HEINONLINE

Citation: 4 Bernard D. Reams Jr. Law of E-SIGN A Legislative of the Electronic Signatures in Global and National Act Public Law No. 106-229 2000 S12375 2002

Content downloaded/printed from HeinOnline (http://heinonline.org) Sun Apr 21 21:39:23 2013

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from uncorrected OCR text.

Now, it is true, that is down dramatically from the last year of the Bush administration, when the true deficit, instead of being $290 billion, was really $341 billion if you excluded the Social Security surplus. But if you exclude the Social Security surplus this year, instead of having a $70 billion surplus, you have a $35 billion deficit.

Some economists say, well, you really ought to put it all together. Well, maybe that is why they are economists. I can tell you this: If you were running a company and you tried to take the retirement funds of your employees and throw those into the pot, you would be in big trouble because that is a violation of the law. It is called fraud. You cannot take the retirement funds of your employees, throw those into the pot, and say you have balanced your operating budget. But that is what is done with the Federal budget.

So I think it is important to understand that while it is true we have made enormous progress, we have come down dramatically with respect to the deficit, and in fact in terms of a unified budget, we are balanced for the first time in 30 years. If we did not count the Social Security surplus, we would still have a deficit of $35 billion.

Mr. President, let me just conclude by saying, the fact is, when I hear our colleagues say, No. 1, President Clinton is responsible for our failure to have a budget resolution, that is absolutely untrue. There is not a Member of this body who does not understand the President does not have one thing to do with the budget resolution. The budget resolution is just that—it is a resolution by both Houses of Congress. It is our responsibility to pass a budget resolution, and this Congress has failed.

For the first time in 24 years, there is no budget resolution. The Senate passed a budget resolution, but the Republicans in the House and the Republicans in the Senate could never agree, and so for months the appropriations bills were delayed. So here we are at the start of a new fiscal year—no budget, no appropriations bills, and we are sitting here wondering how it is going to end.

I think we know how it is going to end, Mr. President. It is going to end with a huge continuing resolution. There will probably be thousands of pages. There will probably be seven or eight appropriations bills all glommed into one package. And remember what Ronald Reagan said about that kind of process? He said in his 1987 State of the Union Address:

> . . . the budget process is a sorry spectacle. The missing of deadlines and the nightmare of monstrous continuing resolutions packing hundreds of billions of dollars of spending into one bill must be stopped.

Our Republican friends in the House and the Senate must not have been listening to former President Reagan, because they have not stopped it. In fact, what they have done is, every year for the last 3 years that they have been in control of this Senate and the House, that is exactly what they have done. They failed to do their work on time and, instead, they have handed us a stack of thousands of pages in a continuing resolution, with no time to review.

And Ronald Reagan said the very next year, on February 18 of 1988, in his budget message:

> As I have stressed on numerous occasions, the current budget process is clearly unworkable and desperately needs a drastic overhaul. Last year, as in the year before, the Congress did not complete action on a budget until well past the beginning of the fiscal year. The Congress missed every deadline it had set for itself just 9 months earlier.

He could have been referring to this Congress, because this Congress has failed to meet every single budget deadline. In fact, for the first time in 24 years, they have produced no budget. Our colleague across the aisle was talking about how a family operates. I do not know many families that never bother to come up with a budget, but that is what has happened here under the leadership of our friends on the other side of the aisle. For the first time in 24 years, there is no budget—none. That is their failure, not the President's failure. It is their failure.

President Reagan went on to say that Congress missed every deadline. He said, "In the end, the Congress passed a year-long 1,057-page omnibus" appropriations bill with an accompanying conference report of over 1,000 pages and a reconciliation bill over 1,100 pages long.

President Reagan said:

> Members of Congress had only 3 hours to consider all three items. Congress should not pass another massive continuing resolution [President Reagan said in 1988.]

He went on to say:

> —and as I said in the State of the Union Address, if they do, I will not sign it.

What a difference 10 years makes. Ten years ago, a Republican President said there should not be passed another continuing resolution. But here we are with a Republican-controlled Congress who has failed to even write a budget. That is the most basic responsibility of any Congress, to write a budget. This Congress, under Republican control, has failed in that most basic duty for the first time in 24 years. Why? Because the Republicans in the U.S. Senate who did pass a budget resolution—we passed it on a bipartisan basis—could never get together with the Republicans in the House of Representatives. So what we have is a colossal failure.

I don't know how else to say it, but this is mismanagement on a grand scale. I hope people will remember what the record is because it does make a difference. America has enjoyed unprecedented prosperity in the last 5 years, prosperity that I believe came in significant part because of an economic plan that was passed in 1993, the 5-year budget plan, that actually did the job. It reduced the budget each and every year. I will show the comparison chart again.

It reduced the budget each and every year since it was passed. When President Bush left town, he had a $290 billion deficit. If you weren't counting Social Security surpluses, it was even worse than that; it was $341 billion. Let's talk on a unified basis for a moment because that is how the press always reports it. Clinton came in and each and every year after we passed that 1993 plan, the deficit has come down. So now we have a $70 billion surplus.

Again, I am quick to say I don't consider this a surplus because it is counting the Social Security surplus. Nonetheless, dramatic progress has been made in reducing the deficit. That has given rise to the strongest economy in almost anyone's memory.

Our friends on the other side who are now in control are responsible for a dramatic failure, a failure to write a budget for the United States of America. The result is, here we are, the new fiscal year has started, we have no budget, half the appropriations bills aren't done, they will all be rolled into a stack of paper that will be probably 3 feet high, it will be slammed on our desks, and we will be told to vote on it 3 hours later.

What a way to govern. What a way to manage.

It is not Bill Clinton's fault that no budget was written here. A budget resolution is the distinct responsibility of the Congress. This Congress has failed.

I yield the floor.

MAKING FURTHER CONTINUING APPROPRIATIONS FOR FISCAL YEAR 1999

The PRESIDING OFFICER. Under the previous order, H.J. Res 134, received today from the House, is deemed as passed.

The joint resolution (H.J. Res. 134) was considered read the third time and passed.

Mr. CONRAD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. JEFFORDS). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. CONRAD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

HOUSE-PASSAGE OF THE DIGITAL MILLENNIUM COPYRIGHT ACT CONFERENCE REPORT

Mr. HATCH. Mr. President, last Thursday the Senate approved, by unanimous consent, the conference report on H.R. 2281, the Digital Millennium Copyright Act (DMCA). I rise today to laud the House's action in adding its vote of approval to that of the Senate. The bill now goes to the President, who I expect will move

HeinOnline -- 4 Bernard D. Reams, Jr., Law of E-SIGN: A Legislative History of the Electronic Signatures in Global and National Commerce Act, Public Law No. 106-229 (2000) S12375 2002

swiftly to sign this important legislation into law.

As I said last Thursday, and on many other occasions, I believe the DMCA is one of the most important pieces of legislation to be considered by Congress this year, even in recent memory. It has been over twenty years since such significant copyright law reforms have been enacted in this country, and this vote has come at a critical juncture in our nation's transition to a "digital millennium."

But all this would not have happened without the critical support of countless parties who have come together in negotiations to refine the bill and reach a compromise that best promotes American interests at home and abroad. Once again, I want to thank all of the conferees who participated in bringing this legislation to closure.

In particular, I want to recognize the efforts of my counterparts on the Senate side, Senator LEAHY and Senator THURMOND. I also want to convey my appreciation for the dedicated efforts of Congressman HENRY HYDE, the distinguished Chairman of the House Judiciary Committee, Congressman JOHN CONYERS, the distinguished Ranking Member of the House Judiciary Committee, and Congressman HOWARD COBLE, the distinguished Chairman of the House Subcommittee on Courts and Intellectual Property. They have been committed to seeing this bill through from the start and have been wholly undeterred by other pressing business that has occupied the House Judiciary Committee in recent weeks. I also want to recognize Congressman TOM BLILEY, the distinguished Chairman of the Commerce Committee, for his willingness to consider the Senate's views objectively and dispassionately.

In addition, I want to acknowledge once again the hard work done by staff. In particular I want to recognize the efforts of Manus Cooney, Edward Damich, and Troy Dow of my staff, whose long hours and tireless efforts were key to guiding this bill through every stage of the legislative process. Bruce Cohen, Beryl Howell, and Marla Grossman, of Senator LEAHY's staff, likewise provided invaluable assistance on all levels. I also want to thank Garry Malphrus of Senator THURMOND's staff for his work in conference, as well as Paul Clement and Bartlett Cleland of Senator ASHCROFT's staff for their invaluable assistance in reaching key compromises in the Judiciary Committee. Finally, I want to thank the House staff, including Mitch Glazier, Debra Laman, Robert Raben, David Lehman, Bari Schwartz, Justin Lilley, Andrew Levin, Mike O'Rielly, and Whitney Fox.

I also want to recognize the long hours and persistent dedication of the many people who engaged in hard-fought, but ultimately fruitful, private-sector negotiations on related issues. Many of the compromises embodied in this legislation would not have been reached without the support of these parties. For example, we would not be lauding the passage of a bill today at all were it not for the willingness of the copyright industries, Internet service providers, educators, librarians, and others in the fair use community to come together at the direction and under the supervision of the Judiciary Committee to arrive at a consensus position regarding standards for limiting the copyright infringement liability of Internet service providers.

Many other negotiations were conducted and agreements reached that made this legislation possible, including agreements between copyright owners and manufacturers of the consumer electronics devices that make the use of their works by the public possible. One such agreement reflects the understanding of the motion picture industry and consumer electronics manufacturers regarding standards for the incorporation of certain copyright protection technologies in analog videocassette recorders. This agreement was the basis for the new section 1201(k) of the Copyright Act, as added by the DMCA, which requires analog videocassette recorders to accommodate specific copy control technologies in wide use in the market today. I have received a letter from Mr. William A. Krepick, President and Chief Operating Officer of Macrovision Corporation—the producer of such copy protection technology—assuring me of his commitment to adhere to the spirit of this agreement by making such technology available on reasonable and non-discriminatory terms, which in some circumstances will include royalty-free licenses. I would ask unanimous consent that the text of this letter be incorporated in the RECORD immediately after my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See Exhibit 1.)

Mr. HATCH. Mr. President, the DMCA is a remarkable bill that is the result of a remarkable process. By enacting this legislation in a timely fashion, the United States has set the marker for the rest of the world with respect to the implementation of the new WIPO treaties. As a result, the United States can look forward to stronger world-wide protection of our intellectual property and a stronger balance of trade as inbound revenues from foreign uses of our intellectual property continue to increase. I am pleased to have been a part of this great effort, and I look forward to the President's signing of H.R. 2281.

EXHIBIT 1

MACROVISION CORPORATION,
Sunnyvale, CA, October 7, 1998.

Hon. ORRIN HATCH,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR CHAIRMAN HATCH: I am writing this letter to you in your capacity as Chairman of the Senate-House Conference Committee on the Digital Millennium Copyright Act of 1998. We understand that the Conference Committee is prepared to include in the final legislation to be reported to the Senate and House of Representatives a provision that requires that analog videocassette recorders manufactured and/or sold in the United States must conform to two analog copy control technologies certain aspects of which are proprietary to Macrovision Corporation. As you may know, Macrovision Corporation has been in business for 15 years providing various copy control technologies to help copyright owners protect their valuable intellectual property. We license various technologies to hardware manufacturers, including manufacturers of consumer electronics and various computer-based products, and to Hollywood movie studios and other independent video producers.

We are a small company and have worked very hard over the past two-and-a-half years to demonstrate to the consumer electronics, computer, and motion picture companies and industries that our copy control technologies offer the best solution to digital-to-analog copy protection for the DVD format, as well as in its traditional analog videocassette application. We have worked with the companies and industries to ensure that compatability and effectiveness are assured, and, as a result, our technologies have been required for use to provide protection of the analog outputs of DVD playback devices implementing the two encryption-based copy protection systems now in the market—the Content Scramble System (CSS) and DIVX.

We support the legislative proposals that are being considered by the Conference Committee, in the form of Subsection "k" and its corresponding legislative history as attached to this letter. We also recognize the unique position that such legislation provides to our technology and our company. Accordingly, we are writing to assure you and your colleagues on the Conference Committee that we will not abuse our position in our licenses for the technologies for which responses are being required by this legislation. Specifically, we are willing to assure you and the Committee that any licenses to be necessary to implement these technologies will be offered on reasonable and non-discriminatory terms, as that phrase is commonly used and understood in industry standards processes. We will modify certain terms and conditions of our baseline analog copy control license agreements—and offer the same modifications to existing licensees—if this legislation is enacted in order to eliminate our contractual requirements that analog videocassette recorders manufactured in or sold in the United States respond to our technologies and that certain display device manufacturers ensure that their products are compatible with our technologies, in the sense of not displaying visible artifacts or distortions in the authorized playback of material protected using our analog copy control technologies. The first of these requirements will now be the subject of the statutory requirement that is the subject of the legislative provision.

The second requirement will now be the subject of an inter-industry forum on compatability issues, that will afford all interested parties an opportunity to work together to resolve such issues as they arise. We hasten to add that we do not expect such problems to arise, since our technologies have been proven to the satisfaction of the manufacturers that they do not cause problems, and we do not expect to make any material modifications to them in the future. Manufacturers already know what the technologies are and can test their products before finalizing their design. We commit to you and your colleagues that any changes that are made to our technologies will be the result of inter and intra industry consensus on the changes before they are made. Nevertheless, in order to reassure everyone involved, we are prepared to cooperate in the

HeinOnline -- 4 Bernard D. Reams, Jr., Law of E-SIGN: A Legislative History of the Electronic Signatures in Global and National Commerce Act, Public Law No. 106-229 (2000) S12376 2002

inter-industry forum that is being established. We have been assured that this forum will be established within six months after passage of this legislation and will include equal representation from the consumer electronics, computer, and movie studio industries.

With regard to our licensing terms, we commit to you and your colleagues that we will from the date of enactment adhere to the following points—which are essentially reflective of our current licensing policies. First, as stated above, our proprietary analog copy protection technology will be offered on reasonable and non-discriminatory terms, as that phrase is used in the normal industry parlance. Second, in relation to certain specific circumstances:

(a) Manufacturers of consumer-grade analog VHS and 8mm analog video cassette recorders/camcorders that are required by the legislation to conform to our proprietary analog copy protection technologies (and any new format analog videocassette recorder that is covered by paragraph (1)(A)(v) of the legislation and thereby required to conform to our proprietary analog copy control technologies) will be provided royalty-free licenses for the use of our relevant intellectual property in any device that plays back packaged, prerecorded content, or that reads and responds to or generates or carries forward the elements of these technologies associated with such content;

(b) In the same circumstances as described in (a), other manufacturers of devices that generate, carry forward, and/or read and respond to the elements of these technologies will be provided with licenses carrying only modest fees (in the current dollar range of $25,000 initial payment and lesser amounts as recurring annual fees);

(c) Manufacturers of other products, including set-top-boxes and other devices that perform similar functions (including integrated devices containing such functionality), will be provided with licenses on reasonable and non-discriminatory terms, including royalty and other considerations.

In the absence of the specific attached legislative and explanatory language, Macrovision would not have made the above referenced commitments regarding our licensing terms and our contract clauses on VCR responsiveness and playability issues. We very much appreciate the work of you and your colleagues in helping to draft and, hopefully, ultimately enact this legislation. We also appreciate and acknowledge the leadership and cooperation of certain companies and individuals in getting this proposal to this point.

I understand that this letter will be incorporated into the official report of the Conference Committee and that the Conferees are relying on our representation herein. If you or other members of the Conference have any questions or need any clarification on any point, please do not hesitate to contact me, or have one of your staff contact me.

Sincerely,

WILLIAM A. KREPICK,
President/COO.

SONNY BONO COPYRIGHT TERM EXTENSION ACT

Mr. HATCH. Mr. President, I am delighted at the recent passage of S. 505, the Sonny Bono Copyright Term Extension Act. The main purpose of the bill is to ensure adequate copyright protection for American works abroad by extending the U.S. term of copyright protection for an additional 20 years. The late Sonny Bono was an avid supporter of the bill, and he fully appreciated what its passage would mean to the American economy. It is therefore an appropriate memorial to this fine American.

20 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 towards 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 lead 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, all the states of the European Union have now brought their laws in compliance with the directive. 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, as well, 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, as I've said previously, 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, in 1996, the core U.S. copyright industries achieved foreign sales and exports exceeding $60 billion, surpassing, for the first time, every other export sector, including automotive, agriculture and aircraft. And, according to 1996 estimates, copyright industries account for some 5.7 percent of the total gross domestic product. Furthermore, copyright industries are creating American jobs at nearly three times the rate of other industries, with the number of U.S. workers employed by core copyright industries more than doubling between 1977 and 1996. Today, these industries contribute more to the economy and employ more workers than any single manufacturing sector, accounting for over 5 percent of the total U.S. workforce. In fact, in 1996, the total 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 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.

The public performance of musical works is one of the copyright rights that will be benefited by the 20-year extension. But—ironically—in title II of the bill, Mr. President, we are cutting back on that right by expanding the exemption that currently exists in the Copyright Act for "mom-and-pop" establishments. Because of the public performance right, businesses that use music to attract customers are required to obtain a license. The licenses can be obtained from the performing rights organizations (PROs), namely, ASCAP, BMI, and SESAC. The PROs, in turn, pay the owners of copyright in

HeinOnline -- 4 Bernard D. Reams, Jr., Law of E-SIGN: A Legislative History of the Electronic Signatures in Global and National Commerce Act, Public Law No. 106-229 (2000) S12377 2002

HeinOnline -- 4 Bernard D. Reams, Jr., Law of E-SIGN: A Legislative History of the Electronic Signatures in Global and National Commerce Act, Public Law No. 106-229 (2000) S12378 2002

Document No. 74

HeinOnline -- 4 Bernard D. Reams, Jr., Law of E-SIGN: A Legislative History of the Electronic Signatures in Global and National Commerce Act, Public Law No. 106-229 (2000) [i] 2002

HeinOnline -- 4 Bernard D. Reams, Jr., Law of E-SIGN: A Legislative History of the Electronic Signatures in Global and National Commerce Act, Public Law No. 106-229 (2000) [ii] 2002