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104TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 104–554

COPYRIGHT CLARIFICATIONS ACT OF 1996

MAY 6, 1996.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MOORHEAD, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 1861]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1861) to make technical corrections in the Satellite Home Viewer Act of 1994 and other provisions of title 17, United States Code, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Copyright Clarifications Act of 1996".

SEC. 2. SATELLITE HOME VIEWER ACT.

The Satellite Home Viewer Act of 1994 (Public Law 103–369) is amended as follows:

(1) Section 2(3)(A) is amended to read as follows:

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"(A) in clause (i) by striking '12 cents' and inserting '17.5 cents per subscriber in the case of superstations that as retransmitted by the satellite carrier include any program which, if delivered by any cable system in the United States, would be subject to the syndicated exclusivity rules of the Federal Communications Commission, and 14 cents per subscriber in the case of superstations that are syndex-proof as defined in section 258.2 of title 37, Code of Federal Regulations; and' ".

(2) Section 2(4) is amended to read as follows:

"(4) Subsection (c) is amended—

"(A) in paragraph (1)—

"(i) by striking 'until December 31, 1992,';

"(ii) by striking '(2), (3) or (4)' and inserting '(2) or (3)'; and

"(iii) by striking the second sentence;

"(B) in paragraph (2)—

"(i) in subparagraph (A) by striking 'July 1, 1991' and inserting 'July 1, 1996'; and

"(ii) in subparagraph (D) by striking 'December 31, 1994' and inserting 'December 31, 1999, or in accordance with the terms of the agreement, whichever is later'; and

"(C) in paragraph (3)—

"(i) in subparagraph (A) by striking 'December 31, 1991' and inserting 'January 1, 1997';

"(ii) by amending subparagraph (B) to read as follows:

'(B) ESTABLISHMENT OF ROYALTY FEES.—In determining royalty fees under this paragraph, the copyright arbitration royalty panel appointed under chapter 8 shall establish fees for the retransmission of network stations and superstations that most clearly represent the fair market value of secondary transmissions. In determining the fair market value, the panel shall base its decision on economic, competitive, and programming information presented by the parties, including—

'(i) the competitive environment in which such programming is distributed, the cost of similar signals in similar private and compulsory license marketplaces, and any special features and conditions of the retransmission marketplace;

'(ii) the economic impact of such fees on copyright owners and satellite carriers; and

'(iii) the impact on the continued availability of secondary transmissions to the public.'; and

"(iii) in subparagraph (C), by inserting 'or July 1, 1997, whichever is later' after 'section 802(g)'.".

(3) Section 2(5)(A) is amended to read as follows:

"(A) in paragraph (5)(C) by striking 'the date of the enactment of the Satellite Home Viewer Act of 1988' and inserting 'November 16, 1988'; and".

SEC. 3. COPYRIGHT IN RESTORED WORKS.

Section 104A of title 17, United States Code, is amended as follows:

(1) Subsection (d)(3)(A) is amended to read as follows:

"(3) EXISTING DERIVATIVE WORKS.—(A) In the case of a derivative work that is based upon a restored work and is created—

"(i) before the date of the enactment of the Uruguay Round Agreements Act, if the source country of the restored work is an eligible country on such date, or

"(ii) before the date of adherence or proclamation, if the source country of the restored work is not an eligible country on such date of enactment, a reliance party may continue to exploit that derivative work for the duration of the restored copyright if the reliance party pays to the owner of the restored copyright reasonable compensation for conduct which would be subject to a remedy for infringement but for the provisions of this paragraph.".

(2) Subsection (e)(1)(B)(ii) is amended by striking the last sentence.

(3) Subsection (h)(2) is amended to read as follows:

"(2) The 'date of restoration' of a restored copyright is the later of—

"(A) January 1, 1996, the date on which the Agreement on Trade-Related Aspects of Intellectual Property referred to in section 101(d)(15) of the Uruguay Round Agreements Act enters into force with respect to the United States, if the source country of the restored work is a nation adhering to the Berne Convention or a WTO member country on such date, or

"(B) the date of adherence or proclamation, in the case of any other source country of the restored work.".

(4) Subsection (h)(3) is amended to read as follows:

"(3) The term 'eligible country' means a nation, other than the United States, that, after the date of the enactment of the Uruguay Round Agreements Act—

"(A) becomes a WTO member,

"(B) is or becomes a member of the Berne Convention, or

"(C) becomes subject to a proclamation under subsection (g).".

SEC. 4. LICENSES FOR NONEXEMPT SUBSCRIPTION TRANSMISSIONS.

Section 114(f) of title 17, United States Code, is amended—

(1) in paragraph (1), by inserting ", or ending 30 days after the Librarian issues and publishes in the Federal Register an order adopting or rejecting the report of the copyright arbitration royalty panel, if such panel is convened" after "December 31, 2000"; and

(2) in paragraph (2), by striking "and publish in the Federal Register".

SEC. 5. ROYALTY PAYABLE UNDER COMPULSORY LICENSE.

Section 115(c)(3)(D) of title 17, United States Code, is amended by striking "and publish in the Federal Register".

SEC. 6. NEGOTIATED LICENSE FOR JUKEBOXES.

Section 116 of title 17, United States Code, is amended—

(1) by amending subsection (b)(2) to read as follows:

"(2) ARBITRATION.—Parties not subject to such a negotiation may determine the result of the negotiation by arbitration in accordance with the provisions of chapter 8."; and

(2) by adding at the end the following new subsection:

"(d) DEFINITIONS.—As used in this section, the following terms mean the following:

"(1) A 'coin-operated phonorecord player' is a machine or device that—

"(A) is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by the insertion of coins, currency, tokens, or other monetary units or their equivalent;

"(B) is located in an establishment making no direct or indirect charge for admission;

"(C) is accompanied by a list which is comprised of the titles of all the musical works available for performance on it, and is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

"(D) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

"(2) An 'operator' is any person who, alone or jointly with others—

"(A) owns a coin-operated phonorecord player;

"(B) has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or

"(C) has the power to exercise primary control over the selection of the musical works made available for public performance on a coin-operated phonorecord player.".

SEC. 7. LIMITATIONS ON EXCLUSIVE RIGHTS; COMPUTER PROGRAMS.

Section 117 of title 17, United States Code, is amended as follows:

(1) Strike "Notwithstanding" and insert the following:

"(a) MAKING OF ADDITIONAL COPY OR ADAPTATION BY OWNER OF COPY.—Notwithstanding".

(2) Strike "Any exact" and insert the following:

"(b) LEASE, SALE, OR OTHER TRANSFER OF ADDITIONAL COPY OR ADAPTATION.—Any exact".

(3) Add at the end the following:

"(c) MACHINE MAINTENANCE OR REPAIR.—Notwithstanding the provisions of section 106, it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine, provided that—

"(1) such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed, and

"(2) with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not

accessed or used other than to make such new copy by virtue of the activation of the machine.

"(d) DEFINITIONS.—For purposes of this section—

"(1) the term 'maintenance' of a machine means servicing the machine in order to make it work in accordance with its original specifications and any changes to those specifications authorized for that machine; and

"(2) the term 'repair' of a machine means restoring it to the state of working in accordance with its original specifications and any changes to those specifications authorized for that machine.".

SEC. 8. PUBLIC BROADCASTING COMPULSORY LICENSE.

Section 118 of title 17, United States Code, is amended as follows:

(1) Subsection (b) is amended by striking paragraph (1) and redesignating paragraphs (2) and (3) as paragraphs (1) and (2), respectively.

(2) Subsection (b)(2) (as redesignated by paragraph (1) of this section) is amended by striking "(2)" each place it appears and inserting "(1)".

(3) Subsection (e) is amended to read as follows:

"(e)(1) Except as expressly provided in this subsection, this section shall not apply to works other than those specified in subsection (b).

"(2) Owners of copyright in nondramatic literary works and public broadcasting entities may, during the course of voluntary negotiations, agree among themselves, respectively, as to the terms and rates of royalty payments without liability under the antitrust laws. Any such terms and rates of royalty payments shall be effective upon being filed in the Copyright Office, in accordance with regulations that the Register of Copyrights shall prescribe.".

SEC. 9. REGISTRATION AND INFRINGEMENT ACTIONS.

Section 411(b)(1) of title 17, United States Code, is amended to read as follows:

"(1) serves notice upon the infringer, not less than 48 hours before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and".

SEC. 10. COPYRIGHT OFFICE FEES.

(a) FEE INCREASES.—Section 708(b) of title 17, United States Code, is amended to read as follows:

"(b) In calendar year 1996 and in any subsequent calendar year, the Register of Copyrights, by regulation, may increase the fees specified in subsection (a) in the following manner:

"(1) The Register shall conduct a study of the costs incurred by the Copyright Office for the registration of claims, the recordation of documents, and the provision of services. The study shall also consider the timing of any increase in fees and the authority to use such fees consistent with the budget.

"(2) The Register shall have discretion to increase fees up to the reasonable costs incurred by the Copyright Office for the services described in paragraph (1) plus a reasonable inflation adjustment to account for any estimated increase in costs.

"(3) Any newly established fee based on paragraph (2) shall be rounded off to the nearest dollar, or for a fee less than $12, rounded off to the nearest 50 cents.

"(4) The fees shall be fair and equitable and give due consideration to the objectives of the copyright system.

"(5) If upon completion of the study, the Register determines that the fees should be increased, the Register shall prepare a proposed fee schedule and submit the schedule with the accompanying economic analysis to the Congress. The fees proposed by the Register may be instituted after the end of 120 days after the schedule is submitted to the Congress unless, within that 120-day period, a law is enacted stating in substance that the Congress does not approve the schedule.".

(b) DEPOSIT OF FEES.—Section 708(d) of such title is amended to read as follows:

"(d)(1) Except as provided in paragraph (2), all fees received under this section shall be deposited by the Register of Copyrights in the Treasury of the United States and shall be credited to the appropriations for necessary expenses of the Copyright Office. Such fees that are collected shall remain available until expended. The Register may, in accordance with regulations that he or she shall prescribe, refund any sum paid by mistake or in excess of the fee required by this section.

"(2) In the case of fees deposited against future services, the Register of Copyrights shall request the Secretary of the Treasury to invest in interest-bearing securities in the United States Treasury any portion of the fees that, as determined by the Register, is not required to meet current deposit account demands. Funds shall

be invested in securities that permit funds to be available to the Copyright Office at all times if they are determined to be necessary to meet current deposit account demands. Such investments shall be in public debt securities with maturities suitable to the needs of the fund, as determined by the Register of Copyrights, and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities.

"(3) The income on such investments shall be deposited in the Treasury of the United States and shall be credited to the appropriations for necessary expenses of the Copyright Office.".

SEC. 11. COPYRIGHT ARBITRATION ROYALTY PANELS.

(a) ESTABLISHMENT AND PURPOSE.—Section 801 of title 17, United States Code, is amended—

(1) in subsection (b)(1) by striking "and 116" in the first sentence and inserting "116, and 119";

(2) in subsection (c) by inserting after "panel" at the end of the sentence the following:

", including—

"(1) authorizing the distribution of those royalty fees collected under sections 111, 119, and 1005 that the Librarian has found are not subject to controversy; and

"(2) accepting or rejecting royalty claims filed under sections 111, 119, and 1007 on the basis of timeliness or the failure to establish the basis for a claim"; and

(3) by amending subsection (d) to read as follows:

"(d) SUPPORT AND REIMBURSEMENT OF ARBITRATION PANELS.—The Librarian of Congress, upon the recommendation of the Register of Copyrights, shall provide the copyright arbitration royalty panels with the necessary administrative services related to proceedings under this chapter, and shall reimburse the arbitrators at such intervals and in such manner as the Librarian shall provide by regulation. Each such arbitrator is an independent contractor acting on behalf of the United States, and shall be paid pursuant to a signed agreement between the Library of Congress and the arbitrator. Payments to the arbitrators shall be considered costs incurred by the Library of Congress and the Copyright Office for purposes of section 802(h)(1).".

(b) PROCEEDINGS.—Section 802(h)(1) of title 17, United States Code, is amended—

(1) by amending the heading to read "DEDUCTION OF COSTS OF LIBRARY OF CONGRESS AND COPYRIGHT OFFICE FROM ROYALTY FEES.—";

(2) in the first sentence by inserting "to support distribution proceedings" after "Copyright Office"; and

(3) by amending the third sentence to read as follows: "In ratemaking proceedings, the Librarian of Congress and the Copyright Office may assess their reasonable costs directly to the parties to the most recent relevant arbitration proceeding, 50 percent of the costs to the parties who would receive royalties from the royalty rate adopted in the proceeding and 50 percent of the costs to the parties who would pay the royalty rate so adopted, subject to the discretion of the arbitrators to assess costs under subsection (c).".

SEC. 12. DIGITAL AUDIO RECORDING DEVICES AND MEDIA.

Section 1007(b) of title 17, United States Code, is amended by striking "Within 30 days after" in the first sentence and inserting "After".

SEC. 13. TREATMENT OF PRE-1978 PUBLICATION OF SOUND RECORDINGS.

Section 303 of title 17, United States Code, is amended—

(1) by striking "Copyright" and inserting "(a) Copyright"; and

(2) by adding at the end the following:

"(b) The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.".

SEC. 14. CONFORMING AMENDMENT.

Paragraph (5) of section 4 of the Digital Performance Right in Sound Recordings Act of 1995 is redesignated as paragraph (4).

SEC. 15. EFFECTIVE DATES.

(a) IN GENERAL.—Except as provided in subsection (b), the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) SATELLITE HOME VIEWER ACT.—The amendments made by section 1 shall be effective as if enacted as part of the Satellite Home Viewer Act of 1994 (Public Law 103–369).

PURPOSE AND SUMMARY

H.R. 1861 accomplishes many purposes. Some of its provisions will assist the U.S. Copyright Office in carrying out its duties, including giving the Office the ability to set reasonable fees for basic services, subject to congressional approval. Others correct or clarify the language in several recent amendments to the law so that Congress' original intent can be better achieved. Two provisions resolve problems created by recent judicial interpretations of provisions of the copyright law. One of these amendments makes clear that the distribution of musical disks or tapes before 1978 did not publish the musical compositions embodied in the disks or tapes. The other amendment ensures that independent service organizations have the ability to activate a computer to maintain and repair its hardware components without being held liable by a court for copyright infringement due to that activation alone.

BACKGROUND AND NEED FOR THE LEGISLATION

The Copyright Act was last generally revised in 1976, in response to the many technological changes that had occurred since the enactment of the 1909 Act. Since 1976, Congress regularly has had to address new issues, especially those raised by new technologies or new methods of exploitation. Each session of Congress has produced at least one major amendment to the Copyright Act.

The U.S. Copyright Office is the agency charged with primary responsibility for implementing the provisions of the Copyright Act. In early 1995, the Copyright Office submitted to the Subcommittee on Courts and Intellectual Property a number of recommendations to clarify or correct the following: the Copyright Fees and Technical Amendments Act of 1989, the Audio Home Recording Act of 1992, the Copyright Royalty Tribunal Reform Act of 1993, the Satellite Home Viewer Act of 1994, and the Digital Performance Right in Sound Recordings Act of 1995. On June 15, 1995, H.R. 1861 was introduced.

HEARINGS

The Committee's Subcommittee on Courts and Intellectual Property held a hearing on H.R. 1861 on November 9, 1995 in Room 2237 Rayburn House Office Building. Testimony was received from Ms. Marybeth Peters, Register of Copyrights, United States Copyright Office, The Library of Congress (Serial #32).

COMMITTEE CONSIDERATION

On December 13, 1995, the Subcommittee held a markup on H.R. 1861. The Subcommittee adopted, by voice vote, an amendment in the nature of a substitute to H.R. 1861 offered by Chairman Moorhead, and favorably reported, by voice vote, a quorum being present, the amendment in the nature of a substitute to the full Committee. On March 12, 1996, the Committee adopted, by voice vote, an amendment offered by Mr. Moorhead to the amendment in the nature of a substitute, and favorably reported, by voice vote, a quorum being present, the amendment in the nature of a sub-

stitute, as amended, to the Committee of the Whole House on the State of the Union.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1861, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 17, 1996.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1861, the Copyright Clarifications Act of 1996.

Enactment of H.R. 1861 would affect direct spending and receipts; therefore, pay-as-you-go procedures would apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM
(For June E. O'Neill, Director).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 1861.
2. Bill title: Copyright Clarification Act of 1996.
3. Bill status: As ordered reported by the House Committee on the Judiciary on March 12, 1996.

4. Bill purpose: H.R. 1861 would amend the United States Copyright Act to make numerous technical corrections and clarifications. Specifically, the bill would:

eliminate certain reporting requirements;

enable the Librarian of Congress to distribute uncontested royalties without convening a Copyright Arbitration Royalty Panel (CARP);

authorize the Librarian of Congress to deduct expenses for the CARP from the royalties collected and distributed by the government;

clarify the arbitration proceedings with regard to jukebox copyright licenses;

shorten the amount of time in which transmitters of live broadcasts must serve notice that they wish to copyright a broadcast from 10 days to 48 hours; and

enable the owner or lessee of a computer to duplicate a copyrighted computer program in order to protect the program if the computer needs to be repaired or maintained.

In addition, the bill would authorize the Register of Copyrights to adjust the current Copyright Office fees in order to reflect the fair cost of registering claims and providing services. The bill specifies that the fees would be credited as offsetting collections to the appropriations account.

5. Estimated Cost to the Federal Government: Under current law, the Copyright Office has the authority to collect and spend user fees; H.R. 1861 would enable the office to increase the amount of such fees to cover its expenses, thus eliminating the need for an annual appropriation starting in 1998. (The 1996 appropriation—net of offsetting collections—is $11 million.) Because H.R. 1861 would enable the Copyright Office to collect and spend the fees without further authorization, the net impact of the fees on direct spending would be roughly zero.

H.R. 1861 also would also authorize the Librarian of Congress to collect and distribute fees for rate making. These fees would increase federal receipts and outlays by about $1 million each fiscal year 1997–2000.

[By fiscal year, in millions of dollars]

	1996	1997	1998	1999	2000
Changes to direct spending and revenues:					
Estimated budget authority	.....	1	1	1	1
Estimated outlays	.....	1	0	1	1
Estimated revenues	.....	1	1	1	1

The costs of this bill fall within budget function 370.

6. Basis of estimate.

MANDATORY SPENDING

Copyright Office Fees.—Under current law, the Copyright office is authorized to collect and spend about $20 million in fees each year. In fiscal year 1996 the Copyright Office received an additional $11 million in appropriations for total net budget authority of $31 million. H.R. 1861 would authorize the Copyright Office to set fees according to the fair cost of registering copyright claims

and providing services. CBO estimates that the Copyright Office would conduct a study on fees in 1997 and would become fully fee-funded in fiscal year 1998, eliminating the need for appropriations.

Under current law, the Copyright Office assesses most of its fees on copyright registration claims. CBO expects that as the office begins to raise fees the number of copyright registrations will begin to fall. As a result of the decrease in demand and the expiration of a certain fee in 1998, CBO expects the Copyright Office to collect slightly less in fiscal years 1998–2000 than the $31 million in budget authority appropriated in 1996. CBO estimates that the office would raise an additional $8 million in fees for total budget authority of $28 million. Although the Copyright Office could collect and spend the fees without further authorization, we would expect the appropriations acts to specify in advance the amount of fees that could be spent in any fiscal year.

Changes to Royalty Fees.—H.R. 1861 would change certain statutory royalty payments for carriage of network signals by satellite carriers. These royalty payments are collected by the federal government as governmental receipts and are distributed without appropriation as direct spending. Because H.R. 1861 would raise the statutory rates to the amounts currently in effect as the result of a 1992 arbitration ruling, CBO estimates that the bill would cause no change in direct spending or receipts.

Under current law, the Copyright Office convenes a Copyright Arbitration Royalty Panel to arbitrate disputes between copyright owners and users. The members of the CARP, who are not government employees, bill the parties to the arbitration directly for their expenses. H.R. 1861 would allow the Librarian of Congress to deduct the expenses of the CARP for distribution proceedings from the royalties held in escrow by the government. CBO estimates that this provision would have no budgetary impact because it would not affect the amount of royalties collected or the amount of money disbursed by the government.

The Copyright Office also convenes a CARP to set royalty rates. H.R. 1861 would authorize the Librarian of Congress to collect fees from parties to a ratemaking proceeding and distribute those fees to members of the CARP to cover their expenses. Based on information from the Copyright Office, CBO estimates that the Librarian would collect and distribute fees of about $1 million each year. These fees would increase federal receipts and outlays by about $1 million each year. The net budgetary impact of such fees would be roughly zero over time.

H.R. 1861 would require the Librarian of Congress to convene a CARP to establish royalty rates if copyright owners and jukebox operators fail to negotiate an agreement on rates. If a CARP were to be convened when the current licensing agreement expires in 1999, the office would likely collect and distribute disputed royalties of about $7 million a year. Based on information from the Copyright Office, CBO expects that the jukebox owners will successfully negotiate another agreement with copyright owners in 1999 and that the royalty payments will not be collected and distributed by the office. Therefore, we do not expect that this provision would affect direct spending and receipts.

SPENDING SUBJECT TO APPROPRIATIONS

CBO estimates that eliminating certain reporting requirements would save the Copyright Office about $150,000 in each of fiscal years 1997–1998. Because additional fee income would be available to cover the office's expenses, net outlays from appropriations would decline from $11 million in 1996 to close to zero in 1998 and subsequent years.

CBO estimates that the other provisions of the bill would have no budgetary impact.

7. Pay-as-you-go considerations: Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1998. CBO estimates that enactment of H.R. 1861 would affect direct spending and receipts, as shown in the following table.

[By fiscal year, in millions of dollars]

	1996	1997	1998
Change in outlays	0	1	0
Change in receipts	0	1	1

8. Estimated impact on State, local, and tribal governments: H.R. 1861 contains no intergovernmental mandates as defined in Public Law 104–4 and would impose no direct costs on state, local, or tribal governments.

9. Estimated impact on the private sector: This bill would impose no new private sector mandates that would exceed the $100 million threshold specified in Public Law 104–4. The increases in copyright fees authorized by the bill would total less than $10 million a year

10. Previous CBO estimate: None.

11. Estimate prepared by: Federal Cost Estimate: Rachel Forward State and Local Government Impact: Karen McVey; Private Sector Impact: Matt Eyles.

12. Estimate approved by: Robert A. Sunshine, (for Paul N. Van de Water, Assistant Director for Budget Analysis).

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 1861 will have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS

Section 1—Short title

This section sets forth the title of the Act as the "Copyright Clarifications Act of 1996."

Section 2—Satellite Home Viewer Act

The Satellite Home Viewer Act of 1994 contained certain drafting errors which were the result of amending the Copyright Act without taking into account changes made by the Copyright Royalty Tribunal Reform Act of 1993.

Subsection (1) clarifies the royalty rates that are paid by satellite carriers for retransmission of network and superstation broadcast signals to satellite dish owners for private home viewing. Congress intended that the rates adopted in the law should be the same as the rates that were set by arbitration in 1992. However, the Satellite Home Viewer Act of 1994 reversed the rates; the current law states that 17.5 cents should be paid for signals not subject to the FCC's syndicated exclusivity blackout rules, and 14 cents per subscriber for signals subject to such rules. Subsection (1) corrects that reversal.

Subsection (2) corrects the section numbers, and accompanying references, to take into account the changes made to title 17 by the Copyright Royalty Tribunal Reform Act of 1993.

Subsection (3) deletes reference to the effective date of the Satellite Home Viewer Act of 1988 to avoid any confusion that might result from two Acts of the same name, and inserts the effective date of the Satellite Home Viewer Act of 1988, which was November 16, 1988.

Section 3—Copyright in restored works

In 1994, a new Section 104A was created to restore copyright protection to certain preexisting works from other World Trade Organization ("WTO") and Berne Convention member countries that had fallen into the public domain in the United States. During the drafting process, some inadvertent errors were made. These errors alter the intended meaning of the statute or create accidental ambiguities. In order to avoid constitutional challenges and unnecessary litigation, the amendments to Section 104A in H.R. 1861 correct the errors.

1. Provision for already-created derivative works

The first part of the amendment to section 104A deals with establishing special treatment for already-created derivative works. The problem with this subsection was created by a word change in the bill during technical and conforming revisions. This change inadvertently altered the effect of the subsection and in large part nullified its purpose. The amendment in H.R. 1861 substitutes the word "restored" for the word "derivative" in two places in subsection (3), entitled "Existing Derivative Works," in order to reverse that mistaken change, and inserts the word "derivative" in one other place in that subsection in order to ensure clarity.

In enacting section 104A, Congress considered the fact that restoring copyright in works that are currently in the public domain creates a potential problem: people may have used these works as the basis for new derivative works, such as motion pictures made from novels. At the time the new derivative work was created, the use of the underlying work was completely lawful, since it was in the public domain. Once copyright in the underlying work is restored, however, the continued use of the derivative work without the consent of the owner of the copyright in the underlying work would constitute copyright infringement. *See Stewart* v. *Abend,* 495 U.S. 207 (1990).

Witnesses at the hearings on the bill testified that preventing the creators of derivative works from making use of those works

might raise Constitutional problems under both the Copyright Clause and the Takings Clause of the Fifth Amendment. Accordingly, Congress included a special provision for derivative works based on restored works where the derivative work was created before the date of restoration, allowing the owner of the derivative work to continue to use it even after the one-year sell-off period provided to all reliance parties, upon payment of reasonable compensation to the copyright owner of the restored work. See SAA at paragraph B.1.c.(3), 1994 U.S.C.C.A.N. 4040, 4292.

In a drafting error, the phrase "if the source country of the restored work is an eligible country" was changed to "if the source country of the derivative work is an eligible country." Since "eligible country" is defined in the statute to exclude the United States, the effect of this word change was to exclude all U.S. derivative works from the benefit of this provision—the major constituency of works that the provision was meant to protect. In other words, U.S. derivative works based on now-restored foreign works that were in the public domain at the time the derivative works were created can no longer legally be exploited in this country without the consent of the owner of the foreign work. The amendment corrects that unintended inequity.

2. Publication of list of notices of intent

The second part of the amendment deletes the requirement for the Copyright Office to publish in the Federal Register a cumulative annual list of notices of intent to enforce restored copyrights filed with the Office. The Office is already required to publish a list of such notices every four months, and publication of a cumulative annual list would be expensive and duplicative.

3. Date of copyright restoration

The third part of the amendment adds the phrase "January 1, 1996" to the statute's definition of "date of restoration" to make explicit the date on which these foreign copyrights were restored.

Despite Congressional intent that the restoration date be January 1, 1996, the statutory language is potentially ambiguous on this point. The "date of restoration" is defined as the date on which the Trade Related Aspects of Intellectual Property Agreement ("TRIPs") entered into force with respect to the United States for works from countries that are members of the Berne Convention or the WTO on that date. The question of when the TRIPs agreement entered into force is subject to interpretation. TRIPs is part of the overall WTO agreement, which generally entered into force on January 1, 1995. However, the WTO agreement allowed a one-year grace period before compliance with TRIPs itself was required. The TRIPs portion of the agreement can therefore be considered to have its own effective date of January 1, 1996.

In enacting new section 104A, Congress intended a 1996 date for the restoration of foreign copyrights. The statute itself requires the Copyright Office to issue regulations governing restored copyrights no later than 90 days before the TRIPs agreement entered into force with respect to the United States. §104A(e)(1)(D)(i). If the TRIPs effective date (and therefore the restoration date) were January 1, 1995, the statute did not become law until 3 weeks prior

to that date, making it impossible for the Copyright Office to comply with a deadline of 90 days in advance.

The Statement of Administrative Action ("SAA"), approved by Congress and the statute's legislative history both confirm this interpretation. The SAA unambiguously states that the foreign copyrights will be restored on the date "when the TRIPs Agreement's obligations take effect for the United States." The Joint Report on the Senate version makes this explicit, stating that the "bill would automatically restore copyright protection for qualifying works * * * one year after the WTO comes into being." Joint Report of the Committee on Finance, Committee on Agriculture, Nutrition and Forestry, and Committee on Governmental Affairs of the United States Senate to accompany the Uruguay Round Agreements Act, S. 2467, S. Rep. No. 412, 103d Cong., 2d Sess. 225 (1994).

Since enactment of the TRIPs Agreement, the Copyright Office and the White House have attempted to resolve any ambiguity. The Copyright Office published a notice of policy decision concluding that January 1, 1996 is the date of restoration. 60 Fed. Reg. 7793 (February 9, 1995). The President issued a proclamation declaring January 1, 1996 to be the date on which the TRIPs obligations take effect for the United States. Proclamation 6780 of March 23, 1995, 60 Fed. Reg. 15845 (1995).

Nevertheless, some commentators have concluded that the language of the statute requires a restoration date of January 1, 1995. See, e.g., William F. Patry, Copyright and the GATT: An Interpretation and Legislative History of the Uruguay Round Agreements Act 31-36 (1995). Apart from the inconsistency with legislative intent, this reading causes problems. First, since the Copyright Office did not (and could not administratively) start to accept notices of intent to enforce restored copyrights until January 1,1996, it would effectively reduce the window of opportunity to file such notices from two years to one. Second, it would affect which foreign works would be restored, and therefore made unavailable for free use by the American public.

4. Definition of "eligible country" for purposes of determining who qualifies as "reliance party"

Finally, the definition of "eligible country" creates a potential unintended problem when read in the context of the definition of who qualifies as a "reliance party." The amendment revises the definition of "eligible country" to resolve this problem.

A "reliance party" is given certain limited rights to continue exploiting restored works. In order to qualify as a reliance party, the time period of when one engaged in acts with respect to the restored work is critical. Ordinarily, these acts must have begun prior to the date of the statute's enactment (December 8, 1994). If the source country of the work has become an "eligible country" after that date, however, the acts must have begun prior to the date it became an eligible country. The problem is that "eligible country" is defined as "a nation, other than the United States, that is a WTO member country, adheres to the Berne Convention, or is subject to a presidential proclamation." In the context of determining whether someone is a reliance party, this could be read to mean that the party's acts must have begun prior to the date that

the source country became an eligible country by joining the Berne Convention. Some countries joined the Berne Convention when it was established in 1886; others joined at subsequent points between that date and December 8, 1994. Obviously, no one will be able to qualify as a reliance party if his or her use of a work had to begin before 1886.

The amendment therefore expands the definition of "eligible country" to clarify the relevant dates of the events leading to eligibility. The reference to a country that "is a WTO member" is changed to refer to a country that "after the date of enactment of this Act, becomes a WTO member"; the reference to a country that "adheres to the Berne Convention" is changed to refer to a country that "on such date [of enactment] is, or after such date becomes, a member of the Berne Convention"; and the relevant presidential proclamation is defined as one that takes place "after such date."

Section 4.—Licenses for nonexempt subscription transmissions

Subsection (1) is intended to avoid the possibility of a gap in the effective dates of the royalty rates established in 1996 and 2000–2001 for the public performance of sound recordings by nonexempt subscription digital transmission services. The Digital Performance Right in Sound Recordings Act of 1995 directed that the rates established in 1996 are to expire on December 31, 2000. New rates are to be established during 2000. However, it is possible that the work of the copyright arbitration royalty panel ("CARP") and of the Librarian of Congress in reviewing the CARP's report will not be concluded by December 31, 2000, thereby creating a period in which no rates apply. Subsection (1) avoids this result by stating that the effective date of the rates set in 1996 last until December 31, 2000, or until 30 days after the Librarian has published in the Federal Register his or her decision to adopt or reject the CARP's rate adjustment decision. Resorting to this second option will be unnecessary if a CARP is not convened, or if the CARP and the Librarian conclude their functions before December 31, 2000.

Subsection (2) deletes the phrase from Section 114(f) which authorizes a copyright arbitration royalty panel to publish its decision in the Federal Register. This was an inadvertent mistake, since only government agencies may publish in the Federal Register. Any decision of a CARP will be published by the Librarian of Congress pursuant to the provisions of chapter 8 of the Copyright Act.

Section 5.—Royalty payable under compulsory license

This section deletes the phrase from Section 115(c) which authorizes a copyright arbitration royalty panel to publish its decision in the Federal Register. Since only agencies may publish in the Federal Register, the decision of the CARP will be published by the Librarian of Congress pursuant to the provisions of chapter 8 of the Copyright Act.

Section 6.—Negotiated license for jukeboxes

The Copyright Royalty Tribunal Reform Act of 1993 eliminated the old § 116 jukebox compulsory license and replaced it with the § 116A negotiated jukebox license adopted in the Berne Convention implementing legislation in 1988. This produced two unintended

results. It eliminated the definitions of a "jukebox" and a "jukebox operator," and it sanctioned the possibility of an arbitration proceeding which is not a copyright arbitration royalty panel (CARP) arbitration. This section restores the original definitions as they appeared in the Copyright Act in 1978, and it clarifies that any jukebox negotiated license which requires arbitration is to be a CARP proceeding.

Section 7. Limitations on exclusive rights; computer programs

This legislation amends Section 117 to ensure that independent service organizations do not inadvertently become liable for copyright infringement merely because they have turned on a machine in order to service its hardware components.

When a computer is activated, that is when it is turned on, certain software or parts thereof (generally the machine's operating system software) is automatically copied into the machine's random access memory, or "RAM". During the course of activating the computer, different parts of the operating system may reside in the RAM at different times because the operating system is sometimes larger than the capacity of the RAM. Because such copying has been held to constitute a "reproduction" under § 106 of the Copyright Act,[1] a person who activated the machine without the authorization of the copyright owner of that software could be liable for copyright infringement. This legislation has the narrow and specific intent of relieving independent service providers, persons unaffiliated with either the owner or lessee of the machine, from liability under the Copyright Act when, solely by virtue of activating the machine in which a computer program resides, they inadvertently cause an unauthorized copy of that program to be made.

The legislation is narrowly crafted to achieve the foregoing objective without prejudicing the rights of copyright owners of computer software. Thus, for example, the amendment does not relieve from liability persons who make unauthorized adaptations, modifications or other changes to the software. The amendment also does not relieve from liability persons who make any unauthorized copies of software other than those caused solely by activation of the machine.

The operative provisions, and limitations, are in two new subsections to Section 117: subsections (c) and (d).

Subsection (c) delineates the specific circumstances under which a reproduction of a computer program would not constitute infringement of copyright. The goal is to maintain undiminished copyright protection afforded under the Copyright Act to authors of computer programs, while making it possible for third parties to perform servicing of the hardware. It states that it is not an infringement of copyright for the owner or lessee of a machine to make or authorize the making of a copy of a computer program provided that the following conditions are met:

First, subsection (c) itself makes clear that the copy of the computer program must have been made solely and automatically by virtue of turning on the machine in order to perform repairs or

[1] See *MAI Sys. Corp.* v. *Peak Computer,* 991 F.2d 511 (9th Cir. 1993), cert. dismissed, 114 S.Ct. 671 (1994).

maintenance on the hardware components of the machine. Moreover, the copy of the computer program which is reproduced as a direct and sole consequence of activation must be an authorized copy that has lawfully been installed in the machine. Authorized copies of computer programs are only those copies that have been made available with the consent of the copyright owner. Also, the acts performed by the service provider must be authorized by the owner or lessee of the machine.

Second, in accordance with paragraph (c)(1), the resulting copy may not be used by the person performing repairs or maintenance of the hardware components of the machine in any manner other than to effectuate the repair or maintenance of the machine. Once these tasks are completed, the copy of the program must be destroyed, which generally will happen automatically once the machine is turned off.

Third, as is made clear in paragraph (c)(2), the amendment is not intended to diminish the rights of copyright owners of those computer programs, or parts thereof, that also may be loaded into RAM when the computer is turned on, but which did not need to be so loaded in order for the machine to be turned on. A hardware manufacturer or software developer might, for example, provide diagnostic and utility programs that load into RAM along with or as part of the operating system, even though they market those programs as separate products—either as freestanding programs, or pursuant to separate licensing agreements. Indeed, a password or other technical access device is sometimes required for the owner of the machine to be able to gain access to such programs. In other cases, it is not the hardware or software developer that has arranged for certain programs automatically to be reproduced when the machine is turned on; rather, the owner of the machine may have configured its computer to load certain applications programs into RAM as part of the boot-up process (such as a word processing program on a personal computer). This amendment is not intended to derogate from the rights of the copyright owners of such programs. In order to avoid inadvertent copyright infringement, these programs need to be covered by subsection (c), but only to the extent that they are automatically reproduced when the machine is turned on. This legislation is not intended to legitimize unauthorized access to and use of such programs just because they happen to be resident in the machine itself and are reproduced with or as part of the operating system when the machine is turned on. According to paragraph (c)(2), if such a program is accessed or used without the authorization of the copyright owner, the initial reproduction of the program shall not be deemed exempt from infringement under subsection (c).

Subsection (d) defines two terms not previously defined by the Copyright Act. Paragraph (1) defines the term "maintenance." These acts can include, but are not limited to, cleaning the machine, tightening connections, installing new components such as memory chips, circuit boards and hard disks, checking the proper functioning of these components, and other similar acts.

Paragraph (2) of subsection (d) defines the term "repair." Acts of repairing the hardware include, but are not limited to, replacing worn or defective components such as memory chips, circuit boards

and hard disks, correcting the improper installation of new components, and other similar acts.

Both paragraphs (1) and (2) of subsection (d) are subject to the same limitations, which are intended to clarify that activating a machine in order to perform maintenance or repair does not constitute infringement under subsection (c) if the maintenance or repair is undertaken to make the machine work in accordance with the parameters specified for such a machine and its component parts. Because technological improvements may lead customers to upgrade their machines, the language of both definitions authorizes service providers to maintain those components of the hardware that have been installed since the time the machine was originally acquired, or to install new components. But their acts shall be deemed non-infringing under subsection (c) only if the components being serviced have been lawfully acquired and installed. Finally, the terms "maintenance" and "repair" do not include unauthorized adaptations, modifications, error corrections or any other changes to any software which may be in the machine being serviced.

Section 8.—Public broadcasting compulsory license

This section eliminates an inconsistency created by the Copyright Royalty Tribunal Reform Act of 1993. This Act directs the Librarian of Congress to collect royalty rate proposals from public broadcasters and copyright owners and then to "proceed on the basis of the proposals." Formerly, the Copyright Royalty Tribunal received such proposals and then conducted a proceeding. The Tribunal Reform Act replaced the Tribunal's name with that of the Librarian's each place it appeared in § 118. Ratemaking authority to decide conflicting rate proposals, however, is within the jurisdiction of the copyright arbitration royalty panels, and therefore the Librarian cannot "proceed" with the rate proposals. This section therefore eliminates the provision.

However, the Committee notes 37 C.F.R. 251.63(b) of the Copyright Office's rules which permits the Librarian to adopt uncontested, settled rate proposals. No action taken under this Act is intended to adversely affect the operation of that rule.

This section also eliminates as obsolete subsection (e)(2) of § 118, which required the Register of Copyrights to submit a report to Congress in 1980 as to the extent of voluntarily negotiated public broadcasting licenses.

Section 9.—Registration and infringement actions

This section amends section 411(b) of the Copyright Act, which covers works that are being transmitted "live" at the same time that they are being fixed in tangible form for the first time. Currently, copyright owners must give the would-be infringer at least a 10-day advance notice that a copyright is being claimed in the work. When notice is given, an injunction can be obtained to prevent the unauthorized use of the work.

This provision has proven problematic when applied to a number of sporting events, especially elimination play-offs. In many instances the teams and the times of the games are not known 10 days in advance. Therefore, this notice provision is amended to provide for notice of not less than 48 hours.

Section 10.—Copyright Office fees

The Copyright Fees and Technical Amendments Act of 1989 established a fee schedule for Copyright Office services which could be adjusted in 1995 and every fifth year thereafter according to changes in the Consumer Price Index.

Actual experience with the fee adjustment mechanism, however, has highlighted certain problems that underscore the need for reform. Because of the relatively low inflation of the early 1990s, the change in the Consumer Price Index was not great enough to justify incurring the costs associated with publicizing and administering a new fee schedule. Therefore, the Copyright Office did not publish a new fee schedule in 1995, and is required by the current statute to wait until 2000 to modify its fees.

However, it is not clear from the current wording of the law whether, if the Copyright Office were to adopt a new fee schedule in 2000, it could take into account the inflation of the entire ten-year period since the last fee schedule was adopted, 1990–2000, or whether it could only take into account the inflation of the period 1995–2000. The fee schedule adopted in 1989 is not based on a cost recovery model. Consequently, merely adjusting fees based on rises in the Consumer Price Index will not solve all of the problems. Therefore, subsection (a) gives the Register the authority to set the basic fees.

Subsection (a) allows fees to be raised beginning in 1996 and in any subsequent year. Based on a study to determine the costs incurred by the Copyright Office, the Register may increase fees up to the reasonable costs incurred by the Copyright Office plus a reasonable inflation adjustment to account for future increases in costs. The fees shall be rounded off to the nearest dollar, or, if the fee is less than $12, to the nearest half-dollar. The fees must be fair and equitable and give due consideration to the objectives of the copyright system. This allows the Register to decide that fees may be less than the costs of the services provided, if that furthers the objectives of the copyright system.

If the Register wants to increase fees, he or she shall submit the proposed fee schedule with the study and its economic analysis to Congress. The fees proposed by the Register may be instituted after the end of 120 days after the schedule is submitted to the Congress unless, within that 120-day period, a law is enacted stating in substance that the Congress does not approve the schedule.

Subsection (b) of this section gives the Register of Copyrights the discretion to invest funds from the Copyright Office's prepaid fees ("Deposit Accounts") that are not needed to meet current demands for services in interest-bearing securities in the United States Treasury, and to use the income from such investments for necessary expenses of the Copyright Office. The Copyright Office is currently engaged in developing its new electronic registration, recordation and deposit system, CORDS (Copyright Office Registration, Recordation and Deposit System), and the Committee expects that the Copyright Office will, where feasible, use the interest on deposit account funds for the development and operation of CORDS.

Section 11.—Copyright arbitration royalty panels

Subsection (1) makes clear that the 1997 satellite carrier rate adjustment is a CARP proceeding. That proceeding was left out of section 801 when the Copyright Royalty Tribunal Reform Act of 1993 was passed, because, at that time, the satellite carrier compulsory license was set to expire in 1994 without any further rate adjustment. With the passage of the Satellite Home Viewer Act of 1994, the satellite carrier compulsory license is extended to December 31, 1999, and the rate adjustment proceeding which has been scheduled for 1997 needs to be reflected in section 801.

Subsection (2) gives two concrete examples of the procedural and evidentiary rulings the Librarian of Congress may render related to CARP proceedings. They include the authority to determine the amount and distribute the royalty fees that are not in controversy, and the authority to reject royalty claims that are untimely or do not establish the basis for a claim as required by the Copyright Office's regulations. By setting out these examples, the Committee does not intend to abridge the authority of the Librarian to make other procedural and evidentiary rulings that would apply to a CARP proceeding, such as precontroversy discovery rulings.

Subsection (3) gives the Librarian of Congress the authority to pay the CARP arbitrators directly according to a signed agreement and any regulations that the Librarian may adopt. Currently, the parties to an arbitration proceeding pay the arbitrators.

Subsection (3) further provides that in distribution proceedings, the payments made to the arbitrators by the Librarian, as well as the costs of the Library and the Copyright Office, come from the relevant royalty pool. In ratemaking proceedings, the costs are paid by assessing the parties to the proceeding, 50 percent from the copyright owners and 50 percent from the copyright users. However, this assessment of the arbitrators' costs may be modified by the arbitrators if they find in their discretion that a different assessment should apply.

Subsection (3) also clarifies the status of the arbitrators. They are independent contractors acting on behalf of the United States. The phrase "acting on behalf of the United States" is intended to make clear that the laws governing the conduct and standards of behavior of government employees and those who deal with them in a professional capacity apply to the CARP arbitrators.

Section 12—Digital audio recording devices and media

The Audio Home Recording Act of 1992 requires the Librarian to determine by March 30th of each year whether there are any controversies among the claimants in the distribution of digital audio recording technology (DART) royalties. However, DART royalty claimants file their claims, in person or by mail, in January and February of each year. Because claims mailed in February may not reach the Copyright Office until early March, there is very little time for the Office to compile its official claimant list and for the claimants to negotiate with each other to determine whether they can settle their differences before the March 30th deadline. The March 30th deadline has proved to be impracticable. This section removes the deadline, and gives the Librarian the flexibility to rea-

sonably set the length of the negotiation period in order to promote settlements.

Section 13—Effect of pre-1978 distribution of recordings containing musical compositions.

This section affirms that the distribution of phonorecords to the public before January 1, 1978 did not constitute publication of the musical composition embodied in that phonorecord under the 1909 Copyright Act. It is intended to restore the law to what it was before the decision of the Ninth Circuit Court of Appeals in *La Cienega Music Co.* v. *Z. Z. Top.* [2]

Until that decision, it was the long-standing view of the Copyright Office and the understanding of the music industry, as reflected in their business practices, that the sale or distribution of recordings to the public before January 1, 1978, did not constitute publication of the musical composition embodied on the recording. This view was confirmed by the Second Circuit Court of Appeals in *Rosette* v. *Rainbo Record Mfg. Corp.* [3]

The *La Cienega* decision has, therefore, placed a cloud over the legal status of a large number of musical works recorded and sold before January 1, 1978. Moreover, it has called into question the long established practices of the Copyright Office. It is the intent of this section to remove the cloud and bring the law into conformity with the Second Circuit opinion and Copyright Office practices.

Section 14—Conforming amendment

This section corrects a numbering mistake in the Digital Performance Right in Sound Recordings Act of 1995.

Section 15—Effective dates.

All amendments to the Copyright Act included in this bill take effect on the date of enactment of the legislation, with the exception of Section 2, the satellite carrier provisions, which are effective on the date of enactment of the Satellite Home Viewer Act of 1994, October 18, 1994.

AGENCY VIEWS

LIBRARY OF CONGRESS,
THE REGISTER OF COPYRIGHTS,
Washington, DC, November 17, 1995.

Mr. HOWARD COBLE,
Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, House of Representatives, Washington, DC.

DEAR MR. COBLE: As you know, from my answer to your question in the hearing on November 9th, I am extremely concerned about the cloud hanging over the copyrights of thousands of pre-1978 musical compositions. I am writing to you now to solicit your support to clarify, through legislation, the status of these songs. As I mentioned, last month the Supreme Court denied a petition for certiorari in *La Cienega Music Co.* v. *Z.Z. Top,* 44 F.3d 813 (1995) cert. denied, 64 U.S.L.W. 3262 (Oct. 10, 1995). The U.S. Court of Ap-

[2] 44 F.3d 813 (9th Cir.), *cert. denied,* 64 U.S.L.W. 3262 (Oct. 10, 1995).
[3] 354 F. Supp. 1183 (S.D.N.Y.), *aff'd per curiam,* 546 F.2d 461 (2d Cir. 1976).

peals for the Ninth Circuit held on January 10, 1995, that selling records constituted "publication" of the recorded musical composition under the Copyright Act of 1909. The Ninth Circuit also implicitly held that recordings were copies of the musical compositions and that unless they bore the required copyright notice, the musical compositions entered the public domain in the United States—the exact wording of the court was "his compositions entered the public domain immediately upon the sale of the recordings to the public."

This position conflicts with the decision of the Second Circuit in *Rosette* v. *Rainbo Record Mfg. Corp.,* 354 F. Supp. 1183 (S.D.NY.), *aff'd per curiam,* 546 F.2d 461 (2d Cir. 1976) that the sale of recordings did not constitute publication of the musical compositions embodied on the recordings under the 1909 Act. The position of the Second Circuit agrees with the established music practice. It also agrees with the long standing practices of the Copyright Office.

For many years, the Copyright Office has espoused the view that recordings sold before January 1, 1978, i.e., those that were released under the 1909 Act, were not copies of the musical compositions embodied on them, and therefore the distribution of recordings did not constitute publication under the federal copyright statute. Moreover, if by chance a recording bore an appropriate copyright notice for the musical composition embodied on it and registration for the music was sought on this basis, registration was refused. The Office would state that copies had to be visually perceptible, e.g. sheet music copies, and that unless such copies had been sold, placed on sale or offered to the public, registration for the music as a published work was not possible. The Office would suggest registration for the work as an unpublished work and ask for the deposit of a lead sheet. See, for example, the enclosed samples of our practices and our publications (Compendium of Copyright Office Practices I (1975) and II (1984); Copyright Office Circular 50, "Copyright for Musical Compositions" and Circular 56, "Copyright for Sound Recordings" (1974); and a form letter, FL 50C.)

In 1972 when sound recordings were added to the statute, the law made it clear that phonorecords constituted copies of only the sound recording—they were not copies of the musical compositions embodied on them. Under the 1909 act all copyrightable works were embodied in copies. The 1976 Act, however, includes two separate forms of fixation—copies and phonorecords. Moreover, in the 1976 Act a copyright notice was only required on visually perceptible copies of works and on phonorecords of sound recordings. Thus, there was no requirement that a recording of a musical composition needed to include a separate copyright notice for the music.

The November 6th Billboard article, "Trade Scrambles to Protect Copyrights: Court's Inaction Could Jeopardize Pre-78 Songs" tells the story. The decision of the Ninth Circuit has effectively cast a cloud over a number of musical compositions. What is at stake here is whether or not to pay mechanical and performance royalties, the validity of contracts and licenses as well as the value of entire song catalogs.

Musical compositions, including classical music, were generally recorded. Under the Ninth Circuit decision they would be considered published and since most recordings would not have contained a copyright notice for the musical compositions contained in the recording, they would be considered in the public domain. Copyright notices on recordings were usually for liner notes, song lyrics, or album artwork and most likely would not have contained the name of the copyright owner of the music.

In any case, the Office refused registration for these works as published works. Many of these works were instead registered as unpublished works; as mentioned above, this was what the Copyright Office suggested. Renewal registrations based on these unpublished registrations may have been made. Later published sheet music editions may have been registered, and renewals based on these registration may also have been made. Despite all of this, copyright for these works could now be considered to be lost by publication of recordings at any time before January 1, 1978.

It seems incongruous that at the time when Congress is considering lengthening the copyright term for musical compositions that we are faced with the possibility that many of these works will be found to be in the public domain under the logic of the Ninth Circuit.

I believe that the drafters of the 1909 law and also of the 1976 law did not intend that distribution of recordings would place the musical compositions embodied in them in the public domain. It is unfortunate that after years in which the law was believed to be settled, this issue has once again been raised. I was hoping the issue would be resolved by the Supreme Court. Since that will not be the case and because these issues present themselves daily to the Copyright Office as well as to those in the music business, it would be very helpful if this Congress could settle the question once and for all.

Enclosed is proposed language for a bill, which hopefully could be added to the Satellite Home Viewer Act Correction bill (H.R. 1861) or could be enacted with the extension of term bill (H.R. 989); the proposal is a simple declaration that under the 1909 Act distribution of phonorecords did not publish the musical compositions embodied in them.

Sincerely,

MARYBETH PETERS,
Register of Copyrights.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 2 OF THE SATELLITE HOME VIEWER ACT OF 1994

SEC. 2. STATUTORY LICENSE FOR SATELLITE CARRIERS.

Section 119 of title 17, United States Code, is amended as follows:

(1) * * *

* * * * * * *

(3) Subsection (b)(1)(B) is amended—

[(A) in clause (i) by striking "12 cents" and inserting "17.5 cents per subscriber in the case of superstations not subject to syndicated exclusivity under the regulations of the Federal Communications Commission, and 14 cents per subscriber in the case of superstations subject to such syndicated exclusivity"; and]

(A) in clause (i) by striking "12 cents" and inserting "17.5 cents per subscriber in the case of superstations that as retransmitted by the satellite carrier include any program which, if delivered by any cable system in the United States, would be subject to the syndicated exclusivity rules of the Federal Communications Commission, and 14 cents per subscriber in the case of superstations that are syndexproof as defined in section 258.2 of title 37, Code of Federal Regulations; and"

* * * * * * *

[(4) Subsection (c) is amended—

[(A) in paragraph (1) by striking "December 31, 1992,";

[(B) in paragraph (2)—

[(i) in subparagraph (A) by striking "July 1, 1991" and inserting "July 1, 1996"; and

[(ii) in subparagraph (D) by striking "December 31, 1994" and inserting "December 31, 1999, or in accordance with the terms of the agreement, whichever is later"; and

[(C) in paragraph (3)—

[(i) in subparagraph (A) by striking "December 31, 1991" and inserting "January 1, 1997";

[(ii) by amending subparagraph (D) to read as follows:

["(D) ESTABLISHMENT OF ROYALTY FEES.—In determining royalty fees under this paragraph, the Copyright Arbitration Panel shall establish fees for the retransmission of network stations and superstations that most clearly represent the fair market value of secondary transmissions. In determining the fair market value, the Panel shall base its decision on economic, competitive, and programming information presented by the parties, including—

["(i) the competitive environment in which such programming is distributed, the cost for similar signals in similar private and compulsory license marketplaces, and any special features and conditions of the retransmission marketplace;

[“(ii) the economic impact of such fees on copyright owners and satellite carriers; and

[“(iii) the impact on the continued availability of secondary transmissions to the public.”;

[(iii) in subparagraph (E) by striking “60” and inserting “180”; and

[(iv) in subparagraph (C)—

[(I) by striking “, or until December 31, 1994”; and

[(II) by inserting “or July 1, 1997, whichever is later” after “section 802(g)”.]

(4) Subsection (c) is amended—

(A) in paragraph (1)—

(i) by striking “until December 31, 1992,”;

(ii) by striking “(2), (3) or (4)” and inserting “(2) or (3)”; and

(iii) by striking the second sentence;

(B) in paragraph (2)—

(i) in subparagraph (A) by striking “July 1, 1991” and inserting “July 1, 1996”; and

(ii) in subparagraph (D) by striking “December 31, 1994” and inserting “December 31, 1999, or in accordance with the terms of the agreement, whichever is later”; and

(C) in paragraph (3)—

(i) in subparagraph (A) by striking “December 31, 1991” and inserting “January 1, 1997”;

(ii) by amending subparagraph (B) to read as follows:

“(B) ESTABLISHMENT OF ROYALTY FEES.—In determining royalty fees under this paragraph, the copyright arbitration royalty panel appointed under chapter 8 shall establish fees for the retransmission of network stations and superstations that most clearly represent the fair market value of secondary transmissions. In determining the fair market value, the panel shall base its decision on economic, competitive, and programming information presented by the parties, including—

“(i) the competitive environment in which such programming is distributed, the cost of similar signals in similar private and compulsory license marketplaces, and any special features and conditions of the retransmission marketplace;

“(ii) the economic impact of such fees on copyright owners and satellite carriers; and

“(iii) the impact on the continued availability of secondary transmissions to the public.”; and

(iii) in subparagraph (C), by inserting “or July 1, 1997, whichever is later” after “section 802(g)”.

(5) Subsection (a) is amended—

[(A) in paragraph (5)(C) by striking “the Satellite Home Viewer Act of 1988” and inserting “this section”; and]

(A) in paragraph (5)(C) by striking "the date of the enactment of the Satellite Home Viewer Act of 1988" and inserting "November 16, 1988"; and

* * * * * * *

TITLE 17, UNITED STATES CODE

CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

* * * * * * *

§ 104A. Copyright in restored works

(a) * * *

* * * * * * *

(d) REMEDIES FOR INFRINGEMENT OF RESTORED COPYRIGHTS.—

(1) * * *

* * * * * * *

[(3) EXISTING DERIVATIVE WORKS.—(A) In the case of a derivative work that is based upon a restored work and is created—

[(i) before the date of the enactment of the Uruguay Round Agreements Act, if the source country of the derivative work is an eligible country on such date, or

[(ii) before the date of adherence or proclamation, if the source country of the derivative work is not an eligible country on such date of enactment, a reliance party may continue to exploit that work for the duration of the restored copyright if the reliance party pays to the owner of the restored copyright reasonable compensation for conduct which would be subject to a remedy for infringement but for the provisions of this paragraph.]

(3) EXISTING DERIVATIVE WORKS.—(A) In the case of a derivative work that is based upon a restored work and is created—

(i) before the date of the enactment of the Uruguay Round Agreements Act, if the source country of the restored work is an eligible country on such date, or

(ii) before the date of adherence or proclamation, if the source country of the restored work is not an eligible country on such date of enactment,a reliance party may continue to exploit that derivative work for the duration of the restored copyright if the reliance party pays to the owner of the restored copyright reasonable compensation for conduct which would be subject to a remedy for infringement but for the provisions of this paragraph.

* * * * * * *

(e) NOTICES OF INTENT TO ENFORCE A RESTORED COPYRIGHT.—

(1) NOTICES OF INTENT FILED WITH THE COPYRIGHT OFFICE—

(A) * * *

(B)(i) * * *

(ii) Not less than 1 list containing all notices of intent to enforce shall be maintained in the Public Information Office of the Copyright Office and shall be available for

public inspection and copying during regular business hours pursuant to sections 705 and 708. [Such list shall also be published in the Federal Register on an annual basis for the first 2 years after the applicable date of restoration.]

* * * * * * *

(h) DEFINITIONS.—For purposes of this section and section 109(a):

(1) * * *

[(2) The "date of restoration" of a restored copyright is the later of—

[(A) the date on which the Agreement on Trade-Related Aspects of Intellectual Property referred to in section 101(d)(15) of the Uruguay Round Agreements Act enters into force with respect to the United States, if the source country of the restored work is a nation adhering to the Berne Convention or a WTO member country on such date; or

[(B) the date of adherence or proclamation, in the case of any other source country of the restored work.

[(3) The term "eligible country" means a nation, other than the United States, that is a WTO member country, adheres to the Berne Convention, or is subject to a proclamation under section 104A(g).]

(2) The "date of restoration" of a restored copyright is the later of—

(A) January 1, 1996, the date on which the Agreement on Trade-Related Aspects of Intellectual Property referred to in section 101(d)(15) of the Uruguay Round Agreements Act enters into force with respect to the United States, if the source country of the restored work is a nation adhering to the Berne Convention or a WTO member country on such date, or

(B) the date of adherence or proclamation, in the case of any other source country of the restored work.

(3) The term "eligible country" means a nation, other than the United States, that, after the date of the enactment of the Uruguay Round Agreements Act—

(A) becomes a WTO member,

(B) is or becomes a member of the Berne Convention, or

(C) becomes subject to a proclamation under subsection (g).

* * * * * * *

§ 114. Scope of exclusive rights in sound recordings

(a) * * *

* * * * * * *

(f) LICENSES FOR NONEXEMPT SUBSCRIPTION TRANSMISSIONS.—

(1) No later than 30 days after the enactment of the Digital Performance Right in Sound Recordings Act of 1995, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and

rates of royalty payments for the activities specified by subsection (d)(2) of this section during the period beginning on the effective date of such Act and ending on December 31, 2000, *or ending 30 days after the Librarian issues and publishes in the Federal Register an order adopting or rejecting the report of the copyright arbitration royalty panel, if such panel is convened*. Such terms and rates shall distinguish among the different types of digital audio transmission services then in operation. Any copyright owners of sound recordings or any entities performing sound recordings affected by this section may submit to the Librarian of Congress licenses covering such activities with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

(2) In the absence of license agreements negotiated under paragraph (1), during the 60-day period commencing 6 months after publication of the notice specified in paragraph (1), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine [and publish in the Federal Register] a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings. In addition to the objectives set forth in section 801(b)(1), in establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated as provided in paragraph (1). The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings.

* * * * * * *

§ 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) * * *

* * * * * * *

(c) ROYALTY PAYABLE UNDER COMPULSORY LICENSE.—

(1) * * *

* * * * * * *

(3)(A) * * *

* * * * * * *

(D) In the absence of license agreements negotiated under subparagraphs (B) and (C), upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress

shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine [and publish in the Federal Register] a schedule of rates and terms which, subject to subparagraph (E), shall be binding on all copyright owners of nondramatic musical works and persons entitled to obtain a compulsory license under subsection (a)(1) during the period beginning January 1, 1998, and ending on the effective date of any new terms and rates established pursuant to subparagraph (C), (D) or (F), or such other date (regarding digital phonorecord deliveries) as may be determined pursuant to subparagraphs (B) and (C). Such terms and rates shall distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general. In addition to the objectives set forth in section 801(b)(1), in establishing such rates and terms, the copyright arbitration royalty panel may consider rates and terms under voluntary license agreements negotiated as provided in subparagraphs (B) and (C). The royalty rates payable for a compulsory license for a digital phonorecord delivery under this section shall be established de novo and no precedential effect shall be given to the amount of the royalty payable by a compulsory licensee for digital phonorecord deliveries on or before December 31, 1997. The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such use shall be kept and made available by persons making digital phonorecord deliveries.

* * * * * * *

§ 116. Negotiated licenses for public performances by means of coin-operated phonorecord players

(a) * * *

(b) NEGOTIATED LICENSES.—

(1) * * *

[(2) ARBITRATION.—Parties to such a negotiation, within such time as may be specified by the Librarian of Congress by regulation, may determine the result of the negotiation by arbitration. Such arbitration shall be governed by the provisions of title 9, to the extent such title is not inconsistent with this section. The parties shall give notice to the Librarian of Congress of any determination reached by arbitration and any such determination shall, as between the parties to the arbitration, be dispositive of the issues to which it relates.]

(2) ARBITRATION.—Parties not subject to such a negotiation may determine the result of the negotiation by arbitration in accordance with the provisions of chapter 8.

* * * * * * *

(d) DEFINITIONS.—As used in this section, the following terms mean the following:

(1) A "coin-operated phonorecord player" is a machine or device that—

(A) is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by the insertion of coins, currency, tokens, or other monetary units or their equivalent;

(B) is located in an establishment making no direct or indirect charge for admission;

(C) is accompanied by a list which is comprised of the titles of all the musical works available for performance on it, and is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

(D) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

(2) An "operator" is any person who, alone or jointly with others—

(A) owns a coin-operated phonorecord player;

(B) has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or

(C) has the power to exercise primary control over the selection of the musical works made available for public performance on a coin-operated phonorecord player.

§ 117. Limitations on exclusive rights: Computer programs

[Notwithstanding] *(a) MAKING OF ADDITIONAL COPY OR ADAPTATION BY OWNER OF COPY.—Notwithstanding* the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

[Any exact] *(b) LEASE, SALE, OR OTHER TRANSFER OF ADDITIONAL COPY OR ADAPTATION.—Any exact* copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.

(c) MACHINE MAINTENANCE OR REPAIR.—Notwithstanding the provisions of section 106, it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine, provided that—

(1) such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed, and

(2) with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not accessed or used other than to make such new copy by virtue of the activation of the machine.

(d) DEFINITIONS.—For purposes of this section—

(1) the term "maintenance" of a machine means servicing the machine in order to make it work in accordance with its original specifications and any changes to those specifications authorized for that machine; and

(2) the term "repair" of a machine means restoring it to the state of working in accordance with its original specifications and any changes to those specifications authorized for that machine.

§ 118. Scope of exclusive rights: Use of certain works in connection with noncommercial broadcasting

(a) * * *

(b) Notwithstanding any provision of the antitrust laws, any owners of copyright in published nondramatic musical works and published pictorial, graphic, and sculptural works and any public broadcasting entities, respectively, may negotiate and agree upon the terms and rates of royalty payments and the proportionate division of fees paid among various copyright owners, and may designate common agents to negotiate, agree to, pay, or receive payments.

[(1) Any owner of copyright in a work specified in this subsection or any public broadcasting entity may submit to the Librarian of Congress proposed licenses covering such activities with respect to such works. The Librarian of Congress shall proceed on the basis of the proposals submitted to it as well as any other relevant information. The Librarian of Congress shall permit any interested party to submit information relevant to such proceedings.**]**

[(2)**]** *(1)* License agreements, voluntarily negotiated at any time between one or more copyright owners and one or more public broadcasting entities shall be given effect in lieu of any determination by the Librarian of Congress: Provided, That copies of such agreements are filed in the Copyright Office within thirty days of execution in accordance with regulations that the Register of Copyrights shall prescribe.

[(3)**]** *(2)* In the absence of license agreements negotiated under paragraph **[**(2)**]** *(1)*, the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph **[**(2)**]** *(1)*, shall be binding on all owners of copyright in works specified by this subsection and public broadcasting entities, regardless of whether such copyright owners have submitted proposals to the Librarian of Congress. In establishing such rates and terms the copyright arbitration royalty panel may consider the rates for comparable circumstances under voluntary license

agreements negotiated as provided in paragraph [(2)] *(1)*. The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such use shall be kept by public broadcasting entities.

* * * * * * *

[(e) Except as expressly provided in this subsection, this section shall have no applicability to works other than those specified in subsection (b).

[(1) Owners of copyright in nondramatic literary works and public broadcasting entities may, during the course of voluntary negotiations, agree among themselves, respectively, as to the terms and rates of royalty payments without liability under the antitrust laws. Any such terms and rates of royalty payments shall be effective upon filing in the Copyright Office, in accordance with regulations that the Register of Copyrights shall prescribe.

[(2) On January 3, 1980, the Register of Copyrights, after consulting with authors and other owners of copyright in nondramatic literary works and their representatives, and with public broadcasting entities and their representatives, shall submit to the Congress a report setting forth the extent to which voluntary licensing arrangements have been reached with respect to the use of nondramatic literary works by such broadcast stations. The report should also describe any problems that may have arisen, and present legislative or other recommendations, if warranted.]

(e)(1) Except as expressly provided in this subsection, this section shall not apply to works other than those specified in subsection (b).

(2) Owners of copyright in nondramatic literary works and public broadcasting entities may, during the course of voluntary negotiations, agree among themselves, respectively, as to the terms and rates of royalty payments without liability under the antitrust laws. Any such terms and rates of royalty payments shall be effective upon being filed in the Copyright Office, in accordance with regulations that the Register of Copyrights shall prescribe.

* * * * * * *

CHAPTER 3—DURATION OF COPYRIGHT

* * * * * * *

§ 303. Duration of copyright: Works created but not published or copyrighted before January 1, 1978

(a) Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2027.

(b) The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.

* * * * * * *

CHAPTER 4—COPYRIGHT NOTICE, DEPOSIT, AND REGISTRATION

* * * * * * *

§ 411. Registration and infringement actions

(a) * * *

(b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner—

[(1) serves notice upon the infringer, not less than ten or more than thirty days before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and]

(1) serves notice upon the infringer, not less than 48 hours before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and

* * * * * * *

CHAPTER 7—COPYRIGHT OFFICE

* * * * * * *

§ 708. Copyright Office fees

(a) * * *

[(b) In calendar year 1995 and in each subsequent fifth calendar year, the Register of Copyrights, by regulation, may increase the fees specified in subsection (a) by the percent change in the annual average, for the preceding calendar year, of the Consumer Price Index published by the Bureau of Labor Statistics, over the annual average of the Consumer Price Index for the fifth calendar year preceding the calendar year in which such increase is authorized.]

(b) In calendar year 1996 and in any subsequent calendar year, the Register of Copyrights, by regulation, may increase the fees specified in subsection (a) in the following manner:

(1) The Register shall conduct a study of the costs incurred by the Copyright Office for the registration of claims, the recordation of documents, and the provision of services. The study shall also consider the timing of any increase in fees and the authority to use such fees consistent with the budget.

(2) The Register shall have discretion to increase fees up to the reasonable costs incurred by the Copyright Office for the

services described in paragraph (1) plus a reasonable inflation adjustment to account for any estimated increase in costs.

(3) Any newly established fee based on paragraph (2) shall be rounded off to the nearest dollar, or for a fee less than $12, rounded off to the nearest 50 cents.

(4) The fees shall be fair and equitable and give due consideration to the objectives of the copyright system.

(5) If upon completion of the study, the Register determines that the fees should be increased, the Register shall prepare a proposed fee schedule and submit the schedule with the accompanying economic analysis to the Congress. The fees proposed by the Register may be instituted after the end of 120 days after the schedule is submitted to the Congress unless, within that 120-day period, a law is enacted stating in substance that the Congress does not approve the schedule.

* * * * * * *

[(d) All fees received under this section shall be deposited by the Register of Copyrights in the Treasury of the United States and shall be credited to the appropriation for necessary expenses of the Copyright Office. The Register may, in accordance with regulations that he or she shall prescribe, refund any sum paid by mistake or in excess of the fee required by this section.]

(d)(1) Except as provided in paragraph (2), all fees received under this section shall be deposited by the Register of Copyrights in the Treasury of the United States and shall be credited to the appropriations for necessary expenses of the Copyright Office. Such fees that are collected shall remain available until expended. The Register may, in accordance with regulations that he or she shall prescribe, refund any sum paid by mistake or in excess of the fee required by this section.

(2) In the case of fees deposited against future services, the Register of Copyrights shall request the Secretary of the Treasury to invest in interest-bearing securities in the United States Treasury any portion of the fees that, as determined by the Register, is not required to meet current deposit account demands. Funds shall be invested in securities that permit funds to be available to the Copyright Office at all times if they are determined to be necessary to meet current deposit account demands. Such investments shall be in public debt securities with maturities suitable to the needs of the fund, as determined by the Register of Copyrights, and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities.

(3) The income on such investments shall be deposited in the Treasury of the United States and shall be credited to the appropriations for necessary expenses of the Copyright Office.

* * * * * * *

CHAPTER 8—COPYRIGHT ARBITRATION ROYALTY PANELS

§ 801. Copyright arbitration royalty panels: Establishment and purpose

(a) * * *

(b) PURPOSES.—Subject to the provisions of this chapter, the purposes of the copyright arbitration royalty panels shall be—

(1) to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 114, 115, [and 116] *116, and 119*, and to make determinations as to reasonable terms and rates of royalty payments as provided in section 118. The rates applicable under sections 114, 115, and 116 shall be calculated to achieve the following objectives:

(A) * * *

* * * * * * *

(c) RULINGS.—The Librarian of Congress, upon the recommendation of the Register of Copyrights, may, before a copyright arbitration royalty panel is convened, make any necessary procedural or evidentiary rulings that would apply to the proceedings conducted by such panel*, including—*

(1) authorizing the distribution of those royalty fees collected under sections 111, 119, and 1005 that the Librarian has found are not subject to controversy; and

(2) accepting or rejecting royalty claims filed under sections 111, 119, and 1007 on the basis of timeliness or the failure to establish the basis for a claim.

[(d) ADMINISTRATIVE SUPPORT OF COPYRIGHT ARBITRATION ROYALTY PANELS.—The Library of Congress, upon the recommendation of the Register of Copyrights, shall provide the copyright arbitration royalty panels with the necessary administrative services related to proceedings under this chapter.]

(d) SUPPORT AND REIMBURSEMENT OF ARBITRATION PANELS.—The Librarian of Congress, upon the recommendation of the Register of Copyrights, shall provide the copyright arbitration royalty panels with the necessary administrative services related to proceedings under this chapter, and shall reimburse the arbitrators at such intervals and in such manner as the Librarian shall provide by regulation. Each such arbitrator is an independent contractor acting on behalf of the United States, and shall be paid pursuant to a signed agreement between the Library of Congress and the arbitrator. Payments to the arbitrators shall be considered costs incurred by the Library of Congress and the Copyright Office for purposes of section 802(h)(1).

§ 802. Membership and proceedings of copyright arbitration royalty panels

(a) * * *

* * * * * * *

(h) ADMINISTRATIVE MATTERS.—

(1) [DEDUCTION OF COSTS FROM ROYALTY FEES.—] *DEDUCTION OF COSTS OF LIBRARY OF CONGRESS AND COPYRIGHT OFFICE FROM ROYALTY FEES.*—The Librarian of Congress and the

Register of Copyrights may, to the extent not otherwise provided under this title, deduct from royalty fees deposited or collected under this title the reasonable costs incurred by the Library of Congress and the Copyright Office *to support distribution proceedings* under this chapter. Such deduction may be made before the fees are distributed to any copyright claimants. [If no royalty pool exists from which their costs can be deducted, the Librarian of Congress and the Copyright Office may assess their reasonable costs directly to the parties to the most recent relevant arbitration proceeding.] *In ratemaking proceedings, the Librarian of Congress and the Copyright Office may assess their reasonable costs directly to the parties to the most recent relevant arbitration proceeding, 50 percent of the costs to the parties who would receive royalties from the royalty rate adopted in the proceeding and 50 percent of the costs to the parties who would pay the royalty rate so adopted, subject to the discretion of the arbitrators to assess costs under subsection (c).*

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CHAPTER 10—DIGITAL AUDIO RECORDING DEVICES AND MEDIA

* * * * * * *

SUBCHAPTER C—ROYALTY PAYMENTS

* * * * * * *

§ 1007. Procedures for distributing royalty payments

(a) * * *

(b) DISTRIBUTION OF PAYMENTS IN THE ABSENCE OF A DISPUTE.—[WITHIN 30 DAYS AFTER] *After* the period established for the filing of claims under subsection (a), in each year after the year in which this section takes effect, the Librarian of Congress shall determine whether there exists a controversy concerning the distribution of royalty payments under section 1006(c). If the Librarian of Congress determines that no such controversy exists, the Librarian of Congress shall, within 30 days after such determination, authorize the distribution of the royalty payments as set forth in the agreements regarding the distribution of royalty payments entered into pursuant to such section (a), after deducting its reasonable administrative costs under this section.

* * * * * * *

SECTION 4 OF THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995

SEC. 4. MECHANICAL ROYALTIES IN DIGITAL PHONORECORD DELIVERIES.

Section 115 of title 17, United States Code, is amended—

(1) * * *

* * * * * * *

[(5)**]** *(4)* by adding after subsection (c) the following:

"(d) DEFINITION.—As used in this section, the following term has the following meaning: A 'digital phonorecord delivery' is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.".

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