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EXTENSION OF REMARKS

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Remarks:

Introduced by Mr. Hughes

INTRODUCING THE COPYRIGHT REFORM ACT OF 1993

HON. WILLIAM J. HUGHES

OF NEW JERSEY

IN THE HOUSE OF REPRESENTATIVES

Tuesday, February 16, 1993

Mr. HUGHES. Mr. Speaker, today, joined by Mr. FRANK, I introduce the Copyright Reform Act of 1993. An identical bill is being introduced in the Senate. As chairman of the Subcommittee on Intellectual Property and Judicial Administration, I have a keen interest in the Copyright Office and the Copyright Royalty Tribunal, two agencies for which the subcommittee has oversight jurisdiction. In the case of the Copyright Royalty Tribunal, we have an agency that is both broken and unnecessary. In the case of the Copyright Office, we have an agency that would be benefited by some relatively minor changes.

During the recent election, the public made clear that it wants a leaner, more efficient Government. President Clinton has taken some steps to reduce the size of the executive branch, and in his address to the Nation last night, he strongly reiterated the need to eliminate wasteful bureaucracy. The Copyright Reform Act of 1993 will bring needed reform to the administration of copyright in the legislative branch: It is a win-win bill that will eliminate an unnecessary agency, reduce the size of legislative branch employment, and remove bureaucratic obstacles to the enforcement of copyright.

EXPLANATION OF BILL

THE COPYRIGHT OFFICE

Title I of the bill concerns the operations of the Copyright Office. The Copyright Office is a part of the Library of Congress. The placement of the Copyright Office in the Library is an outgrowth of an 1870 centralization of the copyright registration and deposit requirements. Before 1870, copyright was secured by filing a prepublication copy of the title page of the work with the U.S. district court where the claimant resided, and by depositing, after publication, copies of the work with the Secretary of State. In 1870, both functions were assigned to the Library of Congress.

The 1870 centralization was extremely successful as a way for the Library of Congress to receive free books. So successful, in fact, that the Librarian of Congress requested the Congress to authorize the construction of a new building to house the deposits and the Library's administrative offices, which were, at the time, in the Capitol. The Librarian's request was fulfilled 27 years later, with the completion of the magnificent Thomas Jefferson Memorial Building, located across the street from the Capitol and adjacent to the Supreme Court.

The year 1897 was a banner year for another reason: The Congress authorized the Librarian to hire a Register of Copyrights to be in charge of the Copyright Department. Before 1897, copyright registration was, in many cases, handled personally by the Librarian.

The Copyright Reform Act of 1993 vests new responsibilities in the Register of Copyrights, including many presently assigned to the Copyright Royalty Tribunal. In light of these new responsibilities and certain separation of power issues discussed below in my explanation of title II of the bill, the act makes the Register a Presidential appointee, subject to the advice and consent of the Senate.

The legislation adopts other Copyright Office reforms that bear explanation. First, the bill repeals sections 411(a) and 412 of title 17, United States Code. Section 411(a) requires that copyright owners register their claim—or have that claim refused—before instituting an action for copyright infringement. Section 412 prohibits the courts from awarding attorney's fees and statutory damages to the copyright owner if the claim has not been registered before the infringement occurs. In the case of published works, there is a 3-month grace period measured from the date of first publication. Section 411(b), which provides special standing for certain works that are first fixed while being simultaneously transmitted, is retained, but amended to delete the registration requirement.

Sections 411(a) and 412 were reviewed during the debates that preceded passage of the Berne Implementation Act of 1988. That act left section 412 unamended, but created a two-tier approach to registration under section 411(a): The copyright owner of a work whose country of origin is a Berne country other than the United States does not have to comply with section 411(a). All other copyright owners, including U.S. authors, however, must comply with that section.

While the two-tier approach permitted adherence to the Berne Convention, it has resulted in U.S. authors being less favorably treated than foreign authors. With Berne adherence behind us, it is time to rethink the two-tier approach. Retention of the section 411(a) requirement has been justified principally on two grounds:

First, it is argued that section 411(a) weeds out frivolous claims. The problem with this argument is that section 411(a) permits claimants to file suit after a rejection. Thus, at most, section 411(a) deters only the assertion of frivolous claims by those who are not sufficiently determined to bring suit after a rejection.

On the other hand, section 411(a), when coupled with section 412, has deprived individuals and small businesses from asserting meritorious claims. Visual artists have been unable to pursue cases of clear-cut copyright infringement because they have not registered their works before an infringement occurs. Many individuals and small businesses are simply unaware that they will be deprived of important remedies if they do not "file with the Government."

Even those who are aware of the section 412 penalty may not be able to avoid its deprivation of remedies. Photographers on assignment typically send their negatives to the newspaper or magazine that has temporarily hired them. Because the negatives remain in the custody of the newspaper or magazine, it is generally impossible for the photographer to comply with the deposit requirements. Because they cannot readily comply with the deposit requirements, they cannot register their work. Because they cannot register their work, they cannot receive attorney's fees and statutory damages pursuant to section 412. Even if photographers could register their works, because it is impossible to know beforehand when a work—or which work—will be infringed, in the case of published photographs photographers are faced with the burden of having to register hundreds, if not thousands of photographs at an obviously prohibitive cost.

Second, it was argued that repeal of section 411(a) and 412 would adversely affect the Library of Congress' acquisition of deposits. The legislation, however, retains the mandatory deposit requirement of section 407 for the benefit of the Library of Congress, the voluntary registration provision of section 408, and the prima facie status that certificates of registration are given under section 410(c). Under section 410(c) a certificate of registration obtained within 5 years of first publication constitutes prima facie evidence of the validity of the copyright and of the facts stated therein. This evidence is often quite useful in preliminary injunction proceedings. Thus, nothing in the bill directly affects the Library's acquisition practices.

During the debates over Berne adherence, it was argued that repeal of section 411(a) would indirectly weaken the Library's acquisitions because fewer deposits would be received under the separate section 408 voluntary registration system. The effect on section 407 as a result of repeal of section 411(a) was, I believe, vastly overstated in those debates. In 1991, 634,797 claims to copyright a year were filed with the Copyright Office, while only 1,831 suits for copyright infringement were filed. Obviously, the vast majority of claimants register for reasons unconnected with litigation.

Repeal of section 411(a) can have no effect on the Library's ability to acquire deposits it needs since section 407 is unamended. Thus, as in the past, the Library retains the full authority to demand, backed up by the Justice Department, any and all copies of copyrighted works published in the United States, entirely apart from the registration system.

I also note that a 1983 policy decision of the Copyright Office and the Librarian of Congress permits the destruction of deposit copies of published works submitted for registration—other than works of visual art—after 5 years. Deposit copies of works of the visual art may be destroyed after 10 years.

Perhaps even more significantly, Copyright Office regulations, approved by the Librarian of Congress, completely exempt the following categories of works from the section 407(a) deposit requirements:

First, diagrams and models illustrating scientific or technical works or formulating scientific or technical information in linear or three-dimensional form, such as an architectural or engineering blueprint, plan, or design, a mechanical drawing, or anatomical model.

Second, greeting cards, picture postcards, and stationery.

Third, lectures, sermons, speeches, and addresses when published individually and not as a collection of the works of one or more authors.

Fourth, literary, dramatic, and musical works published only as embodied in phonorecords.

Fifth, automated databases available only online in the United States.

Sixth, three-dimensional sculptural works, and any works published only as reproduced in or on jewelry, dolls, toys, games, plaques, floor coverings, wallpaper and similar commercial wall coverings, textiles and other fabrics, packaging material, or any useful article.

Seventh, prints, labels, and other advertising matter, including catalogs published in connection with the rental, lease, lending, licensing, or sale of articles of merchandise, works of authorship, or services.

Eighth, tests, and answer material for tests when published separately from other literary works.

Ninth, works first published as individual contributions to collective works.

Tenth, works first published outside the United States and later published in the United States without change in copyrightable content if registration is made under section 408.

Eleventh, works published only as embodied in a soundtrack that is an integral part of a motion picture.

Twelfth, motion pictures that consist of television transmission programs and that have been published, if at all, by reason of a license or grant to a nonprofit institution of the right to make a fixation of the program directly from a transmission to the public.

A cursory review of reported court opinions reveals that a significant amount of litigation involves works falling within one of these exempt categories.

Given the infinitesimal amount of works involved in litigation relative to the number registered—to say nothing of those created but not registered; the exemption from the Library deposit requirements for much subject matter involved in litigation, and the possible destruction of deposit copies after 5 years, repeal of the section 411(a) and 412 requirements should not in any way impact adversely on the Library's acquisition activities. I trust that as in the past, the Library will be diligent in ensuring that it obtains the material it needs.

The final amendment made in title I of the bill relating to the Copyright Office's functions reverses the decisions in *National Peregrine, Inc.* v. *Capitol Federal Savings and Loan*, 116 Bankr. 194 (Bank. C.D. Cal. 1990) and *Official Unsecured Creditors' Committee* v. *Zenith Productions, Ltd. (In re AEG Acquisition Corp.*, 127 Bankr. 34 (Bank. C.D. Cal. 1991), to the extent those decisions held that State Uniform Commercial Code statutes for perfecting security interests are preempted by sections 205 and 301 of the Copyright Act. These decisions have required individuals or organizations taking copyrights as security for financing or loans to comply with the recordation requirements of section 205 of title 17, United States Code, or be deemed an unsecured creditor. Since section 205(c)(2) also requires registration for the work, a considerable amount of time and expense is required in order to comply with these decisions.

These decisions have turned a relatively simple business transaction into a nightmare for businesses and lenders. Moreover, given that a number of lenders have, in the past, only made UCC filings, there is considerable uncertainty about past transactions. This uncertainty is heightened by lenders' inability to register the work.

Congress' intent in enacting the relevant provisions in section 205 was to provide a system for ordering the priority between conflicting transfers, not to preempt state procedures for ensuring that a secured creditor's rights are protected. There is no reason the Federal and State systems cannot coexist in this area.

I am aware that similar issues have arisen with respect to filings in the Patent and Trademark Office. I plan to meet with the Patent and Trademark Office and the affected interests and learn whether amendments should be made to this bill to take into account difficulties in the patent and trademark field.

COPYRIGHT ROYALTY TRIBUNAL

Title II of the bill abolishes the existing Copyright Royalty Tribunal [CRT] and reassigns its functions to the Register of Copyrights and to ad hoc arbitration panels.

The Copyright Royalty Tribunal is an agency whose members have very little to do; perhaps as a result, the three CRT Commissioners seem to spend most of their time feuding. They can well afford to feud: The current salary for Tribunal members is $111,900 per year. The Tribunal's functions can, and under the legislation will be, performed by ad hoc arbitration panels convened by the Register of Copyrights. This procedure was proposed in earlier versions of the revision bills that led to the 1976 Copyright Act, but was abandoned in response to the Supreme Court's January 1976 decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). The Buckley concern arose because the Register of Copyrights was not a Presidential appointee. Since this bill makes the Register of Copyrights a Presidential appointee, any Buckley problems are removed.

Abolition of the Copyright Royalty Tribunal and its replacement with ad hoc arbitration panels has a number of significant advantages. First, taxpayers will benefit by not having to help foot the bill for an unnecessary agency. Second, copyright royalty claimants will benefit by not having to foot the largest part of that bill. Currently, the bulk of the Tribunal's costs are deducted from royalties. By employing ad hoc arbitration panels, administrative costs can be reduced, resulting in increased royalty payments to authors. Third, since the claimants will bear the full costs of arbitration, they will have an extra incentive to reduce the number of issues adjudicated, leading to fewer controversies, and increased royalties. Finally, arbitrated rates can be expected to more closely resemble market rates than a Government-set compulsory license fee.

The experience with arbitration under the section 119 statutory license was a positive one, and indicates that the approach taken in the legislation introduced today can work for the other royalty schemes in title 17.

Somewhat simplified, the legislation takes the following approach: The time tables for adjustment of the compulsory license rates in the statute are left in place. Where there is no controversy over the distribution of royalty fees, the Register of Copyrights will distribute the fees. Where there is such a controversy, the distribution will be made by an ad hoc arbitration panel. In a procedure adapted from the section 119 statutory license, arbitrated decisions may be appealed to the Register of Copyrights. The Register of Copyrights' decision may be appealed to the U.S. Court of Appeals for the District of Columbia. In order to avoid any disruption in present business practices, the legislation preserves all royalty rates and distribution allocations, whether fixed by statute, by the Copyright Royalty Tribunal, or by voluntary agreement, in effect on January 1, 1994, until such time as those rates are adjusted by an arbitration panel or voluntary agreement.

The legislation makes no substantive changes in the existing compulsory licenses, with one exception. Section 116, covering performance of nondramatic works by jukeboxes, is repealed. Section 116A, which superseded section 116 in the Berne Implementation Act of 1988, is renumbered section 116, and as elsewhere in the bill, the Copyright Royalty Tribunal's functions are delegated to the Register of Copyrights and to the ad hoc arbitration panels. The availability of arbitration will provide a sufficient safety net for jukebox operators in the event that voluntary negotiations are unsuccessful.