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Citation: 1 Copyright Technical Amendments Act Satellite Home Act Amendments P.L. 105-80 111 Stat. 1529 S2678 1997

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purposes, has directly contacted that child or a parent of that child to offer a commercial product or service to that child, knowingly fails to comply with the request of a parent—

"(A) to disclose to the parent the source of personal information about that parent's child;

"(B) to disclose all information that has been sold or otherwise disclosed by that person about that child; or

"(C) to disclose the identity of all persons to whom such a person has sold or otherwise disclosed personal information about that child;

"(3) knowingly uses prison inmate labor, or any worker who is registered pursuant to title XVII of the Violent Crime Control and Law Enforcement Act of 1994, for data processing of personal information about children; or

"(4) knowingly distributes or receives any personal information about a child, knowing or having reason to believe that the information will be used to abuse the child or physically to harm the child;

shall be fined under this title, imprisoned not more than 1 year, or both.

"(b) CIVIL ACTIONS.—A child or the parent of that child with respect to whom a violation of this section occurs may in a civil action obtain appropriate relief, including monetary damages of not less than $1,000. The court shall award a prevailing plaintiff in a civil action under this subsection a reasonable attorney's fee as a part of the costs.

"(c) LIMITATION.—Nothing in this section shall be construed to affect the sale of lists to—

"(1) any Federal, State, or local government agency or law enforcement organization;

"(2) the National Center for Missing and Exploited Children; or

"(3) any institution of higher education (as that term is defined in section 1201(a) of the Higher Education Act of 1965 (20 U.S.C. 1141(a)).

"(d) DEFINITIONS.—In this section—

"(1) the term 'child' means a person who has not attained the age of 16 years;

"(2) the term 'parent' includes a legal guardian;

"(3) the term 'personal information' means information (including name, address, telephone number, social security number, and physical description) about an individual identified as a child, that would suffice to physically locate and contact that individual; and

"(4) the term 'list broker' means a person who, in the course of business, provides mailing lists, computerized or telephone reference services, or the like containing personal information of children.".

(b) CLERICAL AMENDMENT.—The analysis for chapter 89 of title 18, United States Code, is amended by adding at the end the following:

"1822. Sale of personal information about children.".

By Mr. HATCH (for himself, Mr. LEAHY, Mr. D'AMATO, Mr. THOMPSON, Mr. ABRAHAM, and Mrs. FEINSTEIN):

S. 505. A bill to amend the provisions of title 17, United States Code, with respect to the duration of copyright, and for other purposes; to the Committee on the Judiciary.

THE COPYRIGHT TERM EXTENSION ACT OF 1997

By Mr. HATCH:

S. 506. A bill to clarify certain copyright provisions, and for other purposes; to the Committee on the Judiciary.

THE COPYRIGHT CLARIFICATIONS ACT OF 1997

By Mr. HATCH:

S. 507. A bill to establish the United States Patent and Trademark Organization as a Government corporation, to amend the provisions of title 35, United States Code, relating to procedures for patent applications, commercial use of patents, reexamination reform, and for other purposes; to the Committee on the Judiciary.

THE OMNIBUS PATENT ACT OF 1997

Mr. HATCH. Mr. President, intellectual property is vitally important to sustaining the high level of creativity that America enjoys, which not only adds to the fund of human knowledge and the progress of science and technology, but also results in the more tangible benefits of a strong economy and a favorable balance of trade.

For example, in 1994, copyright-related industries contributed more than $385 billion to the American economy, or more than 5 percent of the total gross domestic product. This represents more than $50 billion in foreign sales, which exceeds every other leading industry sector except automotive and agriculture in contributions to a favorable trade balance. From 1977 to 1994, these same industries grew at a rate that was twice the rate of growth of the national economy, and the rate of job growth in these industries since 1987 has outpaced that of the overall economy by more than 100 percent.

Mr. President, this is impressive to say the least. And these figures don't begin to take into account the contributions of other intellectual property sectors, including trade in patented technologies and the economic value of famous marks. Clearly intellectual property has become one of our Nation's most valuable resources.

As you know, the Judiciary Committee, is charged with monitoring the effectiveness of our intellectual property laws and with proposing to the Senate changes that are called for to meet new challenges. Because of the digital age and the global economy, we've had our hands full. Let me just go through a few highlights.

In the 104th Congress, we passed the Digital Performance Right in Sound Recordings Act, which, as its name signifies, adjusts the existing performance right in the Copyright Act to the demands of the new digital media. I also introduced, with Senator LEAHY, the National Information Infrastructure (NII) Copyright Protection Act of 1995 to begin to lay down the rules of the road for the information highway. The Committee held two hearings on this bill, but not enough time was left in the 104th to complete our deliberations.

In response to the challenges of the global economy, I introduced the Copyright Term Extension Act of 1995, along with Senator THOMPSON and Senator FEINSTEIN, to give U.S. copyright owners parity of term in the European Union. The EU has issued a directive to increase the minimum basic copyright term from life-plus-50 years to life-plus-70. If we do not follow suit, U.S. works in potentially all EU countries will receive 20 years less protection than the works of the nationals of the host country.

The Copyright Term Extension Act was approved by the Judiciary Committee. I am confident that the bill would have been approved by the Senate as well with little or no opposition, but unfortunately this important legislation was held hostage by advocates of music licensing reform—a totally unrelated issue.

In patents, too, we were very active. The Biotechnology Process Patents Act was passed. Also, I introduced the Omnibus Patent Act of 1996, which remade the Patent and Trademark Office into a government corporation. The corporate form would allow the Patent and Trademark Office to escape the micromanagement that it currently endures from the Commerce Department, although my bill preserved a policy link with the Department. The bill also made several very important substantive changes to the Patent Act.

After some tough negotiations, the Clinton administration ended up supporting the final version of the bill. The Judiciary Committee had a hearing on the bill, but Committee action was held hostage to yet another, totally unrelated issue—judicial nominations.

In addition to improving the efficiency of the patent and trademark systems, I have worked tirelessly for a number of years to rectify the injustice of making American inventors bear a heavier burden in deficit reduction than the ordinary citizen through the withholding of patent surcharge funds. Again last year I led an ultimately unsuccessful effort to ease this tax on American ingenuity.

Now no one has demonstrated more zeal for a balanced budget than I have. As you know, Mr. President, I was on the Senate floor for 3 weeks trying to get this body to discipline itself through the Balanced Budget Amendment. But I do not believe that inventors ought to pay a surcharge on their patent applications only to see that surcharge used for the general revenue rather than to improve the service they receive from the PTO. The PTO, after all, is a self-sustaining agency, not receiving a penny from taxpayer dollars. What they charge, they ought to keep. I am currently looking at a legislative solution to this problem.

I have also been looking into the special patent restoration rules that apply to pharmaceutical products. In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act. Essentially, this law—commonly known as, I am proud to say, the Hatch-Waxman Act—allowed generic drug manufacturers to rely on the costly safety and efficacy data of pioneer

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drug manufacturers and provided for partial patent restoration for pioneer products to offset a portion of the patent term lost due to FDA regulatory review.

I know that many are interested in revisiting particular provisions of the Hatch-Waxman Act now that we have had a decade-plus experience under the new system. In my view, to be successful, any Hatch-Waxman reform must be balanced in a manner that the American public, generic drug firms, and the R&D manufacturers are all able to realize benefits. Toward this end, my staff and I have been meeting with representatives of both segments of the pharmaceutical industry to identify areas of concern.

It is my hope that these discussions will result in proposals to create new incentives in our intellectual property protection system and efficiency in our regulatory processes that will increase the long-term strength of both segments of the industry. Our bottom line goal is clear: We want a climate that produces both innovative new medicines and lower-cost generic copies of off-patent products.

I do not guarantee success in this endeavor, I can only commit that I will listen to all parties involved and see if we can work together to forge a compromise on Hatch-Waxman reform. I would like to do it if we can, but I will not support any approach that is not balanced.

Let me just add that my willingness to work with all parties should not be construed as giving a veto to any particular party. Ultimately, the test I use will be: Will the American public be better off if a particular legislative proposal is adopted? If, and only if, this test can be met, will I ask others in this body to join me in moving legislation.

Mr. President, let me now turn to trademark legislation, an area in which we have had a lot of success. Both the Federal Trademark Dilution Act and the Anticounterfeiting Consumer Protection Act became law in the 104th Congress. The Federal Trademark Dilution Act was significant in that it established the first-ever Federal anti-dilution statute to provide nationwide protection against the whittling away of famous marks. The Anticounterfeiting Consumer Protection Act brought our Nation's anticounterfeiting laws up to speed with the quickly evolving counterfeiting trade by providing stiffer civil and criminal penalties and increasing the tools available to law enforcement to give them the upper hand in this fight.

As you can see though, Mr. President, we have a lot of unfinished business, so today I'm introducing two bills from the last Congress, the Omnibus Patent Act, and the Copyright Term Extension Act. In addition, I'm introducing the Copyright Clarification Act, which is a series of truly technical amendments to the Copyright Act. I am pleased that Senator LEAHY, the distinguished ranking member of the Judiciary Committee, Senator D'AMATO, the distinguished junior Senator from New York, Senator ABRAHAM, the distinguished junior Senator from Michigan, and Senator FEINSTEIN, the distinguished senior Senator from California, are joining me as cosponsors of the Copyright Term Extension Act of 1997.

Of course, Mr. President, these three bills do not comprise my entire intellectual property agenda. For example, at my request, the Copyright Office is taking a look at sui generis protection of databases and at amendments to the Satellite Home Viewer Act. The Copyright Office may very well have recommendations for legislation in this area, and I may introduce such legislation before the end of this session. However, because the three bills I am introducing today have widespread support and have been thoroughly discussed in the last Congress, it is appropriate that they be the first to be considered—old business before new business.

THE OMNIBUS PATENT ACT OF 1997

Mr. President, the Omnibus Patent Act of 1997 is identical to the latest version of a bill I introduced last Congress, S. 1961, except for a few technical changes. Last Congress, S. 1961 gained bipartisan support in the Senate, its counterpart, H.R. 3460 gained bipartisan support in the House, and the Clinton administration also supported this bill. Further, a large, broad coalition of representatives of the patent industry were strongly supportive of the bill. Additionally, the National Treasury Employees Union and the AFL-CIO both supported the provisions that affect their membership. I am fully confident that this far-reaching, bipartisan support will continue this Congress.

I have no doubt that had a vote been taken on S. 1961, it would have passed the Senate by an overwhelming vote. Unfortunately, we did not take up S. 1961 until later in the 104th Congress, and time ran out before we were able to reach a vote on this important measure.

In order to be certain that such a problem is not repeated, I am beginning this process early in the 105th Congress. The House is already acting to move through this important and needed measure without delay. The House counterpart to my bill, H.R. 400, was introduced by Congressman COBLE, the chairman of the House Judiciary Subcommittee on Courts and Intellectual Property. Chairman COBLE has held a hearing on H.R. 400, and the bill was subsequently favorably reported by the subcommittee and the full House Judiciary Committee. I look forward to the consideration of H.R. 400 by the full House of Representatives.

During the last Congress this bill was the subject of multiple hearings in both Houses of Congress. But, this is a new Congress, so I would like to review, once again, the purposes and goals of the Omnibus Patent Act of 1997.

The purposes of this bill are: (1) to provide for more efficient administration of the patent and trademark systems; (2) to discourage "gaming" the patent system while ensuring against loss of patent term and theft of American inventiveness; (3) to protect the rights of prior users of inventions which are later patented by another; (4) to increase the reliability of patents by allowing third parties more meaningful participation in the reexamination process; (5) to make certain that American provisional applications are given the same weight as other countries' provisional applications in other countries' courts; (6) to close a loophole in the plant patent provisions of the Patent Act; and (7) to allow for the filing of patent and trademark documents by electronic medium.

THE UNITED STATES PATENT AND TRADEMARK OFFICE

The United States leads the world in innovation. That leadership is a direct result of our long-standing commitment to strong patent protection. The strong protection of patents and trademarks are of vital importance not only to continued progress in science, but also to the economy. A vast array of industries depend on patents. From the chemical, electrical, biotechnological, and manufacturing industries to computer software and hardware. And trademark is important to all businesses, period.

I believe that we must not only keep our intellectual property laws current and strong, but we must do everything we can to make sure that the offices responsible for the administration of those laws are properly equipped and able to do their job as efficiently as possible.

Thus, the first provision of this bill makes the Patent and Trademark Office a government corporation, called the U.S. Patent and Trademark Organization. Basically, the effect of this provision is to separate the administration of the patent and trademark systems from micromanagement by the Department of Commerce, while maintaining a policy link to that Department. The current PTO has been hampered by burdensome red tape regarding personnel matters, and the office has also been held back from reaching its full potential by the repeated siphoning off of its user fees for other, unrelated expenditures.

The government corporation proposal was the subject of much discussion last Congress. The Administration, various union representatives, representatives of the users of the Patent and Trademark Office, and, of course, the officers of the PTO itself were all involved in helping me to craft this consensus legislation. I am confident that the product of these negotiations will enhance the efficiency of the USPTO while protecting the interests of the Commerce Department and the employees of the USPTO.

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The structure of the USPTO under my bill vests primary responsibility for patent and trademark policy in the head of the USPTO, the Director, and primary responsibility for administration of the patent and trademark systems in the respective Commissioners of Patents and Trademarks. The corporate form of the USPTO inoculates the Patent and Trademark Offices as much as possible from the bureaucratic sclerosis that infects many federal agencies. Further, by subdividing the organization into separate patent and trademark offices, the bill will help raise the prominence of trademarks, an important part of intellectual property but long seen as the poor step-child of the more prominent patent field.

The parties interested in patents and trademarks support having close access to the President by having the chief intellectual policy advisor directly linked to a cabinet officer. The Secretary of Commerce is a logical choice. As a result, while this bill would make the day-to-day functioning of the USPTO independent of the Commerce Department, the policy portion of the new organization will still be under the policy direction of the Secretary of Commerce. Further, as a government corporation, as opposed to a private corporation, the USPTO will remain subject to congressional oversight.

Mr. President, although the creation of the USPTO may be the most dramatic part of this bill, it also contains several important changes to substantive patent law that will, taken as a whole, dramatically improve our patent system.

With the adoption of the GATT provisions in 1994, the United States changed the manner in which it calculated the duration of patent terms. Under the old rule, patents lasted for seventeen years after the grant of the patent. The new rule under the legislation implementing GATT is that these patents last for twenty years from the time the patent application is filed.

In addition to harmonizing American patent terms with those of our major trading partners, this change solved the problem of "submarine patents". A submarine patent is not a military secret. Rather, it is a colloquial way to describe a legal but unscrupulous strategy to game the system and unfairly extend a patent term.

Submarine patenting is when an applicant purposefully delays the final granting of his patent by filing a series of amendments and delaying motions. Since, under the old system, the term did not start until the patent was granted, no patent term was lost. And since patent applications are secret in the United States until a patent is actually granted, no one knows that the patent application is pending. Thus, competitors continued to spend precious research and development dollars on technology that has already been developed.

When a competitor finally did develop the same technology, the submarine applicant sprang his trap. He would cease delaying his application and it would finally be approved. Then, he sued his competitor for infringing on his patent. Thus, he maximized his own patent term while tricking his competitors into wasting their money.

Mr. President, submarine patents are terribly inefficient. Because of them, the availability of new technology is delayed and instead of moving to new and better research, companies are fooled into throwing away time and money on technology that already exists.

By adopting GATT, and changing the manner in which we calculate the patent term to twenty years from filing, we eliminated the submarine problem. Under the current rule, if an applicant delays his own application, it simply shortens the time he will have after the actual granting of the patent. Thus, we have eliminated this unscrupulous, inefficient practice by removing its benefits.

Unfortunately, the change in term calculation potentially creates a new problem. Under the current law, if the Patent Office takes a long time to approve a patent, the delay comes out of the patent term, thus punishing the patent holder for the PTO's delay. This is not right.

The question we face now, Mr. President, is how to fix this new problem. Some have suggested combining the old seventeen years from granting system with the new twenty years from filing and giving the patent holder whichever is longer. But that approach leads to uncertainty in the length of a patent term and even worse, resurrects the submarine patent problem by giving benefits to an applicant who purposefully delays his own application. I believe that Titles II and III of the Omnibus Patent Act of 1997 solve the administrative delay dilemma without recreating old problems.

EARLY PUBLICATION

Title II of the bill provides for the early publication of patent applications. It would require the Patent Office to publish pending applications eighteen months after the application was filed. An exception to this rule is made for applications filed only in the United States. Those applications will be published 18 months after filing or 3 months after the office issues its first response on the application, whichever is later. By publishing early, competitors are put on notice that someone has already beaten them to the invention, thus allowing them to stop spending money researching that same art.

The claims that early publication will allow foreign competitors to steal American technology are simply not true. To start with, between 75 and 80 percent of patent applications filed in the United States are also filed abroad where 18 month publication is already the rule. Further, I have provided in my bill for delayed publication of applications only submitted in the United States to protect them from competitors. Additionally, once an application is published, Title II grants the applicant "provisional rights," that is, legal protection for his invention. Thus, while it is true that someone could break the law and steal the invention, that is true under current law and will always be true, and it will subject them to liability for their illegal actions.

PATENT TERM RESTORATION

Title III deals directly with the administrative delay problem by restoring to the patent holder any part of the term that is lost due to undue administrative delay. To prevent any possible confusion over what undue delay means, the bill sets specific deadlines for the Patent Office to act. The office has fourteen months to issue a first office action and four months to respond to subsequent applicant filings. Any delay beyond those deadlines is considered undue delay and will be restored to the patent term. Thus, Title III solves the administrative delay problem in a clear, predictable, and objective manner.

PRIOR DOMESTIC COMMERCIAL USE

Title IV deals with people who independently invent new art, and use it in commercial sale, but who never patent their invention. Specifically, this title provides rights to a person who has commercially sold an invention more than 1 year before another person files an application for a patent on the same subject matter. Anyone in this situation will be permitted to continue to sell his product without being required to pay a royalty to the patent holder. This basic fairness measure is aimed at protecting the innocent inventor who chooses to use trade secret protection instead of pursuing a patent and who has expended enough time and money to begin commercial sale of the invention. It also serves as an incentive for those who wish to seek a patent to seek it quickly, thus reducing the time during which others may acquire prior user rights. The incentives of this title will improve the efficiency of our patent system by protecting ongoing business concerns and encouraging swift prosecution of patent applications.

PATENT REEXAMINATION REFORM

Title V provides for a greater role for third parties in patent re-examination proceedings. Nothing is more basic to an effective system of patent protection than a reliable examination process. Without the high level of faith that the PTO has earned, respect for existing patents would fall away and innovation would be discouraged for fear of a lack of protection for new inventions.

In the information age, however, it is increasingly difficult for the PTO to keep track of all the prior art that exists. The examiners do the best job they can, but inevitably someone misses something and grants a patent that should not be granted. This is the problem that title V addresses.

Title V amends the existing reexamination process to allow third-parties

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to raise a challenge to an existing patent and to participate in the reexamination process in a meaningful way. Thus, the expertise of the patent examiner is supplemented by the knowledge and resources of third-parties who may have information not known to the patent examiner. Through this joint effort, we maximize the flow of information, increase the reliability of patents, and thereby increase the strength of the American patent system.

There are also safeguards to prevent this process from being abused by those who merely seek to harass a patentholder. First, if a third-party requestor loses an appeal of his reexamination request, he may not subsequently raise any issue he could have raised during the examination proceeding in any forum. Second, a party that loses a civil action where that party failed to show the invalidity of the patent, the party may not subsequently seek a reexamination of such patent on any grounds that could have been raised in the civil action. Third, the burden of reexamination on the patent-holder is minimized by the fact that a reexamination is not like a court review, and that the patent holder need not submit any documentation in order to prevail.

PROVISIONAL APPLICATIONS FOR PATENTS

Title VI is comprised of miscellaneous provisions. First, it fixes a matter of a rather technical nature. Some foreign courts have interpreted American provisional applications in a way that would not preserve their filing priority. This title amends section 115 of Title 35 of the U.S. Code to clarify that if a provisional application is converted into a non-provisional application within 12 months of filing, that it stands as a full patent application, with the date of filing of the provisional application as the date of priority. If no request is made within 12 months, the provisional application is considered abandoned. This clarification will make certain that American provisional applications are given the same weight as other countries' provisional applications in other countries' courts.

PLANT PATENTS

Title VI also makes two corrections to the plant patent statute. First, the ban on tuber propagated plants is removed. This depression-era ban was included for fear of limiting the food supply. Obviously, this is no longer a concern. Second, the plant patent statute is amended to provide protection to parts of plants, as well as the whole plant. This closes a loophole that foreign growers have used to import the fruit or flowers of patented plants without paying a royalty because the entire plant was not being sold.

ELECTRONIC FILING

Lastly, this title also allows for the filing of patent and trademark documents by electronic medium. It is high time that the government office that is, by definition, always on the cutting edge of technology, be permitting to enter the age of computers.

Mr. President, this bill is an important, and necessary measure that enjoys overwhelming support. I am confident that it will be enacted into law this Congress.

THE COPYRIGHT TERM EXTENSION ACT OF 1997

Mr. President, the purpose of the Copyright Term Extension Act of 1997 is to ensure adequate copyright protection for American works abroad by extending the U.S. term of copyright protection for an additional 20 years. It also includes a provision reversing the Ninth Circuit decision in *La Cienega Music Co.* v. *ZZ Top* that calls into question the copyrights of thousands of musical works first distributed on sound recordings.

Except for the *La Cienega* provision, the substance of this bill is identical to S. 483, the Copyright Term Extension Act, which was passed by the Judiciary Committee on May 23, 1996, with overwhelming bipartisan support. This legislation also has the strong support of the Administration, as expressed by both the Commissioner of Patents and Trademarks, Bruce Lehman, and the Register of Copyrights, Marybeth Peters, in their testimony before the Judiciary Committee in the last Congress.

Twenty years ago, Mr. President, Congress fundamentally altered the way in which the U.S. calculates its term of copyright protection by abandoning a fixed-year term of protection and adopting a basic term of protection based on the life of the author. In adopting the life-plus-50 term, Congress cited three primary justifications for the change. 1) the need to conform the U.S. copyright term with the prevailing worldwide standard; 2) the insufficiency of the U.S. copyright term to provide a fair economic return for authors and their dependents; and, 3) the failure of the U.S. copyright term to keep pace with the substantially increased commercial life of copyrighted works resulting from the rapid growth in communications media.

Developments over the past 20 years have led to a widespread reconsideration of the adequacy of the life-plus-50-year term based on these same reasons. Among the main developments is the effect of demographic trends, such as increasing longevity and the trend toward rearing children later in life, on the effectiveness of the life-plus-50 term to provide adequate protection for American creators and their heirs. In addition, unprecedented growth in technology over the last 20 years, including the advent of digital media and the development of the National Information Infrastructure and the Internet, have dramatically enhanced the marketable lives of creative works. Most importantly, though, is the growing international movement toward the adoption the longer term of life-plus-70.

Thirty-five years ago, the Permanent Committee of the Berne Union began to reexamine the sufficiency of the life-plus-50-year term. Since then, a growing consensus of the inadequacy of the life-plus-50 term to protect creators in an increasingly competitive global marketplace has led to actions by several nations to increase the duration of copyright. Of particular importance is the 1993 directive issued by the European Union, which requires its member countries to implement a term of protection equal to the life of the author plus 70 years by July 1, 1995.

According to the Copyright Office, Belgium, Denmark, Finland, Germany, Greece, Ireland, Spain, and Sweden have all notified their laws to the European Commission and the Commission has found them to be in compliance with the EU Directive. Luxembourg, The Netherlands, Portugal, the United Kingdom, and Austria have each notified their implementing laws to the Commission and are awaiting certification. Other countries are currently in the process of bringing their laws into compliance. And, as the Register of Copyrights has stated, those countries that are seeking to join the European Union, including Poland, Hungary, Turkey, the Czech Republic, and Bulgaria, are likely to amend their copyright laws to conform with the life-plus-70 standard.

The reason this is of such importance to the United States is that the EU Directive also mandates the application of what is referred to as the rule of the shorter term. This rule may also be applied by adherents to the Berne Convention and the Universal Copyright Convention. In short, this rule permits those countries with longer copyright terms to limit protection of foreign works to the shorter term of protection granted in the country of origin. Thus, in those countries that adopt the longer term of life-plus-70, American works will forfeit 20 years of available protection and be protected instead for only the duration of the life-plus-50 term afforded under U.S. law.

Mr. President, I've already cited some statistics about the importance of copyright to our national economy. The fact is that America exports more copyrighted intellectual property than any country in the world, a huge percentage of it to nations of the European Union. In fact, intellectual property is our third largest export. And, according to 1994 estimates, copyright industries account for some 5.7 percent of the total gross domestic product. Furthermore, copyright industries are creating American jobs at twice the rate of other industries, with the number of U.S. workers employed by core copyright industries more than doubling between 1977 and 1994. Today, these industries contribute more to the economy and employ more workers than any single manufacturing sector, accounting for nearly 5 percent of the total U.S. workforce. In fact, in 1994, the core copyright industries employed more workers than the four leading noncopyright manufacturing sectors combined.

Clearly, Mr. President, America stands to lose a significant part of its

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international trading advantage if our copyright laws do not keep pace with emerging international standards. Given the mandated application of the rule of the shorter term under the EU Directive, American works will fall into the public domain 20 years before those of our European trading partners, undercutting our international trading position and depriving copyright owners of two decades of income they might otherwise have. Similar consequences will follow in those nations outside the EU that choose to exercise the rule of the shorter term under the Berne Convention and the Universal Copyright Convention.

Mr. President, adoption of the Copyright Term Extension Act will ensure fair compensation for the American creators whose efforts fuel the intellectual property sector of our economy by allowing American copyright owners to benefit to the fullest extent from foreign uses and will, at the same time, ensure that our trading partners do not get a free ride from their use of our intellectual property. And, as stated very simply by the Register of Copyrights in her testimony before the Judiciary Committee in the last Congress: "[i]t does appear that at some point in the future the standard will be life plus 70. The question is at what point does the United States move to this term * * *. As a leading creator and exporter of copyrighted works, the United States should not wait until it is forced to increase the term, rather it should set an example for other countries."

Mr. President, this bill is of crucial importance to our Nation's copyright owners and to our economy. It is also a balanced approach. It contains a provision, allowing the actual creators of copyrighted works in certain circumstances to bargain for the extra 20 years, except in the case of works made for hire. The libraries and archives, too, will be pleased to see that the bill provides them with additional latitude to reproduce and distribute material during the extension term, and it does not extend the copyright term for certain works that were unpublished at the time of the effective date of the 1976 act. This latter provision means that libraries and archives will be able to go forward with their plans to publish those unpublished works in 2003, the year after the current guaranteed term for unpublished works expires.

LA CIENEGA V. ZZ TOP

Mr. President, the Copyright Term Extension Act of 1997 also includes a provision to overturn the decision in *La Cienega Music Co.* v. *ZZ Top*, 53 F.3d 950 (9th Cir. 1995), cert denied, 116 S. Ct. 331 (1995). In general, *La Cienega* held that distributing a sound recording to the public—for example by sale—is a "publication" of the music recorded on it under the 1909 Copyright Act. Under the 1909 act, publication without copyright notice caused loss of copyright protection. Almost all music that was first published on recordings did not contain copyright notice, because publishers believed that it was not technically a publication. The Copyright Office also considered these musical compositions to be unpublished. The effect of *La Cienega*, however, is that virtually all music before 1978 that was first distributed to the public on recordings has no copyright protection—at least in the 9th Circuit.

By contrast, the Second Circuit in *Rosette* v. *Rainbo Record Manufacturing Corp.*, 546 F.2d 461 (2d Cir. 1975), *aff'd per curiam*, 546 F.2d 461 (2d Cir. 1976) has held the opposite—that public distribution of recordings was not a publication of the music contained on them. As I have noted, Rosette comports with the nearly universal understanding of the music and sound recording industries and of the Copyright Office.

Since the Supreme Court has denied cert in *La Cienega*, whether one has copyright in thousands of musical compositions depends on whether the case is brought in the Second or Ninth Circuits. This situation is intolerable. Overturning the La Cienega decision will restore national uniformity on this important issue by confirming the wisdom of the custom and usage of the affected industries and of the Copyright Office for nearly 100 years. My bill, however, also contains a provision to ensure that Congress' affirmation of this view will not retroactively upset the disposition of previously adjudicated or pending cases.

THE COPYRIGHT CLARIFICATION ACT OF 1997

Finally, Mr. President, I am introducing the Copyright Clarification Act of 1997 to make a series of truly technical amendments to the Copyright Act. The need for these technical corrections was brought to my attention in the last Congress by the Register of Copyrights, Ms. Marybeth Peters. This bill was passed by the House of Representatives in similar form in the 104th Congress. Unfortunately time ran short on our efforts to enact the same bill in the Senate. The version I am introducing today is identical to H.R. 672, which passed the House under suspension of the rules just yesterday. I hope the Senate will follow suit and act expeditiously to make these important technical amendments.

CONCLUSION

Mr. President, each of the three bills I am introducing today is tremendously important. For the information of my colleagues I am submitting a brief summary of the Omnibus Patent Act of 1997, a section-by-section analysis of the Copyright Term Extension Act of 1997, and a summary of provisions of the Copyright Clarification Act of 1997. I ask unanimous consent that they be printed in the RECORD, along with the text of the Copyright Term Extension Act of 1997 and the text of the Copyright Clarification Act of 1997.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 505

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Copyright Term Extension Act of 1997".

SEC. 2. DURATION OF COPYRIGHT PROVISIONS.

(a) PREEMPTION WITH RESPECT TO OTHER LAWS.—Section 301(c) of title 17, United States Code, is amended by striking "February 15, 2047" each place it appears and inserting "February 15, 2067".

(b) DURATION OF COPYRIGHT: WORKS CREATED ON OR AFTER JANUARY 1, 1978.—Section 302 of title 17, United States Code, is amended—

(1) in subsection (a) by striking "fifty" and inserting "70";

(2) in subsection (b) by striking "fifty" and inserting "70";

(3) in subsection (c) in the first sentence—

(A) by striking "seventy-five" and inserting "95"; and

(B) by striking "one hundred" and inserting "120"; and

(4) in subsection (e) in the first sentence—

(A) by striking "seventy-five" and inserting "95";

(B) by striking "one hundred" and inserting "120"; and

(C) by striking "fifty" each place it appears and inserting "70".

(c) DURATION OF COPYRIGHT: WORKS CREATED BUT NOT PUBLISHED OR COPYRIGHTED BEFORE JANUARY 1, 1978.—Section 303 of title 17, United States Code, is amended in the second sentence by striking "December 31, 2027" and inserting "December 31, 2047".

(d) DURATION OF COPYRIGHT: SUBSISTING COPYRIGHTS.—

(1) IN GENERAL.—Section 304 of title 17, United States Code, is amended—

(A) in subsection (a)—

(i) in paragraph (1)—

(I) in subparagraph (B) by striking "47" and inserting "67"; and

(II) in subparagraph (C) by striking "47" and inserting "67";

(ii) in paragraph (2)—

(I) in subparagraph (A) by striking "47" and inserting "67"; and

(II) in subparagraph (B) by striking "47" and inserting "67"; and

(iii) in paragraph (3)—

(I) in subparagraph (A)(i) by striking "47" and inserting "67"; and

(II) in subparagraph (B) by striking "47" and inserting "67";

(B) by amending subsection (b) to read as follows:

"(b) COPYRIGHTS IN THEIR RENEWAL TERM AT THE TIME OF THE EFFECTIVE DATE OF THE COPYRIGHT TERM EXTENSION ACT OF 1997.—Any copyright still in its renewal term at the time that the Copyright Term Extension Act of 1997 becomes effective shall have a copyright term of 95 years from the date copyright was originally secured.";

(C) in subsection (c)(4)(A) in the first sentence by inserting "or, in the case of a termination under subsection (d), within the five-year period specified by subsection (d)(2)," after "specified by clause (3) of this subsection,"; and

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

"(d) TERMINATION RIGHTS PROVIDED IN SUBSECTION (c) WHICH HAVE EXPIRED ON OR BEFORE THE EFFECTIVE DATE OF THE COPYRIGHT TERM EXTENSION ACT OF 1997.—In the case of any copyright other than a work made for hire, subsisting in its renewal term on the effective date of the Copyright Term Extension Act of 1997 for which the termination right provided in subsection (c) has expired by such date, where the author or owner of

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the termination right has not previously exercised such termination right, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated in subsection (a)(1)(C) of this section, other than by will, is subject to termination under the following conditions:

"(1) The conditions specified in subsection (c) (1), (2), (4), (5), and (6) of this section apply to terminations of the last 20 years of copyright term as provided by the amendments made by the Copyright Term Extension Act of 1997.

"(2) Termination of the grant may be effected at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured.".

(2) COPYRIGHT RENEWAL ACT OF 1992.—Section 102 of the Copyright Renewal Act of 1992 (Public Law 102-307; 106 Stat. 266; 17 U.S.C. 304 note) is amended—

(A) in subsection (c)—

(i) by striking "47" and inserting "67";

(ii) by striking "(as amended by subsection (a) of this section)"; and

(iii) by striking "effective date of this section" each place it appears and inserting "effective date of the Copyright Term Extension Act of 1997"; and

(B) in subsection (g)(2) in the second sentence by inserting before the period the following: ", except each reference to forty-seven years in such provisions shall be deemed to be 67 years".

SEC. 3. REPRODUCTION BY LIBRARIES AND ARCHIVES.

Section 108 of title 17, United States Code, is amended—

(1) by redesignating subsection (h) as subsection (i); and

(2) by inserting after subsection (g) the following:

"(h)(1) For purposes of this section, during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.

"(2) No reproduction, distribution, display, or performance is authorized under this subsection if—

"(A) the work is subject to normal commercial exploitation;

"(B) a copy or phonorecord of the work can be obtained at a reasonable price; or

"(C) the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.

"(3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives.".

SEC. 4. DISTRIBUTION OF PHONORECORDS.

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

(1) in the first sentence by striking "Copyright" and inserting "(a) Copyright"; and

(2) by adding at the end the following:

"(b) The distribution before January 1, 1978, of phonorecords shall not constitute publication of the musical work embodied therein for purposes of the Copyright Act of 1909.".

SEC. 5. EFFECTIVE DATES.

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

(b) DISTRIBUTION OF PHONORECORDS.—The amendment made by section 4 shall not be a basis to reopen an action nor to commence a subsequent action for copyright infringement if an action in which such claim was raised was dismissed by final judgment before the date of enactment of this Act. The amendment made by section 4 shall not apply to any action pending on the date of enactment in any court in which a party, prior to the date of enactment, sought dismissal of, judgment on, or declaratory relief regarding a claim of infringement by arguing that the adverse party had no valid copyright in a musical work by virtue of the distribution of phonorecords embodying it.

THE COPYRIGHT TERM EXTENSION ACT OF 1997 (S. 505)—SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

The proposed legislation is entitled the Copyright Term Extension Act of 1997.

SECTION 2. DURATION OF COPYRIGHT PROVISIONS

Section 2(a)—Preemption with Respect to Other Laws

This subsection amends §301(c) of the Copyright Act to extend for an additional 20 years the application of common law and state statutory protection for sound recordings fixed before February 15, 1972. Under §301, the federal law generally preempts all state and common law protection of copyright with several exceptions, including one for sound recordings fixed before February 15, 1972 (the effective date of the statute extending federal copyright protection to sound recordings). Because federal copyright protection applies only to sound recordings fixed on or after that date, federal preemption of state statutory and common law protection of sound recordings fixed before February 15, 1972, would result in all of these works falling into the public domain. The §301 exception was enacted to ensure a 75-year minimum term of copyright protection for these works. By delaying the date of federal Copyright Act preemption of state statutory and common law protection of pre-February 15, 1972, sound recordings until February 15, 2067, this subsection extends the minimum term of protection for these works by 20 years.

Section 2(b)—Duration of Copyright: Works Created on or After January 1, 1978

This subsection amends §302 of the Copyright Act to extend the U.S. term of copyright protection by 20 years for all works created on or after January 1, 1978. For works in general, which currently enjoy protection for the life of the author plus 50 additional years under §301(a), this section creates a term equal to the life of the author plus 70 years. Likewise, for joint works under §302(b), this section extends the current term of protection to the life of the last surviving author plus 70 years. For anonymous works, pseudonymous works, and works made for hire, which are protected the shorter of 75 years from publication or 100 years from creation under §302(c), this subsection extends the term to the shorter of 95 years from publication or 120 years from the date the work is created.

This subsection also amends §302(e) of the Copyright Act to extend by 20 years the various dates relating to the presumptive death of the author as a complete defense against copyright infringement. Whereas current copyright protection is generally tied to the life of the author, it is sometimes not possible to ascertain whether the author of a work is still living, or even to identify the year of death if the author is deceased. §302(e) provides a complete defense against copyright infringement when the work is used more than 75 years after publication or 100 years after creation, whichever is less, provided the user obtains a certificate from the Copyright Office indicating that it has no record to indicate whether that person is living or died less than 50 years before. This subsection would extend protection of such works for an additional 20 years—95 years from publication and 120 years from creation—as well as base the presumptive death of the author on certification by the Copyright Office that is has no record to indicate whether the person is living or died less than 70 years before, which is 20 years longer than the 50 years currently provided for in §302(e).

Section 2(c)—Duration of Copyright: Works Created But Not Published or Copyrighted Before January 1, 1978

This subsection amends §303 of the Copyright Act to extend the minimum term of copyright protection by 20 years for works created but not copyrighted before January 1, 1978, provided they are published prior to December 31, 2002. Prior to 1978, unpublished works enjoyed perpetual copyright protection. Beginning in 1978, however, copyright protection for unpublished works was limited to the life of the author plus 50 years, or 100 years from creation for anonymous works, pseudonymous works, and works made for hire. Under §303, however, works created but not published before January 1, 1978, are guaranteed protection until at least December 31, 2002. Works subsequently published before that date are guaranteed further protection until December 31, 2027. This subsection provides an additional 20 years of protection for these subsequently published works by ensuring that copyright protection will not expire before December 31, 1047.

Section 2(d)(1)(A)—Duration of Copyright: Copyrights in Their First Term on January 1, 1978

This subsection amends §304(a) of the Copyright Act to extend the term of protection for works in their first term on January 1, 1978, by extending the renewal term from 47 years to 67 years. The effect of this amendment is to provide a composite term of protection of 95 years from the date of publication.

Section 2(d)(1)(B)—Duration of Copyright: Copyright in Their Renewal Term or Registered for Renewal Before January 1, 1978

This subsection amends §304(b) of the Copyright Act to extend the copyright term of pre-1978 works currently in their renewal term from 75 years to 95 years. As amended, this section clarifies that the extension applies only to works that are currently under copyright protection and is not intended to restore copyright protection to works already in the public domain.

Section 2(d)(1)(C) & (D)—Termination of Transfers and Licenses

These subsections amend §340(c) of the Copyright Act and create a new subsection (d) to provide a revived power of termination for individual authors whose right to terminate prior transfers and licenses of copyright under §304(c) has expired, provided the author has not previously exercised that right. Under §304(c), an author may terminate a prior transfer or license of copyright for any work, other than a work made for hire, by serving advance written notice upon the grantee or the grantee's successor at least 2, but not more than 10, years prior to the effective date of the termination. Such termination may be effected at any time within 5 years beginning at the end of 56 years from the date of publication. The purpose of this termination provision was to afford the individual creator the opportunity to bargain for the benefit of the 19-year extension provided by the 1976 Copyright Act.

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For most individual creators, the existing power of termination under §304(c) will allow them to terminate prior transfers and to bargain for the benefit of both the extension under the 1976 Copyright Act and the extension under the Copyright Term Extension Act of 1997. For a much smaller group of individuals, the five-year window in which to terminate prior transfers under §304(c) has already expired. Thus, these creators are denied the opportunity to reap the benefits of the extended term, while the current copyright owners are given a 20-year windfall. This subsection amends the existing termination provisions under §304(c) of Copyright Act to create a revived window, beginning at the end of the current 75-year copyright term, in which individual creators or their heirs who did not terminate previous transfers or grants prior to the expiration of their right of termination under §304(c) may bargain for the benefit of the extended term.

Section 2(d)(2)—Copyright Renewal Act revisions

This subsection makes corresponding amendments to §102 of the Copyright Renewal Act of 1992 (P.L. 102-307, 106 Stat. 266) to reflect the changes made by the Copyright Term Extension Act.

Section 3—Clarification of Library Exemption of Exclusive Rights

This subsection amends §108 of the Copyright Act, governing limited exemptions from copyright infringement for libraries and archives, including nonprofit educational institutions that function as such, by redesignating subsection (h) as subsection (i) and inserting a new subsection (h). The new subsection (h)(1) will allow libraries, archives, and nonprofit educational institutions to reproduce and distribute copies of works for preservation, scholarship, or research during the last 20 years of copyright, if the works are not being commercially exploited and cannot be obtained at a reasonable price. The new subsection (h)(2) provides that the limited exemption does not apply where the copyright owner provides notice to the Copyright Office that the conditions regarding commercial exploitation and reasonable availability have not been met. The new subsection (h)(3) provides that the exemption does not apply to subsequent users other than the libraries or archives.

SECTION 4. DISTRIBUTION OF PHONORECORDS

Section 4 affirms the longstanding view that the public distribution of phonorecords prior to 1978, did not constitute publication of the musical composition embodied therein under the 1909 Copyright Act. This section overturns the decision in *LaCienega Music Co.* v. *Z.Z. Top.*, 53 F.3d 950 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 331 (1995), which held that the sale of records constituted "publication" of the musical composition under the 1909 Act, and implicitly ruled that unless such a copy contained a copyright notice, the composition entered the public domain immediately upon the first sale. The result of such a view is that potentially thousands of musical compositions will be stripped of their presumed copyright protection as unpublished works under the 1909 Act. Section 13 adopts the view of the Second Circuit that the pre-1978 sale or distribution of recordings to the public did not constitute a publication for copyright purposes. *Rosette* v. *Rainbo Record Mfg. Corp.*, 354 F.Supp. 1183 (S.D.N.Y.), *aff'd per curiam*, 546 F.2d 461 (2d. Cir. 1976). This same view is adopted by the Copyright Office, which for years has refused to accept registrations for such phonorecords as published works.

SECTION 5. EFFECTIVE DATE

Subsection (a) provides that this Act and the amendments made thereby shall be effective on the date of enactment. Subsection (b) provides, however, that the overturning of the *LaCienega* decision will not retroactively upset the disposition of previously adjudicated or pending cases.

Mr. LEAHY. Mr. President, I am glad to be working with Senator HATCH as original cosponsors of this, the Copyright Term Extension Act of 1997. We worked together on this matter last Congress to craft a bill that was reported by the Judiciary Committee to the Senate by a vote of 15 to 3.

I raised a number of questions and concerns during our Judiciary Committee hearing on this issue back in September 1995. I spoke of a letter I had received from Prof. Karen Burke Lefevre of Vermont and the Rensselaer Polytechnic Institute. She expressed reservations, as a researcher and author, that Congress not extend the term for unpublished works beyond the term set by the 1976 Act. This category of materials is set to have its copyrights expire in 2002. They include anonymous works and unpublished works of interest to scholars. In section 2(c) of the bill we introduce today, we accommodate these interests and preserve the public availability of these materials in 2003, if they remain unpublished on December 31, 2002.

I want to thank Marybeth Peters, our Register of Copyrights, for supporting this improvement in the bill, and Senator HATCH for working with me on it.

I am concerned about libraries, educational institutions and nonprofits being able to access materials and provide access in turn for research, archival, preservation and other purposes. We have also made progress in this area as reflected in section 3 of the bill. Copyright industry and library representatives have narrowed their differences. I ask for their continued help in crafting the best balance possible to create public access for noncommercial purposes during the extension period without undercutting the value of copyrights.

At our hearing I also raised the notion of a new right of termination for works where the period of termination in current law has already passed and the 20-year extension inures to the benefit of a copyright transferee. This bill creates such a right of termination in section 2(d) of the bill.

At our hearing, I was still considering whether there was sufficient justification for extending the copyright term for an additional 20 years. At that time we were considering the European Union Directive to its member countries to provide copyright protection for a term of life plus 70 years by July 1, 1995. While many of our trading partners had not extended their terms by July 1995, they have acted to do so in the past 2 years.

I received a letter from Bruce A. Lehman, the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, in which he reported that Austria, Germany, Greece, France, Denmark, Belgium, Ireland, Spain, Italy and the United Kingdom had complied with the EU Directive on Copyright Term. Sweden, Portugal, Finland and the Netherlands were reported to have legislation to do so pending, as well. With so many of our trading partners moving to the longer term but preparing to recognize American works for only the shorter term, I believe it is time for us to act.

This bill also now includes a revised version of legislation that passed the House last Congress but was stalled in the Senate to clarify the Copyright Act of 1909 with regard to whether the distribution of phonorecords may be held to be a divesting publication of the copyright in the musical composition embodied therein. The revision is intended to clarify the law while not affecting cases in which parties have litigated or are litigating this issue.

Finally, I feel strongly that the extension of the copyright term should include public benefit, such as the creation of new works or benefit to public arts. Senator DODD, Senator KENNEDY, and I have been concerned about finding an appropriate way to benefit the public from this extension and continue to do so. Along these lines, the Copyright Office is examining how the extension in this bill will benefit copyright industries, authors and the public.

Given the changes made to meet the concerns that I raised with an earlier bill and in light of the international developments that are disadvantaging American copyrighted works, I cosponsored the Committee substitute at our Judiciary Committee executive business session last Congress and pressed for its consideration by the Senate. Unfortunately, this bill was not considered by the Senate during the 104th Congress.

Accordingly, I join with Senator HATCH to reintroduce this copyright term extension legislation this Congress and look forward to working with him to see to its enactment, without further delay.

Mrs. FEINSTEIN. Mr. President, I want to express my support for the Copyright Term Extension Act of 1997. I believe that extending the basic term of copyright protection by 20 years is a step in the right direction.

Perhaps the most compelling reason for this legislation is the need for greater international reciprocity in honoring copyright terms. The European Union has formally adopted a life plus 70 copyright term, and countries currently awaiting admission to the Union will adopt this standard in the future. Several countries outside of the European Union also have turned to the life plus 70 term, and many expect it to become the international standard.

By extending to life plus 70 years, Congress will help ensure that American creators receive comparable protection in other countries. If we do not act, other nations will not be required

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to provide American authors and artists with any more protection than we offer them at home.

And, before the United States is the world's leader in the production of intellectual property, and because the State of California is home to many of the leading copyright industries, this issue is of great importance to me. We could be the net losers if we do not move toward greater harmonization.

Intellectual property—the collective creative output of America's makers of movies, music, art, and other works—is an enormous asset to the Nation's economy and balance of trade.

The International Intellectual Property Alliance estimates that copyright-related industries contributed more than $385 billion to the U.S. economy in 1994, with more than $50 billion in foreign sales.

Many other countries have preferred to appropriate and re-sell American films, music, and computer programs—some of the great exports of my State of California—rather than license American works.

The United States suffers greatly from illegal duplication of our work. Why, then, should we sit back and allow European companies to legally profit from the use of our works, without paying us in return?

As Prof. Arthur Miller of Harvard Law School aptly, albeit bluntly, put it: "Unless Congress matches the copyright extension adopted by the European Union, we will lost 20 years of valuable protection against rip-off artists." Since America is the world's principal exporter of popular culture, extension of the basic copyright term is an important step in the right direction.

Reciprocity in copyright protection becomes even more necessary in today's global information society, where computer networks span the continents, and intellectual property is shuttled around the world in seconds.

The world has changed dramatically since 1976, when Congress established the present copyright terms. Many copyrighted works have a much longer commercial life than they used to have.

Videocassettes, cable television, and new satellite delivery systems have extended the commercial life of movies and television series. New technologies not only have extended but also have expanded the market for creative content. Cable television, which promises hundreds of different channels, has vastly expanded this market. Networked computers add to the demand for content. Interactive television promises to do the same.

The Copyright Term Extension Act will go far to address the global developments I have mentioned.

After introduction, I recommend that my colleagues and I further develop the language of the act to ensure that all contributors to the creative process receive benefits from the extended copyright term.

I urge my colleagues to support this bill.

S. 506

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Copyright Clarifications Act of 1997".

SEC. 2. SATELLITE HOME VIEWER ACT OF 1994.

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:

"(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 on which the source country of the restored work becomes an eligible country, if that country 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—

"(A) January 1, 1996, 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—

"(A) becomes a WTO member country after the date of the enactment of the Uruguay Round Agreements Act;

"(B) on such date of enactment is, or after such date of enactment becomes, a member of the Berne Convention; or

"(C) after such date of enactment becomes subject to a proclamation under subsection (g).

For purposes of this paragraph, a nation that is a member of the Berne Convention on the date of the enactment of the Uruguay Round Agreements Act shall be construed to become an eligible country on such date of enactment.".

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, if a copyright arbitration royalty panel is convened, ending 30 days after the Librarian issues and publishes in the Federal Register an order adopting the determination of the copyright arbitration royalty panel or an order setting the terms and rates (if the Librarian rejects the panel's determination)" 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, by arbitration in accordance with the provisions of chapter 8, the terms and rates and the division of fees described in paragraph (1).''; 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

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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. 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. 8. 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 1997 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 may, on the basis of the study under paragraph (1), and subject to paragraph (5), increase fees to not more than that necessary to cover 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 under 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 established under this subsection shall be fair and equitable and give due consideration to the objectives of the copyright system.

"(5) If the Register determines under paragraph (2) that 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 from such portion of fees 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 Copyright Office, 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. 9. 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 presiding in distribution proceedings 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 hired 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 of title 17, United States Code, is amended—

(1) in subsection (c) by striking the last sentence; and

(2) in subsection (h) by amending paragraph (1) to read as follows:

"(1) 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 under this chapter. Such deduction may be made before the fees are distributed to any copyright claimants. In addition, all funds made available by an appropriations Act as offsetting collections and available for deductions under this subsection shall remain available until expended. 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.".

SEC. 10. 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. 11. CONFORMING AMENDMENT.

Section 4 of the Digital Performance Right in Sound Recordings Act of 1995 (Public Law 104-39) is amended by redesignating paragraph (5) as paragraph (4).

SEC. 12. MISCELLANEOUS TECHNICAL AMENDMENTS.

(a) AMENDMENTS TO TITLE 17, UNITED STATES CODE.—Title 17, United States Code, is amended as follows:

(1) The table of chapters at the beginning of title 17, United States Code, is amended—

(A) in the item relating to chapter 6, by striking "**Requirement**" and inserting "**Requirements**";

(B) in the item relating to chapter 8, by striking "**Royalty Tribunal**" and inserting "**Arbitration Royalty Panels**";

(C) in the item relating to chapter 9, by striking "**semiconductor chip products**" and inserting "**Semiconductor Chip Products**"; and

(D) by inserting after the item relating to chapter 9 the following:

"**10. Digital Audio Recording Devices and Media ..... 1001**".

(2) The item relating to section 117 in the table of sections at the beginning of chapter 1 is amended to read as follows:

"117. Limitations on exclusive rights: Computer programs.".

(3) Section 101 is amended in the definition of to perform or display a work "publicly" by striking "processs" and inserting "process".

(4) Section 108(e) is amended by striking "pair" and inserting "fair".

(5) Section 109(a)(2)(B) is amended by striking "Copyright" and inserting "Copyrights".

(6) Section 110 is amended—

(A) in paragraph (8) by striking the period at the end and inserting a semicolon;

(B) in paragraph (9) by striking the period at the end and inserting "; and"; and

(C) in paragraph (10) by striking "4 above" and inserting "(4)".

(7) Section 115(c)(3)(E) is amended—

(A) in clause (i) by striking "section 106(1) and (3)" each place it appears and inserting "paragraphs (1) and (3) of section 106"; and

(B) in clause (ii)(II) by striking "sections 106(1) and 106(3)" and inserting "paragraphs (1) and (3) of section 106".

(8) Section 119(c)(1) is amended by striking "unless until" and inserting "unless".

(9) Section 304(c) is amended in the matter preceding paragraph (1) by striking "the subsection (a)(1)(C)" and inserting "subsection (a)(1)(C)".

(10) Section 405(b) is amended by striking "condition or" and inserting "condition for".

(11) Section 407(d)(2) is amended by striking "cost of" and inserting "cost to".

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(12) The item relating to section 504 in the table of sections at the beginning of chapter 5 is amended by striking "Damage" and inserting "Damages".

(13) Section 504(c)(2) is amended by striking "court it" and inserting "court in".

(14) Section 509(b) is amended by striking "merchandise; and baggage" and inserting "merchandise, and baggage".

(15) Section 601(a) is amended by striking "nondramtic" and inserting "nondramatic".

(16) Section 601(b)(1) is amended by striking "subsustantial" and inserting "substantial".

(17) The item relating to section 710 in the table of sections at the beginning of chapter 7 is amended by striking "Reproductions" and inserting "Reproduction".

(18) The item relating to section 801 in the table of sections at the beginning of chapter 8 is amended by striking "establishment" and inserting "Establishment".

(19) Section 801(b) is amended—

(A) by striking "shal be—" and inserting "shall be as follows:";

(B) in paragraph (1) by striking "to make" and inserting "To make";

(C) in paragraph (2)—

(i) by striking "to make" and inserting "To make"; and

(ii) in subparagraph (D) by striking "adjustment; and" and inserting "adjustment."; and

(D) in paragraph (3) by striking "to distribute" and inserting "To distribute".

(20) Section 803(b) is amended in the second sentence by striking "subsection subsection" and inserting "subsection".

(21) The item relating to section 903 in the table of sections at the beginning of chapter 9 is amended to read as follows:

"903. Ownership, transfer, licensure, and recordation.".

(22) Section 909(b)(1) is amended—

(A) by striking "force" and inserting "work"; and

(B) by striking "sumbol" and inserting "symbol".

(23) Section 910(a) is amended in the second sentence by striking "as used" and inserting "As used".

(24) Section 1006(b)(1) is amended by striking "Federation Television" and inserting "Federation of Television".

(25) Section 1007 is amended—

(A) in subsection (a)(1) by striking "The calendar year in which this chapter takes effect" and inserting "calendar year 1992"; and

(B) in subsection (b) by striking "the year in which this section takes effect" and inserting "1992".

(b) RELATED PROVISIONS.—

(1) Section 1(a)(1) of the Act entitled "An Act to amend chapter 9 of title 17, United States Code, regarding protection extended to semiconductor chip products of foreign entities", approved November 9, 1987 (17 U.S.C. 914 note), is amended by striking "orginating" and inserting "originating".

(2) Section 2319(b)(1) of title 18, United States Code, is amended by striking "last 10" and inserting "least 10".

SEC. 13. EFFECTIVE DATES.

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

(b) SATELLITE HOME VIEWER ACT OF 1994.—The amendments made by section 2 shall be effective as if enacted as part of the Satellite Home Viewer Act of 1994 (Public Law 103-369).

(c) TECHNICAL AMENDMENT.—The amendment made by section 12(b)(1) shall be effective as if enacted on November 9, 1987.

SUMMARY OF PROVISIONS—COPYRIGHT CLARIFICATION ACT OF 1997 (S. 506)

The Copyright Clarification Act is intended to make several technical, yet important, changes to Copyright law, as suggested by the U.S. Copyright Office. The following is a brief summary of its provisions.

Satellite Home Viewer Act Technical Amendments. Section 2 makes technical corrections to the Satellite Home Viewer Act of 1994 (SHVA), as recommended by the Copyright Office. First, the bill corrects the dollar figures specified in the Act for royalties to be paid by satellite carriers—the 1994 SHVA amendments mistakenly reversed the rates set by arbitration in 1992 for signals subject to FCC syndicated exclusivity blackout rules vs. those that are not subject to such rules. Second, the bill corrects errors in section numbers and references resulting from the failure of the 1994 SHVA amendments to account for changes made to Title 17 by the Copyright Royalty Tribunal Act of 1993. Third, the bill replaces references to "the effective date of the Satellite Home Viewer Act of 1988" with the actual calendar date so as to avoid confusion caused by the two Acts bearing the same name.

Copyright Restoration. Section 3 clarifies ambiguities and corrects drafting errors in the Copyright Restoration Act, which was enacted as part of the 1994 Uruguay Round Agreements Act to restore copyright protection in the U.S. for certain works from WTO member countries that had fallen into the public domain. First, the bill corrects a drafting error that precludes U.S. creators of derivative works from continuing to exploit those works if copyright protection in the underlying foreign work is restored under GATT. Second, the bill eliminates a duplicative reporting requirement. Third, the bill clarifies Congress' intent that the effective date of restoration is January 1, 1996 (not 1995 as interpreted by some commentators). Fourth, the bill clarifies the definition of "eligible country" as it pertains to limited rights of continued exploitation for those who rely on public domain works that were restored under GATT. An ambiguous reference in the original bill left open the possible interpretation that a party would not qualify as a "reliance party" where reliance had not predated adherence to the Berne Convention for the country of origin—a date that goes as far back as 1886 for many countries.

Digital Performance Right in Sound Recordings. Section 4 ensures that the effective rates under the 1995 digital performance rights bill will not lapse. That bill requires new rates to be established during 2000, and the 1996 rates are to expire at the end of 2000. In the case where the copyright arbitration royalty panel (CARP) does not complete its work by the end of the year, or where the Librarian of Congress does not complete its review of the CARP's report by the end of the year, this section provides that the 1996 rates will continue beyond the December 31, 2000, expiration date until 30 days after the Librarian publishes a decision to adopt or reject the CARP's rate adjustment. This section (as well as provisions in Section 5) also eliminates authorization for a CARP to publish its report in the Federal Register since only federal agencies are permitted to do so. Instead, CARP decisions will be published by the Librarian. Section 11 corrects a numbering mistake in the 1995 Digital Performance Right bill.

Negotiated Jukebox License. Section 6 restores the definitions of a "jukebox" and a "jukebox operator" to §116A of Title 17. These definitions were mistakenly eliminated from the old §116 jukebox compulsory license when that section was replaced by the current §116A negotiated jukebox license in the 1988 Berne Convention implementing legislation. This section also clarifies that all jukebox negotiated licenses that require arbitration are CARP proceedings.

Advance Notice of Intent to Copyright Live Performances. Section 7 changes the current 10-days advanced notice requirement for a copyright owner who intends to copyright the fixation of a live performance to a 48-hours advanced notice requirement. The current provision has proven unworkable for sporting events, in particular, where the teams and times of the event may not be known 10 days in advance.

Copyright Office Fees. Section 8 responds to ambiguities in the Copyright Fees and Technical Amendments Act of 1989. That bill allows the Copyright Office to increase fees in 1995, and every fifth year thereafter to reflect changes in the Consumer Price Index (CPI). The Copyright Office did not raise its fees in 1995, because it determined that the costs associated with the increase would be greater than the resulting revenue. Uncertainty has arisen as to whether the failure to increase fees in 1995 precludes the Copyright Office from increasing its fees again until 2000 and whether the increase in the CPI to be used in calculating the fee increase is the increase since the last fee settlement (1990) or only that since 1995. The bill clarifies that the Copyright Office may increase its fees in any given year, provided it has not done so within the last five years, and that the fees may be increased up to the amount required to cover the reasonable costs incurred by the Copyright Office plus a reasonable inflation adjustment to account for future increases in costs. The bill also allows the Register of Copyrights to invest funds from the prepaid fees in interest bearing securities in the U.S. Treasury and to use the income from those investments for Copyright Office expenses. It is expected that the proceeds will be used for the development of the Copyright Office's new electronic registration, recordation, and deposit system.

Copyright Arbitration Royalty Panels (CARPs). Section 9 clarifies administrative issues regarding the operation of the CARPs. First, it gives the Librarian of Congress express authority to pay panel members directly in ratemaking and distribution proceedings and clarifies that these arbitrators are independent contractors acting on behalf of the U.S. (thus subject to laws governing the conduct of government employees). Second, it clarifies that copyright owners and users are responsible for equal shares of the costs of ratemaking proceedings. Third, it clarifies by way of example the procedural and evidentiary rulings the Librarian of Congress can issue with respect to CARP proceedings. Fourth, it clarifies that the 1997 ratemaking proceeding for the satellite carrier compulsory license is a CARP proceeding.

Digital Audio Recording Devices. Section 10 provides added flexibility for the Librarian of Congress in setting the negotiation period for the distribution of digital audio recording technology (DART) royalties, with the intention of promoting settlements and timely distribution of royalties. The current March 30 annual deadline for determining whether there exist controversies among claimants has proven unworkable and is eliminated by this section.

Miscellaneous Technical Amendments. Section 12 makes various technical corrections, such as spelling, grammatical, capitalization, and other corrections, to title 17.

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Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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