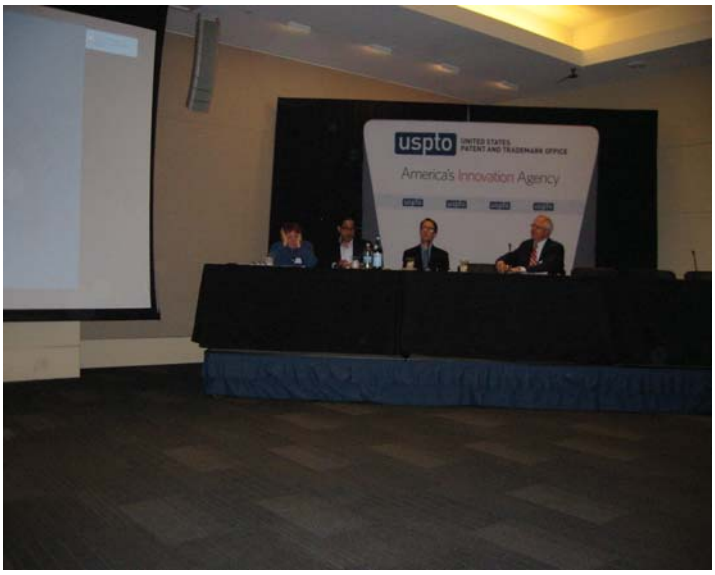
MEETING RECAPITULATION
THE PAULINE NEWMAN
IP AMERICAN INN OF COURT
THURSDAY, OCTOBER 15, 2015

The second Inn meeting of the 2015-2016 year again took place in the Auditorium below the Atrium in the Madison Building of the headquarters of the U.S. Patent & Trademark Office in Alexandria, Virginia.

There was a reception beginning at 6:00 p.m. at which food and drinks were served. The program began after 7:00 p.m.

President Judge Hubert C. Lorin introduced the program. This was the Inn's first program on copyrights. He announced the return of Rob Burns to the Inn from military service.

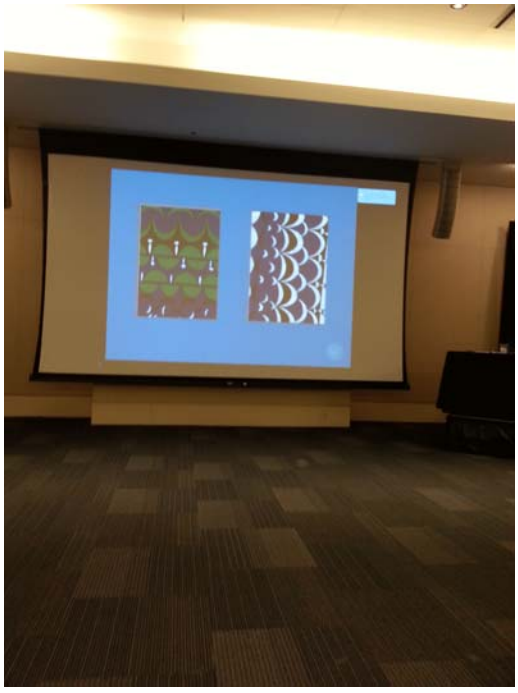
The program was in the form of a panel discussion. The panelists were former Register of Copyrights Marybeth Peters (now with the Oblon firm), former U.S. District Judge Walt Kelley (now with the Hausfeld firm), Sarang Damle, Assistant General Counsel on Legal Issues, U.S. Copyright Office, and Erik Bertin, Deputy Director, Office of Registration Policy & Practices in the U.S. Copyright Office.



Marybeth Peters discussed progress that the Copyright Office has been making, including a new Compendium of Copyright Office Practices.

Sarang Damle said the Copyright Office is not part of the U.S. Patent & Trademark Office, but rather is part of the Library of Congress. In the nineteenth century, the Librarian of Congress lobbied to have the Copyright Office placed under the Library of Congress, so that works that were submitted as copyright deposits could be added to the Library's collections. He does not know why the name Register of Copyrights rather than Registrar of Copyrights is used. It is now a subject of debate whether the Copyright Office should remain part of the Library of Congress. The Copyright Office administers Title 17 of the U.S. Code, dealing with copyrights and related matters. The Copyright Office assists the Department of Justice in litigation involving copyrights, and also advises the U.S. Trade Representative and the Department of State on copyright matters. Congress asks the Office for reports on copyrights. The Copyright Office is in the executive branch for constitutional purposes, but for other purposes it is in the legislative branch. The Register of Copyrights is appointed by the Librarian of Congress, and could be removed by the Librarian.

The 1976 Copyright Act was the last substantial revision of the copyright laws, and it is now out of date, especially with respect to digital technology. Computer software is now ubiquitous and copyrightable. It is illegal to circumvent encryption that prevents illegal copying, even it the circumvention is not itself for an illegal purpose. The purpose of the anti-circumvention legislation was to given content owners some confidence that their works will be protected when they are released to the public, by backing up technological protection with legal protection. But as software becomes more ubiquitous, and is incorporated into more and more devices, ant-circumvention becomes problematic. Legislation gives the Librarian of Congress (on the recommendation of the Register of Copyrights) the power to promulgate regulations creating exemptions from the anti-circumvention law. Creation of copyright small claims court has been proposed to make it economical feasible for enforce copyrights when the damages are for relatively small amounts.

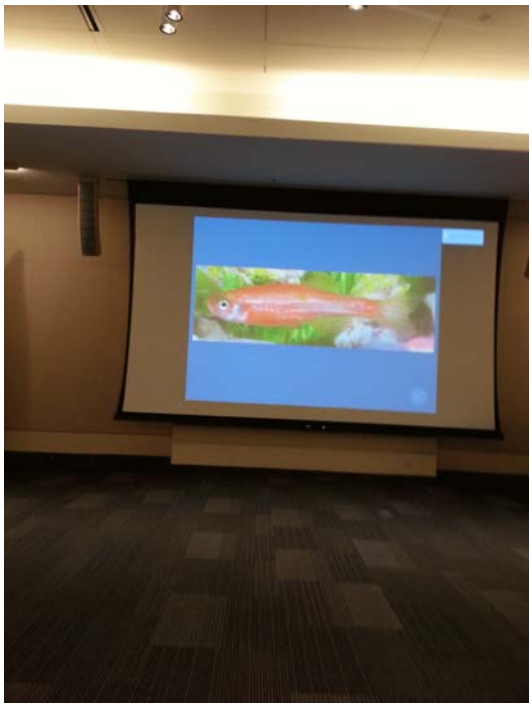


Erik Bertin discussed differences between copyright examiners (also called specialists) and patent or trademark examiners. Copyright examiners do not have to be attorneys. They need a college education, and in the performing arts division, some training in music. There are three divisions in the Copyright Office. The performing arts division handles music, drama, pantomime, motion pictures, and anything that can be performed for an audience. The literary division handles literature, cookbooks, instructional manuals, computer programs, and other textual works, i.e., anything that can be read. The visual arts division handles things that are visual in nature, e.g. paintings, sculptures, designs, i.e., anything that you can see. Two "odd balls", vessel hull designs (for boats) and mask works (for semiconductor chips) are also handled by the visual arts division.

The examiners' primary job is decide whether something is eligible for copyright protection or not. Their first question is whether something is copyrightable subject matter. Their second question is whether it is original. Originality in copyrights means new to the person who created it, not that no one has created it before. A work identical to a previously created work may be copyrightable, if it was not copied from the earlier work. They generally do not search for previously created works, but they "do not check our common sense at the door." They may have questions if something is obviously copied, e.g., because it resembles a famous work or a common design. If something is a compilation, the claimant will need permission from the owners of the works included in the compilation.

The federal courts issue about 2,000 opinions in copyright cases each year. The Copyright Offices rules on more than that number of claims every day. They do not compare works, but have a sense of where the commonalities are. Mr. Bertin displayed examples of designs to illustrate copyrightability. One design painted by a three-year-old child was copyrightable because it was painted by a human. Another design painted by a rhinoceros was not copyrightable because it was not created by a human. Copyright protection does not depend on artistic merit. The worst movies in the world are copyrightable. Copyright registration is a requirement to bring a copyright infringement lawsuit in the United States by U.S. citizens, but the requirement to register only applies to U.S. citizens. People for the Ethical Treatment of Animals has filed a suit for copyright infringement of a photograph of a monkey taken by the monkey himself.

They claimed that a copyright on the photograph did not have to be registered, because the monkey was a domiciliary of Indonesia.



Copyright protects the form in which an idea is expressed, but not the idea itself. Words, familiar symbols, typographical ornamentation, and short phrases are not copyrightable. Functional features of useful articles cannot be registered. Appeals from decisions of examiners within the Copyright Office are handled by people who are not themselves examiners. The bioluminescent property of a genetically engineered fish was not copyrightable. A technical manual can be copyrighted, but the procedures in the manual cannot be copyrighted. A book on yoga can be copyrighted, but not the yoga poses in the book. Choreography can be copyrighted, but not "social dances". Social dances are "any dance that you and I can do." Standard components of articles that the designer did not create cannot be copyrighted. Manufacturing processes cannot be copyrighted, even if they create unique designs. Shape on clothing is not registerable, but designs on clothing may be registerable. Copyright applicants, unlike trademark applicants, do not have to prove acquired distinctiveness, consumer recognition, or that a mark is distinctive as to a class of goods, they only have to prove that a design is creative. Copyrights may live on long after trademarks have expired.

Walt Kelley said that a copyright, unlike a patent, arises at the moment of creation. "You do not get your copyright from the Copyright Office, you get your registration from the Copyright Office." A copyright registration is a "ticket to sue" for copyright infringement. (A copyright application is enough to sue in some circuits.) There is a presumption that the registrant is the owner of the work, if it is registered within five years of creation. Copyrights (unlike patents) can be created by corporations (not merely assigned to corporations). Copyrights, like patents, can be abused by attempting to extend them beyond their proper scope. A patent gives you a monopoly over an idea, but is hard to obtain. Copyrights are easier to obtain, but much more limited. A copyright owner must always prove that he has a valid copyright, which reflects the more limited examination of copyrights. "Originality is always attacked, but always unsuccessfully." Defense lawyers who are patent attorneys will go on searches for prior art in copyright cases, without understanding the different role of originality in copyright law. It does not matter in copyright law if someone else created something before, so long as the plaintiff did not copy it from them.

The panel then took questions from the audience. Software can be both copyrighted and patented. Copyright cannot protect functionality in computer programs, but software is not uncopyrightable merely because it is functional. You cannot always find the owner of an "orphan work", but it is gotten easier because of technology for searching for owners. Proposals for orphan work legislation would generally require a reasonable search before using an orphan

work. The Copyright Office may be given the authority to define a reasonable search by regulations.

The program concluded after 8:00 p.m.

Respectfully submitted,

Stephen Christopher Swift
Secretary