



Copyright's stars and stripes

Seward & Kissel's **Jeffrey M Dine** reviews the ongoing US copyright reform and questions if an overhaul is on the way

On World Intellectual Property Day, 24 April 2013, Congressman Bob Goodlatte, chairman of the Judiciary Committee of the US House of Representatives, announced that his committee would undertake a "comprehensive review of US copyright law over the coming months".¹ The congressman's announcement may mark the beginning of an active effort to reform US copyright law and its Copyright Act of 1976 (the "Copyright Act"); a process that will undoubtedly be long, contentious and unpredictable.

Obsolescence of the Copyright Act

The Copyright Act was itself the product of a more than 20-year reform effort.² Major changes from the prior law, originally enacted in 1909, included extending the copyright term from two fixed-length terms to the "life plus 50 years" term minimum, mandated by the Berne Convention and relaxing copyright formalities, among many others.³

The world has transformed since 1976. Vinyl records were still the dominant medium for the sale of pre-recorded music. In 1975, HBO became the first cable channel to distribute its programming to cable system operators by satellite. Steve Wozniak designed the Apple I computer in 1976. Wide area computer networking, though rapidly developing in the form of the Advanced Research Projects Agency Network (ARPANET), was still in its infancy.

Since the passage of the Copyright Act, multiple generations of technology have blossomed, matured, become obsolete and

been replaced. Copyrighted works originate digitally or can be put in a digital form for minimal cost, and infringing copies can be distributed globally over the internet, with minimal loss of integrity, instantaneously *ad infinitum*. We are now awash in a sea of content, flooding copyright industries and copyright law.⁴ Moreover, the ease of copying has led some consumers not just to disregard copyright but to question its continued validity.

Patchwork amendments to the Copyright Act

Even at the time of its passage, there were concerns that the Copyright Act did not fully address the issues of its day. The register of copyrights at that time, Barbara Ringer, notably called it "a good 1950 copyright law".⁵ She predicted that the law would need to be significantly restructured before the end of the 20th Century.

The Copyright Act has been amended repeatedly since its passage to address technological change. Substantive amendments from the late 1990s included copyright term extension. The Digital Millennium Copyright Act ("DMCA"), enacted in 1998, forbade circumvention of digital measures of protection and set limitations of liability for online service providers. Other amendments have addressed criminal liability for digital piracy, and there have been a number of more technical amendments as well.⁶

Proponents of copyright reform argue that the patchwork of amendments to the Copyright Act to address various elements of technological change has left the Copyright Act without clear "normative principles that

ought to illuminate how copyright law should be applied in particular instances".⁷ The result is court decisions that are inconsistent and based on distinctions and assessments that may not be meaningful. That lack of direction is exemplified by the recent conflicting decisions involving the similar Aereo and Aereokiller internet television services. Both services offer subscribers live and recorded internet access to broadcast television shows through a Byzantine system of individual miniature antennas and processors. The systems are designed solely for the purpose of fitting within earlier court decisions, delineating other circumstances where the provision of broadcast television programmes does not infringe the copyright holders' public performance right. The Second Circuit Court of Appeals found the Aereo system non-infringing.⁸ A federal court in California, examining the Aereokiller service, found that service likely to be infringing.⁹ The tortured metaphysics of these decisions is more reminiscent of the legal fictions of *Gilbert & Sullivan* than a modern law for digital times.

Movement toward reform

Facing these challenges, the movement toward copyright reform has been slowly coalescing since at least the early 2000s, as the US Copyright Office has undertaken (and continues to undertake) studies of various aspects of the copyright law.

In 2007, professor Pamela Samuelson of Berkeley Law School convened a group of 20 law professors and lawyers from private practice and industry as The Copyright Principles Project. In 2010, the group published its *'Directions for Reform'*, a 68 page study setting out 25 separate general

recommendations. The group was unable to reach consensus beyond generalities in many areas.

Starting in 2010, the interest group Public Knowledge began issuing a series of reports as part of its "Copyright Reform Act" project, which proposed legislative changes in a number of areas, such as fair use, streaming licensing and circumvention.¹⁰ In November 2012, the Republican Study Committee (which researches policy issues for a group of republican congressmen) issued a policy brief, which it immediately retracted as prematurely released, that critiqued foundational assumptions of current copyright law. The paper suggested a number of radical copyright reforms, including drastic revision of copyright term length provisions. Of course, the withdrawn report remains available on the internet.¹¹

Hot-button copyright reform issues are also drawing the attention of the general public. For example, over 114,000 people signed a petition at the White House website protesting the determination of the Librarian of Congress that "unlocking" cell phones, starting this year, violates the DMCA.¹² Petitions protesting proposed anti-online piracy legislation similarly garnered over 100,000 signatures and a White House response.¹³

The register of copyrights' vision

Maria Pallante, the present register of copyrights, gave the active push toward reform this spring in a speech on 4 March, 2013. In her talk, 'The next great Copyright Act', she explained why it is time for major revision of US copyright law. She argued that developing technology issues, as well as international developments, have given rise to a need to consider copyright policy issues anew.¹⁴

Ms Pallante set out the goal, "The next great copyright act must be forward thinking but flexible. It should not attempt to answer the entire universe of possible questions, but no matter what, it must serve the public interest. Thus, it must confirm and rationalise certain fundamental aspects of the law, including the ability of authors and their licensees to control and exploit their creative works, whether content is distributed on the street or streamed from the cloud."¹⁵

The register then proceeded to identify 11 major issue areas, with many concerns within each.

Congress quickly picked up on the theme, with Ms Pallante testifying before the House of Representatives' subcommittee responsible for intellectual property on 20 March. Congressman Goodlatte's announcement followed.

Substantive areas for reform

Through the myriad of items in various reform proposals, there are several areas that are likely to be the focus of particular attention, among them are:

Orphan works: An "orphan work" is a copyrighted work whose owner cannot be identified or found, so prospective users either risk infringement liability for using the work, or do not use the work at all, and owners go without compensation. Orphan works have been a subject of Copyright Office and congressional inquiry.¹⁶ Orphan work legislation aims permit use of orphan works, subject to payment of compensation to be paid to the owner if found. The range of works and the means by which they become orphans (such as failure to register or stripping metadata), means that legislative resolution is likely to be complex and will have to be sensitive to these differences.

Library and archive exception: Section 108 of the Copyright Act provides a limited exception for libraries and archives to make copies of various works that would otherwise be infringing.¹⁷ The Copyright Office has said that the section does not adequately deal with digital issues, including digital preservation and conversion as well as lending. Leading concerns include mass digitisation (à la Google Books), as well as the types of institutions that should be able to claim the exception and the number and purpose of allowed copies. The Copyright Office has indicated that Section 108 reform is a policy priority.

Enforcement: Enforcement presents challenges both as to criminal prosecution and civil remedies. As to criminal penalties, illegal streaming is at present only a misdemeanour, regardless of scale. The civil statutory damages provision, which allows owners of works registered with the Copyright Office to be awarded damages (in a range of \$200 to \$150,000 per work) without proof as to quantum of loss, has been critiqued both as to the parameters of the registration requirement as well as quantum.¹⁸ Tied in with the question of statutory damages is discussion of a copyright small claims court, to reduce the cost of pursuing small infringements.

Like the *Talking Heads* song says, for copyright reform "the future is certain; give us time to work it out".¹⁹ Copyright reform is moving forward, haltingly, slowly and uncertainly. It is a frequent topic of discussion and analysis by industry, academic and professional groups. Within individual industries, participants are drawing battle lines and exploring areas of potential compromise and consensus.

Counsel representing clients in specific industries will want to participate in the

emerging debate and legislative process to ensure that their interests are heard.

Footnotes

1. Press Release, US House Judiciary Committee, chairman Goodlatte announces comprehensive review of copyright law (24 Apr 2013) (available at <http://1.usa.gov/10A8i5g>).
2. Maria A Pallante, US register of copyrights, 'The next great Copyright Act', Twenty-Sixth Horace S Manges Lecture, at 2 (available at <http://bit.ly/14x5Jjs>).
3. *Id* at 3.
4. See generally Pamela Samuelson and members of the CPP: 'The Copyright Principles Project: Directions for Reform', 25 Berkeley Tech LJ 1175, 1177 (2010).
5. Pallante at 30.
6. *Id* at 6.
7. Samuelson at 1178.
8. *WNET v Aereo, Inc*, Nos 12-2786-cv, 12-2807-cv, 2013 US App Lexis 6578 (2d Cir Apr 1, 2013)
9. *Fox Television Stations Inc v Barry Driller Content Sys PLC*, No 2:12-cv-06921 (CD Cal 27 Dec 2012) (civil minutes).
10. <http://www.publicknowledge.org/cra/>.
11. Republican Study Committee, 'RSC Policy Brief: Three Myths about Copyright Law and Where to Start to Fix It' (16 Nov 2012) (available at <http://bit.ly/UA1ZF2>).
12. R David Edelman, 'It's Time to Legalize Cell Phone Unlocking' (<http://1.usa.gov/Wr4zoe>).
13. Victoria Espinel et al, 'Combating Online Piracy while Protecting an Open and Innovative Internet' (<http://1.usa.gov/Q2yBFp>).
14. Pallante at 7-9.
15. *Id* at 9.
16. The Copyright Office website has a page collecting materials on orphan works. <http://www.copyright.gov/docs/orphan/>.
17. The comparable page for the library/archive exception is <http://www.copyright.gov/docs/section108/>.
18. Pallante at 13-15.
19. David Byrne, *Road to Nowhere*, on Little Creatures (Sire Records 1985).

Author



Jeffrey M Dine is an associate in the litigation group at Seward & Kissel in New York. He counsels US and foreign clients in a wide range of matters, including copyright, trademark

and trade secrets, as well as complex commercial, securities and maritime litigations, arbitrations and arbitration enforcement actions.