

Session 9A

Emily C. & John E. Hansen Intellectual Property Institute

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SESSION 9: COPYRIGHT LAW

9A. U.S. Copyright Developments

Moderator:

David Carson

U.S. Patent and Trademark Office, Alexandria

Speakers:

Nicholas Bartelt

U.S. Copyright Office, Washington, D.C.

Copyright Modernization: Tuning up the “Engine of Free Expression”

Joshua L. Simmons

Kirkland & Ellis LLP, New York

Taking Copyright a (Dance) Step Too Far

Ralph Oman

The George Washington University Law School, Washington, D.C.

Congress and the Courts Rethink State Sovereign Immunity for Copyright

Panelists:

Steven Tepp

Sentinel Worldwide, Washington, D.C.

Ann Bartow

University of New Hampshire, School of Law, Concord

Joseph C. Gratz

Durie Tangri LLP, San Francisco

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MR. CARSON: Welcome to the panel on U.S. Copyright Developments. As you will see, we have a rather eclectic group of topics that have no discernible relationship from one to the other, but that should make for an interesting panel. If you don't like what the first person says, just wait for the next person and you'll find something you find interesting.

Our first speaker is Josh Simmons, from Kirkland & Ellis, who will talk about copyright and dance steps and some cases that you may have read about in the press. He will be followed by Nick Bartelt of the Copyright Office, who is going to be talking about Copyright Office modernization. Finally, Ralph Oman of The George Washington University Law School will talk about state sovereign immunity, an issue with which he is very familiar because when he was Register of Copyrights he was responsible for a report that led to the enactment of a law which may or may not still be a law; it probably isn't, but we'll hear about that from Ralph.

We also have three great commenters: Steve Tepp from Sentinel Worldwide; Ann Bartow of the University of New Hampshire School of Law; and Joe Gratz of Durie Tangri in San Francisco.

Let's get started, Josh.

MR. SIMMONS: As David mentioned, you may have seen in the press that a number of cases have been filed in the last several months involving the issue of dance steps that were used in videogames. We are representing Take-Two and Epic Games in those cases, which were brought by a series of different plaintiffs involving different dance steps in the games *Fortnite* and *NBA 2K*.

What is interesting about the cases is we moved to dismiss, saying, "Dance steps are not protectable," and I'll explain to you in a minute why we think that. When we moved, we were fortunate enough to have — and I'm going to connect up all of the panel's topics — the Copyright Office's thoughts on the issue. They had refused registration of the dance steps, and we presented that to the courts.

In response to the motion to dismiss and before opposing it, the other side voluntarily dismissed the cases, saying in the press that they were doing so because the *Fourth Estate* decision¹ had come down and some of the steps had been registered and some of them had not been registered. Regardless of whether that was the reason that they were voluntarily dismissed, eight of those cases are off the books, at least for the moment.

The ninth case, in the District of Maryland, is ongoing, but that case, which started with a copyright claim, has subsequently dropped the copyright claim. So we have one case ongoing that involves a dance step issue but no copyright issue live at the moment.

The press reported that there is a tenth case that might have been filed yesterday, but I have not seen that complaint yet, so I can't speak to it.

¹ *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019).

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In any case, I want to talk about the copyrightability issue and what the Copyright Office's views were, at least in the initial refusals.

Those of you who are U.S. copyright lawyers know that we have a concept called the "words and short phrases" doctrine. That doctrine has been adopted by the courts of appeal in pretty much every circuit that has considered the issue. Basically, what they say is that there are some fundamental building blocks of creative works that will not be protected by copyright, the idea being that we need to leave open some space to allow the creativity of authors to create new works.

That concept came from the Copyright Office originally, which had been applying that doctrine since the 1800s, but in the 1950s passed regulations specifically saying that it would not register words and short phrases and did not believe that they were copyrightable. That regulation is what most of the circuit courts have looked to as the basis for their understanding that words and short phrases are not protectable.

What about dance steps and simple routines? We know from the Copyright Act that Congress intended for choreographic works to be protected. Before the 1976 Act, some choreography was protectable as a dramatic work, but the 1976 Act for the first time protected choreographic works. It didn't provide a definition of what a choreographic work is. What we know from the legislative history is that Congress did not think that it included "social dance steps and simple routines," and essentially said, "And everyone knows what a choreographic work is, so we don't need to worry about providing a definition."

The Copyright Office, based on its regulations with regard to words and short phrases, has adopted in the *Compendium*² rules and definitions that it believes are helpful in drawing the line between protectable choreographic works and unprotectable dance steps and simple routines. The *Compendium*, quoting the Second Circuit in *Horgan v. Macmillan*,³ which was in turn quoting the Copyright Office *Compendium*, says that choreography is "the composition and arrangement of 'a related series of dance movements and patterns organized into a coherent whole,'" which it contrasts with "individual movements or dance steps" that the Copyright Office believes are not copyrightable. Nor does it believe that "short dance routines consisting of only a few movements or steps with minor linear or spatial variations, even if the routine is novel or distinctive" are protectable.

In our petition to dismiss our case, we looked at this legislative history, the words and short phrases doctrine, and the dance steps at issue to argue that they were not protectable.

I'm going to show you a couple of the dance steps because that makes this a lot more fun.

The first case involved Alfonso Ribeiro, who is known for playing the character of Carlton in *The Fresh Prince of Bel-Air*. He alleged that he had created this dance for *The Fresh Prince* television show, so our first argument was, "Well, you probably don't own it then, because most actors who perform in a television show give their rights to the producers."

² UNITED STATES COPYRIGHT OFFICE, *COMPENDIUM OF U.S. COPYRIGHT PRACTICE* (3d ed. 2017).

³ *Horgan v. Macmillan, Inc.*, 789 F.2d 157 (2d Cir. 1986).

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Leaving that aside, he did file some registrations, not from *Fresh Prince* but, rather, from his subsequent TV appearances. This is one from *The Graham Norton Show*, where you can see him swinging his arms to the sides, and eventually he'll make this movement. This was the deposit copy submitted to the Copyright Office. There's Graham Norton jumping in the middle.

The Copyright Office said: "No, this is not protectable because it's 'a simple routine' that is not registrable as a choreographic work. It's really only two dance moves, and we don't protect 'simple dance steps.' If you had had a longer piece of choreography, we could talk about that."

He tried to register something from *Dancing with the Stars*, but the Copyright Office said, "Well, again, usually the choreographer would own those rights. You have this little dance step in the middle of a larger work." I don't know actually what his response to the Copyright Office was to explain why he thought he had protection there.

The second work involved the Backpack Kid. This is the "floss" dance. This is the Backpack Kid's deposit copy of him making the well-known floss movement back and forth. First of all, I'm not sure that the Backpack Kid really created this dance step; but leaving that aside, the Copyright Office also found this was not protectable because it's "a single dance step." Again, you have essentially one movement of his arms passing in front and behind, and protecting that would block off a whole lot of other dance moves. Martha Graham, for example, oftentimes uses the same kind of a movement, and that could be problematic. He also attempted to register a different work that incorporated this dance step into more steps, and we can talk about the copyrightability of that.

Terrence Ferguson, who goes by 2 Milly, submitted a video deposited for the movements representing "Milly Rock Dance." There is a longer version of this video, but the only step that was at issue in the case was this one. Of course, we were moving on substantial similarity, so I didn't have to argue that the rest of the dance was not copyrightable; but if I had, the Copyright Office would have held that the entire dance was also not protectable because the movements represented in the video depict a simple routine made up of "social dance steps and do not represent an integrated, coherent and expressive compositional whole and is thus not eligible for copyright registration," in part because it was clearly extemporaneous.

I'm going to show you one more dance, which is the Orange Shirt Kid. This is the Orange Shirt Kid dancing in his bedroom. This dance, first of all, is definitely not the dance that's in *Fortnite*. But leaving that aside, this registration actually was granted by the Copyright Office.

I say that with a footnote, and why? The registration was granted, but it was for a motion picture. The registering attorney learned a lesson and said, "Oh, choreographic work, that's not working; let's file as a motion picture."

But the Copyright Office had figured out what was going on in the case and added a notation to the registration saying, "This registration is for a motion picture. It does not extend to individual dance steps, social dances, or simple dance routines." If you did not learn your lesson, you cannot get around the registration rules by trying to file this as a motion picture.

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As I say, we may not know what happens if they don't bring the copyright claims back into the cases, but for now this is the first time in a long time we have had to consider the copyrightability of dance.

MR. CARSON: And who says America doesn't have talent? [Laughter]

Does anyone care to take up the cudgels for the opposing side on this issue? Seriously, would anyone in the audience care to make that point, or are we all in agreement here?

QUESTION: I have a quick comment. I've seen a video of the other side of the argument. When you see the two videos back to back that the other side is claiming, it is a very interesting video. I'll just leave it there.

MR. SIMMONS: That's an interesting point. We moved on lack of substantial similarity, and in the Ninth Circuit you have to filter out unprotectable elements. Therefore, if these dance steps alone are not protectable, it doesn't matter if they are close or not close. I would argue that even taking them as they are, there are a lot of differences between them. But if you take the Copyright Office at its word, then you don't even have to get into comparing them because that doesn't matter.

MR. CARSON: You don't have the images from the game, do you?

MR. SIMMONS: I don't. I only had seven minutes. Next time I want twelve minutes and I'll show you more.

MR. GRATZ: The material here is pretty simple, but there's lots of options of how to put the steps together, what movements to put together. Do you think there is a higher or a lower level of aesthetic choice being made in choosing how the movements go together in *How to Do "the Carlton"* or in selecting the name of a Java function, since, Josh, you are also counsel for the plaintiff in *Oracle v. Google*?⁴

MR. SIMMONS: I think these cases are much simpler. If you think of it as the "language" of dance, dance steps are a necessary part of that in a way that the application programming interface (API) declaring code in the *Oracle* case is not. There is nothing in that API that needs to be reused because it is the combination of variable names, the names of the functions, a variety of things that were all copied verbatim; there are a lot of different elements there. Here you have one dance step. I think the cases are really different.

PROF. BARTOW: Do you have a theory on how many dance steps would be required?

MR. SIMMONS: Luckily, I don't have to because we don't have that case. But you'd imagine — the purpose of the choreographic work definition was to bring in true dance, true choreography, and you could imagine that you would want to have enough steps to really file it as a choreographic work, not as something that's a social dance.

Otherwise, what you'd end up with is if you were dancing at a club or a wedding or at the Fordham IP Conference — and maybe we'll force everyone to dance a little bit later — then everyone is turned into an infringer automatically. We know that people are doing these dance steps all over the place in a way that you would not see someone performing a Martha Graham routine or something that really looked more like a choreographic work.

⁴ *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339 (Fed. Cir. 2014).

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MR. CARSON: Carlo, you had a comment?

QUESTION [Carlo Lavizzari, Lenz Caemmerer, Basel]: My sons are big fans of these dance movements. But that is not my question. Did you look into sampling cases, e.g. music sampling, because those use very short, distinctive sequences?

MR. SIMMONS: I think the analogy to music is interesting. But there you would be talking about individual notes. Even a short amount of a sound recording may be enough to be protectable, but here you are talking about essentially one note in a musical work. I don't think there has been a sampling case that has held that one single note by itself would be protectable, particularly not when it is performed differently.

Remember, in the sampling cases the sound recording is exactly the same. Here, none of these line up exactly right. Regardless that they may be the same dance step, there are differences in the way that they are portrayed in the games.

QUESTIONER [Mr. Lavizzari]: One note may be difficult, but the first four notes of Beethoven's Fifth Symphony —

MR. SIMMONS: Public domain. I don't have to answer that question. [Laughter]

QUESTION [Richard Pfohl, Music Canada, Toronto]: One thing that is interesting to me is the Copyright Office saying that "social dance steps" are not copyrightable. I wonder if that is getting into sort of a formal vs. informal distinction; in other words, "We privilege Martha Graham as choreography, but if it is some kids doing the Lindy Hop, then that is just 'social dancing' so we will not allow it to be copyrighted.

MR. SIMMONS: We didn't move on the social dance component of the law. But you are correct. Congress said, as you saw in the legislative history, that social dance is not part of the definition of a choreographic work. So we know that those cannot be protectable based on what Congress said, which I think is a little different than what we normally see in the copyright cases where we are concerned about the highbrow/lowbrow distinction. Here, we have legislative history that says, "We are going to draw certain distinctions in the kinds of dance — the broader term — that we are going to protect."

MR. CARSON: That might also in part answer your question, Carlo, comparing it to music.

MR. SIMMONS: I said I would connect it to the other two speeches, so we did the Copyright Office piece. If someone in state government starts doing these dances, the question I have is, is that going to be a sovereign immunity issue? But Ralph will address that issue in a couple of minutes. [Laughter]

PROF. OMAN: Beautiful, beautiful.

MR. BARTELT: Thanks, Josh, for showing how much fun we have at the Copyright Office and the wisdom of some of my colleagues in making their determinations in those cases.

MR. CARSON: All right. Time's up. We are now going to move on to Nick's presentation.

MR. BARTELT: Thanks, David. Good afternoon, everyone. Again, I'm Nick Bartelt. I'm here from the Office of the General Counsel at the U.S. Copyright Office to talk about copyright modernization and how the Office is working to tune up the "Engine of Free Expression."

Briefly, modernization is a multi-year process that requires extensive collaboration among all Copyright Office divisions as well as with the Library of

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Congress. It has two key components: (1) transforming all of the Office's multiple IT systems; and (2) ensuring that non-IT activities are efficient and aligned with the Office's strategic goals.

Before I get into how the Office is modernizing, I should first address why modernization matters.

As the Supreme Court has held in *Harper & Row v. Nation*⁵ and later in *Eldred*⁶ and again in *Golan*,⁷ and which the Office seized upon in a recently announced strategic plan for 2019–2023, copyright is the “Engine of Free Expression.”

In practical terms, the Office's core services of registration, recordation, and statutory licensing are integral to the marketplace transactions in the United States and abroad. They provide legal certainty for licensing works to new businesses, bring U.S. content to foreign countries, and ensure public access to copyright ownership information.

The Office's copyright records fill a need for authoritative rights ownership information when contemplating and executing transactions as well as in litigating disputes.

The Office's registration and recordation systems also constitute the world's largest compilation of copyrighted works and copyright ownership information, encompassing an unparalleled record of cultural heritage.

To give you a sense of the scale, in Fiscal Year 2018 the Office received over 540,000 new claims for copyright, registered over 560,000 claims covering millions of works, and recorded over 21,000 documents regarding copyright ownership. This illustrates both why it is so important and so challenging to modernize.

Moreover, in a post-formalities world where registration is voluntary, it is incumbent on the Copyright Office and the offices from around the world to incentivize these activities, in part, by making it easier for owners and users to participate in the system.

Last fall, the World Intellectual Property Organization and the Copyright Office organized a meeting of experts from around the world to compare different national systems and discuss the challenges and common goals of modernizing systems to maximize value to the creators and to the public. Questions asked included: What might an ideal registration system look like, and how can such a system be achieved with the limited resources of national copyright offices?

A few Office goals for registration and recordation are: (1) to improve user experience; (2) to increase office efficiency; and (3) to decrease processing times.

Our users expect timely service and, by streamlining and coordinating changes and processes, practices, and policies, we expect to realize timely and reliable service delivery for all Office services. These include processing copyright registration applications, responding to information requests, and managing copyright deposits.

How specifically do we plan to achieve these modernization goals?

⁵ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

⁶ *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

⁷ *Golan v. Holder*, 565 U.S. 302, 132 S. Ct. 873, 876, 181 L. Ed. 2d 835 (2012).

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As I said, modernization includes but also goes beyond IT. It is a comprehensive undertaking that spans the entire Copyright Office. Specifically, the Office is working on carrying out a number of major efforts, including:

- Developing an enterprise copyright system
- Reengineering business processes
- Allowing comprehensive access to public records
- Developing a data management initiative
- Outreach to the public and to staff

One modernization project the Office is working on is the Virtual Card Catalog. As I noted previously, the U.S. Copyright Office has the largest collection of copyright records in the world. Members of the public seek out these records to find copyright owners and to get copies of completed and in-process registration records, recordation documents, and registration deposits.

The Office is transforming its historical records by converting the extensive paper-based pre-1978 entries into a digital format for improved public access, enhanced online search capabilities, and continued record preservation. In March the Virtual Card Catalog added more than 24 million card images, expanding the range from 1870 to 1977, to a total now of over 41 million images.

A second project involves modernizing recordation. Copyright Office staff have begun reengineering the paper-based document recordation system for transfers of copyright ownership and other documents pertaining to copyright under 17 U.S.C. § 205, as well as notices of termination under Sections 203 and 304(c) and (d). We are currently in the process of developing an initial limited pilot of this online recordation system.

In addition, the Office has already begun to modernize its recordation regulations. In November 2017, the Office issued an Interim Rule on Recordation that adopted a number of improvements, including that electronically signed documents can now be recorded, expanding the universe of recordable documents.

On the registration front, the Copyright Registration Modernization Project will create a system replacing and improving upon the current electronic copyright system known as eCO. Registration goals, as with recordation, are to improve user experience, increase office efficiency, and decrease processing times.

In October 2018, the Office published a Notice of Public Inquiry that sought input on three areas of reform: (1) the administration and substance of the application for registration; (2) the utility of the public record; and (3) the deposit requirements for registration.

In January 2019, the Office received fifty-four comments that will inform development efforts and identify other potential next steps, including rule-makings that can benefit users even before the next-generation system comes online. As I mentioned, the Office is already modernizing through rule-makings. Office regulations and registration practice have taken on additional significance since the recent Supreme Court decision in *Fourth Estate*, which requires a registration determination before pursuing civil infringement claims in court. Of course, registration has a number of other statutory benefits, including:

- Create a searchable public record of the copyright claim;
- Establish *prima facie* evidence of the copyright's validity; and

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- Allow a copyright owner to claim statutory damages and attorney fees in infringement suits.

In the last few years the Office has promulgated new and revised rules relating to a variety of registration practices. In general, these rules make a number of changes to reflect Office practices, promote efficiency of the registration process, and encourage broader participation in the registration system by reducing the burden on applicants. Many of the rules involve moving applications online and allowing digital upload of deposits.

In order to have up-to-date guidance that reflects all these rules, the Office recently released a revised draft of the *Compendium, Third*. The *Compendium* is an administrative manual of the Register of Copyrights concerning the Office's mandate and statutory duties under Title 17.

In addition to the recent rule-makings, the manual has been updated to reflect the Supreme Court's decision in *Star Athletica*,⁸ and the final version will also be updated to reflect the Supreme Court's recent decision in *Fourth Estate*.⁹

The *Compendium* has also been updated to reflect certain practice changes that have been implemented by the Office of Registration Policy and Practice. Among other changes, the public draft clarifies how and when the Office will communicate with applicants, when it will attempt to correct deficiencies in the application, when it will register a claim with an annotation, and when it will refuse registration.

Finally, just to stay current on Office modernization, I commend to you the dedicated webpage, which has monthly quick-fact updates.

In addition, the Office launched a bimonthly webinar series with the next installment coming in May, and archived webinars available soon.

Thank you for your time. I look forward to hearing from the panel and the audience. Because I am still technically in my probationary period with the Office, you'll excuse me if I answer questions a little unartfully or I am to offer guidance where we haven't taken a position yet.

MR. CARSON: You had a slide that showed the old eCO system and a mockup of the new system. Can you tell us a little more about how the new system is going to look and how much more useful (hopefully) it will be for people to interact with?

MR. BARTELT: It's a work in progress, right? I think we are trying to take this in steps. The pilot that we are working on right now is focused more on recordation. I would say that the registration portal is still really under development. I haven't seen a lot of it, other than what I was able to show on the slide, but we are trying to get a lot of public feedback, a lot of user testing, particularly from people who are finding the current system challenging, and use that input in order to develop a system that will be more workable for people. Unfortunately, I don't know the specifics of how it's looking, but I do know we're doing a lot of user outreach I know on the recordation side, and we plan to do the same for registration.

MR. CARSON: Speaking of public feedback, this may be an opportunity for some informal input.

⁸ *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017).

⁹ *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019).

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QUESTION [Shlomit Yanisky-Ravid, ONO Academic College]: Congratulations on your new job.

My question, as you can guess, is about blockchain. I know some registration copyright systems — and in Europe they have some company that I'm indirectly affiliated with — are thinking that blockchain as a well-encrypted, peer-to-peer, democratic system can maybe replace the current registration system; or could possibly just assist. I don't know. What's your take on that?

MR. BARTELT: I have seen some of the blockchain solutions that are being offered in the private sector. I think the Office would feel those solutions do not offer the same benefits as registration. We've offered this exchange where we review for copyrightability; we are creating this authoritative public record. As I mentioned, there are benefits beyond just creating a record. The blockchain solutions are essentially the modernized version of "mailing it to yourself in a stamped envelope on this date."

I think these solutions potentially have some value for evidentiary purposes solutions. I don't know if users have been successful in bringing claims. But certainly, I think the registration system, particularly once it is modernized, will have hopefully more value. I don't know that we're considering blockchain as part of the development, but I do know that they are trying to modernize the technology, so perhaps in the development blockchain will be considered

QUESTION [Mark Seeley, Board of Directors, Copyright Clearance Center]: The question that I pose for you is really about the question of chain of title. In my prior career, having done a few M&A deals in publishing over a few decades, frankly the records are a mess, and the prior holders haven't recorded changes in title.

The one thing that we do know is that there are collective management organizations, organizations like EBSCO on the journal side as a distributor of content, that do have a fair amount of current information that connects rightholders with works. I wonder whether the Copyright Office is thinking about looking at some of those resources as a way of sort of filling in some of the details.

The problem will be that you will never be able to totally correct some of the old in-firm changes of title, but perhaps there might be some consideration around some type of claiming process, with notice so that people could object to it if they wished to, that looks at current information about rightholders.

MR. BARTELT: Are you suggesting that we ingest information from existing systems and then have people be able to confirm it?

QUESTIONER [Mr. Seeley]: Yes.

MR. BARTELT: That's an interesting idea. I don't know that it is one that we have considered. The focus as far as modernizing the recordation system has been primarily on incentivizing people to use it more and make it more accessible, increase processing times in order to have the record going forward be more reliable, robust, fill in the gaps of chain in title. But looking backward is a welcome suggestion.

QUESTIONER [Mr. Seeley]: Good. Okay.

MR. CARSON: To do that would definitely require some changes in the statute because the way recordation works now is they actually have to get the document, or at least a copy of the document, of transfer with the signature, which is different, for example, from how transfers are recorded at the Patent and Trademark Office. There is

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perhaps some justification for that system. If you've got the actual document, then you can be reasonably certain that, unless someone forged it, it is the actual document. It has someone saying, "I got the assignment." But it's a clunky system to administer.

MR. BARTELT: I think that's right, David. We rely on the certifications of the remitters to say, "I am who I say I am and this document is a true and correct copy."

QUESTIONER [Mr. Seeley]: The problem with broken chain titles is you wouldn't be able to get them. You'd be able to get somebody who says, "I bought that publishing business which had those assets," but you wouldn't be able to get the prior owner to correct the chain title.

MR. CARSON: I know we're over time, but we have a couple of panelists who want to talk and we're going to let them talk. Steve?

MR. TEPP: Everyone agrees it's obvious that the technology that the Copyright Office has at its disposal is insufficient, so modernization is a no-brainer.

The point I want to make is that modernization should be more than just taking the current system and putting it online or making it electronic. When Congress chose in the 1980s to retain a domestic facing formality between U.S. rightholders and the ability to enforce their copyright, I think it's fair to say that they created some sort of obligation to make the registration system feasible for all authors.

We touched on this yesterday morning. For photographers, for other graphic artists, for fine artists, there are a lot of aspects of the registration system that are not feasible.

The published vs. unpublished distinction — granted you could say that's required by the statute, and maybe we need to revise the statute, because a lot of authors don't know when they have given photographs, for example, over to clients, did they publish it? Who knows? And is your registration then defective if you falsely identify that?

Obviously, there is a question about fees, particularly with some proposals that are out there. I'm hopeful that the numbers we have seen are not going to be where they go; but if they did, it becomes burdensome, to say the least.

The "best edition copy" requirement is something that does not serve the Copyright Office's needs as an office of record, but it is really more about the Library of Congress's desires for preservation.

I think all of these things and more need to be looked at and revised to make the registration system more accessible feasibly to the rightholders whose rights are conditioned on it.

My final point is — and this goes to both the questions that have already been asked — the most pivotal thing that I urge everyone to remember is the Copyright Office will not make these decisions. The Register of Copyrights, Karyn Temple, who we heard from yesterday, does not have the authority to make decisions about Copyright Office modernization; the Librarian of Congress does, and that's who these questions and concerns need to be addressed to directly. Carla Hayden and her Chief IT Officer Bud Barton will be making these decisions in consultation with the Copyright Office. Hopefully they are listening to the Copyright Office and listening to all the comments people have sent to the Copyright Office, but at the moment we don't know.

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MR. CARSON: And some of those decisions may require changes in the statute, which means it's up to Congress; and most of those decisions will require money, which is definitely up to Congress. So, yes, it's not all in the Copyright Office's hands.

MR. BARTELT: I do think we try to be mindful of the fees. There was a good point raised yesterday about the fact that we are cognizant of the unique issues that photographers encounter in trying to register their works and we are trying to strike that balance. Even with the fees being what they are, we are not a self-funding operation, we require appropriations, and our fees don't even meet what the costs of doing these registrations are currently.

MR. CARSON: I know there are other questions, but we've got thirty minutes after the last presentation and we'll have time to come back to you.

Ralph?

PROF. OMAN: To conclude — [Laughter]

MR. CARSON: Any comments or questions?

PROF. OMAN: I'm here to talk about state sovereign immunity for copyright infringement, one of the lingering issues in the copyright portfolio.

The problem is, as all of you know, the Eleventh Amendment of the United States Constitution. In most cases the Eleventh Amendment prohibits lawsuits against states in their own name or against state entities, like prison systems or universities, and it prevents suits against them in federal court in most cases. That means that if a state university makes a digital copy of your book of photographs and sends 100,000 copies to all of its faithful alumni — destroying your potential market, since the book of photographs featured the university — you cannot sue the university for copyright infringement and expect to get monetary damages.

Congress thought it had solved the problem back in 1990 when it enacted the Copyright Remedy Clarification Act¹⁰ (CRCA). Relying on its Article I powers, Congress thought it made clear that states could be sued for copyright infringement.

The Supreme Court ultimately held in a related case, *Seminole Tribe*,¹¹ and another case involving other intellectual property, *Florida Prepaid*,¹² that Congress cannot use Article I to abrogate state sovereign immunity. The Eleventh Amendment was adopted after the 1788 adoption of the Constitution, so it trumps Article I.

Circuit courts over the years have deemed the CRCA abrogation constitutionally flawed and have dismissed copyright suits in these areas, with implications for copyright, the most famous being, I think, the *Chavez*¹³ case out West, and most recent cases have followed suit.

There is a case that is now pending before the Supreme Court — we're waiting for a decision on whether it will grant *certiorari* — *Allen v. Cooper*, a case out of the Fourth Circuit, that raises the issues of state sovereign immunity in copyright cases.¹⁴ I

¹⁰ Copyright Remedy Clarification Act of 1990, Pub. L. No. 101-887, 104 Stat. 2749 (1990).

¹¹ *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996).

¹² *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

¹³ *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000).

¹⁴ *Allen v. Cooper*, 895 F.3d 337 (4th Cir. 2018).

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won't get into the details. We'll find out very soon — it could be next week actually — whether or not the Court grants *cert*.

Many experts — many of whom are here today — say that the Court won't take the case. They say that the Court thinks that it has already given us sufficient guidance in this area with *Seminole Tribe* and *Florida Prepaid* and nothing more has to be said, which would argue against the Court taking *cert*. But others say that new evidence that has been produced in a related case suggests that the state infringement problem has grown steadily worse since 1990 and that this evidence vindicates the congressional finding and the congressional rationale in adopting the CRCA. We'll see.

The other alternative is one that I raise with some caution, seeking legislation that would correct the problem once and for all by following the roadmap that the Court gave us in *Florida Prepaid* and the *Seminole Tribe* cases and that the Fourth Circuit gave us more recently in *Allen v. Cooper*.

Some experts with a lot of experience in the field point to strong, even compelling, evidence that shows that the states and state entities have grown in many ways indifferent to their responsibilities and obligations to protect copyright, thinking that the Eleventh Amendment has given them a bulletproof defense against liability.

This evidence that has been accumulated suggests that there have been over 165 cases of direct copyright infringement by states or state entities in the past twenty or so years. The states are engaged in willful copyright infringement. Those figures must be, in my opinion, just the tip of the iceberg. Most infringement suits are almost certainly abandoned after the author talks to a lawyer and discovers that there is no chance of getting damages for the blatant infringement and that in most cases a lawsuit would be a waste of time and money.

In view of that new evidence, Congress could switch its focus from Article I to Section 5 of the Fourteenth Amendment, and that would solve the constitutional problem if the evidence were compelling enough. That is the problem with a legislative fix.

I recognize, and I think most people recognize, that copyright is property. The Fourteenth Amendment allows Congress to intervene legislatively if evidence suggests that the states have deliberately, repeatedly, and intentionally deprived people of their rights or property without due process of law.

I am convinced that Congress could find that evidence persuasive and enact a revised CRCA based on Section 5. Of course, ultimately the courts would have to decide whether or not that is an offense that rises to the constitutional level, but that's an issue for another day.

Thank you very much.

MR. CARSON: Thank you, Ralph.

Steve, I know that from having worked with you on this issue many, many years ago —

MR. TEPP: About twenty.

MR. CARSON: — that you've got great interest in this case and a great deal of sympathy for Ralph's ultimate viewpoint. What's your evaluation of the strength of the case right now?

MR. TEPP: I'll start by patting us both on the back. The General Accounting Office was asked to do a study of this issue after the 1999 Supreme Court decisions.

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By the way, there are two *Florida Prepaid* decisions¹⁵ with opposite captions, with the defendant and the plaintiff trading spots, that were issued on the same day as *Alden v. Maine*,¹⁶ which is the philosophical underlying rationale for the notion of state sovereign immunity actually being broader than is articulated in the Eleventh Amendment. It's Justice Scalia and then-Chief Justice Rehnquist who were really partnering in this trio of decisions.

At the end of the GAO report¹⁷, the Copyright Office and USPTO were invited to submit letters stating their views. What we wrote at the time was, "While it will take some time for states to digest this, there is every reason to believe that without accountability there will not be responsibility" and "we anticipate as time goes by this problem will increase"—and, sure enough, it has. This could hardly be a surprise.

I very much hope the Court takes this case and reverses the decisions from 1999. I'm concerned that they won't. Those decisions are only twenty years old and they were pretty strong decisions. Of course, neither Chief Justice Rehnquist nor Justice Scalia are alive, much less on the Court.

If it does come to trying legislation again, the bar that was set in those decisions is so unreasonably high — it's something on the order of "if your nation has fought a civil war over this issue, you can abrogate under the Fourteenth Amendment" or something close to that — so I'd be concerned about just reenacting the CRCA. Maybe a new Court would see it differently and would at least apply a more reasonable threshold.

The other possibility that I want to reintroduce is something that we worked very hard on at the time, which was legislation that would have denied federal copyright protection — and patent and trademark protection, for that matter — to states and state instrumentalities unless those states waived their immunity from suit for infringements of the various disciplines of IP. I think that was particularly well-balanced and quite reasonable. Some states have waived and some states have sort of a "Hell no, we will never waive" policy.

That legislation was humming along nicely right up until the National Association of Attorneys General found out about it and contacted the U.S. senators from their respective states, and then that was it for that legislation.

So there is that political landmine still, but if it comes to it, it's worth another shot because this is just injustice allowed by a Supreme Court ruling.

MR. CARSON: Ann, you work for the University of New Hampshire —

PROF. BARTOW: I do.

MR. CARSON: — which I believe is a beneficiary of state sovereign immunity.

PROF. BARTOW: I generally seek sovereign immunity every day. [Laughter] I can come back to that if you're interested.

¹⁵ Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd, 527 U.S. 666 (1999).

¹⁶ Alden v. Maine, 527 U.S. 706 (1999).

¹⁷United States General Accounting Office, Report to the Honorable Orrin G. Hatch, Ranking Minority Member, Committee on the Judiciary, U.S. Senate (Sept. 2001), <https://www.gao.gov/assets/240/232603.pdf>.

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Actually, I have a question, though. Presumably since 1999 the folks whose works are getting infringed by the state actors are trying things in state courts, right? They must be trying unfair competition. There are some different theories you could come up with that are sort of copyright-like in state law. I don't know. Has that been something that has gotten any traction?

PROF. OMAN: That issue came up in a case in Texas that is still pending actually involving Texas A&M University, and there was that question of the availability of state remedy. The state attorney general indicated that this would not be actionable under state law in state court, and that avenue was foreclosed.

Another fact that is relevant is that there could be some other theory, I suppose, of legal liability, but the federal law in copyright is very clear that copyright is the exclusive jurisdiction of federal courts, thank you very much.

PROF. BARTOW: The states have no way to protect their citizens from themselves.

MR. CARSON: Ralph, you mentioned, and maybe you can flesh this out a bit, that there have been 165 cases of direct copyright infringement by the states. That's since when?

PROF. OMAN: Since 1990.

MR. CARSON: Okay. Do you know how many of those cases are cases in which the copyright owners have tried to pursue some remedy under state law?

PROF. OMAN: I don't have that figure.

MR. CARSON: In order to satisfy the high test the Court has set, would you actually have to have a record of copyright owners having made that attempt and failed?

PROF. OMAN: The assumption by the party that compiled the list was that if they filed in a federal court, they had either exhausted their state remedies or deemed them not useful to their case.

MR. CARSON: I don't want to put you on the spot, Ann, so feel free not to answer. But as someone who is at least indirectly involved in the history of this, I'm wondering if — you may not care to justify the whole doctrine.

PROF. BARTOW: It's interesting. On the other side of things, I can't help thinking about Georgia's project with online reserves, the legacy of L. Ray Patterson, to try to make sure that libraries have the same sort of ability to put electronic works on reserve that exists for paper books. I'm old enough that I grew up with paper books on reserve. His battle and the state fighting that at the same time is sort of interesting to me. They are hoping for a pretty broad scope of fair use at the same time as they are saying that potentially they don't need to worry about it at all.

MR. TEPP: Shouldn't that be battled out under the fair use doctrine and not have that entire case preempted?

PROF. BARTOW: You don't have to convince me. I'm with you on that. I'm completely with you on that.

It's certainly not the policy of the University of New Hampshire School of Law or any part of the university to disrespect intellectual property. We used to be Franklin Pierce Law School, and the mission of the early school was to protect intellectual property.

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I personally wouldn't want to get — I know copyright, so I guess it's okay — in trouble with my university and be in a defensive position, I guess, if someone was complaining. I think there are still things that you can do to get attention if your works are being abused. The media and making trouble for the individuals responsible might have an effect. I don't know.

MR. GRATZ: Thinking about the proposal to condition the exercise of federal IP rights on waiver, I can only imagine the internal struggle that would occur within large state universities as between the technology transfer world and the library and academic world. The answer might be very different as to who ends up having the political power to control that decision.

I went to the University of Wisconsin, where the Wisconsin Alumni Research Foundation originally owned the patents on vitamins and has been doing this for a long time, such that I think their level of clout might lead to a different decision than might be the case in some other places.

MR. TEPP: That was the idea. And don't forget college mascots.

MR. CARSON: Indeed. I gather, Steve, the proposal, which I have a vague recollection of, was that it would have been for IP across the board. In other words, not only would you have to waive for copyright if you want to assert copyright, but you'd have to waive basically all federal IP rights.

MR. TEPP: Waive immunity for infringement of all IP disciplines, and then you'd get into eligibility for protection under federal law.

MR. CARSON: Right, right. I'm curious. Would anyone care to justify at a policy level the fact that states do enjoy this level of sovereign immunity?

[No response]

Somehow I didn't think so.

I'd be curious to know — we have a lot of foreign visitors — do you have similar doctrines in any of your countries? Here in the United States it's rather complicated because we have a federal system where it's the states who enjoy immunity. The federal government enjoys limited immunity; you can't enjoin it.

MR. TEPP: Because we waived it.

MR. CARSON: I was about to get that. Yes, there is a statute which provides that you can sue the federal government for copyright infringement; you can get damages but you cannot get injunctive relief.

I'm curious whether at the national level or in countries that do have federal systems at the state level, is there any such phenomenon in other countries? Carlo.

PARTICIPANT [Mr. Lavizzari]: There are limitations for sort of innocent infringement and relief under Section 301, sort of combinations of foreign countries. I've always wondered what the United States would do if Nigeria said, "Well, we now have state immunity and you can't sue any of our states." I think the United States would never accept this from any other country.

MR. CARSON: You think it works both ways? [Laughter]

PARTICIPANT [Mr. Lavizzari]: I didn't say that.

MR. CARSON: Thank God! Okay. Good.

Fiona?

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PARTICIPANT [Fiona Phillips, Fiona Phillips Law, Sydney]: In Australia we have Crown immunity, but it doesn't apply so broadly. What we do have is our famous statutory licenses. There is a statutory license for government use, so as long as you are doing something for the services of the Crown (because Australia is still a monarchy), then that is okay, and you can sort it out and pay your equitable remuneration after the fact. So it is very broad.

At one stage of my career, I was an inhouse lawyer at the competition regulator, and the competition regulator had very broad discovery powers for compelling regulated industries to provide information, and sometimes they would put up copyright claims to defend that. Those claims were preempted by the fact that as long as it's for government use it's okay.

MR. CARSON: But at least there is compensation.

PARTICIPANT [Ms. Phillips]: Yes, there is compensation, but basically you can't get in the way of the machinery of government. It doesn't apply to the universities, though.

MR. CARSON: Anyone else?

MR. SIMMONS: One of the interesting things about the possibility of this case coming back up to the Supreme Court is that *Florida Prepaid* and the other Supreme Court cases basically said that Congress hadn't done enough legwork, that there wasn't enough evidence before them to justify abrogating sovereign immunity.

Well, the Copyright Remedy Clarification Act is different in a meaningful way. The Copyright Office has done a lengthy study of why this was necessary and that is part of the *Congressional Record*. There also was testimony from the Register of Copyrights explaining why this was especially necessary for copyright. That legislative history doesn't exist for patent or for trademark. False advertising, I guess, was the other case.

Register Oman was working on that at the time, and he actually did look at all of the infringement that had happened before 1990. So not only do you have this record of post-1990 infringement, but you have this study. Why did we do it? It was because we already saw all of these infringements.

Again, I don't know what a new Court would do with that. Maybe they would say, "Oh, well, we'll just throw it into the same bucket as everything else," which sometimes they do with IP without looking at the differences. But I think that is a meaningful distinction for copyright over the other disciplines.

PROF. OMAN: The study was done before the advent of the digital age with the Internet and infringements being so cheap, fast, and easy. The multiplication of the infringements has increased exponentially, and in my view, there should be some liability.

I should note that bills have been drafted. Two senators are standing by ready to introduce them, but obviously they won't act until we get word from the Supreme Court one way or the other. The bill is very clear in stating that this would not expose the states to liability for a good-faith fair-use argument or for innocent infringement. It would be for direct, willful infringement that they would be exposed to if the legislation were adopted.

MR. CARSON: I'm just curious. Would this draft bill include statutory damages or just compensatory?

PROF. OMAN: Statutory damages were not taken off the table.

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PROF. BARTOW: Is there any economic data about any of this that suggests how much in lost royalties might be at issue and in which states, looking at the differences among states? I was wondering as I was sitting here, if the private schools wind up subsidizing the public schools if it's academic material and that's your only market. I wonder if there are any studies of that.

PROF. OMAN: I'm not aware of any economic studies. But the states that have voluntarily agreed to waive their sovereign immunity probably are pretty clean on the subject, whereas those that have refused to waive have a tradition or a habit of infringement.

MR. SIMMONS: If you look at the cases that are raising this issue, what was done is basically taking a work that was submitted and giving it out to everyone for free. In terms of the economic effect on those authors, I think that's pretty straightforward.

But it's not just books or articles. We litigated a software case against the State of Oregon. When Obamacare was enacted, the State of Oregon hired Oracle to do their work in implementing the system there and there was a dispute over the agreement. There was state court action and there was federal action.

Oracle sued for copyright infringement, saying, "You waived in the agreement," and Oregon said, "No, we didn't." So one of the issues was: is there a waiver; but, if there isn't, also are there Copyright Remedy Clarification Act issues?

After our opening brief was filed and various people came in saying, "Yes, there's no protection for the State of Oregon," the case ended. The parties reached a resolution. We don't know where that would have led.

But it's not just books; it's not just photographs or articles; it's software and anything else that a state or a state actor wants to use.

MR. TEPP: It's reasonable to ask questions about the economic impact. Your suggestion is an interesting angle. I would think it would be rather difficult to have complete data when you factor in undetected infringements and infringements that were detected but no action taken because of futility, recognizing the current state of the law.

I mentioned the GAO report earlier. For what it's worth, when I was at the Copyright Office I worked with our folks inside the Office to come up as best we could with the information about how often states and state instrumentalities register copyrights, and that information is in the GAO report. Not surprisingly, it was quite substantial.

PROF. BARTOW: Yes, it would be labor-intensive. But I know at the University of New Hampshire — and I actually visited Florida last fall, another state school — that you have to submit your syllabi and then they become a state record. So one way to detect it would be to look at the syllabi. We have required information that has to be in the syllabi, including the books we use, the materials we use. You could compile that.

MR. TEPP: That covers potential infringement in the context of instructional-related activities. What if the university has unlicensed software on some of its systems, a handout that has unlicensed images on it that may not be reflected in the syllabus?

PROF. BARTOW: But it's a start.

MR. TEPP: It's something. I'm not opposed to trying to find out what we can. My point is simply that trying to get complete data there is going to be very challenging.

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MR. GRATZ: It might be interesting to look at. I suspect that most states have very similar needs when it comes to many types of software, and software companies probably possess information on (a) which states have waived and (b) which states pay how much for how many licenses. That might be another way of taking a look at the magnitude and seeing whether there are any states that blatantly pirate software or whether everybody more or less acts the way they ought to.

MR. BARTELT: To that point, I am curious. This is for both Ralph and Steve. Since *Chavez* or since this GAO report, has the conduct changed significantly, the types of infringement, what's going on, what's happening?

I think *Allen* was the case in North Carolina where there was a video of a pirate ship under water and the state had passed a law placing it in the public domain. Are what the states are doing in these recent instances, these 165 examples that you have, different in some way than what maybe we saw in the past when you were working on this lovely Copyright Office report or the GAO report?

PROF. OMAN: Want me to sign it? [Laughter]

MR. BARTELT: This is actually a copy I poached from Maria Strong.

PROF. OMAN: Does she want me to sign it?

MR. CARSON: If anyone has a copy, Ralph will be happy to sign copies after this panel.

PROF. OMAN: If I may mention one more point, one of the shortcomings of the 1990 report by the Copyright Office is that we sent out questionnaires to the states. Some of them responded and some of them didn't.

MR. CARSON: Amazing. They didn't respond.

PROF. OMAN: They didn't put themselves on report, surprisingly.

MR. TEPP: Nick, to try to answer your question, I haven't been tracking this closely in the last fifteen or twenty years, but even within months after the 1999 decisions we were already getting at least anecdotal evidence of people coming to us and saying, "We had an infringement case against such-and-such state instrumentality. We sent a cease-and-desist letter and we had a meeting with them. They waved the Supreme Court's decision in our face and said, 'This meeting is over.'" That was discouraging.

MR. CARSON: We have almost ten minutes on this panel on U.S. Copyright Developments, and it sounds like we may have pretty much talked over these issues that have been raised so far.

I know Ann has some issues that she wants to raise.

MS. BARTOW: Yes.

MR. GRATZ: Do we have other questions on the previous topics?

MR. CARSON: Does anyone else have any questions or comments on the topics we have been talking about so far? Okay, let's get to that one person, and then we'll go to Ann.

QUESTION [Dimitrios Moscholeas, Law Office of Dimitrios Moscholeas]: Thank you. Two questions. One is regarding if you happen to know the top three worst state infringers, I'm just curious, and the three states that are really good so far.

The other is for Josh. Josh, regarding choreography, in your view should it be a mixed quantitative/qualitative criterion, not just the number of steps involved but also the

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quality, like something more than just simple steps? Should that be the right approach for choreography?

MR. SIMMONS: In terms of choreographic works, the Copyright Office says that individual dance steps are off the table completely; simple dance routines are also off the table.

One of the interesting things we looked at — again because I like to relate it back, this relates to copyright modernization — is the Copyright Office has started putting out their refusal decisions or reversing refusals, the letters from the appeal board.

One of the things that we cited to was an example of a dance by Pilobolus, which is a modern dance company. Pilobolus tried to register a dance where they form a flower, and there's a lengthy description of it in the letter. The Copyright Office said no. The Copyright Office said, "This is too simple. These are creating a geometric shape, which also is not usually protectable, and it's just simple dance steps."

To answer your question, I think that if it is just a dance step, which is what we were really dealing with in our cases, that's just off the table. In terms of simple dance routines, the Copyright Office has given us quite good guidance on what they'll protect. But I haven't had to draw those lines because we've only had these cases and we haven't heard from the other side how they would defend their copyrightability argument.

PROF. OMAN: The point I want to make is related to Josh's answer. The copyright law talks about compilation authorship; it talks about "selection," "coordination," and "arrangement." It's my understanding that coordination was added specifically to cover choreography: the coordination of one step to another step to another step which requires expert manipulation that rises to a level of artistry that can be protected by copyright.

In the other categories, in compilation, selection, or arrangement, it's very clear in the *Compendium* that there has to be more than two or three items to constitute sufficient authorship to qualify for copyright for an arrangement, for instance. Therefore, by analogy, there have to be two or three or four or five or six distinct steps in the choreographic work to qualify for copyright protection.

MR. SIMMONS: What's interesting about that distinction is if it's a selection, arrangement, and coordination copyright, then the infringement needs to be of the selection, arrangement, and coordination. You can't pluck something out of the middle of that and say, "Aha! You used part of it, and you're infringing."

We didn't get into this in my presentation, but on the Backpack Kid who did the floss dance, he actually does have a registration on a work that has the floss in it. It's a longer work with many different dance steps, and the Copyright Office actually did register that. It's called the "Flossin Dance," but it is a much longer work with a lot of different moving parts. Again, because they were paying attention, they noted that the individual dance steps were not protected; it is just the entire thing.

But the reason that that is not an issue in our case is there is no allegation that the entire set of dance steps was copied; it is just that one movement. Again, you can't just pluck that out and say, "Aha! I have a copyrightable work and you copied this one unprotectable element." It has to be the whole selection and arrangement.

MR. CARSON: With respect to the other question, I'm guessing we don't have a list of which states have been naughty and which states have been nice. Is that fair to say?

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PROF. OMAN: That would be bad politically for the senators who are proposing the legislation.

MR. CARSON: We are going to go to Ann now because we're running out of time.

PROF. BARTOW: Has anyone here litigated a 203 termination rights case?

[No response]

Nobody.

I have been thinking a lot about termination rights. I teach copyright law in many different contexts, and it's a misery to teach the termination rights to the students, even the really smart students. It is really hard to go through the problem sets and other things.

Some of the first few cases — I don't know if you're aware of them — that have been moving through the system — any work with a long tail the content owners are just fighting tooth and nail, particularly in the music industry, to try to prevent this.

In the *YMCA* case¹⁸, the guy who was with the Village People case got so many surprises — that poor guy. First, I think it was a surprise that he was even a co-author; I'm not sure; I haven't nailed that down. Then he had to go through the proceeding to determine if a joint author could exercise termination. And then he went through all the litigation. Ultimately, the content owner behaved so bad that he got attorney fees, which was a good thing. But it went on a long time. The punchline of that case is the only reason the guy (a) knew that he had termination rights and (b) decided to hold fast and fight it all the way through is his wife is an attorney. Had it not been for that, he wouldn't have had any idea.

There are many people, not just musicians, in his generation that have no idea what's out there. I don't know if anyone here has a role in trying to communicate or educate people about that, because I guess if you represent the content owner, you'd like to kind of keep it on the QT. I don't know.

Reactions? That's my best bomb-throwing for Hugh.

MR. CARSON: Amanda, you've got a response on that point? Great.

PARTICIPANT [Amanda Denton, Mitchell Williams Law Firm]: I'm in private practice. This is only really tangential to your question, but it comes up for me in practice when I'm advising about drafting agreements for work for hire and trying to instruct very immature contracting entrepreneurs about the importance of the work-for-hire provision so that they don't come up against the termination problem down the road. It is hard for them to even imagine such success that thirty-five years from now that would be even a concern. There are some limited ways to explain why work for hire is important, and *YMCA* is one of the cases that I try to use, to little effect.

MR. CARSON: Jacqueline, did you have a comment as well?

PARTICIPANT [Jacqueline Charlesworth, Alter, Kendrick & Baron, LLP, New York]: Yes, I wanted to respond quickly. There are many, many termination notices served for musical works and sound recordings. The vast majority are not litigated and the rights are renegotiated. So I think there isn't a huge amount of case law out there — there's some. The reality is that the right is important and it is exercised not infrequently.

¹⁸ *Scorpio Music S.A. v. Willis*, No. 11CV1557 BTM RBB, 2012 WL 1598043 (S.D. Cal. May 7, 2012).

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I don't want to say everyone knows about it and everyone is fully versed on it, so I think education is good.

But typically what happens is, if it is an active catalog and it is valuable, the notice is served, and then it does what it is supposed to do, which is it offers the songwriter, say, an opportunity to renegotiate the rights, and a lot of that is done in a fairly amicable way — not always, but often.

PROF. BARTOW: In addition to the authors who are not aware of their termination rights, the next group of people who need to be educated are trust and estate lawyers.

PARTICIPANT [Ms. Charlesworth]: They do know. They are involved, too. They serve notices as well.

PROF. BARTOW: They need to take copyright law.

PARTICIPANT [Ms. Charlesworth]: Yes. Actually, the intersection of trusts and estates and copyright, I agree, is an interesting area. But there are trusts and estates, and family members become involved, and you will often have kids, and sometimes you get the 50 percent majority and sometimes not. There are a lot of interesting fact patterns that come up in the termination context.

But the law does seem to be functioning. I think there are a lot of gaps, as we know, in the statute, and some of the legal questions that come up are interesting and sometimes hard to answer. The termination industry is happening, but a lot of it is behind the scenes.

MR. SIMMONS: The estate point is interesting because a lot of the cases we have seen involved the estates bringing the suits. When we've seen this come up, the original authors may be comfortable renegotiating because they have ongoing relationships in the industry.

When you then move down to the heir, sometimes they don't have the relationships and don't want to maintain the relationship inside of the industry, so they are willing to throw bombs and bring lawsuits and the rest of it. We see that not just in termination but in other kinds of cases, where there are industry norms that people are used to and relationships that they want to keep, and then their heirs, people from outside the industry, sort of go, "Hey, wait a minute. I want my money." That is not necessarily the only compensation people get from being part of these industries and having these relationships.

MR. CARSON: With that, our time is up. We have a break for twenty-five minutes. For those who want to stick around, Josh will lead us in a performance of the floss dance. [Laughter]