This month we look at copyright law. I will briefly touch on three topics of great current interest. These are i) the problem of "orphan works" ii) the battle between Google and the owners of copyrights in books, over Google's goal of digitizing all of the books ever published for online viewing and iii) the controversy surrounding the Digital Millennium Copyright Act (DMCA).

An orphan work is an original work of authorship for which a good faith, prospective user cannot readily identify and/or locate the copyright owner(s) in a situation where permission from the copyright owner(s) is necessary as a matter of law. Under current law, anyone who uses an orphan work without permission runs the risk that the copyright owner(s) may bring an infringement lawsuit for substantial damages, attorneys' fees, and/or injunctive relief unless a specific exception or limitation to copyright applies. In such a situation, a productive and beneficial use of the work may be inhibited—not because the copyright owner has asserted his exclusive rights in the work, or because the user and owner cannot agree on the terms of a license—but merely because the user cannot identify and/or locate the owner and therefore cannot determine whether, or under what conditions, he or she may make use of the work. This outcome is difficult if not impossible to reconcile with the objectives of the copyright system and may unduly restrict access to millions of works that might otherwise be available to the public (e.g., for use in research, education, mainstream books, or documentary films). Accordingly, finding a fair solution to the orphan works problem remains a major goal of Congress and a top priority for the Copyright Office.

Both the 109th and the 110th Congresses considered the orphan works problem, in each case introducing legislation that built upon many of the Copyright Office's recommendations. The proposed legislation would have: (1) Limited remedies available under the Copyright Act when a user is unable to locate the copyright owner or other appropriate rights holder after conducting a good faith reasonably diligent search; (2) been applicable on a case-by-case basis, meaning that users could not assume that an orphan work would retain its orphan status indefinitely; and (3) permitted the copyright owner or other rights holder later to collect reasonable compensation from the user, but not statutory damages or attorneys' fees. Although Congress came close to enacting legislation shortly before the presidential election in 2008, it failed to do so before adjourning.

Recent high-profile litigation raised additional questions and concerns regarding orphan works in the context of mass digitization of books. The

possibility of mass digitization was not addressed by Congress in its proposed legislation. Ultimately, the issues at the heart of mass digitization are policy issues: the works may in fact have copyright owners, but it may be too labor-intensive and too expensive to search for them, or it may be factually impossible to draw definitive conclusions about who the copyright owners are or what rights they actually own. Presently, the U.S. Copyright Office is reviewing the problem of orphan works in continuation of its previous work on the subject and in order to advise Congress as to possible next steps during 2013.

As mentioned above in 2005 Google announced plans to scan and digitize "the world's books." The Association of American Publishers (AAP) and the Author's Guild (AG) both filed lawsuits against Google immediately following this announcement. In October 2012 AAP and Google settled their lawsuit. In a joint statement it was stated that as a result of the settlement, the Google Library Project will receive access to publishers' copyrighted books. Both parties also said that U.S. publishers can "choose to make available or choose to remove their books and journals digitized by Google for its Library Project." In the statement, AAP and Google said: "Apart from the settlement, U.S. publishers can continue to make individual agreements with Google for use of their other digitally-scanned works." This settlement doesn't affect the litigation between Google and the Author's Guild. The AG responded to AAP's settlement with Google in a statement:

"Google continues to profit from its use of millions of copyright-protected books without regard to authors' rights. Our class-action lawsuit on behalf of U.S. authors continues." The controversy thus continues.

The Digital Millennium Copyright Act of 1998 (DMCA) is a controversial piece of legislation. While much of the criticism of the law is misplaced, there are definite problems with it. The law contains an immunity provision for most websites that contain content submitted by third parties without the involvement of the website operator (e.g. search engines, social networking sites, etc.) known as a "safe harbor" precluding any copyright infringement lawsuit for monetary damages being filed against a website in which a third party has posted an allegedly infringing item. In order to receive this protection the website operator must "take down" the allegedly infringing material without further inquiry. The copyright holder can only go after the party posting the content, not the website. When a person receives a DMCA complaint notice from a site, they often complain the site isn't deciding the

matter in their favor. The problem is the site is not involved in the interpretation of the merits of the claim. The DMCA indirectly requires the site to not make such a determination. If it does, the site loses its immunity. Sites such as Facebook, YouTube, Twitter and any forum could not exist without the DMCA. They would be put out of business by an avalanche of copyright infringement lawsuits. Google gets 1.6 million DMCA complaints a week. Without the DMCA being in place, a significant percentage of these complaints would convert to lawsuits in which Google would be named as a defendant in addition to the party allegedly posting infringing content. It would be impossible for the company to function. An individual who thinks their content was taken down unfairly does have a potential course of action. The can file a counterclaim with the site in question. This counterclaim information is then forwarded to the copyright holder. The copyright holder than has a set time period of roughly two weeks to file a lawsuit against the person posting the content. If that occurs, the "fair use" argument can be asserted as a defense in the action. And if the lawsuit isn't filed the website operator can repost the content at issue.

One major problem with the DMCA is copyright holders sending out automated notices lacking a valid claim. A person impacted by the claim has the right to sue the copyright holder but there is a major problem. One has to prove the copyright holder "knowingly" misrepresented material facts in their claim. This is not an easy burden to meet as the other party can often just claim they negligently made a mistake, which does not meet the burden of proof.

DMCA complaints are now used not so much to protect copyrighted material, but to gain competitive advantages. It is not uncommon for parties to send out notices to try to take down competitor content or to erase negative remarks and reviews online. This is a problem that needs to be addressed soon. Google estimates that of the millions of DMCA complaints it receives, 35 percent are nonsense. DMCA is a law that needs fixing and 2013 could be the year we see some legislative action taken.