Bill introduced, read twice, and referred to the Subcommittee on Courts, Intellectual Property, and the Internet on 03/20/2014.

Amends federal copyright law regarding the exclusive rights of sound recording copyright owners to remove a provision that prohibits license fees payable for the public performance of sound recordings, by means of a digital audio transmission, from being taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works.

Requires Copyright Royalty Judges (CRJs), when setting royalty rates under the compulsory license available for the reproduction and distribution of musical works (commonly referred to as a "mechanical license"), to establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and seller.

Requires CRJs, in establishing such rates and terms, to base their decision on marketplace, economic, and use information presented by the participants. Allows consideration of comparable uses and circumstances under voluntary license agreements.

Respecting Senior Performers as Essential Cultural Treasures Act or the RESPECT Act

House Bill 4772 - Introduced 05/29/2014, Referred to the Subcommittee on Courts, Intellectual Property, and the Internet 07/21/2014

Requires digital music services (certain services providing digital transmissions of music by Internet radio, cable, or satellite) that transmit sound recordings under the statutory license provided under federal copyright law to pay royalties for sound recordings fixed before February 15, 1972, in the same manner as they pay royalties for sound recordings protected by federal copyright that are fixed after such date. (Currently, sound recordings fixed before February 15, 1972, are governed by state laws and are not subject to federal copyright laws that require music services to pay a performance royalty for transmitting such recordings.)

Provides a remedy under which performance royalties for the transmission of such recordings may be recovered in a civil action in federal court if a digital music service fails to make such payments.

Prohibits an infringement action against a transmitting entity from being brought under a state law if the appropriate royalty is paid under this Act.

Declares that this Act does not confer federal copyright protection upon such recordings fixed before February 15, 1972 (sound recordings fixed before February 15, 1972, remain under applicable state laws notwithstanding the payment of royalties under federal statutory licensing requirements). Terminates this Act on February 15, 2067.

Free Market Royalty Act

House Bill 3219 - Introduced 09/30/2013, Referred to the Subcommittee on Courts, Intellectual Property, and the Internet 10/15/2013.

Amends federal copyright law to provide a public performance right for all audio transmissions of sound recordings, thereby extending such right to require terrestrial AM/FM broadcast radio stations to pay royalties for non-digital audio transmissions. (Currently, a performance right for sound recordings is provided only with respect to digital transmissions by cable, satellite, and Internet radio stations.)

Eliminates statutory licensing royalty rates set by Copyright Royalty Judges (CRJs) for the public performance of sound recordings by noninteractive digital audio services.

Allows any noninteractive services performing sound recordings publicly by means of an audio transmission (including cable, satellite, Internet, and AM/FM broadcasters) to collectively negotiate royalty rates for such performances.

Designates SoundExchange, Inc. (an independent, nonprofit organization that collects and distributes royalties), or any successor entity, as the sole common agent to negotiate, agree to, pay, and receive royalty payments.

Authorizes copyright owners of sound recordings, if a license is agreed to by the common agent, to subsequently negotiate and agree to royalty rates and license terms and conditions with any noninteractive services for the performance of such sound recordings (thus allows copyright owners to opt-out of rates or conditions negotiated by the common agent and to instead negotiate direct licenses for their recordings).

Sets forth the royalty payment distributions to be made by the common agent to copyright owners, featured recording artists, and non-featured musicians and vocalists.

Establishes procedures for CRJs to set rates and terms for nonsubscription broadcasts consisting solely of noncommercial educational and cultural radio programs when such rates and terms are not negotiated and agreed upon collectively between the common agent and the noncommercial educational broadcast station.

Modifies ephemeral recording requirements (licenses to reproduce phonorecords to facilitate transmissions) to account for the removal of statutory licensing procedures.

American Royalties Too Act of 2014

Senate Bill 2045 / House Bill 4103 - Each introduced 02/26/2014. In the Senate, read twice and referred the same day to the Committee on the Judiciary. In the House, referred to the Subcommittee on Courts, Intellectual Property, and the Internet on 03/20/2014.

Expands copyright owners' exclusive rights, in the case of a work of visual art, to include the right to collect or authorize the collection of a royalty if the work is sold by a person other than the author for at least \$5,000 in an auction.

Defines "auction" as a public sale of visual art to the highest bidder run by an entity that sold at least \$1 million of works of visual art during the previous year.

Revises the term "work of visual art" to make requirements for photographs consistent with requirements for paintings, drawings, and prints. (Currently, a photograph must be a still photographic image produced for exhibition purposes only.)

Limits the amount of such a royalty to the lesser of: (1) 5% of the purchase price; or (2) \$35,000, subject to cost-of-living adjustments.

Directs entities conducting such auctions to collect and pay the royalties to a visual artists' copyright collecting society. Requires the collecting society, at least four times each year, to distribute the appropriate royalties (minus administrative expenses) to authors or successor copyright owners.

Requires an author of a work of visual art, in order to be eligible to receive such a royalty, to: (1) be a citizen of, or domiciled in, the United States or a country that provides resale royalty rights; or (2) have first created the work in the United States or a country that provides such royalty rights.

Establishes a copyright infringement offense for the failure to pay such a royalty. Subjects infringers to: (1) statutory damages, and (2) liability for the full royalty. Prohibits the sale, assignment, or waiver of the right to collect such a royalty, subject to exceptions for works made for hire and transfers of copyright ownership.

Directs the Register of Copyrights to issue regulations governing visual artists' copyright collecting societies.

Wireless Device Unlocking Legislation

Unlocking Consumer Choice and Wireless Competition Act - Senate Bill 517, Became Law 08/01/2014

Repeals a Library of Congress (LOC) rulemaking determination, made upon the recommendation of the Register of Copyrights, regarding the circumvention of technological measures controlling access to copyrighted software on wireless telephone handsets (mobile telephones) for the purpose of connecting to different wireless telecommunications networks (a practice commonly referred to as "unlocking" such devices). Reestablishes, as an exemption to provisions of the Digital Millennium Copyright Act (DMCA) prohibiting such circumvention, a previous LOC rule permitting the use of computer programs, in the form of firmware or software, that enable used wireless telephone handsets to connect to a wireless telecommunications network, when circumvention is initiated by the owner of the copy of such computer program solely to connect to such a network and access to the network is authorized by the network operator, thus permitting unlocked phones.

Directs the Librarian of Congress, upon the recommendation of the Register, to determine whether to extend such exemption to include any other category of wireless devices in addition to wireless telephone handsets (e.g., tablets and other mobile broadband-enabled devices).

Allows such circumvention (unlocking) to be initiated by the owner of such a device, by another person at the direction of the owner, or by a provider of a commercial mobile radio service or a commercial mobile data service at the direction of such owner or other person, solely in order to enable such owner or a family member of such owner to connect to a wireless telecommunications network, when such connection is authorized by the operator of such network.

Prohibits this Act from being construed to alter any party's rights under existing law.

See Related Acts addressing the unlocking of devices:

Wireless Device Independence Act of 2013 - Senate Bill 467 - Introduced, read twice, and referred to the Committee on the Judiciary on 03/05/2013.

Wireless Consumer Choice Act - Senate Bill 481 - Introduced, read twice, and referred to the Committee on Commerce, Science, and Transportation on 03/06/2013

The Unlocking Technology Act of 2013 - House Bill 1892 - Introduced 05/08/2013, referred to the Subcommittee on Courts, Intellectual Property, and the Internet 06/14/2013.

FCC-Based Proposed Legislation
(addressing only copyright-related provisions)

STELA Reauthorization Act of 2014 - House Bill 4572 - passed by the House 07/22/2014

Related bills, each titled Satellite Television Access Reauthorization Act of 2014: House Bill 5036, Placed on the Union Calendar, Calendar No. 410 on 07/22/2014 and Senate Bill 2454, Placed on Senate Legislative Calendar under General Orders. Calendar No. 445 on 06/26/2014.

Each amend federal copyright law, as amended by the Satellite Television Extension and Localism Act of 2010 (STELA), to extend until December 31, 2019, the statutory license under which satellite carriers retransmit distant television broadcast stations to viewers who are unable to receive signals for such stations in their local market. (Currently, the statutory licensing authority for such satellite retransmissions is scheduled to expire on December 31, 2014.)

Summary includes copyright-related proposed sec. 106 of HB 4572:

(Sec. 106) Requires a Comptroller General (GAO) report concerning changes to carriage requirements currently imposed on MVPDs that would be required, or beneficial to consumers, if Congress implemented a phase-out of statutory compulsory licensing procedures (a licensing and royalty distribution system administered by the U.S. Copyright Office under which cable and satellite operators may retransmit programming, without negotiating with every copyright holder, by paying licensing royalties at statutorily-defined rates determined by Copyright Royalty Judges or by using a royalty-free license for the retransmission of local broadcasts) under federal copyright law.

Next Generation Television Marketplace Act

House Bill 3720 - Introduced 12/12/2013; Referred to the Subcommittee on Courts, Intellectual Property, and the Internet 01/27/2014. Required to take effect on January 1, 2018.

Summary includes copyright-related provisions:

Repeals federal copyright laws requiring statutory licenses for certain secondary transmissions of distant and local television programming by satellite carriers. Eliminates certain categories of remedies relating to alteration of programming violations by cable systems.

Extends exemptions from copyright infringement laws to certain secondary transmissions by cable systems and satellite carriers. Repeals provisions concerning cable system: (1) nonsimultaneous transmission infringement, and (2) statutory licenses for secondary transmissions.

Television Consumer Freedom Act of 2013

Senate Bill 912 - Introduced, read twice, and referred to the Committee on Commerce, Science, and Transportation on 05/09/2013.

Summary includes copyright-related provision:

Conditions the availability of the statutory copyright license to an MVPD on the MVPD offering local commercial television stations, and any other channels of video programming under common control with such stations, for purchase by subscribers on an a la carte basis.

Bullet Points from *The Next Great Copyright Act* by Copyright Registrar Maria A Pallante
published in the Columbia Journal of Law and the Arts 36:3 (2013)

The internet and digital technology have revolutionized how copyrighted works are created and disseminated, and while patchwork and significant changes have gone a long way, the Act is poised for a revision from a broad view.

I. PAVING THE WAY

A. *The Copyright Office* has created studies in the areas of:

digital first sale (2001)	mass digitization (2011)
orphan works (2006)	pre-1972 sound recording federal protection (2011)
statutory licensing for cable/satellites (2011)	resale royalties for visual artists (pending)
termination provisions (2010)	enforcement have small claims (pending)

B. *Congress* has long debated 115 compulsory mechanical license reform and sound recording public performance and has introduced bills related to:

copyright protection for fashion	nominal 50 year registration fee
fair use exemptions to 1201 anti-circumvention	new standards for copyright royalty judges
church exemptions for showing football games	

C. *Courts* have interpreted inducement as secondary liability, 512 DMCA knowledge standards, and public performance of cable and deferred on

orphan works	Kirtsaeng first sale
statutory damages	digital first sale
public performance of streaming	retransmission
Berne compliance exceptions	

Readability is more essential than ever as more people than ever are affected by the Act. Content dissemination is pervasive as is consumption and use.

II. REVISIONS TO BE PONDERED

Congress' key consideration: What does and does not belong in a copyright owner's control? It must consider exceptions and limitations, enforcement tools, licensing schemes, and the registration system. Today's major issues are:

1. *Exclusive rights* (eg sound recording public performance rights; "making available" as distribution")
2. *Incidental copies* (eg 112 ephemeral copies for broadcast transmission, 117 computer copies for use of a program, DMCA 512 storage in course of transitory communication/caching, and 117 computer copies during repair). "Not all reproductions are equal in the digital age," so Congress must consider "how long a reproduction must endure to be fixed."
3. *Enforcement* (including participants of payment processors, advertising networks, search engines, ISPs, and copyright owners and via legislation and complementary voluntary initiatives). Prosecutors can pursue illegal copies and distributions as felonies but illegal streaming only as misdemeanors. Congress should consider creating a streamlined small copyright claims process and eliminating timely registration as a prerequisite to statutory damages or drastically improve the public record.
4. *The DMCA* (are hosts and owners fairly sharing takedown burdens?) Triennial rulemaking allows for non-infringing exemptions; the process engages technology, emerging markets, IP protections, fair use, and other noninfringing activities.

5. *Digital First Sale* (in the digital marketplace, should the owner control all copies?. And what of the import/export of physical copies?)

6. *Exemptions and Limitations* (libraries and archives/orphan works, accommodations for those with print disabilities, higher education institutions and markets, and clarity in personal use). Berne members must ensure exemptions do not unreasonably prejudice legitimate copyright owner interests and do not conflict with normal exploitation of the work. Review for exemptions in higher education serves the copyright objectives of markets that produce quality educational materials, affordable licensing schemes, open source materials, the reasonable application of fair use, library exceptions, academic freedom (including the right to disclaim copyright) and disability-friendly formats.

7. *Licensing* (Congress should encourage newer, more efficient licensing schemes by reviewing growth of direct licensing, microlicensing, voluntary collective licensing, private and public registries, and legislative regimes). Music reform is particularly important, especially 115 mechanical licenses and 114 sound recording public performance. A 2006 proposal for a blanket system for digital mechanicals failed. What of one-step licensing for reproduction and performance? What of webcasting rates? Congress could greatly help the gridlocks in this arena.

8. <i>Deposits for the Library of Congress</i> (407 deposits and 408 registrations deposits). Registration is:	
evidence of copyrightability	guidance to the court
evidence of statutory damages	required for many IP business transactions
a catalyst for public record	often required to settle litigation

Mandatory Deposit can use tweaks because

- the definition of "publish" and "best edition" leaves out some digital copies
- the required formats may not be those used by copyright owners
- it may need greater security for files and for making them available

III. **BOLDER CONSIDERATIONS**

1. How do we offset the effects of the long copyright term, which is now typical internationally? (eg provisions for orphan works, 108(h) archive material, and fair use). Should there be a requirement to register for the last 20 years?
2. Should we create room for licensing schemes opt-outs (eg in the areas of greater education and library access and for collective licensing that binds participants)?
3. We must make the law more accessible - it's like the tax code and harmful to the rule of law.

IV. **POLICY / THE COPYRIGHT OFFICE**

There are now many more stakeholders and the force of the internet. It can be hard to separate the medium from the message, and there is the "free" approach of copylefters. We need formal & informal; paid & free; and information, commentary, & entertainment.

Players should include corporations, consumer groups, advocacy groups, and the government. Particularly the copyright office has long history and expertise, a direct advisory relationship with Congress, administers copyrights, and daily interacts with other agencies.

Along with doing what it does better, with appropriate technology and resources, the Office could improve; administer enforcement proceedings; offer ADR to resolve legal facts and issues; issue advisory opinions; engage in educational activities; and ensure transparency of actors via registries and collective organizations.