COPYRIGHT REFORM ACT OF 1993

HEARINGS

BEFORE THE

SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

H.R. 897

COPYRIGHT REFORM ACT OF 1993

MARCH 3 AND 4, 1993

Serial No. 11

F/W PL 103-198



Printed for the use of the Committee on the Judiciary

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COPYRIGHT REFORM ACT OF 1993

WEDNESDAY, MARCH 3, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:12 a.m., in room 2247, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives William J. Hughes, Jack Reed, Xavier Becerra, Carlos J. Moorhead, Howard Coble, Hamilton Fish, Jr., F. James Sensenbrenner, Jr., and Bill McCollum.

Also present: Hayden Gregory, counsel; William F. Patry, assistant counsel; Phyllis Henderson, secretary; and Thomas E. Mooney, minority counsel.

OPENING STATEMENT OF CHAIRMAN HUGHES

Mr. HUGHES. The Subcommittee on Intellectual Property and Judicial Administration will come to order. Good morning.

The Chair has received a request to cover this hearing in whole or in part by television broadcast, radio broadcast, and still photography, or by any of such methods of coverage. In accordance with committee rule 5(a) permission will be granted, unless there is objection.

Is there objection?

[No response.]

Mr. HUGHES. Hearing none, permission is granted.

This morning we will begin testimony on the Copyright Reform Act of 1993. We will have additional testimony tomorrow, as you may know, in room 2128, at the same time, 10 a.m.

President Clinton has said to those who argue he is not making enough spending cuts that they should make suggestions, "Be specific." H.R. 897 makes specific suggestions regarding two legislative branch agencies for which this subcommittee has oversight jurisdiction: Copyright Royalty Tribunal and the Copyright Office. In my opinion, and apparently that of a majority of the Copyright Royalty Tribunal, CRT is a good place to start. Under the bill the CRT's functions will be handled by the Copyright Office and ad hoc arbitration panels.

Abolishing a full-time agency that has an episodic workload and replacing it with as needed arbitration panels does make some sense. Two of the CRT Commissioners have suggested that the bill be amended to require that subsequent panels take into account

precedence. This seems to be a very constructive suggestion, and I am sure these hearings will produce other useful recommendations for improving the bill. Other parts of the bill concern reforms in Copyright Office procedures. Testimony on this part of the bill will be heard today and tomorrow.

The Chair, speaking for himself, is very open-minded—we want the very best operations. We are deeply committed to, first of all, cost efficiency in government and very committed to seeing that our copyright laws are properly and adequately administered. We look forward to hearing from the witnesses and fashioning the very best piece of legislation that we can fashion.

[The bill, H.R. 897, follows:]

I

103D CONGRESS
1ST SESSION

H. R. 897

To amend title 17, United States Code, to modify certain recordation and registration requirements, to establish copyright arbitration royalty panels to replace the Copyright Royalty Tribunal, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 16, 1993

Mr. HUGHES (for himself and Mr. FRANK of Massachusetts) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 17, United States Code, to modify certain recordation and registration requirements, to establish copyright arbitration royalty panels to replace the Copyright Royalty Tribunal, and for other purposes.

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 Reform Act of 1993".

TITLE I—COPYRIGHT OFFICE

SEC. 101. COPYRIGHT RECORDATION PROVISIONS.

Section 301(b) of title 17, United States Code, is amended—

(1) in paragraph (3) by striking "or" after the semicolon;

(2) in paragraph (4) by striking the period and inserting "; or"; and

(3) by adding at the end the following:

"(5) perfecting security interests.".

SEC. 102. COPYRIGHT REGISTRATION PROVISIONS.

(a) REGISTRATION AND INFRINGEMENT ACTIONS.—Section 411 of title 17, United States Code, is amended to read as follows:

"§ 411. Registration and infringement actions

"In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner serves notice upon the infringer, not less than 10 or more than 30 days before such fixa-

tion, identifying the work and the specific time and source of its first transmission.".

(b) REGISTRATION AS PREREQUISITE TO CERTAIN REMEDIES FOR INFRINGEMENT.—Section 412 of title 17, United States Code, and the item relating to section 412 in the table of sections at the beginning of chapter 4 of title 17, United States Code, are repealed.

SEC. 103. THE COPYRIGHT OFFICE: GENERAL RESPONSIBILITIES AND ORGANIZATION.

(a) REGISTER OF COPYRIGHTS.—Section 701(a) of title 17, United States Code, is amended to read as follows:

"(a)(1) The President shall appoint, by and with the advice and consent of the Senate, the Register of Copyrights. The Register of Copyrights shall be paid at the rate of pay in effect for level IV of the Executive Schedule under section 5315 of title 5.".

"(2) All administrative functions and duties under this title, except as otherwise specified, are the responsibility of the Register of Copyrights as director of the Copyright Office of the Library of Congress. The Register of Copyrights shall appoint all other officers and employees of the Copyright Office, who shall act under the Register's general direction and supervision.".

(b) ANNUAL REPORT.—Section 701(c) of title 17, United States Code, is amended to read as follows:

"(c) The Register of Copyrights shall make an annual report to the Congress on the work and accomplishments of the Copyright Office during the previous fiscal year.".

(c) REPEAL.—Section 701(e) of title 17, United States Code, is repealed.

SEC. 104. COPYRIGHT OFFICE REGULATIONS.

Section 702 of title 17, United States Code, is amended by striking the last sentence.

SEC. 105. CONFORMING AMENDMENTS.

(a) DEFINITIONS.—Section 101 of title 17, United States Code, is amended by striking the definition of the "country of origin" of a Berne Convention work.

(b) RECORDATION OF TRANSFERS AND OTHER DOCUMENTS.—Section 205(c) of title 17, United States Code, is amended by striking "but only if—" and all that follows through the end of paragraph (2) and inserting the following: "but only if the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work.".

(c) INFRINGEMENT OF COPYRIGHT.—Section 501(b) of title 17, United States Code, is amended in the first

sentence by striking ", subject to the requirements of section 411,".

(d) REMEDIES FOR INFRINGEMENT.—Section 504(a) of title 17, United States Code, is amended by striking "Except as otherwise provided by this title, an" and inserting "An".

TITLE II—COPYRIGHT ROYALTY TRIBUNAL

SEC. 201. COPYRIGHT ARBITRATION ROYALTY PANELS.

(a) ESTABLISHMENT AND PURPOSE.—Section 801 of title 17, United States Code, is amended to read as follows:

"§ 801. Copyright arbitration royalty panels: establishment and purpose

"(a) ESTABLISHMENT.—The Register of Copyrights is authorized to appoint and convene copyright arbitration royalty panels to—

"(1) make determinations concerning the adjustment of the copyright royalty rates as provided in section 803;

"(2) adjust royalty payments under section 1004(a)(3);

"(3) distribute royalty fees deposited with the Register of Copyrights under sections 111 and

119(b) in the event a controversy over such distribution exists; and

"(4) distribute the royalty fees deposited with the Register of Copyrights under section 1005 in the event a controversy over such distribution exists under section 1006(c).".

(b) MEMBERSHIP AND PROCEEDINGS.—Section 802 of title 17, United States Code, is amended to read as follows:

"§ 802. Membership and proceedings of copyright arbitration royalty panels

"(a) COMPOSITION OF COPYRIGHT ARBITRATION ROYALTY PANELS.—A copyright arbitration royalty panel shall consist of 3 arbitrators selected by the Register of Copyrights pursuant to subsection (b).

"(b) SELECTION OF ARBITRATION PANEL.—Not later than 10 days after publication of a notice initiating an arbitration proceeding under section 803 or 804, and in accordance with procedures specified by the Register of Copyrights, the Register of Copyrights shall select 2 arbitrators from lists of arbitrators provided to the Register by parties participating in the arbitration. The 2 arbitrators so selected shall, within 10 days after their selection, choose a third arbitrator from the same lists, who shall serve as the chairperson of the arbitrators. If such

2 arbitrators fail to agree upon the selection of a chairperson, the Register of Copyrights shall promptly select the chairperson.

"(c) ARBITRATION PROCEEDINGS.—Copyright arbitration royalty panels shall conduct arbitration proceedings, in accordance with such procedures as they may adopt, for the purpose of making their determinations in carrying out the purposes set forth in section 801. The arbitration panels shall act on the basis of a fully documented written record. Any copyright owner who claims to be entitled to royalties under section 111 or 119 or any interested copyright party who claims to be entitled to royalties under section 1006 may submit relevant information and proposals to the arbitration panels in proceedings applicable to such copyright owner or interested copyright party. The parties to the proceedings shall bear the entire cost thereof in such manner and proportion as the arbitration panels shall direct.

"(d) REPORT TO THE REGISTER OF COPYRIGHTS.—Not later than 180 days after publication of the notice initiating an arbitration proceeding, the copyright arbitration royalty panel conducting the proceeding shall report to the Register of Copyrights its determination concerning the royalty fee or distribution of royalty fees, as the case may be. Such report shall be accompanied by the written

record, and shall set forth the facts that the arbitration panel found relevant to its determination.

"(e) ACTION BY COPYRIGHT ARBITRATION ROYALTY PANEL.—Within 60 days after receiving the report of a copyright arbitration royalty panel under subsection (d), the Register of Copyrights shall adopt or reject the determination of the arbitration panel. The Register shall adopt the determination of the arbitration panel unless the Register finds that the determination is arbitrary. If the Register rejects the determination of the arbitration panel, the Register shall, before the end of that 60-day period, and after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee or distribution of fees, as the case may be. The Register shall cause to be published in the Federal Register the determination of the arbitration panel, and the decision of the Register (including an order issued under the preceding sentence). The Register shall also publicize such determination and decision in such other manner as the Register considers appropriate. The Register shall also make the report of the arbitration panel and the accompanying record available for public inspection and copying.

"(f) JUDICIAL REVIEW.—Any decision of the Register of Copyrights under subsection (e) with respect to a determination of an arbitration panel may be appealed,

by any aggrieved party who would be bound by the determination, to the United States Court of Appeals for the District of Columbia Circuit, within 30 days after the publication of the decision in the Federal Register. The pendency of an appeal under this paragraph shall not relieve persons obligated to make royalty payments under sections 111, 119, or 1003 who would be affected by the determination on appeal to deposit the statement of account and royalty fees specified in those sections. The court shall have jurisdiction to modify or vacate a decision of the Register only if it finds, on the basis of the record before the Register, that the Register acted in an arbitrary manner. If the court modifies the decision of the Register, the court shall have jurisdiction to enter its own determination with respect to the amount or distribution of royalty fees and costs, to order the repayment of any excess fees, and to order the payment of any underpaid fees, and the interest pertaining respectively thereto, in accordance with its final judgment. The court may further vacate the decision of the arbitration panel and remand the case for arbitration proceedings in accordance with subsection (c).".

(c) ADJUSTMENT OF COMPULSORY LICENSE RATES.—Section 803 of title 17, United States Code, is amended to read as follows:

"§ 803. Adjustment of compulsory license rates

"(a) PETITIONS.—In accordance with subsection (b), any owner or user of a copyrighted work whose royalty rates are specified by this title, or by a rate established by the Copyright Royalty Tribunal before the date of the enactment of the Copyright Reform Act of 1993, or by a copyright arbitration royalty panel after such date of enactment, may file a petition with the Register of Copyrights declaring that the petitioner requests an adjustment of the rate. The Register of Copyrights shall make a determination as to whether the petitioner has a significant interest in the royalty rate in which an adjustment is requested. If the Register determines that the petitioner has a significant interest, the Register shall cause notice of this determination, with the reasons therefor, to be published in the Federal Register, together with the notice of commencement of proceedings under this chapter. Except as provided in subsection (b)(1), the rates set by a copyright arbitration royalty panel shall attempt to reflect what the fair market value of the use would be in the absence of a compulsory license.

"(b) TYPES OF PROCEEDINGS.—

"(1) CABLE.—In making determinations concerning the adjustment of the copyright royalty rates in section 111, copyright arbitration royalty panels

shall make their determinations only in accordance with the following provisions:

"(A) The rates established by section 111(d)(1)(B) may be adjusted to reflect national monetary inflation or deflation, or changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar level of the royalty fee per subscriber which existed on the date of the enactment of the Copyright Reform Act of 1993, except that—

"(i) if the average rates charged cable system subscribers for the basic service of providing secondary transmissions are changed so that the average rates exceed national monetary inflation, no change in the rates established by section 111(d)(1)(B) shall be permitted; and

"(ii) no increase in the royalty fee shall be permitted based on any reduction in the average number of distant signal equivalents per subscriber.

Copyright arbitration royalty panels may consider all factors relating to the maintenance of

such level of payments including, as an extenuating factor, whether the cable industry has been restrained by subscriber rate regulating authorities from increasing the rates for the basic service of providing secondary transmissions.

"(B) In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by section 111(d)(1)(B) may be adjusted to ensure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations. In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, a copyright arbitration royalty panel shall consider, among other factors, the economic impact on copyright owners and users, except that no adjustment in

royalty rates shall be made under this subparagraph with respect to any distant signal equivalent or fraction thereof represented by—

"(i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal, or

"(ii) a television broadcast signal first carried after April 15, 1976, pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15, 1976.

"(C) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(1)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected

television broadcast signals carried on those systems affected by the change.

"(D) The gross receipts limitations established by section 111(d)(1) (C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section; and the royalty rate specified in such section shall not be subject to adjustment.

"(E) With respect to proceedings under subparagraph (A) or (D), petitions under subsection (a) may be filed during 1995 and in each subsequent fifth calendar year.

"(F) With respect to proceedings under subparagraph (B) or (C), petitions under subsection (a) may be filed within 12 months after an event described in either such subsection. Any change in royalty rates made pursuant to subparagraph (B) or (C) may be reconsidered in 1995 and each fifth calendar year thereafter, in accordance with subparagraph (B) or (C), as the case may be.

"(2) PHONORECORDS.—With respect to proceedings to adjust the copyright royalty rates in section 115, petitions under subsection (a) may be filed in 1997 and in each subsequent tenth calendar year.

"(3) COIN-OPERATED PHONORECORD PLAYERS.—If a negotiated license authorized by section 116 is terminated or expires and is not replaced by another license agreement under such section, the Register of Copyrights shall, upon petition filed under subsection (a) within 1 year after such termination or expiration, convene a copyright arbitration royalty panel. The arbitration panel shall promptly establish an interim royalty rate or rates for the public performance by means of a coin-operated phonorecord player of non-dramatic musical works embodied in phonorecords which had been subject to the terminated or expired negotiated license agreement. Such rate or rates shall be the same as the last such rate or rates and shall remain in force until the conclusion of proceedings by the arbitration panel, in accordance with section 802, to adjust the royalty rates applicable to such works, or until superseded by a new negotiated license agreement, as provided in section 116(c).

"(4) NONCOMMERCIAL BROADCASTING.—A copyright arbitration royalty panel may commence proceedings to adjust the copyright royalty rates in section 118 as provided in that section.

"(5) DIGITAL AUDIO RECORDING.—The Register of Copyrights shall make adjustments to royalty payments under section 1004(a)(3) as provided in that section.".

(d) DISTRIBUTION OF COPYRIGHT ROYALTIES.—Section 804 of title 17, United States Code, is amended to read as follows:

"§ 804. Distribution of copyright royalties

"The distribution of royalties under this title shall be as provided in section 111(d)(4), 119(b)(4), and 1007.".

(e) REPEAL.—Sections 805 through 810 of title 17, United States Code, are repealed.

(f) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 8 of title 17, United States Code, is amended to read as follows:

"Sec. 801. Copyright arbitration royalty panels: establishment and purpose.
"Sec. 802. Membership and proceedings of copyright arbitration royalty panels.
"Sec. 803. Adjustment of compulsory license rates.
"Sec. 804. Distribution of copyright royalties.".

SEC. 202. JUKEBOX LICENSES.

(a) REPEAL OF COMPULSORY LICENSE.—Section 116 of title 17, United States Code, and the item relating

to section 116 in the table of sections at the beginning of chapter 1 of such title, are repealed.

(b) NEGOTIATED LICENSES.—(1) Section 116A of title 17, United States Code, is amended—

(A) by redesignating such section as section 116;

(B) by striking subsection (b) and redesignating subsections (c) and (d) as subsections (b) and (c), respectively;

(C) in subsection (b)(2) (as so redesignated) by striking "Copyright Royalty Tribunal" and inserting "Register of Copyrights";

(D) in subsection (c) (as so redesignated)—

(i) in the subsection caption by striking "ROYALTY TRIBUNAL" and inserting "ARBITRATION ROYALTY PANEL"; and

(ii) by striking "the Copyright Royalty Tribunal" and inserting "a copyright arbitration royalty panel"; and

(E) by striking subsections (e), (f), and (g).

(2) The table of sections at the beginning of chapter 1 of title 17, United States Code, is amended by striking "116A" and inserting "116".

SEC. 203. PUBLIC BROADCASTING COMPULSORY LICENSE.

Section 118 of title 17, United States Code, is amended—

(1) in subsection (b)—

(A) by striking the first 2 sentences;

(B) in the third sentence by striking "works specified by this subsection" and inserting "published nondramatic musical works and published pictorial, graphic, and sculptural works";

(C) in paragraph (1)—

(i) in the first sentence by striking ", within one hundred and twenty days after publication of the notice specified in this subsection,"; and

(ii) by striking "Copyright Royalty Tribunal" each place it appears and inserting "Register of Copyrights";

(D) in paragraph (2) by striking "Tribunal" and inserting "Register of Copyrights";

(E) in paragraph (3)—

(i) by striking the first sentence and inserting the following: "In the absence of license agreements negotiated under paragraph (2), the Register of Copyrights shall, pursuant to section 803, convene a copy-

right arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (2), shall be binding on all owners of copyright in works specified by this subsection and public broadcasting entities, regardless of whether such copyright owners have submitted proposals to the Register of Copyrights.";

(ii) in the second sentence—

(I) by striking "Copyright Royalty Tribunal" and inserting "copyright arbitration royalty panel"; and

(II) by striking "clause (2) of this subsection" and inserting "paragraph (2)"; and

(iii) in the last sentence by striking "Copyright Royalty Tribunal" and inserting "Register of Copyrights"; and

(F) by striking paragraph (4);

(2) by striking subsection (c); and

(3) in subsection (d)—

(A) by redesignating such subsection as subsection (c);

(B) by striking "to the transitional provisions of subsection (b)(4), and"; and

(C) by striking "Copyright Royalty Tribunal" and inserting "copyright arbitration royalty panel".

SEC. 204. SECONDARY TRANSMISSIONS BY SUPERSTATIONS AND NETWORK STATIONS FOR PRIVATE VIEWING.

Section 119 of title 17, United States Code, is amended—

(1) in subsection (b)—

(A) in paragraph (1) by striking ", after consultation with the Copyright Royalty Tribunal," each place it appears;

(B) in paragraph (2) by striking "Copyright Royalty Tribunal" and inserting "Register of Copyrights";

(C) in paragraph (3) by striking "Copyright Royalty Tribunal" and inserting "Register of Copyrights"; and

(D) in paragraph (4)—

(i) by striking "Copyright Royalty Tribunal" each place it appears and inserting "Register of Copyrights";

(ii) by striking "Tribunal" each place it appears and inserting "Register"; and

(iii) in subparagraph (C) by striking "conduct a proceeding" in the last sentence and inserting "convene a copyright arbitration royalty panel"; and

(2) by striking subsection (c) and inserting the following:

"(c) DETERMINATION OF ROYALTIES.—The royalty fee payable under subsection (b)(1)(B) shall be that established by the Copyright Royalty Tribunal on May 1, 1992, as corrected on May 18, 1992.".

SEC. 205. CONFORMING AMENDMENTS.

(a) CABLE COMPULSORY LICENSE.—Section 111(d) of title 17, United States Code, is amended as follows:

(1) Paragraph (1) is amended by striking ", after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted),".

(2) Paragraph (1)(A) is amended by striking ", after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted),".

(3) Paragraph (2) is amended by striking the second and third sentences and by inserting the fol-

lowing: "All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution by the Register in the event no controversy over distribution exists, or by a copyright arbitration royalty panel in the event a controversy over such distribution exists. The Register shall compile and publish on a semi-annual basis, a compilation of all statements of account covering the relevant 6-month period provided by paragraph (1) of this subsection.".

(4) Paragraph (4)(A) is amended—

(A) by striking "Copyright Royalty Tribunal" and inserting "Register of Copyrights"; and

(B) by striking "Tribunal" and inserting "Register".

(5) Paragraph (4)(B) is amended to read as follows:

"(B) After the first day of August of each year, the Register of Copyrights shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Register determines that no such controversy exists, the Register shall, after deducting the Copyright Office's reasonable administrative costs under

this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Register finds the existence of a controversy, the Register shall, pursuant to chapter 8 of this title, convene a copyright arbitration royalty panel to determine the distribution of royalty fees.".

(6) Paragraph (4)(C) is amended by striking "Copyright Royalty Tribunal" and inserting "Register of Copyrights".

(b) AUDIO HOME RECORDING ACT.—

(1) ROYALTY PAYMENTS.—Section 1004(a)(3) of title 17, United States Code, is amended—

(A) by striking "Copyright Royalty Tribunal" and inserting "Register of Copyrights"; and

(B) by striking "Tribunal" and inserting "Register".

(2) DEPOSIT OF ROYALTY PAYMENTS.—Section 1005 of title 17, United States Code, is amended by striking the last sentence.

(3) ENTITLEMENT TO ROYALTY PAYMENTS.—Section 1006(c) of title 17, United States Code, is amended by striking "Copyright Royalty Tribunal"

and inserting "Register of Copyrights shall convene a copyright arbitration royalty panel which".

(4) PROCEDURES FOR DISTRIBUTING ROYALTY PAYMENTS.—Section 1007 of title 17, United States Code, is amended—

(A) in subsection (a)(1) by striking "Copyright Royalty Tribunal" and inserting "Register of Copyrights";

(B) in subsection (b)—

(i) by striking "Copyright Royalty Tribunal" and inserting "Register of Copyrights"; and

(ii) by striking "Tribunal" each place it appears and inserting "Register"; and

(C) in subsection (c)—

(i) by striking the first sentence and inserting "If the Register finds the existence of a controversy, the Register shall, pursuant to chapter 8 of this title, convene a copyright arbitration royalty panel to determine the distribution of royalty payments."; and

(ii) by striking "Tribunal" each place it appears and inserting "Register".

(5) ARBITRATION OF CERTAIN DISPUTES.—Section 1010 of title 17, United States Code, is amended—

(A) in subsection (b)—

(i) by striking "Copyright Royalty Tribunal" and inserting "Register of Copyrights"; and

(ii) by striking "Tribunal" each place it appears and inserting "Register";

(B) in subsection (e) by striking "Copyright Royalty Tribunal" each place it appears and inserting "Register of Copyrights";

(C) in subsection (f)—

(i) by striking "Copyright Royalty Tribunal" each place it appears and inserting "Register of Copyrights";

(iii) by striking "Tribunal" each place it appears and inserting "Register"; and

(iii) in the third sentence by striking "its" and inserting "the Register's"; and

(D) in subsection (g)—

(i) by striking "Copyright Royalty Tribunal" and inserting "Register of Copyrights"; and

(ii) by striking "Tribunal" each place it appears and inserting "Register".

TITLE III—GENERAL PROVISIONS

SEC. 301. EFFECTIVE DATE.

(a) TITLE I.—

(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by title I take effect on the date of the enactment of this Act.

(2) SECTION 103.—The amendments made by section 103 take effect on January 1, 1994.

(b) TITLE II.—The amendments made by title II take effect on January 1, 1994.

(c) EFFECTIVENESS OF EXISTING RATES AND DISTRIBUTIONS.—All royalty rates and all determinations with respect to the proportionate division of compulsory license fees among copyright claimants, whether made by the Copyright Royalty Tribunal, or by voluntary agreement, before the effective date set forth in subsection (b) shall remain in effect until modified by voluntary agreement or pursuant to the amendments made by this Act.

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Mr. HUGHES. The Chair recognizes the distinguished ranking Republican, Mr. Moorhead.

Mr. MOORHEAD. Thank you, Mr. Chairman.

The CRT and the Copyright Office have been of great concern to this subcommittee for many years. The CRT was created by this subcommittee in 1976. In the 101st Congress I offered an amendment that raised the level of the Register of Copyrights to that of the Commissioner of Patents along with salary and staff increases.

H.R. 897 has some good ideas, but it also has some provisions that I am just not sure about. For example, the abolition of the present statutory incentives to the Register. The vast majority of materials received now by the the Library through copyright are not obtained by mandatory deposit but through voluntary registration stimulated by the statutory incentives of requiring statutory damages and attorney's fees which this bill would eliminate. What effect would this abolition have on the Library's ability to gather the necessary deposits of books and other copyrighted material so essential to its effective operation?

The Register of Copyrights has been appointed by the Librarian of Congress for the past 100 years. Although the Librarian is appointed by the President with the advise and consent of the Senate, his position has been, over the years, nonpolitical. The Register of Copyrights' position is even more nonpolitical. What will be gained by making the Register a Presidential appointment?

Presidential appointments of the Copyright Royalty Tribunal have not necessarily enhanced the prestige of that office. Appointments of Commissioners with expertise in copyright or communications law have been scarce. Neither Republicans nor Democratic Presidents have distinguished themselves in this regard.

But in spite of that, the CRT has done the job it was created to do. It has had its ups and downs, but its proceedings and determinations have worked. We may need to review its inner workings. We can establish legislative qualifications for Commissioners because I don't believe that we are going to save money by its abolition or necessarily improve the quality of their decisions by switching to arbitration panels. One problem with arbitration panels is that they don't have a continuity that continues through with a policy from year to year that the people who are dependent upon now the Tribunal for distributions of funds have come to depend upon and to have some idea what would happen. I think that continuity is necessary.

Maybe the testimony this morning will change by mind.

Thank you, Mr. Chairman.

Mr. HUGHES. Thank you, Mr. Moorhead.

Our first panel this morning consists of the three Commissioners of the Copyright Royalty Tribunal: Cindy Daub, Bruce Goodman, and Edward Damich.

Commissioner Daub was nominated by President Bush as a Commissioner of the Copyright Royalty Tribunal on September 6, 1989, and following her confirmation by the Senate began her 7-year appointment. Commissioners Damich and Goodman were appointed by President Bush on September 3, 1992, and are currently serving as recess appointments.

Commissioners, if you will come forward now, we would appreciate it. We have received copies of your written testimony which, without objection, will be made a part of the record in full. I am going to ask you to proceed as you see fit.

Mr. MOORHEAD. Mr. Chairman, while you are waiting for the witnesses to come forward, I have a 2-page memorandum I received by fax from the highly respected Register of Copyrights, Barbara Ringer, and I would like to put her letter into the record.

Mr. HUGHES. Without objection, so ordered. If any other members have statements they would like to submit, they will be received, without objection.

[The memorandum follows:]

COMMITTEE FOR LITERARY PROPERTY STUDIES

Georges Borchardt
Robert F. Drinan
Frank D. Gilroy
Henry F. Graff
John Hersey
Justin Kaplan
Irwin Karp*
John M. Kernochan
Perry H. Knowlton

Barbara Ringer
Robert Wedgeworth

* Counsel

March 2, 1993

To: Hon. William J. Hughes, Hon. Barney Frank, Hon. Carlos J. Moorhead
Subcommittee on Intellectual Property and Judicial Administration

cc: Hon. Dennis DeConcini, Hon. Orrin G. Hatch, Register Ralph Oman

Hayden Gregory, Tom Mooney, Karen Robb,
Darrell Panathiere, Ann Harkins

From: Irwin Karp, John M. Kernochan, Barbara Ringer

Re: Copyright Reform Act of 1993: H.R. 897, S. 373

We oppose H.R. 897 in its present form and urge that your Subcommittee schedule additional hearings in a few weeks so that we and other organizations concerned with reform of the Copyright Act can testify about our objections to the Bill, propose needed changes, and answer your questions concerning our views — and have a reasonable time to prepare our testimony and statements. The few days between our obtaining the Bill and tomorrow's hearing did not give us sufficient time to provide you with a full statement of our position. We will do so. We wish, however, to make these comments on the eve of the hearings.

We believe sections 412 and 411(a) should be eliminated from the Copyright Act, but not by enacting H.R. 897 in its present form. In 1989, Irwin Karp testified on the inequities of Section 412 and urged the House and Senate subcommittees on copyright to ameliorate them. Neither the Subcommittees, nor author or user groups, indicated any interest in revising or eliminating Section 412; nor did the Congress choose to eliminate Section 411(a) with respect to American authors when it had the opportunity to do so when enacting the Berne Convention Implementation Act.

Having thus accepted and lived with these sections for several years, we believe the Subcommittees and the organizations that support immediate passage of H.R. 897 to eliminate them can afford to wait a few months more while the Subcommittees consider the Bill's amendment to provide alternative incentives for voluntary registration to replace

40 Woodland Drive, Rye Brook, NY 10573 (914) 939-5386

sections 411(a) and 412. We will suggest some of these, and others can be found.

We believe there is no sound reason why the Register of Copyrights should be appointed by the President rather than by the Librarian of Congress who is a Presidential appointee. Librarians of Congress have appointed Registers of Copyright for the last century, and the system has worked well -- giving the Country a series of qualified, non-political Registers, including Arthur Fisher, Abraham Kaminstein and Barbara Ringer, who initiated and successfully conducted the monumental 20-year program to overhaul the United States Copyright Act. The Buckley decision would not require that the Register be a Presidential appointee if the dispute-resolving functions of the Copyright Royalty Tribunal were transferred to "ad hoc arbitration panels" in the Copyright Office or if the Register distributed fees or decided appeals of decisions by the arbitration panels.

We believe, however, that the Copyright Royalty Tribunal should be restructured not abolished. The Tribunal approach has several advantages over ad hoc arbitration, including the essential continuity (which Commissioner Edward J. Damich stressed in his letter to you) and adherence to precedent which the Tribunal, even in restructured form, would provide. There are other serious problems with "ad hoc arbitration" that should be examined in subsequent hearings.

* * * *

The Committee for Literary Property Studies is an informal, not-for-profit, non-funded group. It conceived and proposed the 1992 Automatic Copyright Renewal Amendment to the Copyright Act. Its amicus curiae brief in the "Rear Window" case was cited by Justice O'Connor as providing one of the fundamental reasons for upholding the conclusion reached by her majority opinion.

Barbara Ringer is the former Register of Copyrights.

John M. Kernochan is Nash Professor Emeritus of Law at the Columbia University Law School and Director of its Center for Law and the Arts.

Irwin Karp was counsel to the Authors League of America for 33 years, he and chaired the State Department's Ad Hoc Working Group on U.S. Adherence to the Berne Convention. He has testified frequently before the Subcommittee on copyright and related issues.

Mr. HUGHES. Why don't we begin with you, Ms. Daub? We have your statement, which will be made a part of the record. You may summarize, hopefully, and we will go on to the other two Commissioners.

STATEMENT OF CINDY S. DAUB, CHAIRMAN, COPYRIGHT ROYALTY TRIBUNAL

Ms. DAUB. Thank you, Mr. Chairman. Mr. Chairman, Congressman Moorhead, Congressman Reed, Congressman McCollum, I am honored to have this opportunity to testify before you this morning. It is unfortunate that we, the Commissioners of the Copyright Royalty Tribunal, are not appearing here today as a unified body with the same purpose in mind, the preservation of the Copyright Royalty Tribunal. Therefore, the detailed statement I am now submitting for the record and my oral remarks represent my personal views. My remarks will be twofold in nature, and I certainly hope to complete them in the limited time provided.

First, Mr. Chairman, I too watched with a keen interest President Clinton's first address to the Nation. I strongly support and applaud the President's attempt to streamline the Federal Government and eliminate wasteful bureaucracy. However, Mr. Chairman, if that is your goal, then the Copyright Reform Act of 1993 is not the way to achieve it. Your statement introducing the bill describes it as a win-win bill that will eliminate an unnecessary agency, reduce the size of the legislative branch employment and remove bureaucratic obstacles to the enforcement of copyright.

On the surface the bill seems to appeal. But even a brief look behind the political pump reveals that this bill will have the contrary effect. This committee is well aware of the CRT's statutorily mandated areas of responsibilities. Therefore, I would like to briefly state our accomplishments during the year 1992 to show you just a glimpse of our workload and its importance.

During the fiscal year 1992 oral hearing for the 1989, cable royalty distribution alone lasted from October through December. This began September 1991. And distribution of all of the 1989 cable royalties has been completed. We also made a 90-percent partial distribution of the 1990 cable royalties and had to grapple with a complicated motion to dismiss one of the claimants which had based its claim on a unique statutory interpretation.

In February of the same year, the CRT assembled an arbitration panel for the purpose of adjusting the satellite rate, and then reviewed the panel's determination to assess whether it complied with the statutory criteria. Upon finding that the determination was reasonable, CRT adopted and published it in May 1992.

During the same calendar year of 1992 the CRT also held the combined 1989, 1990, 1991 satellite royalty distribution hearing. During May through December 1992 the CRT had held a paper hearing to determine the new rates and terms for public broadcasting.

In addition to all of the above, during the latter part of 1992 the Tribunal also had to deal with the implementation of the new Audio Home Recording Act, a new and additional responsibility assigned to the CRT by your committee and the Congress just last year. The Tribunal held an informal meeting with the parties af-

fected by the new act and issued an advanced notice of rulemaking to implement the act.

Mr. Chairman, most notably, all of this work was accomplished with the limited resources we have, with the Tribunal's total staff of nine, including the three Commissioners present here today—although my two colleagues were not there for the most of the year.

Though Congress appropriated funds for 18 positions 16 years ago, our total staff of 9 are fewer in number today than when we—the first Tribunal had a staff of 10 people. Not many Federal agencies can claim that although their responsibilities have increased they operate with fewer people today than when they were created.

Mr. Chairman, in your statement you described the CRT as a broken and unnecessary agency. The CRT's record would dispute your assessment. The only study done by the General Accounting Office at the request of Congress examined the operation of our agency. The GAO concluded in its report that "It is clear the Tribunal was given a very difficult task with no technical support and minimal authority with which to work." In fact, with few remands all of the CRT's determinations were affirmed by the appellate courts.

Mr. Chairman, in your statement you argued the bill would benefit the taxpayers. I would beg to differ with you. Eighty-six percent of the total current operating budget of $911,000 comes from royalties and only 14 percent or $130,000 from taxpayers. Our total budget is less than ½ of 1 percent, administering approximately $200 million of copyright royalties annually. Just for the record, during the past 16 years the Tribunal distributed over $1 billion in cable royalties alone. The Tribunal is the only pay-as-you-go Federal agency that I know of, with the exception of perhaps the Federal Reserve Board.

The Appropriations subcommittee chairman, Mr. Vic Fazio, has referred to the agency as exemplary in frugality and has regularly lauded the Tribunal's efficiency and professionalism. In the words of Chairman Fazio during the 1993 appropriations hearing, he said, "When you think of all the money adjudication costs, it is an incredible total and small amount of public funds to make it all happen. You, CRT, are really doing the job. You have not taken advantage at all of the sources of revenue that you have coming to you. I think everyone on the Tribunal has operated in a very business and professional-like manner."

Mr. Chairman, you also mentioned that the royalty claimants would benefit from cost savings. A careful review of the proposal discloses that not only will it not save these parties any money, it will likely increase their costs. The bill proposes to impose additional responsibilities on the Register of Copyrights. It is inconceivable that the Register will be able to perform these additional responsibilities without a staff. Unlike the Tribunal which funds 86 percent of its operating costs with the royalties, the Register's cost of operation may have to be fully funded with taxpayer dollars.

There will also be additional costs in setting up the internal working of this new shop, and, of course, dismantling the current Tribunal. Additionally, Mr. Chairman, the use of an arbitration panel has the following drawbacks. No. 1, it would not provide necessary stability to properly perform CRT's current functions. No. 2,

arbitrators would not be required to undergo the scrutiny of a Senate confirmation. Such scrutiny serves to weed out potential and actual conflicts of interest in an area which involves hundreds of millions of dollars.

No. 3, since the arbitrator's compensation depends on the length and complexity of the proceeding, unlike Commissioners, whose salaries are not contingent upon these factors, there would be an incentive to prolong the proceeding.

No. 4, since an arbitration panel would not be convened until there is a controversy, the arbitrators would not be available to facilitate settlements, nor would they have the incentive to do so.

No. 5, an arbitration panel's rates would not be any closer to marketplace rates than CRT's rates because the panel would be required to operate under the same statutory restraints that have applied to the Tribunal. Moreover, the panel's rates would not be any closer to marketplace rates than CRT's since CRT has historically made every effort to determine a rate that is as close as possible to a free marketplace.

No. 6, this will also increase the claimants' cost because panel determinations are not binding on future panels. The establishment of precedent by the CRT has been a predominant impetus behind the long history of settlements. In essence, the parties will be reinventing the wheel with each and every proceeding under the proposed bill.

No. 7, an additional detriment is the fact that the panel's decisions may have to be reviewed by the courts.

In addition, Mr. Chairman, transferring CRT responsibilities to the Copyright Office will destroy the independent nature of the entity that not only determines distribution among copyright owners but sets rates for copyright users. Independence from the Copyright Office is essential since the Copyright Office has historically been viewed, rightfully or wrongfully, by industry as the defender of the copyright owner, which would hamper the Copyright Office's ability to perform the most essential role of settlement facilitator.

The Tribunal has always operated with the overriding philosophy that it is an independent agency free from political pressures, engaged in balancing the equities of copyright owners and copyright users based solely on the record evidence placed before it. The CRT has always prided itself on being neither owner friendly nor user friendly, but a complete neutral arbiter.

Mr. Chairman, now this brings me to address your comment on the Commissioners feuding. Mr. Chairman, the subject matter I am about to address is not a pleasant one. However, in view of the fact that your statement reveals certain perceptions of CRT Commissioners and because of the positions my colleagues have taken, I must address them by describing to you some of the circumstances which have prevailed at the Tribunal recently.

My friends and my two colleagues who are seated here today who are recess appointees, as you pointed out, who arrived at the Tribunal simultaneously, asked me as the Chairman of the agency to sign off on the purchase of expensive personal items which the agency did not need. Included were personal computers and printers with additional parts such as modems that were compatible with home systems for their private offices, requests for

speakerphones, dictaphone equipment. When they were told by myself and the staff administrator the agency had no money to purchase those items, I was told to delay the hearing date of the General Counsel who was already scheduled to arrive, as well as to make cuts from the agency employees' compensation. I objected, but I was outvoted. They requested agency funds for their personal swearing-in reception, which I objected to given our shortage of funds. However, subsequently I was told that they had used CRT's postage meter for 500-plus invitations for that reception.

It became clear as time passed that one of the Commissioners may be conducting private business for profit within CRT's office. Commissioner Goodman founded a private company called FYI Networks, Inc., shortly before he was nominated to the current position and currently is the president of that company.

Mr. Chairman, with your permission, I have a couple of documents I would like to present to you, and that would be self-explanatory.

Mr. HUGHES. Without objection, it will be so received. Staff will receive the documents.

[The documents follow:]

APPENDIX 1

CONFIDENTIAL DISCLOSURE AGREEMENT

This Agreement is entered into by and between the FYI Network, Inc., 5335 Wisconsin Avenue, Suite 300, Washington, D.C. 20015-2003 ("FYI") and George A. Tejadilla, 310 St. Mary's, Suite 2201, San Antonio, Texas 75205 ("Investor").

WITNESSETH

WHEREAS, FYI is the owner of certain proprietary information related to programming and marketing ideas, products, and services, including strategy, pricing, potential customers, vendors, and consultants, addressees and telephone numbers (hereinafter referred to as the "Information") with all right, title, and interest vested therein, and having the authority to disclose said Information;

WHEREAS, FYI desires to disclose to Investor the Information for Investor's evaluation of said Information for investment purposes;

WHEREAS, Investor desires to receive such Information so that he can fully evaluate FYI in order to determine its investment potential;

NOW THEREFORE, in view of the mutual covenants herein and consideration flowing from each of the parties to the other, the parties hereto agree to the terms and conditions contained herein:

1. Investor agrees not to use for himself or others, or disclose to others, or permit the use or disclosure of, any aspect of the Information, including but not limited to, details concerning the development of the Information without first receiving written authorization to do so from FYI;

2. Investor agrees not to disclose to any unauthorized party the fact that FYI is marketing, or plans to market, a service, programming, products, or concepts identified in or related in any way to the Information;

3. Investor warrants and represents that any Information learned from FYI shall be used by Investor solely for the purpose of investment evaluation;

4. In order to avoid disclosure of Information to any other person, firm, corporation or association, Investor agrees that for a period of three (3) years from the date of said disclosure, he will treat such Information as confidential and with at least the same degree of care as Investor employs with respect to his own information which he does not wish to have published or disseminated. However, Investor shall have no obligation in respect of such Information, which is:

a. Independently developed by Investor without benefit of this disclosure or was

already known to Investor at the time of this disclosure;

b. Publicly known or becomes publicly known by the actions of third parties;

c. Rightfully received by Investor from a third party on a non-confidential basis;

d. Rightfully received by Investor under an obligation of confidentiality from a third party in accordance with the rights granted to Investor by such third party; or

e. Approved in writing by FYI for release by Company.

5. Investor shall be entitled, at his option, to subject the Information to such evaluation as in his judgement is warranted and to disclose such Information to employees of Investor. Such employees shall be required to hold said Information in the same degree of confidentiality as Investor, who shall be responsible for any breach.

6. No obligation of payment is assumed by, nor may be implied against Investor by this Confidential Disclosure Agreement, other than that of treating the Information as described above. ACCEPTANCE OF THE INFORMATION SHALL NOT GIVE INVESTOR THE RIGHT TO USE THE INFORMATION FOR OTHER THAN THE SPECIFIED PURPOSES.

7. Upon request by FYI, Investor will return to FYI all originals and all copies of the Information in the possession of Investor.

8. All communications, notices, and exchanges of Information contemplated herein shall be sent to the parties at the respective addresses first above mentioned.

9. In the event that any one or more of the provisions contained in this Confidential Disclosure Agreement shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision thereof and this Confidential Disclosure Agreement shall be construed as if such invalid, illegal, or unenforceable had never been contained herein. Additionally, in lieu of such invalid, illegal, or unenforceable provision, there shall be deemed to be added automatically, as a part of this Confidential Disclosure Agreement, a provision as similar to such provision as shall be valid, legal, and enforceable.

IN WITNESS WHEREOF, the parties hereto have either executed this instrument themselves or have caused this instrument to be executed by their duly authorized representatives.

FYI Network, Inc.

by: Bruce D. Goodman

Date: _____

George A. Tejada

Date: 01/04/92

FAX

TO: BRUCE GOODMAN
FROM: MR. FIREMAN
DATE: DEC. 28, 1992

I RECEIVED THE ENCLOSED FAX — ISN'T THIS INTERESTING ??

FOR YOUR INFO, I HAVE MADE CONTACT WITH A STRONG RUSSIAN GROUP WHO ARE CHECKING INTO THE RUSSIAN AMERICAN INTERNATIONAL LTD TO SEE IF KHATSENKOV IS USING IT ...

HOW DO YOU THINK WE SHOULD HANDLE THIS FAX ? DO ANYTHING ?

PLEASE GIVE ME A RING IN FLORIDA AT: 407/798-9496, TO DISCUSS "FYI", AS I HAVE BEEN CONTINUALLY RUNNING INTO FRIENDS OF MINE WHO ARE VITALLY INTERESTED IN INVESTING BUT I AM AT A LOSS TO TELL THEM THE FACTS, BECAUSE I AM COMPLETELY IN THE DARK WHAT OUR NEXT MOVE IS ... WILL YOU PLEASE ENLIGHTEN ME, ONE WAY OR ANOTHER ..

REDS.,

MR. FIREMAN

I WOULD APPRECIATE YOUR NOT "KEEPING ME HANGING" ...

ENC - 1 PAGE

МОСКОВСКО-ЯКУТСКИЙ
ТОРГОВЫЙ ДОМ

Фирма "ПОСРЕДНИК"

[illegible]
[illegible]
Тел. [illegible]
Факс (095) [illegible]

MOSCOW-YAKUT
TRADING HOUSE

"POSREDNIK" Company

10 Fl., "Moscovia" Bldg.,
36 Novy Arbat,
Moscow 121205, Russia
Tel.: (095) 290-8428
Fax: (095) 290-9776

Исх. № _____

" " _____ 19 г.

The Honorable Simon C. Fireman

December 23, 1992

Dear Simon,

I have the pleasure to wish you and your delightful wife Norma merry Christmas and a happy New Year. I also wish your family prosperity and flourishing.

My affairs are in a good state and all take the normal course...

Sincerely yours,

G. Khatsenkov

G.Khatsenkov

APPENDIX 2

92-1-90 CD
1990 CABLE ROYALTY DISTRIBUTION

SERVICE LIST

JOINT SPORTS

Robert A. Garrett
Arnold & Porter
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202)872-6700
(202)872-6720 FAX
(Represents MLB)

Major League Baseball

Thomas J. Ostertag
Office of the Commissioner
of Baseball
350 Park Ave., 17th Floor
New York, NY 10022
(212)371-7800
(212)355-0007 FAX

Philip R. Hochberg
Baraff, Koerner, Olender
& Hochberg
Suite 300
5335 Wisconsin Avenue, N.W.
Washington, D.C. 20015-2003
(202)686-3200
(202)686-8282 FAX
(Represents NBA & NHL)

National Basketball Assn.
National Hockey League

Judith Jurin Semo
Squire, Sanders & Dempsey
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202)626-6600
(202)626-6780 FAX
(Represents NCAA)

National Collegiate Athletic
Association

As a commissioner on the Copyright Royalty Tribunal, I am keenly interested in your proposed legislation to modify the Copyright Act. Although I am concerned that *ad hoc* arbitration panels would not provide the necessary stability to perform properly the tribunal's functions, I strongly agree with the proposal to sunset the tribunal. In reaching this conclusion, I rely not only on my experience as a commissioner, but also on my background as an attorney and executive in the communications industry.



Created in 1976 to encourage programing diversity and access to programing at a time when the cable industry was in its infancy, the tribunal has become a bureaucratic Energizer bunny which has outlived its usefulness, but keeps on going and going. In fact, the tribunal has achieved the remarkable feat of displeasing both program owners who believe the rates allocated by the tribunal are too low and many cable operators who believe the rates are too high. And the benefit to taxpayers is elusive, at best, and illusory, at worst.

Even if the cable compulsory license for local programing, the Audio Home Recording Act and other legislative underpinnings of the tribunal's charter are to be preserved, the tribunal, as a stand-alone agency awkwardly interposed between the Copyright Office and the FCC, should be sunset in the near future. Its functions can be reallocated (e.g., to private licensing groups, to other federal agencies such as the FCC, the Library of Congress). In an economic environment which mandates that every government agency must overcome a presumption of unnecessary expense and counterproductivity, the tribunal has too often been noted more for providing employment to unqualified political appointees than for its help to taxpayers and the industry it should serve.

Certainly, I recognize that calling for the abolition of my own agency is akin to an infantryman's calling down artillery fire on his own position. But I hope this letter will be a call to arms to other presidential appointees who recognize that entrenched bureaucracy must give way to enlightened sacrifice if America is to achieve its economic potential.

Very truly yours,
Bruce D. Goodman

Mr. HUGHES. You may proceed.

Ms. DAUB. Mr. Chairman, if you take just a few seconds to look at the documents called appendix I and appendix II.

[Pause.]

Mr. HUGHES. Have you previously brought this to the attention of the Chair or anybody? Is this the first time I have seen these documents?

Ms. DAUB. Yes, sir.

Mr. HUGHES. Because I don't remember seeing appendix I or appendix II.

Ms. DAUB. No, I have not.

Mr. HUGHES. Is there some reason they were not submitted before the hearing?

Ms. DAUB. Yes, sir.

Mr. HUGHES. What is that?

Ms. DAUB. Your staff and my colleagues have been in communications and I wasn't sure whether or not that would be communicated back to my colleagues.

Mr. HUGHES. Oh, I see. OK, you may proceed.

Ms. DAUB. If you refer appendixes I and II you will note that FYI Network, Inc., is located in the same office suite as one of the law firms which come before us to collect millions of dollars. These documents raise conflict of interest concerns. We will soon be engaging in 1990 cable distribution hearings and this law firm will come before us to argue for their clients.

I would also like you to take a minute to read appendix I, and you will note that this document came through CRT's fax machine. Mr. Chairman, this is only one example.

[Pause.]

Mr. HUGHES. You may proceed.

Ms. DAUB. Thank you. Conducting his private business in CRT's office often interferes with the agency's own work. Mr. Chairman, as you can see from appendix III Commissioner Goodman is the same person who wrote that article, where he calls for the abolishment of the Tribunal and calls the agency "a bureaucratic Energizer bunny which has outlived its usefulness but keeps on going and going."

Moreover, my two colleagues signed off on each other's financial disclosure forms and forwarded them to the Government Ethics Office. As you are aware, these forms should have been reviewed and signed by an independent reviewer.

My two colleagues make up the majority vote in the agency, and they have attempted to change the internal rules to meet their own needs. Whenever I have objected and raised concerns with respect to the legality or legal matters, I was accused of not following majority rule. It seems to me that the temporary nature of the Commissioners tenure provide fertile ground for potential abuse. It is even more dangerous where the recess appointees make up the majority. When one reads my colleagues' letters calling for the abolishment and/or reform of the Tribunal, to the public they would appear very heroic. However, their actions are rather questionable, to be completely candid. I could not believe this is the same Mr. Goodman who lobbied long and hard to be confirmed for a full 7-year term, the same Mr. Goodman who is using the offices of the Tribu-

nal and government equipment for his personal business. Surely if the Tribunal is to be abolished there are two distinct potential advantages my two colleagues might have:

No. 1. They will maximize their stay at CRT. Their recess appointment could end at any time with the President's own appointees. But the chance of the President appointing their replacements is reduced drastically if the Tribunal is the target for abolishment.

No. 2. The 2-year ban from lobbying one's own agency for government officials after their termination of employment would not exist if the function of CRT is under another government agency. Mr. Goodman then would be free to lobby and the agency's abolishment may very well boost his business as the communications industry expert. Your bill, Mr. Chairman, unfortunately would work favorably for Mr. Goodman's self-interest.

It should be said, as unnecessarily difficult as it has been, notwithstanding the tension created by the conduct, the substantive work of the Tribunal has been discharged with high quality and on time. Mr. Chairman, there are no tax dollars to be saved, no downsizing of government to be achieved, no cost savings in setting disputes for the claimants except perhaps losing the current independent nature of the entity, lose the negotiating facilitating capacity by transferring CRT duties to the Copyright Office, it will likely lead to some difficult disruption.

However, Mr. Chairman, I do understand that these are difficult times for our country. Therefore, I offer the following recommendations:

First, fully fund the Tribunal's budget from royalties. This financing method was originally proposed by former Legislative Appropriations Subcommittee member, Congressman Clair Burgener of California, as a means of reducing the tax burden. I believe that this proposal will find support in the industry, and some of the members of the industry have already expressed their support. This amount will be far less than additional arbitration and litigation costs that would be forced upon the claimants by the proposed changes. It is a small price to pay to ensure objectivity and independence of important determinations.

Second, the change should be accompanied by the additional modification of the current statute to force the staggering of the Commissioners terms. Mr. Chairman, this way the Tribunal will not be put into a vulnerable position when there is only one vacancy at a time. Therefore, I suggest that the staggering be every 2 years.

Mr. Chairman, I truly believe that the Tribunal is a worthwhile agency. I strongly ask that you reconsider your bill.

Mr. Chairman, that concludes my statement. Thank you for your attentiveness to my remarks, and I look forward to your questions.

Mr. HUGHES. Thank you, Ms. Daub.

[The prepared statement of Ms. Daub follows:]

STATEMENT OF CINDY DAUB

CHAIRMAN

COPYRIGHT ROYALTY TRIBUNAL

I. Introduction

Mr. Chairman and Members of the Subcommittee, I too watched with keen interest President Clinton's first address to the nation. I strongly support and applaud the President's attempt to streamline the Federal Government and eliminate wasteful bureaucracy. Mr. Chairman, if that is truly your goal, then the Copyright Reform Act of 1993 (Bill) is not the way to achieve it.

At this point, I would like to note that this is my own personal statement. It would have been preferable to have an agency statement, but all three Commissioners differ in their positions. Appearing with me are my two colleagues, Commissioners Bruce Goodman and Edward Damich. Also present is Linda Bocchi, the Copyright Royalty Tribunal's General Counsel.

Your statement, introducing the Bill, describes it as 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. On the surface, the Bill seems appealing, but even a brief review of this Bill reveals that it will have the contrary effect.

II. The Tribunal's 1992 Accomplishments

The Tribunal is an agency that has responsibility for implementing five statutory licenses, of which it actively implements four, and the new Audio Home Recording Act of 1992. During fiscal year 1992, with regard to the cable statutory license, the Tribunal held over a month of hearings to determine the distribution of the 1989 cable royalties and ordered distribution of all the 1989 cable royalties. The Tribunal also made a partial distribution of the 1990 cable royalties and grappled with a motion to dismiss one of the claimants, which had based its claim on a unique statutory interpretation.

With regard to the satellite statutory license, the Tribunal assembled an arbitration panel for the purpose of adjusting the rate, and reviewed the panel's determination to assess whether it complied with the statutory criteria. Upon finding that the determination was reasonable, the Tribunal adopted it.

During the calendar year 1992, the Tribunal also held a proceeding to determine distribution of the combined 1989-1991 satellite royalties. This proceeding was unique in that it required the holding of a bifurcated Phase I proceeding.

Stage I of Phase I included a prehearing conference and a "paper" hearing. Stage I required resolution of a complicated legal issue. The Tribunal bifurcated the Phase I proceeding in the hope that resolution of this, interlocutory but significant, matter would result in the parties reaching a universal settlement as to the distribution of the royalties.

Once the Tribunal resolved the interlocutory issue, the parties did, in fact, reach a global settlement. The Tribunal was prepared to distribute the 1989-1991 royalties, which amounted to approximately $10 million, in December of 1992. At the request of the parties, the royalties were not distributed until January of 1993.

With regard to the public broadcasting statutory license, the Tribunal held a "paper" hearing to determine the new rates and terms. With the assistance of the General Counsel of the Tribunal, all but one of the parties were able to submit a settlement agreement or joint proposal.

In addition to all of the above, during the latter part of 1992, the Tribunal also had to grapple with implementation of the new Audio Home Recording Act. The Tribunal held an informal meeting with parties affected by the new Act, answered numerous telephone inquiries regarding the Act, and issued an *Advance Notice of Rule Making*.

III. Tribunal Budget and Staff

Mr. Chairman, it must be underscored that all of this work was achieved with three Commissioners, one professional staff member, the Tribunal's General Counsel, and without any professional consultants. This was realized through the expert budget management of a modest annual budget of $865,000. Moreover, 85% of these costs were shouldered by the claimants, the very parties that benefit from the Tribunal's services, with

the taxpayers shouldering a mere 15% of these costs. I defy any agency to match that record.

It is also worth noting that the Tribunal was originally appropriated enough funds for a staff of eighteen. However, rather than take advantage of this appropriation, the Tribunal convened with a staff of ten. Now sixteen years later, the Tribunal functions with a staff of nine. I dare say, not too many Federal Agencies can claim that, almost two decades later, although their responsibilities have increased, their staff has decreased.

IV. The Tribunal's Record

The Tribunal's accomplishments in 1992 are not unique. The Tribunal has a long history of successfully performing difficult and very subjective statutory functions with a small staff and a limited budget. *See* Attachment A. From 1977, when the Tribunal commenced operating with a budget of $276,000, to present when it operates with a budget of $911,000, the Tribunal has performed its responsibilities with a budget of under one million dollars. *In fact, the Tribunal has regularly returned portions of its budget to the* claimants and U.S. Treasury. *See* Attachment B. Over the past sixteen years, the Tribunal has distributed over $1 billion in cable royalties; $48 million in jukebox royalties; and $10 million in satellite royalties. *See* Attachment C.

Mr. Chairman, in your statement, you described the Tribunal as a "broken and unnecessary" agency. The Tribunal's record disputes your assessment. In 1981 the

General Accounting Office (GAO), at the request of the Committee on the Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House of Representatives, examined the operation of the Tribunal. GAO's study was based on an examination of the Tribunal's legislative history, its proceedings and procedures, interviews with Tribunal Commissioners, meetings with eighteen organizations affected by the Tribunal's operations and other key individuals, in and out of Government, knowledgeable about the Tribunal and the compulsory licenses it oversees. Notably, the key individuals and the representatives of the eighteen organizations interviewed were assured that any of their comments that might affect their future dealings with the Tribunal would be kept confidential.

The GAO study reported that, with certain exceptions, the Tribunal was recognized by the affected interests as a competent body. Other than criticisms involving the problems that regularly occur in court rooms, and the Tribunal's legislative mission, the interviewed parties had no criticisms of the Tribunal. *See* Statement of Wilbur D. Campbell, Deputy Director, Accounting and Financial Management Division, Before the Committee on the Judiciary Subcommittee on Courts, Civil Liberties, and House Representatives (June 11, 1981).

The GAO concluded, in its report, that,

> It is clear the Tribunal was given a very difficult task, with no technical support, and minimal authority with which to work. The Tribunal has done

> what it was mandated to do. ... It has followed acceptable procedures and has made determinations required to date. Id. at 6, 22.

The Legislative Appropriations Subcommittee has regularly lauded the Tribunal's efficiency and professionalism. In the words of Chairman Fazio,

> When you think of all the money adjudication costs, it is an incredible total and small amount of public funds to make it all happen. ... You [the Tribunal] are really doing the job. You have not taken advantage at all of the sources of revenue that you have coming to you. I think everyone on the Tribunal has operated in a very businesslike way. *See* Fiscal Year 1993 Legislative Branch Appropriation Request: Before the Subcommittee on Legislative Appropriations of the House Committee on Appropriations, 102 Cong., 2nd Sess. 264 (1992) (statement of Chairman Fazio).

The United States Court of Appeals for the District of Columbia has found the Tribunal's efforts to set a market price "more than reasonable" in light of Congress' mandate to have the Tribunal operate as a substitute for the market place. *See National Cable Television Association, Inc. v. Copyright Royalty Tribunal*, 724 F.2d 176, 185 (1983); *Cf. ACEMLA v. Copyright Royalty Tribunal*, 854 F.2d 10 (2nd Cir. 1988). The Court has also acknowledged the fact that the Tribunal, by establishing precedents (the game rules), has facilitated settlements among the parties. In the words of the Court, "[t]he umpire has established precedents on which the players may rely in submitting their claims." *See National Association of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 385 (1982), *quoted in NBC v. Copyright Royalty Tribunal*, 848 F.2d 1289, 1297 (D.C. Cir. 1988). Additionally, the Tribunal has a sterling appeals record since, except for a few partial remands, all of the Tribunal's decisions have been affirmed by the Court. *See* Attachment D.

V. Analysis of the Copyright Reform Act of 1993

The Bill Has No Cost Savings And Will In Fact Increase Costs

Mr. Chairman, in your statement, you argue that the Bill will save both the taxpayers and the royalty claimants some undisclosed amount. A careful review of the proposal reveals that, not only will it not save these parties any money, it may, in fact, increase their costs. The Bill proposes to impose the following additional responsibilities on the Register of Copyrights (Register):

a) ascertain whether a controversy exists;
b) if controversy exists, convene an arbitration panel;
c) review the arbitration panel's distribution determination to ascertain whether it is arbitrary in view of the relevant statutory and legal criteria;
d) if the determination is arbitrary, the Register will have to fully examine the record and issue a determination, within sixty days;
e) entertain petitions for rate adjustment, including determination of whether petitioner has a significant interest ;
f) commence rate adjustment proceeding;
g) Convene arbitration panel for rate adjustment;
h) in the case of public broadcasting rates, establish requirements by which copyright owners receive reasonable notice of use of their works.

From my experience and knowledge of the issues presented to the Tribunal, it is unlikely that the Register will be able to perform these additional responsibilities without additional staff and resources. Unlike the Tribunal, which funds 86% of its operating costs with the royalties, the Register's costs of operation will be fully funded with taxpayer dollars. There will also be additional costs in setting up the internal workings of this new shop, and dismantling the Tribunal.

Additionally, contrary to your assertions, use of an arbitration panel will not result in cost savings. Firstly, unlike the Commissioner's compensation, the panel's compensation will most likely be contingent on the length and complexity of the proceeding. Furthermore, with all due respect to the legal profession, the compensation of most lawyers that represent parties before the Tribunal is also contingent on the length and complexity of the proceedings. Consequently, rather than provide an extra incentive to reduce the number of issues adjudicated, and thereby decrease the number of controversies, the arbitration proposal provides an extra incentive to prolong the proceedings, and an impediment to settlement.

The use of arbitration panels to issue final determinations will also increase the claimants' costs because panel determinations are not binding on future panels. The establishment of precedent by the Tribunal has been a predominant impetus behind its long history of settlements in the areas of cable, public broadcasting, and jukebox. Unfortunately, not only are the determinations not binding on subsequent panels, but the Tribunal's own, well-established, precedent will not be binding on the panels. In essence, under the arbitration model, the parties will be reinventing the wheel with each and every proceeding. This fact will surely hamper settlement. Any party, who feels that it has not fared well, will have an incentive, during subsequent proceedings, to try to shape the new wheel in its favor.

An additional detriment is the fact that the panel's decision may be reviewed by the courts. The Court of Appeals, on repeated occasions during the early years of the Tribunal, expressed its displeasure with the litigious nature of the parties appearing before the Tribunal. *See NAB v. CRT,* 809 F.2d 172 (1986), *quoting CBN v. CRT,* 720 F.2d 1295, 1319 (D.C. Cir. 1983) and *NAB v. CRT,* 772 F.2d 922, 940 (D.C. Cir. 1985). The Tribunal's well-established precedent, over time, discouraged this pattern of appeals. The absence of such precedent will inevitably lead to regularly recurring appeals. These appeals will result in substantial costs to both the claimants, by way of litigation costs, and the taxpayers, by way of court costs.

In sum, the Bill proposes to replace a three decision maker scheme, which has well-established rules and procedures, with a four decision maker scheme, which could never establish game rules because it is incapable of establishing precedent. The efficiency and cost savings of such a proposal are elusive, at best, and illusory, at worst.

The Bill May Destroy The Essential Independent Nature Of The Decision Making Body

The proposed Bill has draw backs other than the added costs to the claimants and taxpayers. Specifically, transferring the Tribunal's responsibilities to the Copyright Office may destroy the vital independent nature of an entity that, not only determines distribution among copyright owners, but also establishes rates for copyright users. The Tribunal historically has been,

> an independent agency, free from political pressures, engaged in balancing the equities of copyright owners and copyright users based solely on the record evidence placed before it. It is neither owner friendly nor user friendly, but a completely neutral arbiter. *See* Copyright Royalty Tribunal Reform: Hearings on H.R. 2752 and H.R. 2784, Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice for the House Committee on the Judiciary, 99th Cong., 1st Sess. 161 (1985) (statement of Edward W. Ray, Acting Chairman of the Copyright Royalty Tribunal).

Independence from the Copyright Office is essential to the effectiveness of the Tribunal, because the Copyright Office has been perceived as an advocate of the copyright owner. This preconception, whether or not justified, may frustrate the Copyright Office's ability to perform the most crucial of the Tribunal's roles, that of settlement facilitator. This is a role which the Tribunal has performed well. I believe that the Tribunal has, without exception,

> steadfastly insisted on private settlements rather than give in to the tendency of other agencies toward greater government involvement in the marketplace. *Id.*

Such an agency has unquestionably served the public interest well.

My colleague, Commissioner Goodman, noted in his letter of February 17, 1993, that the Tribunal "has managed to achieve the remarkable feat of displeasing both program

owners...and many cable operators." *See* Letter from Commissioner Bruce Goodman to House Copyright Subcommittee Chairman William Hughes (February 17, 1993). Commissioner Goodman's observation, in fact, underscores the Tribunal's success as a negotiator. A good negotiator is one who negotiates a deal which somewhat displeases each side, by making each side feel that it has relinquished something. The worst scenario is where one side is perceived, rightly or wrongly, as always winning the negotiations. Such a situation will surely chill the prospects of settlement.

Additional Drawbacks of Arbitration Panel Proposal

Aside from the chilling effect that the perception of one-sidedness may have, the proposed Bill has additional drawbacks. With regard to settlements, the Bill provides that an arbitration panel will not be convened until a controversy has been declared. Therefore, the Register will have the awesome responsibility of serving as settlement facilitator. Performance of the settlement responsibility, in addition to all of the Register's other responsibilities, may result in the settlement function not receiving the attention it requires.

A further drawback of the arbitration panel proposal is that it will not provide the necessary stability and continuity to enable the proper performance of the statutory functions, nor the proper forum for resolving legal issues, such as whether Congress intended networks to share in the satellite superstation fund. *See* Letter from Commissioner Edward Damich to House Copyright Subcommittee Chairman William Hughes (February 17, 1993). Since, with the convening of every arbitration panel will come

a new committee of decision makers, who will have to familiarize themselves with substance and procedure, the potential for discouraging settlements and prolonging the proceedings is substantial. Moreover, since the arbitration panel will not be convened until a controversy is declared, resolution of interlocutory matters, such as motions to dismiss filed prior to declaration, will have to be handled by the Register's taxpayer-funded staff.

The use of arbiters to determine the distribution of hundreds of millions of dollars presents certain basic concerns. Currently, Commissioners undergo a thorough scrutiny during the Senate confirmation process. The confirmation process is crucial because it weeds out potential and actual conflicts of interest. Arbiters, however, will not be required to undergo any such scrutiny. Even though it is the Register who will convene the panel, the Register will not have the resources to undertake a scrutiny, in any way, comparable to that of the Senate.

Arbitration Panel Determined Rates Will No More Closely Resemble Marketplace Rates Than Those of The Tribunal

Mr. Chairman, your final point in support of the proposed Bill is that "arbitrated rates can be expected to more closely resemble market rates than a government-set compulsory license fee." I take issue with that unsubstantiated conclusion. The Court of Appeals has stated that, based on the statutory guidelines, the Tribunal's efforts to set market prices are "more than reasonable." *See National Cable Television v. Copyright Royalty Tribunal*, 724 F.2d at 185. A legal practitioner, who is familiar with the Tribunal's

work, made a similar observation, stating that "in the absence of changes in the substantive statutory guidelines, it should not be assumed that a different decision maker... [will make] a substantially different decision." *See* Attachment A.

The arbitration panel will have to operate under the same statutory restraints that have applied to the Tribunal. In the event of a controversy, it will have to hold hearings to entertain oral and written evidence of the value of "intellectual property created by a population of artists as diverse as our culture." *Id.* It will then, based on the record, undertake the difficult and subjective task of determining a rate as close as possible to a marketplace rate. This is exactly the task that the Tribunal has performed over the past sixteen years. As noted earlier, however, the arbitration panel will lack the ability and incentive to facilitate settlements.

VI. Recommendation

Mr. Chairman, although as I have discussed above, I believe that the Tribunal is an efficient and productive agency, these are truly drastic times for this country. It is, therefore, imperative for every Federal Agency to examine ways to minimize taxpayer burden. Therefore, I offer the following recommendation:

Budget: Fully fund the Tribunal's budget from the royalty funds.

This financing method was originally proposed, by former Legislative Appropriations Subcommittee Member Burgener of California, as a means of reducing the tax burden. I believe that this proposal will find support in the industry, and will follow in the Tribunal's long tradition of cost consciousness.

Structure: The current statute should be modified to ensure the staggering of the Commissioners' terms. The terms should be staggered by two year intervals.

The staggered terms will guarantee that the majority of the Tribunal will remain in place through each and every change in Commissioner. Such stability is necessary to safeguard the interests of the Tribunal, and to ensure that no one Commissioner's self-interest overrides the interests of the agency.

Mr. Chairman, I am not here to try to save my job, but rather I am here because I truly believe that the Tribunal is a worthwhile agency and one that should remain in existence. I strongly ask that you reconsider your bill.

Mr. Chairman, that concludes my statement. Thank you for your attentiveness to my remarks and I look forward to your questions.

Monday Memo

ATTACHMENT A

A Copyright Royalty Tribunal commentary from Bruce Forrest, Farrow, Schildhause, Wilson & Rains, Washington

Coming to the defense of the Copyright Royalty Tribunal

The necessity of a Copyright Royalty Tribunal and the role of the compulsory license have been the subject of fair-minded debate for some time. There have also been less useful *ad hominem* attacks on the tribunal members and their decisions. The tribunal's commissioners are called "political hacks" and "incompetent," their rulings "plucked out of thin air," sometimes "outrageous." Cries for abolition or reform have recently been propelled by an episode (the resignation of the tribunal's chairman) which, in the long run, should prove irrelevant to the tribunal's work. Making funeral plans for the tribunal has become something of a Washington parlor game.

It is time to take more objective stock of the tribunal. If one takes into account the agency's difficult, and very subjective, functions and the records put before it, I submit that one will find that the tribunal has done precisely what Congress told it to do, and it has done its job quite well.

Reform may well be in order. But it must be based upon careful review of the tribunal's statutory role and analysis of its performance based upon the records the parties put before it. Anything short of this will surely make things worse.

One must appreciate the nature of the tribunal's work. It sets fees for intellectual property created by a population of artists as diverse as our culture. It then allocates the collections among competing claimants.

The tribunal inherited three low-balled statutory rates which were nothing more than political compromises. The legislative history of the two-and-three-quarter-cent song fee for "mechanical recordings" shows that Congress rejected a proposal to maintain that rate pending the occurrence of "relevant factors" after enactment. The $8 fee set for each jukebox for each year was absurdly low. The statutory fees for cable television signals were premised upon the FCC's cable operator restrictions of distant-signal carriage and the syndicated program deletion option given to local broadcasters. The new tribunal was directed to commence proceedings to adjust the phono record and jukebox fees to make them "reasonable." The cable television fees were to be adjusted, again to be "reasonable," when the FCC's anticipated deregulation steps took place.

It was assumed that substantial upward adjustments of fees would occur. But the tribunal was given only very blunt instruments to decide by how much.

Setting fees for compulsory copyright licenses is not like setting rates for a public utility. The tribunal is not determining a reasonable rate of return on capital investment, or remunerating the cost of service.



Bruce G. Forrest joined the Washington office of the Oakland, Calif., law firm of Farrow, Schildhause, Wilson & Rains in December 1984. Before that, he was with the appellate staff of the Justice Department's civil division. While at Justice, Forrest defended a number of the Copyright Royalty Tribunal's administrative decisions before the courts.

For cable television, Congress was even less helpful. The tribunal was specifically told only to consider the "economic impact" on copyright owners and users in setting the new fee after repeal of the FCC's distant-signal rules. And for its distribution cases, Congress candidly declined to give the tribunal any guidelines at all.

The tribunal's struggles to explain "in detail" the reasons for its decisions have been met with scorn. But anyone who participated in drafting this statute should be dissuaded—or at least embarrassed—from criticizing the tribunal for vagueness.

In the first two tribunal rate proceedings (the "mechanical fee" for the record industry and the juke box fee), the copyright users largely relied upon an attempt to impose a burden of proof on anyone seeking to change the statutory fee levels, and poormouthing about the plight of their industry. But by any measure those fees were inadequate. If inflation alone were used to adjust the mechanical phono record fee, it would have risen to 14 cents per song. The jukebox fee was a small fraction of comparable fees charged in a wide variety of western nations. No one should have been surprised when the agency declined to impose a burden of proof on copyright owners or when it refused to require copyright owners to subsidize copyright users by supressing rates.

Counsel for the cable industry were fully aware of these matters when the tribunal entered its most controversial proceeding: the setting of cable rates in light of FCC deregulation. The cable operators put on an affirmative case to show that the rates were already high enough. But this presentation was successfully rebutted by the coordinated presentations of many copyright owners' groups. They proved overwhelmingly that a very substantial rate increase was in order.

The reviewing courts have unanimously affirmed the tribunal's rate decisions substantially in their entirety. The reviewing courts were correct because there was ample evidence of record to support tribunal decisions.

Whether the compulsory licenses should be abolished is a policy question beyond the purview of this note. But proposals to keep the compulsory licenses, and to replace the tribunal with a Federal Copyright Agency ("Cablecasting," June 3), or move its function to the Department of Commerce or the Library of Congress, should be scrutinized most carefully. In absence of changes in the substantive statutory guidelines, it should not be assumed that a different decision maker would have made a substantially different decision. Based on the records I've seen, the tribunal's decisions were not at all surprising.

The worst route, which all interests should avoid, is the delegation of any initial decisional authority to the courts. Any lawyer familiar with the range of personalities and judgments available from the judicial branch will shudder (perhaps gleefully) at the prospect of courthouse shopping battles. — Ideally, legislation will fix compulsory license fees and negotiation will divide the pool. The cable television fee schedule, especially, needs revision. Even if overall receipts are maintained, the schedule is too rococo, and it dictates results based more on history than economic reality.

Meanwhile, absent statutory change, copyright users should still be able to substantially improve their evidentiary showings before the agency. The tribunal has discounted the "marketplace" analogies presented by copyright owners, finding that resulting fees would be unfairly high. Certainly some effort should be made to better quantify the value of these differences. Experience with current fee levels should provide valuable information as to whether those fees were set at levels that were too high or too low.

But absent statutory changes or improved administrative presentations, don't expect new commissioners or new bureaucratic structure to satisfy complaints about performance under this statute. ■

ATTACHMENT B

ACTUAL EXPENDITURES COMPARED TO APPROPRIATED BUDGETS

FISCAL YEAR	AUTHORIZED BUDGET	ACTUAL EXPENSES	UNOBLIGATED ALLOTMENT
1977	$ 276,000[1]	$ 32,351	$ 243,649
1978	726,000[2]	469,775	256,225
1979	805,000	485,979	319,021
1980	471,000[3]	461,196	9,804
1981	470,000	437,640	32,360
1982	487,000	476,614	10,386
1983	626,000	555,440	70,560
1984	700,000[4]	480,064	219,936
1985	722,000[5]	459,250	262,750
1986	512,000[6]	509,374	2,626
1987	629,000[7]	579,463	49,537
1988	662,000[8]	611,000	51,000
1989	633,000[9]	598,000	35,000
1990	674,000[10]	673,500	500
1991	845,000[11]	862,000	3,000
1992	865,000[12]	863,700	1,300
1993	911,000[13]		

[1] Expenses were for purchase of office furniture and equipment only.
[2] Expenses were for 10 months operation only.
[3] Tribunal decreased positions from 18 to 10.
[4] Tribunal authorized 11 positions. Vacancies created by the death of Mary Lou Burg and resignation of Katherine D. Ortega and their respective assistants were not filled until late FY 1984. Ratio of appropriated funds to royalty funds 30%/70%.
[5] Authorized 11 positions. Ratio of appropriated funds to royalty funds 30%/70%.
[6] House Committee on Appropriation authorized funding for 3 commissioners, 3 assistants and a general counsel. Ratio of appropriated funds to royalty funds 30%/70%.
[7] Ratio of appropriated funds to royalty funds 20%/80%.
[8] Authorized 8 positions (3 commissioners, 3 assistants, 1 general counsel, secretary to general counsel. Ratio of appropriated funds to royalty funds 20%/80%.
[9] Authorized 8 positions. Ratio of appropriated funds to royalty funds 20%/80%.
[10] Authorized 9 positions. Ratio of appropriated funds to royalty funds 15%/85%.
[11] Authorized 10 positions. Ratio of appropriated funds to royalty funds 15%/85%.
[12] Tribunal requested elimination of 1 position (legal researcher); authorized 9 positions. Ratio of appropriated funds to royalty funds 15%/85%.

[13] Authorized positions 9. Ratio of appropriated funds to royalty funds 14%/86%.

ATTACHMENT C

STATUS OF ROYALTY FEE FUNDS DISTRIBUTED

Section 809 of the Copyright Act provides for the timely distribution of royalty fees that are not subject to an appeal, and where royalties would not be affected by an appeal under any circumstances. Each year since the Copyright Act of 1976 became effective on January 1, 1978, the Copyright Office has maintained the jukebox and the cable copyright royalty funds and the Tribunal. The funds are comprised of two elements: the deposits by the copyright users (less the administrative costs of the Copyright Office and the Tribunal) and growth on investment of the funds. The Tribunal has disbursed the following royalty fees

Royalty Fee Fund	Dollar Amount	Percent Distributed	Percent Held in Reserve
Cable			
1978 Cable Royalty Fund	$ 17,689,000	100.00	-0-
1979 Cable Royalty Fund	23,764,000	100.00	-0-
1980 Cable Royalty Fund	28,083,000	100.00	-0-
1981 Cable Royalty Fund	35,595,000	100.00	-0-
1982 Cable Royalty Fund	44,384,000	100.00	-0-
1983 Cable Royalty Fund	84,369,000	100.00	-0-
1984 Cable Royalty Fund	104,355,000	100.00	-0-
1985 Cable Royalty Fund	114,405,000	100.00	-0-
1986 Cable Royalty Fund	130,024,000	100.00	-0-
1987 Cable Royalty Fund	174,333,000	100.00	-0-
1988 Cable Royalty Fund	209,660,000	100.00	-0-
1989 Cable Royalty Fund	228,459,000	100.00	-0-
1990 Cable Royalty Fund	180,107,000	90.00	10.00
1991 Cable Royalty Fund	185,066,000	-0-	100.00
Jukebox			
1978 Jukebox Royalty Fund	$ 1,122,000	100.00	-0-
1979 Jukebox Royalty Fund	1,360,000	100.00	-0-
1980 Jukebox Royalty Fund	1,228,000	100.00	-0-
1981 Jukebox Royalty Fund	1,183,000	100.00	-0-
1982 Jukebox Royalty Fund	3,320,000	100.00	-0-
1983 Jukebox Royalty Fund	3,166,000	100.00	-0-
1984 Jukebox Royalty Fund	5,992,000	100.00	-0-

Royalty Fee Fund	Dollar Amount	Percent Distributed	Percent Held in Reserve
Jukebox (cont'd)			
1985 Jukebox Royalty Fund	5,508,000	100.00	-0-
1986 Jukebox Royalty Fund	5,351,000	100.00	-0-
1987 Jukebox Royalty Fund	6,535,000	100.00	-0-
1988 Jukebox Royalty Fund	6,732,000	100.00	-0-
1989 Jukebox Royalty Fund	6,442,000	100.00	-0-
1990-1999 (License Suspended)			
Satellite			
1989 Satellite Royalty Fund	$ 2,698,000	100.00	-0-
1990 Satellite Royalty Fund	3,457,000	100.00	-0-
1991 Satellite Royalty Fund	3,762,000	100.00	-0-

ATTACHMENT D

APPEALS

CABLE DECISIONS

National Association of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367 (D.C. Cir. 1982) (1978 cable distribution). Remanded to explain non-award to NPR, affirmed in all other respects.

National Cable Television Association v. Copyright Royalty Tribunal, 689 F.2d 1077 (D.C. Cir. 1982) (1980 cable inflation adjustment). Remanded to explain or correct mathematical formula for inflation adjustment, affirmed in all other respects.

Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal, 720 F.2d 1295 (D.C. Cir. 1983) (1979 cable distribution). Remanded to explain non-awards to Devotional Claimants and to Commercial Radio, affirmed in all other respects.

National Cable Television Association v. Copyright Royalty Tribunal, 724 F.2d 176 (D.C. Cir. 1983) (3.75% and syndicated exclusivity surcharge). Affirmed.

National Association of Broadcasters v. Copyright Royalty Tribunal, 772 F.2d 922 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 1245 (1986). (1979 remand, 1980 remand and 1982 cable distribution). Affirmed.

National Association of Broadcasters v. Copyright Royalty Tribunal, 809 F. 2d 172 (2d. Cir. 1986) (1983 cable distribution). Affirmed.

National Broadcasting Company v. Copyright Royalty Tribunal, 848 F. 2d 1289 (D.C. Cir. 1988) (1984 cable distribution). Affirmed.

ACEMLA v. Copyright Royalty Tribunal, 854 F. 2d 10 (2d Cir. 1988) (1985 cable distribution). Affirmed.

JUKEBOX DECISIONS

Amusement and Music Operators Association v. Copyright Royalty Tribunal, 636 F.2d 531 (D.C. Cir. 1980) (1978 regulations on access to jukebox). Dismissed for lack of jurisdiction.

Amusement and Music Operators Association v. Copyright Royalty Tribunal, 676 F.2d 1144 (7th Cir. 1982) (1980 jukebox royalty rate). Affirmed.

ACEMLA, Latin American Music and Latin American Music, Inc. v. Copyright Royalty Tribunal, 763 F.2d 101 (2d Cir. 1985) (1982 jukebox distribution). Remanded to ascertain whether appellants were performing rights societies or copyright owners.

ACEMLA v. Copyright Royalty Tribunal, 809 F.2d 906 (D.C. Cir. 1987) (1982 remand/1983 jukebox distribution). Affirmed.

ACEMLA v. Copyright Royalty Tribunal, 835 F. 2d 446 (2d. Cir. 1987) (1984 jukebox distribution). Affirmed.

ACEMLA and Italian Book Corporation v. Copyright Royalty Tribunal, 851 F. 2d 39 (2d Cir. 1988) (1985 jukebox distribution) Affirmed.

MECHANICAL DECISIONS

Recording Industry Association of America v. Copyright Royalty Tribunal, 662 F.2d 1 (D.C. Cir. 1981) (1980 mechanical rate adjustment). Remanded to consider alternative scheme for interim rate adjustment which would not require agency discretion in a year outside of the ratemaking year set by Congress, affirmed in all other respects.

Mr. HUGHES. Mr. Goodman, we have your statement. I hope you can summarize, but you may proceed as you see fit.

STATEMENT OF BRUCE D. GOODMAN, COMMISSIONER, COPYRIGHT ROYALTY TRIBUNAL

Mr. GOODMAN. I thank you, Mr. Chairman, and members of the subcommittee. I will make a 5-minute statement.

Rather than address the allegations which I have learned for the first time about conflict of interest, that is a subject that I would be pleased to discuss with you at anytime privately. For now, however, I thought I would address H.R. 897 which I had understood was the subject of the hearing today.

When I accepted my appointment I believed that the Tribunal would be in the crossroads between fast-evolving communications law and exciting new concepts in the copyright law. It seemed to be the right place at the right time. But the place turned out to be Brigadoon. The time was when Brigadoon's villagers were not awake. If the Tribunal had a theme song it would be "Don't Stop Thinking About Yesterday."

The Tribunal's problems are pervasive, systemic, inevitable and insoluble. With the benefit of 20/20 hindsight we can now see that the vehicle upon which so many well-meaning people placed their hopes turned out to be a spruce goose in conception and the *Exxon Valdez* in execution.

The Tribunal was not only given few responsibilities, but they were primarily quasi-judicial in nature. Thus, the Tribunal was doomed to inefficiency because the very nature of litigation guarantees an unpredictable and inconsistent workload, and without typical administrative responsibilities the Tribunal cannot fill in the gaps.

Exacerbating the problems flowing from the flawed concept has been the dismal execution of the legislation. In particular, the appointment of Commissioners has been terribly politicized. Too often Presidents of both parties have exalted political loyalty over experience and qualifications. A candid postmortem would reveal that everyone concerned shares in the blame for the Tribunal's inevitable failure:

First, the Presidents of both parties who too often failed to demand even the most basic credentials in their appointees to the Tribunal.

Second, Congress for creating an agency with a mission that was too small and a workload that was too unpredictable, for failing to require Commissioners to possess appropriate experience, and then for regularly approving underqualified appointees.

Third, the parties for expecting the worst and passively watching their expectations confirmed.

Fourth, the appointees themselves who, eager for a 7-year appointment with little work and less pressure, accepted positions for which they knew they were not qualified.

As a result, the parties are caught in a catch-22. They can't go to the Federal courts until they have proceeded before the Tribunal. Then if they appeal, the courts routinely rubberstamp the Tribunal citing administrative efficiency and expertise without looking back into the Tribunal's actual experience. Thus the parties are

captives in an unworkable system and there is little they can do to alleviate their problems.

The problem is more the Tribunal's lack of value than its actual cost. In a variation of "you get what you pay for," the Tribunal's attitude seems to be that since the parties and the taxpayers don't get very much, if they don't pay very much either it is all OK. It seems similar to a movie theater which shows B movies but charges only a dollar because the movies aren't very good.

But there is a major difference. In a competitive marketplace, if you don't like the B movie playing at the dollar theater, you can walk down the street to the Bijou and see the latest blockbuster for $7. The choice is yours. But the taxpayers and the parties don't get a choice with the Tribunal. There is no marketplace. What Congress has decreed is what they get.

At a time when spending cuts are desperately needed, there is no such thing as a governmental expense that is de minimis. By identifying the Tribunal, Congress has accepted President Clinton's challenge to name specific expenditures which can be cut. It is a step in the right direction and, hopefully, will take America on the trillion million journey to cure the deficit.

The underutilization of the Tribunal and the appointment of underqualified Commissioners have been so depressingly consistent that it is in inexcusably naive to expect improvement in the future. Instead it is more productive to turn the page on the Tribunal and consider alternatives. In my statement to the subcommittee I expand on a number of alternatives. For now, however, I will simply note that the Tribunal's successor should be qualified, should be obligated to observe precedent, and should provide the stability, continuity and sense of confidence which the parties deserve.

Throughout its life the Tribunal has been assailed by criticism. Eight years after midwifing the Tribunal into existence, Congressman Kastenmeier described the Tribunal as "broken beyond repair" and introduced legislation to transfer its functions. His bill was called the Copyright Tribunal Sunset Act, whose title left little doubt as to the level of frustration with the Tribunal. Senator DeConcini told a group of cable executives in 1985 that "If I were in your business I would be frustrated as holy hell." At least two former Commissioners have advocated the abolition of the Tribunal, and today a majority of the Tribunal calls into question its continued existence. But through it all the Tribunal has just kept sailing along.

In advocating the abolition of my own agency, I feel like a captain scuttling his own boat, but I have reluctantly concluded that this boat is an unworthy vessel for the taxpayers, the copyright owners and the cable operators. It is time for the Tribunal to sail off into the sunset.

Thank you.

Mr. HUGHES. Thank you very much, Mr. Goodman.

[The prepared statement of Mr. Goodman follows:]

STATEMENT OF BRUCE D. GOODMAN
COMMISSIONER
COPYRIGHT ROYALTY TRIBUNAL

March 3. 1993

I. INTRODUCTION.

Mr. Chairman and members of the Subcommittee, my name is Bruce D. Goodman; I have been a Commissioner on the Copyright Royalty Tribunal since September 1992. I support H.R. 897 - the Tribunal should be sunset effective January 1, 1994. Ill-conceived and poorly executed, the Tribunal has failed both the taxpayers and the parties which appear before it. But, like a bureaucratic Energizer bunny, it just keeps on going and going and going. After more than 15 years, it is time to say that the Tribunal should go no further.

Its functions should be reassigned. Thereafter and as soon as practicable, the Tribunal's primary area of responsibility - the cable compulsory copyright license - should also be reviewed and a determination made whether it should be retained, modified or terminated.

II. BACKGROUND. As set forth in the Legislative History, the Copyright Royalty Tribunal was created as an independent federal agency in the legislative branch to determine, review and adjust certain royalty rates for use of copyrighted materials pursuant to compulsory licenses provided in the Copyright Act of 1976. Initially, a bill in the Senate provided that, upon certifying the existence of a controversy concerning distribution of statutory royalty fees or upon periodic petition for review of statutory royalty rates by an interested party, the Register of Copyrights

would convene a three member panel to constitute a Copyright Royalty Tribunal for the purpose of reviewing the controversy or reviewing the rates. According to this bill, the Tribunal would be appointed from among the membership of the American Arbitration Association or a similar organization; but the Tribunal would exist within the Library of Congress.

Due to constitutional concern over the provision of a Senate bill that the Register of Copyrights, an employee of the legislative branch, would be appointing members of the Tribunal, the bill was amended to provide for the direct appointment of the Commissioners by the President. The first Chairman was the well-qualified Thomas C. Brennan, who had been the Chief Counsel of the Subcommittee on Patents, Trademarks, and Copyrights throughout the consideration of the enabling legislation. Thereafter, the Tribunal went downhill.

In fact, Rep. Robert Kastenmeier (D-Wisc.), who was one of the primary driving forces behind the establishment of the Tribunal in 1977, less than 10 years later described the Tribunal as "broken beyond repair" and introduced legislation to create a Copyright Royalty Court to perform the Tribunal's functions. The Kastenmeier bill followed the "Copyright Royalty Tribunal Sunset Act", a bill introduced by Rep. Mike Synar (D-Okla.) and whose title left little doubt as to the level of frustration with the Tribunal. Senator Dennis DeConcini (D-Ariz) told a group of cable executives in 1985 that, "If I were in your business, I would be frustrated as holy hell".One former chairman, herself a controversial commissioner who

resigned under pressure, testified subsequently that the Tribunal should be eliminated because it was "effectively paralyzed", was "totally useless", "totally unjust" and, throughout its history, had established a precedent for "incompetence, ineffectiveness, and apathy.". In fact, she even added "apparent corruption" to its impressive list of evils. Another former commissioner more quietly called for its abolition. And, today, a majority of the Tribunal calls into question its continued existence.

Notwithstanding this dubious history, I allowed my optimism to triumph over reality when I accepted the appointment to the Tribunal in 1992. I looked forward to working with Professor Edward J. Damich, who I had been told would be appointed to the Tribunal with me; and I believed that the Tribunal would be perfectly located in the crossroads between fast-evolving communications law and exciting new concepts in copyright law. I expected to be right in the middle of the activity, watching compulsory copyright, must carry, retransmission consent, DART, and all the others exciting copyright/communications issues play out before my eyes. With millions of dollars at stake and a skilled bar representing the parties, it seemed to be the right place and the right time. But the place turned out to be a bureaucratic Brigadoon; the time was when the villagers were not awake; and if the Tribunal had a theme song, it would be "Don't Stop Thinking About Yesterday".

III. PROBLEMS OF THE Tribunal. What went wrong? Everything. With the benefit of 20:20 hindsight, we can now see that the vehicle upon which so many well-meaning people placed their hopes

turned out to be a Spruce Goose in conception and a Titanic in execution. Although well-intentioned, the Tribunal was flawed from start to finish. From conception through execution.

A. WORKLOAD. The Tribunal's workload is inconsistent and, too frequently, insignificant due to the following:

1. LIMITED RESPONSIBILITIES. Although, on paper, the Tribunal's list of responsibilities appears significant, if not impressive, settlements are common (e.g., agreement was reached by the parties entitled to cable compulsory copyright distributions under Section 111 for 1983 through 1988; and agreement was reached by the parties under Sections 116 for the jukebox industry for 1990 through 1999). Moreover, the compulsory copyright under Section 119 Is scheduled to terminate on December 31, 1994.

2. THE NATURE OF LITIGATION. The Tribunal's overwhelming and primary responsibility is quasi-judicial. However, the workload regarding any individual compulsory license is inherently and inevitably unpredictable. As is true with litigation in any forum, a case tried to completion requires a significant expenditure of time, but if a case settles quickly, there is little for the arbiter to do other than approve the settlement agreement. Thus, in the case of the Tribunal, if the parties settle their dispute over the allocation of royalties from the cable compulsory license pool, there may be virtually nothing for the Tribunal to do for the remaining several months of the year.

B. THE COMMISSIONERS. Each year, a pool of royalty payments which can exceed $200 million must be allocated among

claimants to the cable compulsory copyright license royalties. Literally hundreds of claimants coalesce into claimant groups with a commonality of interest to pursue their claims. Highly-skilled attorneys with an expertise in copyright/communications law submit articulate, albeit legalistic, briefs outlining and arguing the legal and factual issues by citing detailed and complicated legal precedent and positioning the factual evidence in the most persuasive way. They present complex evidence in hearings with direct and cross examination of the witnesses. Every positive nuance is carefully coaxed out of friendly witnesses just as subtle, but damaging, admissions are elicited from hostile witnesses. The attorneys paint their evidence on a broad canvas using barely-perceptible brush strokes that are visible only to the well-trained and highly experienced legal eye.

To a legal scholar or at least an experienced attorney, the issues are fascinating, stimulating, compelling, and challenging. But to a layman, the same issues must be bewildering, confusing, boring, and mind-boggling. To the parties and their lawyers, with so many millions at stake, it all must simply be frustrating.

Ideally, the Tribunal commissioners - who must resolve factual issues and make legal judgements - will be appointed based on their experience and expertise in copyright, communications, and entertainment law. Some litigation experience is beneficial, but a legal background is essential.

Certainly, it is unreasonable to expect that every commissioner will possess all this experience. But, shockingly,

until this year, the appointees had little or no experience in copyright law or communications law or entertainment law or any law at all - few were attorneys. It is the height of naive and blind optimism to expect an inexperienced layman to decipher legal and industry jargon; grasp and resolve the legal and factual issues; and - in the instance of the chairman - run the hearing.

Clearly, Congress envisioned that the Tribunal would consist of an experienced group of attorneys-as-arbitrators who would hear evidence and write the decisions. The legislative history reveals the specific intent of Congress that "the Commissioners perform all professional responsibilities themselves", as assisted by a small secretarial and clerical staff. However, in 1985, in the midst of a blitzkrieg of criticism, a general counsel was added to the Tribunal following the recommendation of the Government Accounting Office, which was concerned with the quality of the Tribunal's decisions and the qualifications of its commissioners. In fact, the House Subcommittee on Courts, Civil Liberties and the Administration of Justice held hearings on the future of the Tribunal. During this time, the GAO; Donald Curran - acting Register of Copyrights; and a number of expert witnesses proposed that the existing Tribunal should be modified by establishing legislative qualifications for commissioners.

Neither political party bears the sole blame for exalting the politically faithful over the experienced and the qualified. In fact, each administration during the Tribunal's lifetime has apparently looked upon the Tribunal as a place more to reward its

friends than to staff with experts. Numerous observers have found it both disheartening and puzzling to note the politicizing of the process of appointing commissioners to an agency which has absolutely no political agenda or even input into traditional politics. The issues before the Tribunal are consistently apolitical and their resolution cannot be considered to benefit either political party. Although there have been dedicated and qualified commissioners on the Tribunal; too often the appeal of a seven year term with little work, less pressure, and no heavy lifting has proven to be an irresistible attraction for un-or underqualified job-seekers with a friend in the oval office.

C. THE WORKPRODUCT. The discontent of the parties with the Tribunal's decision-making ability is manifest from the many appeals and critical comments in past hearings to abolish the agency. As a result of the politicizing of the appointment process, the parties or claimants are caught in a frustrating catch-22. They can't go to the federal courts until they have proceeded before the Tribunal. Then, if they appeal, which they do with an alarming and telling frequency (for example, of the first six cable distributions, five were appealed), the courts - without examining the background of the Tribunal's commissioners - routinely cite the traditional agency's "administrative efficiency and expertise" and refuse to overturn the Tribunal's findings. (See, e.g., National Association of Broadcasters v. Copyright Royalty Tribunal, 675 F. 2d 367 (D.C. Cir. 1982). As a practical matter, the claimants, i.e., the parties which appear before the Tribunal, are unable to express their candid opinions of the Tribunal before the appellate

courts, before Congress or in any other forum because statements critical of the commissioners and their decisions could ill-serve the parties at hearing time. As a result, the parties are captives in a frequently non-working and unworkable system and there is little they can do to alleviate their problems.

D. VALUE.

1. HARD AND SOFT COSTS. It is the Tribunal's *value*, not its actual costs to the taxpayers which makes appropriate its abolition. The Tribunal's total budget is small - approximately $1,000,000 of which the claimants pay approximately 86%. There are, however, more substantial hidden or soft costs - the process of appointing Commissioners starts with letters and calls to members of Congress, then letters and calls to the White House. The calls bounce back and forth; the messages work their ways up and trickle down. The Office of Presidential Personnel becomes involved; there are interviews, recommendations, FBI security checks, hearings before the Judicial Committee, meetings with the Office of Government Ethics; and reams of paperwork to complete and review. After confirmation, there are meetings with the Appropriations Committees, more paperwork, and all the other hidden expenses and meetings which rob the government of its time.

2. COST/BENEFIT ANALYSIS. More significant than the Tribunal's hard and soft costs is its abysmal failure under a cost/benefit analysis. That is, one must examine whether the benefit the Tribunal provides justifies its costs. To ask that question is to answer it - even though the Tribunal's costs are low.

Apparently, based on a twist to the old saw that "you get what you pay for", the Tribunal's attitude seems to be that, since the parties and the taxpayers don't get very much, if they don't pay very much either, it's all OK. It seems similar to a movie theater which shows "B" movies, but charges only a dollar because the movies aren't very good. But there is a major difference - in the marketplace of capitalism, if you don't like the "B" movie playing at the dollar theater, you can walk down the street to the Bijou and see the latest blockbuster for $7. The choice is yours. But the taxpayers and the claimants don't get a choice with the Tribunal. There is no marketplace. What Congress has decreed is what they get.

Although critics of the Tribunal have recommended that additional staff and money were needed for the agency to run smoothly, expenses have been moderated - in accordance with economic necessity and, perhaps, the Tribunal's view of its own worth. As a result, there is no library, no access to electronic data bases, and virtually no budget for travel or seminars. Consequently, the commissioners have little chance to learn on the job and the public is not adequately informed of the opportunities to participate in the agency's allocation of royalties. The Tribunal's responsibility under the Audio Home Recording Act is a case in point. Unless Slash, one of the leads with the heavy metal group Guns n' Roses, happens to catch the right edition of the *Federal Register*, he may be unaware of his opportunity for royalties for his performances.

3. SPENDING AND THE ECONOMY. It is clear that America's deficit must be reduced and I firmly believe that spending cuts must lead the way. The challenge to cutting spending is the ability to wield the knife in a way that the fat is excised, but the bone is left intact. Although the Tribunal's caloric total is not high, the calories it does have are largely empty - in a nutritional pyramid, the Tribunal would fall somewhere between Jell-O and Doritos. Just as a dieter must count his calories one at a time, Congress and the Executive Branch must eliminate every unnecessary expenditure. When America's deficit exceeds the GNP of most other nations and continues to grow rapidly, there is no such thing as a governmental expense that is *de minimis*.

This concept is so well-accepted that it has spawned numerous aphorisms that have become trite through popularity, e.g., "If you watch the pennies, the dollars will take care of themselves"; "the journey of a thousand miles begins with a single step".

The President has challenged America to name specific governmental expenditures which can be cut. By identifying the Tribunal, Congress has accepted that challenge. It is a step in the right direction and, hopefully, will take America on the multi-billion mile journey to cure the deficit.

E. CONCLUSION. The Tribunal's problems are pervasive, systemic, inevitable, and insoluble. The agency was fatally flawed in its conception and irresponsibly treated in its execution.

1. THE TRIBUNAL'S CONCEPTION. The concept could not possibly have worked efficiently because a small government agency

cannot possibly act as an efficient adjudicator of a limited number of issues which arise in an irregular and unpredictable fashion. As the workload ebbs (e.g., the claimants settle), the Tribunal is underutilized; and even if the workload were to flow (e.g., none of the claimants settle), the limited Tribunal resources would be swamped and unable to cope. Due to its narrow mission, the Tribunal cannot expand into other work during the times that are fallow for litigation. And due to its small staff and limited resources, the agency cannot delegate or re-assign other work within the small agency if it is confronted by a work overload (admittedly, an oxymoron when used in conjunction with the Tribunal).

Certainly, small agencies are capable of functioning very effectively - but they must have workloads that are consistent and predictable. For example, an agency to prepare for the nation's Bicentennial or an Olympics Committee. But no agency can be efficient where there are not enough people or there is not enough work to smooth the mountains and valleys.

2. THE TRIBUNAL'S EXECUTION AND IMPLEMENTATION. Exacerbating the problems inevitably flowing from the flawed concept has been the dismal execution and implementation of the legislation. A candid and unbiased post-mortem would reveal that everyone concerned shares in the blame for the Tribunal's inevitable failure:

a. the Presidents of both parties, who, too often, failed to demand even the most basic credentials in their appointees;

b. Congress, which created an agency with a mission that was too small and a workload that was too unpredictable; and failed, first, to include a requirement of appropriate experience in the Act and, then, regularly approved unqualified appointees, In fact, in 1985, Senator Charles Mathias, told a group of cable executives that, "If you blame anyone, you've got to blame us."

c. the claimants, which have grown to expect the worst and have passively watched their expectations confirmed; and

d. the appointees, who - eager for a seven year sinecure - accepted positions for which they knew they were not qualified.

Possibly, the fault even extends to the voters and the political and governmental system, itself, which tolerates this poor use of the taxpayers money and the abuse of the patronage system. In any event, the underutilization of the Tribunal and the appointments of unqualified commissioners has been so depressingly consistent that it is inexcusably naive to expect an improvement in the future.

Instead, the Tribunal is inevitably doomed to continue along its past unsatisfactory course. Wishing it all will be better won't make it so. That is the one lesson that can be learned from the Tribunal's 15+ year history. As Santayana warned, "those who ignore the past, are condemned to repeat it". The Tribunal should be sunset on December 31, 1993. But a home must be found for its responsibilities.

IV. **ALTERNATIVES TO THE TRIBUNAL.** Ordinarily, it would be illogical to consider the abolition of an agency without, at the same time, reviewing the viability of all its responsibilities. Accordingly, the cable compulsory license would appear to be an appropriate candidate for discussion. However, in view of numerous pending legal challenges to the "must carry" and "retransmission consent" provisions in the Cable Television Consumer Protection and Competition Act of 1992, it may make sense to defer that consideration until more of the underlying issues have been resolved. Because I fear that the existence of the Tribunal and of the cable compulsory license may be inextricably bound, however, I would encourage the Subcommittee to consider this substantive area at the first appropriate opportunity. In any event, the following alternatives to the Tribunal are explored, assuming *arguendo*, that there is no change planned in the functions currently under the Tribunal's responsibility.

A. SPECIFIC ALTERNATIVES.

1. AD HOC PANELS IN THE COPYRIGHT OFFICE. On the positive side, transferral to the Copyright Office makes eminently good sense because:

a. The Tribunal and the Copyright Office are both in the Legislative Branch;

b. The enabling statute is the *Copyright* Act and the Copyright Office is responsible for administering the copyright laws;

c. The Copyright Office's licensing division already provides administrative support for the Tribunal;

On the negative side, there are two major problems with the *ad hoc* nature of the panels:

a. Although the nature of the Tribunal's work dictates that it must be episodic, there are continuous, albeit minor, needs for an arbiter's response. For example, the claimants regularly file comments (which are *de facto* motions) with the Tribunal reporting impediments to settlement, requesting the Tribunal's resolution, and promising a likely settlement following resolution. The time required to address and resolve these issues is not extensive, but it is essential to have a panel of arbitrators waiting in readiness. Although the hearings may extend for only a few weeks, the entire proceedings can drag on for more than a year from the day a controversy is determined to the date it is resolved. Therefore, even if the panels are to be *ad hoc*, the appointment must be for at least the life of the particular declared controversy (e.g., the resolution of cable compulsory copyright license for 1990); and

b. There is a benefit to a continuation of the same arbitrators on a panel. First, they become even more familiar with the issues. Second, they bring the benefits of stability and continuity that a churned panel would lack. Unlike *permanent* arbitrators, it is unlikely that *ad hoc* arbitrators would have the opportunity to handle succeeding arbitrations because a losing party is usually extremely reluctant to select the same arbitrator

for future arbitrations. Third, permanent arbitrators are more likely to follow precedent for the straightforward reason that it is their own precedent.

Finally, although making the Register of Copyrights a Presidential appointee would appear to avoid the separation of powers problems in Buckley v. Valeo, 424 U.S. 1 (1976), it could politicize this position. Given the problems identified above with political appointments, I am concerned that the Bill may replace politically-caused problems at the Tribunal with politically-caused problems at the Copyright Office.

2. PERMANENT PANELS UNDER THE COPYRIGHT OFFICE OR ANOTHER AGENCY OR DEPARTMENT. For the reasons stated above, panels that are selected for more than one year would be preferable. The panels could be placed under the Register of Copyrights (if the position become a Presidential appointee); or under another presidential appointee in the Library of Congress; or in any other logical agency (e.g., the Federal Communications Commission) or department (e.g., the Commerce Department). In any event, the arbitrators should be required to observe precedent unless they could make a convincing case that it should be overturned.

3. ADMINISTRATIVE LAW JUDGES IN THE COPYRIGHT OFFICE. The cost to the taxpayers (or the claimants if they are to pay the entire costs) for their share of maintaining full-time ALJ's should be comparable to the costs of paying *ad hoc* arbitrators

whose daily rates tend to be high. Moreover, there are a number of benefits to "employee" ALJ's:

a. their employment by the Copyright Office ensures a lack of conflicts of interest and brings various ethical constraints otherwise unavailable;

b. their availability is guaranteed;

c. they would identify with and prioritize the arbitrations and, unlike arbitrators, they would be less likely to abandon the process if their other commitments became more demanding;

d. they would be more likely to honor precedent; and

e. there may be other adjudications for them which would increase their workload and improve efficiency.

4. ALJ'S AT THE FEDERAL COMMUNICATIONS COMMISSION ("FCC"). The potential advantage over ALJ's in the Copyright Office is that the FCC ALJ's are more likely to have other needs to ensure that their workload is sufficient. Additionally, it may be cleaner from a Constitutional standpoint to have ALJ's in the Executive Branch exercising quasi-judicial responsibilities.

5. ALJ'S IN OTHER DEPARTMENTS (E.G., THE COMMERCE DEPARTMENT). Again, there are the advantages of increased efficiency for ALJ's with other functions and for an executive agency to exercise quasi-judicial functions. Because the Patent and Trademark Office is within the Commerce Department, there is a reasonable nexus of expertise.

6. PRIVATE ARBITRATION. Congress could simply provide that the parties, if they do not reach agreement, will submit their claims to final and binding arbitration under the auspices and rules of the American Arbitration Association. The panels would be selected by the parties to increase the likelihood of experience and competence; arbitrators would serve for at least three years in provide stability and continuity; and the panels would be obligated to observe (but not blindly follow) precedent. Appeals could be limited to one of several previously designated District Court judges.

7. FEDERAL COPYRIGHT COURTS. Certain sitting judges could be designated to hear claims arising under the Copyright Act. However, formal litigation, with full discovery and strict adherence to the Federal Rules of Civil Procedure, is expensive and would increase the costs to the parties as well as adding an additional, albeit minor, burden to an overcrowded judicial system.

8. RECONSTITUTE THE TRIBUNAL. I do not recommend this alternative because: (i) it would not address the inherent inefficiency of a small, stand-along quasi-judicial agency; and (ii) given the disappointing record of naming commissioners, it is likely that the qualifications would be interpreted "charitably".

9. LEGISLATIVELY-DETERMINED AND PRE-SET RATES. I do not recommend this alternative because the sucking sound that you would hear would be lobbyists pulled toward Capitol Hill.

Consequently, the rates would be determined based less on the equities than on the political power of the parties.

B. CONCLUSION. There are numerous alternatives to the Tribunal as a stand-alone agency. Most would be superior provided that there is a mechanism in place to assure that the arbiters of the controversies will be qualified. Obviously, it is not essential for every arbiter to be familiar with Copyright law and Entertainment law and Communications law and be a lawyer with experience in hearings and litigation. However, there must be some familiarity and experience with the basic issues. An economist might provide a satisfactory alternative to a third lawyer, but at least two arbiters on a panel of three should be lawyers and the non-lawyer should never run the hearing. In any event, the Tribunal's successor - an arbitration panel or administrative law judges - should be qualified, should be obligated to observe - if not slavishly follow - precedent and should provide the stability, continuity and sense of confidence which the parties deserve.

Ideally, the arbiters will be occupied fully and efficiently when they are not involved in controversies previously submitted to the Tribunal. However, even if their workloads do not increase beyond that of the current commissioners, the parties and the taxpayers will realize a significant savings because: (i) the supporting staffs can be shared with other arbiters or employees where the arbiters are part of a larger agency; (ii) the rental space, telephone equipment, etc. will be less costly if they are an extension of another agency; and (iii) the enormous hidden or soft

costs of Presidential appointments and stand-alone agencies will disappear.

V. DISCLAIMERS.

A. BUREAUCRACY AND THE CIVIL SERVICE SYSTEM. Because of a strong pre-disposition, it is necessary for me to add this disclaimer. I believe that too many Federal, State, and local governments operate inefficiently and do not properly serve the taxpayers. This generalization is not intended to be absolute or all-encompassing because there are many notable and admirable exceptions. The tragedy is that the government is able to - and does - attract America's best and its brightest. But many lose their ambition, their enthusiasm, and their dedication along the way. As a result, the agencies, the departments, and the taxpayers suffer.

The causes are obvious - there rarely exists either: (i) the carrot/reward for government employees who work hard and well; or (ii) the stick/penalty for unsatisfactory work. On one hand, workers learn quickly that their salaries are dependent less on hard work and ability than on the whim of the current-President who withholds or grants pay increases and the arbitrary availability of openings in the next grade. On the other hand, termination or even denials of within-grade increases are few and far between. There is no profit motive - for either the organization or the employees. And increasingly, morale has plummeted as government employees have become convenient whipping persons.

The problem, of course, is not the employees; it is the system. For those reasons and because our economy warrants it, a new Grace Commission should be formed to tackle these problems which seem relatively straightforward and not difficult to solve. However, until then, I confess my suspicion of government and my pre-inclination to sunset any mission, agency or department that has outlived its usefulness or never achieved its purpose. I strongly believe that the Tribunal has failed in this regard, but I acknowledge that my disappointment and frustration with the civil service system may make me faster to pull the trigger.

B. THE COPYRIGHT OFFICE. H.R. 897 would modify certain operations in the Copyright Office. Rather than comment on those modifications in this Statement, I will defer to witnesses from the Copyright Office.

C. BUCKLEY V. VALEO, 424 U.S. 1 (1976). I recognize that the Buckley case presents certain potential obstacles to the re-assignment of the Tribunal's functions to the Copyright Office. Although I have certain suggestions in that regard, I will defer to the Constitutional lawyers the best method to accommodate Buckley and the planned re-assignment of the Tribunal's functions.

VI. OVERALL CONCLUSION AND RECOMMENDATION. For the reasons stated above:

A. THE TRIBUNAL SHOULD BE SUNSET AS AN AGENCY ON DECEMBER 31, 1993;

B. THE TRIBUNAL'S FUNCTIONS SHOULD BE REASSIGNED;

C. THE LEGISLATION RE-ASSIGNING THE TRIBUNAL'S FUNCTIONS SHOULD SPECIFY (GENERALLY OR SPECIFICALLY) THE EXPERIENCE REQUIRED FOR AN ARBITER TO BE SELECTED BY A GOVERNMENT AGENCY OR DEPARTMENT; AND

D. IN THE NEAR FUTURE, CONGRESS SHOULD EXAMINE EACH OF THE TRIBUNAL'S FUNCTIONS TO DETERMINE ITS FUTURE.

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COMMISSIONER BRUCE D. GOODMAN

Bruce D. Goodman was appointed to the Copyright Royalty Tribunal by President Bush on September 3, 1992.

Mr. Goodman, 47, an attorney and business executive, has a broad background in broadcasting, cable television and telecommunications. Prior to his appointment, Mr. Goodman was President of FYI - the Consumer Channel, a cable television channel dedicated to program-length commercials. His prior experience includes eight years as Senior Vice President and General Counsel for the Mutual Broadcasting System, Inc., where his responsibilities included the negotiation of several hundred contracts for broadcasting rights, as well as other operational and staff functions for the network, its owned stations, and its satellite telecommunications division.

Additionally, Mr. Goodman was Vice President of the Amway Corporation, a multi-billion dollar direct-marketing company; and President of MultiComm Telecommunications Corp., an industry pioneer in the distribution of data by FM subcarriers and very small aperture satellite antennas. Mr. Goodman also engaged in the private practice of law as a partner with Arter & Hadden, a large national law firm, where he chaired the Entertainment and Communications Group and was involved in litigation regarding various unique copyright issues. Additionally, he was Senior Counsel to John H. Fanning, Chairman of the National Labor Relations Board and worked for the NLRB General Counsel in a number of positions.

Mr. Goodman is a past member of the National Association of Broadcasters Code Board; American Advertising Federation Legal Committee; the Washington Metropolitan Area Corporate Counsel Association, Inc.; and the Federal Communications Bar Association. Active in charitable activities, he is a board member of the National Chamber Orchestra; and the Washington Ear, a reading service for the blind.

Articles written by Mr. Goodman have appeared in Broadcasting; Electronic Media; Broadcast and Financial Management Journal, RadioWeek, and CableVision.

A native of Pennsylvania, Mr. Goodman is a graduate of Pennsylvania State University and the Georgetown University Law Center. He is a member of the bars of the District of Columbia, Virginia, Florida, and the United States Supreme Court.

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Bruce D. Goodman
Commissioner

February 17, 1993

The Honorable William J. Hughes
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman:

As a Commissioner on the Copyright Royalty Tribunal, I am keenly interested in your proposed legislation to modify the Copyright Act. Although I am concerned that *ad hoc* arbitration panels would not provide the necessary stability to perform properly the Tribunal's functions, I strongly agree with the proposal to sunset the Tribunal. In reaching this conclusion, I rely not only on my experience as a Commissioner, but also on my background as an attorney and executive in the communications industry.

Created in 1976 to encourage programming diversity and access to programming at a time when the cable industry was in its infancy, the Tribunal has become a bureaucratic Energizer bunny which has outlived its usefulness ... but keeps on going and going. In fact, the Tribunal has achieved the remarkable feat of displeasing both program owners who believe the rates allocated by the Tribunal are too low and many cable operators who believe the rates are too high. And the benefit to taxpayers is elusive, at best, and illusory, at worst.

Even if the cable compulsory license for local programming, the Audio Home Recording Act and other legislative underpinnings of the Tribunal's charter are to be preserved, the Tribunal, as a stand-alone agency awkwardly interposed between the Copyright Office and the FCC, should be sunset in the near future. Its functions can be re-allocated (e.g., to private licensing groups, to other federal agencies such as the FCC, the Library of Congress). In an economic environment which mandates that every government agency must overcome a presumption of unnecessary expense and counter-productivity, the Tribunal has too often been noted more for providing employment to unqualified political appointees than for its help to taxpayers and the industry it should serve.

Certainly, I recognize that calling for the abolition of my own agency is akin to an infantryman's calling down artillery fire on his own position. But I hope this letter will be a call to arms to other Presidential appointees who recognize that entrenched bureaucracy must give way to enlightened sacrifice if America is to achieve its economic potential.

Very truly yours,

Bruce D. Goodman

Mr. HUGHES. Mr. Damich, welcome.

STATEMENT OF EDWARD J. DAMICH, COMMISSIONER, COPYRIGHT ROYALTY TRIBUNAL

Mr. DAMICH. Thank you very much, Mr. Chairman. I must excuse myself for the raspy quality of my voice. I came down with the flu on Monday, and it is only by dint of medical science I am able to appear here today.

Mr. HUGHES. Well, don't feel too bad. We all have it and you wouldn't want to be left out.

Mr. DAMICH. That is right. You are right. Who am I going to give it to here? That is the problem.

I have a short statement dealing with the substance of your proposed bill, and I would like to make a few comments on the charges that I have heard today for the first time as well.

Mr. Chairman and members of the subcommittee, my name is Edward J. Damich. I am a Commissioner of the Copyright Royalty Tribunal. Thank you for the opportunity to express my views on the Copyright Reform Act of 1993, H.R. 897. This is the second time that I have testified before the subcommittee. The first time was in 1987 under your predecessor, Mr. Kastenmeier, when I testified in favor of U.S. adherence to the Berne Convention. Today I am pleased to testify in favor of title II of H.R. 897, which replaces the Copyright Royalty Tribunal and which repeals the jukebox compulsory license.

Mr. Chairman, you have stated that the Copyright Royalty Tribunal is an agency that is both broken and unnecessary. I believe that the Copyright Royalty Tribunal is not broken, but that it is unnecessary. Admittedly, there are different senses to the word "broken." What I mean is the Copyright Royalty Tribunal is not broken because it does what it is supposed to do. As I see it, the problem with the Tribunal is that it is inefficient. It does not have enough to do to warrant a full-time independent Federal agency, and historically the Commissioners have lacked the appropriate legal expertise for the Tribunal to act on an optimum level.

Despite the fact that the Copyright Act commits five compulsory licenses to the Tribunal's purview as well as rate and royalty determinations under the Audio Home Recording Act, its actual work occurs episodically, due largely to statutory schedules and settlement by the parties that appear before it. When it does work it performs adjudicatory functions similar to those of administrative law judges, who are ordinarily required to be members of the bar for 7 years and have 7 years of administrative law litigation experience. Yet, according to the evidence available to me, only 5, including Commissioner Goodman and myself, out of 13 Commissioners have had legal experience in relevant fields. This is largely due to the fact that the Commissioners are political appointees.

The mechanism established by H.R. 897 more closely reflects the episodic character of compulsory license and AHRA determinations, and the need for appropriate legal expertise by providing for ad hoc arbitration panels chosen in a way that ordinarily will result in qualified arbitrators. However, H.R. 897 should promote predictability, and thus settlement, by requiring the panels to take prece-

dent into account and by allowing the Register to disapprove panel determinations that do not do so.

Because of *Buckley* v. *Valeo,* in order to integrate compulsory license and AHRA determinations into the Copyright Office, H.R. 897 makes the Register a Presidential appointee. Since the Register would have only narrow review of arbitration panel determinations and would not engage in the actual hearing process, I do not think that H.R. 897 allows politics to taint the adjudicatory process. I do not have an opinion on whether the Register as a Presidential—whether making the Register a Presidential appointee is wise or unwise on other grounds.

If for other reasons it should prove unwise to change the status of the Register, Congress should still abolish the jukebox compulsory license and replace the Copyright Royalty Tribunal. Congress should create a new Copyright Royalty Commission composed of three Commissioners, who would be appointed by the President with Senate confirmation in order to satisfy *Buckley* v. *Valeo,* with appropriate legal expertise. The CRC would meet on an as needed basis and perform the functions assigned to the Register by H.R. 897.

In sum, the actual workload generated by the compulsory licenses and AHRA does not justify the existence of a full-time independent Federal agency, especially one that historically has lacked expertise in its fields of activity. As a Republican, I have always been in favor of downsizing the Federal Government, and I am happy to see this theme being carried forward by President Clinton and by the subcommittee. No one who is concerned with the elimination of government waste and inefficiency can afford to leave the Tribunal untouched.

Thank you again, Mr. Chairman and members of the subcommittee, for this opportunity to express my views.

Mr. HUGHES. Thank you, Mr. Damich.

[The prepared statement of Mr. Damich follows:]

Statement of Edward J. Damich

Commissioner, Copyright Royalty Tribunal

March 3, 1993

Mr. Chairman, my name is Edward J. Damich. I am a Commissioner of the Copyright Royalty Tribunal. Thank you for the opportunity to express my views on the Copyright Reform Act of 1993 (H.R. 897). This is the second time that I have testified before the Subcommittee. The first time was in 1987, under your predecessor, Mr. Kastenmeier, when I testified in favor of U.S. adherence to the Berne Convention.

My testimony today will focus on Title II of H.R. 897 which abolishes the Copyright Royalty Tribunal in favor of copyright arbitration royalty panels overseen by the Register of Copyrights, but my position on this question requires me also to touch on those parts of the bill that eliminate the jukebox compulsory license and that change the status of the Register of Copyrights.

Mr. Chairman, you have stated that the Copyright Royalty Tribunal is "an agency that is both broken and unnecessary." I believe that the Copyright Royalty Tribunal is not broken, but it is unnecessary. Admittedly, there are different senses to the word, "broken." What I mean is: The Copyright Royalty Tribunal is not broken because it does what it is supposed to do. During my six-month tenure on the Tribunal, I have participated in royalty distribution under the satellite compulsory license, rate

adjustment for the use of certain works in noncommercial broadcasting, and the initial steps for distribution of royalties under the Audio Home Recording Act (AHRA). I can personally testify that each was accomplished in a timely fashion and that all three commissioners and the staff acquitted themselves in a professional manner.

The Tribunal is unnecessary, however, because it does not do enough to justify its existence as a full-blown, independent federal agency. Furthermore, what the Tribunal does, it does inefficiently. By "inefficient," I mean that the parties and the American taxpayers pay more than they have to to get the job done. I do not mean that the Tribunal costs a lot. As you well know, our FY1993 budget is under a million dollars and only a relatively small portion of that comes from the federal treasury. But I cannot be persuaded that an agency should continue because, though inefficient, it doesn't cost the parties or the taxpayers very much. Does waste have the right to continue because it is *small* waste? I suspect that President Clinton's cuts in the White House staff don't amount to a "hill of beans" when compared to the federal budget as a whole, yet they have symbolic value and *real* value--they add up. As a Republican, I have always been committed to downsizing the federal government, and I believe that the Copyright Royalty Tribunal is a good place to start.

As you may know, I am a law professor. Periodically, law schools are evaluated by the American Bar Association, which requires them to write a self-study. The first two questions of

any self-study are: (1) what do you do? and (2) how do you do it? What follows is my draft of a self-study for the Copyright Royalty Tribunal.

First, what does the Tribunal do? On paper it would appear to be very busy. It adjusts the rates for five compulsory licenses--mechanical, jukebox, public broadcasting, cable, and satellite--and for digital audio recording technology under AHRA. It distributes royalties under the cable and satellite compulsory licenses and under AHRA. Historically, however, its only regular, annual business is the cable royalty distribution.

Proceedings for rate determinations[1] occur episodically. The Tribunal held a rate adjustment proceeding for the mechanical license in 1980 and 1987, and the next rate adjustment proceeding will be due in 1997. It held a rate adjustment proceeding for the jukebox license in 1980, but Congress made jukebox rates largely a matter of private negotiation after 1990. (H.R. 897 repeals the jukebox license.) The Tribunal held rate adjustment proceedings for the public broadcasting license in 1978, 1982, 1987, and 1992. (The 1992 rate adjustment was settled.) The Tribunal held a rate adjustment proceeding for the cable license in 1981, 1983, 1985, and 1990. The Tribunal held a rate adjustment proceeding for the satellite license in 1992, but, by statute, this consisted in merely approving rates determined by an arbitration panel. (The

[1]Rate adjustments are sometimes made without a hearing, as for example, in the case of cost-of-living adjustments.

satellite license is scheduled to sunset in 1994.) Under AHRA, the Tribunal has no rate-setting duties until 1998.

The cable royalty distribution is the real jewel in the Tribunal's otherwise rhinestone crown. It occurs yearly, and it involves about $200 million. On the other hand, the first satellite royalty distribution was held in 1992 for 1989-91 (three years) because the satellite royalty payments were not significant enough for an annual distribution, and, after a one-day hearing, the parties settled. It remains to be seen whether satellite royalty payments will grow enough to justify annual distribution, and, again, the satellite license is scheduled to sunset in 1994. There is great speculation whether AHRA royalty payments will justify an annual distribution proceeding, but there is talk of a "dry run" in 1993 despite the minuscule receipts from October 28th through December 31, 1992.

Second, how does the Tribunal do its work? With the sole exception of the public broadcasting rate adjustment, the Tribunal only acts upon petition of the parties. If the parties to a royalty distribution settle, that ends the controversy and the role of the Tribunal. As I have noted, this happened with the 1989-91 satellite royalty distribution in 1992. Settlement and agreement among the parties is not uncommon. The Tribunal is supposed to be the default mechanism. Thus, in order to have a true picture of the Tribunal's activity, it is necessary to inquire into how often the parties settled among themselves. Even the cable royalty distribution was settled about half the time.

If the parties do not agree, the Tribunal receives written submissions of direct cases. At this stage, it might have a preliminary hearing to narrow and define issues. Finally, it has the royalty distribution or rate determination hearing in chief.

This adjudicatory function of the Tribunal points out the second inefficiency of the Tribunal--historically, it has lacked commissioners with legal expertise in fields relevant to the Tribunal's work. By my reckoning and according to official biographies on file with the Tribunal, only five commissioners out of 13 have fit this profile, including Commissioner Goodman and myself. The Tribunal's own statement before this Subcommittee in 1985 admitted that the courts had criticized the quality of the decisions and that the Tribunal had to hire a general counsel to remedy this deficiency:

> The Tribunal would be less than candid, however, if it did not acknowledge the criticism addressed by the courts to the quality of its final determinations. At times, they have been imprecise in expressing the connection between the record evidence and the ultimate decision. With the addition of a general counsel, the Tribunal will improve the quality of its decisions.[1]

After Mr. Robert Cassler was hired as general counsel in 1985, the quality of the Tribunal's decisions did improve, and the current general counsel, Ms. Linda Bocchi, has continued his reputation for professional excellence. The hiring of a general counsel, however, although improving the quality of its work, paradoxically made it less efficient overall by hiring an *extra*

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[1]Statement of the Copyright Royalty Tribunal, July 11, 1985, p. 18.

person to do the work originally assigned to the commissioners. The Copyright Act of 1976 envisioned a Tribunal composed of experts in the field who would take a "hands on" approach to their work, with only clerical staff for support:

> The [Tribunal] is authorized to appoint a staff to assist it in carrying out its responsibilities. However, it is expected that the staff will consist *only* of sufficient clerical personnel to provide one full time secretary for each member and one or two additional employees to meet the *clerical* needs of the entire [Tribunal]. ***Members of the [Tribunal] are expected to perform all professional responsibilities themselves,*** except where it is necessary to employ outside experts on a consulting basis. Assistance in matters of administration, such as payroll and budgeting, will be available from the Library of Congress.
>
> ***The Committee expects that the President shall appoint members of the [Tribunal] from among persons who have demonstrated professional competence in the field of copyright policy.***[1]

Because the Tribunal is involved in trial-like proceedings, I believe that not only relevant expertise, but *legal* expertise is necessary to make the Tribunal efficient. I do not think that I am being parochial in insisting on this qualification. Some commissioners were experienced in fields directly related to the Tribunal's activities at the time that the courts criticized the quality of the Tribunal's decisions. It is interesting to note that administrative law judges, who perform functions similar to Tribunal commissioners, are required ordinarily to have been

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[1]Copyright Law Revision (S.22), H.R. Rept. 94-1476, 94th Cong., 2d Sess., pp. 174-75 (emphasis added). At the time of the Report, the Tribunal was called the "Copyright Royalty Commission." For clarity, I have substituted "Tribunal" for "Commission."

members of the Bar for seven years *and* to have had seven years experience in administrative law or litigation.

In sum, two facts undermine the case for a permanent Copyright Royalty Tribunal. First, to a large extent, the work of the Tribunal is not constant. It ebbs and flows largely due to statutory schedules and to the ability of the parties to agree to a settlement. Second, the commissioners, as political appointees, have historically lacked legal expertise in the fields relevant to their responsibilities. As a result, the Copyright Royalty Tribunal, like an old furnace, is a working but inefficient machine.

The mechanism set up by H.R. 897--arbitration panels that are insulated from the political process and that are convened on an "as needed" basis addresses the problems of episodic work and lack of expertise. (Although H.R. 897 does not require that the arbitrators have relevant legal experience, the method of choosing arbitrators described in the bill would probably result in at least some arbitrators with expertise in the relevant fields.) Professor Stipanowich, in his article, "Rethinking American Arbitration," states that "a hallmark of arbitration is the presence of one or more decisionmakers with pertinent knowledge or experience."[4] Among the advantages of knowledgeable and experienced arbitrators, Stipanowich notes: "[A] pertinent technical or legal background should enhance the ability of the arbitrator to identify the

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[4]T. Stipanowich, *Rethinking American Arbitration*, 63 Ind. L. J. 425, 435-36 (1988).

significant issues in a particular case and to sharpen the focus of the hearing to deal with those issues."[5]

The principal reservation that I have regards continuity. Unless the arbitration panels are bound to take precedent into account, a great deal of the efficiency of the ad hoc panels will be lost as the parties reinvent the wheel with each new panel. Predictability is always an impetus to settlement. Thus, I would suggest the addition of language such as that found in an earlier version of the Audio Home Recording Act regarding binding arbitration: "In rendering a final decision, the arbitral panel shall take into account any final decisions rendered in prior proceedings ...that address identical or similar issues."[6] Furthermore, the Register should be enabled expressly to disapprove an arbitration award if an arbitration panel did not take precedent into account.

In order to fold the Tribunal's activities into the Copyright Office, *Buckley v. Valeo* requires that the Register of Copyrights become a presidential appointee. At first, this created in me another reservation, since I was convinced that lack of legal expertise has had a baneful effect on the Tribunal. Upon reflection, however, I noted that the Register himself or herself will not conduct the quasi-judicial proceedings of the arbitration panels, and therefore, a Register who lacked legal expertise in the

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[5] *Id.*, at 436.

[6] Audio Home Recording Act of 1991 (S. 1623), Sen. Rept., 102d Cong., 2d Sess., p. 15 § 1032(b)(5).

field would probably not be a serious drawback, especially if he or she is advised by counsel when called upon to reject or approve an arbitration panel's decision. (I want to make it very clear that I have not studied the overall impact on the Copyright Office of making the Register a political appointee; I am merely stating that I do not foresee as much inefficiency in making the ratifying officer a political appointee as I do in making the initial decision-makers political appointees.)

Even if it should prove unwise to change the status of the Register, I urge the Subcommittee not to abandon its reform of the Tribunal or the abolition of the jukebox compulsory license. The pattern established by H.R. 897--arbitration panels subject to review for limited purposes--can still provide the basis of a transformed Tribunal-like entity. In that event, I would propose that the current Copyright Royalty Tribunal be abolished and that effective January 1, 1994 a new Copyright Royalty Commission be established within the Copyright Office. This Commission would consist of three commissioners, appointed by the President from among persons with legal expertise in the fields of copyright or communications for seven-year terms.[7] The Commission would not sit permanently, but would convene as needed to perform the same functions as the Register does under H.R. 897. The commissioners would be compensated on a per diem basis, and the Copyright Office would provide administrative, legal and research support staff.

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[7]Other federal agencies that require expertise include: the Commodity Futures Trading Commission, the International Trade Commission, and the Consumer Product Safety Commission.

(It may be recalled that the Copyright Office Licensing Division currently handles the royalty payments for the Tribunal.) This plan would provide both expertise and continuity, and it would reflect the episodic nature of compulsory license and AHRA controversies. The disadvantage of this plan is that it shrinks but does not completely eliminate a layer of federal bureaucracy.

In sum, the actual workload generated by the compulsory licenses and AHRA does not justify the existence of a full-time, independent federal agency, especially one that historically has lacked expertise in its fields of activity. No one who is concerned with the elimination of government waste and inefficiency can afford to leave the Tribunal untouched. The plan adopted by H.R. 897 is a viable one, but more attention should be paid to the problem of continuity. If change in the manner of appointment of the Register proves to be unwise, at the very least the Tribunal should be reconstituted as a part-time commission of experts in copyright and communications law who oversee ad hoc arbitration panels.

Mr. Chairman, thank you for this opportunity to express my views. I stand ready to provide you with any additional information that you request.

Mr. HUGHES. Commissioners Daub and Damich, both of you disagree with my characterization of the CRT as broken, perhaps administratively dysfunctional would have been a little more specific. Here is why. When most agencies testify, there is an agency position. The agency position is decided by majority rule as a general proposition.

Commissioner Daub, your testimony is that all three Commissioners differ and that is why you believe there is no agency position. That is not how the numbers add up to me. I count both Commissioners Damich and Goodman as favoring abolition of the CRT. Under majority rule, the agency position should be in favor of the bill. Have I missed something?

Ms. DAUB. Mr. Chairman, the invitations from your committee, full committee chairman, Mr. Brooks, came to each and every one of us and requested for individual views of your bill. There was no request for the agency views, Mr. Chairman. That was my understanding. Please correct me if I am wrong.

Mr. HUGHES. No, I think we asked for an agency position.

Ms. DAUB. There was no communications requesting, to us, an agency——

Mr. HUGHES. Mr. Damich, what do you want to add to that?

Mr. DAMICH. I would like to comment on that, Mr. Chairman. Commissioner Goodman and I asked Chairman Daub to join us in a meeting prior to the hearing in order to discuss the possibility of an agency position. Chairman Daub, however, refused to attend that meeting. We had the meeting anyway because we presumed that by majority rule we have the right to call a meeting in which we discussed an agency position. The conclusion that we came to was that although Commissioner Goodman and I disagreed on whether or not the arbitration panels were a good idea, considering every factor, we had agreed that the agency position would be that the CRT should be abolished. So there is, in fact, an agency position.

Mr. HUGHES. I know the Chair, and I am sure many of my colleagues, have followed the internal disputes at the CRT, and they began with some very basic themes. First of all, let me ask, who is the Chairman of the CRT? Can you give me some idea?

Ms. DAUB. Are you asking of me, Mr. Chairman?

Mr. HUGHES. Yes. I am asking anybody. Who is the Chairman?

Ms. DAUB. Currently I serve as the Chairman.

Mr. HUGHES. Is that correct, Mr. Damich?

Mr. DAMICH. I think legally it is correct. As you know, Mr. Chairman, we had a meeting to change the internal rule which forbade the rotation of the Chairman to Commissioners who did not have one year's experience on the Tribunal. However, to my shock and dismay, and that of also Commissioner Goodman, Chairman Daub refused the order of the majority of the Tribunal to notify the public in the Federal Register of this change of internal rules.

Mr. HUGHES. So, even though a majority of the CRT basically promulgated—adopted a rule that would be—should be published in the Federal Register, Ms. Daub refused to so publish it. Is that what you are saying?

Mr. DAMICH. That is correct. That is correct, Mr. Chairman.

Mr. HUGHES. Is that an accurate portrayal of what occurred, Ms. Daub?

Ms. DAUB. Not exactly so, Mr. Chairman. The history of the rule change, let me say—Congressman Fish, it is good to see you, sir. Perhaps it will take a long time to explain all of the intricacies.

Mr. HUGHES. Maybe you could just——

Ms. DAUB. Mr. Chairman, I will try to briefly give you the background.

Mr. HUGHES. Maybe I can ask you a specific question.

Ms. DAUB. When I arrived at CRT there was a rule that said the Chairman ought to have served 1 year as a Commissioner before he or she can assume the Chairmanship. That is in our Code of Federal Regulations. I did not feel that I was in any way prejudiced by the 1-year requirement, and I did abide by that rule. Thus, I did not become Chairman for the first 23 months. I became Chairman December 1991.

Mr. HUGHES. Who was Chairman during that period of time?

Ms. DAUB. The former colleagues of ours. And, of course, not realizing that that Code of Federal Regulation was changed by my former colleagues I abided by the rule that was existing. I didn't serve as the Chairman upon arrival at the Tribunal, and I had to serve as Commissioner for a year.

About a month or 2 into my Chairmanship, Mr. Goodman said that, "Well, nothing personal against you, Cindy. I want the Chairmanship now." And I had said, "Well, we do have a year requirement and the statute does say such Chairman shall serve 1 full year. And then it does also say upon convening, the Tribunal will elect among themselves a chair from 7-year Commissioners." So I said, "Well, let's do some legal research before we proceed with this."

I have suggested to my colleagues since February 2 or 3 was scheduled to be an appropriations hearing, if we could meet February 11 after our business matters are decided and then we would have plenty of time, our General Counsel could research all of the legal applications to this matter, and then we would convene.

Well, Mr. Goodman, apparently realizing that he only had very short time on the Tribunal wanted to push it. He said let's make it effective, initially effective February 1. There was a legal question that the General Counsel has raised that one could not begin the Chairmanship February 1 because if you follow the statutory language, the Chairmanship at the CRT has always begun December 1 since its inception, which means you cannot go back, make the rule change retroactively applied. The legal question of retroactivity had to be researched.

Since the Commissioners did not want to do further legal research, they wanted to take the action. I said that I could not participate without all the facts, all the legal questions answered. They said with or without you present, we will go ahead and vote on it, and they did in fact vote on it.

Mr. HUGHES. Anybody—Mr. Goodman.

Mr. GOODMAN. I am sorry. I started nodding off halfway through.

I did listen to the last part and that is certainly true. We did vote on it. We called a vote either four or five times and each time

Commissioner Daub left the meeting because it appeared that she was going to be in the minority.

But your statement is accurate. There have been—there has been a vote.

Mr. HUGHES. Well, I know this is very unpleasant, but let's try to keep our remarks not so personal, so we can try to get to the facts.

Was a vote taken, basically, to publish in the Federal Register?

Mr. GOODMAN. Yes, it was.

Mr. HUGHES. And was it sent to the Federal Register?

Mr. GOODMAN. Yes, it was.

Mr. HUGHES. And what happened?

Mr. GOODMAN. Ms. Daub notified the Federal Register that she wanted it withdrawn.

Mr. HUGHES. Even though a majority of the CRT ordered it be published?

Mr. GOODMAN. That is correct.

Mr. HUGHES. Is that accurate, Ms. Daub, that you indicated that you did not want them to publish it?

Ms. DAUB. Mr. Chairman, there——

Mr. HUGHES. You can answer that yes or no.

Ms. DAUB. Did I not——

Mr. HUGHES. Yes. Did you advise the Federal Register not to publish——

Ms. DAUB. Yes, I did.

Mr. HUGHES [continuing]. A change——

Ms. DAUB. Yes. Yes, I did.

Mr. HUGHES [continuing]. In its regulations——

Ms. DAUB. Yes, I did.

Mr. HUGHES [continuing]. That was agreed to by a majority of the CRT?

Ms. DAUB. Yes, I did. Since—may I add a point here.

Mr. Chairman, all of the official documents of CRT are signed by the Chairman. The legal office of Federal Registry confirmed that fact and they did return the documents back to our agency.

Mr. HUGHES. Was that the first time that you had notified the Federal Register not to publish a regulation or change in regulation?

Ms. DAUB. That is not the first time, Mr. Chairman. May I——

Mr. HUGHES. Let me just finish if I might.

Commissioners Argetsinger and Aguero also sent a regulation to the Federal Register after adoption by the CRT, did they not?

Ms. DAUB. Yes, they did.

Mr. HUGHES. That was followed up by a letter, basically, or a communication to the Federal Register not to publish that in the Federal Register also?

Ms. DAUB. Congressman Hughes, may I answer with a statement? Mr. Patry and Mr. Hayden, the two staff, your subcommittee staff, have been informed, one-sided stories, if I may be bold to say that. This, perhaps, is the information that may take up an hour or two to explain the real truth and the background matters and I don't——

Mr. HUGHES. Ms. Daub.

Ms. DAUB. Yes, sir?

Mr. HUGHES. I don't want to get into the background matters. I want to know if in fact—that was my only question—if there was another instance where a regulation was adopted by the CRT, sent to the Federal Register for publication and, in fact, where you interceded and prevented it from being published? That was my question.

Ms. DAUB. Mr. Chairman, the motion they voted on was a motion I had not even seen. You cannot take votes without the Chairman even being present. Mr. Chairman, the motion has been changed each and every time the General Counsel brought up legal questions, to suit their own purposes. He had one purpose and one purpose only in mind: to become a Chairman at any cost. He tried to get around the rules and the laws and, yes, he may be a lawyer, and my colleagues talked about qualifications of Commissioners past and present. Mr. Chairman, if Congress wanted the Commission to be an all-lawyer panel they would have stated so. They didn't, precisely because they wanted diverse representation there.

And if I may, and I do understand—the lawyers do understand those legal corners and how to get around those areas, but I do know what is right and wrong. And, Mr. Chairman, let me say this. You can characterize, Well, Cindy, you did that last time. You are doing it again. Aren't you a troublemaker?

However, let me clarify this, Mr. Chairman.

Mr. HUGHES. No, I am not saying that. Ms. Daub, I was just trying to find out if, in fact, you did intercede on another occasion, and I am aware that you did because, frankly, I have a letter of March 31, 1992, which, without objection, I am going to submit for the record, and let me read it to you. The letter is directed by the two Commissioners, Mario F. Aguero and J.C. Argetsinger and it is directed to Martha L. Girard, Director of the Office of Federal Register, National Archives.

"Dear Ms. Girard: We certainly regret that we have put the Federal Register in a difficult situation. As our General Counsel, Robert Cassler, explained to your staff, our statute, 17 U.S.C. 801 and following, refers only to the powers of the Tribunal. The Tribunal shall adopt regulations. It does not specify any powers of the chairman in this or other regards. The chairmanship rotates annually. We have repeatedly asked the chairman pursuant to our current regulations to hold a meeting. She has repeatedly refused this lawful request. Enclosed are memos to this effect and her response. Also enclosed is the notice of the chairman of March 30 requesting her participation and non-voting. This notice was sufficient. It caused her to be aware of the issue enabling her to write you yesterday directing that no publication be printed signed by the other two Commissioners." And it goes on and on.

The only point is that it was suggested by you, Mr. Damich, and by you, Ms. Daub, that there is nothing basically broken about this agency, and here you have a vote taken by the CRT directing that a regulation be promulgated in the Federal Register and the Chairman intercedes and prevent it from being published.

Now, if that is not administratively dysfunctional and broken I don't know what is. How can you operate that way?

Ms. DAUB. Mr. Chairman, I may——

Mr. HUGHES. It sounds to me—and I am going to turn to other members. It sounds to me that you have so little to do that all you do is fight about everything. You have so little to do and so much time on your hands you fight about petty stuff.

Ms. DAUB. Mr. Chairman, the circumstances that I have described in my statement are not petty, and I may be faulted to be taking my job too seriously. I think if you were in my shoes you would have viewed the circumstances which I have described earlier to be unacceptable. Mr. Chairman, in this town, in my opinion, that to get along you must go along, even if there are wrongdoings in the Government office under your very eyes. Mr. Chairman, you may say you are wrong for not signing the rule, even though majority have voted, and you can condemn me for not following the majority rule. But the majority can order you to rob a bank, and I will not abide by the majority rule, Mr. Chairman.

Mr. HUGHES. Well, I am way beyond my time. I have some additional questions, but I am going to recognize the gentleman from California.

Mr. MOORHEAD. Well, thank you, Mr. Chairman. I am not going to delve into the arguments between the members, but I do see something that has happened here that probably shouldn't happen. I know that both Mr. Goodman and Mr. Damich are interim appointments. Now, it is too bad it had to be interim appointments, in my opinion, because if you had a longevity and you were going to become a Chairman at the end of a year, I think you would have a little bit different input into the thing than when you are on for a few months and you don't know when you are going off. Well, you both went on in September, I think. Is that correct?

It is a little early to become a Chairman, probably, after being on for 5 months, especially if the rule requires a year. And there are problems there, but it is too bad that the arguments are taking place here. But what we are considering is not whether the members of the Commission have arguments between themselves, because obviously the two of you are going off as soon as President Clinton makes an appointment for somebody else, and there will be different personnel on the Tribunal.

So what we have to consider basically here is whether this Tribunal does the job. From what I read, the Government pays about $130,000 toward the cost of the Tribunal. The rest comes from the people who are recipients of the money that is distributed. Is that true, Mr. Goodman?

Mr. GOODMAN. That is true in hard costs.

Mr. MOORHEAD. Now, I understand there has been a recommendation that the Government share be passed on to the claimants under the Tribunal, and that the Government has no cost whatsoever any longer. Is that true? That recommendation has been made?

Mr. GOODMAN. I believe that Chairman Daub made that recommendation.

Mr. MOORHEAD. That would certainly make it probably the cheapest Government agency there ever was.

Mr. GOODMAN. It would certainly reduce the cost. I can see two problems with it. One problem is that one might wonder whether

there is a conflict of some sort for the parties who are paying for the litigation. I am sure that has been delved into.

Mr. MOORHEAD. Well, we often have fees for almost every kind of service, so that isn't something that is unusual. You are a lawyer, Mr. Goodman. I hope that in answering our questions all of you can divorce yourself from the disputes that are taking place, because I am not going to try to deal with differences in personalities or anything else. But don't you think there is an advantage, a continuity. You get arbitrators to make this determination of how the funds are to be distributed and everything, you don't always have the same kind of rules or the same effort to distribute in the same way that you have before.

Do you think there is an advantage to that continuity?

Mr. GOODMAN. I absolutely do. And my statement indicated that whoever the arbiters are there should be a continuity, a stability, they should observe precedent, and they should be qualified. What I would like to see is either administrative law judges or arbitrators who are permanent, and by permanent I don't mean forever but they would last at least 1, 2, 3 years, and the savings would be, instead of them meeting on a daily basis, being paid on a daily basis, they would be paid on a per diem basis. They would be required to observe, if not slavishly follow, precedent. But they would be incented to follow precedent because it would be their own.

I do agree with you that you do need that stability.

Mr. MOORHEAD. One thing you said, that the product of the CRT is very poor and that the claimants are afraid to tell us that. But you know the claimants are represented by such people as Jack Valenti, Eddie Fritz, Jim Mooney, ASCAP, Ted Turner. They are not shy violets any of them. If there was anything wrong, boy, would they tell us it was wrong in a hurry.

Mr. GOODMAN. I have noted that there aren't any claimants here today who are appearing either before—either in favor of or opposed to H.R. 897.

Mr. MOORHEAD. I don't know if they were asked to appear, as a matter of fact. You were asked because you are the Tribunal.

I guess the way I look at it, if it isn't broken, fix it. I can see that this group doesn't get along very well together. You would have to be—you don't have to have 20/20 eyesight to see that. But that isn't the question. This Tribunal in its present form isn't going to be here very long regardless of whether this bill passes or it doesn't pass. I am sure the Chairmanships are going to go from one to another. Many things will be changed. The question is, as I see it, do we want to abolish a Tribunal that basically in their product, as I have understood, has been pretty good, even though we have had these squabbles going on between members of the Tribunal on occasion. And I guess there being three of you as there have been all along it can make an awful lot of noise and cause trouble.

Mr. Damich, if you had to write into the statute qualifications to be a Commissioner what would they be? Should they all be lawyers?

Mr. DAMICH. As I stated in my statement, both my written remarks and my oral remarks, I do think that they should be lawyers and that they should have experience in appropriate fields. Among

the two of them I would say copyright is an obvious one, and I think communications law is another obvious one.

Mr. MOORHEAD. What do you think about that, Mr. Goodman?

Mr. GOODMAN. I agree with that. I could understand that you could perhaps have an economist as one of the three. I would think that because the Chairman runs the hearings I think it might be difficult to have a nonlawyer running a hearing. I am told that the reason that the Tribunal is called a tribunal and not a commission is that Congress wanted to indicate the quasi-judicial nature of it. I think it is a hurdle for a layman to understand legal vernacular as well as the industry vernacular and also administer a hearing.

Mr. MOORHEAD. I am not avoiding you, Ms. Daub, but you have already answered that question pretty well before in your statement.

Should the term be 7 years as it now is or something less? Mr. Goodman.

Mr. GOODMAN. I don't think it matters at all. I think, you know, perhaps 7 years is a——

Mr. MOORHEAD. Ms. Daub suggested—you know, it is unfortunate that—horribly unfortunate actually, that you two come on as temporaries at exactly the same time and it does create a problem that normally would not be existent if there were appointments made on a staggered basis every couple of years, and you would have people coming along with several years of experience. The way this has worked out it makes the Commission look bad, to have it work the way it does. And I don't think it is that bad in its normal workings.

Mr. GOODMAN. If I may say that in behalf of the Tribunal I would distinguish the procedural disagreements with substantive disagreements, at least in the months Commissioner Damich and I have been here I personally do not believe there has been any problems with substantive decisionmaking.

Mr. MOORHEAD. Mr. Damich, in your statement you say that it is OK to make the Register a Presidential appointment since his review of an arbitration panel decision is limited. I am more concerned about the office and execution and establishment of a national copyright policy that is based on merit and not on politics. Would that Office become politicized by Presidential appointments? Would that benefit the Office itself? What makes you think a President would do a better job in appointments to the Register than he did with the CRT?

Mr. DAMICH. As I stated in my statement, Mr. Moorhead, I have not closely studied the issue, the broader issue about the ramifications on the Copyright Office of making the Register a Presidential appointee. I looked at it simply from the standpoint of would it reintroduce politics into the adjudicatory process that the CRT engages in, and I feel that it would not because of the fact that the Register would not be engaged in any hands-on type adjudicatory functions.

Mr. MOORHEAD. I will ask all three of you this, should the CRT members be appointed by the Librarian of Congress, and keep it nonpolitical all the way through?

Mr. DAMICH. Well, the only reason why I would opt for a separate CRC, as I call it, the new—the Copyright Royalty Commission,

is because of *Buckley* v. *Valeo*. If we didn't have *Buckley* v. *Valeo*, I see no need for any kind of supervision of what the CRT does by a Presidential appointee. What I am dealing with is the legal requirement of *Buckley* v. *Valeo*, which I think is the reason why in the bill the Register is made a Presidential appointee, and I think it is an incredible formality even under my proposal with the CRC to have the President appoint CRC Commissioners. But, as I say, what I am dealing with is the legal reality of *Buckley* v. *Valeo*.

Mr. MOORHEAD. My time is virtually up, and I don't know what is going to happen to this bill. But I would earnestly ask all three of you, you have got responsibilities, you have got an important job because this does affect some major industries, please try to get along. It may be difficult but try to get along as long as each of you are on the Commission or as long as—you don't have to agree on every single thing. But love your neighbor, and the whole thing will work a whole lot better. It will bring more credit to your work.

Mr. HUGHES. It is funny. That is what my constituents said last weekend about Democrats and Republicans.

[Laughter.]

Mr. HUGHES. The gentleman from California.

Mr. BECERRA. Mr. Chair, I came in late. I guess I missed some interesting testimony, so rather than ask some questions I suspect some of my other colleagues have some interesting questions and I will bow over to them.

Mr. HUGHES. The gentleman from Florida.

Mr. MCCOLLUM. Thank you, Mr. Chairman. I have a couple of questions for both Mr. Goodman and Mr. Damich in particular on some of these substantive matters that Ms. Daub testified to regarding the criticisms of this bill.

One of the things she suggests is that the cost of operations if we go to this Register system will be borne by the taxpayers as to opposed now, the system which we have, which I guess is mostly funded by royalties. In fact, she proposes that I guess all of it be covered by royalties, the cost of the operations involved in this.

Do you have a comment on that, Mr. Goodman? Is that a problem with the bill?

Mr. GOODMAN. I think that I would have to look at that in terms of conflicts, but I think that is basically a good idea.

Mr. MCCOLLUM. What is a good idea?

Mr. GOODMAN. To have it borne entirely by the parties.

Mr. MCCOLLUM. As opposed to the taxpayers.

Mr. GOODMAN. Well, as it is now the taxpayers pay, I think it is approximately 14 percent, so it is not a dramatic difference but it is still a significant savings. And, to the extent that we are trying to save the taxpayers money, I think it makes some sense.

Mr. HUGHES. Would the gentleman yield to me?

Mr. MCCOLLUM. I would be glad to yield.

Mr. HUGHES. I think there is a misperception here because it would refer it to the Copyright Office and the Licensing Division is 100 percent funded by royalty moneys, not taxpayers' money.

Mr. MCCOLLUM. So you think Ms. Daub is wrong, Mr. Chairman——

Mr. HUGHES. Yes, absolutely.

Mr. MCCOLLUM [continuing]. In her interpretation?

Mr. HUGHES. There is no question about it.

Mr. MCCOLLUM. Well, I—you know.

Mr. HUGHES. If anything, it is an advantage to have the Copyright Office do it, because royalties finance it.

Mr. MCCOLLUM. Ms. Daub, do you want to respond to that?

Ms. DAUB. Mr. Chairman, would the presumption be that the Register will be handling CRT's current functions in total by himself, or are you suggesting that he would require some staffers that would need——

Mr. HUGHES. I don't know. I would imagine it would require additional staff. That is not the issue. The issue is whether or not it would be public funds as opposed to royalty funds, and my only point was that the Licensing Division of the Copyright Office is financed 100 percent by royalties, not by public funds.

Ms. DAUB. Mr. Chairman, the Licensing Division handles currently only for the work that is related to CRT's work.

Mr. HUGHES. I understand. But if we referred it to the Copyright Office it would be funded, that is my point, by royalty funds, not by——

Ms. DAUB. Mr. Chairman, the Register would not just handle CRT's function. He is on the taxpayers' payroll under current statute or as you would—under your proposed bill, if he does have a staff to handle current CRT's workload, his employees, would they be working strictly on royalty matters? I mean I think these things need to be clarified by statute.

The way it is written, or the way the bill is written in the current form it appears to be that the taxpayers will have to pick up the——

Mr. HUGHES. Well, I don't think that is the case.

Mr. MCCOLLUM. Mr. Damich, would you care to comment on this? Because I, frankly, am new to this subcommittee and I have not had any dealings with this issue before, so I am a little bit at a loss to be the expert myself. I am learning from you all.

Mr. DAMICH. OK. Thank you very much.

Yes, the bill states, "The parties to the proceeding shall bear the entire cost thereof in such manner and proportion as the arbitration panel shall direct." So the majority of costs certainly will be borne by the parties. Currently the Copyright Office basically does the administrative work for the royalty payments that come in that we distribute and set the rates for, and that is the Licensing Division that Chairman Hughes was talking about. And his proposal would retain, of course, the Licensing Division and they would continue to do that as they do that now, and they receive their funds from the royalty payments that come in.

But I think the whole—I agree with Chairman Daub in this respect. I don't think that by comparison with other items in the Federal budget we are talking about a huge sum. But, of course, that cuts both ways. That means that it is not a huge saving even if we agree with Chairman Daub and say—or a huge expense, even if we agree with Chairman Daub and say that the Copyright Office will have additional expenses. I think the important thing is this, and that is that we have an agency that is inefficient. In other words, it is an independent full-time Federal agency that does not have enough work to do to justify that. We could probably make the ar-

gument about many of the cuts that President Clinton has made, and especially his scrutiny of Presidential commissions, that that doesn't amount to a hill of beans if we look at the Federal budget. But the fact of the matter is that we would be eliminating inefficiency and waste in the Federal Government if the CRT was to be abolished.

Mr. MCCOLLUM. Let me ask you about her precedence question then, since you are wearing the lawyer's hat here for us. She suggests in her testimony that there would be a problem with abolishing the Tribunal because the system that is suggested in this bill would not provide a precedence-setting scheme, and that if you have from one case or one hearing to another the parties who come before the—whatever body, the Register or whoever is doing it, would not have that kind of a force that you have presently. What is your thinking on that?

Mr. DAMICH. I am concerned about that. I identified that in my letter to Congressman Hughes and also in my statement, and I think that that can be remedied as I suggested in my written remarks: That a provision should be inserted into the bill to require the arbitration panels to consider precedent, that is to say, to consider what the Copyright or the former Copyright Royalty Tribunal has done and also what other arbitration panels have done. And I also think the Register in his narrow review function should also look to the decision of the panel and see if they have taken precedent into account. Now that doesn't mean, of course, they have to slavishly follow it, but they have to take it into account.

Mr. MCCOLLUM. Chairman Daub, one last question of you. It concerns the heart of what they are saying, I think, and that is, they are saying to us that there just isn't enough work for a Tribunal. It is intermittent. You just aren't busy enough. You don't need to be independent, or at least there is a lot of wasted time in it. You seem to be arguing that there needs to be a Tribunal even if there isn't enough work, but I am not sure we ever got to the point of whether you believe, you know, the workload is very light or heavy. What do you say about the workload?

Ms. DAUB. Well, in my opening statement I did just briefly state it, and the list of the work that the Tribunal was engaged in and completed just during calendar year 1992. They are impressive. Any of the cases will last anywhere from 5 months to 1 year, and we are required to complete the work within the statutory mandate, within 1 year.

If you refer to my statement you will be able to tell the kind of workload that the agency has to handle, but more importantly, Congressman McCollum, we are like a fire station, a fireman. Just because you are not out there putting out fires 24 hours a day does not mean the fire station is not necessary and unneeded, therefore, just waste of taxpayers' money, and abolish it.

Congressman McCollum, I believe when you dress up the old dog with new clothes just because somebody thinks it will hunt better the dog won't hunt better. Perhaps the dog will be so uncomfortable it will lose its purpose. I do believe that there is immense uncertainty among the claimants. The system has worked well. It is not broken. And when it is not broken why try to fix it? There are no tax dollars to be saved here, no downsizing of government to be

made here. Nine people. Sixteen years ago there were 10 people. There are no bureaucracies to be trying to cut down. We all seem to agree, and if it is only the feuding is the reason to get rid of an agency, may I say, Mr. Chairman, please do not throw the baby out with the bathwater just because there are some very ambitious people who arrive at a tribunal on a temporary basis, think that they can ask for and use the facilities for their own purposes, and if you think that is right and I was wrong for not following the majority, Mr. Chairman, and if it is called feuding, so be it. Thank you.

Mr. MCCOLLUM. Mr. Damich.

Mr. DAMICH. Yes. I have used the image of a fire station also, but I would like to extend that image and say there are volunteer fire departments as well that don't serve as full-time firefighters.

I would also like to demythologize the past year's record of the Tribunal. As I have stated in my written remarks, if you look at in writing what is committed to our care we, in fact, look very busy. But let me look at some of the things mentioned by Chairman Daub.

First of all, she mentions the cable royalty distribution. Well, if you look at the history of the cable royalty distribution you will find that about half the time it was settled by the parties, and therefore never went through the whole process.

She talked about the satellite distribution and failed to mention that the satellite distribution was a combined distribution for 1989 to 1991, which means during that period of time there was no work of the Tribunal dealing with satellite distributions.

Also she talked about the satellite rate determination. She did mention the fact that the satellite rate determination was made by an arbitration panel, interestingly enough, and is simply reviewed by a very narrow standard of review by the Tribunal, which is indeed very close to what has been suggested by Congressman Hughes.

Thank you.

Mr. MCCOLLUM. Thank you. Mr. Goodman.

Mr. GOODMAN. I just want to comment on the fireman analogy also. When I joined the Tribunal the Commissioner whom I replaced was living in Miami, FL, and he had been on the Commission for almost 8—on the Tribunal for almost 8 years, which means the taxpayers and the parties had paid him almost a million dollars. He was fighting the Tribunal's fires from Miami, FL.

Ms. DAUB. He did not live in Miami, FL, and we have staffers here in the room. He had residence here, rented an apartment full time with his son who worked at the Republican National Committee and his wife who is an artist and who has part-time employment. He had never, except during summer months, and he was here as a full-time Commissioner. That is misrepresentation.

Mr. MCCOLLUM. Well, obviously, there is a lot of dispute about all of this among you all, which is why the problem exists. But thank you very much, Mr. Chairman.

Mr. HUGHES. The gentleman from New York.

Mr. FISH. Thank you. I am going to just try to ask a few questions to try to get this thing a little bit straighter in my own mind.

I gather that, Mr. Goodman, and Mr. Damich, that you have been Commissioners for a relatively short time.

Mr. GOODMAN. Since September of last year.

Mr. FISH. September. Same for you, Mr. Damich?

Mr. DAMICH. That is correct. Yes.

Mr. FISH. And these were recess appointments. How come within a matter of whatever it is, 5 months, that you want to abolish a job that you sought last September?

Mr. GOODMAN. That is a very fair question, and let me just comment a little bit about my specific experience. When I was—when I accepted the appointment I did it eagerly and looked forward to the task ahead. As time went by, I kept waiting for the fires, and they quickly discovered that fires were few and far between. When Congressman Hughes proposed his bill, at that point I thought I had a choice of three things I could do. I could remain neutral. I could oppose it. And I could support it.

At that point, based on my 5 months' experience I thought I had no alternative other than supporting it. It is certainly an uncomfortable feeling, but after almost 25 years of practicing law, hopefully you have developed a moral compass and mine told me that I had no choice.

Mr. DAMICH. May I respond?

Mr. FISH. Please.

Mr. DAMICH. Mr. Fish, I was a professor of law at George Mason University and taught copyright law, and therefore studied the Copyright Royalty Tribunal and was aware of its functions for a number of years. I had talked to people on the Hill, Hill staffers, and I also had talked to fellow academicians, all of whom held the Tribunal in very low regard. I, however, thought that it had some very important tasks and that if I were appointed to the Tribunal I would be able to use my expertise in order to make it more professional and make it more respectable.

However, after serving several months on the Tribunal I came to the conclusion that this really was an impossible task.

Mr. FISH. I think that, Mr. Chairman, I would suggest that this is one issue of a couple that I would be raising that would be best served by a further half day at least of hearings by other people, claimants, former Members of Congress, perhaps.

Let me get to the question of personalities, just for a minute. Mr. Moorhead I think addressed that. It doesn't look as if you two gentlemen are going to be around for long in the status of your recess appointments. You are going to join a lot of other good Republicans who are unemployed at this point. So that may take care of itself.

But, on the question of cost, I gather there is no objection on the part of the panel to going from 86 percent of your budget being from user fees to 100 percent, is that not correct? Is that your view, Madam Chairman.

Ms. DAUB. That is my personal view, Mr. Chairman.

Mr. FISH. Gentlemen.

Mr. DAMICH. I have some reservation with that. I think I recall that that was an original proposal at one point, and it was rejected by Congress on the basis that it was thought that the agency in its rate setting determinations might be prejudiced and upping the rates in order to increase the amount of money available. I don't

recall clearly, but I think that is what one objection to making it funded——

Mr. FISH. Today you would have to balance that argument against a proposed largest tax increase in history being before us, so I think it might well not raise it to the same elevation.

You, sir.

Mr. GOODMAN. Generally I think that is an attractive idea. I also would like to go back and look at the legislative history, and I would like to find out why the percent was set as it is. You know, what reason. It seems peculiar to have 86 percent of the budget paid for by the claimant. That demands the question be answered, why not 100 percent, and I would be interested in knowing that answer.

Mr. FISH. Yes. So would I. But it does seem that if cost is a major factor here, that one can be resolved very quickly and user fees are getting increasingly popular. So I guess we are down to efficiency, and that I am really not in a position, and I don't think this panel would enlighten us very much on that either, Mr. Chairman. I think that is another reason we need other people to tell us as to whether or not the Copyright Tribunal is indeed the efficient way of proceeding.

Thank you.

Mr. HUGHES. How did the arbitration panel work in the satellite transmission area? The arbitration panel basically recommended and adjudicated and it was reviewed by the CRT. How did that work? Did it work fairly well? Not so well? Anybody?

Mr. DAMICH. Neither Commissioner Goodman nor I were on the Tribunal when the actual rate determination of the arbitration board was accepted by the Tribunal. I have read the arbitration panel report, which I think is excellent, and if I recall from reading the past acts of the Tribunal, the Tribunal accepted it with no objection. But I would defer to Chairman Daub, who was there at the time.

Mr. HUGHES. Yes. Ms. Daub, how did it work? How did the arbitration panel work? It was set up specifically in the legislation to do precisely what is recommended here in the satellite transmission area?

Ms. DAUB. The agency has requested and extracted about 20 names from AAA—I am sorry, the American Arbitration Agency——

Mr. HUGHES. No, I don't want to know how it—I asked how it worked. I know how it was set up and what the process was, but how did it work? My understanding is that the CRT reviewed that decision without any change.

Ms. DAUB. The requirement, the statutory requirement was if their findings were consistent with the intent of Congress that we are to approve their decision whether we agree essentially. There may have been some minor differences but if they tried to apply intent and criteria described in section 119 that we were to approve, and we did approve.

Mr. HUGHES. Tell me what the CRT would have done differently without the arbitration panel.

Ms. DAUB. Since the Commissioners at CRT are the working Commissioners, we do not have, as you know, judges sitting in at a hearing——

Mr. HUGHES. No. I only want to know what the CRT would have done differently than the arbitration panel decided. Because the argument is being made that arbitration panels wouldn't work very well.

Ms. DAUB. Oh. I see.

Mr. HUGHES. Now, in legislation that the Congress enacted in the last few years in the satellite transmission area we set up an arbitration panel. They made their decision, CRT reviewed it and approved it without change. Now, you suggested, however, that there might have been some minor things that you would have done differently, and I ask you what they are. What you would have done differently at the CRT if we had not had an arbitration panel.

Ms. DAUB. My points where I have differed with respect to your suggestion and the bill that you have proposed are basically on cost to the claimants and the taxpayers, and the fact that our decisions at CRT are binding decisions which have been the impetus for settlements. So we are coming from different angles.

Are you saying under the current system would the CRT——

Mr. HUGHES. No. My question—I guess I haven't made myself very clear. I apologize.

What I want to know is in the satellite transmission area we set up an arbitration panel system much like what is being recommended in this bill for other areas that are within CRT's responsibility, and I asked how that worked. I suspected it worked fairly well because the Copyright Royalty Tribunal accepted the arbitration panel's decision without any change. Then I asked you what you would have done differently as a CRT if we didn't have such an arbitration panel, and you said, "Well, there were some minor things we might have recommended," and I asked you what. What you would have done differently if we had not had an arbitration panel?

Ms. DAUB. You are talking about section 119 as it was written and if it did not have the panel, if CRT handled it, the Commissioners handled it without——

Mr. HUGHES. What you would have done differently?

Ms. DAUB. How would you have done it differently? Well, then it goes back to my point that, obviously, the panel who were chosen were chosen in that—of course, section 119 does give both sides of the claimants, users and the owners, a chance to pick one of their own. Under your bill the Register picks both arbitrators, which gives the Register immense power. I mean it works the other way around.

Mr. HUGHES. How about if we change that? If that is your understanding of the bill, and that is not my understanding of the bill, how about if we change that so that we have an independent system whereby users basically——

Ms. DAUB. Well, Mr. Chairman, with all due respect, since I am not advocating use of arbitration panels I would defer to someone else to answer those questions.

Mr. HUGHES. I see. Let me move on to something else. How much time from September until the present time have you spent, Mr. Goodman, working at your job?

Mr. GOODMAN. I have had a lot of time to examine that question.

Mr. HUGHES. It seems like an eternity this morning.

[Laughter.]

Mr. GOODMAN. Unfortunately, it is very difficult to do, and the reason for that is I really want to be an expert on the CRT, and to some large extent work expands to fill the time. So what I have done is spend a lot of time reading, for example, the Audio Home Recording Act, reading past decisions. I spend a lot of time talking to Commissioner Damich, debating different issues. So I have spent a great deal of time on the CRT, you know——

Mr. HUGHES. Educating yourself about the job.

Mr. GOODMAN. Educating myself. Now, a very interesting question, and I have not had a chance to review this, and it would be particularly interesting to look over past years, is to look to see exactly how much work there has been for the CRT to do this year and previous years. As Commissioner Damich said, in approximately half the years of the Tribunal's existence the primary focus of its responsibility, the cable copyright area, has settled. I have a difficult time figuring anything the Tribunal would have done in those years. I can't think of anything they would do other than addressing sporadic requests from the parties for a resolution of something related to settlement. But in terms of a substantive decision, other than that, it seems to me that in several of those years it would have been literally nothing the Tribunal did.

Mr. HUGHES. How many hearings have you had since you——

Mr. GOODMAN. Since I have been here? This is probably the busiest year in the Tribunal's history because we have had the public broadcasting rate adjustment issue came up, that is settled. We have had the——

Mr. HUGHES. How many days of hearings?

Mr. GOODMAN. None.

Ms. DAUB. It was a voluminous paper hearing, Mr. Chairman.

Mr. HUGHES. What do you mean by a paper hearing?

Ms. DAUB. The parties do file papers, then they reply to the paper motion, et cetera, et cetera. And with nine people, Mr. Chairman, we do have to answer a zillion telephone inquiries, corrections, adjustments.

Mr. HUGHES. I am asking as Commissioners how many hearings? Besides a so-called paper hearing where somebody has filed their position and got a response to that position and a solution.

Mr. GOODMAN. There was a—we had a, almost a—I guess I will describe it as a procedural hearing that lasted half a day in the satellite area.

Mr. HUGHES. What was the nature of that procedural hearing?

Mr. GOODMAN. It was an interesting issue. It was to determine whether to bifurcate the hearing in order to take—I'd just sort of abbreviate it—two different kinds of evidence and our decision was that we would permit the parties to brief the one issue first because they would argue that it would aid in settlement.

Mr. HUGHES. You know one of the doubts expressed, Ms. Daub, about arbitration panels and whether they are cost effective, you

have been asserting that arbitration hearings are the same length as CRT hearings. Isn't it cheaper, really, than employing a full-time agency—that is what we are—which, since 1981 the General Accounting Office has found basically it does not have enough of a function to keep them busy. If I want my house painted, isn't it cheaper for me to hire a painter when I need one rather than have a year-round painter on staff?

Ms. DAUB. May I answer to that?

Mr. HUGHES. Yes.

Ms. DAUB. Mr. Chairman, the very existence of the agency encourages settlement. We are the impetus. Our determination is the benchmark for next dispute, and often precisely because we have the determination with reasoning which is binding, that the parties are much more likely to settle the next time around, and that is precisely why they have settled——

Mr. HUGHES. Wouldn't that be the case with arbitration panels. Let me give you an example. I practiced law for many years, and there were judges and judges. Forum shopping is something that I guess lawyers do as a matter of course because they can read tribunals and lawyers fairly well. With the roll of the dice with an arbitration panel perhaps you may not know who you are going to get. Wouldn't that run counter to your argument? Wouldn't that be additional pressure on the parties to settle? Knowing that if they can't settle, if they can't work out their dispute, there is going to be an arbitration panel to make that decision and that is a roll of the dice as to what they are going to do? Isn't that the same kind of pressure? If not, isn't that even a more certain pressure?

Ms. DAUB. Mr. Chairman, would you be suggesting that CRT's past determinations to be some type of benchmark? May I ask a question, Mr. Chairman?

Mr. HUGHES. I don't understand.

Ms. DAUB. Since arbitration panel's decisions are not binding, how will they base the settlement, if previous arbitration panel determination is not——

Mr. HUGHES. In the same fashion that the CRT does, basically. Just like the same course was followed by the arbitration panel set up for the satellite transmission resolutions.

Ms. DAUB. But, Mr. Chairman, if I were the losing party, felt like by this panel my percentage of distribution of the royalties were much lower, I am likely to try to reinvent the wheel to persuade the next set of panels, and so according to my calculation it would be much more costly to the claimants.

Mr. HUGHES. Does the gentleman from California have any questions?

Mr. BECERRA. No.

Mr. HUGHES. Does the gentleman from Florida have any further questions?

Mr. MCCOLLUM. No.

Mr. HUGHES. The gentleman from New York.

Mr. FISH. No, thank you.

Mr. HUGHES. Thank you very much, Commissioners.

Mr. DAMICH. Thank you, Mr. Chairman.

Mr. HUGHES. We appreciate your testimony today.

Ms. DAUB. Thank you.

Mr. HUGHES. It is very helpful to us.

Mr. GOODMAN. Thank you, Mr. Chairman.

Mr. HUGHES. Our next panel consists of four representatives from the computer software industry. Steve Metalitz is vice president and general counsel of the Information Industry Association. Steve is a frequent and valued witness. He formerly served as staff director and chief counsel of the Senate Subcommittee on Patents, Copyright, and Trademarks from 1982 to 1989. Last week Steve was over in the Senate battling for the soul of the Library of Congress.

We welcome you here today to battle for the soul of the Copyright Office.

Mr. METALITZ. Thank you, Mr. Chairman.

Mr. HUGHES. Our other Steve is Steve Peters, senior corporate counsel—I wonder if those leaving can leave just as quietly as possible.

Our other Steve is Steve Peters, senior corporate counsel, Adobe Systems, Inc., appearing on behalf of the Software Publishers Association. Mr. Peters hails from Mississippi but heeded Horace Greeley's admonition by going to Stanford Law School.

Our third witness is Robert Holleyman, president of the Business Software Alliance. BSA is comprised of leading business software publishers. Mr. Holleyman, like Mr. Metalitz, served as a Senate staffer with the Committee on Commerce, Science and Transportation.

Our fourth witness is James Burger, director of government law for Apple Computers, Inc., appearing on behalf of the Computer Business and Equipment Manufacturers Association. Before joining Apple, Mr. Burger was in private practice for some 16 years where he specialized in intellectual property and international trade.

Gentlemen, we welcome you here today. We have your statements, which we have read, and I would like you to summarize so we can get right to questions. That will expedite the business at hand. And your statements, without objection, will be made a part of the record in full.

And why don't we begin with you, Mr. Metalitz? Welcome.

STATEMENT OF STEVEN J. METALITZ, VICE PRESIDENT AND GENERAL COUNSEL, INFORMATION INDUSTRY ASSOCIATION

Mr. METALITZ. Thank you very much, Mr. Chairman. It is an honor to be here again on behalf of the Information Industry Association, which, as you know, is the national trade association of leading companies in the information business.

We have some preliminary comments to offer on your legislation. We have looked at it extensively over the past 2 weeks. We may have some additional comments to make as we explore further what impact it will have on our membership, which is quite diverse. Our comments focus on section 102 of the bill which repeal two provisions of the Copyright Act that require registration of claims to copyright before copyright owners can bring infringement lawsuits and before they can receive statutory damages and attorney's fees.

We believe that the record supports repeal of both of these provisions, as your bill would do. They represent unnecessary procedural

hurdles to the enjoyment of full-fledged protection under the copyright law. Many of these issues were thoroughly aired back in 1987 and 1988, when Congress considered the legislation to implement U.S. adherence to the Berne Convention. At that time the current two-tier system was set up on copyright registration in order to make the minimal changes that were needed in order to join Berne. I don't think anyone ever thought that that was really the best solution on the merits as far as the copyright system in the United States was concerned. It is a confusing system. It discriminates against U.S. copyright owners, and in our view it is time to eliminate it.

Section 412, the provision that deals with statutory damages and attorney's fees was not as thoroughly discussed during the 1987 and 1988 debates, but we think a similar analysis would apply. We don't think it is a good idea to condition effective remedies in the copyright field on compliance with the registration formality. We believe that your proposal would leave adequate incentives in place for voluntary registration. Some of the incentives are related to litigation, other incentives are unrelated to litigation, but I think in many cases at least registration would continue.

The question of the impact of these changes on the collections of the Library of Congress is certainly a legitimate question. It needs to be evaluated objectively. In the earlier congressional consideration, a record was made that the impact of the elimination of section 411(a) would be minimal on the collections of the Library. That needs to be looked at with regard to section 412. But it should be borne in mind that the deposits that come in through the copyright registration process are far from the only means that the Library of Congress uses to add to its collections. There are many other methods available. And, in fact, in some areas such as the areas that the companies represented here specialize in, machine readable works, works in electronic formats relatively little of what the Library obtains for its collections is obtained through the registration deposit procedures, so the impact there would not be great.

In any case, we think it is time for Congress to consider severing the link between effective copyright protection and the acquisitions objectives of the Library. Those are important objectives, but we simply don't feel that a creator's right to obtain effective copyright protection should depend on how quickly he or she gives a free copy of the work, or two free copies of the work, to the Library of Congress. Those are simply separate issues.

We have, as an association, no position on the matter of the status of the Copyright Office and the method of appointment of the Register of Copyrights. We do suggest that as Congress considers this question it should look at the issue of the relationship between the Library of Congress and the Copyright Office. Right now the Copyright Office is subordinated to the Library. We think it would be beneficial to the copyright system to have a somewhat greater degree of independence. That is not, in our view, the same issue as who appoints the Register of Copyrights, but we think it is an important issue to be looked at.

We don't have a position on the issues that were addressed by the preceding panel or on the other matters that are addressed by

the bill, but we appreciate this opportunity to share at least our preliminary observations on those other portions of the legislation.

Thank you.

Mr. HUGHES. Thank you very much.

[The prepared statement of Mr. Metalitz follows:]

STATEMENT OF STEVEN J. METALITZ
VICE PRESIDENT AND GENERAL COUNSEL
INFORMATION INDUSTRY ASSOCIATION

Mr. Chairman, and members of the Subcommittee:

The Information Industry Association (IIA) appreciates this opportunity to offer its comments on H.R. 897, the Copyright Reform Act of 1993.

IIA is the trade association of leading companies pursuing business opportunities associated with the creation, distribution, and use of information. These companies develop and distribute innovative information products and services to meet the information needs of American business, professionals and consumers. IIA companies deliver information in formats ranging from traditional print publications to electronic databases accessed via on-line computer services; CD-ROM and other optical publishing formats; and other new media that are assuming growing importance in the information marketplace.

A thriving and competitive information marketplace requires strong copyright protection and an efficient system for defining and enforcing that protection. Accordingly, since its founding in 1968, copyright law and policy have been of paramount importance to IIA. It has been our privilege to testify on numerous occasions before this subcommittee and its predecessors, and we are grateful to have another opportunity to do so today.

The Copyright Reform Act would make several important changes in the system for obtaining and enforcing copyright protection. In the fortnight since this legislation was introduced, IIA has not had the opportunity to complete a thorough analysis of its impact upon our diverse membership. Therefore, the comments we offer today must be regarded as preliminary. We would appreciate the opportunity to supplement this testimony as appropriate while H.R. 897 remains under consideration in this subcommittee.

COPYRIGHT REGISTRATION

Most of our comments are directed to section 102 of H.R. 897, which repeals sections 411(a) and 412 of the Copyright Act. These statutory sections require, with limited exceptions, that a claim of copyright be registered with the Copyright Office before a copyright holder may sue for infringement of copyright, and generally prevent a victim of infringement from obtaining statutory damages or an award of attorneys' fees if the work was not registered before the infringement commenced. IIA supports the elimination of these hurdles to the enjoyment of full-fledged copyright protection under our laws.

As the subcommittee well knows, the issues presented by this legislation were extensively debated in the late 1980's, as Congress considered legislation to implement U.S. adherence to the premier international copyright treaty, the Berne Convention. Most experts in the field identified the requirement of registration as a prerequisite to an infringement lawsuit (as embodied in section 411(a)) as incompatible with Berne's requirement that "the enjoyment and exercise of [rights under the Convention] shall not be subject to any formality." Although the Senate proposed to eliminate section 411(a) entirely, the House opposed this approach. Ultimately, a compromise was struck, which freed non-U.S. copyright claimants from the requirement of registration, while keeping section 411(a) in effect for U.S. claimants.

While this compromise achieved the goal of eliminating the existing incompatibility between U.S. law and Berne standards, few observers ever regarded it as a satisfactory solution. The "two-tier" approach unfairly discriminates against U.S. copyright proprietors, and creates unnecessary confusion. H.R. 897 would eliminate these problems by simply repealing the registration prerequisite for all copyright claimants, as IIA and other interested parties urged in the late 1980's.

The policy arguments in favor of repeal of section 411(a) are compelling. Most of these were thoroughly aired during the Berne adherence debate, and need not be reviewed in detail today. There is ample evidence that section 411(a) subjects copyright claimants to a procedural requirement that may be complex and costly to accomplish, and that discourages them from pursuing infringement actions to defend their entitlement to the benefits of copyright law. This effect undermines the central premise of our copyright system, by imposing unnecessary obstacles to the realization of the incentives provided to authors in order to "promote the progress of science ...". U. S. Constitution, Art. I, sec. 8, cl. 8. The record also demonstrates that section 411(a) plays only a minimal role in promoting registrations or benefitting the Library of Congress through accompanying deposits.

Recent trends have also distorted the "gatekeeping" role played by the Copyright Office under section 411(a). Particularly with respect to machine-readable works, such as databases in electronic form, the registration process has sometimes taken on a life of its own. Increasingly, the Office has carried on an elaborate correspondence process with claimants over collateral issues such as the way a work is described, whether particular sets of records constitute a separate data file, and whether specifications or disclaimers ought to be endorsed on the face of the registration certificate. Although, under the Copyright Act, the ultimate decision on copyrightability remains with the courts, the would-be claimant must jockey for position in the registration phase, so that his copyright claim, if later tested in court, will be presented to the decisionmaker in the best light. These changes in the registration function drive up expense and create inconvenience for all parties concerned, with little discernible benefit for the courts or the copyright system generally. Repeal of section 411(a) could reverse this disturbing trend.

In addition to section 411(a), H.R. 897 would repeal section 412, which denies statutory damages and attorney's fees to successful plaintiffs who did not make timely registration of their claims with the Copyright Office. Although technically compatible with Berne standards, this section still exacts a substantial penalty for non-compliance with the registration formality. Many copyright proprietors may forego enforcement of their rights in unregistered works because the remaining remedies — actual damages and injunctions — are, by themselves, insufficient to justify the expense and difficulty of mounting an infringement action. In these situations, once again, the social bargain underlying copyright law is undermined, since the incentives for creative activity remain unrealized.

Thus, there are strong arguments for repeal of section 412 as well as section 411(a). While the subcommittee should investigate the impact of such a repeal upon the voluntary registration process, predictions of a sharp drop in registration activity should be viewed with some skepticism. Important litigation-related incentives for registration — notably, the prima facie effect of the registration certificate, see section 410(c) — would remain unchanged. In any event, anticipation of litigation is clearly only one of several reasons why copyright proprietors choose to register their claims with the Copyright Office. Other business and personal reasons probably drive the bulk of registration activity.

The subcommittee should also evaluate objectively the likely impact of repeal of section 411(a) and 412 upon the acquisition activities of the Library of Congress. The Library today relies upon deposits accompanying copyright registration for a significant proportion of its acquisitions, but only in some categories. In others, including most electronic works, registration deposit contributes relatively little to the Library's collections. To avoid technical complexities and administrative difficulties, the Copyright Office has chosen not to require deposit of complete machine-readable works, except in the case of works embodied in compact disk (CD-ROM) formats.

In any event, there are strong policy arguments for severing the link between effective copyright protection and the acquisitions objectives of the Library. An author's ability to deter and punish a thief of intellectual property should not turn upon the author's alacrity in furnishing the Library of Congress with a free copy of the work.

Aside from the stream of deposits accompanying copyright registration, which enactment of H.R. 897 would not eliminate, the Library has many other means at its disposal for preserving the breadth and depth of its collections, including but not limited to the mandatory deposit system established by section 407 of the Copyright Act. While from the information industry's perspective there have been some points of controversy with the Library's use of the mandatory deposit provisions, particularly with regard to high-priced, limited edition publications, and some works in electronic formats, the Copyright Office has also shown a commendable interest in reaching mutually acceptable resolutions of these problems. For instance, over the past year, IIA has led a group of industry representatives in discussions with Library and Copyright Office officials to agree on the ground rules for Library use of publications in compact disk format acquired through either registration or mandatory deposit. These discussions have been constructive and enlightening for all parties and will soon, we hope, culminate in a set of standard CD-ROM deposit agreements that should receive broad support.

In any case, it would be misleading to pose the issue for the Library of Congress as a stark choice between registration deposit and other, costlier means of Library acquisitions. Dispassionate analyses should shed more light on the extent to which the repeal of section 411(a) and 412 will diminish the flow of new materials into the collections of the Library of Congress, and may also suggest other, more appropriate incentives for deposit that will help the Library maintain and improve its invaluable collections.

In summary, IIA commends the sponsors of H.R. 897 for revisiting the question of the role of copyright registration in the overall system for defining and enforcing intellectual property rights in works of authorship. We continue to offer our full support for repeal of section 411(a), and believe that the record will demonstrate that repeal of section 412 is also in the public interest.

STATUS OF THE COPYRIGHT OFFICE

Section 103 of H.R. 897 would significantly change the institutional position of the Register of Copyrights and of the Copyright Office which he heads. IIA has no position on this provision at this time. We believe that it is timely to re-examine the current structure in order to maximize its benefits and correct its drawbacks.

Currently, the Register of Copyrights is appointed by the Librarian of Congress. Neither the Executive Branch nor the Congress has any formal role in choosing the incumbent of this important position. The Copyright Office itself is firmly ensconced within the Library of Congress, which has full administrative and policy control over the Office's activities. All the Register's staff is appointed by the Librarian, and the Register and staff "act under the Librarian's general direction and supervision." 17 U.S.C. 701.

H.R. 897 would authorize the President to appoint the Register of Copyrights, with the advice and consent of the Senate. The Register would assume full control over the Office's duties under the Copyright Act, would appoint the Office's staff, and would provide general direction and supervision. However, the Office would apparently remain part of the Library of Congress.

As the subcommittee considers whether to change the status and position of the Copyright Office, it should carefully examine (among many other factors) the relationship between the Copyright Office and the Library of Congress. The Office's current subordination to the Library is both a strength and a shortcoming.

On one hand, subordinating the Office to the Library makes sense to the extent that the Office's functions support the Library's mission. The copyright registration and mandatory deposit systems provide a prime example. Since the sole purpose of mandatory deposit, and a major goal of registration deposit, is to enhance the collections of the Library, the current institutional structure is quite rational. Of course, to the degree that the registration process is severed from the acquisition role, as IIA believes it should be, the arguments for this structure become less compelling.

On the other hand, the location of the Copyright Office within the Library of Congress inevitably places the Register of Copyrights in the uncomfortable position of carrying out potentially inconsistent or even conflicting missions. Simply put, what is best for the Library of Congress in its acquisitions policies, its provision of library services, and its role in the larger library community, is not always the same as what is best for the copyright law. For a variety of legitimate reasons, the Library is under strong institutional pressure to "push the envelope" of the copyright law on a variety of issues, ranging from fair use (section 107), to the prohibition on copyright in federal government works (section 105). When these pressures are felt in the Copyright Office, as a subordinate body of the Library of Congress, conflict is almost unavoidable. Indeed, the credibility of the Office on broader copyright issues could be called into question.

On balance, IIA believes the copyright system would benefit from giving the Copyright Office greater independence from the Library of Congress. To advance this goal, it may not be necessary to change the way the Register is appointed. For example, enactment of section 104 of H.R. 897, which eliminates the Librarian's control over regulations issued by the Copyright Office, would increase the Office's independence, even if the Register continued to be initially appointed by the Librarian. But by the same token, changing the appointment method alone may be insufficient to relieve the Office of its current problem of serving inconsistent missions. In considering changes to the Office's status, the subcommittee should focus squarely upon the desired relationship between the Copyright Office and the Library of Congress, and then consider the range of institutional structures that could accommodate the desired relationship.

Regardless of who is given the power to appoint the Register of Copyrights, the subcommittee should consider taking steps to safeguard the high level of professional competence which has characterized the Office for decades. Section 701 of the Copyright Act could be amended to require that the appointee be experienced and knowledgeable in the copyright law. While such a requirement, if directed to the President, probably could not be directly enforced, it would send a clear signal as to Congress' intent and as to the standards the Senate would use in carrying out its advice and consent role. Similar requirements can be found in legislation creating other advice and consent positions in both the legislative and executive branches. See, e.g., 44 USC section 301 (Public Printer "must be a practical printer and versed in the art of bookbinding"); 28 U.S.C. section 505 (Solicitor General must be "learned in the law").

OTHER PROVISIONS

IIA takes no position at this time on the other provisions of H.R. 897.

Section 101 of the bill would overturn two bankruptcy court decisions that pre-empted state Uniform Commercial Code provisions on recordation of security interests with respect to copyrighted materials. While IIA is unaware of any opposition to this provision, it has not had an opportunity to study the question nor to arrive at a formal position.

Section 105 of the bill includes conforming changes necessitated by repeal of sections 411(a) and 412 of the Copyright Act. In the short time since H.R. 897 was introduced, we have not had the chance to review the statute to see whether other conforming changes are required.

Title II of H.R. 897 abolishes the Copyright Royalty Tribunal and establishes arbitration royalty panels, under the supervision of the Register of Copyrights, to adjust royalty rates and order distributions under the statutory compulsory licenses. Since IIA member companies have had little contact with the CRT and, in their information businesses, are generally not subject to any of the compulsory licenses, we have no comments to offer upon these provisions.

Title III establishes the effective dates of the amendments made by H.R. 897. Since disputes continue to arise over the effect of legislative amendments upon cases pending on their effective date (e.g., pending Supreme Court cases on the 1991 Civil Rights Act), the subcommittee should consider spelling out, in legislative history if not in the text of the bill, the impact of repeal of sections 411(a) and 412 upon pending cases in which the copyright in question was not registered in a timely fashion, or at all, with the Copyright Office.

CONCLUSION

IIA appreciates the opportunity to comment on H.R. 897. Congress should take the opportunity to do now what it failed to do at the time of adherence to the Berne Convention, and repeal section 411(a). The repeal of section 412 would also enhance the effectiveness of our copyright regime, by further reducing the hurdles erected by the registration formality for copyright proprietors seeking to enjoy the full protection provided by the law. Changes in the status of the Copyright Office, particularly in relation to the Library of Congress, merit careful study, but IIA takes no position at this time on the proposal to make the Register a Presidential appointee.

Mr. HUGHES. Mr. Peters.

STATEMENT OF STEVE PETERS, SENIOR CORPORATE COUNSEL, ADOBE SYSTEMS, INC., ON BEHALF OF SOFTWARE PUBLISHERS ASSOCIATION

Mr. PETERS. Mr. Chairman, thank you for the opportunity to appear this morning in support of H.R. 897. I am Steve Peters, senior corporate counsel for Adobe Systems. We create software for producing, printing and communicating electronic documents such as this product, Adobe Premiere, which can be used to edit videotape on a personal computer.

I am appearing on behalf of the Software Publishers Association, which I will refer to as the SPA. The SPA has over a thousand members, including large companies such as Adobe, Apple, IBM, Lotus, Novell, and Microsoft, as well as hundreds of smaller companies. The SPA is the largest trade association of the software industry. We support section 102 regarding copyright registrations and section 101 regarding the recordation of security interest in copyrighted works, but take no positions on the other issues.

The SPA supports section 102, which eliminates the registration requirement, for two principal reasons: first, it will be a significant aid in the fight against piracy; and, second, it will eliminate a burdensome requirement which is particularly harsh on individual entrepreneurs, small companies and U.S. claimants.

Under section 102 a copyright owner will no longer be required to register a copyright in order to file suit or to get the benefits of statutory damages and attorney's fees. We think this change will have a major impact on the war against software piracy. Our industry is extremely vulnerable to piracy because anybody with a personal computer can make a perfect copy of one of our products with just a few keystrokes. Conservative estimates place revenue lost by U.S. software companies to piracy in the billions of dollars annually. Stolen software costs jobs, threatens R&D budgets, and increases cost for legitimate consumers. The SPA estimates that software piracy cost 60,000 jobs in the software and retail industries last year.

Passage of section 102 would help control piracy by simplifying the process of enforcing copyrights and providing economic incentives to do so that often aren't available today. Although the registration requirement may not sound burdensome, it does have a devastating effect on the ability of software companies to enforce their copyrights.

And compliance is costly. My company spent over $400,000 in the last 3 years complying with registration requirements.

The registration requirement is especially harmful to the individual entrepreneurs and small startups that are vital to our industry. Many of them simply don't know about the requirement. Their focus is creating quality products and technologies and not complying with the formalities of copyright law. They often learn about the registration requirement when it is too late, which is after their product has been infringed, and absent the benefits of statutory damages and attorney's fees they often decide that enforcement is simply not worth the price.

Even when they file a registration on the first version of a product, they often fail to register subsequent versions. The SPA has encountered these scenarios repeatedly, and 400-plus lawsuits and audits that it has pursued on behalf of its members in the past 2 years.

Mandatory registration serves no useful purpose. In the computer area we don't think it is useful to the acquisitions for the Library because what we submit for the Library is this product, and what we submit with our copyright registration is a printout of source code that only a few people in the country can read and understand.

The SPA supports section 101 regarding the recordation of security interests for two primary reasons. First, it will reduce confusion and uncertainty in the software and financial industries, and second, it will remove a barrier to financing for software companies. Section 101 would confirm that security interests don't have to be recorded by the Copyright Office, thereby allowing secured parties to perfect their rights under the U.C.C.

Recent court decisions have created a lot of uncertainty over how to perfect a security interest in computer software by requiring filings with the Copyright Office. These decisions have resulted in overlapping and inconsistent systems by requiring secured creditors to conduct searches and record security interests with the Copyright Office and local Secretary of State. Commercial financing transactions require quick access to accurate filing information, which Copyright Office recording systems weren't really established to provide. These burdens on the searching and filing process have a chilling effect on financial transactions for software companies.

A bigger problem for lender security is the different systems for establishing priority under the U.C.C. and the Copyright Act. The simple and effective rule of the U.C.C. is that the first to file wins. This provides the security that lenders need. Under the Copyright Act the first to sign wins, as long as it is recorded within 30 days, or 60 days for documents that are signed abroad. As a result of this, no lender can really be assured of security without waiting 60 days, because their interests could be preempted by a later filing of an earlier signed document. Section 101 would advance the economic viability of our industry by providing certainty to lenders and removing some barriers to capital.

The U.S. software industry is one of the bright stars of the American economy today. Passage of section 102 would help our industry play its role in creating new jobs and improving the U.S. economy by permitting software companies to take full advantage of the protection afforded by the Copyright Act.

Passage of section 101 would provide a financial stimulus by reducing confusion and uncertainty and removing a barrier to financing. Every dollar that we lose because of piracy, complying with these procedural requirements, and failed financing is a dollar that we can't use to support the R&D we need to stay ahead in this industry.

Thank you, and I will be happy to answer any questions, Mr. Chairman.

Mr. HUGHES. Thank you very much, Mr. Peters.

[The prepared statement of Mr. Peters follows:]



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Statement of the
SOFTWARE PUBLISHERS ASSOCIATION
On H.R. 897, The Copyright Reform Act of 1993
before the
Subcommittee on Intellectual Property and Judicial Administration
of the House Committee on the Judiciary
U.S. House of Representatives
March 3, 1993

Mr. Chairman, thank you for the opportunity to appear this morning in support of H.R. 897, the Copyright Reform Act of 1993. I am Steve Peters, senior corporate counsel for Adobe Systems, Inc., a software company that develops, markets and distributes software products for producing, communicating and printing documents. I am appearing on behalf of the Software Publishers Association, which I will refer to as the SPA.

The SPA is the principal trade association of the personal computer software industry, with a membership of over 1000 companies. Its members include large companies such as Adobe, Apple, Borland, IBM, Lotus, Microsoft, Novell, Symantec, and WordPerfect, as well as hundreds of small companies that develop and market business, consumer and educational software products.

The U.S. software industry today is a $40.2 billion industry, with over 50% of its sales coming from international markets. The U.S. software industry currently commands a 75% share of the world-wide software market. It is one of the fastest-growing sectors of the U.S. economy, currently growing at the rate of 12.3% per year. It creates enormous benefits to the nation's economic vitality and balance of payments.

The SPA supports H.R. 897, primarily because of the positive impact it will have on eliminating the industry-wide problem with software piracy, and on enhancing the economic viability of the industry in general. Specifically, the SPA supports Section 101 (relating to the recordation of security interests in copyrighted works), and Section 102 (relating to copyright registration provisions). The SPA takes no position, however, on Section 103, dealing with the General Responsibilities and Organization of the Copyright Office, or on Title II of the bill, dealing with the Copyright Royalty Tribunal.

THE REGISTRATION REQUIREMENT

Let me begin with a discussion of Section 102 of the bill -- the provision eliminating the registration requirement. Under this section, a copyright owner will no longer be required to register as a prerequisite to filing suit to enforce his or her copyright, or to recover statutory damages and attorneys' fees. The SPA supports this revision because it will have a significant impact in the war against software piracy.

The SPA actively monitors the scope and extent of software piracy both in the United States and worldwide, and is engaged in significant efforts to deter such piracy, as well as to detect and prosecute piracy when and where it occurs. In the last two years the SPA has brought over 400 lawsuits and audits on behalf of its members against businesses, educational institutions, and other entities unlawfully using or distributing PC software.

Piracy is a problem for all industries dealing with copyrighted products. But it is perhaps most destructive to the software industry. Three reasons set the software piracy problem apart from piracy directed at other copyrighted works:

First, unlike other copyrighted products, software is exceptionally easy to reproduce, and the copy is identical in all respects to the original. Second, while most other copyrighted works are copied primarily so that someone can make money by distributing the illegal copies to others, software is frequently copied extensively by a single organization for its own internal use. Third, the relatively high retail value of most software, which reflects the research and development costs that go into producing these products, also increases the incentive to pirate.The extent of software piracy is enormous. Industry studies have indicated that, at a minimum, for each legal copy of software in circulation, another copy is pirated. The SPA estimates that revenue lost to software piracy worldwide amounts to billions of dollars each year.

The software piracy problem is, quite literally, a national economic issue. Stealing software means stealing jobs. For this reason, the SPA believes that controlling piracy should be a major goal of U.S. policy makers. Passage of H.R. 897 would help meet this goal by greatly simplifying the process that allows the software industry to enforce its copyrights, and by providing the economic incentive to do so that is unavailable in so many cases.

At present, a copyright owner cannot bring suit against an infringer until its copyright has first been registered with the U.S. Copyright Office. In addition, unless the owner registered before the act of infringement, the owner cannot recover the statutory damages and attorneys fees allowed by the Copyright Act. While these requirements may not sound burdensome, in practice the net effect of these rules is a significant adverse impact on the ability of the software industry to protect its assets against infringers.

One of the primary reasons for this impact is that many software businesses (especially the newer and smaller startup businesses) are simply unaware that their rights and remedies under the Copyright Act are adversely affected if they do not promptly register their newly developed products.

The basic scenario is a simple one, but is played out over and over again. Software developers are inventors, skilled craftsmen, and entrepreneurs. While the industry includes several large players, the majority of the software developed and marketed by the industry comes from small start-up/entrepreneurial ventures, often founded with almost no capital and little more than an idea. Their priorities are developing quality leading-edge software products, the kind that will keep the U.S. in the lead in this technology, not on complying with the formalities of the U.S. Copyright Office. As a consequence, they frequently pay little or no attention to copyright law until they learn that someone has infringed the copyright in their new product. It is only then that they learn that any legal proceedings must wait while they register their product, and that, in any event, they will be unable to recover statutory damages and attorneys' fees. Faced with a scenario where the legal fees may exceed the actual damages they could recover, they often decide that enforcement of their rights is simply not worth the price.

A variation on this theme results from the rapid pace at which software products are revised, modified, and enhanced. Existing computer programs are frequently updated and enhanced to create new versions or releases, and new programs are frequently derivatives of older ones. Thus, registration of new versions is often overlooked, or there is confusion over when it is necessary to register a new version.

This problem has arisen time and time again in the infringement lawsuits that the SPA files on behalf of its members. All too often an SPA investigation will reveal infringement of a member's software product, but after the member is contacted about participating in the lawsuit, it turns out that the product is not registered. At that point, the SPA's only options are to proceed without that member's participation or to delay filing the suit while the product is registered, and then to proceed without the ability to recover statutory damages or attorneys' fees. Because most of the lawsuits filed by the SPA are settled on the basis of statutory damages, this is a significant problem.

This roadblock in the way of recovering statutory damages has a significant inhibiting effect on the industry's ability to enforce its copyrights and protect its products. Statutory damages may often constitute the only meaningful remedy available to a copyright owner for infringement of his or her work. With most industry products selling for a few hundred dollars, and many for less than that, the ability of a copyright owner to recover significant actual damages, as authorized by the Copyright Act, is greatly reduced. When this is coupled with the inability to recover attorneys' fees, what we see is a significant deterrent to copyright owners who seek to enforce their rights.

The cause of this problem, mandatory registration, serves no useful purpose. It is a formality that is required only of U.S. claimants, and presents an often significant bureaucratic deterrent to filing and prosecuting litigation.

Even for companies that are knowledgeable about the registration requirement (such as the SPA's larger members), there are several impediments to registration that often result in a conscious decision not to register. For example, many publishers are reluctant to register out of concern (real or imagined) over the possible disclosure of trade secrets

embodied in their software that might result from the fact that the required deposit is publicly available for viewing. Although the Copyright Office has taken steps to allay these concerns by issuing regulations that reduce the amount of program code required for deposit, they still remain.

The registration process also imposes an unnecessary burden on software publishers who are required to deal with issues defining and/or limiting the scope of their claims, when, unlike the patent process, the Copyright Office does not (and should not) decide the scope of copyright protection for software.

For example, many defendants in copyright infringement litigation are raising as an affirmative defense a claim of "fraud on the copyright office" based on failure to disclose certain information in the registration process that would have the effect of limiting the scope of the copyright claim. In the recent case of Ashton-Tate Corp. v. Fox Software, Inc., 760 F. Supp. 831 (N.D. Cal. 1991) for example, one federal judge took the extraordinary step of declaring invalid the copyright to the then-dominant software product in its field because the application for registration had failed to disclose that it was derived from a public domain product, even though the product itself was copyrightable. The judge later reversed his ruling. The SPA believes that the scope of a copyright in a computer program should be decided on the merits, not on the technicality of a failure to define or limit the scope of the claim in the application.

The primary assets of the businesses in this industry -- computer programs -- would have almost no value, and this enormous industry would not even exist, were it not for the protection against unauthorized copying it receives under the Copyright Act. But although copyright protection is automatic upon creation, and is not conditioned upon

registration, the protection is illusory if it cannot be enforced without registration. The SPA is not suggesting that registration be eliminated, as registration still is *prima facie* evidence of ownership and validity of the copyright. However, the SPA strongly urges that registration no longer be a prerequisite to enforcing one's copyright or obtaining the benefits of the statutory damage and attorneys' fee provisions. For these reasons, we support Section 102.

SECURITY INTEREST PERFECTION

Let me now turn to Section 101 of the bill, the provision relating to the recording requirements for perfecting a security interest in a copyrighted work. Section 101 would confirm that the perfection of security interests in copyrights does not require a recording with the Copyright Office, thereby allowing secured parties to perfect their rights by recording under the well-established rules of the Uniform Commercial Code.

The SPA supports this amendment to the Copyright Act because, quite simply, it will greatly reduce confusion and uncertainty in both the software and financial industries, and enhance the ability of software developers and publishers to leverage their intangible assets for further economic development.

With the ever-increasing economic significance of the software industry, its primary assets, the computer programs that it develops and markets, are increasingly being considered as collateral for financing future development and as security for other purposes. But according to two recent decisions (National Peregrine, Inc. v. Capitol Federal Savings and Loan (In re Peregrine Entertainment, Ltd., 116 B. R. 194 (C.D. Cal. 1990) and Official Unsecured Creditors' Committee v. Zenith Productions, Ltd. (In re AEG Acquisition Corp.), 127 B. R. 34 (C.D. Cal 1991)), secured creditors are required to

comply with the recordation requirements of Section 205 of the Copyright Act or their security interests will be deemed unperfected. This has led to a great deal of confusion, and generally requires secured creditors to conduct searches and record their security interests both in the Copyright Office and with the local Secretary of State.

In commercial financing transactions, it is vital that the parties have quick access to accurate filing information about liens. Loans and business acquisitions often operate on a very tight timetable and require immediate access to information. In most states, a UCC filing search can be performed quickly by use of an on-line computer database, and manual copies can be provided overnight. This is primarily because the state UCC recording systems are set up with the sole purpose of providing this type of information in a commercial setting.

By contrast, the Copyright Office, while it has recording capabilities, has not had as its primary purpose the facilitation of commercial transactions. Because of this difference in focus, searching Copyright Office records is often time-consuming and expensive, and the information is not always available via computer.

The filing system used by the Copyright Office is equally unsuited for these types of commercial transactions, as recordations must be made by title or registration number, rather than by owner. To perfect a security interest in all works of a debtor could thus require hundreds of filings, which must be continuously updated. The UCC recording system, which was expressly designed for commercial transactions, requires only a single filing to cover all of a debtor's intangible property, including property acquired in the future. The burdens on the searching and filing process imposed under the law as

presently interpreted have a chilling effect on finance transactions, and serve to discourage lenders from lending to software businesses.

The Peregrine court recognized these shortcomings, and specifically invited Congress to take remedial action -- noting that "If the mechanics of filing turn out to pose a serious burden, it can be taken up by Congress during its oversight of the Copyright Office." Peregrine at n10. The SPA urges the Congress to accept this invitation and to remedy these burdens on commerce and finance by passing H.R. 897.

Even more devastating to lender security is the fact that the Copyright Act uses a different system from the UCC for establishing priority of rights. It is essential to any recording system for commercial transactions that a lender know, based on public records, that it will have priority in collateral at the time of the transaction. Under the UCC, the rules of priority in security interests are simple -- the first to file wins. A secured lender thus can be certain of its priority, as long as it has done the proper search and filing. Under the Copyright Act, however, no such certainty exists. Section 205(c) of the Copyright Act essentially provides that in a conflict between two secured parties, the first to sign wins, as long as it is recorded within 30 days (for documents signed within the U.S.) or 60 days (for documents signed outside of the U.S.). This means that a lender could be preempted based on a later filing.

To help understand the importance of priority rules to financings, let me use the example of a mortgage on real estate. Under a first to file system, a lender can be certain that its loan will be secured by a first mortgage by doing the proper search and filing. The filing is of public record, and no one is misled into making other loans based on that security. Under the system used in the Copyright Act, however, no lender would make a loan

without waiting for 60 days, knowing that its mortgage could be preempted by a later filing of an earlier document. This degree of uncertainty is not supportable in today's financial markets, and will chill the availability of capital.

The benefits of enacting H.R. 897 would have a broad positive impact: the software industry would benefit, by removing barriers to capital; the financial industry would benefit, by creating more certainty and security in financing transactions wherein software is used as collateral; and the economy would benefit, by the incentives to business growth, creation of jobs, and reduction of duplication in government functions. Accordingly, the SPA supports Section 101 of H.R. 897.

The U.S. software industry is one of the bright spots in the American economy today. If the industry is to play its role in lifting the economy out of recession and creating new opportunities for the future, it must be able to take advantage of the incentives of the Copyright Act. Every dollar that ends up in an offshore bank account or is funnelled into other illegal activities by organized groups of pirates is a dollar that cannot be used to support the research and development necessary to keep the software industry vibrant and growing. Consumers also suffer when they have to pay higher prices for their software to compensate for the amount of product pirated that, by virtue of the economics involved, cannot be effectively pursued.

On behalf of the personal computer software industry I urge you to move quickly to mark up and pass Sections 101 and 102 of H.R. 897. We will be happy to cooperate with you and your staff in any way needed to help accomplish this result.

Thank you, Mr. Chairman. I shall be happy to answer any questions you may have.

Mr. HUGHES. Mr. Holleyman. Welcome.

STATEMENT OF ROBERT HOLLEYMAN, PRESIDENT, BUSINESS SOFTWARE ALLIANCE

Mr. HOLLEYMAN. Mr. Chairman, thank you very much for this opportunity to testify today. My name is Robert Holleyman. I am president of the Business Software Alliance. We are a coalition of software publishers who work worldwide in the fight against software piracy.

I would like to comment on several aspects of the bill today that are particularly unique in our antipiracy effort. The other aspects of BSA's testimony will be filed for the record.

Specifically, I would like to address those sections of the bill that deal with the elimination of a registration requirement under 411 as a precondition for filing an infringement action and the elimination of the section 412 requirement for registration in order to obtain statutory damages and attorney's fees. I would like to give several concrete examples why the current provisions adversely impact our fight against piracy.

As Mr. Peters was saying, piracy is one of the biggest threats to our industry. We estimate that worldwide the industry loses between $10 and $12 billion each year as a result of piracy, and for U.S. companies such as ours which have a 75-percent market share worldwide and which obtain more than 50 percent of their revenues from foreign sales, this has a particularly significant impact.

I would like to give an example of two cases that we have recently initiated and explain why I feel that the existing law could have adversely affected our action. Several months ago the BSA filed an action against a computer bulletin board system that was operating out of Baltimore. Bulletin board systems provide access to hundreds or thousands of individuals for the electronic exchange of information. Many of these boards are perfectly legal. We support them. They are a way of facilitating the exchange of information.

In the case BSA initiated in Baltimore, we acted against what we found were literally hundreds if not thousands of copies of copyrighted programs that were being uploaded and downloaded, without authorization, by way of the computer bulletin board. Particularly significant in BSA's case in Baltimore was the fact that when we obtained a court order, an injunction, and when we raided the bulletin board, in addition to the many copyrighted works for which registration certificates had been filed, we found a significant number of beta versions of programs, prerelease versions of programs that had never in the case of many of them been filed for registration with the Register of Copyrights. In this case, fortunately, or unfortunately, depending on your perspective, we found even more copies of unauthorized but released versions that did have registrations, so our claim was valid. We were able to quickly act and shut down the board.

However, in the case of the prerelease versions we were severely limited in our ability to act, or if we filed a registration even after bringing suit—after carrying out the raid, it would have been impossible for us to obtain statutory damages and attorney's fees. It is particularly unfair because beta versions tend to be sought by

the same sorts of individuals who would want to be first to have a new model car. These are the people who, whether they need one or not, want the very first model that comes out. The difference is that most people wait until a new car is actually on the market before they try to obtain one and our case, with the beta versions, they were effectively stealing them before they were even released from the factory. So had we been forced to rely on the beta versions that we found, our action would have been far less effective, than it was, had it been effective at all.

By way of contrast, at that same time as we carried out our raid in Baltimore the German Federal police were carrying out 13 raids against bulletin boards operating in Berlin. While those were criminal cases, BSA may very well file civil actions following the raids. In contrast with the United States, we would not have similar prohibitions in Germany acting against the beta versions of programs that we found there.

In conclusion, BSA believes the existing two-tier system discriminates against U.S. authors. It hurts the infringement actions that we carry out. And finally, wherever I am in the world, whether it is in Bangkok, whether it is in the PRC, whether it is in Turkey, the United States is viewed as the model for a strong copyright law and strong enforcement. However, the misunderstandings that result, based on the current 411 and 412 requirements, pose, I believe, procedural roadblocks for us in our fight against piracy overseas.

So for these and other reasons included in my testimony we support the provisions of the bill eliminating the section 411 and 412 requirements for registration as a precondition to filing suit, and as a precondition to obtaining statutory damages and attorney's fees, respectively. Thank you very much for the invitation to testify.

Mr. HUGHES. Thank you very much, Mr. Holleyman.

[The prepared statement of Mr. Holleyman follows:]

STATEMENT OF ROBERT HOLLEYMAN
PRESIDENT, BUSINESS SOFTWARE ALLIANCE
ON H.R. 897, THE COPYRIGHT REFORM ACT OF 1993

Before the Subcommittee on
Intellectual Property and Judicial Administration

Committee on the Judiciary
United States House of Representatives
March 3, 1993

Mr. Chairman:

Thank you for inviting the Business Software Alliance (BSA) to present testimony on H.R. 897, the Copyright Reform Act of 1993. Member companies of the BSA are: Aldus Corporation, Apple Computer, Inc., Autodesk, Inc., Borland International, Inc., Lotus Development Corporation, Microsoft Corporation, Novell, Inc., WordPerfect Corporation and GO Corporation.

According to the U.S. Department of Commerce, the U.S. packaged software industry market currently totals $23.3 billion annually and is growing at a rate of over 13% per year. BSA's member companies provide nearly 71 percent of the packaged PC software published by U.S. companies. U.S. companies enjoy a 75 percent share of the world market for all packaged PC software. In 1991, our industry employed over 40,000 full-time employees worldwide. Sixty five percent of these workers were employed by BSA companies, and in 1990 BSA companies provided nearly 90 percent of the new, full time jobs in the software industry.

The BSA exists to promote the continued growth of the industry through programs to eradicate software piracy. The focus of these programs is understanding of and compliance with software copyright laws in the U.S. and around the world.

H.R. 897 focuses on three areas of the current copyright law: (1) the requirement of registration as a prerequisite to an infringement suit and the right to obtain statutory damages and attorneys fees, (2) the relationship of the Copyright Act to state law governing security interests, and (3) the structure and organization of the Copyright Office and the Copyright Royalty Tribunal.

Registration as a Prerequisite to Infringement Suits and the Right to Statutory Damages and Attorneys Fees

The current two tier approach discriminates against U.S. authors

H.R. 897 amends Section 411 of the Copyright Act to eliminate the advantage now given to "works whose country of origin is not the United States." Under existing law owners of works "whose origin is not in the United States" may sue for infringement without receiving a registration certificate from the Library of Congress." The practical effect of this provision is that owners of works created in America – unlike owners of works created abroad – must apply to the Copyright Office and receive a registration certificate before they can bring an action in federal court to enjoin infringing uses of their works and obtain damages.

The disadvantage to works of American authorship in this "two tier approach" is compounded by the fact that, even after a work has been registered, section 412 of the Copyright Act prohibits U.S. copyright owners from receiving statutory damages and attorneys fees for piracy of their works which occurred prior to registration.[1] In these cases owners of copyrights of U.S. origin must prove actual monetary damages as their only means of effective relief. These provisions of sections 411 and 412 clearly discriminate against U.S. copyright owners in favor of foreign copyright owners. The BSA supports Chairman Hughes' decision, expressed in H.R. 897, to eliminate this discrimination.

As you know, the current "two tier" approach to registration came into being as part of the Berne Convention Implementation Act and represented a compromise between the House and Senate versions of that legislation. The House bill adopted the views of the Library of Congress, which had argued that the Congress should take a "minimalist approach" to the changes necessary to comply with the Berne treaty. The Senate bill was based on a more literal reading of Article 5 (2) of the Berne Convention which mandates that "the enjoyment and exercise of these [exclusive rights] shall not be subject to any formality." The principal advantage of the two tier approach embodied in the 1988 compromise legislation is that it makes it unlikely that foreign copyright owners will complain about the failure of the U.S. to comply with the Berne Convention because they are no longer subject to formalities. Therefore the U.S. cannot be accused of unfair international trade practices. However, this does not mean that it is fair to U.S. authors.

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[1] Not only is an injured party unable to obtain statutory damages for infringements which took place prior to registration of a work, but he or she may not obtain statutory damages where the work continues to be infringed *after* registration. *See, Mason v. Montgomery Data Inc.*, 967 F.2d 135 (5th Cir. 1992).

The two tier approach creates problems in enforcement abroad

The continuation of discriminatory formalities in U.S. law -- even though directed only at works of U.S. origin -- creates problems for BSA member companies in their efforts to combat piracy of their products abroad. As a result of industry / government cooperation, the United States has achieved considerable success in recent years in persuading foreign governments to enact copyright laws to protect rights in computer programs. *However, enforcement of the rights granted under these laws in many countries has been far from easy. Procedural requirements often make it difficult to get to into court.* And, the ability to obtain effective injunctive and monetary relief -- of the kind which discourages further piracy -- also is a serious problem. When we complain about such problems, we at times face the argument that the U.S. system -- by requiring registration as a precondition to suit and limiting damages and attorneys fees to post registration infringements -- is little different. Enactment of H.R. 897 would eliminate this argument.

Copyright registration is of limited value in litigation

In addition to encouraging foreign governments to take an obstructive, "minimalist" approach to eliminating cumbersome formalities, the existing law can unfairly prejudice U.S. copyright owners in asserting their rights at home. Under section 410 of the Copyright Act the Register of Copyrights issues a certificate of registration only after an "examination" to determine that "the material deposited constitutes copyrightable subject matter." As the House Committee Report accompanying the 1976 Copyright Act states, "unlike a patent claim, a claim to copyright is not examined [under this section] for basic validity before a certificate is issued."[9]

Copyright Office examiners do not have the ability to make fine line determinations about what constitutes copyrightable subject matter. Section 410 was intended to weed out of the registration process obviously uncopyrightable subject matter such as machines, book titles and names. Fine line decisions about copyrightability are best made by the courts on the basis of the fact finding and evidentiary process available only in adversarial judicial proceedings. It is particularly difficult to make fine line decisions about the content of registrations in computer programs where the material deposited consists of source code which is not easily understandable to the reader and which does not even indicate the kind of interfaces and screen displays which may be a part of the expression embodied in a given work.

For all practical purposes the kind of *prima facie* determination of copyrightability represented in a copyright registration could easily be made by a court after a cursory examination of the work involved. This is exactly what happens in a majority of the

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[9] H.R. Rep. No. 94-1476, 94th Cong. 2d. Sess. at 157.

developed countries of the world. Therefore, the claimed advantages of registration in expediting the litigation process are largely illusory.

Of course, to the extent that copyright owners find registration an advantage in litigation, nothing in H.R. 897 will prevent them from continuing to register and have the benefits of the system.

Mandatory registration is not necessary or appropriate as a means of building the Library's Collections

Another argument used in favor of the existing system is that the mandatory deposit accompanying registration of a work assists the Library of Congress in building its collections. As you, Mr. Chairman, indicated in your floor remarks accompanying introduction of the bill, much of the material deposited in conjunction with Section 411 is of no value to the Library's collections and is exempted from the mandatory deposit requirement. This must certainly be true of the computer source code deposits which accompany software registrations. In addition, I would respectfully suggest Mr. Chairman, that the requirement that copyright registrants give up copies of their works to the Library without compensation constitutes a burden imposed on authors which has nothing to do with the purpose of the copyright system under Article I, Section 2 of the Constitution, to "promote progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."

Furthermore, the House Committee Report accompanying the 1976 Act makes it clear that section 407 requiring mandatory deposits on demand of the Library – not section 411 dealing with registration – is the part of the Act intended to supply the Library of Congress with material for its collections. As this Committee's report accompanying the 1976 Act states:

> Under section 407 of the bill, *the deposit requirements can be satisfied without ever making registration*, and subsection (a) makes clear that deposit "is not a condition of copyright protection." (emphasis supplied)[y]

Mr. Chairman, to the extent that the Library of Congress has an interest in using the Copyright Act as a vehicle for enriching its collections, it is clear that Sec. 407 – which remains untouched in H.R. 897 – will meet this need. However, I would like to note in passing, that Sec. 407 is not, itself, without its problems. To the extent that copyright owners are required to deposit with the Library, on demand, full copies of computer programs on magnetic disks which may contain valuable trade secrets which

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[y] H.R. Rep. No. 94-1476, 94th Cong. 2d. Sess. at 150.

become available to all users of the Library's reading room, the industry believes there is a potential for harm in the present system.

The Relationship of the Copyright Act to the Uniform Commercial Code

In general, the BSA supports the principal of federal preemption of state law regarding copyrights which is contained in section 301 of the Copyright Act. Section 301 preempts state law regarding "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright...." The purpose of section 301, as we understand it, is to create a uniform law of copyright by prohibiting a patchwork of state laws which would disrupt the smooth functioning of the federal law copyright system. With adherence to the Berne Convention and the prohibition against formalities contained in that treaty, it is particularly important that states be discouraged from creating barriers to the smooth functioning of the copyright system.

However, an over-broad interpretation of section 301 can impede efficient commerce in copyrighted products. This is the case with regard to the recent decisions of federal bankruptcy courts 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.* 127 Bankr. 34 (Bank. C.D. Cal 1991).

Neither of these cases involved state laws which created copyright or copyright-like rights. Rather, the disputes involved were simply whether the Uniform Commercial Code would apply to security interests in transactions involving copyrights.

Many start-up software companies must rely on bank or investor financing in order to enter the market place. Investors, banks and their attorneys are accustomed to securing their loans and investments under the state laws embodying the Uniform Commercial Code. These recent cases, requiring federal recordation of security interests, can only confuse investors and their counsel in cases involving intellectual property. This discourages easy access to capital by start-up companies, thereby limiting the very incentives to investment in copyrighted works which the Copyright Act is meant to foster. H.R. 897 clarifies the law to eliminate this confusion. BSA supports this clarification.

The Structure of the Copyright Office and the Copyright Royalty Tribunal

Much of H.R. 897 is directed at changes which are necessary to permit the substitution of *ad hoc* arbitration panels for the full time Copyright Royalty Tribunal in resolving disputes arising under the compulsory licenses contained in the Copyright Act. None of these compulsory licenses apply to computer programs created by BSA member

companies. Since our companies do not use the Tribunal mechanism, we believe that it would be inappropriate to comment on these proposed changes in the law.

In connection with transferring functions of the Copyright Royalty Tribunal to the Register of Copyrights, the Register is made a Presidential appointee under the legislation. This presumably is to avoid constitutional problems with the Register's performance of Tribunal functions. As is the case with the other changes in the Tribunal mechanism, the BSA does not take a position on this issue because none of the compulsory licenses which give rise to the need for the Copyright Royalty Tribunal apply to works of BSA member companies. However, because of the importance of the Register of Copyrights and the Register's relationship with other agencies of the government -- in international and other arenas -- we would encourage Congress and this subcommittee to consult with the appropriate representatives of the Executive Branch in reaching a decision on this issue.

The Business Software Alliance appreciates this opportunity to testify on the provisions of H.R. 897, the Copyright Reform Act of 1993, as they impact our industry.

Mr. HUGHES. Mr. Burger, welcome.

STATEMENT OF JAMES S. BURGER, DIRECTOR, GOVERNMENT LAW FOR APPLE COMPUTER, INC., CHAIRMAN, PROPRIETARY RIGHTS COMMITTEE, COMPUTER BUSINESS AND EQUIPMENT MANUFACTURERS ASSOCIATION

Mr. BURGER. Thank you, Mr. Chairman and members of the committee. My name is Jim Burger and I am director of law for Apple Computer, Inc. I am here today representing the Computer and Business Equipment Manufacturers Association—CBEMA—as chairman of its Proprietary Rights Committee.

CBEMA, representing the leading U.S. providers of information technology products and services, strongly supports section 102 of the bill eliminating copyright registration as a prerequisite to bringing an infringement action. We are aware of the arguments of the value to the public of registration and deposit of works. However, computer registration, as you have heard already, plays no role in deposit of works. And, indeed, there is an alternative the Librarian has established for receiving computer program works in the forms that Mr. Peters explained. So the Library can get deposit absent this requirement for registration to bring a lawsuit.

The computer application review process performed by the Copyright Office is not the proper place for determining the scope of copyright protection for these valuable computer program assets. Rather as is true, really, of all literary work copyright protection this is an evolving area of law, and it is best determined and actually is being determined today by Federal courts on the merits, not via a clerical review in the Copyright Office.

Lastly, the two-tier U.S. system with its discrimination against U.S. authors really provides a poor example for developing countries which are trying to emulate our system in the hopes of developing a domestic software industry after the example of our very successful industry here.

CBEMA also supports section 101 of the bill which would amend section 301(b) of the Copyright Act to overturn *National Peregrine, Inc.* v. *Capitol Federal Savings & Loan Association.* Peregrine has added confusion and difficulty to financing transactions by holding that sections 205 and 301 of the Copyright Act preempt State Uniform Commercial Code provisions for perfecting security interests in copyrights.

Mr. Chairman, we agree with the statement in your remarks in the Congressional Record that Congress did not intend to preempt State U.C.C. provisions regarding perfection of security interests. Section 101 of the bill is a much needed clarification of the law.

We also feel that this might be an appropriate time for Congress to consider clarifying its intent regarding the effect of section 205 of the act on State U.C.C. provisions that govern the priority of security interests. As pointed out in your introductory remarks, Mr. Chairman, and I quote, "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." Although we are not aware of any case that has raised the issue specifically, it is possible that a court could interpret sections 205

and 301 of the Copyright Act, even as amended by the bill, as preempting State U.C.C. provisions that govern the priority of security interests. We believe this is a question that merits further study by Congress.

Those are the views we have developed on H.R. 897 in the 2 weeks since its introduction. I would be pleased to answer such questions as I can today and undertake to obtain answers to others.

Thank you, Mr. Chairman.

Mr. HUGHES. Thank you, Mr. Burger.

[The prepared statement of Mr. Burger follows:]

Statement of the
COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION
Presented by James M. Burger,
Chief Counsel, Government, Apple Computer, Inc.

Mr. Chairman, my name is Jim Burger. I am Chief Counsel, Government, for Apple Computer. I am here representing the Computer and Business Equipment Manufacturers Association, CBEMA, as Chairman of its Proprietary Rights Committee.

CBEMA represents the leading U.S. providers of information technology products and services. Its members had combined sales of $234 billion in 1991, representing nearly 5% of our nation's gross national product. They employ over 1 million people in the United States.

CBEMA strongly supports Section 102(a) of the Bill, which would eliminate copyright registration as a prerequisite to bringing an infringement action.

When the U.S. adhered to the Berne Convention, Congress had to amend Section 411 of the Copyright Act in order to comply with Article 5(2) of Berne. As you know, that Article bars member states of Berne from imposing formalities as a condition to authors' enjoyment and exercise of their rights under copyright. Consistent with the minimalist approach that Congress—quite appropriately—took in amending our laws to permit Berne adherence, it changed Section 411 only as to works of non-U.S. authorship.

Berne did not compel any change with respect to U.S. works. However, while this two-tiered system is technically in compliance with Berne, it is clearly inequitable because it favors foreign authors and discriminates against U.S. authors.

We are aware of the arguments that have been made about the value to the public of registration and deposit of works. But the availability of the incentives provided to our authors under the United States Constitution should not be connected to the acquisition policies of the Library of Congress. The result of this connection is that U.S. authors, and only U.S. authors, are discouraged from protecting their works of authorship in U.S. Courts by the imposition of unnecessary clerical registration formalities.

Moreover, the registration of computer programs plays almost no role in providing computer program deposits to the Library of Congress. This is because the great majority of deposits included with computer program copyright registration applications consist, in accordance with U.S. Copyright Office Regulations, only of selected sections of the programs with intentionally blocked-out portions, in order to protect trade secret material in the computer programs. Such deposit materials are not suitable for deposit in the collection of the Library of Congress. Instead, the Librarian has established separate mechanisms to build the collection of computer programs.

Going to the copyright application review process performed by the Copyright Office – it is at best nominal for computer programs because the deposit material in the copyright application is either in machine-readable form only or has significant sections blocked out. Thus, the Copyright Office examination consists primarily of reviewing the application to determine if it is completely filled in and reviewing the scope of the claim made in the application. This examination meets the requirements under the statute, but their repeal will not dilute the copyright since the scope of copyright for these valuable program assets is an evolving area of the law which should be determined and is being determined by Federal Courts on the merits, not via clerical review.

Lastly, the U.S. two-tier system, with its discrimination against domestic authors, provides an awful example for developing countries which are trying to emulate our system in the hopes of developing a domestic software industry.

Thus, CBEMA does not favor the present law which compels U.S. authors—and only U.S. authors—to register their works in order to exercise their legal rights. Section 102(a) of the Bill redresses the inequity in current law by treating U.S. authors equally with all other authors, and we support the provision without reservation.

CBEMA also supports Section 101 of the Bill, which would amend Section 301(b) of the Copyright Act to overturn *National Peregrine, Inc. v. Capitol Federal Savings & Loan Assoc.*, 116 B.R. 194 (Bankr. C.D. Cal. 1990). By holding that Sections 205 and 301 of the Copyright Act preempt state Uniform Commercial Code provisions for perfecting security interests in copyrights, Peregrine has added confusion and difficulty to financing transactions.

Section 205 of the Copyright Act presently requires that to record a document pertaining to a copyright in the Copyright Office, the work be registered and be specifically identified in the recorded document. These requirements are far more onerous than the applicable UCC provisions that permit generic identification of collateral. Moreover, under these requirements a lender effectively cannot take after-acquired copyrights as collateral, unless the lender takes on the burden of making additional filings—or making sure that the borrower files—each time the borrower acquires a new copyright interest.

We agree with the statement in your remarks in the *Congressional Record*, Mr. Chairman, that Congress did not intend to preempt state UCC provisions regarding perfection of security interests. Section 101 of the Bill is a much-needed clarification of the law.

We also feel that this might be an appropriate time for Congress to consider clarifying its intent regarding the effect of Section 205 of the Act on state UCC provisions that govern the priority of security interests. As you pointed out in your introductory remarks, Mr. Chairman, "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." Although we are not aware of any case that has raised the issue specifically, it is possible that a court could interpret Section 205 and 301 of the Copyright Act, even as amended by the Bill, as preempting state UCC provisions that govern the *priority* of security interests. We believe this is a question that merits further study by the Congress.

Section 102(b) of the Bill would repeal Section 412 of the Copyright Act. Section 412 now generally requires that authors register their works before an infringement takes place if they are to be permitted to recover statutory damages and attorneys fees in a suit against that infringer. We are just beginning to analyze the impact of this change and cannot express a view today.

CBEMA does not take a position with respect to any of the remaining provisions of the Bill.

We appreciate the opportunity to present our views to the Subcommittee today, and we would be pleased to provide any further assistance the Congress may request on the matters I have discussed, which are of great concern to our members.

Mr. HUGHES. In your opinion, does a deposit with the Copyright Office permit the Copyright Office to place on the public record any details about the extent of a copyright you claim?

Mr. BURGER. No. That is particularly important with computer programs because of the rules, the registration rules of the Copyright Office which are done to protect the trade secrets in computer source code, as Mr. Peters says. Only certain portions are provided. The rest is all intentionally blanked out.

Mr. HUGHES. So, of what value, in your judgment, is your deposit with the Library of Congress?

Mr. BURGER. Zero. Again, as I stated in my oral testimony, the Librarian has established an alternate method for getting computer programs, which we have supported. In fact, as I recall some years ago that it occurred. Apple Computer and Compaq Computer donated machines to a reading room to enable the Librarian—the Librarian even getting this program without our donations wouldn't be able to use it. It is useless without a computer. So we helped them set up a reading room and we provide our materials free of charge. And, under section 407 the Librarian could demand it.

It seems to us not fair (a) to discriminate against U.S. authors, and (b) to require this donation to the Library in order to sue.

Mr. HUGHES. The gentleman from California.

Mr. BECERRA. Thank you, Mr. Chair. Mr. Burger, the only question I have for you is, if in fact H.R. 897 went through and became law, would your members continue to file the mandatory deposits with the Library of Congress?

Mr. BURGER. I think we would—the larger companies would tend to continue to register their major programs. I have to be honest with you and say that when we considered this internally our reasons for supporting this bill, the elimination of section 411, really were not so much immediate concerns of Apple. Yes, we might save some money. We do register.

Our concern is the reason we believe our computer is done well is because of many, many small companies, small software developers who go out and they spend a couple years of their life without compensation to develop programs that make this machine work well, and make it exciting for people to buy, make it productive. Those are the very companies which we believe that this bill will support. Those are the companies, by the way, who also create the bulk of the jobs in the industry. The new starting companies don't have the time, the money, the resources, nor the focus to think of registration. Often, as Mr. Holleyman says, they have got beta versions that are circulating out there that none of us registered.

So our view is this would be very, very important to the smaller companies, and, frankly, from a selfish point of view would help us too, because we want to help those companies.

Mr. HUGHES. Would the gentleman yield? Are we talking about section 407 and section 408?

Mr. BURGER. Well, right now we are talking about section 411, I think.

Mr. BECERRA. The mandatory——

Mr. BURGER. The mandatory—oh. Forgive me. Excuse me. I thought you were talking about 411.

Your section 407, we think that the Librarian could use that. We would continue to cooperate with the Librarian. See, what we give them under section 411 is useless. We do give under an alternate deposit—it is not really a deposit, it is almost a gift. They need to use section 407 to get it. We would continue to do that. We don't need to be forced. We think it is a good idea that they have a reading room, and provided they safeguard our software the way we have asked them to in our licensing agreement, and they have agreed to that after some discussion. We think it is good.

Mr. BECERRA. And let's make sure I am clear on what is the difference between sections 411 and 407: section 407, we are not changing that.

Mr. BURGER. No.

Mr. BECERRA. You are still required to do——

Mr. BURGER. We do not ask that section 407 be changed. We don't—we don't give our software because of section 407, but we don't think there is any reason to change it.

Mr. BECERRA. Is there anything different between the submission you make under section 411 and that under section 407?

Mr. BURGER. Oh, yes. Absolutely. Section 411, as I answered before to the chairman, we give source code but we only give, I think it is the first several pages, the last several pages, and everything in the middle is blanked out. So, even to those, as Mr. Peter says, who are capable of reading source code, and I barely can read one type of source code—most people can't—but even those who can read it, it is useless. It serves no purpose for the Library's deposit requirement.

Mr. PETERS. I might add that we have made over 1,500 deposits under section 411 and we have only had one request from the Library of Congress, which happened to be for our most popular product, and you couldn't glean that from the registrations we made under section 411. So my assumption is they have some other method of requesting products that are in demand by their users.

And the source code deposits that we make, we deposit up to 50 pages of the code. One of our typical applications like this consists of 7,000 pages of source code, so the 50 pages is pretty worthless to anybody.

Mr. BECERRA. One last question, and I don't know if you can give me an answer to this specifically.

What would be the cost of the section 411 submission?

Mr. PETERS. I can address that. For us it is typically 2 to 3 days of engineering time plus a couple of hours of administrative time. Part of the problem the engineers have is that the statute requires the first and last 25 pages. Under modern programming techniques, programs are developed by a team of engineers, and it is like taking a bunch of parts and pouring them into a bucket and then saying, OK, give me the first and the last part. There is really no such thing, so they spend a lot of time trying to figure out what is the first and last 25 pages and then making sure that we are not revealing trade secrets when we make the deposit.

Mr. BECERRA. Now, isn't some of that work required anyhow to complete the section 407 submission as well.

Mr. PETERS. No. The section 407 submission is taking this package from our factory and sending it to the Library.

Mr. BECERRA. So there are some cost savings there as well.

Mr. PETERS. Yes. Definitely.

Mr. BECERRA. Thank you. Thank you, Mr. Chairman.

Mr. HUGHES. What is the average submissions a year by your firm?

Mr. PETERS. Well, we have made over 1,500 in the past 3 years. And we have a set of programs—a set of typeface software programs which we will revise every year or two. I mean we will have to submit those revisions unless the law is changed. So I anticipate 1,500 or so every couple of years for us.

Mr. HUGHES. What do you estimate the cost savings would be?

Mr. PETERS. Well, I know for the last 3 years it has cost us $400,000. A part of that was participating in some Copyright Office decisions. But we would not have had to participate in those absent this rule.

Mr. HUGHES. Would that be typical of any copyrighted software?

Mr. PETERS. I think it is probably higher for us than for most companies.

Mr. HUGHES. Just because of the volume? Sheer volume?

Mr. PETERS. Right.

Mr. HUGHES. All right. I don't have any further questions. I would like to hold the record open for 10 days. I think you have answered all the questions in your testimony in chief. But if not, we will direct the questions to you and we would ask you to respond within 10 days.

Thank you very much. We appreciate your testimony and your help today.

I am going to recess for 5 or 10 minutes so I can catch that vote. We will come back and we will take the last witness.

The subcommittee stands in recess.

[Recess.]

Mr. HUGHES. The subcommittee will come to order.

Our final witness today is J. Michael Cleary, a partner in the Washington, DC, law firm of Brylawski, Cleary & Komen, where he specializes in copyright, trademark and unfair competition law.

Mr. Cleary is testifying today on behalf of the American Bar Association, Section of Business Law, Ad Hoc Committee on Security Interests, and the Section of Intellectual Property Law.

We have your written statement, Mr. Cleary, and, without objection—there is nobody here to object—it will be made a part of the record in full, and you can proceed as you see fit. Welcome.

STATEMENT OF J. MICHAEL CLEARY, PARTNER, BRYLAWSKI, CLEARY & KOMEN, WASHINGTON, DC, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. CLEARY. Thank you, Mr. Chairman. Thank you for inviting me to appear today to testify on H.R. 897. My remarks will be limited to the security interests aspects of the bill. As you noted, we have submitted a written statement, which has been available to members in attendance.

Mr. Chairman, at the outset, I would like to acknowledge and thank you for your remarks in introducing H.R. 897 in which you indicate that you are aware that similar issues on security interests have arisen with respect to filings in the Patent and Trade-

mark Office, and that you 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. Your remarks could not have been more timely since the groups I represent today have been working diligently for the past 3 years to come up with a solution which would apply to all types of intellectual property and not just copyrights.

I believe that just a very brief historical perspective of who we are and how we came to be here today might give you some better insight into the problem which we perceive surrounding security interests and intellectual property.

In 1990 the chairs of the American Bar Association's Business Law Section and Intellectual Property Law Section realized that their respective groups were working at cross purposes and at loggerheads in trying to solve a problem which had faced the legal community for many years. On the one hand, the intellectual property bar was moving toward a solution which would establish Federal preemption with respect to security interests in the patent and trademark field akin to what is felt to be the present state of the law on copyrights.

On the other hand, the business lawyers who are familiar in working with the Uniform Commercial Code on a daily basis and who viewed the copyright law structure as an aberration and the then recently decided *Peregrine* case as an abomination were working to take the Federal Government out of play and to return everything to the States, which had in place working systems with which they were familiar. And thus it came to pass that in true lawyerly fashion the business law section organized a task force and the intellectual property group appointed an ad hoc committee and gave the charge to get together and see if you can't work something out.

I am here as chair of the ad hoc committee of the intellectual property section. Regrettably, Michael Bamberger and Alan Christenfeld, the cochairs of the business law task force, are out of the country and could not be here with me today. However, we did have a nationwide telephone conference with our 30-plus members last week, and the views expressed in our written statement reflect our current thinking and also reflect the substance of resolutions which were passed by both sections at the ABA annual meeting last August in San Francisco.

However, I must emphasize that I am not here today to present the views of the ABA, nor of any section, since our resolutions have not yet gone up through the channels of approval which are mandated by the ABA bylaws.

So, what is the problem with security interests and intellectual property? Basically it is one of uncertainty. I can tell you this from experience, because my father was one, that bankers do not like uncertainty when it comes to handing out their money. Anyone of us who has ever put his name on a promissory note or a loan document does not need to be told that the legal effect of what is being signed is uncertain. Even seasoned lawyers in this field approach giving opinions in this area of the law with a great amount of trepidation.

Now, in our written statement we have outlined the historic sources of the problem including article 9 of the Uniform Commercial Code and its contradictory comments, the lack of any statutory or regulatory expression of how to deal with security interests in the patent and trademark arenas, and indeed significant gaps in the statutory and regulatory scheme of the copyright law such as what to do when the debtor defaults.

Indeed this lack of statutory guidance on what happens in the event of default somewhat highlights the uncertainty of the present situation. We all know what happens if we miss a payment on our car or house. The bank can begin foreclosure proceedings and the law is very clear as to what can happen after that.

But how do you foreclose on intangible property? In the area of copyright we know it is not on the material object in which the copyrighted work is embodied because section 202 of the statute tells us so. We also know it is not by seizing the copyright certificate since the *Kingsrow Enterprises* case involving the Judy Garland tapes tells us that. So how does one foreclose on a copyright?

The present Copyright Act as well as H.R. 897 are noticeably silent, and we offer this just as an example of some of the problems we have been trying to grapple with and coming up with a reasonable solution. In our written statement we have set forth our overall recommendations which we have labeled the "mixed approach." And we are very mindful that whenever you have two committees approaching a task from disparate viewpoints the end product may be a camel. But the proposal we have set forth, we believe, provides a comprehensive, yet achievable, solution which would encompass all elements of intellectual property, meets the needs of both owners of intellectual property and those who obtain security interest in the property.

Our approach has been approved to the extent of a resolution being passed by the business law section and also the intellectual property law section. In addition, the U.S. Trademark Association has passed a resolution favoring, in principle, this mixed approach. And we have also received a favorable report from the permanent editorial board of the Uniform Commercial Code, specifically the study group on article 9.

So, if I could summarize the mixed approach in just a few sentences, it would be as follows: We would recommend that the individual States handle all issues of security interests in intellectual property under U.C.C. article 9 from creation through to foreclosure with respect to all parties except subsequent purchasers for value. With respect to those purchasers for value, Federal law would govern priority, and secured parties would protect themselves by filing a copy of their State filing in the Federal office. This approach would clarify what is covered by the State filing and what is covered by the Federal filing, and by dual filing a secured party would be fully protected.

Now, we have discussed this approach with the Register of Copyrights and his staff, and with the former Commissioner of Patents and Trademarks and his staff. We had a very productive meeting—that was almost 1 year ago—and our approach was, at least in our view, well received. In our written statement we support the intent of H.R. 897 to the extent that it would begin to move the issues

of security interests in copyright from the Federal arena and back to the States. We applaud this approach because it is part of what we would hope to accomplish. And, while we have some specific criticisms of the limited approach taken in H.R. 897 in our written statement, we hope that our views are not taken in the wrong vein.

We have worked very hard on developing an approach which would cover all aspects of intellectual property, and we would like to see the fruits of our labor translated into a legislative proposal which would completely solve the present problem and establish a framework which we could all live with and work with in the future.

We are hopeful that we can finalize our efforts in the next couple of months, and we would eagerly look forward to working with the subcommittee and its staff in drafting appropriate legislation.

Again, thank you for inviting me to appear, and I would welcome any questions.

Mr. HUGHES. Thank you, Mr. Cleary.

[The prepared statement of Mr. Cleary follows:]

PREPARED STATEMENT OF J. MICHAEL CLEARY, PARTNER, BRYLAWSKI, CLEARY & KOMEN, WASHINGTON, DC, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

The Task Force on Security Interests in Intellectual Property of the Section of Business Law of the American Bar Association, together with the Ad Hoc Committee on Security Interests of the Section of Intellectual Property, welcome this opportunity to present their views on the security interest provisions of H.R. 897.

The views presented in this statement reflect positions taken by the Task Force and the Ad Hoc Committee, and are consistent with resolutions passed by the Section of Business Law and the Section of Intellectual Property Law. However, the views do not represent the positions of the American Bar Association nor of any Section, since no authority to present these views could be obtained in the short time since these hearings were scheduled.

The goal of the Task Force, formed in 1990, with the assistance of the Ad Hoc Committee, has been to recommend a comprehensive legal system governing security interests in intellectual property, likely to be enacted by the relevant legislative bodies, dealing responsibly with the interests of the various parties, that would provide certainty, ease of perfection, modest cost, and minimum change. Any such comprehensive system should encompass creation of the security interest, ready access to prior filings, perfection, priority, acknowledgement of the interests of parties other than the debtor and the secured party, and a method of foreclosure. In addition, such a system should accommodate the interests of the owners of intellectual property, lenders desiring to take a security interest in such property, purchasers, investors, and licensees. The system would:

(a) enable a third-party to determine who has an interest in the property (whether ownership interest, license interest, or security interest);

(b) permit a perfected security interest to survive as rights are transformed from common law or state law to federal rights, and vice versa; and

(c) enable a secured party to encumber after-acquired property and proceeds from a license or sale based on the initial filing.

We are pleased that this Subcommittee recognizes that there is a problem with respect to the present regime as to copyrights. We urge, however, that the solution proposed by H.R. 897 is incomplete, even as applied solely to copyrights. Further, the Subcommittee should take this opportunity to cure the problem for patents, trademarks, and mask works as well.

The current state of the law governing security interests in intellectual property is unsatisfactory. There is uncertainty as to where and how to file, what constitutes notice of a security interest, who has priority, and what property is covered by a security interest. This area of the law is further complicated by the fact that both federal and state law impact on these issues.1/

Intellectual property in this context includes a broad range of material. Certain intellectual property rights are created

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1/ Traditionally, many practitioners have tried to "solve" the problem by dual filing in both systems without knowledge as to the effect of each filing and their interrelationship, if any. Basically, the major problem remains that of uncertainty.

and governed solely by federal law, such as copyrights and patents. Trademark rights can arise under either state or federal law. State law applies as to trade secrets and patentable materials and inventions as to which no federal application has been filed. With respect to copyrights only, there is apparently federal preemption with respect to at least some aspects of security interests.[2/]

Two leading commentators have articulated the problem accurately: "Uncertainty and confusion probably always have existed about the employment of intellectual property as collateral for a loan. Since the drafting of Article 9 of the Uniform Commercial Code, an uneasy coexistence of state and federal law has developed. Both state and federal law now arguably apply when a debtor attempts to use a patent or trademark to secure a loan. The extent to which each body of law is applicable and the interaction between the two systems was left unclear by the drafters of Article 9 and has not been clarified by Congress."[3/] Trade names, computer programs and other electronic forms of intellectual property, and other less clearly defined forms of intellectual property further complicate the issues.

Intellectual property rights are included within the Article 9 definition of "general intangibles" (comment to §9-106, UCC).

2/ Official Unsecured Creditors' Committee v. Zenith Productions, Ltd. (In re AEG Acquisition Corp.), 127 B.R. 34, 40 (C.D. Cal. 1991); National Peregrine, Inc. v. Capitol Federal Savings & Loan (In re Peregrine Entertainment, Ltd., 116 B.R. 194, 198-204 (Bankr. C.D. Cal. 1990).

3/ Weinberg & Woodward, "Easing Transfer and Security Interest Transactions in Intellectual Property: An Agenda for Reform," 79 Ky.L.J. 61, 62-64 (1990-1991) (citations omitted).

Under the UCC, the sole practical method of perfecting a security interest in general intangibles (including intellectual property) is by filing a financing statement in accordance with Article 9 [UCC §9-302(1)]. However, §9-104(a) provides that Article 9 does not apply to security interests to the extent that the parties' rights regarding such property are governed by federal statutes. Further, §9-302(3)(a) provides that a financing statement is not "necessary or effective to perfect a security interest in property subject to (a) a statute ... of the United States which provides for a national registration ... or which specifies a place of filing different from that specified in this Article." However, Official Comment 1 to §9-104 explains that "if the Federal statute contained no relevant provision, this Article could be looked to for an answer." Unfortunately, as described below, the Official Comments do not provide adequate clarity.

Comment 1 states that the Federal Copyright Act (at that time the Copyright Act of 1909, which has since been superseded by the Copyright Act of 1976) "would not seem" to be sufficient to exclude the application of Article 9, and suggests that the Patent Act is similarly inadequate. Thus, the Comment suggests, Article 9 filing requirements appear to apply to copyrights and patents. However, the Comment's next sentence compares the Copyright and Patent Acts to the Federal Aviation Act as examples of federal systems which supersede the filing systems. This confusion is compounded by Comment 8 to §9-302(3)(a), which includes the Copyright Act of 1909, but not the Patent Act, when giving examples of federal statutes which supersede state filing systems.

A. Copyrights

The current Copyright Act has been held to preempt the filing arrangements of UCC Article 9,[4/] since it provides for the filing of related documents, creates priority rules, and contains provisions which overlap with the UCC. 17 U.S.C. §101, et seq. The Official Comments to UCC §9-104, describing the Copyright Act as not superseding the UCC filing requirements, are simply not applicable to the current law, since they refer to the former Copyright Act, which only provided for recording of "assignments." Thus, in National Peregrine, Inc. v. Capitol Federal Savings, supra, n.2, the court did not give effect to a security interest which was filed under Article 9 and held that federal law preempts.

B. Trademarks

Historically, trademark rights have been governed by both federal and state law. Generally speaking, rights attendant to federally registered marks are governed by federal law. Rights in marks which have never been federally registered or with respect to which federal registration has lapsed, exist solely under state law (either state common law or state statute). Moreover, even for marks that are subject to an effective federal registration, there are numerous important associated rights - e.g., goodwill, license rights, royalty interests, etc. - that are not governed by federal law. Secured creditors generally desire to reach these associated state law rights as well as the marks themselves when taking a security interest in the debtor's

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4/ See cases cited in footnote 2.

intellectual property rights.

Although it is clear that applicable state law governs the creation and foreclosure of security interests in trademarks, it is considered unclear whether the perfection and priority of those security interests are governed by federal law (i.e., the Lanham Act, 15 U.S.C.A. §§1051-1127) or state law (i.e., the UCC).[5/] Accordingly, many practitioners now conduct dual state and federal lien searches, and make dual state and federal lien filings, against trademarks.

An apparently "absolute" assignment by the debtor to the creditor with a license-back arrangement is a mechanism sometimes used in the face of uncertainty concerning both the effect of a security interest filing against trademarks in the Patent and Trademark Office ("PTO") and the broader question of whether a document other than an assignment will be accepted by the PTO.[6/] Transferring the registration itself raises questions as to whether certain of the negative incidents of ownership, such as liability for infringements, are also transferred to the secured party.

5/ All reported cases apply Article 9. See, e.g., In re 199Z, Inc., 137 B.R. 778 (Bankr. C.D. Cal. 1992); In re Roman Cleanser Co., 43 B.R. 940 (Bankr. E.D. Mich. 1984), aff'd 802 F.2d 207 (6th Cir. 1986).

6/ To avoid an assignment in gross which may invalidate the trademark, there also must be an assignment of the accompanying goodwill. A concern also exists that a foreclosure may be considered an assignment in gross, which would result in a loss of the assignor's priority, at best, and, at worst, invalidation of the mark. ALI, Tentative Draft No. 3, Restatement of the Law of Unfair Competition §34, Comment (1991). See also Marshak v. Green, 746 F.2d 927, 929-30 (2d Cir. 1984); Berni v. International Gourmet Restaurants of America, 838 F.2d 642, 646 (2nd Cir. 1988).

C. Patents

Secured parties generally believe that filing a UCC financing statement in the state system is sufficient to perfect a security interest in a patent as a type of general intangible.[7/] However, secured parties remain concerned that a court may require an additional filing in the PTO in order to perfect a security interest. Clearly, trustees in bankruptcy have little to lose and much to gain in attacking state-only filings as long as the law is uncertain. As a result, many secured parties regularly search and file in both the state UCC system and the PTO.

Since the PTO does not accept filings of UCC financing statements, filings by secured parties in the PTO take various forms. Under one approach, the secured party receives and files an assignment of one or more specified named patents with a license back to the debtor.[8/] Others file security agreements labelled Patent "Mortgages" in order to reduce the chances of an ineffective filing and any liability associated with the assignment of record ownership to the secured party. Still others file security agreements or "collateral assignments," relying upon the PTO staff to accept the filing.

7/ E.g., City Bank and Trust Co. v. Otto Fabric, Inc., 83 B.R. 780 (D.Kans. 1988); In re Transportation Design and Technology, Inc., 48 B.R. 635 (Bankr. S.D.Cal. 1985).

8/ That structure was originated in order to avoid rejection by the PTO staff, which historically dealt with assignments. However, that structure potentially exposes the secured party to infringement and other liability.

D. Mask Works

In a manner similar to the current Copyright Act, the Semiconductor Protection Act provides for federal recording of interests in "mask works" (analogous to blueprints for computer chips), clearly preempting UCC Article 9 filing requirements. Security interests in mask works must be recorded under this federal system in order to achieve perfection. 17 U.S.C. §901, et seq. Analysis of the comparisons of the law governing mask works to copyright law adds further support for the argument that federal copyright filings are necessary for perfection.

RECOMMENDATIONS

The Task Force and the Ad Hoc Committee support the development of a coordinated federal/state approach. Under this approach, financing statements on form UCC-1 would be filed under the applicable state's UCC Article 9, which filing would create priority as to all manner of intellectual property against lien creditors, secured creditors and all third parties other than subsequent purchaser/assignees for value. As to subsequent purchaser/assignees, priority would be achieved by a notice of filing or filing (on a debtor's name basis) of a copy of the UCC-1 filed in the state office with an appropriate federal cover sheet in one or more federal offices.[9/] It is contemplated by the Task Force that a secured party in any transaction in which intellectual property is, or may become, of significance would routinely file at both the state and federal level;

9/ There could be one combined registry for all federal intellectual property, or two or three (i.e., one each for copyrights, patents, and trademarks) separate registries.

this would solve any problems relating to the transformation of intellectual property from the state to the federal realm.

This approach will clarify what is covered by a state filing and what is covered by a federal filing. Further, by dual filing, a secured party would be fully protected.

In reaching this consensus, we have assumed the following pre-requisites: (a) that notice filing registries indexed by debtor name (preferably only one registry, though it could be more) be established by the PTO and the Copyright Office; (b) that the various "look-back" periods will be eliminated or substantially reduced; (c) that secured parties will be given the ability to file prior to federal registration and prior to imposition of the security interest; and (d) that a filing would apply to after-acquired property and proceeds. (Our discussions with the relevant federal offices lead us to believe that these assumptions are achievable).

Priority would be determined under Article 9. Existing federal statutory provisions would have to be amended in order to meet the legitimate interests of parties to various transactions, since federal law governing patents, copyrights, and trademarks permits significant "look-back periods" which make it difficult for purchasers or lenders to determine title and security interests on a current basis.

The Patent Act currently provides for a three-month look-back period; i.e., an assignment, grant or conveyance is void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the PTO

within three (3) months from its date or at any time prior to the subsequent purchase or mortgage. 35 U.S.C. §261.

Similarly, under the Copyright Act a transfer of copyright ownership includes an assignment, mortgage, exclusive license, or any other conveyance, alienation or hypothecation of a copyright. 17 U.S.C. §101. As between two conflicting transfers, the one executed first prevails if it is federally recorded (a) within one (1) month after its execution in the U.S., (b) within two (2) months after its execution outside the U.S., or (c) at any time prior to federal recordation of a later transfer. 17 U.S.C. §205(d).

As concerns trademarks, the Lanham Act states that a trademark assignment shall be void as against any subsequent purchaser for a valuable consideration without notice, unless recorded in the PTO within three (3) months after the date thereof or prior to such subsequent purchase. 15 U.S.C. §1060.

Any of these extensive look-back/grace periods obviously defeats the justified expectations of purchasers or lenders that title and security interests can be determined on a relatively current basis.

SUMMARY OF RECOMMENDATIONS

In summary, we suggest:

(a) that federal law be changed to provide that recordal of security interests in intellectual property governed by federal law in the relevant federal agency establishes priority with respect to bona fide purchasers for value (other than an Article 9 secured party), and to provide that recordal of security interests in all intellectual property in the relevant state agency

under Article 9 of the Uniform Commercial Code establishes priority as against all other persons;

(b) that the Patent, Trademark, Copyright, and Mask Work laws and rules be amended to provide that recordal of security interests in the respective federal agencies with respect to registered and unregistered copyrights, registered and unregistered mask works, patents and applications for patents, and trademarks which are the subject of federal regulations or applications for federal registration establish priority with respect to subsequent bona fide purchasers for value (other than an Article 9 secured party), and to provide that recordal of security interests in such intellectual property under relevant state law under Article 9 of the Uniform Commercial Code establishes a priority as against all other persons;

(c) that federal agencies adopt the same form of notice filing with respect to security interests as in state agencies under the Uniform Commercial Code;

(d) that federal law and rules be changed to permit recordal in the respective federal agencies of notices of security interests with respect to debtors, without requiring specific identification of the properties securing the debt and without requiring recordal of the security interest agreement itself, in substantially the same form of notice filing as is currently employed under the Uniform Commercial Code; and to permit recordal in the respective federal agencies of notices of security interests which shall be effective with respect to debtors' "after-acquired" property; and

(e) that federal agency records concerning title to and security interests in intellectual property be made more useful by substantially reducing the grace periods for recordal of documents.

H.R. 897

The proposal we have set forth provides for a comprehensive yet achievable solution to the problem. It also meets the needs of both owners of and dealers in intellectual property, and those who obtain security interests in such property. It has obtained the support of both the intellectual property bar, and those representing lenders to owners of such property.

We applaud and support the intent of H.R. 897 to the extent that it would remove the issue of perfection of a security interest in a copyright from the federal sphere back to the states. However, the approach taken in H.R. 897 does not address companion issues such as priority and foreclosure. In our view, passage of the bill as it presently stands would not solve the problem of what to file and where to file, but indeed might exacerbate it, for the following reasons:

a. §101 of the Copyright Act would still contain a definition of a "transfer of copyright" which includes a security interest.

b. §205(d) governing priority of conflicting transfers of copyright, which incorporates §205(c) setting forth the procedure for acquiring "constructive notice," would be left intact, so that we would have the anomalous situation of looking to state law to determine if a security interest has been perfected, and

looking to the Copyright Act to determine if a state-perfected security interest has priority over other transfers of copyright, including other security interests. Presumably, a state-perfected security interest would still have to be timely recorded in the Copyright Office to obtain priority.

c. Neither the present law nor H.R. 897 addresses the important question of foreclosure in the event of default.

Unfortunately, due to the short period prior to this hearing, we have not had the time to translate our approach into a specific legislative proposal. We are ready, however, promptly to work with Subcommittee staff to do so. It would be unfortunate if the Subcommittee missed this opportunity to pass a comprehensive solution to a very real business problem.

Mr. HUGHES. I gather that your criticism is, it just doesn't go far enough, it doesn't deal with trademark and patent?

Mr. CLEARY. That is correct.

Mr. HUGHES. Security problems.

Mr. CLEARY. That is correct, Mr. Chairman.

Mr. HUGHES. I don't have any further questions. Thank you very much.

Mr. CLEARY. All right. Thank you.

Mr. HUGHES. I appreciate your help.

That concludes the hearing for today, and the subcommittee stands adjourned.

[Whereupon, at 12:37 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

COPYRIGHT REFORM ACT OF 1993

THURSDAY, MARCH 4, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:14 a.m., in room 2128, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives William J. Hughes, Jack Reed, Carlos J. Moorhead, Howard Coble, and Bill McCollum.

Also present: Hayden Gregory, counsel; William F. Patry, assistant counsel; Veronica Eligan, secretary; Phyllis Henderson, secretary; and Thomas E. Mooney, minority counsel.

Mr. HUGHES. The Subcommittee on Intellectual Property and Judicial Administration will come to order. Good morning.

The Chair has received a request to cover this hearing in whole or in part by television broadcast, radio broadcast, and still photography, or by any of such methods of coverage. In accordance with committee rule 5(a), permission will be granted unless there is objection. Is there objection? Hearing none, permission will be granted.

I welcome you to the second day of hearings on the Copyright Reform Act of 1993. Today's hearing will focus on parts of the bill pertaining to the Copyright Office. Throughout the course of the testimony, it will be helpful to clearly distinguish between the two very different types of procedures at issue.

The first is section 407 of the Copyright Act. This section requires that copies of all copyrighted works distributed in the United States be deposited with the Library of Congress within 3 months of publication. This section is called mandatory deposit and is entirely for the benefit of the Library of Congress, not for the benefit of the Copyright Office. In fact, the failure to comply with the requirement of section 407 does not result in loss of copyright or any of the copyright owner's rights; administrative fines are the only sanction. H.R. 897 does not change this section. Thus, the legal requirement that copyright owners deposit with the Library remains.

The second area we will hear testimony about is voluntary registration with the Copyright Office. Section 408 of the Copyright Act permits, but does not require, copyright owners to register their works. Copyright is automatic under our system. You get a copyright merely by creating the work. Unlike the Patent Office,

the Copyright Office does not grant copyrights. Instead, it registers claims to copyright.

Registration with the Copyright Office does give copyright owners certain procedural benefits, such as prima facie evidence of the originality of the work and ownership of it. Deposits under section 408 may also serve to satisfy the separate section 407 requirements, letting copyright owners' deposits do double duty. H.R. 897 does not change this part of the law either. Thus, if H.R. 897 is enacted, copyright owners may still register with the Copyright Office and will receive the full benefits of registration.

What H.R. 897 proposes to repeal are sections 411(a) and 412. These provisions have nothing to do with Library deposit under section 407. Section 411(a) requires certain copyright owners to register with the Copyright Office before bringing an infringement action. Section 412 then says that if the copyright owner has not registered before the work is infringed, the valuable remedies of statutory damages and attorney's fees may not be awarded.

The combined effect of sections 411(a) and 412 is to make registration mandatory in most cases. There may be a useful purpose for such indirect coercion, but I have not yet been convinced, especially in light of the clearly negative results of these provisions.

Yesterday, computer industries testified they are required to create expensive deposits for registration purposes. These deposits, consisting of only the first and last 25 pages of a computer program that may be 7,000 pages long, are not wanted by the Library of Congress and can hardly serve as an adequate public record for examination purposes. Foreign computer copyright owners from the Berne countries do not have to register their work before suing, thereby placing U.S. companies at a competitive disadvantage, it was argued just yesterday.

Today, we will hear testimony from photographers and other visual artists who will make very similar arguments. In the other corner, and leading off today, are the Librarian of Congress, Dr. James H. Billington, and the Register of Copyrights, Ralph Oman, who will give spirited defenses of existing law.

I do want to make this observation before they begin. No one disputes that the Library of Congress is a national treasure that must be preserved. At the same time, no one disputes the importance of strong copyright protection, and I also might say parenthetically that, while we may have done things in a particular way for 200 years, that may be a good reason to look at our procedures to see whether the marketplace works as well today. The marketplace has changed, as we all know. Technologies have changed, and, frankly, it is healthy sometimes to look at the system to see whether it serves our national interest.

I am becoming concerned that, given the Copyright Office's position in the Library of Congress, Library acquisition policy is having a possibly unintended but possibly negative impact on copyright policy. It may be that the time has come to consider separating the legitimate interests of the Library in acquisitions from copyright policy. We need to ensure that the Library gets what it reasonably needs, and I expect to go into this issue in some detail in the weeks ahead, but we cannot let the Library's acquisition policies harm

U.S. copyright owners both here and overseas. That possible harm comes in a number of ways.

First, there is a large body of material that the Library simply does not want. Yet, even though the Library does not want this material, Copyright Office procedures result in copyright owners either being forced to create expensive deposits that no one wants or, in the case of many visual artists, being deprived of their rights entirely. I am not sure that is good public policy.

Second, I also do not think it is good public policy to treat U.S. authors less favorably than foreigners. What public policy is served by having the Adobe Corp., but not its foreign competitors, spend $400,000 or thereabouts on registration deposits that no one wants and that do not serve as an adequate public record for examination purposes? Believe me, the sky will not fall in by a series of hearings that will examine these most important issues.

The gentleman from California.

Mr. MOORHEAD. Thank you, Mr. Chairman.

As I indicated yesterday, the two items that concern me the most about H.R. 897 are making the position of Register of Copyrights a Presidential appointment and the abolition of the incentives to register copyrights. One may seriously disrupt the professionalism of the Copyright Office, and the other may seriously impact the Library's ability to collect and compile copyrighted works.

Our present registration system has been in place and working since 1870 and is the reason why we have the most comprehensive Library in the world. H.R. 897 would abolish it. I have yet to hear any reasons that would justify such a major change. Of course, if I am a user of the Copyright Office and someone says to me, "How would you like not to have to register or have to pay any fee and yet have full access to our courts and all of our copyright remedies?" You would have to be very shortsighted not to jump at that.

At the very best, the abolition of the registration fee is going to play havoc with the Copyright Office's budget and, at the very worst, jeopardize the Library itself and encourage a substantial increase in litigation. If you get nothing for registering your copyright, why register? If you can have your attorney's fees paid for and not even register, why not sue? If there is no copyright mark affixed or date listed on a work and if there is no registration, how does anyone know what is and what is not copyrighted?

As our colleague from New York said yesterday, we need more hearings. It would be helpful to hear from the new administration since H.R. 897 would abolish three Presidential appointments and create a new one.

Mr. Chairman, I have also asked our former colleague, Bob Kastenmeier, to give us his views in writing on H.R. 897, as I discussed with you and we considered to be a good idea. His opinions and judgment would be very helpful to me and, I believe, helpful to our subcommittee.

I have great confidence in the chairman of this subcommittee. Mr. Hughes and I work very closely together, and it is very seldom that we are diametrically opposed to each other. I think there is no reason why something that has been in effect since 1870 can't be modified or changed, and I certainly would be willing to go along with modifications or changes that I thought were going to be bene-

ficial and would overall help the Copyright Office, the Library of Congress, and would help the industries that depend upon them.

I know this is the kind of bill that has come out of the Senate, is in the House, and it is both places, and the leaders on both sides have supported it. I hope we take a lot of time to very seriously consider what is going to happen, where we can make changes in this legislation to improve it. I am happy to work with you, Mr. Chairman. But, as it now is, I don't like it very well and I would have to see some substantial changes made in it before I could support it.

Thank you, Mr. Chairman.

Mr. HUGHES. I thank the gentleman.

We have with us the Librarian of Congress and the Register of Copyrights.

The Librarian of Congress, James Billington, was appointed by President Reagan in September 1987. He is a renowned expert on Russian history and culture and had the good fortune to be in the right place at the right time during the abortive coup attempt against Mikhail Gorbachev. Dr. Billington came to the Library from the Woodrow Wilson International Center for Scholars, and before then he was professor of history at Princeton University in my home State of New Jersey.

The Register of Copyrights, Ralph Oman, is a frequent witness before this subcommittee and, as such, hardly needs an introduction. He is recognized worldwide as an expert in copyright law, and we are very proud of the work he performs both here at home and abroad.

We welcome both of you.

Dr. Billington, why don't we begin with you. We have your full statements, which will be made a part of the record, and we have read those statements. We hope you can summarize for us so we can get right to questions.

Dr. Billington.

STATEMENT OF JAMES H. BILLINGTON, THE LIBRARIAN OF CONGRESS, ACCOMPANIED BY DONALD CURRAN, ASSOCIATE LIBRARIAN FOR CONSTITUENT SERVICES

Mr. BILLINGTON. Thank you, Mr. Chairman and members of the subcommittee. I appreciate the opportunity to appear here.

As Librarian of Congress and thus an appointed custodian of America's creative and intellectual heritage, I see H.R. 897 as posing considerable threats to the future of the Library's great collections. The Library contains almost 100 million items, not just books but maps, manuscripts, motion pictures, prints, photographs, musical scores, radio and television programs, the entire record of the variegated creativity of the American people. Copyright law has been a principal source of these materials for the Library since 1870. Today, about 25 percent of the items acquired for our collections come from copyright. Many of our specialized collections simply would not exist but for copyright registration. The collections as a whole are strengthened and augmented by copyright deposits of books, films, photographs, television news programs, and so forth. We also exchange copyright items. We do not want to keep permanently items that the Nation's Library can use in exchanges

to fill our needs from other sources, especially foreign libraries. The value of the materials transferred to the Library from the copyright system in fiscal year 1992 alone is in excess of $12 million.

This system works for the copyright owners, for the Library, for the Congress, and, we think most importantly, perhaps for future generations of American researchers and plain citizens who are going to perpetuate this tradition of creativity on which our prosperity as well as our health and creativity itself is based.

In 1988, when the United States joined the Berne Convention, Mr. Chairman, this subcommittee outlined two objectives: maintain a strong copyright law and maintain a strong Library of Congress serving the public as a depository of our cultural heritage.

The American Constitution itself recognizes the social contract established with authors in order to promote the progress of science and the useful arts by securing rights for authors for a limited time. In America, the rights of copyright not only protect the personal interests of authors and publishers but also serve the broader public good with the deposit of copies of their works in the Library of Congress where all, for generations to come, can use them for scholarship and research.

H.R. 897 seriously, and perhaps gravely, threatens the Library's future ability to maintain the quality and range of these collections at a time of already diminishing budgets. The proposal would damage the copyright registration system and the free flow of deposit copies to the Library. It eliminates two strong legal incentives to encourage publishers and creators to register materials, and it severs the 123-year-old link between the Library and the Copyright Office. These disruptions would greatly reduce the ability of the Library to collect and preserve in the first instance the unpublished works that form a significant part of America's creative and intellectual heritage—that is, television programs, architectural drawings, photos, music scores, and so forth.

Many priceless unpublished works have come to the Library under copyright deposit, ranging from the first edition of a Dvorzak opera, to an unpublished play of Zelda Fitzgerald, to choreography by Agnes DeMille, to an unpublished composition by the then 14-year-old Aaron Copland. I could go on forever. The Library's collections would be immeasurably diminished had the following types of materials not been registered: network news shows since the 1960's, rare performances of artists such as Martha Graham on videotape, important American photographs of such masters as Richard Avedon and Diane Arbus, original music scores of major American artists such as Scott Joplin.

If compliance with mandatory deposit is anything less than current voluntary compliance with registration, as it is likely to be under the provisions of this bill, the Library's international exchange program would also suffer. We regularly exchange copyright duplicates for other valuable items, we use copyright deposits to get items not obtained otherwise, such as the papers of Taiwan's once outlawed Democratic Progressive Party, a complete set of the publications of the European Space Agency, opposition publications from the former Soviet Bloc, and rare works by the Japanese Imperial Household Agency.

The effect on the Library's collections of books and other published materials, while now speculative, would also be potentially very costly. To the extent that this legislation endangers the ability of the Library to collect copyrighted materials as thoroughly or as rapidly or as comprehensively across all information formats as it does today, we would wind up with a less usable, less comprehensive, and more costly record of the Nation's creativity and cultural heritage.

With all due respect, Mr. Chairman, it appears to us that the bill, if enacted, could end up costing the Nation much more than it saves.

The floor statement introducing this bill, Mr. Chairman, alluded to the alleged discrimination our copyright registration system inflicts in American authors vis-a-vis their foreign counterparts. I do not see this as a matter of unfriendly discrimination. To comply with the Berne Convention, we do not require foreign authors to register as a prerequisite to a lawsuit. That was simply the price of adherence to Berne, which was overwhelmingly endorsed by the Congress. But American authors and copyright owners actually benefit from the strong American copyright registration system because it cuts down on copyright litigation. The public benefits from savings in the cost of judicial administration and the maintenance of good registration records. Weakening the American registration system will only increase the burden on the courts and damage those registration records.

The bill makes the Register of Copyrights a Presidential appointee with the advice and consent of the Senate in order to transfer the functions of the Copyright Royalty Tribunal to the Library. I take no position on moving the functions of the Copyright Royalty Tribunal to the Copyright Office, but the Congressional Research Service's legal experts advise me that it is constitutionally unnecessary for the Register of Copyrights to be a Presidential appointee in order to perform the arbitration functions contemplated by the Copyright Reform Act.

The Librarian of Congress is a Presidential appointee and can supervise the appointment of the arbitration panels created by the bill and, together with the Register, carry out the duties and functions now assigned to the Copyright Royalty Tribunal.

H.R. 897 makes fundamental changes in copyright registration and Library acquisition policy. Mr. Chairman, we know that you as a friend of the Library are as concerned as we are about unintentionally moving us on a path which could permanently damage both the collections and the National Library. H.R. 897 could drastically deplete the Library's collections by forcing the Library to purchase or forgo the broad range of materials that could no longer be demanded by the Copyright Office.

I think it is a fallacy to think that searching out and buying copies is more cost effective than registration deposit. Copyright registration copies save us money in making acquisition decisions. Under the current system, the items automatically flow to us and we can officially decide which items to select for permanent preservation by the Library. Under the proposed mandatory deposit method of acquiring works, we would have to spend new moneys to identify the works so that we could make a demand and to

spend new money in administrative and judicial enforcement as well as new money, of course, in purchasing.

By removing the Library's authority over deposit regulations issued by the Copyright Office and over its staff, the bill seriously undermines the Library's ability to control the flow of works that form the nucleus of our specialized nonbook collections, a key part of the unique aspect of the Library's collections and a growing part of interest for both public policy and scholars. So I am convinced that, at the very minimum, no such major change in the copyright law should be contemplated without a full study of its possible impact on the Library of Congress and the Copyright Office and on our ability to serve the Congress, scholars, other libraries, and the public.

I stand ready to work with you and this committee to work out the difficulties that occasionally arise in the application of existing law and in addressing any important concerns of owners to which we may not have been sufficiently attentive and which may have been a factor in these proposals. We are certainly anxious to cooperate, and I will, of course, be glad to answer any questions, Mr. Chairman.

Mr. HUGHES. Thank you, Doctor.

[The prepared statement of Mr. Billington follows:]

STATEMENT OF JAMES H. BILLINGTON
THE LIBRARIAN OF CONGRESS
BEFORE THE SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION
HOUSE COMMITTEE ON THE JUDICIARY
103rd Congress, First Session

March 4, 1993

Mr. Chairman and members of the Subcommittee, I wish to thank you and your staff for the opportunity to testify before this committee on an issue that gravely concerns me as Librarian of Congress and thus as custodian of America's creative and intellectual heritage. The Library contains almost 100 million items---not just books, but maps, manuscripts, pictures, prints, photographs, musical scores, and radio and television programs.

The copyright registration system, created by Congress, has brought free deposit copies of these materials to the Library for us to preserve and for future generations to study and learn from. Since 1870, the system has worked efficiently for the Library and for the nation. Without it, we could never have built up the world's most comprehensive collections in all formats, used by scholars every day and available to all comers.

Now this system, created by Congress, appears to be in jeopardy. On February 16, the Copyright Reform Act of 1993 (H.R. 897; S. 373) was introduced in the House and Senate. There was widespread surprise.

The proposed bill, whatever its intent, effectively eviscerates the copyright registration system and eliminates the statutory incentives that bring the Library free deposit copies. It severs the historically close ties between the Library and the Copyright Office.

These disruptions would gravely harm the unique ability that the Library of Congress has to collect and preserve <u>unpublished</u> works ---television programs, musical scores, architectural drawings, photographs---for future

generations. The bill's impact on the Library's future acquisition of books and other published materials, while less predictable, would probably involve considerably higher costs to the Library and the taxpayer.

The Library's role is indispensable to the purposes of Copyright legislation---that is, to promote the growth and exchange of ideas by making the nation's intellectual and creative output available for study.

This legislation endangers the ability of the Library to collect copyrighted materials as thoroughly, as quickly, or as comprehensively across all information formats as it does today. The result will be a less usable, less comprehensive, and more costly record of the nation's cultural and intellectual heritage. Even if adequate measures are taken to ensure that the Library's collections are not diminished by the proposed changes, the bill, in the long run, is likely to cost the nation much more than its sponsors say it will save.

In these times of already restricted budgets, I fear the bill will drastically deplete the Library's collections by forcing the Library to purchase (or forego) the broad range of materials that could not efficiently be demanded. Moreover, by removing the Librarian's authority over deposit regulations issued by the Copyright Office and over the staff of that Office, the bill seriously undermines the Library's ability to control the flow of works that constitute the nucleus of our specialized collections.

Although I take no position on moving the functions of the Copyright Royalty Tribunal to the Copyright Office, I note that the Congressional Research Service's legal experts advise that it is not a constitutional requirement that the Register of Copyrights be a presidential appointee in order to perform the arbitration functions contemplated by the Copyright Reform Act.

Finally, I am convinced that no major change of the Copyright Law should be undertaken without a full study of its projected impact on the Library of Congress.

The answers to these important unresolved questions could only be gained from careful study. The consequences of this measure should be fully known, before implementation, by the Congress and by all interested parties.

These points are discussed more fully below:

Introduction: The Library of Congress and the Copyright Office

Copyright functions were placed in the Library of Congress by an act of Congress more than one hundred and twenty years ago. Since that time, the copyright deposit and registration system has not only enhanced the collections of the Library but has permitted greater access to timeless literary and artistic treasures.

The flow of copyrighted material to the Library of Congress encompasses both published and unpublished works. The sweeping range of materials that are copyrighted, has made the permanent collections of the Library of Congress unique in this nation, unrivalled by even the greatest scholarly and public libraries. Because of copyright registrations, the Library has been able to assemble in one national collection materials that would otherwise escape preservation or study. To take just one example, the Library's collections of self-published local histories and genealogical works have made the Library a focal point for research in the history of American families, cities, and immigrant communities. The collections of the Library testify to the cultural diversity so important to this nation's strength.

The commitment of the Library to transform what would otherwise be a vast warehouse into an organized, accessible panorama of the nation's intellectual and cultural life, makes the Library not just a beneficiary, but a full partner and vigilant supporter of the creative community.

The mission of the Library of Congress underscores the significance of this partnership. The Library's duties are to assemble "universal collections, which document the history and further the creativity of the American people," and "to acquire, organize, provide access to, maintain, secure, and preserve these collections" in order to "sustain and contribute to the advancement of thought and knowledge throughout the United States and the world." Without the copyright deposits acquired as a result of the present statutory incentives to register, the quality and universality of the Library's collections would be severely compromised.

I. Contribution of Copyright Registrations to Library of Congress Collections

According to current copyright law, the demand provisions function in collaboration with the registration system. The Library of Congress is entitled to demand for deposit two copies of all *published* U.S. works in which a copyright is claimed, but there is no legal basis for demanding the deposit of any *unpublished* materials. Rather, the Library relies on the copyright registration process to acquire unpublished materials. Unpublished works are those works which, by definition, are generally not available for purchase, by this or any other library.

For these reasons, if the Copyright Reform Act of 1993 were to be enacted, the Library would no longer be able to acquire unpublished copyrighted materials at all. Not only would the distinctive nature of the Library's

collections be suddenly truncated, but the nation would lose, both for present and future generations, the right of access to the full range of the nation's cultural and intellectual history and its expression.

Since the collections that would be lost are of incalculable value, the impact of this provision of the Copyright Reform Act of 1993 can therefore be demonstrated only by offering examples of what might have been lost to the nation, if incentives for registration did not exist. The Library's collections would be diminished had the following types of materials not been registered:

- Broadcast media, that is, all television and radio programming, which are considered unpublished (and would not be subject to mandatory deposit).
- Rare performances of artists such as Martha Graham captured on videotape.
- Important American photographs of such masters as Richard Avedon and Diane Arbus.
- Original music scores of major American artists such as Scott Joplin.
- Architectural drawings, which together form an unparalleled record of all aspects of American building design.

II. Sufficiency of Mandatory Deposit Process

The proposed legislation would not change current requirements for mandatory deposit of *published* works. However, the vast majority of materials received now by the Library through Copyright are not obtained by mandatory deposit, but through voluntary registration stimulated by the statutory incentives of recovering statutory damages and attorney's fees. The success of this voluntary registration procedure shows up not only in the high rate of compliance, but in the very low rate of litigation over copyright infringements.

In FY 1992, over 85 percent of books received via the Copyright Office were registered.

The impact on the quality of the Library's collections of the proposed radical shift in the source and processing of copyright receipts, is bound to be great. But we would have to determine (1) the extent of voluntary compliance which the Library could anticipate from publishers; (2) the timeliness of voluntary compliance; (3) the costs to the Library, including the cost of identifying and demanding publications, and the ability of the staff to identify smaller publishers and their publications; and (4) any increased resistance on the part of publishers to the Library's demands, along with the need for increased judicial enforcement of these demands.

For example, based on the latest available data, there presently exist 14,000 publishers of machine-readable works and 48,500 products. Because the Library has already experienced difficulty in claiming these materials, it would be possible to build a collection of machine-readable materials for the Library and the nation *only* at greatly increased expense, if all the terms of the proposed legislation were enacted.

Extent of compliance. The very existence of a staff at the Copyright Office now dedicated to placing demands with noncompliant publishers indicates that some noncompliance is, and will be, a factor. A scenario of 100% compliance is unrealistic. Increasing the workload of the current staff handling deposits and demands, to cover the full range of published materials that are now being registered, would increase costs significantly. Additional expenditures should also be anticipated to cover the cost of employing additional bibliographers, subject specialists, and others whose job it is to ensure the universality and high quality of the collections. The cost of enforcement would also increase.

Cost to the Library of new procedures. In addition to the actual costs of supporting an expanded operation to secure increased deposits and issue demands, there are other costs associated with unknowns such as extent of compliance and timeliness. To give just one example, the Library has recently instituted group registration for serials, which allows publishers to register many individual issues of a serial for a single $20 fee. In the Law Library, this has resulted in such timely registrations that the Library will be able to cancel its subscriptions to many expensive looseleaf services without compromising service to Congress. If deposits are not received as timely registrations, the costs of acquiring materials needed for immediate service to Congress can only escalate.

Another important area where new costs to the Library can be anticipated is the Library's extensive foreign acquisitions program. The Copyright Law contains provisions which specifically authorize the Library to exchange duplicate materials received via Copyright for other materials needed by the Library. In 1992, the Library sent out approximately 38,000 copies of publications received through Copyright and not needed for the Library's collections, to international exchange partners; in exchange, the Library received foreign publications determined to be needed by the Library, with an estimated value of between $1.3 and $1.9 million. If compliance with mandatory deposit is anything less than current voluntary compliance with registration, the Library's international exchange program would also suffer greatly. A few recent examples of how copyright duplicates have been exchanged for valuable materials for the Library's collections are:

- Publications of political opposition parties such as Taiwan's once outlawed Democratic Progressive Party, not available through regular channels;

- Documentation of new developments in foreign science and technology, including a complete set of publications of the European Space Agency (NASA receives only a fraction of these);

- Opposition publications from the former Soviet bloc; new literary output of the former Soviet Republics and the new republics of Eastern Europe, including hundreds of works from the new republic of Croatia; and other foreign cultural treasures such as 74 videos from the State Theatrical Library in Moscow;

- Materials otherwise unavailable for purchase, such as works by the Japanese Imperial Household Agency, and a rare first edition of Dvorak's opera Armida.

Legal challenges and resistance to mandatory deposit. The proposed legislation places reliance for copyright acquisitions on mandatory deposit without having examined all possible legal outcomes of doing so. By relying exclusively on the mandatory deposit program, instead of balancing this program with the incentives that exist under the current voluntary registration program, the Library's legal experts anticipate at least some increased resistance to demand deposit, and increased need for judicial enforcement. Should a publisher successfully challenge the constitutionality and the legality of mandatory deposit as the principal means of copyright acquisitions, the Library would be left without even the ability to acquire those materials now being registered. This outcome would do great damage not just to the Library, but to the creative community at large, since it is in the overall interest of that community that the Library collect, record, and preserve this national heritage.

III. Other Problems

A decreased ability of the Library to acquire published materials would also crimp programs where the Library redistributes published materials to the National Library of Medicine and the National Agricultural Library.

Copyright registration records are *de facto* the U. S. national bibliography, because they are the most complete, unedited entries of the products of American creativity, ingenuity, and artistic expression. Diminished voluntary compliance will severely devalue this catalog and hamper future scholarly research.

IV. Impact of Making the Register of Copyrights a Presidential Appointee

The Library's ability to collect copyrighted materials is integrally related to the regulations and legal interpretations of the Copyright Office. Under the present Act, as under the 1909 Act, the Copyright Office is part of the Library of Congress, not an independent agency. As a consequence, the Register of Copyrights is an employee of the Library, appointed by the Librarian, and administers the Office under the Librarian's general direction and supervision. Thus, all regulations established by the Register to administer the Copyright Act are by law subject to the approval of the Librarian.

At this time, those regulations and interpretations are initiated, reviewed, and approved by the Librarian of Congress. For example, the Library, rather than the Copyright Office, presently determines the format in which various genres of published works must be deposited.

The Copyright Reform Act of 1993 would make the Register of Copyrights a Presidential appointee. The amendment would remove the authority of the Librarian to approve regulations established by the Office. The Library would still have the authority to "consult" with the Register before he/she issues regulations with respect to the acquisition of transmission programs.

However, in most cases, the Librarian would have no authority over regulations in this most important area of the law which governs the deposit of copies for the Library. This legislation could compromise the commonality of

interests between the Copyright Office, the Library, and their constituents, possibly to the detriment of all. At a time when publishing and communication are experiencing technological breakthroughs, it is particularly critical that the interests of the Library, the Copyright Office, and their constituents, be treated as mutual and complementary. The Library must be able to work hand in hand with the Copyright Office to ensure the continued collection, preservation, and protection of published and unpublished materials, including the new electronic information media that are making an increasingly important contribution to the nation's intellectual heritage.

The Library has made many reasonable accommodations in response to the needs of the creative community. A good example is the agreement arrived at by the Library in response to problems encountered by professional photographers in registering their photographs individually. Several months ago, the Library and the photographers confirmed that collections of photographs may be registered using a single registration application and fee, with copies provided to the Library in videotaped form.

It is important that the Library continue to participate in accommodations that are reasonable and workable from the perspective of copyright owners, but which would not compromise the Library's unique collections or its ability to fulfill its mission. To assure continuity, the Copyright Office should remain under the authority and supervision of the Librarian of the Congress. We see no constitutional necessity to alter the present statutory scheme of appointment in order to vest the proposed arbitral functions in the Register as proposed in the Copyright Reform Act of 1993. (I have attached a discussion of this particular issue in Appendix A to this statement.)

V. Need for Study Prior to Major Changes in Copyright Law

The nation's copyright laws have undergone several major revisions in just the last twenty-five years. Each of these revisions has been preceded by thorough study and planning by many parties in anticipation of expected impacts.

The Copyright Reform Act of 1993 recommends a major revision of the Copyright Law, but its assessment of potential impact on the Library of Congress collections (as well as on the Copyright community generally) is largely speculative. Before this legislation is enacted, its possible impact should be examined fully and openly with all affected parties.

In our view, any study of the potential impact of the proposed legislation should examine the following subjects:

- Anticipated loss of deposit of unpublished materials
- Anticipated loss of deposit of published materials
- Anticipated levels of compliance with mandatory deposit
- Anticipated costs of enforcing increased numbers of demands
- Comparative timeliness of compliance with mandatory deposit and voluntary registration
- Legal and constitutional soundness of mandatory deposit requirement as the principal means of copyright acquisitions
- Increased costs to the Library, including staffing, of purchasing additional materials for collections or for use in exchange and of increased staff
- Analysis of other national legal deposit systems
- Future of copyright, including electronic registration and/or deposit of published and unpublished materials
- Impact on the Library's collections of removing the Librarian's authority over the regulations and staff of the Copyright Office

- Other financial implications: could the Library expect to be reimbursed for the costs of Copyright Office overhead and space, once it lost copyright deposits?

In short, this legislation, from the Library's point of view, gravely threatens a system which over 120 years has admirably served the Library, the Congress, the creative community, and the public interest. At the very least, serious study of its potential impact is required so that the public and the Congress may be fully aware of the probable costs. We look forward to working with the committee in any problems in copyright registration that the bill attempts to address. Thank you.

APPENDIX A

Non-Necessity of Re-Establishing The Office of the Register of Copyrights as a Presidential Appointee in Order to Vest it With Arbitral Functions

In remarks accompanying the introduction of H.R. 897, the Copyright Reform Act of 1993, 139 Cong. Rec. E337 (daily ed. Feb. 16, 1993), Rep. William J. Hughes indicated that in order constitutionally to accomplish one of the proposal's chief purposes, abolition of the Copyright Royalty Commission, and have its present functions be performed by *ad hoc* arbitration panels convened by the Register of Copyrights, it is necessary that the Register be appointed by the President with advice and consent of the Senate in order to avoid conflict with the principles established by the Supreme Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). At present, the Register is appointed by the Librarian of Congress who is in turn appointed by the President with Senate advice and consent.

We conclude that the proposed change in the current appointive scheme is not constitutionally required. *Buckley* simply requires that any person exercising substantial executive functions pursuant to the laws of the United States must be an "Officer of the United States." While direct appointment by the President would certainly qualify the Register to perform the contemplated arbitral duties, the present appointment scheme is also legally sufficient. A brief summary of the legal basis for this conclusion follows.

The Copyright Act, 17 U.S.C. 1, *et seq.* (1976), contains various compulsory licensing provisions which permit the use of copyrighted works without copyright owners' permission upon the payment of a fee. The compulsory fees were originally set by statute in 1976, 17 U.S.C. 11, but subsequently have been adjusted by the Copyright Royalty Tribunal (CRT). 17 U.S.C. 115-116, 801(b).

The CRT also determines the formula for distribution of royalty fees paid under the compulsory licenses. 17 U.S.C. 118.

The CRT is an independent agency in the legislative branch composed of three members appointed by the President with the advice and consent of the Senate for seven year terms. 17 U.S.C. 801(a), 802. The CRT is provided with certain support functions by the Library of Congress, 17 U.S.C. 806, and performs functions which dovetail with those of the Copyright Office, see *e.g.*, 17 U.S.C. 111(d)(2) and (3), 119(b). The Library of Congress and the Copyright Office, which is a constituent part of the Library, 17 U.S.C. 701(a), are also in the legislative branch. The Librarian of Congress is appointed by the President with Senate concurrence, 2 U.S.C. 136, and the Librarian in turn appoints the Register of Copyrights, the head of the Copyright Office. 17 U.S.C. 701(a).

In 1988, Congress created a new compulsory license for secondary transmission of copyrighted works by satellite. 17 U.S.C. 119. The initial royalty fee is established by the statute. 17 U.S.C. 119(b)(1)(B). Thereafter, adjustments are to be made by voluntary negotiation or, on failure to agree, through binding arbitration by panels convened by the CRT. Panel decisions must be made "on the basis of a fully documented written record" and in conformity with factors set forth in the statute. 17 U.S.C. (c)(3)(C) and (D).

The panel's report may be adopted or rejected by the CRT. If rejected, the CRT sets the rate. The CRT's decision is subject to limited review by the Court of Appeals for the District of Columbia, *i.e.*, the appeals court may modify or vacate the decision of the panel or the CRT only of it finds that either acted in an "arbitrary manner." 17 U.S.C. 119(c)(4).

H.R. 897 would abolish the CRT and, adopting the arbitration mechanism of the 1988 amendment for resolution of all contested fee and

distribution questions, place supervisory and review authority in the Register, who would be an advice and consent presidential appointee. The arbitral functions are executive duties that may be performed by an officer of the United States. See, *e.g.*, *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940); *Todd & Co.* v. *SEC*, 557 F.2d 1008 (3d Cir. 1977); *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1168 (1990); *Cospito* v. *Heckler*, 742 F.2d 72 (3d Cir. 1984), *cert. denied*, 471 U.S. 1131 (1985). The only question, then, is whether the Register of Copyrights can remain as he is now, an appointee of the Librarian of Congress, and be constitutionally capable of exercising the review and other executive functions that would be vested in that office by H.R. 897. It appears apparent that no alteration in the status quo is necessary to effect such a change in function.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held that any person "exercising significant authority pursuant to the laws of the United States" must be appointed in accordance with article II, sec. 2, clause 2 of the Constitution, the Appointments Clause. 424 U.S. at 126. See also *Bowsher v. Synar*, 478 U.S. 714, 721-27 (1986). That is, Congress may vest the appointment of officers in the President, with the advice and consent of the Senate, or, alternatively, it may vest the appointment of inferior officers in the President alone, in the heads of departments, or in the courts of law. See *Freytag v. Commissioner*, 111 S.Ct. 2631 (1991).

Congress has provided that the Librarian of Congress must "be appointed by the President, by and with the advice and consent of the Senate." Act of February 19, 1897, ch. 265, sec. 1, 29 Stat. 544, 546, *codified* at 2 U.S.C. 136 (1988). The law makes no provision with respect to the tenure of the

Librarian and as to whether and by whom he might be removed from office. The legislature's silence in this regard, however, raises no serious legal question as to where the power to remove the Librarian resides. The long established rule is that in the face of statutory silence, the power of removal is presumptively incident to the power of appointment. *Myers v. United States*, 272 U.S. 52, 161 (1926); *Shurtleff v. United States*, 189 U.S. 311, 318 (1903); *Reagan v. United States*, 182 U.S. 419, 426-27 (1901); *In re Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). This presumption, coupled with the legislative history of the 1897 amendment, which indicates a congressional awareness of the executive nature of the Librarian's functions, establishes beyond peradventure that the present appointment process was enacted with the understanding that presidential appointment, and the concomitant power of at-will removal, was constitutionally compelled. See, *e.g.*, 29 *Cong. Rec.* 316 (1896) (statement of Rep. Quigg) ("Once appointed, he will remain, as now, until removed by the President"); Id. at 318-19 (statement of Rep. Dockery) ("This Library of Congress is a department of the Government. It is an executive department and should be under the control of the executive branch ... It is a great national Library ... and is an executive bureau, and as such should be presided over by some executive officer with authority to appoint and remove its employees"); Id. at 386 (statement of Rep. Cannon) ("This library is practically a great department, embracing not only the National Library, but covering the copyright business and the care of that great building . . . [A]s a general proposition, appointments must, under the Constitution, be made by the President, by the courts, or by the heads of Departments ... I do not think that Congress has any right to devolve this duty upon the House and the Senate; and I think that when our fathers adopted such a provision as a part of the Constitution they acted wisely, because it is not best

-- it never has been found best in the history of governments -- to invest in the legislative power the administrative function. Hence any such mingling of authority has been expressly prohibited by the Constitution"). As a consequence, anyone the Librarian appoints similarly has the constitutional capacity under *Buckley* to exercise executive duties.

While no case has directly dealt with the question of the removal power of the President with respect to the Librarian, the views of the framers of the 1897 legislation that the Library performs executive functions and thus must be headed by an "officer of the United States" appointed in conformity with requirements of the Appointments Clause, was forcefully supported and confirmed by the Fourth Circuit's 1978 decision in *Eltra Corporation v. Ringer*, 579 F.2d 294 (4th Cir. 1978). There the appeals court affirmed a lower ruling dismissing a mandamus action brought to compel the Register of Copyrights to register a proposed copyright as a "work of art." Among the contentions of the appellant was the claim that the Register of Copyrights is a legislative office and cannot perform executive functions since it is part of the Library of Congress which, through the Congressional Research Service (CRS), performs exclusively legislative functions as a support agency for the Congress. As a consequence of this activity, it was urged, the Library as a whole must be deemed legislative in character and its copyright functions cannot be lawfully exercised, citing the Supreme Court's then recent decision in *Buckley v. Valeo, supra*, as controlling authority. The appeals court unequivocally rejected the argument in an opinion in which it delineated the executive character of the Library despite the unique presence of CRS, the constitutional necessity of presidential appointment of the Librarian, and the appropriateness of the appointment of the Register by the Librarian.

The registration of copyrights cannot be likened to the gathering of information "relevant to the legislative process" nor does the Register perform a function "which Congress might delegate to one of its own committees." The operations of the Office of the Register are administrative and the Register must accordingly owe his appointment, as he does, to appointment by one who is in turn appointed by the President in accordance with the Appointments Clause. It is irrelevant that the Office of the Librarian of Congress is codified under the legislative branch or that it receives its appropriation as a part of the legislative appropriation. The Librarian performs certain functions which may be regarded as legislative (*i.e.*, Congressional Research Service) and other functions (such as the Copyright Office) which are executive or administrative. Because of its hybrid character, it could have been grouped codewise under either the legislative or executive department. But such code-grouping cannot determine whether a given function is executive or legislative. After all, the Federal Election Campaign Act of 1971, under which the Federal Election Commission reviewed in *Buckley* was appointed, is codified under the legislative heading and its appropriations were made under that heading . . . Neither the Supreme Court nor the parties in *Buckley* regarded that fact as determinative of the character of the Commission, whether legislative or executive. It is no more permissible to argue, as the appellant did in the article in the *George Washington Law Review* . . . that the mere codification of the Library of Congress and the Copyright Office under the legislative branch placed the Copyright Office "within the constitutional confines of a legislative agency" than it would be to contend that the Federal Election Commission, despite the 1974 amendment of the Act with reference to the appointment of its members, is a legislative agency unconstitutionally exercising executive administrative authority.

The Supreme Court has properly assumed over the decades since 1909 that the

> Copyright Office is an executive office, operating under the direction of an Officer of the United States and as such is operating in conformity with the Appointments Clause. The challenge of the appellant to the constitutionality of the 1909 Act and to the Register's power thereunder, would, if properly before us, be without merit.

579 F.2d at 301 (footnotes omitted).

In sum, then, there can be no legal doubt that in placing the appointment power of the Librarian in the President, Congress was legislating with knowledge and understanding that the method of appointment was constitutionally mandated and that it was because the Librarian was to exercise executive functions that the power of removal resided in the President. Further, there is no evidence in the legislative history or structure of the act establishing the presidential appointing authority that would supply the necessary clear and express rebutting indicia of a congressional intent to override the presumption of removability. Thus there can be little doubt that a reviewing court would find that the supervisory role contemplated for the Register in the proposed arbitral scheme would pass constitutional muster. As the *Ringer* court makes clear, "[t]he operations of the Office of Register are administrative and the Register must accordingly owe his appointment, as he does, to appointment by one who is turn appointed by the President in accordance with the Appointments Clause," 579 F.2d at 301. The Librarian clearly is a "head [] of department []" under the clause capable of appointing "inferior officers" such as the Register. See *Silver v. U.S. Postal Service*, 951 F.2d 1033, 1037-40 (9th Cir. 1991)(Postal Service is a "department" capable of receiving appointment authority, the nine governors of the Postal Service are the head of the department, and the Postmaster General and his deputy are "inferior officers" appointed by the Governors). As a consequence, the Register in turn may exercise the supervisory

and review functions contemplated by the proposed arbitral mechanism. Thus there is no constitutional necessity to alter the present statutory scheme of appointment in order to validly vest the proposed arbitral functions in the Registar.

Mr. HUGHES. Mr. Oman, welcome.

STATEMENT OF RALPH OMAN, REGISTER OF COPYRIGHTS, LIBRARY OF CONGRESS, ACCOMPANIED BY DOROTHY SCHRADER, GENERAL COUNSEL

Mr. OMAN. Thank you, Mr. Chairman and members of the subcommittee.

On CRT reform let me just make two brief points. First, we could live with any of the solutions that are on the table, and we would be happy to help you make those solutions work, whichever one you choose to implement; and, second, we don't think any of the solutions on the table require that the Register of Copyrights be a Presidential appointee.

Let me make one technical point with regard to CRT reform. While the Office could shoulder the responsibilities of the CRT, I would like to urge you to clarify the bill to permit the Copyright Office to deduct all of its administrative costs associated with the supervision and review of the arbitral panels. The bill allows the arbitral panels to deduct their costs but makes no provisions for the deduction of pre- or post-arbitral cost, which is the cost that the Copyright Office would incur, and we would hope that that change might be made.

Now let me talk just briefly about the registration system. The bill leaves only one strong inducement to registration, and that is the prima facie presumption of copyright validity. This incentive is important, but I think we have to admit that it has not been sufficient to induce registration in other countries. In Canada, for instance, our neighbor, they have a system that relies on the inducement of the value of the certificate, and they had only 8,000 registrations last year in total.

Even though I have no hard evidence, Mr. Chairman, I predict that registrations will drop and the Library will see fewer copyright deposits through registration. The Librarian has given you many examples of works that would be put in jeopardy. Let me give another concrete example. A few years ago, when Texas was celebrating is sesquicentennial, a famous Congressman from Texas called to inquire if we could locate the first State song of Texas. Teams of experts had scoured the libraries and archives of the State of Texas and had come up empty handed. The Library of Congress found it in 20 minutes because the song had come in as a copyright deposit 60 years ago. It was the only copy in existence as far as we know.

With your indulgence, I have a few other samples, that might be of interest to the subcommittee, of works that came in under copyright. I will be glad to provide a list of others for the record if you have an interest.

One of the works recently acquired since I was Register were the unpublished letters of J.D. Salinger, the famous recluse. Those letters would not be in the collection of the Library of Congress had it not been for the requirement to register as a precondition to suit. There were five famous photos by Andy Warhol that we have in our collections that we wouldn't otherwise have. We have an architectural drawing by Frank Lloyd Wright, a handsome model of the American Embassy in Tokyo that served as a model for the Impe-

rial Hotel in Tokyo, which is one of the most famous architectural landmarks in the world, the lobby of which is preserved in the museum in Nagoya. We also have the first American cartoon strip, the Yellow Dugan Kid, which was filed with the Copyright Office in 1896. We have a huge collection of photographs from the Spanish-American War, including Teddy Roosevelt and the Rough Riders in the Battle of San Juan Hill, and the African-American troops, the 19th U.S. Volunteer Infantry, that served in the Spanish-American War.

These are the types of deposits that come in under existing law, particularly the photographs, that would be unpublished and that we couldn't demand under the section 407 deposit provision of the law. Mandatory deposit—speaking of which—is not and cannot be made a full substitute for registration deposit, even though the people in my office who work in that division of the Library do a tremendous job with very limited resources. Our best guess is that registrations overall will decline substantially.

I see a certain irony in our timing. Next week our copyright records will go on line to 20 million users over the Internet. Our records have tremendous value not only to the copyright industries but to academic researchers and writers as well, particularly the information about unpublished materials which the Copyright Office alone can provide, and the reduction of that value if our records become incomplete or spotty due to voluntary registration should be factored into the evaluation of the costs of this legislation.

It would be a loss if our extraordinary system of records, one with a 123-year history, is diminished because of the unique and understandable problems of the visual artists and photographers. We can help them in other ways, and I should point out, Mr. Chairman, that we have already bent over backward in our efforts to help them to vindicate their rights in court. I have a list of special procedures that we have implemented to make life easier for the small entrepreneur, the business person who doesn't have the time, inclination, or money, to comply with an onerous registration system. I would be happy to provide this to the subcommittee. If it could be made a permanent part of the record, I would be grateful.

Mr. HUGHES. Without objection, it will be so received.

[The list follows:]

Assistance to Businesses

Public Information functions - Circulars and speakers - outreach to inform small businesses copyright basics and how to register. Activities in this area are substantial.

Special registration procedures - Creating "special" breaks creates difficult policy choices because many "breaks" shifts costs to other fee payers or the taxpayer. In addition, the integrity of the public record can not be compromised. Nevertheless, the Copyright Office has been sensitive to the needs of business, both large and small alike, and has been accommodating wherever possible. Examples include:

- Blanket exemptions from mandatory deposit of certain categories of items not needed for the collections.
- For software - special deposit rules allowing trade secret material to be deleted.
- For dynamic data bases, special deposit rules simplifying timely registration.
- For "secure tests" special rules minimizing the deposit.
- For many categories of authorship, the deposit requirement has been reduced to one copy.
- Special group registration procedures have been established for serials and daily newspapers. These are cost-effective only when the acquisitions needs of the Library are taken into account.
- Artists can register groups of unpublished works as unpublished collections.
- Special deposit rules have recently been established for photographers.
- Deposit regulation has special relief provision which is liberally applied.
- Motion picture agreement permits the return of the deposit of the copyright owner, subject to recall.

Mr. HUGHES. Also I have a series of letters I would admit at this point commenting on the legislation, without objection.

[See app. 15.]

Mr. OMAN. We shouldn't, in our opinion, risk the overall fabric of our entire system because of these few pockets of problems, which we recognize. I have heard no broad-based clamoring for change. Let's stick with the tried and true legislative rule that those who advocate change should carry forward the burden of showing that that change is necessary.

In addition to the impact on the Library's collection, title I impacts the judicial system and has important litigation costs. The Judicial Conference is on record as noting that the elimination of registration as a prerequisite to suit for copyright infringement means increased difficulty in trying copyright cases. Increased difficulty means increased taxpayer costs for judicial administration, more cases, more complex cases, more judges, more space, and greater litigation costs overall, especially for defendants.

Whatever the merits of the photographers' concerns and the visual artists' concerns, which the Copyright Office, as I said, has tried to address through flexible registration deposit practices, the registration incentives of existing law should not be changed without a thorough study. I think you should talk to the judges, Mr. Chairman.

Yesterday, some of the richest corporations in the country came before your subcommittee wearing artists' rags, or at least the turtleneck shirts and earth shoes of the computer programmers. They invoked the image of a struggling basement entrepreneur in support of their effort to deep-six section 411(a). In fact, Mr. Chairman, the bill could increase the power of the powerful. The U.S. Copyright Office's registration system generally, and section 411(a) specifically, are the best protection the small entrepreneur defendant has against a deep-pocket corporation that sues them. If you drop section 411(a), the corporation can sue the entrepreneur for infringement on a flimsy claim without risking a Copyright Office rejection, and often the entrepreneur will have no choice but to knuckle under rather than face expensive litigation in court.

We wouldn't be debating section 411(a) today if the giant software companies were only concerned with the burdens of registration on the small entrepreneur. They want the right to march into court without having to vet their claim through the Copyright Office and risk a rejection. We are talking about tough, close legal questions on the threshold of the law. The courts value our judgments because we are the expert agency. They want us to focus the issues. They want us to put the claim to copyright into its legal and historic perspective, and they want us to reject claims as necessary. We do that for them, and they don't want us to stop as far as I know.

As the subcommittee with jurisdiction over both intellectual property and the administration of justice, I think it would be a useful exercise to run this proposal by the courts. If the judges want plaintiffs to file suits without any input from the Copyright Office, please let me know. We are very conscientious about our job and very scrupulous about the limitations on our authority. We are not petty-fogging bureaucrats who enjoy making people jump

through hoops. We are not empire builders who are out to protect jobs. We do what Congress wants us to do. We think you want us to do this review. If you decide that you don't want us to review claims to copyright before plaintiffs file suit, just say so. We can work with you, Mr. Chairman, to design a substitute inducement to registration that protects the Library's collections. We can do that and then let section 411(a) fade away, but I predict that the judges will urge you to keep us as part of the process.

The public registration system has served well for many years the interests of copyright owners, copyright users, and the public. The registration system is now essentially self-sustaining. Those who benefit directly from the system pay about 60 percent of the costs through user fees. The value of copyright deposits transferred to the Library for the permanent collections or for exchanges to acquire other works generally equals the remaining portion of the Copyright Office's budget. This is truly a win/win situation.

We urge you not to legislate changes that will have an unknown impact without an indepth study. If you need to move forward on CRT reform with dispatch, we urge you to decouple that issue from the unrelated issues that pose a threat to the Library and to the registration system. If you want witnesses to sing the praises of both the Library and the current registration system, we promise to help you line up a star-studded list of witnesses to testify.

Let me end, Mr. Chairman, with a wistful observation. Yesterday, Ms. Daub reported a perception that the Copyright Office is in the pocket of the copyright owners. Mr. Metalitz, representing the copyright owners, says that you should examine the close connection between the Library and the Copyright Office, presumably on the theory that we are too close to the user community. Damned if you do, and damned if you don't. I see these two different perceptions as very healthy. We try our best to represent a balanced view in the public interest, and I think we succeed; both sides complain about us.

That concludes my statement, Mr. Chairman, and I would be pleased to answer any questions, and I would like to introduce Dorothy Schrader, the General Counsel of the Copyright Office, who is here to help us field your questions.

Thank you very much.

Mr. HUGHES. Thank you very much.

[The prepared statement of Mr. Oman follows:]

STATEMENT OF RALPH OMAN
REGISTER OF COPYRIGHTS AND
ASSOCIATE LIBRARIAN FOR COPYRIGHT SERVICES
BEFORE THE SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION
HOUSE COMMITTEE ON THE JUDICIARY
103rd Congress, First Session

March 4, 1993

Mr. Chairman and members of the Subcommittee, I wish to thank you and your staff for the opportunity to appear here today to testify on H.R. 897, Copyright Reform Act of 1993.

Chairman Hughes and Representative Frank introduced H.R. 897 on February 16. An identical bill was introduced in the Senate on the same day.

The Copyright Reform Act makes substantial changes to the U.S. copyright system: it drastically amends the registration provisions; amends the recordation provisions of the Copyright Act; abolishes the Copyright Royalty Tribunal (CRT); shifts the functions of the CRT to the Copyright Office; converts the position of Register from appointment by the Librarian of Congress to appointment by the President; and removes from the Librarian any authority over Copyright Office regulations and Copyright Office staff. The bill effects a major reorganization of government operations impacting copyright policy, judicial administration, and Library acquisitions policy.

The Copyright Office is convinced that this legislation will have a significant adverse effect on the Library of Congress, the courts, and other users who rely on the Library collections and the public registration records compiled by the Copyright Office. Our statement discusses the amendments proposed in H.R. 897 in order of the magnitude of this effect on the collections of the Library, the courts, litigants and users of the copyright registration system.

The sponsors of the bill anticipate budget savings for taxpayers by abolition of the nine-person Copyright Royalty Tribunal and transfer of its functions to the Copyright Office. Mr. Chairman, in your statement introducing the bill, you apparently reach the tentative conclusion that the Title I registration amendments are minor and will have little impact on the operations of the Copyright Office and the Library. We conclude otherwise and hope to persuade you of the depth and correctness of our concerns. Unfortunately, Mr. Chairman, this bill's Title I amendments will cost taxpayers. It will either cost substantial money to replace deposit items not received through registration, or the Nation will suffer major gaps in the collections of the Library of Congress.

The CRT now deducts 86% of its budget from the royalty pools. The bill's Title II cost savings could be achieved easily and without any dislocation by authorizing the CRT to deduct the 14% paid by taxpayers from the royalty pools.

In any case, the Register of Copyrights -- who has been appointed by the Librarian for nearly 95 years -- need not be appointed by the President in order to effect a constitutionally sound transfer of CRT functions to the Copyright Office of the Library of Congress.

I. REGISTRATION CHANGES PROPOSED IN TITLE I

A. Summary of Amendments to Registration

Title I of the bill eliminates two of the three incentives of the existing Copyright Act to encourage basic copyright registration. The bill eliminates the requirement to seek registration with the Copyright Office before filing suit for copyright infringement in case of works of United States origin and non-Berne foreign works. The bill also eliminates the principal incentive to early registration, which is the requirement of making registration before infringement occurs in order to obtain statutory damages and attorney's fees, except for a three-month grace period after publication.

The bill leaves only one incentive to make basic registration -- the prima facie presumption of copyright validity, if registration is made before or within five years of publication. This incentive, while important, allows registration to be delayed up to five years, and has not been sufficient to induce registration in significant numbers in other countries, who thereby abandoned public copyright registration systems in favor of private registries.

For the first time in the 200 years of United States copyright history, the bill proposes to grant statutory damages to unregistered works. The implications of this radical change are profound and should be given the most careful study. No other country awards statutory damages for infringement of copyright. This is an extraordinary remedy that until now has only been justified because it applied to registered works.

Apart from the policy implications of this radical proposal, our experience and knowledge of registration systems leads us to conclude that the

change is not cost-effective with respect to the collections of the Library, the courts, and copyright litigants.

B. Cost-Effectiveness of Changes to Title I

1. The Effect on the Collections of the Library of Congress

H.R. 897 would have a devastating effect on the Library of Congress's collections. The depth and universality of our great national Library owe more than is generally understood to the existing copyright registration system with its strong statutory incentives for registration. Section 412 assures that the vast majority of published works, and the commercially significant unpublished works, including television programs, will be registered because it makes the possibility of recovering statutory damages and attorneys' fees in the event of an infringement contingent upon registration within three months of publication or before infringement occurs. This assures that the Library receives deposit copies concurrently with publication and that the collections are enriched by the vast breadth of our cultural heritage, from published books and periodicals to prints and photographs, obscure reference materials, manuscripts, music, sound recordings, maps and charts, motion pictures, television programming, and architectural works. The Library has the largest and most diverse collections in the world, and has become the research library to Congress, the Executive Branch, the American people, and the world, to a great extent because we have the strongest public registration system in the world.

The present system assures that both the Congressional Research Service and the Law Library receive timely materials that enable them to aid Congress by providing up-to-date research, analysis, and information on national and international issues.

In looking at our future as an electronic Library, we have begun to augment the collections through copyright by requiring deposit of digital works, including full-text files, numeric databases, graphic information systems, photographs, and citations and abstract databases. These unpublished materials would be largely unavailable if Section 412 were eliminated as an incentive for registration.

Finally, the current copyright system is particularly responsible for the unparalleled collections of Americana in the Library.

Last year, nearly 650,000 works were received through the registration system. Each of these, whether published or unpublished, was available for the Library to add to its permanent collection. The value of the materials transferred to the Library from the copyright system, conservatively estimated, exceeded 12 million dollars. Moreover, the Library has at least a five-year window to review deposits of published works to determine if it wants to select something not chosen immediately. Also, many of the works not selected by the Library for its own use are used by the Library's exchange program. Under this program, deposits secured through copyright may be exchanged for foreign works through official exchanges, or may be used to supplement the collections of small, under funded public or school libraries across the country.

Besides reducing the amount of material the Library would receive from copyright, the Reform Act would have the additional effect of reducing the quality of material deposited for registration purposes. The Copyright Office, working at the Library's direction, is currently able to insist upon the highest quality edition of the copyrighted work because the incentives supporting registration are strong. By removing the Librarian of Congress's supervisory authority over the Copyright Office, and by eliminating the incentives supporting

registration, we diminish the responsiveness of depositors to the Library's needs.

a. The demand provisions of Section 407, while an important adjunct to the current registration system, could never replace it.

Relying upon mandatory deposit and enforcement to supply copies now acquired by registration would be both costly and imperfect. During fiscal year 1992, with a staff of 17, the division handling mandatory deposit secured 5832 titles for the Library, many of which were identified by other divisions in the Library. Serials (periodicals and newspapers) represent 85 percent of the works received through mandatory deposit. At the same time, 97,800 titles were transferred to the Library through copyright registration, and the cost of processing those works was offset by the $14 million received as copyright registration fees. If, for purposes of analysis, the division currently handling mandatory deposit were forced to acquire all 97,800 titles through mandatory deposit or demand, the Library would be precluded from obtaining a significant number of works for legal or practical reasons. The Library cannot legally demand unpublished works, [1] and it is not practical to identify publications from other than large publishing houses in order to issue a demand. Moreover, the demand staff would have to be significantly enlarged to perform its increased duties.

Finally, enforcement of demands is far more costly than voluntary compliance through a registration system that offers inducements to register. Currently, the efficiency of the division handling mandatory deposit relies

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[1] The problem cannot be solved by expanding mandatory deposit to include unpublished works. You cannot demand something until you know of its existence. Generally, the Library could not know about the unpublished works. Moreover, the constitutionality of any proposal to demand unpublished works would have to be examined with the greatest care.

heavily on the voluntary compliance of copyright owners receiving demands. For three reasons, this voluntary compliance would probably drop under the Reform Act. First, copyright registration as an inducement for depositing with the Library would be lost. Because of the substantial incentives supporting registration, twenty-five percent of copyright owners receiving demand letters elect to register their copyright claims. Under the Reform Act, this incentive to deposit would be removed, and resistance would rise accordingly.

Second, the division handling mandatory deposit relies heavily on the records of copyright registrations to decide what to demand. With a severely reduced number of registrations, the efficiency of using the records of the Copyright Office would be markedly reduced. More investigative work would be required to identify those works that should be demanded.

Third, a mandatory system backed by judicial enforcement is necessarily more cumbersome and costly than a system where participants comply voluntarily because they find it in their best business interest to do so.

Resistance to mandatory deposit is costly for both the Copyright Office and the Justice Department. Enforcement of mandatory deposit raises unique legal issues. One case raising constitutional objections has already been adjudicated in the Library's favor, but issues with constitutional dimensions would predictably be raised if the enforcement burden expanded. [2] Every claim against a foreign national necessarily involves complex jurisdictional matters. In addition, issues relating to publication, the type and nature of editions subject to deposit, copyrightability, claims for special relief, copyright disclaimer, the applicability of personal hardship defenses, and other matters

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[2] The constitutionality of mandatory deposit has not been tested since we joined Berne and eliminated the notice requirement.

render mandatory deposit cases burdensome. The Copyright Office estimates that paying retail prices for additions to the collections would be far more economical than using the mandatory deposit provision. [3]

Our cost projections for replacing the present registration system with principal reliance on mandatory deposit include none of the costs incurred by the Department of Justice. Enforcement proceedings are both costly and time consuming. Currently, only four Section 407 cases await action by the Justice Department. Dramatic increases in the number of mandatory deposit claims issued in an environment of resistance will substantially increase enforcement costs.

b. H.R. 897 would likely result in a dramatic decline in registrations.

Mr. Chairman, in your introductory statement, you tentatively conclude that these drastic amendments to the registration incentives will not affect the Library both because of mandatory deposit and because the vast majority of claimants register for reasons unconnected with litigation. You mention that 634,797 works were submitted for registration in 1991, but only 1,831 copyright infringement suits were filed.

The Office does not draw the same conclusion from these figures. We respectfully suggest that the number of actions filed demonstrates nothing about the number of works registered because proprietors wanted the ability to recover statutory damages and attorney's fees should their works be infringed. As we discuss later, the Office sees the number of registrations compared to infringement actions as a positive value of the existing registration system.

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[3] By replacing the present registration system with principal reliance on mandatory deposit without factoring in the cost of judicial enforcement, we estimate that to acquire deposits essential for the Library's collections, the cost of demanding each increment of 10,000 titles would be $1.1 million.

As evidence that registrations will decline if two of the three incentives are removed, the Office notes below what happened when registration incentives were changed in the recent past. It also finds persuasive information on the registration system in Canada where the main incentive to registration is the one that H.R. 897 would retain.

The U.S. registration system was analyzed very carefully during the revision period that led to enactment of the 1976 Act. The incentives selected by Congress after studied deliberation were those considered the most efficient and practical. Congress looked at these incentives again at the time in 1988 when it passed the Berne Convention Implementation Act. During the Berne revision section 411(a) was amended to delete the requirement that works of Berne origin had to be registered before a suit was brought, but the §412 incentives were retained for all authors.

The amendment to §411 has already changed the way foreign authors register and deposit with the Library. The receipt through registration of foreign works that the Library needs for its collections has dropped an estimated 30-40 percent since the United States joined the Berne International Copyright Convention. For example, Syndicat National, the major French publishers' association, which had traditionally registered copyright claims for its members, ceased all original registrations since the spring of 1989, whereas in the year preceding, (before we joined Berne), it registered 1,427 claims. This major loss of deposit copies forces the Library to purchase materials it would otherwise have acquired through registration, [4] or suffer gaps in the collection of French works.

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[4] Because tracking the identity of individual publishers proved difficult and we could not establish publication in the United States, demands were not issued for these materials.

The recent experience of the Copyright Office in registering renewal claims after amending the law to provide for automatic vesting suggests there would be a dramatic fall off in basic registration under the Reform Act. Notwithstanding several incentives to encourage renewal registration, [5] there was a drop off of 37% of renewal registrations comparing the last three months of 1992 with the last three months of 1991. [6] In the coming year, the administrative office of the Copyright Office is projecting a decline in renewal registrations of 40%.

Canada, a country with about one tenth the population of the United States, has a voluntary registration system. The certificate of copyright registration is prima facie evidence of the subsistence of the copyright. The other inducement to registration is an innocent infringement defense in a copyright action. [7] The Canadian Copyright Office registered 8,700 claims in the last fiscal year. This number has remained steady for many years. Approximately 15-20% of applications are foreign. There is no separate break-down for registration of United States works.

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[5] Although this registration decline does not affect deposits, it illustrates the potential for change in registration activity.

[6] The primary incentive for seeking a renewal certificate is the prima facie evidence value of that certificate. While this incentive appears identical to the incentive applicable in the Reform Bill, in the case of renewals it is far greater because the owner of a renewal right is never apparent. The incentive of statutory damages and attorney's fees is less significant for renewals since most works were registered for the original term, which makes them eligible for these remedies.

[7] Where the defendant alleges that he was not aware of the existence of the copyright in the work, the plaintiff is not entitled to any remedy other than injunction. If, however, the work was registered, the defendant will be deemed to have reasonable ground for suspecting that copyright subsisted in the work.

The incentives to encourage copyright registration must be finely calibrated if we want a strong public registration system. The recent changes in registration incentives have already resulted in a significant decline in registration and in the works available for the collections of the Library; drastic changes, such as the ones proposed, will be even more devastating.

2. The Proposed Reform Act would not be Cost-Effective from the Standpoints of Judicial Economy or Litigation Costs.

Under the proposed Reform Act, copyright registrations would drop dramatically. How much and how soon is a matter of speculation, but the long term outcome is not in doubt. The Canadian experience suggests many copyright owners will bring copyright infringement actions without attempting registration. Such a radical departure from 200 years of accepted copyright practice in the United States requires thoughtful appraisal.

Our present copyright registration system assists the courts and litigants in trying copyright matters. At the same time, the registration system avoids the complex administrative processing of the U.S. Patent Office. Despite these considerations, it cannot be denied that the copyright registration system has costs. Although the registration fees are low, businesses bear even higher administrative expenses in preparing applications. [8] In addition, applicants who have a legal dispute with the Copyright Office will bear substantial legal expenses in trying to resolve that dispute in their favor.

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[8] On numerous occasions the Copyright Office has addressed the concerns of businesses by simplifying registration procedures. Examples include establishing group registration procedures for periodicals and daily newspapers, and the recent agreement with a group representing photographers to permit the deposit of a video tape for groups of photographs. Despite these efforts to reduce expenses for businesses, it is obviously impossible to drop administrative expenses to zero, while maintaining the integrity of the public record.

While copyright applications involve some costs, there are greater costs associated with adding more cases and more complex copyright litigation to the burden of the federal judiciary. The relatively small number of infringement actions compared to registrations is a virtue -- not a criticism -- of the effectiveness of the public registration system. The Copyright Office believes that the long term costs engendered under the proposed Reform Act would outweigh any savings proprietors might enjoy by filing fewer copyright registrations.

Under section 410(c) of the copyright law, certificates of registration constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. Clearly, the most important issue clarified by registration is copyrightability. [9] Other important matters clarified by registration include the identity of the author and whether the work is made for hire; the identity of the copyright owner, and if different from the author, the basis of the legal transfer of ownership; the existence of prior registrations, preexisting material, and issues of new matter; and a basis of eligibility for copyright claims in foreign works.

Many, if not most, new forms of creative expression originate first in the United States. In this environment of swift technological change, copyrightability issues of new modes of expression must be addressed virtually at the outset of market introduction. Recent examples include computer programs in a wide variety of formats, including embodiment in a computer chip; elaborate

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[9] Historically, copyright registration was extremely important in clarifying compliance with formalities. Because the Berne Convention Implementation Act of 1988 abolished all remaining formalities, that function has fallen by the wayside. In the meantime, however, issues of copyrightability have grown far more complex, and the importance of registration in this area has been elevated accordingly.

costume designs; holograms; printed circuit boards; [10] the potential separate copyrightability of computer screens; and electronic databases. In addition, Congress recently extended the copyright law to cover an old form of creative expression -- building designs, in order to meet Berne Convention requirements.

In the United States, copyrightability issues are initially addressed through the copyright registration system. Many examples can be cited where the Copyright Office acted to provide guidance in newly emerging areas of the copyright law. For the purposes of this statement, the Office will cite only the issue of separate registration of computer screens. The Office initially dealt with the subject in the area of video games; and, as a matter of first impression, permitted the screens to be registered separately from the underlying code. After a series of confusing court cases in the area of computer programs, the Copyright Office held a public hearing on the issue. Following study of the issue, the Copyright Office concluded that all copyrightable expression in a program and a video game, including the screens, should be registered as one work. Accordingly, a policy statement was published in the Federal Register implementing the decision. 53 FR 21817. The Copyright Office's policy clarification assisted the courts in dealing with issues involving computer screens. [11]

Last year the Copyright Office registered 650,000 copyright claims representing the core of the intellectual output of the United States. [12] It

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[10] While registration of printed circuit boards has been sought, the Copyright Office has consistently maintained that such utilitarian designs do not qualify for copyright protection.

[11] Manufactures Technologies, Inc. v. CAMS, Inc., 706 F.Supp 984 (D. Conn. 1989.); Lotus Development Corp. v. Paperback Software Int'l., 740 F.Supp 37 (D. Mass 1990).

[12] In a major Report entitled COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: 1977-1990, prepared for the International Intellectual Property Alliance by (continued...)

is impossible to overstate the importance of the intellectual property those registrations represented. It is, however, relatively easy to overlook the importance of 14,000 cases received in the Copyright Office which are not reflected in those figures. Those 14,000 cases involved copyright claims refused registration, largely for noncopyrightability. If ten percent of those cases were litigated, the copyright caseload of the courts would nearly double.

Section 102(b) of the copyright law excludes copyright protection in "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such a work." Copyright Office regulation §202.1, 37 C.F.R., expands on the material not subject to copyright to include words and short phrases, such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents; blank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecard, address books, report forms, order forms and the like, which are designed for recording information, and do not in themselves convey information. The regulation also excludes works consisting entirely of information that is common property containing no original authorship, such as, for example, standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources. New Copyright Office regulation §202.11 concerning architectural works provides exclusions for structures other than buildings, such as bridges, cloverleafs, dams, walkways, tents, recreational

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[12](...continued)
Stephan Siwek and Harold Furchtgott-Roth of Economists Incorporated, it was concluded that the "core" copyright industries contributed $190 billion to the U.S. economy, and represented 3.3% of the gross domestic product.

vehicles, mobile homes, and boats. The regulation additionally excludes standard features, such as standard configuration of spaces, and individual standard features, including windows, doors and other staple building components.

The central principle underlying the list of exclusions is that these elements represent the basic building blocks of human expression. Monopoly claims on the building blocks of expression subject all citizens to harassing copyright infringement suits for exercising basic First Amendment freedoms, and engaging in legitimate business enterprises. The copyright registration system screens out those claims.

Decisions of the Copyright Office on copyrightability are not infallible. There are basically two ways to appeal decisions of Office rejection. First, owners of copyright claims refused registration can file copyright infringement actions against alleged infringers, but must proceed in the face of a public record of a refusal to register the claim. Alternatively, rejected applicants can appeal Office decisions directly under the Administrative Procedure Act. [13]

Overturning a refusal to register by the Copyright Office is difficult. That is how it should be because claims refused registration usually involve monopoly claims in the basic building blocks of human expression.

The proposed Reform Act effectively abolishes this entire process of front end screening of copyright claims. Obviously, no copyright claimant who anticipates a possible rejection would seek registration. Rather the claimant would proceed directly to federal court. Under such a system, the uniformity imposed by the copyright registration system at the front end would be lost

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[13] Section 701(d) of the Copyright Act makes the APA generally applicable to administrative functions of the Copyright Office.

entirely. Instead, our already over burdened federal judiciary would be required to make ad hoc decisions without the benefit of review by copyright specialists who make decisions on copyrightability everyday on the basis of their familiarity with the vast array of copyrightable expression. This system would impose enormous costs in the long term because ad hoc litigation on the limits of the copyright law will not produce as uniform and consistent an approach.

By removing the obligation to register before filing copyright infringement actions, the Reform Act takes absolutely no account of defendants' rights. Defendants would have no access to a public record system to help them easily identify the authorship they are charged with infringing.

After studying the issue of copyright registration in the context of the Berne Convention Implementation Act of 1988, the Administrative Office of the United States Court expressed strong support for the current system. In a letter addressed to Chairman Robert Kastenmeier, Director L. Ralph Mecham made the following statement:

> The [Judicial] Conference decided not to take a position on any of [the Berne Convention implementing] bills. It did, however, approve the suggestion of its Committee on Federal-State Jurisdiction that Congress be advised that, to the extent the bills delete the requirement of registration of a copyright as a prerequisite to litigation, there is likely to be increased difficulty in trying copyright cases. In effect, the Conference concluded that it was helpful to point out to the Congress the usefulness of the registration requirement in trying copyright cases . . .

Several years ago, a major study was undertaken on the cost-effectiveness of the U.S. copyright system, compared with foreign copyright

systems. [14] The study examined copyright enforcement policies of the motion picture industry and the fabric industry. Of the countries studied, only the United States possessed a largely universal public record system. The study concluded that the system in place in the United States was far more cost effective because of the legal and commercial benefits which flowed from the public record.

In summary, the system currently in place, which provides front end copyright screening and creates a public record of copyright claims, is highly cost effective in dealing with complex copyright issues. The Reform bill would gut the registration system in order to address up front expenses. Such an approach, however, would prove far more costly in the long run because it would shift resolution of disputes to the most costly method possible - ad hoc federal litigation. Under the Reform Bill, the uniformity, efficiency, and universality of the current system would be lost.

C. Benefits of Present Registration System

A system of copyright registration has been a central feature of our copyright law since its origin in 1790, and the deposit of material to identify the work being registered has always been required. Since 1846 (except for an interval of a few years) copies of published works under copyright have also been required to be deposited in the Library of Congress for its collections.

The present copyright act provides for two kinds of deposit section 408 registration deposit and section 407 mandatory deposit. One deposit may

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[14] Cost-Benefit Analysis of U.S. Copyright Formalities, King Research, Inc. (February 1987).

satisfy both requirements, but deposit under section 407 may be made without registering a claim to copyright.

Deposit has always been a key element of the United States copyright system, although the method of encouraging or enforcing deposit has differed. The present copyright act encourages deposit by registration incentives. Registration and deposit have always been linked. Removal of incentives to register as proposed in this bill would vitiate the registration system and also dry up the source of deposit material for the Library of Congress. As noted earlier in countries such as Canada, which have wholly voluntary systems of registration without sufficient inducements to register, most copyrights are not registered. Compelling inducements are needed to achieve a fairly complete coverage of claims in copyright registration records. The present registration system provides benefits for both copyright owners and users and has other significant values, not all of which can be assigned a monetary value.

1. Value to Copyright Owners

Registration provides authors and other copyright owners a permanent and official record of their copyright claims. It furnishes them with proof of the existence of their works at a particular time and the facts supporting their copyright claims. Particularly important to them is the certificate of registration, which constitutes prima facie evidence of the stated facts and is generally accepted as proof of copyright. [15] A strong public registration system facilitates enforcement of copyright against infringers.

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[15] While the bill proposes retention of this incentive, overall weakening of the registration system from the elimination of the other incentives will gradually devalue the presumption of validity.

2. Value to Users

Registration serves other purposes for persons who wish to use copyrighted materials. It provides accessible official records from which they can obtain information regarding the existence and basis of a copyright claim, the extent of the claim (e.g., in a new version of a preexisting work), its duration, and its initial ownership. In conjunction with the records of assignments and other transfers of ownership, it enables users to trace title to the copyright. Thus, a user can identify the person from whom permission must be obtained before using a copyrighted work in order to avoid infringement.

3. Value of the Public Record

In the major foreign countries that have no public registry for copyrights, private organizations find it necessary to maintain much the same kind of copyright records for their own use. This is indicative of the value of a registration system, but we believe that a public registry is far preferable: it provides a single, comprehensive record that is official, based on an objective administrative review, and freely accessible to the entire public. Private records may serve the purpose of the particular groups that maintain them, but they do not provide, for users of copyright materials and for the public, the accessible source of authoritative information afforded by a central public registry.

More than 24,000,000 copyright claims have been registered in Copyright Office records; more than 600,000 were registered last year. This vast wealth of information is freely available to copyright users, scholars, and the public. Because the registration system required the deposit of copies and specific information concerning each copyright claim, the registration records are of high quality and very complete, especially concerning commercially viable

works. It has been noted that there are relatively few copyright infringement actions filed each year (fewer than 2000). The Copyright Office believes that the registration system reduces infringement actions by weeding out frivolous claims, and by providing certainty concerning the validity of registered claims, complete facts surrounding ownership and extent of claim, and identity of the copyrighted work through the deposit copies.

4. Registration Deposit Enriches the Collections of the Library

Copyright registration provides a means for securing the voluntary deposit of copies, which are made available to the collections of the Library of Congress. One major advantage of the present registration system is that it results in the deposit of large numbers of unpublished works.

The Copyright Act does not authorize the Library of Congress to demand copies of unpublished works, but the Library does have access to copies of unpublished works deposited for registration. Certain categories of works (unique works of art not reproduced in copies; music that does not become commercially successful, or has a limited audience; dramas which may be performed but may not be reproduced in copies for the public; and photographs) are often unpublished. Major television programs, computer programs, and CD-ROM databases may not be "published" in the statutory sense.

In 1992, the Copyright Office registered claims in 208,000 unpublished works including 115,000 works of the performing arts (music, dramas, choreography and pantomimes, motion pictures and filmstrips); and 24,000 works of the visual arts (fine and graphic art, sculptural works, technical drawings and models, photographs, cartographic works, commercial permits and labels, and works of applied art and architecture). The Copyright Act requires that the Office retain copies of unpublished works for the life of the copyright. The

Office does not dispose of any unpublished deposits. Copies of millions of unpublished works are contained in Copyright Office and Library files. Those copies are sometimes the only remaining copy of a work which would otherwise be permanently lost.

5. Judicial Economy

Registration provides an administrative review of copyright claims to assist the courts and the public in construing the law.

- Many unfounded claims, usually resulting from a lack of understanding or knowledge of the law, are weeded out, thus avoiding needless controversy and litigation.
- Authors and other claimants not familiar with the law are informed of the requirements for copyright protection.

6. Commercial Transactions

A strong public registration system facilitates commercial transactions relating to copyright.

D. Flexibility of the Deposit and Registration System

One of the complaints about the 1909 Copyright Act was the rigidity of the deposit and registration requirements. The present Act eliminated mandatory basic registration and replaced it with permissive registration by offering incentives to induce registration, and requiring the deposit of two copies if published, or one copy if unpublished, for registration. The present law also permits exceptional treatment for both registration and deposit where exceptions are warranted, making deposit and registration more flexible.

Section 408(c)(1) of the present law authorizes the Register of Copyrights to specify, by regulation, the nature of the copies or phonorecords to be deposited for registration. The regulations may also require or permit,

for particular kinds of works, the deposit of identifying material instead of copies or phonorecords, the deposit of only one copy or phonorecord where two would normally be required, or a single registration for a group of related works. The Register's regulatory options are partially limited by the statute and by requirements of the Library of Congress to receive copies or phonorecords consistent with its acquisition policies. The Library would be permitted to demand these copies or phonorecords in any case, under section 407, if the works were published; therefore, deposit for registration is not an additional burden in cases where the Library could demand deposit.

The Register has used his authority to issue deposit regulations in sections 202.19, 202.20, and 202.21 of the code of federal regulations, 37 CFR Chapter II. Section 202.19 prescribes rules pertaining to the deposit of copies and phonorecords of published works for the Library of Congress under section 407 of title 17 of the United States Code. These regulations implement the Library's goal of receiving deposits of copyrighted works consistent with its acquisitions policies. The regulations exempt those categories of works -- like greeting cards -- that the Library does not seek to acquire and that the Library receives in preferred formats. Section 202.20 of the regulations contains the detailed registration deposit requirements for different categories of works. Section 202.21 establishes requirements for identifying material in lieu of copies or phonorecords. The deposit requirements are tailored to subject matter, the need to identify the copyrighted work, and the needs of the Library. The Office has also issued regulations concerning group registration of contributions to periodicals, daily newspapers, and serials.

In those regulations the Copyright Office attempts to accommodate the needs of depositors as well as the Office and the Library. The Office is always

available to meet creators of works who may be having a problem with deposit or registration to reach an acceptable accommodation within the parameters imposed by the copyright law and the needs of the Library. There are few cases where deposit is an onerous burden that cannot be ameliorated by changes in Office regulations or by special relief granted on a case-by-case basis.

For example, in 1992 the Copyright Office approved a special procedure for registration of collections of unpublished photographs. Following a meeting with representatives of the American Society of Magazine Photographers, the Office agreed to their preferred form of deposit: 3600 images captured on one videotape. This was "the easiest, cheapest, and most efficient option from the standpoint of both the photographer and the Copyright Office." [16]

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[16] Letter of May 21, 1992 from Charles Ossola to Harriet Oler, Chief, Examining Division. Appendix I.

II. ANALYSIS OF TITLE I AMENDMENTS TO RECORDATION

A. Summary of Changes

The Copyright Reform Act proposes changes that would overturn the National Peregrine case and permit security interests to be perfected by recordation of the document either with a state office as envisioned in the Uniform Commercial Code (UCC) or with the Copyright Office.

The Reform Act contains amendments to the 301 preemption section and to section 205 governing recordation of documents. H.R. 897 proposes to reverse the federal preemption of recording security interests in the Copyright Office and permit recordation in the states under the UCC. It does this by amending Section 301 of the Copyright Act to add a new paragraph (b)(5) "perfecting security interests," to the list of subject matter not preempted by federal copyright law.

Section 205 of the Copyright Act provides rules regarding recordation of transfers or other documents pertaining to copyright interests in the Copyright Office. Section 205(c)(2), provides an added inducement to registration; it gives all persons constructive notice of the facts stated in a document recorded in the Copyright Office if the document specifically identifies the work(s) to which it applies and registration has been made in the Office. The Copyright Reform Act proposes to remove paragraph (c)(2) thus removing another inducement to register. Removal of paragraph (c)(2) would give constructive notice of the facts stated in any document recorded in the Office regardless of registration if the document complies with (c)(1) and reveals specific information so that it could be revealed by a reasonable search.

B. Effect of the *Peregrine* Decision on Recordation of Security Interests

A security interest relating to copyright involves a mortgage that may be secured by a copyright. Perfecting a security interest requires the preparation of a document under the Uniform Commercial Code (UCC) and recordation of the document. The UCC specifies that the document should be recorded in the appropriate state to perfect the security interest. Decisions in National Peregrine, Inc. v. Capitol Federal Savings and Loan, 116 Bankr. 194 (Bank. C.D. Cal. 1990) and Official Unsecured Creditor's Committee v. Zenith Productions, Ltd. (In re AEG Acquisitions Corp.), 127 Bankr. 34 (Bank, C.D. Cal. 1991), held that state UCC statutes for perfecting security interests involving copyrights are preempted by sections 205 and 301 of the Copyright Act. These decisions require recordation of such security interests in the Copyright Office in compliance with section 205 of the Copyright Act. Absent such recordation the interest will be deemed unsecured. Since section 205(c)(2) also requires registration for the work for the document to give constructive notice, registration of the works must also be made.

C. Comment on Proposed Amendments to Recordation

The Copyright Office does not oppose reversing the National Peregrine decision. Considerable uncertainty now exists because lenders are much more familiar with the UCC than the Copyright Act. Persons taking the security interest may be unable to make a registration if they are unfamiliar with the registration facts or do not have copies of the works to deposit. In some cases considerable time and expense may be involved.

As you note in your floor statement, Mr. Chairman, similar issues have arisen with respect to filings in the Patent and Trademark Office. The

American Bar Association, Patent, Trademark and Copyright Subcommittee is currently studying the problems posed by recording intellectual property security interests. A report is forthcoming.

The Copyright Office suggests that it might be advisable to await the publication of this report by the bar group and have the benefit of their thinking before proposing legislation to cover both recordation of a security interest in the Copyright Office and the Patent and Trademark Office.

The Copyright Office would like to point out a problem that may exist regarding the proposed amendments to recordation.

Section 205(d) of the Act governs the priority between conflicting transfers. Under the section, the first transfer executed prevails if it is recorded in the Copyright Office in the manner required to give constructive notice under 205(c), within one month after its execution in the United States, or at any time before recordation in such manner of a later transfer.

The amendment of section 301 to permit security interests to be perfected by recordation in the state may still create an uncertainty with the lender as to the requirement of section 205(d) governing priority of copyright transfers which require recordation in the Copyright Office.

In considering amendments to the recordation provisions, the Copyright Office also notes the possibilities in the emerging electronic era. While bankers today may be more comfortable dealing with local state filings under the U.C.C., in the future it will be technologically possible for a sole centralized source of recorded security interests to deliver that information on a banker's terminal in his office.

III. ANALYSIS OF TITLE II OF THE COPYRIGHT REFORM ACT

A. Summary of Amendments to Chapter 8 of Title 17

Title II of the bill amends chapter 8 of the Copyright Act which governs the establishment and operation of the Copyright Royalty Tribunal. See, 17 U.S.C. §§801-810. The bill eliminates the Copyright Royalty Tribunal and gives the Register of Copyrights authority to convene copyright arbitration royalty panels to set rates and distribute royalties for the section 111 cable compulsory license, the section 119 satellite carrier compulsory license, the section 118 public broadcasting compulsory license, and the Audio Home Recording Act of 1992, section 1001 et. seq.

New section 801 empowers the Register of Copyrights to appoint and convene copyright arbitration panels for the purposes of adjusting the royalty rates and distributing the royalties collected pursuant to the cable and satellite carrier compulsory licenses and the Audio Home Recording Act, and the setting of rates and licensing terms for the section 118 public broadcasting compulsory license. The format of the proposed arbitration panels is patterned after the arbitration process currently appearing in section 119(c)(3) of the satellite carrier compulsory license. For each panel, the Register is directed to select two arbitrators not more than 10 days after publication (presumably in the Federal Register, although the bill does not specifically so provide) of a notice initiating an arbitration proceeding. The two arbitrators are to be selected from lists of arbitrators provided to the Register by the parties participating in the arbitration. This is different from the satellite carrier arbitration panel, which required selection from a list of arbitrators registered with the American Arbitration Association. See 56 FR 67601 (1991). However, like

the satellite license, the two arbitrators select the third arbitrator who serves as chairperson of the proceedings. If the two arbitrators cannot agree as to the third, the Register is directed to make the selection.

Once the arbitration panel is convened, it has 180 days from publication of the notice of initiation of proceedings to report its determination as to either the royalty rate or distribution, depending upon the purpose of the proceeding. During this 180 day period, the panel is charged with building a fully documented written record. The bill provides that any copyright owner who claims to be entitled to cable and satellite royalties and any interested "copyright party" claiming to be entitled to audio home recording royalties "may submit relevant information and proposals to the arbitration panels in proceedings applicable to such copyright owner or interested copyright party." The bill is not clear as to whether these submissions may be made in distribution proceedings only, or rate setting proceedings as well. Furthermore, non-copyright owners (such as cable or public broadcasters) are not afforded the opportunity to make such submissions in the rate setting proceedings in which they would participate. The bill does provide, however, that all parties to the proceedings shall bear the entire cost thereof as directed by the panel, which presumably would include both copyright and non-copyright interests.

Upon receipt of the report of the arbitration panel, the Register has 60 days either to accept the determination of the panel or to reject it as arbitrary. If the Register rejects the report, he or she must substitute his or her own decision. The total time period from initiation of proceedings to final decision is seven months. The final decision may be appealed directly to the Court of Appeals for the District of Columbia Circuit within 30 days of its publication in the Federal Register.

Although new sections 801 and 802 are applicable to proceedings adjusting the rates of the compulsory licenses, new section 803 is expressly directed towards those proceedings. Any "owner or user of a copyrighted work whose royalty rates are specified by this title" may petition the Register for an adjustment of a royalty rate(s). The bill directs that the Register shall "make a determination as to whether the petitioner has a significant interest in the royalty rate in which an adjustment is requested," and, if so, convene an arbitration panel for such purposes.

Section 803(a) provides that the royalty rates set by the arbitration panels "shall attempt to reflect what the fair market value of the use would be in the absence of a compulsory license," except in accordance with the specific provisions of section 803(b). This differs from the rate setting process of the satellite carrier license, in that fair market value was only one of the factors considered by that arbitration panel, as opposed to an overall goal.

Section 803(b) delineates rate making requirements for specific compulsory licenses. In the case of cable, the provisions found in current section 801(2) are carried over completely into the bill. Petitions for royalty and cable gross receipts adjustments due to inflation or deflation may be filed in 1995 and every five years thereafter, and petitions for adjustments due to changes in FCC cable carriage, syndicated and sports exclusivity regulations may be filed within 12 months of the change, and reconsidered in 1995 and every five years thereafter (if applicable).

With respect to the mechanical compulsory license of section 115 for the making of phonorecords, petitions for adjustments in the royalty rates may be filed in 1997 and every ten years thereafter.

The jukebox compulsory license, which is currently suspended to the end of the decade and has been replaced by negotiated licenses, is addressed in new section 803(b)(3). In the event that a negotiated license expires and is not replaced, the Register shall convene an arbitration panel upon petition within one year of expiration of that negotiated license. The panel shall establish an interim rate until a new jukebox license is negotiated. The bill also ends the current suspension of the section 116 jukebox compulsory license by repealing the license altogether, thereby subjecting jukebox to the negotiated licenses of current section 116A.

Finally, the bill provides that adjustment of royalty rates for the section 118 public broadcasting compulsory license and the audio home recording license are governed by the provisions currently contained in those sections. Current sections 805 through 810, which describe the details of operation and administration of the Copyright Royalty Tribunal, and judicial review of Tribunal orders, are repealed.

B. Cost Analysis

The Copyright Office believes that any cost savings to the government by eliminating the Copyright Royalty Tribunal and transferring its responsibilities to the Register of Copyrights, as administered through arbitration panels, will be *de minimis*. Less than 15 percent of the Tribunal's operating budget currently comes from appropriated funds. Furthermore, the costs to parties participating in the rate adjustment and distribution proceedings may increase significantly, under the proposed bill, negating any administrative efficiencies achieved by Tribunal elimination.

For the last several fiscal years, approximately 85% of the CRT's operating budget has come from the royalty fund, and 15% from the appropriated general fund. In FY 1993, $781,000 of a budget of $911,000 will be paid out of the royalty pools.

Based on current figures, outright elimination of the Tribunal could save the government no more than $150,000 a fiscal year. Although the Copyright Office does not foresee any immense increase in costs associated with assuming the responsibilities of the CRT, increased staff and administrative costs associated with the task will consume some, if not all, of the CRT "dividend."

The Copyright Office is prepared and capable to shoulder the tasks of the bill, but any resultant savings in costs to the government will be extremely de minimis.

The Copyright Office does not perceive any cost savings to the parties participating in distribution. New section 802(c) makes it clear that the "parties to the proceedings shall bear the entire cost thereof in such manner and proportion as the arbitration panels shall direct," thus placing 100% of the cost of the arbitration panels on the participating parties. [17] By directly assessing the participants, the bill changes current law which allows the Tribunal to deduct its costs from the specific royalty pool. Thus, for example, in the case of a ratemaking proceeding, those copyright claimants who participated in an arbitration proceeding and successfully raised the rates would be required to bear the burden of the cost of the proceeding (minus the amounts paid by any non copyright holders). Unlike the current law, where the cost would be

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[17] The bill is not clear as to what, if any, of the costs incurred by the Register must be paid by the parties. Thus, for example, if the Register should reject a decision of an arbitration panel and make his or her own finding, are the parties assessed the costs associated with that finding (which presumably would be done after the arbitration panel had assessed costs)?

shared by all existing and potential claimants through an assessment of costs against the total royalty fund, non participant copyright claimants to the arbitration proceeding would shoulder no cost, and yet still benefit from the increase in royalty rates. The practice of charging only the participants to a proceeding may shift a disproportional amount of the costs of ratemaking and distribution proceedings to a relatively few number of parties, rather than spreading costs evenly.

Another perceived inefficiency is the possibility of increased costs per proceeding versus costs now associated with the CRT. The CRT has established an eclectic body of precedent, particularly in distribution proceedings, throughout the years which has served to shape and form its activities. The Commissioners and permanent staff have therefore developed a working knowledge of copyright and the factors related to the ratemaking and distribution process, resulting in institutional efficiencies. The arbitration panels proposed in the bill will contain different arbitrators each time they are convened. The parties will therefore be required to undertake the cost of "educating" the panel members in the ratemaking and distribution process, along with familiarizing them with the extensive precedent and procedures of the Tribunal which will be carried over into the process. [18] The lack of continuity created by separate panels not bound in identity or precedent may likely dramatically increase the attendant costs of their convening, creating overall economic inefficiencies and possible

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[18] The bill does not provide any specifics as to how the arbitration panels are to conduct the distribution process. Presumably, CRT procedures of dividing the distribution into two phases, along with attendant procedures and precedent for hearings, interlocutory matters, etc., may be adopted by the panels. If such procedures are not carried over, the participants would then be faced with even more costs in essentially reinventing the wheel.

inequalities of administration. The Register will probably have little impact on the arbitration panels given the narrow standard of review.

The anticipated but illusory cost savings could be made real by a simple amendment allowing the CRT to deduct all of its administrative costs from the royalty pools. This simple amendment would save taxpayers some money without the potential inefficiencies and dislocations of the pending bill.

IV. CONCLUSION

The bill's anticipated cost savings are marginal, given that the Copyright Royalty Tribunal is nearly self-sustaining now. The 14 percent of the CRT's budget now paid by taxpayers could be saved more easily and surely by a simple amendment allowing the CRT to deduct all of its administrative costs from the royalty pools. If there are problems relating to rotation of the chairmanship and majority rule, the bill could provide for presidential appointment of the CRT Chairman and decision by majority rule.

If the Congress continues to prefer the transference of CRT functions to arbitral panels supervised by the Copyright Office, this transfer can and should be effected without making the Register of Copyrights a presidential appointee and otherwise fracturing the nearly 100 year old relationship between the Librarian of Congress and the Register of Copyrights. The Appointments Clause of the Constitution presents no problem in the transfer of CRT functions since the Librarian is a presidential appointee who could supervise these new functions of the Register and the Copyright Office.

To realize any cost savings from a transfer of the CRT functions, the bill must be clarified to permit the Copyright Office to deduct all of its administrative costs associated with the supervision and review of the arbitral panels. The bill allows the arbitral panels to deduct their costs but makes no provision for the deduction of post-arbitral costs.

The Reform Act's Title I amendments to the copyright registration and recordation system are not presented by the bill's sponsors as cost saving measures but rather as minor improvements. Let no one mistake their real impact. Title I's minor amendments are in fact radical surgery with all of the costs

associated with radical surgery. Title I will cost taxpayers. The inevitable decline in registrations will have a devastating impact on the flow of copyright deposits to the collections of the Library. Mandatory deposit is not, and cannot be made, a full substitute for registration deposit. In any case, mandatory deposit is more costly to taxpayers than registration deposit. Either the Library will have to be authorized to expend additional appropriated funds to acquire items lost from registration deposit by Title I's elimination of two of the three incentives for making registration, or the Nation will suffer major gaps in the collections of the Library.

We are convinced registrations will decline substantially. How much and how soon depends on a variety of perceptions and behaviors. Other countries have abandoned a strong public registration system in favor of private registries because those countries mistakenly failed to provide sufficient incentives to induce registration. One result is less effective enforcement of copyright in foreign countries, which we are now seeking to correct through trade-related intellectual property standards. Most experts would agree that it is much easier to get quick relief in the courts of the United States than it is in other countries.

In addition to the negative, costly impact on the Library's collections, the Title I amendments impact the judicial system and litigation costs. The Judicial Conference is on record as noting that elimination of registration as a prerequisite to suit for copyright infringement means increased difficulty in trying copyright cases.

"Increased difficulty" means increased taxpayer costs for judicial administration -- more judges, more space, and greater ligitation costs. More

suits and more complex litigation mean the litigation costs of parties will increase, especially for defendants.

Increased litigation costs do not necessarily mean better enforcement of copyright. The problems associated with relatively minor infringements of the copyrights of photographers, for example, will not be cured by this bill. At bottom judicial enforcement for minor infringements is not successful. Free lance photographers cannot really sue magazine publishers and other clients who give them work. Portrait photographers have a different problem: the public and the courts have never really accepted the 1976 Copyright Act's change in the law which took the copyright away from the party commissioning the photograph and gave the copyright to the photographer. The average citizen does not understand why he or she cannot get extra prints of studio photographs of their family from a less expensive source than the original photographer. Photographers face an uphill battle in educating the public about the current copyright law, but education rather than judicial enforcement is the more efficient solution.

Whatever the merits of the photographers' concerns -- which the Copyright Office has tried to address through flexible registration deposit practices -- the registration incentives of existing law should not be changed without a thorough study of their merits and of the possible impact of the proposed amendments on the Library's collections, judicial administration, and litigation costs.

Mr. Chairman, the public registration system has served the interests of copyright owners, copyright users, and the public. The registration system is now essentially self-sustaining. Those who benefit directly from the system pay about 60 percent of the costs through user fees. The value of copyright deposits transferred to the Library for the permanent collections, or for

exchanges to acquire other works, generally equals the portion of the Copyright Office's budget from appropriations. This is truly a win-win situation. We urge you not to legislate changes that will, we think, drastically impact this nearly self-sustaining government operation without an in-depth study.

APPENDIX I

HUNTON & WILLIAMS

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May 21, 1992

Harriet Oler
Chief, Examining Division
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Photography Deposit Options

Dear Ms. Oler:

Dick Weisgrau and I appreciated the time that you, Dorothy Schrader and Frank Vitalis took at our March 26, 1992 meeting to discuss the deposit options available to photographers submitting applications for group registration of unpublished photographs in the Copyright Office. The purpose of this letter is to confirm our understanding of what the Copyright Office would regard as acceptable deposit formats for the photographer/group registration applicant.

As we mentioned at our meeting, we intend to give guidance to the 5,000 members of the American Society of Magazine Photographers based on the outcome of our meeting. Before we do so, we thought it would be prudent to obtain written confirmation from you that our understanding of the Copyright Office's position on group registration deposit options for photography is correct.

At our meeting, the following forms of deposit for group registration applications for unpublished photographs were deemed acceptable to the Copyright Office:

1. One separate transparency per image included in the group sought to be registered.

2. One or more 8 x 10 color sheets containing color chrome copies of 20 transparencies on each 8 x 10 sheet.

3. One or more 8 x 10 color sheets, made from a laser printer, containing color copies of 20 transparencies on each 8 x 10 sheet.

4. A videotape on VHS format containing as many images as the camera can focus upon while preserving the visibility of each image. As many as 3600 images (30 images per minute on a 120 minute tape) could be included in one videotape, as long as the elements of each image were ascertainable.

We agreed at the meeting that the easiest, cheapest, and most efficient option from the standpoint of both the photographer and the Copyright Office is option 4, the videotape. That is not to say that individual photographers will not make their own independent decisions as to what particular option to utilize; but the videotape option seems the most attractive in general, and it has the added virtue of presenting the fewest logistical problems for the Copyright Office.

Mr. HUGHES. Dorothy, did you have a statement?

Ms. SCHRADER. No.

Mr. HUGHES. OK. Welcome.

First of all, Ralph, let me invite you to run for public office, and you will find that we manage to antagonize everybody, so I am sympathetic.

First of all, let me just assure you once again, as I attempted to do yesterday and as I attempted to do in other conversations, that we are going to take whatever time we need to take to examine this issue in depth. It is an important issue, and we have already begun talking to judges, and it may very well be we will take some testimony from the courts, because I think it is important to hear from them on these issues. And we intend to talk to other experts. My colleague from California believes that we should get those in who have other expertise in the copyright area so that we have a broad range of views before we do anything.

I don't know that there is anything that is urgent, including what to do about the CRT. I haven't figured out what to do about them. Maybe you can help us.

Doctor, do you think the CRT has been operating effectively—cost effectively, efficiently?

Mr. BILLINGTON. Are you asking me, Mr. Chairman?

Mr. HUGHES. Yes.

Mr. BILLINGTON. Well, as I said in my testimony, I don't feel that the Library should take a position on this issue. I think it probably could operate more effectively, but I think I would really defer to my colleagues.

Mr. HUGHES. Are you privy to any of the battles that have been taking place over the years?

Mr. BILLINGTON. I am aware that there has been considerable conflict.

Mr. HUGHES. I spent a lot of time last year listening to them.

Mr. BILLINGTON. Yes.

Mr. HUGHES. I'm sure you must have. My colleague from California, I'm sure, could tell you of all the hours he spent listening to the battles among the three Commissioners.

Mr. BILLINGTON. Well, I think I would defer to my colleagues who deal more directly with it than I do.

Mr. HUGHES. You want to defer to Ralph.

What do you say, Ralph? What can you tell us about the operation of the CRT? Is it cost-effective?

Mr. OMAN. We have had continuous dealing with the CRT——

Mr. HUGHES. That is the understatement of the year.

Mr. OMAN [continuing]. On a professional level, and we see very little of the activity that you referred to, Mr. Chairman. I think if we look at the results we can't complain about the track record of the CRT. Their judgments are generally sustained by the courts, they do their work in a timely fashion, and I have not heard complaints coming from the private sector on the result.

Mr. HUGHES. As you know, that is because most of the matters are resolved amicably, and insofar as the courts are concerned, they defer to them, unless it is arbitrary and capricious. I'm not so sure how that helps us. Anyway, that is our problem and it is not necessarily your problem.

But even there, with the CRT, I don't know that there is anything that is so urgent that we have to rush into any particular solution to any aspect of the legislation, and we are going to take whatever time we have to take to make sure that what we do advances the public interest, doesn't take away from it, and I can assure you, Dr. Billington, that we are all concerned. We want to make sure the Library of Congress receives all the deposits that will enrich our society and future generations, and nobody wants to take away from that.

By the same token, we have reviewed deposit policy before. We did so just a couple of years ago and basically changed the law in the fashion that impacted the Library, by adopting a two-tier registration system for Berne Convention authors. But we made a determination as a matter of policy that it was prudent to do so under the circumstances. To gain the advantages of being signatories to the Berne Convention, we decided to do that.

What we are talking about here is basically once again reviewing policy to see whether or not it is good public policy. That is healthy, that is not detrimental. As you well know, as a professor of Princeton University and Woodrow Wilson School, we have seen a lot of changes over the years, and we haven't always changed as rapidly as required. So it is healthy.

For Library purposes only, Doctor—please leave aside the copyright registration in answering the question—for Library purposes only, you have absolutely no need, nor do you want, the first and last 25 pages of blacked-out source code from a 700,000-page computer program, do you?

Mr. BILLINGTON. I think for Library purposes, computer programs are an increasingly important part of the—we collect in all formats and all modes of the packaging and communication of human knowledge and creativity, not just because that is what Thomas Jefferson did in his library and Congress decided to do when it bought a universal library even at that early stage but because it is a distinctive feature of the American genius to be creative in a whole variety of formats and so forth. So I think there is a presumption of interest and importance.

On the question of the first and last 25 pages as far as the collections of the Library are concerned though, I would defer to Don Curran, who is the right person because he does supervise the machine-readable reading room.

We have the first and, as far as I know, only reading room devoted especially to machine-readable materials in the Library system. This is an important part of our function for the general public. Now on the specific things on those things, again, I would defer to Mr. Curran.

Mr. HUGHES. Would you identify yourself for the record, please?

Mr. BILLINGTON. He is the Associate Librarian for Constituent Services.

Mr. CURRAN. I am, as Dr. Billington said, the Associate Librarian for Constituent Services, and the body of materials that end up in the collections, the machine-readable materials that you refer to, are in our jurisdiction.

The answer to your question is no, we would not collect those materials as part of the collection of the Library of Congress that

you describe. That is an activity of the Copyright Office to aid them in making a registration. On the other hand, there are thousands of items that are in machine-readable form that come through the Library by way of the copyright registration system that are added to the collections.

Mr. HUGHES. You get those. You get the full tapes, do you not?

Mr. CURRAN. Yes, sir.

Mr. HUGHES. But my only question was——

Mr. CURRAN. The answer was no.

Mr. HUGHES. That was the question I was posing.

Mr. OMAN. Mr. Chairman, could I point out that those regulations, which require only the first 25 pages and the last 25 pages, were adopted at the request of the copyright owners to make their lives simpler and to protect their trade secrets and that we have to examine something to ensure that there is sufficient copyrightable authorship to issue the certificate which they can then use in court as prima facie validity of their copyright.

Mr. HUGHES. Is that really of assistance to the court? How could the court gain anything of any value from the first page and perhaps the last 25 pages?

Mr. OMAN. It is used for identification purposes to ensure that the work that is being litigated over is the work that was, in fact, registered.

Mr. HUGHES. That is the point that the software folks were trying to make, as I understood it. It is really of no value to the Library of Congress, it penalizes them if they don't go through that formality, and it costs them money.

Now I grant you, they are fairly well-to-do corporations, but they are also right in saying that it also puts them at a competitive disadvantage to their foreign counterparts. My only question—and you have answered it—is, really, it is of no value, no value to the Library of Congress because these deposits are worthless to the Library of Congress, and I suspect they are of no value—but we will ask the courts—to the courts.

Mr. OMAN. They see the registration system as useful to the efficient administration of justice, and it is required in that context. There are other machine-readable works, computer programs, as well, that are important to the Library's collections. Some of those come in through the mandatory deposit function. Some of the witnesses yesterday suggested that this is done automatically. I checked the figures when I got back to the office last night, and apparently 445 items were received through this automatic deposit system, the mandatory deposit system.

Mr. HUGHES. Over what period of time?

Mr. OMAN. Out of 40,000 titles in print, 146 were sent in as a result of demand, and that was maybe one-quarter of the total that came in altogether, but this is really a very small amount of the work that is being created. But maybe it is all that the Library needs at this particular juncture in history. Perhaps when machine-readable works become more relied on by scholars and archivists we will increase the demands and rely more heavily on the works that come in through registration.

Mr. HUGHES. Dr. Billington, for Library purposes do you have any need or do you want the 100,000 commercial photographic images that the Olan Mills Corp. generates a week?

Mr. BILLINGTON. Well, I can't answer that. I don't know what the photographs that the Olan Mills people generate every week are. We have an enormous photographic collection, which is an increasingly important record of the American experience. You are asking another of a series of questions, I think, as to what the Library retains for its permanent collections of these, and I think there are a lot of decisions that have to be made, but we really retain a great deal of these materials. Whether we would retain this particular set or not I don't know, but we are dealing with the kinds of numbers and the kinds of decisions that it is hard to give you an honest assessment of on the basis of anecdotal and episodic examples of this kind.

Mr. HUGHES. Are they commercial photographs you retain, or are they specialized photographs like kids' school pictures?

Mr. BILLINGTON. Well, the acquisitions policy of photographs is based on a wide variety of acquisitions, but a great deal of it comes in from the copyright collections. This is one of the really immense special collections at the Library, and it benefits from having a fairly rich segment to go through that comes in automatically. Otherwise, it wouldn't be anything like the collection that it is.

Mr. HUGHES. Yes, but the vast majority of commercial photographs, would the Library of Congress have any interest in?

Mr. BILLINGTON. Well, it is rather hard—not really, of course. I mean our main interest isn't in commercial photographs, no. I think the answer to that question is no, the vast majority, but there will be some that could be very important for the national collection.

Mr. HUGHES. I have some additional questions, but I have gone well beyond my time.

The gentleman from California.

Mr. MOORHEAD. Thank you, Mr. Chairman.

Dr. Billington, we are going through a bill here that is very important to your Library and to all the intellectual property field. What I would really appreciate if you would do—I guess it doesn't do us any good to just be opposed. I would like for you and for Mr. Oman to go through all of the areas that are covered by this bill and tell me, in a letter or otherwise, with a copy to the chairman, where you think the Library or the Copyright Office or the Tribunal could be changed for the better, what we could do to improve the quality of work by legislation.

We agree that many things here may be detrimental, but I don't think just saying we are against it is going to prevail with the two top people in the Senate on this subject already on this bill. We have to be positive in what we are going to do. I think you will get a lot of ears that are willing to listen to your expertise, but we have got to go beyond where we are right now, especially with the Tribunal. I think they probably have been doing their major job well, but you have got to admit, if there is the kind of controversy among the members of any kind of an agency that you have had here, it perks up a lot of attention.

I would like to know what rules you think could be changed in the Tribunal, how that Tribunal could be changed, or even in basic format—bring it more closely under the Register of Copyrights—or what we can do not only in the quality of the product they put out but in the perception that it gives the public to improve it, so that Bill Hughes and I and others won't be faced with complaints on a regular basis.

I think you are the best able to do that of anyone that I know of, and I would really appreciate that expertise.

Now, Dr. Billington, it is your opinion that H.R. 897 is not going to save money if it is going to cost a substantial amount of money beyond what is being spent now. Could you elaborate and provide us with your best figures?

Mr. BILLINGTON. Elaborate on the figures?

Mr. MOORHEAD. Yes, and if you can't now, help us out in a written answer later.

Mr. BILLINGTON. Yes, I will. I mean there are three categories of cost—the direct acquisitions cost outlays; there would be additional costs involved in the complex bibliographic work of identifying these things that aren't registered but that you want to claim, much more expensive than it probably seems; it would take a lot of expert calculation as well as judicial and administrative costs in going after the ones you aren't getting; and then there would be the foregone costs, which are almost impossible to calculate, particularly in the unpublished areas where we wouldn't even know about these works.

Costs—when you are talking about the Nation's creative and cultural heritage, it is very difficult to put numbers on it, because it is the same as we have with the security problems at the Library. People say, "Well, they are not that serious; we shouldn't take such drastic steps;" but it is impossible to calculate what the loss to the Nation is.

I just had dinner two nights ago with the head of Sloan Kettering, and he told me that one of the most important breakthroughs that they have just made in cancer research was a direct result of a volume of which there was a single copy in the Library of Congress from the 19th century. That was just a sheer accident that I happened to be having dinner with this particular gentleman, but it is testimony like that that makes you realize that you can't put a value on any loss, and particularly the uncertainties that are involved in something like this.

But we will be happy to provide you—with some statistics here, rather than rattle them off—incidentally, I am very happy to provide you with a detailed analysis of just the kind you talked about breaking down the different components in both cases.

Mr. MOORHEAD. We would very much appreciate that.

[The analysis follows:]

The following analysis assumes that there no longer would be a mandatory registration system and that the present incentives to registration no longer would exist.

We have calculated increases in staff for the Acquisitions Division needed to demand published works that would no longer be registered, and would therefore be unavailable for selection for the Library's collections. We have not estimated the administrative and space costs of increasing the size of the Copyright Acquisitions Division from 15 to 148 personnel in five years.

We have not attempted to estimate the increased cost either to the judicial system for handling infringement litigation that is obviated currently by the existence of a strong registration system, or to the Department of Justice for handling demands for works that publishers refuse to deposit voluntarily.

It is also impossible to put a value on the cost to the intellectual property business community that would result if we no longer maintained a fully comprehensive registry of the nation's creative works--a registry spanning a century containing nearly 25 million works that is constantly relied on by the courts in the course of copyright litigation, and by the business community for thousands of commercial transactions yearly. As this national record withers, so will its usefulness until it is ultimately abandoned.

If the registration of **published** works were to decline from 367,000 annually at the rate of 20%, 10%, 10%, 5%, and 5% to 215,000 during the first five years following enactment of HR 897, and then remained fairly constant for the following five years, and the registration of **unpublished** works declined from 220,000 annually by about two percent annually for the first five years to 199,000, and thereafter remained constant, then the following table represents the overall fiscal and staff impact.

In summary, the figures shown below indicate a cumulative additional appropriation of $14 million for the first five years and $28 million for the full ten years:

Current (FY93)	518	$9.5	--	--
	Staff [1]	**(A) Appropriated Funds w/out HR 897 ($ millions)**	**(B) Appropriated Funds with HR 897 ($ millions)**	**(C) = (B)-(A) Additional Appropriated Funds ($ millions)**
HR 897 Year 1	525	$9.5	$11.0	$1.5
HR 897 Year 2	529	$9.5	$11.7	$2.2
HR 897 Year 3	537	$9.5	$12.56	$3.06
HR 897 Year 4	538	$9.5	$12.87	$3.37
HR 897 Year 5	543	$9.5	$13.37	$3.87
SUB-TOTAL		**$47.5**	**$61.5**	**$14**
HR 897 Years 6 - 10	543	$47.5	$61.5	$14
TOTAL		**$95**	**$123**	**$28**

[1]The staff of the Copyright Acquisitions Division is included in this column. As the staff in copyright proper declines from 503 to 395 over 5 years, the acquisitions staff would climb from 15 to 148.

Mr. MOORHEAD. You have characterized the Library of Congress as a national library, and you have started to explain some of the people that have used it. Can you give some idea about some of the users of the Library?

Mr. BILLINGTON. Yes, sir. We have about 800,000 users that actually come to use the 22 reading rooms that we have here. We answer about 1,400,000—this is just statistics for last year—requests from around the country. The users, of course, are very varied. There is the Congressional Research Service which serves the Congress directly; there are serious scholars and researchers that do use us, for instance, for the history of the motion picture industry which is having its 100th anniversary this year; scholars using the film collection as well as traditional research materials. This helps, of course, keep markets alive for films, and it helps the industry itself. It is used in popular works.

Herman Wouk moved to Washington basically to use the Library of Congress' resources while writing "War and Remembrance." David McCulloch will give you the same testimony about many of his books and so forth. Documentary filmmakers like Ken Burns spent many months using the Library's prints—we were just talking about the photographs—and the manuscript collection as well to create his award-winning Civil War documentary film. Interlibrary loan which we do for free—unlike other research libraries which charge for it—we are free for libraries in every congressional district in the country; researchers using the Library's copyright card catalog to research the copyright status of works used in other works—major motion pictures, books, et cetera.

In short, the promotion of progress in the arts and sciences, a constitutional provision on which this whole enterprise is based, is actively promoted by these collections which, in turn, reinvigorate the creativity of the country and keep it going so that there is another generation of people to be concerned, in turn, about protecting their intellectual property and taking the risks that creativity involves.

So there is really a wide variety of users besides the obvious ones of this Library, but it does refuel the creative and the productive processes of the country, we think, and that is perhaps not as fully recognized or even as often acknowledged as it might be.

Mr. MOORHEAD. Dr. Billington, you have given us some information about the exchange and gift program. Can you elaborate how this program works?

Mr. BILLINGTON. Yes. Materials received through copyright, through Federal libraries and other sources that aren't needed by the Library are exchanged for materials that are needed through exchange agreements with thousands of institutions throughout the world. They are also used in our donation program to help underfunded U.S. libraries. We give away—we don't sell any duplicates or anything of that kind, but we give them to underfunded libraries throughout the country—in prisons, Indian reservations, and other libraries throughout the country. We give away thousands and thousands of books each year as well as using them for exchange and gifts, acquiring things that are needed by the national collections but that are especially difficult to acquire through the normal kind of book trade. So it is a very important part of what we do.

Mr. MOORHEAD. There are some who believe that in order for the Register of Copyrights to perform the duties of the CRT he needs to be appointed by the President to avoid a *Buckley* v. *Valeo* problem. The fourth circuit in 1978, in *Eltra* v. *Ringer,* 579 F. 2d 294, made a holding which I would like to put in the record but which is too long for me to read as a part of this question.

[The holding follows:]

The Fourth Circuit in 1978 in Eltra v. Ringer, 579 F.2d 294, held that:

> "...The operations of the Office of the Register are administrative and the Register must accordingly owe his appointment, as he does, to appointment by one who is in turn appointed by the President in accordance with the Appointments Clause. It is irrelevant that the Office of the Librarian of Congress is codified under the legislative branch or that it receives its appropriation as a part of the legislation appropriation. The Librarian performs certain functions which may be regarded as legislative (i.e., Congressional Research Service) and other functions (such as the Copyright Office) which are executive or administrative. Because of its hybrid character, it could have been grouped code-wise under either the legislative or executive department. But such code-grouping cannot determine whether a given function is executive or legislative...

Mr. MOORHEAD. The final portion of it is this:

"The Supreme Court has properly assumed over the decades since 1909 that the Copyright Office is an executive office, operating under the direction of an Officer of the United States and as such is operating in conformity with the Appointments Clause."

This decision is pretty clear. It would appear that there is no *Buckley* v. *Valeo* problem in the Copyright Office. We don't need to make the Register a Presidential appointment in order to transfer to him CRT functions. Is this correct?

Mr. BILLINGTON. I'm sorry, but could you just rephrase the final question again, please?

Mr. MOORHEAD. All right. The decision in the Supreme Court is rather clear. They are saying that there is no *Buckley* v. *Valeo* problem in the Copyright Office and that we don't need really to make the Register a Presidential appointment to transfer CRT functions to him. Is this basically correct?

Mr. BILLINGTON. Yes, we believe so. We got our Congressional Research Service to look at it, and they thought that the CRT functions could be easily transferred to us, as I indicated in my testimony, since the Librarian is a Presidential appointee and they didn't see that there were any legal obstacles to that at all. I think that has been upheld.

Mr. MOORHEAD. Mr. Oman, the lawyer down there, do you want to reply to that?

Mr. OMAN. Yes. I would agree with the fourth circuit's assessment, and that judgment was borne out by the study that was commissioned by Mr. Hughes of CRS.

Mr. MOORHEAD. I know I have gone way over my time, but I wanted to ask Dr. Billington one more question.

You indicate in your statement that this bill separates the Copyright Office from the Library of Congress. Could you elaborate on that, please.

Mr. BILLINGTON. Well, there has been, as you know, a 123-year tradition which has worked well, really, with two objectives: to maintain a strong copyright law and, at the same time, a vibrant Library of Congress. There is the constitutional mandate to promote the progress of science and the useful arts, which is, in part, a social contract with authors who create works and at the same time make them available to the public and the Library of Congress, makes them available for the serious users, the variety of which I have already alluded to.

Historically, deposits come in through copyright, and much of this unique published and unpublished material would not be here but for the copyright deposit, and, as I indicated in my testimony, Mr. Moorhead, we fear that mandatory deposit won't work, and we know that our budget is being trimmed back so that we cannot expect to purchase what we do not otherwise receive by copyright.

The close working relationship between the Copyright Office and the Library of Congress helps us to get materials not only in the least onerous way but also the best quality material for preservation purposes. That is a new problem that has come up; it is something I know you are familiar with, Mr. Chairman, and have been very helpful with on film preservation, because the motion picture agreement gives us better quality copies of 35-millimeter film, for instance, than mandatory deposit will; that is, there are no splices, it is not an old projection print, and so forth.

So we think, in summary, that the relationship has been a good one. We don't doubt that it is subject to reexamination and that there are particular improvements, but to move from particular improvements which may seem minor to changes which will have uncertain effects and could have very devastating effects seems to us a radical step, and we do not think that mandatory deposit as an alternative is likely to be cheaper and, in fact, is more likely to cost more money than the copyright deposit system as it has historically evolved.

Mr. MOORHEAD. Thank you, Doctor. I know I have gone well beyond my time, and I want to thank the chairman for allowing me to do that.

Mr. HUGHES. They are important issues.

The gentleman from Rhode Island.

Mr. REED. Thank you, Mr. Chairman. I just have a few questions.

Mr. Oman, in your testimony I think you indicated you take no position with respect to the transfer of CRT functions to your office, that any mechanism would be appropriate in your view.

Mr. OMAN. Those that are on the table all strike me as workable, and we would be able to exercise the authority that is proposed for us under the authority of the Librarian; yes, sir.

Mr. REED. And we can assume from that that you don't anticipate any adverse financial impact on your office by that reorganization or, another issue, increased litigation because of the changes that are proposed that you would have to deal with.

Mr. OMAN. Those costs, if the amendment that I had requested is made to the legislation, would be borne by the royalty pool, the $200 million royalty pool that would be overseen by the new procedures.

The litigation costs perhaps would be increased for the parties at the outset as they get used to the new system and people get used to the new standards that are established by the bill. It would establish as the benchmark, which the arbitrators would search out, fair market value, which is a change in the standard from what was originally proposed in 1976. This would require additional litigation to sort out, but I think this system could settle down to a routine after a few years and be as cheap if not cheaper than the current system.

Mr. REED. I'm having a little bit of difficulty in sorting out the principal issue. I think your principal objection, both Mr. Billington and Mr. Oman, to the legislation is that it would discourage deposits to the Library of Congress of materials, and just to clarify again, in your mind, Mr. Oman, and I presume Mr. Billington, you have separated that from any reorganization issues contained in the bill; you see this as a totally separate issue, that we could go ahead and reorganize the Copyright Tribunal transfer functions, do a Presidential appointee or not do a Presidential appointee, and it is separate from the issue of deposits. Is that correct, just for my clarification?

Mr. BILLINGTON. No. I think the question of the Presidential appointee or not—in other words, removing the control over regulations and staffing from the Library is a very serious part of the risk to the acquisitions policy and to the sustaining of the collections of the Library of Congress.

The other question is totally removable, the removal of the Tribunal. Yes, absolutely, a variety of mechanisms can come. But the question of moving it, the Copyright Office, out of the Library of Congress organizationally, which is what happens if you make it a special Presidential appointee, and presumably an executive branch agency, raises then a whole new set of questions for the Library's acquisitions that are of the gravest concern. But the Royalty Tribunal, yes, that is quite separate.

Mr. REED. Could you just elaborate, and I know time is short, but what grave questions would be raised if Mr. Oman worked for the President of the United States and didn't work for you?

Mr. BILLINGTON. Well, the question of making effective regulations, the whole question of how you are going to define and enforce the continued receipt of books; it is a very simple matter. As it is, the Librarian is able to enforce not simply the acquisition of books but the original constitutional purpose of advancing progress in the arts and sciences by our continuing to assemble this univer-

sal collection to directly see to it that both staff and regulations and our activities are doing this.

There is no reason why good copyright law—and maybe we can improve it in certain respects as well as good administrative practices—that any accumulation of particulars can't be well handled under this line of command, which is directly responsive to the Congress in any case, and we are happy to try to correct it or take a hard look at it, and we will in response to Mr. Moorhead's question earlier.

But the separation out of this would mean we would have to reinvent the wheel, and it would cost a great deal of money and duplication to, in effect, assure that we would have anything like the same kind of level or speed in the acquiring of materials. That is very important too because of delays as well as cost, and we think it would end up costing more money, so that the admirable intention that seems to underlie many of these proposals—that is, to streamline and save money—would, in fact, almost certainly have the opposite effect in the end, in our view.

Mr. REED. But it is at least theoretically conceivable that you could bifurcate the functions and give the Library statutory responsibility to receive deposits—in fact, mandate deposits and create incentives to make people deposit, give you regulatory authority to promulgate regulations about how and when you receive deposits while, at the same time, giving responsibilities for issuing registrations of copyright and all of the things that the Copyright Office does now in a separate form, is that at least theoretically conceivable? Your argument would be, it would be expensive.

Mr. BILLINGTON. The bill removes two of the three incentives that exist, so I think it——

Mr. REED. Again, I don't want to belabor the point, perhaps the disincentive to deposit is one thing, but I don't see—and I'll stop here—the immediate connection between who is responsible for running the copyright, be it an employee of the Library of Congress or a direct appointee to the President.

But one final line of questioning. I think in Mr. Oman's testimony he indicated that Canada basically has a system which is pretty much voluntary and perhaps somewhat similar to the direction in which this bill is headed. Is their national library—I presume they have one—languishing because no one deposits, and they can't acquire collections, and the Canadian culture is at risk?

Mr. BILLINGTON. I think to some extent. I think they get something like 6,000 deposits annual registration whereas we get something like 640,000. I mean there is quite a difference.

Mr. OMAN. In fact, in Canada the deposit aspect is not part of the Canadian copyright law, so the 8,000 registrations that I made reference to were only to establish the prima facie validity of the certificate which would be used in court to facilitate the trying of a copyright case.

The Library of Congress is unique in the world in terms of the scope of collections, the media of collections. If it is the National Library of Norway, they collect books in the Norwegian language. That is fairly easy to keep track of. They don't have any aspirations to universality. That is why we need works coming in from all over the world, from every aspect of our copyright industry, and why de-

posit is such an important part of our copyright registration system.

Mr. BILLINGTON. Yes, the Canadians collect only books, so that they don't have this wide, comprehensive collection of total creativity; and, second of all, of course the law now provides for the best edition of a work which the Library is able to determine with its expertise in terms of its acquisitions.

Mr. REED. Thank you.

Mr. HUGHES. I thank the gentleman.

The gentleman from Florida.

Mr. MCCOLLUM. Thank you very much, Mr. Chairman.

Mr. Oman, in your opinion, is there any need for somebody making determinations like the Copyright Tribunal makes to be an attorney?

Mr. OMAN. The question was asked yesterday of Professor Damich, and he ventured the opinion that it helps facilitate the orderly administration of the procedures by having trained attorneys exercising those functions. Historically, we have not required them to be attorneys, and some of the most distinguished Commissioners on the Copyright Royalty Tribunal were not attorneys, but it perhaps would facilitate matters if everyone were speaking the same language and understood the rules of evidence and could speed up the administrative process. But I would say that it is not an essential aspect of the job if, in fact, the person involved were conscientious and hard working and dedicated to coming to grips with the issues.

Mr. MCCOLLUM. Thank you. It was that testimony that he gave yesterday that prompted my question, and I appreciate your comment on it.

Mr. Billington, the photographers that are going to testify today or the folks representing them say that most photographs are not registered under the current system and that the argument that the Library would be deprived of key photographs therefore is really not very justified. One of their statements says that there is no systematic way of tracking the photographs deposited in connection with registration applications and there is no genuine interest in those photographs that are filed in the Copyright Office as far as expanding the Library's collections is concerned. Do you have any comment on that assessment by some of the witnesses that are going to follow you?

Mr. BILLINGTON. Well, I haven't seen this testimony, and we haven't had very much time to prepare for these hearings. This is a highly technical question.

I think there may very well be some adjustments that are desirable in how much we bring in, but I do know that in size and dimensions, copyright deposit has very much enriched the photographic collections which are becoming increasingly important in the Library. So I would be happy to take a look at their arguments, but I think it would be more responsible of me to read the full testimony and give you as part of perhaps the response to questions that Mr. Moorhead has already suggested——

Mr. MCCOLLUM. All right. That would be fine. I was just curious if you had a response.

I am curious, Mr. Oman—if I could ask you a photography type of question as well—is there, in your opinion, any value to the proposition that if somebody is a photographer and they don't register all of their photographs because there are thousands and thousands of them, I suppose, that they would have difficulty in suing with regard to those they don't register—is there some value in the argument that that difficulty actually is a positive thing because it would reduce the potential litigation out there? In other words, is there a problem that, if every photograph somebody takes and you can recover damages for somebody replicating it, that you are going to potentially clog the court systems or make trouble for somebody? I mean I have heard that argument made. What do you think?

Mr. OMAN. Was that question of me, Mr. McCollum?

Mr. MCCOLLUM. That is a question of you, Mr. Oman.

Mr. OMAN. The issue of registration of photography has been a problem for some years. There are companies like Olan Mills that have had problems with people copying their portraits. As a general rule, they don't register their works with the Copyright Office except when they go into court. Their problem has been convincing the courts that the person who commissioned and paid for the photograph, the portrait, isn't entitled to have somebody else make a copy of it, and that has been their difficulty in enforcing their rights more than the onerous burden of the registration system.

I do think that the requirement of registration and depositing of copies does serve the long-term interests of the Library of Congress. I could imagine a question being asked in 1870 of the Librarian, "What use is served by taking into the collections all of the photographs of Matthew Brady?" who was essentially a commercial photographer back during the Civil War. The fact that we have those works in the collection of the Library of Congress accounts for the extraordinary documentary that Ken Burns put together on the Civil War.

Let me ask Ms. Schrader to add a few technical points on that matter.

Mr. MCCOLLUM. Certainly. I would be happy to have you do that. Ms. Schrader.

Ms. SCHRADER. I just wanted to underline the point that there was a major change in the Copyright Act effective in 1978. Before 1978, the presumption of the law was that the commissioning party in the case of a portrait photograph owned the copyright, the photographer did not have the copyright. We changed the law in 1978. That is probably a good result. But the problem since then has been that the public has not really accepted that change completely. The ordinary person doesn't understand why they can't go to a less expensive place to get duplicate prints of the photographs of their children and their parents and why they have to go back to the original photographer to get the duplicate prints, and I think that is a major part of the problem of the enforcement of photographers' rights, especially in the case of the studio photographers.

Mr. MCCOLLUM. Rather than registration problems, yes.

Ms. SCHRADER. It is not registration.

Mr. MCCOLLUM. Right.

Mr. OMAN. And we have bent over backwards to accommodate them. We are allowing them to submit videotapes of 3,500 photographs for one fee of $20. We have been doing things like this on a regular basis to make their lives easier. We still haven't gotten all the way there, but we are determined to bring them into the system as best we can.

Mr. MCCOLLUM. One last question, Mr. Chairman, if you will indulge me, to Mr. Billington.

You have suggested that we do a study or have a study done, and you have listed quite a number of questions as to the impact on the Library and on the registration system that needs to be analyzed. Who, in your opinion, would be the type of person or persons qualified to do such a study? Who should we be having look at this if we were to pursue that avenue?

Mr. BILLINGTON. I really think we can do the study ourselves. The Congressional Research Service did a legal opinion on this question of the Tribunal and whether a new appointment is necessary for it. We have a tradition of doing objective studies for the Congress, and we could do it in-house, or we could get a combination of in-house and outside people.

Mr. MCCOLLUM. How long do you expect it would take to do that study if you did it?

Mr. BILLINGTON. I don't think terribly long.

Mr. MCCOLLUM. In other words, a few months? You could do it this year?

Mr. BILLINGTON. Sure. In terms of response, at least the way Mr. Moorhead was setting up a set of questions. It depends whether you want the study as a general, comprehensive study of the problem or a particular response to the provisions of this bill. But in either case, I don't see that this study would take a great deal of time. I think we have pretty good statistics and so forth. We have a lot of things to clarify.

One thing on this question of photos, for instance: We get a lot of things which we copyright which we don't add to the collections—jewelry, figurines, wallpaper. I mean a lot of these things involve intellectual creativity but are not properly parts of the collections. Much of the commercial photography would surely fall in that category as well, but some of it is important.

Most of the photographs we get are by gift and direct benefactions rather than through copyright deposits. We do get some in this category, but we get a lot of things that are copyrighted that don't become part of the national collection, so I don't think people should be shocked, and I see no reason—I mean I see it as part of my responsibilities as well as the Register's responsibilities to define and constantly update and revise copyright policy, that is part of our statutory responsibilities, as well as be concerned about the acquisitions policy.

So I think if there is a set of specific things that concern the photographers—we changed, for instance, our copyright registration of serials so that they could bulk register a whole amount, and I certainly am grateful for the airing of problems and for calling to my attention an additional range of concerns that I will want to be more attentive to in the future as well.

Mr. MCCOLLUM. Thank you, and thank you very much, Mr. Chairman.

Mr. HUGHES. Just to follow up on the gentleman's line of questioning, you know, we very much appreciate the Congressional Research Service's legal memo on basically *Buckley* v. *Valeo* and whether or not there are any constitutional infirmities involved in basically the Register of Copyrights making some of the decisions, raising some of the separation of powers questions. But my recollection is that that was a fourth circuit opinion; certiorari was not sought in that case. So at least for all purposes in the fourth circuit that may be the law but may not be the law of the land because the Supreme Court has never spoken on that.

So one of the questions is whether or not it is worth the risk. We are talking about a lot of money first of all, and if in fact there are some—if the D.C. circuit were to come out, for instance, with a decision that would put that in question, who can say, first of all, what would be the ultimate decision? I don't know, and while I think the CRS memo is helpful, it doesn't resolve the problem for us.

But more importantly and more to the point—and I don't know what the answer is—is deposit policy, the needs of the Library of Congress driving the policy in copyright, and if that is so—and I think it does to some extent—is that healthy?

I don't know what the answer is to whether or not the Register of Copyrights should be a Presidential appointment. I have heard it argued in discussions I have had with individuals about it. They say, well, it may unduly politicize the Office. Well, it hasn't politicized the Office in the Commissioner of Patents. Basically your job is every bit as important as the Commissioner of Patents. I would assume you would argue that. I think it is. You are paid the same salary, as I recall. It would give you certain amount of independence you presently don't have.

I think it is rather clear that Dr. Billington's concerns are a lot different in some respects because of his concerns about deposits in the Library than copyright policy concerns, and that may not be bad. It may be that it doesn't present that kind of a conflict of interest that, as policymakers, we should worry about it. But those are issues that I think are legitimate for discussion and debate, and it has nothing to do with Dr. Billington, you have been a very able administrator of the Library of Congress; it has nothing to do with that. It has to do with good copyright policy for the years ahead.

Mr. BILLINGTON. Mr. Chairman, with all due respect, I don't see why the Librarian of Congress cannot be entrusted to be concerned about good copyright policy as well as acquisitions for the Library. I am entirely a public servant at the service of the Congress, and these various considerations I am happy to have brought to my attention as well as to this committee's attention and to see that we give them due care and consideration. I have certainly always viewed my responsibilities as including good copyright policy. In fact, it is part of good copyright policy. It is one of the, really, two purposes, not only to protect the rights of authors but to facilitate the national collection which can be a base for the next generation

of authors and the continuation of the tradition, which we will continue to protect, of intellectual property rights.

Mr. HUGHES. But, Doctor, in all candor, I hope that you are the Librarian for the next 200 years, but you won't be, and we are talking about policy, what is good policy. Now it may very well be that you can reconcile those issues without too very much difficulty in the public interest, but how about the next Librarian of Congress when these issues come down the pike? We are going to have, with increasing frequency, the problems photographers are having, the problems that the software people have alluded to.

Your major interest, rightfully so, is to make sure that we have and continue to have the best library in the world. Now in most instances, your interests for that and the interests of developing good copyright policy are identical perhaps, but that is not always the case. We see some problems already. We saw it back in 1988 when we modified the law in the Berne Implementation Act. I would assume that gave you much heartburn. In fact, as I understand the history of the issue, it was held up for a number of months while we argued and debated just how to resolve it, and the way we resolved it was to set up a two-tiered system.

So we already have some conflicts that have developed. It has nothing to do with Dr. James Billington and his leadership of the Library of Congress, it has to do with policy, good policy, good copyright policy.

Let me ask you some questions, Ralph. On pages 5 and 6 of your statement you indicated that in moving supervisory authority over the Copyright Office and by eliminating the incentives supporting registration we diminish the responsiveness of depositors to the Library's needs. Can't we cure the regulatory problem by giving the Librarian the authority to promulgate regulations under section 407?

Mr. OMAN. They are promulgated under the authority of the Librarian today, and I suspect that that would continue under the regime you are proposing.

The larger question, I think, is whether or not the Register of Copyrights will be sensitive to the needs of the Library in a balanced way, in a way that promotes the long-term policies that undergird the copyright laws, and I would think that a change in the lines of authority and the giving of an independent authority to make demands under 407 to the Librarian would not necessarily be the most efficient way of handling the issue.

Mr. HUGHES. What I am interested in—and the point is, your suggestion that making the Register a Presidential appointee might somehow lead to a different approach than we currently have. If that is true, doesn't that demonstrate that there is somewhat of a conflict between copyright policy and Library acquisition policy?

Mr. OMAN. Of course, under the current regime a copyright registration deposit satisfies the mandatory deposit, so there is a great deal of overlap there in joint recordkeeping, and we do work together in both areas.

Mr. HUGHES. But doesn't it indicate some conflict? That is my point.

Mr. OMAN. The conflict I see is conflict that is healthy in promoting the underlying purpose of the copyright law. I don't think you would want in the efficient administration of justice a Register of Copyrights who was, as Cindy Daub said yesterday, in the pocket of the copyright industries. The courts would not defer to our certificates, we would not have the independent judgment, we would not be promoting the public interest.

I think having a foot in the Library camp, the user camp, and a foot in the creative community camp is very helpful in promoting the congressional purposes enunciated in the Copyright Act.

Mr. HUGHES. I see the conflict, and let me give you a good example of the kind of conflict that I am concerned about.

Have you read the written statement of the Newsletter Publishers Association, in particular the appendix, which reproduces a letter of yours to Mr. Warren dated January 4 of this year?

Mr. OMAN. I don't recall that specifically, but we have had many conversations with the Newsletter Publishers, and I am familiar with the issues involved.

Mr. HUGHES. I will give you the letter, if counsel can provide that. In the letter to Mr. Warren, you deny his request to use the Copyright Office's group registration procedure for daily newspapers. Mr. Warren publishes daily newsletters and will testify later. Your regulation permits daily newspapers to register all the issues of a newspaper in one month on one application for one fee of $40 when accompanied by a microfilm deposit. That is a very good idea, and I support that. I think that is forward looking and good policy.

But Mr. Warren comes along with his daily newsletters, and you say to him no, and the reason you gave him is the following—and I quote—"The Library's interest in acquiring daily newsletters can be fully satisfied by a few purchases and mandatory deposit." The group registration is for voluntary copyright registration under section 408, isn't it?

What you are saying very clearly in the letter, it seems to me, is that because the Library can get what it wants for its purposes, you are going to deny a request to use a copyright registration procedure designed to relieve unnecessary burdens and expenses on the part of copyright owners who are forced to register their works in order to preserve their legal rights. What copyright purpose is served by such a refusal?

Let's be clear about the consequence of that decision. What you are telling Mr. Warren is that if he wants to make sure he can receive statutory damages and attorney's fees for infringement, he has to register every single day each of his 13 newsletters. That is close to $9,000 in registration fees alone. Have I missed something in that?

Mr. OMAN. No. I think you have laid out the issues exactly as they are, Mr. Chairman. We have had long conversations with the Newsletter Publishers. We are, in his case, making available the normal procedures of the law that were established by Congress, the single fee, the single registration. The privilege of group registration is an exception to the general rule that we have allowed in certain instances when it serves the long-term interests of the Library.

We undertake to make the changes even though it costs us more money, and it is more difficult to examine them. There are administrative burdens that result, but we are willing to bear those burdens if there is something in exchange. There was something in exchange for the daily newspapers, because we got them on microfiche copies, they went directly into the collections of the Library of Congress; it was a good deal from the public's point of view.

The newsletters—the Library is not interested. Why make special arrangements for them if we can't make special arrangements across the board? That would be your decision to make if you want us to reorder our procedures. We would be happy to do that. But in this case we decided that there was no good public interest served in making that exception to the normal procedures.

Mr. HUGHES. My only point is that, it is an area where conflict exists, where policy decisions that are of interest to the Library of Congress are influencing a decision for a copyright owner who wants to protect his works against infringement. That is the only point I am making.

Mr. OMAN. I think I should point out that the strongest opposition to changing the procedures in terms of daily newsletters came not from the Library but from the Examining Division of the Copyright Office. They are not serving the interests necessarily of the Library, they are looking at their own work statistics, and their own work flow.

Mr. HUGHES. I understand.

Mr. OMAN. But this is an issue that we can reexamine obviously, and we will be happy to talk to Mr. Warren and others in this regard.

Mr. HUGHES. I have gone well beyond my time.

Does the gentleman from Florida have any more questions?

Mr. MCCOLLUM. No.

Mr. HUGHES. OK. I have a number of questions, but we will submit them to you in writing.

Let me assure you, we look forward to working with you to see if we can't get all the facts out so that as policymakers we can make the very best decisions for all concerned—for the Library of Congress, for copyright owners, users, and for the American public. We want to effect good policy, and we are going to take our time to make sure we understand all the problems, all the nuances, and it will be very helpful if, instead of making statements about the sky is about to fall in, let's get some facts out here and see if we can't examine them. We are willing to look at the facts and see if we can't work with you in developing good policy, OK?

Thank you very much.

Mr. OMAN. Thank you, Mr. Chairman.

Mr. BILLINGTON. Thank you.

Mr. HUGHES. Our second panel this morning consists of Art Rogers, an artist, and Richard Weisgrau, executive director of the American Society of Media Photographers. Mr. Rogers hails from Point Reyes, CA, and is responsible indirectly for the creation of the sculpture sitting on the table there and directly responsible for the sculpture being here.

I want to thank you, Mr. Weisgrau and also Chuck Ossola, for your efforts, which is, I think, one of the finest "show and tell" programs we have had in some time.

Mr. Weisgrau is intimately involved in copyright issues on behalf of photographers and the day-to-day problems they face in enforcing their rights.

We welcome both of you. You may take your seats at the witness table. We have your testimony, which we have read and, without objection, will be made a part of the record, and we would like you to summarize, Mr. Rogers and Mr. Weisgrau, so we can get right to questions. We have put your statements in the record in full. We have read them, so it would be very helpful if you could summarize.

Why don't we begin with you, Mr. Weisgrau. Welcome.

STATEMENT OF RICHARD WEISGRAU, EXECUTIVE DIRECTOR, AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, ACCOMPANIED BY CHARLES D. OSSOLA, ESQ., HUNTON & WILLIAMS

Mr. WEISGRAU. Mr. Chairman and committee members, counselors, guests of the committee, my name is Richard Weisgrau. I am the executive director of the American Society of Media Photographers. In some of the printed materials in evidence and before you, you will see the name "Magazine Photographers." We are the same organization, having recently changed our name to keep current with the technology. Generally, our association is known as the ASMP in the trade.

On behalf of our panel—Mr. Ossola, our general counsel; Mr. Art Rogers, an ASMP member; and his counselor, Mr. Donald Prutzman; and Mr. Vincent Striano, the president of ASMP, who came all the way from Washington State to sit in on these hearings and who singlehandedly directed our organization to look into this copyright registration issue 18 months ago—I want to thank you.

Mr. HUGHES. We thank him for coming, and welcome.

Mr. WEISGRAU. ASMP has 5,000 members. It has 36 chapters across the country; it has members on station in 26 countries; they do editorial, news, advertising, and corporate media photography; you can find them in the farm fields of Kansas today and in the fields of fire of Sarajevo tomorrow. We have placed a copy of our book in front of each position there, "10,000 Eyes," and you may have that with our compliments. It shows the diversity and quality of publication photographers' works.

Copyright is vital to their interest. This bill is critical to their interest. Without copyright, these people are no more than day workers who are highly educated, who spend years training and developing skills. With copyright, they are men and women with an estate, contributing to an information age that benefits the public interest.

I spent 22 years as a working professional and member of the society, 8 years on its board of directors, and now 5 as executive director. I have been in the trenches, and now I have the privilege to coach the people in the trenches. I am going to speak to you about what is going on out there. I am not going to talk to you about what I think happens, I am going to talk to you about what I know happens.

The vast majority of photographers simply do not receive the benefits of the copyright law when they are infringed. It is a good law when everything is working, but when there is an infringement it breaks down for photographers. Dorothy Schrader has said the ordinary person doesn't understand. I agree with her. All the people out there are ordinary people. The vast majority of people don't understand, and there is a lot of infringement on account of it.

I deal with infringement of ASMP members' work on a regular basis. I get the phone calls. After determining that they are bona fide infringements, I ask the question: "Did you register prior to this infringement?" Ninety-nine percent of the time, the answer to that question is no. When I explain the principle of actual damages and profits, I quickly find that a photographer is not in a position to cover the attorney's fees and costs to pursue a litigation to enforce his or her rights. The fact is that they withdraw from the matter usually feeling quite taken and very exposed in the future.

Photographers can't afford to pursue cases on principle alone; they can't get attorneys to take these type of cases on contingency; they simply can't function with the present registration requirement in enforcing their rights.

Sometimes I contact infringers on their behalf and attempt to arrange a payment. I have actually been told: "Sue me; you will never recover enough money to make it worth your while." I have been told that by infringers. Photographers almost never pursue infringements. The infringers go unpunished; the copyright owner loses, and the infringer wins. The registration requirement is becoming a shield for infringers.

We have filed supporting histories, and will continue to do that while the record is open, which document our position. When a photographer does pursue, as in the case of Mr. Rogers, he is in for big trouble, and Mr. Rogers will explain that. He took that photograph which gave birth to that statue. The birth of that statue then led to what I consider to be a miscarriage of justice.

The new technologies—if you read the wonderful book that the OTA made in 1985 about the effects of new technologies on the copyright system, you quickly come to understand that the rate of infringement in this country will increase. These new technologies have caused great stress already on photographers.

In the packets of information we have placed before you, we have placed an ad that we cut from a mail order catalog for "The Rip-Off Artist." "Rip-Off Artist Learns to Read." "Lift a photo, logo, or drawing, and transfer it to a report, manual, or article." It's like an invitation to steal. You are right, the public doesn't understand, but this is how they are advertised to.

This is a photograph of Niblett, the dog, with his pile of hotdogs, also in your packet, taken by our member, Preston Lyon. This is a photocopy of a newspaper ad where they scanned his photograph identically except for his credit line—they did leave his name out of it—and ran this. When this was discovered, Mr. Lyon came to us and asked what he should do. He had no registration prior to infringement. The actual damages might be the market value of a license to reproduce that image. That might be as much as $2,000. Mr. Lyon cannot hire an attorney and pursue an infringer with a

$2,000 reward at the end of the road. It makes it absolutely impossible for him.

[Articles appear in the appendix.]

Mr. WEISGRAU. Last year, Mr. Ossola and I were at a conference, on a panel, speaking to electronic publishers. An individual on that panel said to the whole audience, "Well, I think photographers' works are likely to be priced too high in this new media, so I'm just going to steal them, and you won't be able to do anything about it." This is an attitude that exists out there.

We are concerned about the Library of Congress and those issues, but we are concerned about survival of photographers. The ASMP has created an organization, the MPCS—that is, the Media Photographers Copyright Agency—and it is meant to imitate the music composers' attempts to create licensing agencies within their own industry to protect their interests, but we will not be able to protect photographers' interests with that agency unless this registration requirement is changed.

Photographers don't register. Some can't register. They don't own their work product; it is separate from the copyright. They shoot the product, and deliver it to the client, and never see it again. Some can't because they are out on locations for months at a time, shipping materials back to publishers. Those materials are in vast circulation long before they ever come home. Some don't because they can't afford to. It is money, time, and staff intensive.

Deadlines dictate to photographers. A photographer can come from an assignment with 200 rolls of film. That is 6,000 pictures, and the client wants it yesterday. When the photographs are finally published, it could be months later, and the photographer is back in the cycle with another client who doesn't have time to take all this material and register it. A photographer can produce more copyrightable works in one day than most authors will produce in their life.

The copyright is simply not working for photographers, it is working for the infringers. We have heard the argument that the Library of Congress needs these deposits. Last year in a meeting with the curators of the Prints and Photographic Division of the Library of Congress, they said to me, "We do not rely upon these deposits; we do not want these deposits; most of the material that is deposited is not in a form in which we can use it; we do not ask to have them sent over here; I think they are sent to somewhere in Virginia in a warehouse; we never go there; we don't want to go there." When I asked, "How do you get the work?" they said, "We identify the works we want and go out and secure them."

It would seem to me that under 407 they have the perfect vehicle to secure any published work they want. All they have to do is send a demand letter and say, "Send it in here," if it hasn't been. The Copyright Office or the Library of Congress have said they got 600,000 registered into the Library this year. To me, that says the system is a failure. There are millions of registered works. This is such a tiny percentage, it says the system doesn't work. If they really want them, they ought to find a more effective way. I don't think they really want them all though.

In my busiest year as a photographer—this is 1981—I created 300,000 images, of which more than 35,000 were published. I would not register them. How could I possibly register them?

We conducted discussions with the Copyright Office, and I must say that they have been very cooperative and they have always listened sensitively to our needs, and we have just published a paper to our members and other photographers about bulk registration, a new system on videotape. We accepted this gladly because it is the last best chance we have. It is not a solution. All photographers aren't going to register this way. It becomes almost impossible. Let me explain.

First of all, there is between a $700 and $900 commitment in equipment to go and do this. Now, as I told you before, 200 rolls of film in an assignment for a photographer out for a week or so is not unusual. That would be 6,000 color transparencies. Six thousand color transparencies amount to 80—you put 80 transparencies in a tray to project it, and this system requires projecting it and then videotaping those images on to the videotape.

With 80 per tray, 6,000 is 75 trays that have to be loaded, unloaded, all the images have to be catalogd, because obviously you have to be able to identify any image that is on the tape. They then have to be projected for a time long enough that an examiner can identify the copyrightable material—we estimate 2 to 3 seconds at a minimum—then the trays have to be unloaded and refilled and the next tray loaded and put on.

I did a little method/time motions work last night and just figured out, roughly speaking, that if you are really quick you can do a tray in 30 minutes and, if you are not, 45. On a 200-roll assignment, you could take between 37½ hours and 56½ hours to register, according to this system. No photographer can give a week up to register his week's worth of shooting. If you take the 300,000 images I shot in 1981, if I wanted to bulk register them all, I would have had to have one person on payroll for an entire year just doing that. I wouldn't have had a profit in my company if I had done that. Not to mention the fact that the photographer can't hold the film generally that long. People want this film. You don't tell a major news magazine, "Oh, excuse me, I can't send the images in because I have to register them." Their deadline is tomorrow morning.

They say that the elimination of the registration requirement will increase litigation. I can't accept it; I simply can't accept it. I have experience with registered photographs. Some photographers have registered and have had infringements. I have never seen one of those cases go to court. Why? Infringers don't want to play in that game. They are not going to come in and go to court. They settle these cases right away if there is a registered photograph. Attorney's fees keep people out of courts.

The fact is that if it does go to court, attorney's fees avoid prolonged litigation. As they say in the opening pages of this book, the common defense against an infringement prosecution is, outspend your opponent when he is a small, individual author. Attorney's fees would eliminate that and unclog the courts.

As to the thought that there might be frivolous lawsuits, a frivolous lawsuit brought by any creator could, as you know, be punish-

able by fees awarded to the defendant. They are not going to bring frivolous lawsuits; besides the fact, even if you get the attorney's fees, who wants to give up a couple of years of their life in litigation to prove a point? They want to stop infringement because it damages their work and their ability to earn a living.

Additionally, we have seen that strong enforcement is education. All you have to do is look at ASCAP in the music industry to see how enforcement educates, that it will reduce the amount of infringement.

Finally, I do not know why the doors to the courthouse shouldn't be open to any meritorious litigation. That is really what is going on out there, and, as I said, I have been there, and I must say, I'm going back tomorrow. The infringers get away with it, and the photographers find that they can't enforce their rights, and an unenforced right is really no right at all.

This bill really needs broad-based support, and it certainly gets it from the creator community, and I'm sure your mail over the next months will prove that and the open record as these organizations and authors write-in will prove that.

We are not asking the Congress to protect us. All we are asking for is to be given the means to protect ourselves. We want the system to work. I have volunteered to the Library of Congress curators to help them secure works from any photographer from whom they want them. I would be happy to sit down any time and work out better systems, but I can't believe that the photographers' interests in protecting their copyright have to be sacrificed so that we can collect more works in the Library. There have got to be other ways to collect the works. So I ask you please to speed this bill into law and give us the assistance we need.

Thank you.

Mr. HUGHES. Thank you very much, Mr. Weisgrau.

[The prepared statement of Mr. Weisgrau follows:]

JOINT STATEMENT OF RICHARD WEISGRAU, EXECUTIVE DIRECTOR OF THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, AND CHARLES D. OSSOLA, GENERAL COUNSEL, IN SUPPORT OF H.R. 897, THE COPYRIGHT REFORM ACT OF 1993

I. INTRODUCTION AND OVERVIEW

Mr. Chairman, we thank you and the other members of the Subcommittee for affording us the opportunity to present this testimony in support of H.R. 897, the Copyright Reform Act of 1993. We are here to testify on behalf of the American Society of Media (formerly Magazine) Photographers, which is known throughout the photographic industry as ASMP.

ASMP is a trade association comprised of nearly 5,000 of the world's finest professional freelance photographers engaged in the publication of photographs. The work of ASMP members is seen every day in magazines, advertisements and other published materials throughout the United States and abroad.

The copyrights in their photographs are the principal business assets of ASMP members. The rights flowing from copyright enable ASMP members to profit from and to control republication of their works during their careers. This source of income is also often the only retirement fund that ASMP members have.

We are, respectively, the Executive Director of ASMP, and the organization's general counsel. Mr. Weisgrau has served as Executive Director of ASMP since 1988, and in that capacity is in daily contact with the organization's Board of Directors, its 36 Chapters around the country, and the problems of many of ASMP's 5000 members. Mr. Weisgrau was formerly a working photographer

for 22 years, and served on ASMP's Board of Directors for 8 years prior to becoming Executive Director. Altogether, Mr. Weisgrau has over 30 years of experience in confronting the commercial and legal realities facing a professional photographer in this country. Over the last five years, Mr. Weisgrau has, as Executive Director of ASMP, advised hundreds of ASMP members on how to protect their copyright rights, and he has attempted to negotiate settlements of numerous infringement disputes involving the unauthorized use of ASMP members' photographs.

Mr. Ossola is a copyright lawyer in private practice who has represented ASMP on copyright matters since 1986, and who added general counsel responsibilities to his representation of ASMP in 1991. Mr. Ossola represented ASMP in its effort to achieve reform of the work made for hire provisions of the copyright laws (S. 1253 in the 101st Congress), and also represented ASMP as well as 45 other organizations in support of the artist's position in Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989), which rejected the argument that a freelance artist should be considered the work for hire "employee" of the party that commissioned him simply because of that party's right to supervise and direct the artist's efforts. Mr. Ossola has worked with Mr. Weisgrau in attempting to resolve many copyright disputes involving ASMP members, and he has also represented individual ASMP members, as well as a broad array of other individual and corporate clients, in copyright litigation throughout the United States.

ASMP believes that H.R. 897 is the most important copyright legislation to be introduced in the Congress in many years, and we strongly urge its prompt passage by the House and of the companion bill, S. 372, by the Senate. The bill makes available to all copyright owners, not just those with the resources and staff to promptly register copyrighted works, two critically important remedies for the violation of copyright rights--statutory damages and attorneys' fees. Under the present system, most ASMP members, and their counterparts in other creative disciplines, are unable to secure the benefits of these remedies in enforcement actions because they cannot comply with the burdensome requirements of section 412. As a result, most ASMP members, like other individual and small business copyright owners, are precluded from taking enforcement action against infringers. For ASMP members, Mr. Chairman, the copyright system often does not work, and the principal culprit is section 412.

Professional photographers in particular have a compelling and urgent need for elimination of this bureaucratic requirement, because they produce thousands of copyrighted works a year that cannot possibly be registered at all, much less in a timely fashion. Without a staff to process and organize for registration many thousands of photographs, ASMP members do not, and physically cannot, register the vast majority of their works. The enormous amount of time involved in preparing registration applications, and the expense required to produce deposit copies of each image registered, are far beyond the means of most

working photographers. Furthermore, as your introductory statement recognized, many photographers find it impossible to register their works at all because the unprocessed film that they send to their clients is often not returned to them, or at best occurs many months after the photographs have been published. And without deposit copies of photographs that are required to file a complete registration application, many ASMP members are unable ever to register their works, and thus cannot, as a jurisdictional matter, file suit against infringers under present law.

Nor can the argument that section 412 must be retained to preserve the collection of the Library of Congress stand in the way of this reform. Most photographs are not registered under the current system, and thus the argument that the Library would be deprived of access to deposit copies of photographs if section 412 were eliminated is illusory. Moreover, even for the relatively few photographs that are registered, the Library is neither aware of what comes into the Copyright Office, nor is it interested in the vast majority of what is sent in as deposit copies. The Photography and Prints Division of the Library has told us that they have no systematic way of tracking the photographs deposited in connection with registration applications. Not only does the Division not know what comes in the door, it has no genuine interest in photographs filed in the Copyright Office as a means of expanding the Library's collection.

The timely registration requirement serves no legitimate public benefit, and imposes enormous hardship--in terms of both time and expense--upon ASMP members and other individual authors. The requirement persists, despite United States adherence to the Berne Convention, as an obstacle to the enforcement and vindication of the copyright rights of individual authors in this country--an obstacle not faced by foreign authors who are exempt from the registration requirement as a result of the 1988 amendments to the Act. We should no longer maintain a system that makes it harder, rather than easier, to protect the copyright rights of individual authors, who as a group constitute the vast majority of copyright owners in this country. The bill sensibly provides for reform that will reverse that circumstance, and instead facilitate the enforcement of copyright rights by United States authors.

Accompanying out statement are several individual statements from photographers and an illustrator that highlight the need for the meaningful reform that would be achieved by H.R. 897. While the hearing record remains open, we anticipate the submission of other statements from individual ASMP members and others whose experience with the copyright system shows the vital importance of effective remedies, which are unfortunately absent in most cases under the present system. And we commend to the Subcommittee the experience of ASMP member Art Rogers, whose testimony vividly shows why rights without effective remedies are of little practical value in the real world.

II. THE CRITICALLY IMPORTANT REMEDIES OF STATUTORY DAMAGES AND ATTORNEYS' FEES SHOULD BE AVAILABLE TO ALL COPYRIGHT OWNERS IN ORDER TO MAKE COPYRIGHT RIGHTS ENFORCEABLE

H.R. 897 proposes to eliminate section 412 of the Copyright Act, which requires copyright owners to register their works before infringement commences (or within three months of publication for published works) in order to be eligible to claim statutory damages and attorneys' fees. 17 U.S.C. § 412(1), (2). This simple act of removing the timely registration obstacle to the availability of these remedies will mean that copyright rights will be enforceable for the first time for the vast majority of individual authors, including ASMP members.

A. History Of Section 412.

The requirements imposed by section 412 are of relatively recent vintage, having been introduced into the Copyright Act as part of the 1976 amendments. Under section 25 of the 1909 Act, the copyright proprietor of a registered, published work was entitled to recover actual damages and the profits earned by the infringer, or in the alternative "such damages as to the court may, in its discretion, allow the amounts as hereinafter stated...." 1909 Act, Sec. 25(b). Certain minimum and maximum amounts of these statutory damages were prescribed by the same provision of the Act. Id.

Similarly, section 40 of the 1909 Act vested the courts with the discretion to award reasonable attorneys' fees to the

prevailing party.[1/] Copyright owners were not required to register their works prior to infringement in order to be eligible for an award of attorneys' fees in the event liability was proved.

The 1976 Act introduced a new requirement, which in effect was a condition precedent, that had to be met even in order to be eligible for an award of statutory damages and attorneys' fees. Section 412 was intended to respond to the elimination of the requirement in the prior law that all published works be registered. It was conceived as a way to establish a practical inducement to the registration of published works. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 158 (1976). As for unpublished works, the rationale stated in the House Report was that the copyright owner "should not be given special statutory remedies unless the owner has, by registration, made a public record of his copyright claim." Id.

It is clear from the House Report that Congress believed that copyright plaintiffs would be able to secure injunctive relief to prevent infringement, and to recover actual damages and profits from infringers even where the "special remedies" of statutory damages and attorneys' fees were not available. Unfortunately, however, experience over the 15 years the 1976 Act has been in effect has shown that for individual authors and small business proprietors of copyright, the "usual" remedies are

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1/ In contrast, the 1909 Act provided that "full costs shall be allowed...," thereby making the award of costs mandatory. Sec. 40.

ineffective in the absence of the "special" remedies. In short, individual authors and small business owners of copyright cannot, in the vast majority of cases, file suit to obtain preliminary or permanent injunctive relief, or to recover actual damages and profits, unless they have the option of electing statutory damages and unless their attorneys' fees may be recovered from the defendant if the plaintiff prevails.

B. The Importance Of Statutory Damages And Attorneys' Fees In Copyright Infringement Litigation

The experience of ASMP members over the last 15 years has plainly shown that unless statutory damages and attorneys' fees can be recovered, copyright rights simply cannot be enforced. On a weekly basis, ASMP headquarters, and its Executive Director personally, receives information and documentation of 5-10 new infringements of the rights of ASMP members. The first question asked of ASMP members complaining of infringement is invariably: "Do you have a registration in place prior to infringement?", and, just as predictably, the answer is no in the vast majority of cases. From that point forward, the rest of the details--unfortunately including the egregiousness of the conduct and the willfulness of the infringer--are merely academic, for it is clear that the photographer simply cannot afford to litigate the matter. Indeed, even if ASMP were to lend its financial support to the member whose rights have been infringed, it is unlikely that the litigation can be justified as an economic proposition if the legal fees cannot be recovered.

As a result, infringers most often are undeterred by the threat of an enforcement action, which they know is a mere empty threat in the vast majority of cases for one overriding reason--the prospective plaintiff cannot recover statutory damages and attorneys' fees even if he or she proves liability. The simple reality is this: if attorneys' fees and statutory damages can be recovered, the individual and small business copyright owner is empowered to take enforcement action against infringers; and absent such remedies, enforcement is economically unjustifiable or altogether impossible. This is so for several reasons, all of them rooted in the reality of copyright litigation.

First, the foremost goal of most copyright plaintiffs is to obtain an injunction preventing continuation of the infringement. Monetary damages, except in the relatively rare case of obviously profitable infringement, are normally a secondary consideration for copyright plaintiffs who simply want the infringer to stop the illegal activity. But unless the individual or small business copyright plaintiff has substantial resources, he or she cannot afford to file an infringement action to obtain a preliminary or permanent injunction unless the fees associated with proving infringement will most likely be paid by the infringer. The practical reality is that the copyright plaintiff cannot stop the infringer unless this remedy is available--and infringers know, and take advantage of, that truth.

Second, most infringements do not involve large financial stakes from the standpoint of provable actual damages, or obvious

and substantial profits.[2/] It is often difficult, as Congress recognized in making statutory damages available in the first place, to prove any actual lost sales for which a causal connection with the infringing activity can be established. And where actual damages can be shown, they are most often negligible, or at the very least dwarfed by the costs of litigation. Insofar as the defendant's profits are concerned, they too are usually difficult to prove in the courtroom, and are more often than not far less than the costs of litigation.[3/]

Thus when a copyright plaintiff sits down to decide whether the high costs of obtaining injunctive relief and recovering provable damages can be economically justified,[4/] the answer

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2/ For example, the plaintiff in Branch v. Ogilvy & Mather, Inc., 772 F. Supp. 1359 (S.D.N.Y. 1991), succeeded in proving infringement, but was awarded profits of $1 by the jury. Fortunately for the plaintiff, he was able to elect statutory damages before judgment was entered, and he ended up with a $10,000 damages award. Had statutory damages been unavailable, as they are in most instances of infringement, the plaintiff would have recovered nothing despite proving infringement.

3/ Furthermore, despite the fact that § 504(b) only requires the plaintiff to prove gross revenues of the infringer and then shifts the burden to the defendant to prove deductible costs, the profits trial usually requires the plaintiff to retain one or more experts (if only to counter the defendant's creative profits calculation), and thus is very costly. As any lawyer who has represented a copyright plaintiff knows, expert testimony--often at hourly rates higher than the lawyer's--is a necessity if the defendant presents its own damages expert. But few individual and small business copyright litigants can afford to hire competent damages experts, and thus their chances of success on profits questions is often seriously compromised.

4/ Even preliminary injunctions, which are the fastest and most cost-effective means of resolving copyright disputes, often involve considerable discovery and sometimes require an

(continued...)

almost always is no if attorneys' fees and statutory damages cannot be recovered--and the infringer goes free. Absent the ability to recover statutory damages and attorneys' fees, the costs of infringement litigation usually exceed the amount in controversy, and thus cannot be borne by individuals and small businesses.

Third, for those relatively few individual and small business copyright owners who take on the challenge of an enforcement action without the ability to recover attorneys' fees and statutory damages, they face the prospect of extraordinary financial sacrifice even if they win. If the defendant knows that the plaintiff cannot recover his attorneys' fees, there is often a strong incentive to drag out the litigation until the plaintiff's limited financial resources are exhausted, and he either gives up or settles for a nominal amount that may not even cover the legal expenses. The sobering experience that ASMP member Art Rogers has had over the last three and a half years litigating an infringement case against a willful infringer, which is discussed at length in Mr. Rogers' separate testimony, is a current example of the depletion of resources and life

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1/ (...continued)
evidentiary hearing. It is not unusual for the legal fees associated with securing a preliminary injunctive to exceed $10,000, with the associated costs (such as transcript fees) often half as much. And even if the preliminary injunction is granted, the litigation may continue, and the fees and costs can easily exceed $50,000 and even $100,000 if the case goes to trial or settles close to the trial date. Few individual and small business plaintiffs can afford these litigation costs, even in cases where the infringement is clearly willful and ongoing.

savings that the individual plaintiff faces if he cannot recover his legal fees and related litigation expenses from the guilty defendant.

Fourth, individual and small business copyright owners find it difficult to find a lawyer to represent them--and especially to represent them well--if statutory damages and attorneys' fees cannot be recovered. If recovery of legal fees is impossible, most lawyers are reluctant to take on an infringement case unless the amounts likely to be recovered exceed the costs of bringing the action. As explained above, that usually is not so in most copyright litigation, and thus taking on the matter, even on a contingency arrangement, is a distinctly uninviting prospect for the lawyer. ASMP unfortunately has found that access to legal representation for photographers is extremely limited in infringement matters unless eligibility for statutory damages and attorneys' fees exists.

C. Despite Their Practical Importance, Statutory Damages And Attorneys' Fees Almost Always Are Not Available To ASMP Members And Other Individual And Small Business Copyright Owners

Section 412 of the Act is not working as intended, and is having the counterproductive effect of discouraging individual and small business copyright owners from protecting their rights. The plain reality is that the vast majority of ASMP members, and indeed of individual authors and copyright owners working in disciplines other than photography, do not and cannot register their works because they lack the resources and time to do so. This is not a matter of choice, it is a matter of reality, of the

everyday pressures that confront the working photographer or other professional in his or her career. There is no point in continuing to debate the academic proposition that photographers and other individual authors should register their works, for it is clearly apparent, as the Copyright Office has acknowledged to us, that they do not do so even under the current regime. Thus elimination of the registration requirement as a condition precedent for entitlement to statutory damages and attorneys' fees would not, in reality, change the status quo with respect to registration practices of individual authors: the vast majority do not register now, and they would not register if section 411(a) was revised as the bill proposes.

The importance of statutory damages and attorneys' fees notwithstanding, ASMP members find it impossible to register their works before the commencement of infringement, and the vast majority of them do not do so on any systematic basis. This is true for a variety of practical reasons:

1. The sheer volume of output by photographers precludes timely registration. ASMP photographers shooting for publication produce an enormous volume of work over the course of a year. In this respect, photographers are uniquely burdened by the registration-before-infringement requirement. On the average, a busy publication photographer creates many hundreds of images per assignment, and may create several thousand images per month. It is not unusual for an ASMP member to shoot well over 50,000 images annually, and that output represents just what he

shoots on assignment, and does not include what he or she shoot on his or her own. No creator working in other disciplines produces such a voluminous portfolio of copyrightable works, and that fact alone puts photographers in an especially vulnerable position with respect to compliance with the registration-before-infringement requirement.

2. The photographer has no staff, and he or she is often on the road in some distant location. Like most individual authors and small business people, the vast majority of working ASMP members do not have any staff to handle copyright registrations. In this respect, photographers and other individual authors are in a much different position than are publishers, which normally have the size and resources to assign the responsibility for registering their published works to one or more employees. If registration is to be done at all by ASMP photographers, they must do it themselves, and they find it impossible as a practical matter to do so.

By its nature, publication photography often requires the photographer to shoot on location for extended periods, and to travel extensively from one shoot to another. He or she is simply not in the office enough to handle the time-consuming task of filling out registration forms and making deposit copies of each image to be registered in the Copyright Office.

3. Photographers cannot register because they often do not have anything to deposit. Registration cannot be achieved unless a deposit copy of the work to be registered accompanies

the registration application. In many instances, however, photographers do not have film or negatives in their possession in order to comply with the deposit requirement. When shooting on location, many photographers are required to send their many rolls of exposed but unprocessed film to the client by overnight mail, and thus never see the photographs that result. It is not unusual for the film to be lost or damaged before it is returned to the photographer, if indeed that ever occurs at all. And even if it does occur, the return of prints or transparencies usually does not take place until well after the expiration of the three-month grace period for published work established by section 412.

4. Group registration of photographs is of limited value, and is unlikely to be effective in overcoming the practical obstacles to timely registration. ASMP has recently published and distributed to its members a "White Paper" on copyright registration of photographs. (A copy is attached to this statement). The purpose of the paper is to emphasize the importance of timely registration in preserving the vital remedies of statutory damages and attorneys' fees, and to provide photographers with the best possible information on how to most efficiently register their works.

The White Paper was in part an outgrowth of ASMP's discussions with the Copyright Office with respect to greater reliance on group registration of photographs as a means of inducing more photographers to register their works--and thus be better positioned to enforce their rights. ASMP appreciated the

willingness of the Copyright Office, and even of the Register himself, to work with us to develop the most efficacious group registration procedures achievable under current law. But we know that what emerged from this process, while perhaps the best that can be achieved under current law, will not, in the real world, result in a material change in photographers' registration practices.

• Group registration is available for published photographs only under limited circumstances that make it, in the words of ASMP's White Paper, "not very feasible as a safeguard system to protect one's rights." The requirement that a published photograph in a group registration be first published as a contribution to a collective work within a 12 month period is itself enough to make this procedure of extremely limited value to most photographers. 37 C.F.R. § 202.3(b)(6)(i)(c). Moreover, even if the law were changed to make group registration of published photographs easier, photographers would still have to deposit a copy of each published photograph, and that burden alone--given the volume of published photographs and the time and expense required to put together deposit copies--is insurmountable.

• Group registration of unpublished photographs is subject to fewer restrictions, but the deposit requirements associated even with those registrations are prohibitively expensive and burdensome. While hundreds of unpublished photographs could, in theory, be registered in a single group registration, the deposit

requirements--which the Copyright Office states that it could not waive--remain extraordinarily daunting to the individual photographer. The White Paper lays out several deposit options for photographers to utilize in group registrations of unpublished photographs, but even the most inviting of them--recording the images on a videotape--requires a substantial investment in equipment (camcorders are not cheap) and an even greater investment of precious time.[5/]

ASMP has no criticism of the Copyright Office on this issue, and indeed appreciated the cooperation the Office extended. Rather, as the bill recognizes, the problem lies with the statute itself, which the Office, of course, cannot change. That problem consists of the unavoidable reality that no matter how "easy" registration is made for photographers and other individual authors, it will remain expensive, burdensome and impossible to comply within a timely fashion as required by section 412. As a result, unless the law is changed as proposed by H.R. 897, statutory damages and attorneys' fees will remain unavailable to most copyright plaintiffs, and thus most infringements will be tolerated by frustrated copyright owners.

[5/] The Copyright Office has expressly approved the use of the videotape as a deposit option for group registration of unpublished photographs, and is aware that ASMP is encouraging its members to utilize that deposit format. The acceptability of the videotape format for group registration deposits of unpublished photographs reaffirms the reality that the Prints and Photographs Division of the Library of Congress has no genuine interest in the photographs deposited in the Copyright Office. It would be difficult to argue that the Library may have some legitimate interest in acquiring copies of the videotaped recordings of photographic images.

D. Strong Policy Considerations Favor The Elimination Of The Registration Requirement As A Condition Precedent For Recovery Of Statutory Damages And Attorneys' Fees

ASMP is most interested in making sure that the copyright laws are effective for photographers and other creators in practice, not just in theory. That is, unfortunately, not true today, and it has not been true for many years.

We do not claim that the unavailability of statutory damages and attorneys' fees is the only reason why copyright rights cannot be enforced by photographers against infringers. As ASMP has stated before in testimony before the Senate and in briefs before the federal courts, the work made for hire provisions of the copyright law work great hardship on ASMP members and other freelancers by unfairly and permanently depriving them of their rights of authors and of the benefits of copyright ownership. And we do not deny that in some cases, infringement litigation is simply impractical or ill-advised even if statutory damages and attorneys' fees are available.

We do claim, however, and we have the day-to-day experience to prove it, that infringement litigation is out of the question for the overwhelming majority of ASMP members for one simple reason--they cannot recover attorneys' fees and statutory damages. We further claim that the practical result of this phenomenon is that copyrights are, for most authors, simply unenforceable in the courts, and that copyright rights are infringed with impunity on a daily basis. We respectfully suggest that this should not be so, and that our copyright system

ought to work not only for the copyright industries, but for other equally deserving copyright owners who lack the resources to register on a timely basis and to protect their rights in the courts. We further suggest that the bill would go a long way toward making the system work better for individual authors and small business owners, and that the ultimate beneficiary of the changes it would introduce will be the public.

We believe several policy considerations strongly favor enactment of the bill:

1. As a matter of equity and sound copyright policy, statutory damages and attorneys' fees should be available to all copyright owners. These remedies should not be dispensed only to those copyright owners with the resources and staff to register all of their copyrighted works on a timely basis. The copyright laws should reflect a public policy in favor of protecting copyright rights and discouraging infringers regardless of the economic circumstances of the copyright owner, and without requiring compliance with bureaucratic formalities. Congress has already recognized, by authorizing the award of statutory damages and attorneys' fees, that these remedies further the objectives of the Copyright Act. "The broad discretionary power given courts to make such an award [of statutory damages] serves the dual purposes of the Copyright Act: to compensate copyright owners and to provide a deterrent for would-be infringers."

Lauratex Textile Corp. v. Allton Knitting Mills, Inc., 519 F. Supp. 730, 733 (S.D.N.Y. 1981).[6/]

2. The availability of statutory damages and attorneys' fees will force more settlements, and will do so more quickly. We can say from personal experience that when an infringer is faced with the prospect of paying both their lawyers and ours, they are suddenly more interested in negotiation rather than litigation. On several occasions, we have been involved in negotiations where we reminded the infringer that his litigation costs would likely include two sets of legal fees (the infringer's and ours), and that the expensive proposition of proving profits would be avoided by simply asking the court to award statutory damages based on, among other things, the extent to which the infringing conduct is found to be willful. In these instances, we were able to negotiate a fair settlement because the infringer recognized that it was more cost-effective, and less risky, to settle the matter rather to litigate it--and to do so before the legal fees, which the infringer would likely be held responsible for, mounted. Indeed, in our experience the availability of these remedies often makes it far easier to settle an infringement dispute without filing suit, because the infringer stands to pay the entire cost of litigation if it goes forward.

[6/] See also McCulloch v. Albert E. Price, Inc., 823 F.2d 316, 323 (9th Cir. 1987) ("Because section 505 is intended in part to encourage the assertion of colorable copyright claims, to deter infringement, and to make the plaintiff whole, fees are generally awarded to the prevailing plaintiff.").

3. Digital technology and electronic publishing will make effective enforcement of copyright rights even more important in the future. Changes in technology and publishing media will make it far easier for infringers to use copyrighted works such as photographs without authorization and without paying compensation. In the photography industry, this is already apparent. Images can easily be digitized with hand-held scanners, which some retailers do not hesitate to advertise as highly effective in copying the works of others. One scanner, referred to by the manufacturer as the "Rip-off Artist OCR", appeared recently in one trade publication under the following slogan: "Rip-Off Artist Learns to Read!" (Copy attached). The text of the ad invited the prospective customer to "snatch a photograph...", and "lift a photo, logo or drawing and transfer it to a report, manual or article."[2/]

Once scanned, photographs and other copyrighted material can easily be manipulated to suit the intended uses of the infringer. In some instances, the digital manipulation is so complete as to make the original work virtually unrecognizable, but we have already been informed of several cases in which photographs were obviously used to create infringing derivative works.

The anticipated explosion of electronic publishing over the next decade and into the 21st century will also make effective enforcement of copyright rights more important than ever for all

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2/ Buried deep in the text of the ad was a brief and half-hearted admonition to the reader to "please get permission and credit the source before you begin to scan copyrighted material."

copyright owners, big and small. Many commercial publications are already available on CD-ROM or through on-line services, and the distribution of an enormous variety of entertainment products--many of them incorporating photographs and other visual images--through electronic media will occur in the not-to-distant future. Photographs are already included in many electronic media products available for educational uses, and ASMP anticipates that the demand for photographs in entertainment media will increase rapidly in future years.

In order to serve the new market for electronic media products, and to deal with the multitude of enforcement problems that may result from widespread electronic distribution of photographs and the capabilities of scanning technology, ASMP has recently established a new subsidiary, which will operate under the name Media Photographers' Copyright Agency (MPCA). MPCA will negotiate licenses with electronic publishers on behalf of ASMP members, who collectively own the rights to millions of high-quality, marketable images. MPCA will also be expected to police compliance with license agreements and to take action against infringers who appropriate copyrighted images without permission.

The assets to be licensed by MPCA--the copyrights of ASMP members--will be substantially diminished in value if widespread piracy is tolerated. This legislation will make it possible for the new agency to undertake enforcement action against infringers, and to wield the threat of meaningful sanctions against infringers both as a means of deterring further illegal

activity, and of inducing settlement of infringement claims short of litigation.

4. The bill will facilitate enforcement of copyrights, and thereby encourage respect for copyright rights and deter infringement. The bill will have an immediate and significant impact on the integrity of our copyright system. By making copyright rights enforceable, the bill will subject infringers to substantial costs if they violate the rights of copyright owners, and especially if they do so knowingly or in reckless disregard of the owners' rights. Knowing that they will pay the price for their illegal activity, infringers will be inclined to settle legitimate infringement claims quickly and fairly. Moreover, those who are considering using copyrighted works without permission will be forced to think long and hard about whether it is worth it to risk substantial financial penalties if they are caught--or whether it is wiser to negotiate permission to use the works from the copyright owners. The overall objective of the copyright system ought to be to encourage respect for copyright rights, and to make sure that infringers will pay an appropriately stiff price if they violate those rights. H.R. 897 will make that objective far more attainable than it has been in the past.

5. The bill will not displace the discretion of the federal courts in making awards of statutory damages and attorneys' fees. The bill does not guarantee that any copyright plaintiff will receive a substantial award of statutory damages

if infringement is proved. Nor does the bill guarantee copyright plaintiffs that they will be entitled to an award of attorneys' fees if they prevail in the litigation, or if so how much of those fees will be awarded. Instead, the bill simply makes it possible for all copyright owners to recover statutory damages against infringers,[8/] and for them to be eligible to receive an award of attorneys' fees. It will still be up to the court to decide how large the award of statutory damages should be within the guidelines set forth in the statute. And it will still be the court's decision whether an award of fees is appropriate in any given case, and further how much that award should be in light of prevailing rates, the complexity of the issues, the conduct of the defendant and other equitable considerations.

Under current law, which would not be changed by the bill, the courts are authorized, but not required, to award attorneys' fees to the "prevailing party" in copyright litigation. 17 U.S.C. § 505. In practice, many courts routinely award attorneys' fees to prevailing copyright plaintiffs, and they do it in recognition of the strong public policy in favor of protecting copyrights: "Attorneys' fees are awarded in order to assure equal access to the courts, to provide an economic

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8/ It may be that the court will award the minimum amount of statutory damages to the copyright plaintiff, which under present law is $500. 17 U.S.C. § 504(c)(1). In other cases, the court is authorized to award up to $20,000 in statutory damages, taking into account the particular circumstances of the case. Id. Where the infringer is found to have acted willfully, the court can increase the award of statutory damages up to a maximum per work infringed of $100,000. Id. § 504(c)(2).

incentive to challenge infringements and to penalize the losing party."[2/] The amount of the attorneys' fee award is also wholly discretionary with the court (the statute merely instructs that the award should be "reasonable"), and often reflects a variety of factual considerations arising from the specific circumstances of each case.

Infringers know that in cases in which the copyright plaintiff is eligible for an award of attorneys' fees, they will in all likelihood be required to pay a substantial proportion of the plaintiff's attorneys' fees if infringement is proved. In addition, of course, they will have to pay their own lawyers' fees to defend the case. The bill would simply require infringers to face this prospect of a "double-barrelled" payment in every case in which infringement is proved by a copyright owner. Neither the plaintiff nor the defendant will know for sure whether attorneys' fees will be awarded to the copyright owner if he prevails, but at least some proportion of the plaintiff's fees will likely be assessed against the infringer--and the infringer's counsel will be well aware of that likelihood. The beneficial result of this pressure will be to deter infringers, to facilitate enforcement of copyright rights, and to require those that commit illegal copying to pay a severe enough price for their misdeeds that they will be induced to

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2/ Branch v. Ogilvy & Mather, Inc., 772 F. Supp. at 1365, citing, Oboler v. Goldin, 714 F.2d 211, 213 (2d Cir. 1983).

settle the matter promptly without the need for prolonged litigation.

6. The bill will not adversely affect the acquisition practices of the Library of Congress. Any suggestion that elimination of the registration-before-infringement requirement, and indeed of the mandatory registration provision itself, will somehow hamper the efforts of the Library of Congress to acquire works for its collection fails to take account of some basic facts.

• First and foremost, most copyright owners do not register their works even under present law. As noted above, we estimate that 95% of ASMP members do not ever register their photographs in the Copyright Office. Further, we estimate that over 99% of the copyrighted photographs produced by ASMP members are not ever registered in the Copyright Office. Other organizations representing the interests of individual and small business copyright owners will no doubt be reporting similar statistics. Thus at the present time, the Library does not, through deposits submitted with copyright registration applications, have access through the Copyright Office to the vast majority of copyrighted works created in this country. In light of this reality, the proposed changes offered by the bill will have no practical effect on the Library's collection.

• Second, we know from our discussions with the Prints and Photographs Division of the Library of Congress that it does not systematically review the deposits accompanying the applications

to register copyrights in photographs. In fact, we were told by representatives of that Division that they do not have any true grasp of the volume, content or quality of the photographs submitted for registration in the Copyright Office. Further, we were informed that the Prints and Photographs Division does not use the deposits submitted in connection with copyright registration applications as sources for making acquisition decisions. Rather, we were advised that the Library relies upon other sources, including the private art market, to determine which photographs it may be interested in acquiring for its collection. In sum, as relayed to us by the Library itself, there is little or no relationship between the photographs deposited in the Copyright Office as part of registration applications and the acquisition policies and practices of the Library with respect to photographs.

• Third, as you acknowledged in your statement accompanying the introduction of the bill, it would preserve the current requirement set forth in section 407 of the Act that copyright owners submit copies of published works to the Copyright Office for the benefit of the Library of Congress. Thus, to the extent that the Library has an interest in the works submitted in compliance with this requirement, that interest is preserved.

7. The bill will not discourage those who register now to continue their practice of registration. There is every reason to believe that publishers, major corporations and other segments of various copyright industries will continue to

register their works even if registration is permissive as the bill proposes. Further, for those relatively few individual authors and small businesses that do take the time and effort routinely to register their works, the proposed changes in the law will not induce them to change that practice.

• The bill would not eliminate all incentives to register, but merely the ones--statutory damages and attorneys' fees--that must be available if copyright rights are to be enforceable. For example, the evidentiary benefits of registration afforded by section 410(c) would be preserved. It is certainly beneficial to copyright owners, especially those who have recourse to the courts to seek preliminary injunctions against infringers, to register their works within five years of publication in order to have the validity of the copyright and of the facts stated in the application presumed. For most copyright owners with substantial means and the staffs available to handle registrations, this benefit alone is likely to be a strong incentive to the continuation of existing registration practices. Furthermore, it is undeniably helpful to the copyright plaintiff to have a public record of his or her work on file with the Copyright Office in the event of a dispute concerning the authenticity or authorship of the work. Thus those copyright owners desirous of making such a public record will still be free to do so under the proposed bill, and there is no reason to believe that the situation will be different if the legislation is enacted.

• There is, however, a basic difference between these benefits and the remedies of statutory damages and attorneys' fees, and that difference is again rooted in the real world of copyright enforcement and litigation. The fact is that copyright owners can and do file infringement actions even without the evidentiary benefits of section 410 (c), or the "public record" benefit of a preexisting registration (they usually register shortly before filing suit). But very few copyright owners, especially individuals and small businesses, can afford to litigate against even the most willful of infringers unless those owners can recover their attorneys' fees and obtain an award of statutory damages without the necessity of a profits trial. Taking these realities into account, it makes sense to preserve those inducements to registration that can fairly be described as discretionary and non-essential. At the same time, however, it is absolutely necessary--if copyright rights are to be meaningful for the majority of authors--to insure the availability of viable and effective remedies if the copyright plaintiff is successful.

III. THE MANDATORY REGISTRATION REQUIREMENT OF SECTION 411(a) SHOULD BE ELIMINATED

Most of the considerations justifying elimination of the timely registration requirement established by section 412 apply with equal force to the need to make the entire registration system permissive rather than mandatory. There are, however, a few additional factors which confirm this view.

A. Compliance With Section 411(a) Entails Costs That Are Not Outweighed By Any Public Benefit

Section 411(a) requires United States copyright owners to file a registration application before filing an infringement action in federal court. 17 U.S.C. § 411(a). This is a jurisdictional requirement, and is strictly construed.

Compliance with this requirement requires the copyright owner to fill out the registration form and prepare deposit copies for each work that will be the subject of the infringement action. For individual and small business copyright owners, this exercise entails an investment of time and money, and may require (in an era in which fraud on the Copyright Office is a routine affirmative defense) the advice and assistance of a lawyer with expertise in copyright matters.

Often copyright registration applications are filed on the eve of the filing of the infringement action. While the filing of the application alone may be sufficient to vest jurisdiction in the federal courts, many copyright owners feel obliged to request expedited treatment--at considerable expense--of their registration applications so as to take advantage of the evidentiary presumptions available under section 410(c).

These costs are not outweighed by benefits to the public. It costs taxpayers money to process the registrations filed in anticipation of litigation, and they gain nothing from that bureaucratic exercise. The works registered are usually but a small fragment of the copyright owner's total work, and thus the Library of Congress does not, through section 411(a), gain access

to the entire photographic collection of the author. The courts are able to resolve infringement claims without the benefit of the Copyright Office's cursory review of application forms to ensure that a sufficient amount of authorship is present and that the form is filled out properly.

B. Many Photographers Are Prevented From Filing Infringement Actions Because They Cannot Comply With The Deposit Requirements Associated With Registration

As noted above, the filing of a copyright registration application is a jurisdictional requirement for gaining access to the federal courts, which are solely authorized to hear infringement cases. But the copyright owner cannot file a registration application unless he possesses copies of the work to be registered, which are necessary to meet the deposit requirements of the law.

In many instances, photographers do not have possession of their works, and cannot register for that reason. As explained above, unprocessed film is routinely sent to the clients of photographers on an expedited basis, and the resulting images are often never returned to the photographer. In these circumstances, the only way the photographer can register a work that is allegedly infringed is to deposit the infringing copy--which may include authorship not contributed by the photographer. But if copies of the infringing work cannot be obtained before the lawsuit is filed, then the photographer may find himself without any remedy.

This is not a mere possibility, but a reality for a number of ASMP members who have been unable to register their works for lack of a deposit copy, and are thereby shut out of the federal courts. They justifiably maintain that useless formalities are once again invoked to prevent the enforcement of copyright rights, and ask ASMP what legitimate public policy objectives warrant such a result. ASMP does not believe any such objectives exist, and agrees with the sponsors of H.R. 897 that the mandatory registration requirement should be excised from the law.

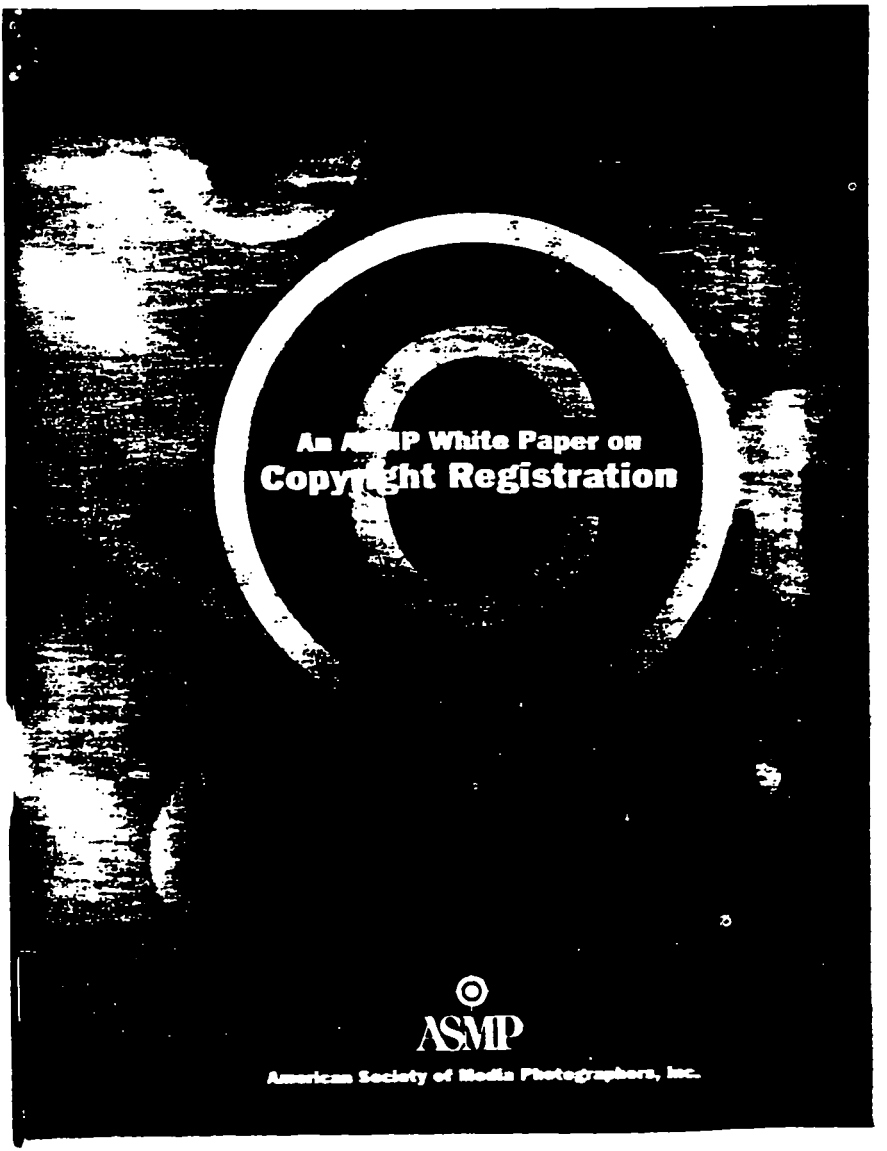
IV. THE REGISTER OF COPYRIGHTS SHOULD BE A PRESIDENTIAL APPOINTEE

ASMP believes that the Register of Copyrights holds an important position of public trust and responsibility, and that the leadership obligations associated with the position warrant the status of a Presidential appointment. This is especially true in the information age, when technologies are changing at an unprecedented rate, and when the pressure and reliance upon our copyright system is intense. Furthermore, we believe that the Register should be responsive to the views of the electorate as represented in their choice of a President.

V. THE COPYRIGHT ROYALTY TRIBUNAL SHOULD BE ABOLISHED

ASMP supports the proposed elimination of the Copyright Royalty Tribunal. The duties currently carried out by that body could be more effectively discharged by the Register of Copyrights and selected arbitration panels. Furthermore, the record of the Tribunal in setting compulsory license fees does

not suggest that the interests of copyright owners are being exceptionally well-served. Given the amount of taxpayer dollars required to maintain the Tribunal, ASMP believes that the money is better spent on programs that more directly benefit copyright owners and the public.


An ASMP White Paper on
Copyright Registration
ASMP
American Society of Media Photographers, Inc.

Preface

The *Copyright Registration White Paper* was written specifically for professional photographers to provide valuable information acquired over the years by ASMP and its members.

ASMP was founded in 1944 by the most prominent photojournalists of the time. They defined the Society's main purpose with these words: "To protect and promote the interests of photographers, whose work is primarily for publication." Today, ASMP is a diverse group of advertising, corporate and editorial photographers. Even with this diversification, the original purpose stands.

One way ASMP fulfills its purpose is by providing information to photographers, enabling them to be better business persons. A creative eye is not enough to assure success in today's complex business of photography.

The information in this white paper is based upon ASMP's extensive experience. However, we render no legal opinion concerning its application. Adaptation to each photographer's circumstances is encouraged. ASMP also recommends seeking the advice of knowledgeable legal counsel when questions or problems arise. It should also be noted that ASMP does not fix terms, conditions, or rates, which should be individually negotiated between photographer and client. Membership in ASMP is open to all qualified photographers, regardless of age, race, creed, national origin, gender, sexual orientation or physical disability.

This and future white papers are part of ASMP's continuing effort to provide valuable information to professional photographers.

ASMP is photographers helping photographers.

American Society of Media Photographers, Inc.
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This paper was written by Richard Weisgrau
ASMP executive director

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1. Introduction

The travel brochure was a classic use of stock photography, a travel destination company's promotional piece for a vacation retreat. Thousands had been mailed and the great photographs had stimulated substantial interest from would be travelers. The centerpiece photographs of the brochure had been shot by two different photographers, Mary and John, who licensed the usage directly to the travel company's design firm.

About six months after the brochure was published, Mary and John, two old friends, discovered their centerpiece photographs in a magazine article about the location. They were upset, as neither of them had licensed anyone to use their images in such fashion. A quick check with the magazine showed that the images had been scanned from the travel brochure.

The magazine's editor wasn't even apologetic. He admitted the scanning, and offered each of them $25.00 for the use. Neither Mary nor John were about to accept such a token payment for such a willful violation of their copyright. Their demands for fair compensation were rejected, and the editor told them to sue if they wanted the $125.00 that the usage would normally bring.

The answer is that Mary read this white paper when it arrived, and followed its advice. John was too busy to read it and put it on the shelf, never to look at it again. Mary had registered her photograph with the Copyright Office before it was infringed. John didn't know that there was a great advantage to doing so, and how easily and inexpensively it could be done. Do you want to be like John or Mary? Reading this paper could be some of the most rewarding minutes of your professional career.

2. Why Register?

ASMP's national office is frequently made aware of copyright infringements perpetrated against its members. Most of these infringements go unprosecuted, and the infringers go unscathed.

The reasons for this phenomena of unprosecuted offenses is quickly and easily identifiable. It stems from the fact that the copyright protected photograph(s), which were infringed, were not registered with the Copyright Office in a timely fashion. Although not required to own the copyright, timely registration would make the photographer eligible to collect attorney's fees expended in prosecution, and also eligible for statutory damages up to $100,000 per infringement.

The cost of prosecuting a copyright infringement case can be very high, particularly when an alleged infringer can afford a rigorous defense. Outspending the copyright owner is a tactic that is often used to break a photographer's determination to enforce his/her rights. Most infringers know that photographers have limited resources and will not be able to spend all that is necessary to prosecute a well fought case. They are also aware of the fact that without timely registration an award of attorney's fees will be out of reach, further limiting the potential resources of the photographer, since most lawyers will not take such a case on a contingency fee basis. On the other hand, infringers are much more likely to settle out of court when confronted with the probability that they will likely have to pay your legal fees, as well as theirs, on top of an award of statutory damages.

Timely registration is dependent upon two circumstances: whether the work is unpub-

lished or published. Under copyright law, the word published means: The distribution of copies of a work to the public by sale, other transfer of ownership, by rental, lease or lending. Offering to distribute copies to people or businesses for purposes of further distribution, public performance or public display constitutes publication. Therefore, when you send images to your stock agency, which will do further distribution (submission and licensing), and public display (stock catalogs, etc.) you have legally published your work. A public performance or display, in and of itself, does not constitute publication. Exhibiting your photographs in public does not constitute publication, unless you exhibit them through another party, such as a gallery, which offers them for sale (for further distribution).

The copyright law treats published and unpublished photographs differently, in relation to registration as a prerequisite for infringement remedies. The law prohibits awards for statutory damages or attorney's fees for any infringement of copyright:

a) Of an unpublished work, occurring before the date of its registration, or
b) After the first publication of a work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work

A simple restatement of the law is that you can't collect attorney's fees and statutory damages unless you have registered an unpublished work before the infringement, or unless you registered a published work within three months after its first publication. Note: for published work the law does not speak about 3 months after any publications, but rather three months after its first publication.

You can register a published work at any time following three months after first publication, but that registration will only preserve remedies of attorney's fees and statutory damages for infringements that occur after the registration.

The law is written with a three month allowance after first publication to allow you time to learn of the publication, obtain copies and file the registration.

The following two examples will help clarify the application of the law:

Example 1:
You shoot a brochure cover and the brochure with the image cover is published for the first time on July 1. You register the image on September 30. Later, you discover that the image was infringed on August 31. Since you registered within three months of first publication, you may seek an award of attorneys' fees and statutory damages even though the infringing began a month before the date of registration.

Example 2:
You shoot a brochure cover and the brochure with the cover image is published for the first time on July 1. You register the image on December 1. Later you discover that the image was infringed on August 31 and January 15. You are not fully protected for the August 31 infringement, since you failed to register within three months after first publication. You are fully protected for the January 15 infringement since it happened after registration.

At ASMP we find that few unpublished works are infringed, and that most infringements are of published works, and, as such, they occur six months, a year or even longer after a photo's first publication. Obviously, this leads one to the con-

clusion that to be well protected you have to register either immediately after publication or before it.

In summary, it is important to remember that although the copyright law of the United States does not require a photographer to register his/her works to own the copyright to them, timely registration will serve the photographer's interests if the registered work is infringed by providing eligibility for attorney's fees and statutory damages. Your opponent's knowledge that these remedies are available to you will often enable you to negotiate a settlement without filing suit, or within a reasonable period of time after filing suit. Registration should be made before or immediately after publication.

Statutory damages are limited by law to a maximum of $100,000 per infringement. Many people construe this to mean that infringements often receive awards near this amount. In fact that is not the case. A survey of recent cases shows that awards for statutory damages are made after evaluating certain factors, including willfulness, extent of unauthorized use, and the commercial value of the unauthorized use(s). An award could be for $500, $5000, or $50,000, or any other amount, at the discretion of the court. Still, since the attorney's fees are also covered, any award will exceed the monetary cost of prosecution.

3. How to register

Registration is simply the process of filing copies of photographs accompanied by an accurate and complete registration form with the U.S. Copyright Office, and receiving certificate of registration to show that such a deposit has been made. Any copyrightable work can be registered, a motion picture, a book, a painting, a CD-ROM, a slide show, and, yes, photographs. But, just as the copyright law treats published and unpublished works differently, so do the regulations which govern registration. We'll examine these differences further on in this document.

There is a $20.00 fee for registering a copyrighted work. Obviously the greater number of photographs included in one registration the less expensive the registration cost per image. If you consider that on a given day a photographer can produce hundreds of separately copyrightable images, clearly registration could cost thousands of dollars unless done in some bulk fashion.

Registration can be made of single images or of groups of images. The single image registration is much the same for published and unpublished work. A photographer completes copyright registration form VA, adds two copies of a published work or one copy of an unpublished work, and the $20.00 filing fee. This is sent to the Copyright Office in Washington, D.C. (**See Copyright Office information in addenda.**)

When registering a group of photographs things become more complicated. There are options for photographers, again the options are divided by published or unpublished. And, the relative ease of the process is influenced by whether the work has been published or not.

Published photographs will be accepted by the Copyright Office for registration in groups under these narrow conditions, **only**.

1) Each photograph in the group was first published as a contribution to a collective work **within a twelve month period**. (A collective work is a magazine, periodical, etc.)

2) The author is an individual photographer, not an employer or other party for whom the photograph was made as a work for hire.

3) If published prior to May 1, 1989, each photograph as first published contained a separate copyright notice which names the applicant as the copyright owner.

4) Copies of the collective work(s) in which the group of photographs appeared must be filed with the registration (this is called the deposit).

As you can see, only a few published images meet these criteria. One could readily draw the conclusion that group registration of published photographs is not very feasible as a safeguard system to protect one's rights.

Still, there is a bright light of opportunity in the remaining option - the group registration of unpublished images. This opportunity lies in the regulations governing such registration, which are much broader than those for published works.

Group registration of unpublished works are allowed under the following conditions.

1) All the photographs must be by the same photographer.

2) They cannot have been published (as defined previously herein).

3) Copies of the photographs must be in an acceptable form of deposit (which we will define).

4) Each collection must be given an identifying title (any name will do, e.g. Photographs of Pat Photographer 1983).

5) The entire copyrightable subject matter of each photograph has to be visible (full frame).

That's it. There are no other restrictions. A photographer can register thousands of unpublished images in a single application and for a single $20.00 fee. There is no time limit - the unpublished photographs could have been taken yesterday or over the last 20 years. These rules are very liberal when compared to the regulations for published works.

To make a bulk registration of unpublished images a photographer must submit a completed form VA with the $20.00 fee. Also required is one copy of a deposit containing all the images to be registered. The deposit can be in any one of the several forms described below.

1) A group of individual transparencies in protective plastic pages.

2) A group of contact sheets (color or black & white).

3) A group of positive contact sheets made from slides ganged together, as when placed in protective plastic pages.

4) A group of color laser copier reproductions of slides, ganged together as in #3 above.

And finally, after discussions with ASMP, the Copyright Office has officially approved.

5) A videotape on VHS format containing as many images as the tape can hold while preserving the visibility of each image for a least two seconds per image. This means a 120 minute tape could hold 30 images per minute for a total of 3600 images per tape.

Again, the full frame of the original must be visible.

Note: Each tape requires its own form VA and $20.00 registration fee.

With this officially approved deposit form, photographers now have a simple, affordable, easily managed system to register their unpublished images.

Note: An example of a completed form VA, registering a videotaped bulk registration is included in the addenda at the back of this publication. A blank copy of Form VA is also included. It may be photocopied and used to register your work.

4. Preparing for registration

Before establishing a system for registering your unpublished photographs certain analysis is in order. First, one must recognize that most of a photographer's work is unpublished, and at some point all work is unpublished. Now the simple fact is that any infringement is likely to be of a published work. So by registering all unpublished work, you will be protecting any photograph which is to be published later.

Second, one must recognize that many times, particularly in stock work, the photographer doesn't know which images have been published for months after that publication. When you add to that fact the difficulty of group registration of published work, it seems clear that the easiest, least expensive and most timely choice is to register your unpublished work.

If you decide to register your unpublished work you will have to consider that unpublished work is divided into four categories.

1) Inventory of images on hand but not considered viable for eventual publication (rejects).

2) Inventory of images on hand that is part of your stock file and is likely to be sent to your stock agency. (Remember - the sending of work to your stock agency constitutes publication, as offering your work to a party for further distribution). You should apply for registration before you send your submission to your stock agency.

3) Assignment photographs which will be, as outtakes, sent into inventory.

4) Assignment photographs which will be sent to the client for possible use.

While you might reasonably decide not to register images that fit into category 1, above, categories 2, 3 and 4 seem important to register.

There are no serious logistical problems for dealing with category 2 and 3 images. Regardless of the way that you create the deposit you have time to get the work done. However, category 4 images, those waiting to go to a client for a job, present a greater problem because the time available for creating the deposit is limited.

For the most part, if shooting black and white or color negative film a color contact sheet can be made to serve as the deposit for registration. But when you have photographed with transparency film the task of making the deposit is harder to plan.

Although a color contact sheet or a color laser copy of a group of transparencies is an acceptable form of deposit, the equipment to produce these is not readily available; the cost of these methods on a per

image basis is high as only twenty 35mm slides can fit one sheet, and less when larger formats are used.

Clearly, a videotape deposit offers some distinct advantages. Not only does it reduce the cost per image registered with the ability to put up to 3000 images onto a tape, which can cost as little as $5.00, but it also can be done by any photographer who owns either a video camera and recorder or a camcorder. There are various devices readily available to those who want to build dedicated systems to record their work. They range from self-contained copy devices, such as Tamron's Fotovix, to inexpensive attachments for a slide projector, such as the Vivitar Slide Duplicator. Many photography and video magazines contain ads for such devices.

The final consideration is to reduce the time it takes to create this registration deposit to avoid delays in delivering the edited photographs to your client. This process can be kept to a minimum by using the video option for a deposit.

Obviously, assignment photographs will have to be edited and if the video registration deposit can be made immediately after processing there will be little loss of time.



No matter how you take your coffee.

If the video recording is to be done after the edit, it is important to remember that those images to be sent to your client should be put on tape first, then sent on their way to the client. After that, the remainder of the images can be added. The final act is completing form VA and sending the tape off to the Copyright Office.

5. Duplicates and similars

Many photographers create in camera duplicates of photographs which they take. In as much as these photographs are identical to one another only one of them needs to be registered to protect the group of duplicates.

However, similars, those photos which are like but not identical to another image, should be registered as unique images. While one could academically debate the extent of similarity and therefore the need to register some similars, it makes no sense to risk a loss of copyright protection when one considers the economy of bulk registration.

We strongly suggest that similars be registered with your bulk application.

Serve your 35mm slides and negatives any way you like with Fotovix III. It's the surprisingly affordable and easy to use photo-to-video processor that perks up business presentations and home photo libraries. Fotovix III also inputs instantly to floppy disks, for sharp computer imaging and desktop publishing. For larger format films, there's the advanced Fotovix II-X. And if special effects are your cup of tea, there's Tamron's Video Editor II.



For a demonstration see a Tamron dealer or write to Tamron Industries, Inc., Box 388, Port Washington, NY 11050 In Canada: Ampix Foto, 22 Telson Road, Markham, Ont. L3R 1E5

TAMRON
FOTOVIX



Fotovix can make it for you.



Addenda

Registering your copyright and obtaining forms

Registration is handled through the:

Register of Copyrights
Library of Congress
Washington, DC 20559
Phone: 202-707-3000

A 24-hour **hotline** for obtaining registration forms is: 202-707-9100.

Samples of the Form VA, the basic form for registering all works in the visual arts, are on the following pages. In addition to photographs as such, this form should also be used for registering the following items when they are primarily or exclusively photographic in nature: books, advertising materials, and most single contributions to periodicals. When these items consist primarily of text, they should be registered in class TX.

If first publication occurs in a separately copyrighted work, such as a magazine, you can still register the copyright in class VA as a contribution to a collective work, thus securing the advantages of statutory damages and legal fees in an infringement case. This procedure is safer than relying upon the registration of the collective work itself.

Display of copyright notice

There are three ways to display a copyright notice:

© 1993, Pat Photographer
Copyright 1993, Pat Photographer
Copr. 1993, Pat Photographer

Although all three are acceptable, it is generally thought that © 1993, Pat Photographer is the most widely recognized internationally

Filling Out Application Form VA

Detach and read these instructions before completing this form.
Make sure all applicable spaces have been filled in before you return this form.

BASIC INFORMATION

When to Use This Form: Use Form VA for copyright registration of published or unpublished works of the visual arts. This category consists of "pictorial, graphic, or sculptural works," including two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, technical drawings, diagrams, and models.

What Does Copyright Protect? Copyright in a work of the visual arts protects those pictorial, graphic, or sculptural elements that, either alone or in combination, represent an "original work of authorship." The statute declares: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

Works of Artistic Craftsmanship and Designs: Works of artistic craftsmanship are registrable on Form VA, but the statute makes clear that protection extends to "their form" and not to "their mechanical or utilitarian aspects." The "design of a useful article" is considered copyrightable only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

Labels and Advertisements: Works prepared for use in connection with the sale or advertisement of goods and services are registrable if they contain "original works of authorship." Use Form VA if the copyrightable material in the work you are registering is mainly pictorial or graphic; use Form TX if it consists mainly of text. **NOTE:** Words and short phrases such as names, titles, and slogans cannot be protected by copyright, and the same is true of "mere" variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents; and works containing only information that is common property, such as standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources. When used commercially, material of this sort can sometimes be protected under state laws of unfair competition or under the Federal trademark laws. For information about trademark registration, write to the Commissioner of Patents and Trademarks, Washington, D.C. 20231.

Architectural Works: Copyright protection extends to the design of buildings created for the use of human beings. "Architectural works" created on or after December 1, 1990, or that on December 1, 1990, were unconstructed and embodied only in unpublished plans or drawings are eligible. Request Circular 41 for more information.

Deposit to Accompany Application: An application for copyright registration must be accompanied by a deposit consisting of copies representing the entire work for which registration is to be made.

Unpublished Work: Deposit one complete copy.

Published Work: Deposit two complete copies of the best edition.

Work First Published Outside the United States: Deposit one complete copy of the first foreign edition.

Contribution to a Collective Work: Deposit one complete copy of the best edition of the collective work.

The Copyright Notice: For works first published on or after March 1, 1989, the law provides that a copyright notice in a specified form "may be placed on all publicly distributed copies from which the work can be visually perceived." Use of the copyright notice is the responsibility of the copyright owner and does not require advance permission from the Copyright Office. The required form of the notice for copies generally consists of three elements: (1) the symbol "©", or the word "Copyright," or the abbreviation "Copr."; (2) the year of first publication; and (3) the name of the owner of copyright. For example: "© Jane Cole." The notice is to be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. Works first published prior to March 1, 1989 must carry the notice of their own copyright protection.

For information about notice requirements for works published before March 1, 1989 or other copyright information, write Information Section, LM-401 Copyright Office, Library of Congress, Washington, D.C. 20559.

LINE-BY-LINE INSTRUCTIONS

Please type or print using dark ink.

1 SPACE 1: Title

Title of This Work: Every work submitted for copyright registration must be given a title to identify that particular work. If the copies of the work bear a title or an identifying phrase that could serve as a title, transcribe that wording completely and exactly. In the application, indexing of the registration and future identification of the work will depend on the information you give here. If you are submitting an untitled work or a work that has been incorrectly titled, add the date of construction after the title: "Untitled (Abstract painting, 1988)" or "Jane Doe (Self-portrait, 1990)."

Previous or Alternative Titles: Complete this space if there are any additional titles for the work under which someone searching for the registration might reasonably search, or under which a document pertaining to the work might be recorded.

Publication as a Contribution: If the work being registered is a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Then, in the line headed "Publication as a Contribution," give information about the collective work in which the contribution appeared.

Nature of This Work: Briefly describe the general nature or character of the pictorial, graphic, or sculptural work being registered for copyright. Examples: "Painting"; "Charcoal Drawing"; "Etching"; "Sculpture"; "Map"; "Photograph"; "Scale Model"; "Lithographic Print"; "Jewelry Design"; "Fabric Design."

2 SPACE 2: Author(s)

General Instructions: After reading these instructions, decide who are the "authors" of this work for copyright purposes. Then, unless the work is a "collective work," give the requested information about every "author" who contributed any appreciable amount of copyrightable matter to this version of the work. If you need further space, request "Continuation Sheets." In the case of a collective work, such as a catalog of paintings or collection of cartoons by various authors, give information about the author of the collective work as a whole.

Name of Author: The fullest form of the author's name should be given. Unless the work was "made for hire," the name of the author required is that of the individual who created the work, i.e., the author. In the case of a work made for hire, the statute provides that "the employer or other person for whom the work was prepared is considered the author."

What is a "Work Made for Hire"? A "work made for hire" is defined as: (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, or as an instructional text, as an answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. If you have checked "Yes," to indicate that the work was made for hire, you must give the full legal name of the employer, or other person for whom the work was prepared. You may also provide the employee's name, if appropriate, along with the name of the employer (for example: "John Compton, employee of Acme Tool Co."; or "Acme Tool Co., employer for hire of John Ferguson").

"Anonymous" or "Pseudonymous" Work: An author's contribution to a work is "anonymous" if that author is not identified on the copies or phonorecords of the work. An author's contribution to a work is "pseudonymous" if that author is identified on the copies or phonorecords under a fictitious name. If the work is "anonymous," you may: (1) leave the line blank; or (2) state "anonymous" on the line; or (3) reveal the author's identity. If the work is "pseudonymous," you may: (1) leave the line blank; or (2) give the pseudonym and identify it as such (for example: "Huntley Haverstraw, pseudonym"); or (3) reveal the author's name, making clear which is the real name and which is the pseudonym (for example: "Henry Leek, whose pseudonym is William Farrell"). However, the citizenship or domicile of the author must be given in all cases.

Dates of Birth and Death: If the author is dead, the statute requires that the year of death be included in the application unless the work is anonymous or pseudonymous. The author's birth date is optional, but it is useful as a form of identification. Leave this space blank if the author's contribution was a work made for hire.

Author's Nationality or Domicile: Give the country of which the author is a citizen, or the country in which the author is domiciled. Nationality or domicile must be given in all cases.

Nature of Authorship ... [illegible] ... material created by this author in which copyright is claimed.

3-Dimensional sculptures: fine art sculptures, toys, dolls, scale models and sculptural designs applied to useful articles

2-Dimensional artwork: watercolor and oil paintings; pen and ink drawings; mixed media illustrations; greeting cards; collages; stencils; patterns; computer graphics; graphics appearing in screen displays; artwork appearing on posters, calendars, games; commercial prints and labels and packaging, as well as 2-dimensional artwork applied to useful articles

Reproductions of works of art: reproductions of pre-existing artwork made by the following: lithography, photoengraving, or etching

Maps: cartographic representations of an area such as state and country maps; atlases; marine charts; relief maps and globes

Photographs: pictorial photographic prints and slides and holograms

Jewelry designs: 3-dimensional designs applied to rings, pendants, earrings, necklaces and the like

Designs on sheetlike materials: designs reproduced on textiles, lace and other fabrics; wallpaper; carpeting; floor tile; wrapping paper and clothing

Technical drawings: diagrams illustrating scientific or technical information in linear form such as architectural blueprints or mechanical drawings

Text: textual material that accompanies pictorial, graphic or sculptural works such as comic strips, greeting cards, games, rules, commercial prints or labels, and maps

Architectural works: designs of buildings, including the overall form as well as the arrangement and composition of spaces and elements in the design. **NOTE:** Any representation of the underlying architectural plans must be applied for on a separate Form VA, checking the box "Technical drawing."

3 SPACE 3: Creation and Publication

General Instructions: Do not confuse "creation" with "publication." Every application for copyright registration must state "the year in which creation of the work was completed." Give the date and nation of first publication only if the work has been published.

Creation: Under the statute, a work is "created" when it is fixed in a copy or phonorecord for the first time. Where a work has been prepared over a period of time, the part of the work existing on fixed form on a particular date constitutes the "created work" as of that date. The date you give here should be the latest one in which the author completed the particular version for which registration is now being sought, even if other versions exist or if further changes or additions are planned.

Publication: The statute defines "publication" as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. A work is also "published" if there has been an offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display." Give the full date (month, day, year) when and the country where publication was authorized. If the work has been published in the United States and other countries, it is sufficient to state "U.S.A."

4 SPACE 4: Claimant(s)

Name(s) and Address(es) of Copyright Claimant(s): Give the name(s) and address(es) of the copyright claimant(s). If the work is "work made for hire," the employer is the author. The copyright in a work belongs initially to the author. The term "author" includes, in the case of a work made for hire, the employer or other person for whom the work was prepared. The copyright claimant is either the author of the work or a person or organization to whom the copyright initially belonging to the author has been transferred.

Transfer: The statute provides that, if the copyright claimant is not the author, the application for registration must contain a brief statement of how the claimant obtained ownership of the copyright. If any copyright claimant named in space 4 is not an author named in space 2, give a brief statement explaining how the claimant(s) obtained ownership of the copyright. Examples: "By written contract." "Transfer of all rights by author." "Assignment." "By will." Do not attach transfer documents or other attachments or riders.

5 SPACE 5: Previous Registration

General Instructions: The questions in space 5 are intended to find out whether an earlier registration has been made for this work and, if so, whether

[illegible] registration can be made for the same version of a particular work.

"Same" Version: If this version is substantially the same as the work(s) covered by a previous registration, a second registration is not generally permitted. However, if the work has been registered in unpublished form and a second registration is now being sought to cover this first published edition, or if somewhere more than the author is identified as a copyright claimant in the earlier registration and the author is now seeking registration in his or her own name, you may check one of these two exceptions above. Check the appropriate box and give the earlier registration number and date. Otherwise, do not check either box. For assistance, write the Copyright Office for information about supplementary registration, recordation of transfers of copyright ownership.

Changed Version: If the work has been changed, and you are now seeking registration to cover the additions or revisions, check the last box in space 5, give the earlier registration number and date, and complete both parts of space 6 in accordance with the instruction below.

Previous Registration Number and Date: If more than one previous registration has been made for the work, give the number and date of the latest registration.

6 SPACE 6: Derivative Work or Compilation

General Instructions: Complete space 6 if this work is a "derivative work" or a "compilation." Both of these terms are defined in the statute and refer to works that have already been published or registered for copyright or have fallen into the public domain. A "compilation" is defined as a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. A "derivative work" is a work based on one or more pre-existing works. Examples of derivative works include reproductions of works of art, sculptures, toys, or drawings and graphics based on paintings, maps based on previously published sources, or any other form in which a work may be recast, transformed, or adapted. Derivative works also include works consisting of editorial revisions, annotations, or other modifications, if these changes, as a whole, represent an original work of authorship.

Pre-existing Material (space 6a): Complete this space and space 6b for derivative works. In this space identify the pre-existing work or works that have been transformed or adapted. Examples of pre-existing material might include: "Russian Architecture" or "19th century quilt design." Do not enter "None" in this space for compilations.

Material Added to This Work (space 6b): Give a brief, general statement of the additional new material covered by the copyright claimant for which registration is sought. In the case of a derivative work, identify this new material. Examples: "Adaptation of design and additional artistic work." "Translation of painting by photolithography." "Additional cartographic material." "Addition of photographs." If the work is a compilation, give a brief, general statement describing both the material that has been compiled and the manner in which it has been selected, coordinated, or arranged. Examples: "Compilation of 19th century political cartoons."

7,8,9 SPACE 7,8,9: Fee, Correspondence, Certification, Return Address

Fee: The Copyright Office has the authority to adjust fees at five-year intervals based on changes in the Consumer Price Index. The most adjustment was made in 1982. Please consult the Copyright Office after [illegible] to determine what fee is now due. See also the fee schedule.

Deposit Account: If you maintain a Deposit Account in the Copyright Office, identify it in space 7. Otherwise, leave the space blank and send the fee with your application and deposit.

Correspondence (space 7): This space should contain the name, address, area code, and telephone number of the person to be contacted if questions arise about this application or become necessary.

Certification (space 8): The application cannot be accepted unless it is dated and the handwritten signature of the author of other copyright claimant, or of the owner of exclusive right(s), or of the duly authorized agent of author, claimant, or owner of exclusive right(s).

Address for Return of Certificate (space 9): The address box must be completed legibly since the certificate will be returned in a window envelope.

PRIVACY ACT ADVISORY STATEMENT required by the Privacy Act of 1974 (P.L. 93-579)

[illegible] The authority for requesting this information is [illegible] 17 U.S.C. secs. 409 and 410. Furnishing the requested information is voluntary. But if the information is not furnished, it may be [illegible] in which registration may not be made or may be delayed or refused. The principal uses of the requested information are the establishment and maintenance of a public record and the examination of the application for compliance with legal requirements. Other routine uses include public inspection and copying, preparation of public indexes, preparation of public catalogs in copyright registration and preparation of special reports upon request. NOTE: No other advisory statement will be given in connection with this application. Please keep this statement and refer to it if we communicate with you regarding this application.

FORM VA

For a Work of the Visual Arts
UNITED STATES COPYRIGHT OFFICE

REGISTRATION NUMBER

VA VAU

EFFECTIVE DATE OF REGISTRATION

Month Day Year

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

1

TITLE OF THIS WORK ▼

NATURE OF THIS WORK ▼ See instructions

PREVIOUS OR ALTERNATIVE TITLES ▼

PUBLICATION AS A CONTRIBUTION If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work ▼

If published in a periodical or serial give: Volume ▼ Number ▼ Issue Date ▼ On Pages ▼

2 a

NAME OF AUTHOR ▼

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes
☐ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of ▶ ____
Domiciled in ____

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No
If the answer to either of these questions is "Yes," see detailed instructions.

NOTE
Under the law, the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire" check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates of birth and death blank.

NATURE OF AUTHORSHIP Check appropriate box(es). See instructions
☐ 3-Dimensional sculpture ☐ Map ☐ Technical drawing
☐ 2-Dimensional artwork ☐ Photograph ☐ Text
☐ Reproduction of work of art ☐ Jewelry design ☐ Architectural work
☐ Design on sheet/like material

b

NAME OF AUTHOR ▼

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes
☐ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of ▶ ____
Domiciled in ▶ ____

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No
If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Check appropriate box(es). See instructions
☐ 3-Dimensional sculpture ☐ Map ☐ Technical drawing
☐ 2-Dimensional artwork ☐ Photograph ☐ Text
☐ Reproduction of work of art ☐ Jewelry design ☐ Architectural work
☐ Design on sheet/like material

3 a

YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED This information must be given in all cases.
____ ◀ Year

b DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK
Complete this information ONLY if this work has been published.
Month ▶ ____ Day ▶ ____ Year ▶ ____
____ ◀ Nation

4

See instructions before completing this space.

COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2. ▼

TRANSFER If the claimant(s) named here in space 4 are different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. ▼

DO NOT WRITE HERE OFFICE USE ONLY

APPLICATION RECEIVED

ONE DEPOSIT RECEIVED

TWO DEPOSITS RECEIVED

REMITTANCE NUMBER AND DATE

MORE ON BACK ▶ • Complete all applicable spaces (numbers 5-9) on the reverse side of this page • See detailed instructions • Sign the form at line 8

DO NOT WRITE
Page 1 of ____

EXAMINED BY

CHECKED BY

CORRESPONDENCE
Yes

FOR COPYRIGHT OFFICE USE ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

PREVIOUS REGISTRATION Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office?

☐ Yes ☐ No If your answer is "Yes," why is another registration being sought? (Check appropriate box) ▼

a. ☐ This is the first published edition of a work previously registered in unpublished form.

b. ☐ This is the first application submitted by this author as copyright claimant.

c. ☐ This is a changed version of the work, as shown by space 6 on this application.

If your answer is "Yes," give: Previous Registration Number ▼ Year of Registration ▼

5

DERIVATIVE WORK OR COMPILATION Complete both space 6a & 6b for a derivative work; complete only 6b for a compilation.

a. Preexisting Material Identify any preexisting work or works that this work is based on or incorporates. ▼

b. Material Added to This Work: Give a brief, general statement of the material that has been added to this work and in which copyright is claimed. ▼

6

DEPOSIT ACCOUNT If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account.

Name ▼ Account Number ▼

7

CORRESPONDENCE Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/ZIP ▼

Area Code & Telephone Number ▶

CERTIFICATION* I, the undersigned, hereby certify that I am the

Check only one ▼

☐ author

☐ other copyright claimant

☐ owner of exclusive right(s)

☐ authorized agent of

Name of author or other copyright claimant, or owner of exclusive right(s) ▲

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Typed or printed name and date ▼ If this application gives a date of publication in space 3, do not sign and submit it before that date.

Date ▶

Handwritten signature (X) ▼

8

MAIL CERTIFICATE TO

Name ▼

Number/Street/Apartment Number ▼

City/State/ZIP ▼

Certificate will be mailed in window envelope

9

* 17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than $2,500.

June 1982—10,000

☆ U.S. GOVERNMENT PRINTING OFFICE: 1982 352 432:5

FORM VA

For a Work of the Visual Arts
UNITED STATES COPYRIGHT OFFICE

REGISTRATION NUMBER

VA VAU

EFFECTIVE DATE OF REGISTRATION

Month Day Year

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

1

TITLE OF THIS WORK ▼

Works of Pat Photographer, Vol. 1.

NATURE OF THIS WORK ▼ See instructions

Photographs

PREVIOUS OR ALTERNATIVE TITLES ▼

None

PUBLICATION AS A CONTRIBUTION If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work ▼

If published in a periodical or serial give: Volume ▼ Number ▼ Issue Date ▼ On Pages ▼

2

a

NAME OF AUTHOR ▼

Pat Photographer

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes
☒ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of ▶ U.S.A.
Domiciled in ▶ U.S.A.

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☒ No
Pseudonymous? ☐ Yes ☒ No

NOTE

NATURE OF AUTHORSHIP Check appropriate box(es). See instructions

☐ 3-Dimensional sculpture ☐ Map ☐ Technical drawing
☐ 2-Dimensional artwork ☒ Photograph ☐ Text
☐ Reproduction of work of art ☐ Jewelry design ☐ Architectural work
☐ Design on shortlike material

b

NAME OF AUTHOR ▼

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes
☐ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of ▶
Domiciled in ▶

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No

NATURE OF AUTHORSHIP Check appropriate box(es). See instructions

☐ 3-Dimensional sculpture ☐ Map ☐ Technical drawing
☐ 2-Dimensional artwork ☐ Photograph ☐ Text
☐ Reproduction of work of art ☐ Jewelry design ☐ Architectural work
☐ Design on shortlike material

3

a YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED This information must be given. 1992

b DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK
Complete this information ONLY if this work has been published. Month ▶ Day ▶ Year ▶
Nation

4

COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2. ▼

Pat Photographer
123 Main Street
Anytown, State 12345

TRANSFER If the claimant(s) named here in space 4 are different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. ▼

APPLICATION RECEIVED

ONE DEPOSIT RECEIVED

TWO DEPOSITS RECEIVED

REMITTANCE NUMBER AND DATE

MORE ON BACK ▶ • Complete all applicable spaces (numbers 5-9) on the reverse side of this page • See detailed instructions • Sign the form at line 8

DO NOT WRITE HERE
Page 1 of ___ pages

EXAMINED BY | FORM VA

CHECKED BY

☐ CORRESPONDENCE
☐ Yes

FOR COPYRIGHT OFFICE USE ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

PREVIOUS REGISTRATION Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office? **5**

☐ Yes ☒ No If your answer is "Yes," why is another registration being sought? (Check appropriate box) ▼

a. ☐ This is the first published edition of a work previously registered in unpublished form.

b. ☐ This is the first application submitted by this author as copyright claimant.

c. ☐ This is a changed version of the work, as shown by space 6 on this application.

If your answer is "Yes," give: Previous Registration Number ▼ Year of Registration ▼

DERIVATIVE WORK OR COMPILATION Complete both space 6a & 6b for a derivative work; complete only 6b for a compilation. **6**

a. Preexisting Material Identify any preexisting work or works that this work is based on or incorporates. ▼

b. Material Added to This Work Give a brief, general statement of the material that has been added to this work and in which copyright is claimed. ▼

See instructions before completing this space.

DEPOSIT ACCOUNT If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account. **7**

Name ▼ Account Number ▼

CORRESPONDENCE Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/Zip ▼

PAT Photographer
123 MAIN STREET
ANYTOWN MYSTATE, ZIP

Area Code & Telephone Number ▶ 123 - 456 - 7890

Be sure to give your daytime phone number.

CERTIFICATION* I, the undersigned, hereby certify that I am the **8**

Check only one ▼

☒ author

☐ other copyright claimant*

☐ owner of exclusive rights

☐ authorized agent of _____

Name of author or other copyright claimant, or owner of exclusive rights ▲

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Typed or printed name and date ▼ If this application gives a date of publication in space 3, do not sign and submit it before that date.

PAT PHOTOGRAPHER date ▶ 12-31-92

Handwritten signature (X) ▼

Pat Photographer

MAIL CERTIFICATE TO **9**

Name ▼

PAT Photographer

Number/Street/Apt number ▼

123 MAIN STREET

City/State/ZIP ▼

ANYTOWN, MYSTATE, ZIP

Certificate will be mailed in window envelope

Register of Copyrights
Library of Congress
Washington, DC 20559

*17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than $2,500.

June 1982—130,000

GPO 0 : GOVERNMENT PRINTING OFFICE : 1982 372-432/6C



Scan a photograph, advertisement or a quote from the newspaper. Then you can create powerful documents with this revolutionary scanning system.

NOW WITH OPTICAL CHARACTER RECOGNITION

Rip-Off Artist Learns to Read!

Lift a photo, logo or drawing and transfer it to a report, manual or article. And now, with the included $495 Optical Character Recognition (OCR) package, you can scan books, encyclopedias and newspapers right into your own word processor. Read on and discover how you can use this phenomenal technology to add persuasive graphics and authoritative text to everything you write for the breakthrough price of just $249.95.

By Drew Kaplan

It's a technological miracle! Imagine scanning a newspaper article and inserting the words directly into your customer letters.

Imagine reading sales figures from a spreadsheet and instantly putting them into your sales proposals.

And, *imagine* snatching a huge illustration, chart or map and slipping it into your monthly production report.

Now you can create attention-demanding reports, proposals and letters with a complete scanning system that not only scans graphics but actually "reads" text!

Just run this advanced scanner across a page. Instantly the text you've scanned appears on your computer's screen. Then you can edit the text in your word processor.

Plus, you can snatch eye-riveting art, illustrations, photographs and maps right off a page and into all your work.

But before we examine mind-grabbing persuasive graphics, let's explore the sophisticated text-snatching power of this incredible scanning system.

TEXT-SNATCHING TECHNOLOGY EXPLAINED

It's revolutionary. It's called OCR (Optical Character Recognition). It's a scanning innovation designed to read the bars and stems of printed words on a page.

But, instead of interpreting them as graphics like other scanners, OCR actually identifies these components as individual letters, words and sentences.

Until a few years ago, top-of-the-line scanning systems using this phenomenal OCR technology cost a staggering $40,000.

But, the price and technology barriers have been blasted. And now, we can all thrill to the same text snatching power as multimillion-dollar publishing houses, law firms and multinational corporations.

Simply run the blades across a newspaper or magazine article, catalog page or cherished page of text.

This scanning system instantly reads the text and displays it on screen.

You can then save your scanned text as a WordPerfect or WordStar file. Or you can choose to save it as the universal ASCII (pronounced as-key) format.

Either way you'll effortlessly incorporate your scanned text into virtually any word processor you subscribe to or drive you wish.

And, look at this! Since the early OCR scanners, this OCR system is a real virtual if not *the* best word in the business world.

No matter the text size, color, font style or any other hard-to-read or unconventional specs, this OCR scanning system can read it with uncanny accuracy.

Plus, the 4 1/2" wide scanner makes incredible 8½" x 11" full page scans! Just make two quick passes over a page. This scanning system automatically puts the pieces together right on the screen.

How accurate is it? I've found you'll get an astonishing 98% or better accuracy. So I always run my just-scanned text through my word processor's spell checker. That way I know it'll be perfect.

OCR PRODUCTIVITY IN ACTION

Forget laboriously hand-typing pages of text. With this advanced OCR scanning system, you can save valuable time while creating sit-up-and-take-notice reports, newsletters, articles and term papers.

If you're a contractor, you can scan your client's request form. Then using the text as a "skeleton," you can create a concise bid complete with equipment requirements, dates, numbers and costs.

If you're a lawyer, now you can scan briefs that were written before the age of computers (or from other law firms) to help you build new briefs for the nineties.

And, if you're a student, now you can easily research information for school papers and college theses. (Remember to always footnote the source.)

Plus, with permission, you can integrate information you find from magazines, newspapers and journals into all your work—even in column format!

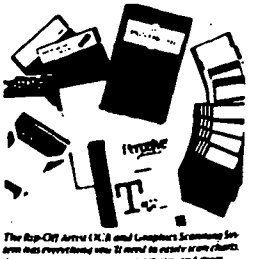
Fast Database Libraries, too. Now you can keep comprehensive records of business-boosting information. Just scan newspaper articles, journal reports and advertisements into your database.

You'll have a complete record of business trends, declines and surges to help you precisely plan your next corporate move.

Caution: It's illegal to use copyrighted material from newspapers, magazines and books for most commercial purposes. So please ask permission and credit the source whenever you use this material.

This OCR scanning system is also perfect for linking incompatible computer systems.

Whether your clients or associates create documents on a Macintosh, Commodore, mainframe or typewriter, it doesn't matter



The Rip-Off Artist OCR and Loophole Scanning System does everything you'll need to easily scan charts, documents, photos, magazine articles and more!



Insert tiresome hours hand-typing quotes, figures and information into your computer. Now using new OCR technology you can grab words right off a page and insert them into your word processor, spreadsheet or database files. Or, with the flick of a switch . . .

. . . you can effortlessly supercharge all your business reports, newsletters and sales proposals with the attention-demanding power of magic charts, diagrams, illustrations and logos you've scanned with professional 100-, 200-, 300- or even 400-dpi resolution.

This OCR scanner system will convert any document you choose into THE FORMAT you and your computer can work with.

But, hold on. You can also add eye-opening 400-dpi graphics instantly to all your reports and proposals. Here's how.

CAPTIVATE YOUR READERS WITH HIGH-RESOLUTION GRAPHICS

Capture your reader's attention and never let go! This easy-to-use OCR scanning system is also a 400-dpi graphics scanner!

Now you can grab a picture of yourself and instantly place it on brochures, business letters or handbooks.

Now you can copy drawings, diagrams and maps out of encyclopedias, journals and almanacs for your club newsletters.

And, now your children can turn in A+ term papers complete with compelling illustrations, phonograms, charts and diagrams.

Remember, graphics, like text, are subject to copyright laws. So please get permission and credit the source before you begin to scan copyrighted material.

You can even scan your logo and create personalized stationery on your continuous feed paper or single feed paper.

Signatures, too! Now you can scan your own signature to add a truly personalized touch to your thank-you notes and fund raising letters direct from your printer.

Plus, if you have a fax card in your computer or a modem, you can scan reports, memos, letters cancelled checks, photos or anything you can think of. Then you can fax or upload your scanned images quickly and easily anywhere.

UNEQUALED SCANNING HARDWARE

It's unlike any ordinary hand scanner. Mustek's half-page scanner uses a newly improved yellow-green LCD light to precisely scan both graphics and text.

So whether the graphic or text you're scanning is black-and-white or in full color, you'll capture a great-looking black-and-white copy every single time.

Plus, the scanner has a window (so you can see exactly what you're scanning) and guide rollers that ensure you always get accurate, finely detailed, distortion-free images.

You can even adjust the resolution of your image to 100, 200, 300 or 400 dpi.

SOPHISTICATED SOFTWARE RUNS THE WHOLE OPERATION

The brain behind this text-snatching, graphics-heisting operation is the included advanced software — one program for scanning text and two for scanning graphics.

Perceive Personal. This incredible $495 OCR software is the heart of this scanning system. With Perceive Personal you can effortlessly scan typewritten typeset, laser-printed and dot matrix text in either fixed or proportional spacing.

Plus, it's smart. It recognizes and interprets multiple columns, portrait (vertical) and landscape (horizontal) pages.

ScanKit. With ScanKit you can snatch graphics and then customize them any way you want. You can capture any graphics image, rotate it and crop it.

PC Paintbrush. You can also capture graphics with PC Paintbrush but unlike ScanKit you can also edit them, add text and then paint them with a palette of vivid colors or patterns.

And once scanned, you can incorporate your graphics into other programs using the PCX, IMG or TIF formats.

INSTANT INSTALLATION

Simply slip the included scanner card into any open expansion slot in your IBM PC/AT, 386 or compatible computer with standard Hercules, EGA or VGA graphics. Load the software. Plug in the Mustek scanner. And you're ready to go!

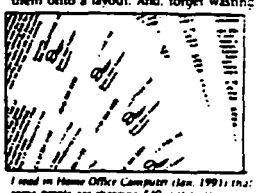
The easy-to-understand manual makes it all simple to do. A hard drive and a minimum of 640k memory are required.

The Mustek OCR and Graphics Scanning System is compatible with virtually all dot matrix, ink jet, HP LaserJet Plus and Series II or compatible laser printers.

It's engineered by Mustek, Inc. and backed by their standard limited warranty.

RIP OFF GRAPHICS (AND NOW TEXT) RISK-FREE

Forget cutting up drawings and pasting them onto a layout. And, forget wasting hours hand-typing pages of text.



I read in Home Office Computer (Jan. 1991) that some people are charging $40 just to scan your signature and send it back to you on a disk. Who wants $40? With the Rip-Off Artist you can effortlessly do it yourself (plus scan graphics, logos and text). Then instantly tape your signature on hundreds of 'personalized' letters.

Simply pass this 4.13" wide hand scanner over anything you want. You'll astound your readers with stunning graphics and text.

If you're not absolutely amazed with the Rip-Off Artist's OCR and graphics capabilities, simply return it to DAK in its original box within 30 days for a courteous refund.

To order your Rip-Off Artist OCR and Graphics Scanning System including the Mustek 400-dpi Hand Scanner, Newly Released $495 Perceive Personal, PC Paintbrush, ScanKit, Expansion Card and more risk-free with your credit card, call toll-free 1-800-325-0800 or send your check for DAK's market-blasting price of just $349.95 ($9 P&H).

Use Order No. 5844 for 5¼" disks. And, use Order No. 5850 for 3½" disks.

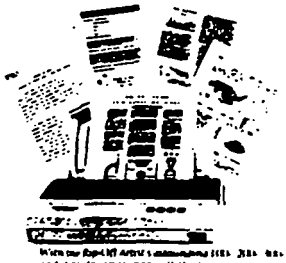
You'll see text magically flow into your word processor, database or desktop publisher seconds after you've scanned it.

Plus, you'll grab your reader's attention with eye-catching photos, drawings and charts you've scanned into your documents.

FINAL CLOSEOUT NOW JUST $99.90

Use Order No. 5844 or 5850 ($9 P&H).

If you've been waiting to buy a Rip-Off Artist, now is the time to do it. Now you can save a whopping $50 off my original, industry-blasting price.



With the Rip-Off Artist's astounding 100-, 200-, 300- and 400-dpi resolution, all the text and graphics you scan and print will be sharp and easy to read.

STATEMENT OF DAVID LISSY
MEMBER, AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS
IN SUPPORT OF H.R. 897

Mr. Chairman,

My name is David Lissy. I am a well-established professional photographer.

In 1991, I accepted an assignment from a client and licensed limited catalog rights to them in writing, before completion of the assignment, and, in more refined and detailed terms, after completion of the assignment. I did not apply for copyright registration of the photographs.

Early this year, I discovered that the client had used two shots from that assignment in newspaper advertisements placed in four U.S. markets. In accordance with the price list for additional uses included in our original 1991 agreement, I billed the client $2,700.00 for the newspaper ads. As a result, the client company has refused to pay the fee and has told me they will never hire me again.

I was astounded when I reviewed my options for restitution with an attorney. I can sue only for the lost $2,700.00 fee in these circumstances, whereas if I had registered the photographs, I could ask for up to $100,000 in statutory damages plus attorneys' fees. It is clear that clients would be less inclined to run roughshod over photographers if faced with the possibility of paying damages and legal fees, but few photographers are able to register their works in order to secure this protection.

A photographer seeking to redress the infringement of an unregistered work confronts a true dilemma. He will likely lose

a client and owe attorneys' fees even if he goes after and wins a judgment against an infringer. In my situation, I have no prospect of substantial damages to persuade the infringer to settle or to counterbalance the loss of a client. Under current copyright law, the best I can achieve is a Pyrrhic victory.

**STATEMENT OF NANCY WIGGINS, ILLUSTRATOR
IN SUPPORT OF H.R. 897**

Mr. Chairman,

My name is Nancy Wiggins and I have been a successful commercial illustrator for over twenty years.

Recently, an established design firm commissioned me to paint a watercolor of Cuyahoga Savings Bank for duplication on the covers of the bank's promotional packet. Subsequently, the bank called me to ask for permission to use the illustration on the cover of the annual report. I asked for $900.00 for this additional use, a price that was less than half of the price for such work suggested in the Graphic Artist's Guild's Pricing and Ethical Guidelines. The bank's marketing representative told me this was too high a price and the bank intended to use the illustration for the annual report without paying me anything. It did so.

Later, I asked the design firm for the return of my original watercolor and discovered that the director of the design firm had framed it and presented it to the bank's CEO for his office. I called the CEO and politely requested the return of my work. I explained that the bank had rights to reproduce the illustration on the promotional package, but that it had not bought the original painting. If he wanted the painting, I would sell it to him for $1,500.00. In response, he replied, "It's my goddamn piece of artwork and I can do what I like with it. You can go to hell."

When I approached the design firm to help me recover the fees for the additional uses, the head of the firm told me that if I pursued the matter, she would circulate word in the creative community that I was greedy and difficult.

Stymied in my attempts to resolve the claim in an amicable way, I then considered retaining an attorney, but abandoned the idea when I calculated that attorneys' fees would exceed the disputed amount. I had not registered the work and could not ask for legal fees. I backed down, but have never received another job from the design firm or the bank.

I now realize that I am completely vulnerable if clients choose to make multiple uses of my work without paying me. It is extremely difficult for me to register my illustrations. I work on very tight deadlines and do not have time to apply for registration before delivering my artwork. Moreover, I deliver the original to the client and am not able to keep full reproductions for myself. If a client chooses to keep my original work and refuses to pay me for multiple uses, there is nothing I can do. Usually the costs of taking legal action to enforce my rights are greater than the additional fees I seek. Without the ability to recover my legal fees from an infringer, and to obtain what are in essence punitive damages, enforcement is out of the question. Unless the law is changed, I lack the remedies needed to protect my copyrights and to force infringers to compensate me for unauthorized use of my work.

STATEMENT OF HANK DELESPINASSE
MEMBER, AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS
IN SUPPORT OF H.R. 897

Mr. Chairman,

My name is Hank deLespinasse. I have been a professional photographer for over twenty-five years.

In my experience, photographers rarely apply for copyright registration of their works because the costs and administrative burdens are prohibitive. In one 2½ year period, I submitted more than 56,00 pictures to Image Bank, the stock agency which acts as my agent, but I did not register most of them individually because of practical constraints. Much of my business is derived from the sale of photographs published in the catalogs of Image Bank and I recently discovered, to my regret, that the catalogs containing my images are also unregistered. That lack of individual and catalog copyright registration left me with almost no recourse when I stumbled upon blatant infringement of some of works during a visit to a computer trade show in 1991.

While visiting the Comdex exposition, I admired a series of photographs displayed upon a bank of computer monitors. I was surprised to identify some of the works as my own and those of other well-known Image Bank photographers. The salesman at the booth told me that the exhibitor had purchased the photographs from Image Bank for $100.00 each, but my suspicions were aroused because there were almost sixty pictures on display, and I could see printing dots within the images as if they had been scanned from catalogs rather than reproduced from the kind of reproduction-grade duplicates which Image Bank provides to

legitimate buyers. When I called Image Bank, they confirmed that the exhibitor had purchased only one-time audio-visual use rights for seven photographs. In fact, the exhibitor had overstepped limits of the license for one-time usage of the purchased photographs also; all of the images flashed up on the computer screens hundreds of times a day for several days during the exposition.

I returned to the exhibit with my camera to record evidence of the infringements by taking pictures of the monitor screens showing my images. While I was photographing the computer screens, an executive with the exhibitor's company came up to speak with me and commented on how much she liked the photographs. She then added that the company "actually paid some money" for the seven images which had the company logo burned into them because of plans to distribute them as part of a reseller demonstration. I was appalled at these plans because a reseller demo involves international dissemination of information on computer chips with no limits on the scope of distribution. Incorporation of images in a reseller demo ensures almost infinite uncontrolled duplication and many photographers would not consider selling such rights even if an appropriate price were determinable.

Upon inspection, it was apparent to me that all of the displayed images had been scanned from catalogs. Even the seven purchased images imprinted with the company logo carried the telltale printers' dots within the images. Apparently, even

though the company had received high-quality transparencies of these photographs from Image Bank, the representative at the booth told me it was easier to scan these images for computer display directly from the printed page.

I later identified the origins of thirty-five of the images displayed on the computer screens in various Image Bank catalogs, but when I informed Image Bank of my discovery I found that although all catalogs bear the copyright symbol, they are not protected by copyright registration. Image Bank is now negotiating with the infringers, but without a claim for attorneys' fees or statutory damages on the horizon, their negotiating posture, even as the wronged party, is greatly weakened.

As a wronged individual, I have even less recourse. Image Bank largely manages the uses of my photographs for me and I do not retain the transparencies of much of my work. If I attempted to manage and police the licensing and distribution of my photographs, I would have no time to do new work. Attempting to register all of my works in anticipation of possible future infringement presents a logistical nightmare.

Yet my recent encounter with the infringements at the Comdex exposition illustrates the ease with which infringers may now steal and display works for which they have no intention of paying. The new scanning technologies have facilitated duplication to the extent that infringers may copy with

increasing ease while creators sink in a quagmire of registration requirements and unrecoverable legal fees.

STATEMENT OF GARY KELLNER
MEMBER, AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS
IN SUPPORT OF H.R. 897

Mr. Chairman,

My name is Gary Kellner. I have been a professional photographer for eleven years.

Three years ago, I accepted a job for Goodyear through a local advertising agency. In the course of an arduous three-day shoot involving elaborate arrangements, I took several rolls of film for an in-house sales force brochure. My invoice specified one time usage of the photographs for that purpose. After completion of the job, I asked the ad agency to return my film to me when the art director had finished his selection of shots for the brochure, and they assured me that they would promptly do so so that I could use some of the shots for my own business advertising.

Despite numerous requests, the film was not forthcoming. Eventually the agency sent me part of the film only, a damaged roll.

Some months later, I was browsing at a trade show for business supply organizations and noticed a three dimensional point-of-purchase display for Goodyear products prominently featuring one of my images from the brochure shoot. I found that every Goodyear store across the nation was displaying this item.

Upon investigation, I also learned that Goodyear had liked the shot and had requested the agency to return my film to them for the displays. Without questioning or asking my permission, the agency had complied.

When upon the advice of an attorney I asked for a $1,500 fee for the use of my image in the display, the ad agency responded that their purchase order had established the photographs as works for hire and no additional fees were due. In fact, the agency had never issued a purchase order to me, but I had not registered the photographs, and knew that legal fees for pressing my claim would be more than $1,500, so I abandoned my efforts to seek payment.

As a practical matter, I am simply unable to register all of my photographs or to know which ones I should register. It is impossible to guess which images might be targets for infringement, and registration of every single image would send me into bankruptcy. I often send out my rolls of film to clients and consequently lack even the required deposits for registration or proofs of what has been infringed. By the time I receive my film back from clients, often the three months from publication has already elapsed and infringements may have already occurred, thus foreclosing opportunities to register in time to secure the rights to damages and legal fees. Until the law is changed, I will be unable to protect my copyright right from unscrupulous clients and others, who, under the current scheme, may make infringing uses of creative works with impunity.

STATEMENT OF PRESTON LYON
MEMBER, AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS
IN SUPPORT OF H.R. 897

Mr. Chairman,

My name is Preston Lyon. I have been a professional photographer since 1975.

Hardships imposed by the present copyright laws have forestalled my attempts to protect my works from infringement or to object to known instances of infringement.

For example, six months ago, a leading advertising agency commissioned me to create an original photograph to accompany clever lines of copy in an advertisement for Schneider camera lenses. The resulting photograph, a humorous view of a large dog delicately taking a hot dog from a pile of wieners in buns, involved a painstaking set-up with a trained dog. Under the terms of my agreement with the advertising agency, for $1,500 the agency retained exclusive rights for two years usage of the photograph bearing my credit line in that particular advertisement.

Several weeks after the Schneider ads began to appear in a number of publications, the advertising agency advised me that a Florida Lexus dealership had placed an unauthorized variation of the ad featuring my photograph in the Fort Lauderdale Sun - Sentinel. Attorneys from Schneider contacted the Lexus dealer and demanded a fee of $1,000 for the infringement which they received with the dealer's apologetic explanation that an entrant in an in-house advertising contest at his business had submitted the copy and photograph as original work.

Schneider declined to share the proceeds of the infringement demand with me or the advertising agency because the $1,000 fee was not even enough to cover the $4,000 attorney's fee incurred in pressing the demand.

My options to redress this infringement were discouragingly limited. I had not registered the "dog eat dog" photograph; having taken more than 40,000 pictures during last year alone, I am not in a position to manage the paperwork or absorb the costs of registering each of my works. As a result, I have no hope of recovering attorneys fees or statutory damages if infringers steal my work.

Had I pursued my first option to file suit against the Lexus dealership, my legal fees certainly would have outstripped any potential court award. My other option -- to insist on a share of Schneider's settlement money -- would have alienated a good client for a negligible sum. Though angered by the infringement of a highly original photograph, I have reluctantly dropped the matter.

This is not first time I have faced such a situation. Three years ago, I produced a distinctive photograph of a sumo wrestler on a skateboard for an advertising agency representing an international shipping company. A different advertising agency later reproduced the photograph in a promotional flyer illustrating their creative work. They did not ask permission to use the photograph, I received no credit or compensation for the damage to the commercial value of my work, and there were no

promising remedies available to me. Again, legal fees would have more than offset any award resulting from cease and desist demands or a lawsuit.

I have no doubt that I will face other infringements of this kind during my career, and will be virtually powerless to guard against them, unless you pass the bill now under consideration.

Mr. HUGHES. Mr. Rogers, welcome.

STATEMENT OF ART ROGERS, PROFESSIONAL PHOTOGRAPHER, ON BEHALF OF THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, ACCOMPANIED BY DONALD PRUTZMAN, ESQ.

Mr. ROGERS. Mr. Chairman, my name is Art Rogers, and it is my pleasure and honor to appear before you today to testify on behalf of the American Society of Media Photographers, known as ASMP, in support of H.R. 897, the Copyright Reform Act of 1993.

I am a professional photographer working and living out of Point Reyes, CA, for the past 22 years. Like most ASMP members, I make my living solely by photography and, in particular, from the exercise of my copyright rights. I have been fortunate enough to achieve a degree of professional success in my career. I have had exhibitions of my photographs, and they have been shown in many parts of the United States. My work is widely published in magazines and journals in this country and abroad. Several of my photographs are included in the permanent collections of the San Francisco Museum of Modern Art, the Center for Creative Photography at the University of Arizona, and the Joseph Seagrams & Sons California Collection in New York City. I have taught photography at, among other places, the San Francisco Art Institute.

I have brought with me today several examples of my work—you should have in front of you a recent piece published in Life magazine—to give you an idea and some insight into the nature and quality of my work. There are also several note cards that are currently in print.

But it is not my success as a professional photographer that has led me to appear today before the subcommittee, but the story I have to tell you about my experience in the Federal courts over the past 3½ years trying to protect the copyright in a single photograph entitled "Puppies," which is over there. I believe that my experience, despite its favorable outcome on the merits, demonstrates the pressing need to make statutory damages and attorneys' fees recoverable by all successful copyright plaintiffs.

Like most photographers, I have neither the time nor the staff to register the thousands of images that I create each year, but as a result of my not having registered just one of the many thousands of photographs I have created over the course of my career, I have been put through a long and difficult travail as I have attempted to vindicate my rights against a blatantly willful infringer. I am here to tell you how difficult that process has been despite my victory in the courts and to ask that the law be changed so that no one will be forced to make the sacrifices I have had to make to enforce my copyright rights.

My story begins in 1980 when I was asked to photograph eight new German Shepherd puppies by a client named Jim Scanlon. As is always the case when asked to create an image interpreting some aspect of the world, I exercised considerable creative judgment in deciding how the photograph should be composed and executed, including the arrangement of the models—which I decided in this case to expand to include both Jim and Mary Scanlon—also deciding on the lighting to be used and the photographic details. I made approximately 50 exposures to accomplish this, and after

the contact sheets were prepared I chose one in particular as the final photograph. The Scanlons purchased several prints for a few hundred dollars, and, as is my practice, I retained my copyright in the image and all others shot along with it and added this image to my catalog of works available for further reproduction and distribution. A large printed photograph is over here.

[Indicating photograph.]

Mr. ROGERS. In the ensuing years, my copyright in this image earned revenues and various reproduction opportunities. In 1984 I licensed its use in a note card to Museum Graphics. That company has a long history of distributing high-quality photography, including photographs by Ansel Adams, Imogen Cunningham, and Edward Weston. I believe that Museum Graphics has since completed two printings of 5,000 each of this "Puppies" image. You have in front of you today a copy of that.

In 1987, a New York City artist by the name of Jeff Koons purchased one of these note cards and proceeded, without my permission or knowledge, to convert my two-dimension image into a three-dimensional sculpture. After tearing my copyright notice off the card, Koons supplied his artisans in Italy with the image and instructed them quite literally to copy the work. He instructed his workers how to paint the resulting sculpture by marking the photograph itself as it appeared on the note card, and before you is that sculptural rendition of my work.

Koons displayed his copy of my work at a show of his entitled "The Banality Show" at the Sonnabend Gallery in New York City in 1988. He made a total of four sculptures based on this photograph and subsequently sold three of them for $367,000. Displayed next to "Puppies" is the Koons sculpture.

In May 1989, Jim Scanlon, the gentleman in the photograph, received a call from a friend who had seen what she thought was a colorized version of my photograph in the Sunday edition of the Los Angeles Times. Jim got the paper and discovered that the newspaper photograph was not the photograph of "Puppies" but, rather, a photograph of the sculptural rendition of that photograph which was being shown in an exhibition at the Los Angeles Museum of Contemporary Art. Jim called my attention to this.

At this time, I had not filed for copyright registration for "Puppies" and had no reason to anticipate that my work would be copied by Koons. I soon found out, after consulting counsel to consider my legal options, that the absence of a prior registration foreclosed the possibility of recovering my legal fees even if I won the lawsuit and further meant that I could not be awarded statutory damages in lieu of proving actual damages and Koons' profits.

My first problem was finding a competent lawyer willing to represent me in a case in which our legal fees could not be recovered. That was a very difficult and frustrating experience, and only through good fortune was I able to retain Mr. Donald Prutzman—who is here with me today to my right—to represent me in an infringement case against Mr. Koons.

We filed suit for copyright infringement and other causes of action against Koons and Sonnabend Gallery, which sold the sculptures, on October 11, 1989. After completion of discovery, the trial court granted summary judgment in my favor against both defend-

ants on the copyright claim in December 1990. The court rejected Koons' argument that his copying of my work was protected by "fair use" under copyright law. Far from "commenting upon" or criticizing my work, the court held that Koons "simply appropriated it."

The district court ruled that I was entitled to a permanent injunction against Koons and Sonnabend Gallery prohibiting them from making, selling, lending, or displaying copies of "String of Puppies." It further ordered Koons to turn over to me the remaining copy of that work still in his possession, an order which Koons proceeded to defy by shipping it out of the country, which prompted the court to hold him in contempt. Only recently did Koons finally deliver the remaining copy of this infringing sculpture to me.

Since I could not recover attorney's fees and statutory damages from Koons, I asked the district court to award me money damages in the amount of his profits, which I believed were the full amount of the revenues earned from the sale of the three sculptures infringing, which was an amount of $367,000. Despite Koons' failure to set forth a detailed accounting of his alleged expenses which could be deducted from these revenues, the district court denied my summary judgment motion seeking an award of profits, thereby requiring a damages trial to be held to determine the appropriate amount of profits to be awarded. As of this date, that damages trial has yet to occur and I have not recovered a penny of the profits that Koons has made from the sale of his infringing copies.

Koons then appealed the district court's determination of infringement to the second court of appeals. After briefs were filed and an argument was heard before that court, it issued a decision on April 2, 1992, affirming the grant of summary judgment in my favor. In yet another even more emphatic rejection of Koons' fair use argument, the second circuit court found that Koons' copying of "Puppies" was done in bad faith and solely for profit and that Koons' claim that his work was a parody was misplaced. As the court stated in its opinion, "It is not really the parody flag that appellants are sailing under but, rather, the flag of piracy."

The second circuit believed that I was entitled to a recovery of statutory damages. In fact, the court went so far as to suggest that "given Koons' willful and egregious behavior, we think Rogers may be a good candidate for enhanced statutory damages" pursuant to 504(c). However, section 412 of that act, which the court may not have considered when it wrote its decision, would seem to bar those statutory damages because the photograph was not registered at the onset.

Thus, in light of section 412, proving actual damages and profits will probably be necessary if I am to recover any monetary damages from Koons. Insofar as profits are concerned, the court indicated that Koons would have the opportunity at a trial to establish elements of profit not attributable to my work, which the court suggested may include Koons' "notoriety" and "his related ability to command high prices for his work."

Now the case is back before the district court for determination of my damages, and no trial date has been set yet. It is clear, however, that we face yet another long and difficult road in bringing this matter to a final conclusion and that it will require a great

deal of time, effort, and financial resources on the part of both myself and my lawyer.

Koons has asked the court to receive testimony from numerous expert witnesses, and I have been obliged to retain experts to counter those positions that Koons' witnesses will no doubt advance. We face the prospect of an extended trial and the possibility of yet another appeal after the jury determination of the appropriate damages. We are now in the 4th year of this litigation.

My attorney has invested hundreds of hours in this case, and we are precluded from recovering any of his fees from a defendant that the courts have held is a willful and egregious infringer. Furthermore, I have spent close to $40,000 in litigation costs alone to date, and I'm sure that more costs lie ahead as we move closer to the damages trial.

Now I am required to go through an exercise that permits the infringer to put forth various arguments as to why the vast majority of the profits earned from his illegal activity should be his and I should be entitled to only nominal damages. If Koons is successful in these arguments, 4 years of litigation and thousands of dollars in attorney's fees and litigation expenses will result in a minimal financial recovery from the infringer for me, the innocent party.

I respectfully suggest to you, Mr. Chairman, and to your colleagues on the subcommittee that this should not be so. The infringer should not be allowed to avoid paying my legal fees and expenses because of a technical requirement that my work be registered before an infringement began. The infringer should not be able to force me to go through a damages trial because I simply cannot ask the court for an award of statutory damages up to $100,000, which is what the law permits for those few people who comply with the technical requirements of section 412, nor should the infringer, especially one who has knowingly copied my work solely for profit, be afforded the opportunity to wiggle out of substantial profits awarded by arguing that he is, in fact, responsible for those profits despite his sole reliance on my work.

Few photographers or other individual copyright owners have chosen to risk what I have risked, and now I can see why. I have devoted almost 4 years to this effort, and my health, my business, and my family have suffered as a result. I have made great financial sacrifices to keep this litigation going, and all of the sacrifices have been required to bring this case, one that the courts have already held involved egregious misconduct, simply to the point of a full damages trial.

I firmly believe that I would have been spared much of this agony if I had been able to recover my attorney's fees and statutory damages against Koons. It is questionable whether even someone like Jeff Koons would have dragged this litigation out all these years if in the end he would have been required to pay not only his but my legal fees and it was clear that, at a minimum, he would owe me statutory damages.

On behalf of ASMP and all other photographers and individual copyright owners who may take action against future infringers, I urge the speedy enactment of H.R. 897. By making statutory damages and attorney's fees available to all copyright owners, Congress will prevent the abuse of the system to which I have been sub-

jected, and it will enable persons like myself to take action against infringers and to make them pay for their illegal conduct.

Thank you for giving me an opportunity to testify before you today.

Mr. HUGHES. Thank you very much, Mr. Rogers, and let me first of all just congratulate you on your outstanding photography.

Mr. ROGERS. Thank you.

Mr. HUGHES. It really is impressive.

[The prepared statement of Mr. Rogers follows:]

STATEMENT OF ART ROGERS, PROFESSIONAL PHOTOGRAPHER AND MEMBER OF THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, IN SUPPORT OF H.R. 897, THE COPYRIGHT REFORM ACT OF 1993.

Mr. Chairman, my name is Art Rogers, and it is my pleasure and honor to appear before you today to testify on behalf of the American Society of Media Photographers (ASMP) in support of H.R. 897, the Copyright Reform Act of 1993.

I am a professional photographer working and living out of Point Reyes, California for the past 22 years. Like most ASMP members, I make my living solely from my photography, and in particular from the exercise of my copyright rights. I have been fortunate enough to have achieved a degree of professional success in my career, and exhibitions of my photographs have been shown in many parts of the United States. My work has been widely published in magazines and journals in this country and abroad. Several of my photographs are included in the permanent collections of the San Francisco Museum of Modern Art, the Center for Creative Photography at the University of Arizona, and Joseph Seagrams and Sons in New York City. I have taught photography at, among other places, the San Francisco Art Institute.

I have brought with me today several examples of my work so that you and the Subcommittee will gain some insight into the nature and quality of my work.

It is not my success as a professional photographer that has led to my appearance before your Subcommittee today, but the story that I have to tell about my experience in the federal courts over the last three and a half years trying to protect my copyright in a single photograph entitled "Puppies". I believe

that my experience, despite its favorable outcome on the merits, demonstrates the pressing need to make statutory damages and attorneys' fees recoverable by all successful copyright plaintiffs.

Like most photographers, I have neither the time nor the staff to register the thousands of images that I create each year. But as a result of my not having registered just one of the many thousands of photographs that I have created over the course of my career, I have been put through a long and difficult travail as I have attempted to vindicate my rights against a blatantly willful infringer. I am here to tell you how difficult that process has been despite my victory in the courts, and to ask that the law be changed so that no one will be forced to make the sacrifices I have made merely to enforce my copyright rights.

My story begins in 1980, when I was asked to photograph eight new German Shepherd puppies by a client, Jim Scanlon. As is always the case when asked to create an image interpreting some aspect of the world, I exercised considerable creative judgment in deciding how the photograph should be composed and executed, including the arrangement of the models (which I decided to expand to include Jim Scanlon and his wife), the lighting to be used, and other photographic details. I made approximately 50 exposures, and after contact sheets were prepared, I chose one particular frame as the final photograph. The Scanlons purchased several prints for a few hundred dollars. As is my practice, I retained my copyright in the image and all

others shot along with it, and added the image to my catalogue of works available for further reproduction and distribution. A large print of the photograph, which I named "Puppies", is on display here today.

In the ensuing years, my copyright in this image earned revenues as various reproduction opportunities arose. In 1984, for example, I licensed the use of "Puppies" to Museum Graphics for reproduction on notecards and postcards. That company had a long history of distributing high-quality photography, including photographs by Ansel Adams, Imogen Cunningham and Edward Weston, on such media. I believe that Museum Graphics has since completed two printings, of 5,000 each, of the "Puppies" image. I have with me today examples of the Museum Graphics notecards containing that image.

In 1987, a New York City artist by the name of Jeff Koons purchased one of the Museum Graphics notecards of "Puppies", and proceeded--without my permission or knowledge--to convert my two-dimensional image into a three-dimensional sculpture. After tearing my copyright notice off the notecard, Koons supplied his artisans in Italy with the image and instructed them, quite literally, to copy my work. He instructed his workers how to paint the resulting sculpture by marking the photograph itself as it appeared on the notecard.

Koons displayed his copy of my work at his "Banality Show" held at Sonnabend Gallery in New York in 1988. He made a total of four sculptures based on my photograph, and subsequently sold

three of them for a total of $367,000. Displayed next to "Puppies" is a photograph of Koons' sculpture, which he entitled "String of Puppies."

In May 1989, Jim Scanlon received a call from a friend who had seen what she thought was a "colorized version" of my photograph in the Sunday edition of the Los Angeles Times. Jim got the paper and discovered that the newspaper photograph was not "Puppies" but rather was Koons' sculptural rendition of my photograph, which was being shown in an exhibition at the Los Angeles Museum of Contemporary Art. Jim called it to my attention.

At this time, I had not filed for copyright registration for "Puppies", and had no reason to anticipate that my work would be copied by Koons. I soon found out, after consulting counsel to consider my legal options, that the absence of a prior registration foreclosed the possibility of recovering my legal fees even if I won a lawsuit, and further meant that I could not be awarded statutory damages in lieu of proving actual damages and Koons' profits.

My first problem was finding a competent lawyer willing to represent me in a case in which our legal fees could not be recovered. That was a difficult and frustrating experience, and only through good fortune was I able to retain Donald Prutzman, who is here with me today, to represent me in an infringement action against Koons.

We filed suit for copyright infringement and other causes of action against Koons and Sonnabend Gallery, which sold the sculptures, on October 11, 1989. After completion of discovery, the trial court granted summary judgment in my favor against both defendants on the copyright claim in December of 1990. (A copy of the trial court's decision is enclosed). The court rejected Koons' argument that his copying of my work was a protected "fair use" under the copyright laws. Far from "commenting" upon or criticizing my work, the court held that Koons "simply appropriates it."

The district court ruled that I was entitled to a permanent injunction against Koons and Sonnabend prohibiting them from making, selling, lending or displaying copies of "String of Puppies." It further ordered Koons to turn over to me the remaining copy of that work still in his possession--an order which Koons proceeded to defy by shipping it out of the country, which prompted the court to hold him in contempt. Only recently did Koons finally deliver the remaining copy of the infringing sculpture to me, and it is now stored in a warehouse in New York. I would have brought the Koons sculpture with me today were it not for the fact that transporting it here would be prohibitively expensive.

Since I could not recover attorneys' fees and statutory damages from Koons, I asked the district court to award me money damages in the amount of his profits, which I believed were the full amount of the revenues earned from the sale of the three

infringing sculptures, or $367,000. Despite Koons' failure to set forth a detailed accounting of his alleged expenses which could be deducted from these revenues, the district court denied my summary judgment motion seeking an award of profits, thereby requiring a damages trial to be held to determine the appropriate amount of profits to be awarded. As of this date, that damages trial has yet to occur, and I have not recovered a penny of the profits Koons made from the sale of his infringing copies.

Koons then appealed the district court's determination of infringement to the Second Circuit Court of Appeals. After briefs were filed and an argument was heard before that court, it issued a decision on April 2, 1992 affirming the grant of summary judgment in my favor. (A copy of the Second Circuit's opinion is enclosed). In yet another, even more emphatic, rejection of Koons' fair use argument, the Second Circuit found that Koons' copying of "Puppies" was done in bad faith and solely for profit, and that Koons' claim that his work was a parody was misplaced. As the court stated in its opinion, "it is not really the parody flag that appellants are sailing under, but rather the flag of piracy."

The Second Circuit mistakenly believed that I was entitled to a recovery of statutory damages. In fact, the court went so far as to suggest that "given Koons' willful and egregious behavior, we think Rogers may be a good candidate for enhanced statutory damages pursuant to 17 U.S.C. § 504(c)(2)." However, section 412 of the Act, which the court may not have considered

when it wrote its decision, would seem to bar statutory damages because the photograph was not registered at the outset.

Thus, in light of section 412, proving actual damages and profits will probably be necessary if I am to recover any monetary damages from Koons. Insofar as profits are concerned, the court indicated that Koons would have the opportunity at trial to establish elements of profit not attributable to my work, which the court suggested may include Koons' "notoriety" and "his related ability to command high prices for his work."

Now the case is back before the district court for a determination of my damages, and no trial date has yet been set. It is clear, however, that we face yet another long and difficult road in bringing this matter to a final conclusion, and that it will require a great deal of time, effort and financial resources on the part of both myself and my lawyer. Koons has asked the court to receive testimony from numerous expert witnesses, and I have been obliged to retain experts to counter the positions that Koons' witnesses will no doubt advance. We face the prospect of an extended trial, and the possibility of yet another appeal after the jury determination of the appropriate damages.

We are now in the fourth year of this litigation. My attorney has invested hundreds of hours in the case, and we are precluded from recovering <u>any</u> of his fees from a defendant that the courts have held is a willful and egregious infringer. Furthermore, I have spent close to $40,000 in litigation costs alone to date, and I'm sure that many costs lie ahead as we move

closer to the damages trial. Now I am required to go through an exercise that permits the infringer to put forth various arguments as to why the vast majority of the profits earned from his illegal activity should be his, and I should be entitled to only nominal damages. If Koons is successful in these arguments, four years of litigation and thousands of dollars in attorneys' fees and litigation expenses will result in a minimal financial recovery from the infringer for me, the innocent party.

I respectfully suggest to you, Mr. Chairman, and to your colleagues on the Subcommittee, that this should not be so. The infringer should not be allowed to avoid paying my legal fees and expenses because of a technical requirement that my work be registered before infringement began. The infringer should not be able to force me to go through a damages trial because I cannot simply ask the court for an award of statutory damages up to $100,000, which is what the law permits for those few individuals who comply with the technical requirements of section 412. Nor should the infringer, especially one who has knowingly copied my work solely for profit, be afforded the opportunity to wiggle out of a substantial profits award by arguing that <u>he</u> is in fact responsible for those profits, despite his sole reliance on my work.

Few photographers or other individual copyright owners have chosen to risk what I have risked, and now I can see why. I have devoted over three years to this effort, and my health and family have suffered as a result. I have made great financial

sacrifices to keep this litigation going. And all of this sacrifice has been required to bring this case--one that the courts have held involved egregious misconduct--simply to the point of a full damages trial.

I firmly believe that I would have been spared much of this agony if I had been able to recover my attorneys' fees and statutory damages against Koons. It is questionable whether even someone like Jeff Koons would have dragged this litigation out all these years if in the end he would have been required to pay not only his, but my, legal fees, and it was clear that, at a minimum, he would owe me statutory damages.

On behalf of ASMP and all other photographers and individual copyright owners who may take action against future infringers, I urge the speedy enactment of H.R. 897. By making statutory damages and attorneys' fees available to all copyright owners, Congress will prevent the abuse of the system to which I have been subjected, and will enable persons like myself to take action against infringers and to make them pay for their illegal conduct. Thank you for giving me the opportunity to testify before you today.

to another. Thus, "it [is] in the district court's province as trier of fact to weigh the evidence, and in particular the opinion research." *American Home Products*, 577 F.2d at 167. After reviewing the record in this case, we conclude that Judge Cedarbaum's evaluation of the survey questions is not clearly erroneous.

J & J * Merck also argues that the district court erroneously adopted Dr. Wind's opinion regarding the necessity of a controlled study. It contends that, "[t]he object of Mr. Ridgway's survey, like any advertising communication test, was to measure the impact of an ad upon consumers *in the real world*—not in some artificial or 'control[led]' environment." This contention lacks merit for two reasons. First, Judge Cedarbaum drew no conclusion from the fact that the survey lacked a control; indeed, her legal discussion makes no mention of it whatsoever. Second, we find J & J * Merck's opposition to a control study at odds with its own proposed theory of Lanham Act liability, i.e., that liability exists for exploiting publicly held misperceptions even where the challenged advertising is literally truthful. In these types of cases, the purpose of a control study is to identify the portion of the survey population that held extrinsic beliefs prior to viewing an advertisement—for example, the unsubstantiated belief that aluminum causes Alzheimer's disease. Thus, a control would likely be indispensable proof in an action premised on J & J * Merck's theory. After all, without such evidence it would be hard to imagine how a plaintiff could ever convincingly establish that there was, in the first instance, a public misperception for the defendant to exploit.

Since J & J * Merck did not submit persuasive extrinsic evidence that the challenged Tums' commercials communicated a false message to consumers by implication or otherwise, we cannot say the district court was clearly erroneous in rejecting it. Accordingly, its false advertising claims must fail.

CONCLUSION

Based upon the literal message of the challenged commercials, and on the responses obtained from the consumer survey, the district court found that J & J * Merck failed to establish that commercials were either false or misleading. Upon review, we conclude that the district court's findings were not erroneous. Therefore, we affirm the district court's denial of injunctive relief, and its dismissal of J & J * Merck's complaint.

Affirmed.



Art ROGERS, Plaintiff-Appellee-Cross-Appellant,

v.

Jeff KOONS; Sonnabend Gallery, Inc., Defendants-Appellants-Cross-Appellees.

Nos. 234, 388 and 235, Dockets 91-7396, 91-7442 and 91-7540.

United States Court of Appeals, Second Circuit.

Argued Oct. 3, 1991.

Decided April 2, 1992.

Photographer brought suit against sculptor alleging infringement of his copyrighted photograph "Puppies" to create sculpture "String of Puppies." The United States District Court for the Southern District of New York, Charles S. Haight, Jr., J., 751 F.Supp. 474, as amended on reargument, 777 F.Supp. 1, held that sculptor infringed photographer's copyright, issued permanent injunction and turnover order, and held sculptor in contempt for violation of turnover order. Sculptor appealed. Photographer cross-appealed from denial of damage award for infringing profits. The Court of Appeals, Cardamone, Circuit Judge, held that: (1) photographer established valid ownership of copyright in original work of art; (2) evidence supported

determination that sculptor copied photographer's protected work without authorization; (3) sculptor's unauthorized use of photograph did not fall within fair use doctrine; (4) remand was necessary to determine amount of damages; and (5) holding sculptor in contempt for violation of turnover order was proper.

Affirmed.

1. **Copyrights and Intellectual Property** ⇐83(3.5)

Presumption of ownership arising from certificate of registration from United States Register of Copyrights may be rebutted. 17 U.S.C.A. § 410(c).

2. **Copyrights and Intellectual Property** ⇐36

Copyright protection extends only to those components of work that are original to creator; fact that whole work is copyrighted does not mean that every element of it is copyrighted; however, quantity of originality needed to be shown is modest. 17 U.S.C.A. § 101 et seq.

3. **Copyrights and Intellectual Property** ⇐6, 64

Portion of photographers' photograph allegedly infringed by sculptor was original work of authorship protected under Copyright Act; photographer's inventive efforts in posing group for picture, taking picture, and printing picture sufficed to meet original work of art criteria. 17 U.S.C.A. § 101 et seq.

4. **Copyrights and Intellectual Property** ⇐83(7)

Undisputed direct evidence of copying of copyrighted photograph by sculptor, who admittedly gave copy of photograph to artisans and told them to copy it, was sufficient to support entry of summary judgment in photographer's favor on issue of unauthorized copying in copyright infringement action. 17 U.S.C.A. § 101 et seq.

5. **Copyrights and Intellectual Property** ⇐89(2)

Where access to copyrighted work was conceded, and accused work was so substantially similar to copyrighted work that reasonable jurors could not differ on issue, summary judgment on issue of unauthorized copying could be sustained. 17 U.S.C.A. § 101 et seq.

6. **Copyrights and Intellectual Property** ⇐51

In determining whether two works of art are substantially similar for purposes of Copyright Act, focus must be on similarity of expression of idea or fact, not on similarity of facts, ideas or concepts themselves. 17 U.S.C.A. § 101 et seq.

7. **Copyrights and Intellectual Property** ⇐75

No copier may defend act of plagiarism by pointing out how much of copy he has not pirated. 17 U.S.C.A. § 101 et seq.

8. **Copyrights and Intellectual Property** ⇐51

It is only where points of dissimilarity between works exceed those that are similar and those similar are—when compared to original work—of small import quantitatively or qualitatively that finding of no infringement is appropriate in copyright infringement action. 17 U.S.C.A. § 101 et seq.

9. **Copyrights and Intellectual Property** ⇐53

Exploitation of copyrighted work for personal gain militated against finding of fair use of copyrighted material. 17 U.S.C.A. § 107.

10. **Copyrights and Intellectual Property** ⇐64

Sculptor's "String of Puppies" could not be deemed parody of photographers' photograph for purposes of fair use doctrine where photographer's "Puppies" was not, even in part, object of alleged parody; copied work must be, at least in part, object of parody, otherwise there would be no need to conjure up original work. 17 U.S.C.A. § 107.

11. **Copyrights and Intellectual Property** ⇐64

Sculptor's claim that his infringement of photographer's work was fair use solely because he was acting within artistic tradi-

tion of commenting upon commonplace could not be accepted; copied work was not object of sculptor's parody, as required for protection under fair use doctrine. 17 U.S.C.A. § 107.

12. Copyrights and Intellectual Property ⇐53

Where original work is factual rather than fictional, scope of fair use doctrine is broader. 17 U.S.C.A. § 107.

13. Copyrights and Intellectual Property ⇐64

Sculptor's unauthorized use of photographer's copyrighted photograph to craft sculpture did not fall under fair use doctrine; among other things, sculptor's intent was to make substantial profit, sculpture could not be considered "parody" of photograph, photograph was copied nearly in total, sculptor's work was primarily commercial in nature, being produced for sale as high-priced art, and sculpture created likelihood of future harm to market for photographer's work. 17 U.S.C.A. § 101 et seq.

14. Copyrights and Intellectual Property ⇐87(2)

In apportioning profits for infringement of photographer's copyrighted work, sculptor was entitled to retain profits to extent he could prove they derived solely from his own position in art world. 17 U.S.C.A § 504(b).

15. Copyrights and Intellectual Property ⇐86

Contempt order for direct violation of turnover order in copyright infringement case was entirely proper after defendant sculptor attempted to ship infringing copy of his sculpture from United States after turnover order was issued. 17 U.S.C.A. § 503(b).

John B. Koegel, New York City (Frank H. Wright, Michael D. Rips, Cathy Wright Isaacson, Wright Manning Rips & Maloney, of counsel), for defendants-appellants Jeff Koons and Sonnabend Gallery, Inc.

L. Donald Prutzman, New York City (Andre R. Jaglom, Stecher Jaglom & Prutzman, of counsel), for plaintiff-appellee Art Rogers.

Gregory F. Hauser, New York City (Walter, Conston, Alexander & Green, P.C., New York City, Louis A. Colombo, John D. Parker, Michael K. Farrell, Baker & Hostetler, Cleveland, Ohio, of counsel), filed a brief on behalf of United Feature Syndicate, Inc. as amicus curiae.

Before: CARDAMONE, PIERCE and WALKER, Circuit Judges.

CARDAMONE, Circuit Judge:

The key to this copyright infringement suit, brought by a plaintiff photographer against a defendant sculptor and the gallery representing him, is defendants' borrowing of plaintiff's expression of a typical American scene—a smiling husband and wife holding a litter of charming puppies. The copying was so deliberate as to suggest that defendants resolved so long as they were significant players in the art business, and the copies they produced bettered the price of the copied work by a thousand to one, their piracy of a less well-known artist's work would escape being sullied by an accusation of plagiarism.

BACKGROUND FACTS

A. *Rogers*

We think it helpful to understanding this appeal to set forth the principals' professional backgrounds. Plaintiff, Art Rogers, a 43-year-old professional artist-photographer, has a studio and home at Point Reyes, California, where he makes his living by creating, exhibiting, publishing and otherwise making use of his rights in his photographic works. Exhibitions of his photographs have been held in California and as far away as Maine, Florida and New York. His work has been described in French ("Le Monde"), British ("The Photo") and numerous American publications, including the Journal of American Photography, Polaroid's Close-Up Magazine and the Popular Photography Annual. Rogers' photographs are part of the permanent collection of the San Francisco Museum of

Modern Art, the Center for Creative Photography at the University of Arizona and Joseph E. Seagrams and Sons in New York City. He has taught photography at the San Francisco Museum of Modern Art.

B. *Creating The Photograph "Puppies"*

In 1980 an acquaintance, Jim Scanlon, commissioned Rogers to photograph his eight new German Shepherd puppies. When Rogers went to his home on September 21, 1980 he decided that taking a picture of the puppies alone would not work successfully, and chose instead to include Scanlon and his wife holding them. Substantial creative effort went into both the composition and production of "Puppies," a black and white photograph. At the photo session, and later in his lab, Rogers drew on his years of artistic development. He selected the light, the location, the bench on which the Scanlons are seated and the arrangement of the small dogs. He also made creative judgments concerning technical matters with his camera and the use of natural light. He prepared a set of "contact sheets," containing 50 different images, from which one was selected.

After the Scanlons purchased their prints for $200, "Puppies" became part of Rogers' catalogue of images available for further use, from which he, like many professional photographers, makes his living. "Puppies" has been used and exhibited a number of times. A signed print of it has been sold to a private collector, and in 1989 it was licensed for use in an anthology called "Dog Days." Rogers also planned to use the picture in a series of hand-tinted prints of his works. In 1984 Rogers had licensed "Puppies", along with other works, to Museum Graphics, a company that produces and sells notecards and post cards with high quality reproductions of photographs by well-respected American photographers including, for example, Ansel Adams. Museum Graphics has produced and distributed the "Puppies" notecard since 1984. The first printing was of 5,000 copies and there has been a second similar size printing.

C. *Koons*

Defendant Jeff Koons is a 37-year-old artist and sculptor residing in New York City. After receiving a Bachelor of Fine Arts degree from Maryland Institute College of Art in 1976, he worked at a number of jobs, principally membership development at the Museum of Modern Art in New York. While pursuing his career as an artist, he also worked until 1984 as a mutual funds salesman, a registered commodities salesman and broker, and a commodities futures broker. In the ten years from 1980 to 1990 Koons has exhibited his works in approximately 100 Group Exhibitions and in eleven one-man shows. His bibliography is extensive. Koons is represented by Sonnabend Gallery, New York, Donald Young Gallery, Chicago, and Galerie Max Hetzler, Cologne, Germany. His works sell at very substantial prices, over $100,000. He is a controversial artist hailed by some as a "modern Michelangelo," while others find his art "truly offensive." A New York Times critic complained that "Koons is pushing the relationship between art and money so far that everyone involved comes out looking slightly absurd."

D. *Creating the Sculpture "String of Puppies"*

After a successful Sonnabend show in 1986, Koons began creating a group of 20 sculptures for a 1988 exhibition at the same gallery that he called the "Banality Show." He works in an art tradition dating back to the beginning of the twentieth century. This tradition defines its efforts as follows: when the artist finishes his work, the meaning of the original object has been extracted and an entirely new meaning set in its place. An example is Andy Warhol's reproduction of multiple images of Campbell's soup cans. Koons' most famous work in this genre is a stainless steel casting of an inflatable rabbit holding a carrot. During 1986 and 1987 the sculptor traveled widely in Europe looking at materials and workshops where he might fabricate materials for the Banality Show. He decided to use porcelain, mirrors and wood as mediums. Certain European studios were chosen to execute his

porcelain works, other studios chosen for the mirror pieces, and the small Demetz Studio, located in the northern hill country town of Ortessi, Italy, was selected to carve the wood sculptures.

Koons acknowledges that the source for "String of Puppies" was a Museum Graphics notecard of "Puppies" which he purchased in a "very commercial, tourist-like card shop" in 1987. After buying the card, he tore off that portion showing Rogers' copyright of "Puppies." Koons saw certain criteria in the notecard that he thought made it a workable source. He believed it to be typical, commonplace and familiar. The notecard was also similar to other images of people holding animals that Koons had collected. Thus, he viewed the picture as part of the mass culture—"resting in the collective sub-consciousness of people regardless of whether the card had actually ever been seen by such people."

Appellant gave his artisans one of Rogers' notecards and told them to copy it. But in order to guide the creation of a three-dimensional sculptural piece from the two-dimensional photograph, Koons communicated extensively with the Demetz Studio. He visited it once a week during the period the piece was being carved by the workers and gave them written instructions. In his "production notes" Koons stressed that he wanted "Puppies" copied faithfully in the sculpture. For example, he told his artisans the "*work must be just like photo*—features of photo must be captured;" later, "*puppies need detail in fur* Details—Just Like *Photo*!;" other notes instruct the artisans to "*keep man in angle of photo*—mild lean to side & mildly forward—same for woman," to "keep woman's big smile," and to "keep [the sculpture] very, very realistic;" others state, "*Girl's nose is too small. Please make larger as per photo;*" another reminds the artisans that "The puppies must have variation in fur *as per photo*—not just large area of paint—variation *as per photo*" (emphasis supplied).

To paint the polychromed wood "String of Puppies" sculptures, Koons provided a chart with an enlarged photocopy of "Puppies" in the center; painting directions were noted in the margin with arrows drawn to various areas of the photograph. The chart noted, "Puppies, painted in shades of blue. Variation of light-to-dark *as per photo*. Paint realistic *as per photo*, but in blues." and "Man's hair, white with shades of grey *as per black and white photo*!" (emphasis supplied).

When it was finished, "String of Puppies" was displayed at the Sonnabend Gallery, which opened the Banality Show on November 19, 1988. Three of the four copies made were sold to collectors for a total of $367,000; the fourth or artist's copy was kept by Koons. Defendant Koons' use of "Puppies" to create "String of Puppies" was not authorized by plaintiff. Rogers learned of Koons' unauthorized use of his work through Jim Scanlon, the man who had commissioned Rogers to create "Puppies." A friend of Scanlon's, who was familiar with the photograph, called to tell him that what she took to be a "colorized" version of "Puppies" was on the front page of the calendar section of the May 7, 1989 Sunday *Los Angeles Times*. In fact, as she and Scanlon later learned, the newspaper actually depicted Koons' "String of Puppies" in connection with an article about its exhibition at the Los Angeles Museum of Contemporary Art.

PRIOR PROCEEDINGS

Rogers brought this action against Koons and Sonnabend Gallery on October 11, 1989, alleging copyright infringement and unfair competition under § 43(a) of the Lanham Act and under state law. Both sides advised the district court at an early stage of the proceedings that, at least as to copyright infringement, disputed factual issues were unlikely and disposition on summary judgment would probably be appropriate. After completion of discovery, both sides moved for that relief on July 5, 1990. Rogers' motion was limited to the copyright infringement claim. Koons and the Sonnabend Gallery sought summary judgment dismissing all counts in plaintiff's complaint.

The district court held oral argument on November 26, 1990. In a December 10, 1990 decision, described more fully below, it found that Koons copied "Puppies" in "String of Puppies" and that this copying was not a fair use. It therefore found infringement, 751 F.Supp. 474. Rogers' motion for an infringing profits award was denied because the trial court believed there were disputed questions of fact concerning their computation. As to Sonnabend Gallery, the district court concluded on February 22, 1991 that the record showed Sonnabend's as well as Koons' liability for infringing profits. On March 27, 1991 it entered a permanent injunction enjoining Koons and Sonnabend Gallery from making, selling, lending or displaying any copies of, or derivative works based on, "Puppies," and, pursuant to 17 U.S.C. § 503, requiring defendants to deliver all infringing articles to plaintiff within 20 days, including the fourth or artist's copy of "String of Puppies."

When defendants failed to comply with the turn-over order, Rogers moved to hold defendant Koons in contempt. The proceedings on that motion revealed that nine days after the injunction was issued, Koons had loaned the fourth copy of "String of Puppies" to a museum in Germany and arranged for its shipment out of the United States. After a hearing on May 8, 1991 the district court held Koons in contempt, directed him to do whatever was necessary to effect the sculpture's return from Germany, and imposed a daily fine for continued non-compliance to commence eight days later.

On May 28, 1991 we denied Koons' motion to stay the injunction and the contempt penalty pending appeal, but delayed the commencement of the daily fine until June 7, 1991. From the finding of copyright infringement, the granting of a permanent injunction, and the turn-over order appellants Koons and Sonnabend appeal. Rogers cross-appeals from the denial of an award prior to trial for infringing profits. We affirm.

DISCUSSION

I Ownership of Copyright in an Original Work of Art

One of the powers given Congress under Art. I, § 8 of the United States Constitution is: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries." Madison noted that "[T]he utility of this power will scarcely be questioned." The Federalist No. 43 (Madison) at 279. He further observed that copyright for authors was their right under common law. *Id.*; *see* 2 Blackstone, *Commentaries on the Laws of England* 407 (Univ. of Chicago ed. 1979). As a result, Congress enacted a copyright law, 17 U.S.C. § 101 *et seq.* (1976), under which the instant litigation was instituted.

[1] To establish an infringement of a copyright, a plaintiff must show both ownership of a copyright and that defendant copied the protected material without authorization. *See Weissmann v. Freeman*, 868 F.2d 1313, 1320 (2d Cir.), *cert. denied*, 493 U.S. 883, 110 S.Ct. 219, 107 L.Ed.2d 172 (1989). The Copyright Act makes a certificate of registration from the U.S. Register of Copyrights *prima facie* evidence of the valid ownership of a copyright, *see* 17 U.S.C. § 410(c), though that presumption of ownership may be rebutted, *see Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189, 192 (2d Cir.1985). Protection under the copyright statute extends to pictorial works, 17 U.S.C. § 102(a)(5). For more than a century photographs have been held to be copyrightable "writings" under Article I, § 8 of the Constitution. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349 (1884) (photograph of Oscar Wilde an original work of art)

[2] Of the several issues before us, the first concerns the originality of "Puppies." Defendants do not challenge plaintiff's ownership of a valid copyright, but assert instead that the portion of Rogers' work allegedly infringed was not an original work of authorship protected under the

1976 Copyright Act. Since the law protects authors' exclusive rights to their works, the cornerstone of that law is that the work protected must be original. *See Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, — U.S. —, 111 S.Ct. 1282, 1287, 113 L.Ed.2d 358 (1991). Thus, that a whole work is copyrighted does not mean that every element of it is copyrighted; copyright protection extends only to those components of the work that are original to the creator. *Id.* 111 S.Ct. at 1289. But the quantity of originality that need be shown is modest—only a dash of it will do. *Id.* at 1287; 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 1.08[C][1] (1991) (Nimmer).

[3] Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved. *See Burrow Giles*, 111 U.S. at 60, 4 S.Ct. at 282. 1 Nimmer, § 2.08[E][1]. To the extent that these factors are involved, "Puppies" is the product of plaintiff's artistic creation. Rogers' inventive efforts in posing the group for the photograph, taking the picture, and printing "Puppies" suffices to meet the original work of art criteria. Thus, in terms of his unique expression of the subject matter captured in the photograph, plaintiff has established valid ownership of a copyright in an original work of art.

II Unauthorized Copying by Defendant

[4] Plaintiff next must demonstrate that defendant Koons copied his protected work without authorization. The district court granted summary judgment to Rogers on this issue, finding Koons' sculpture "String of Puppies" an unauthorized copy of Rogers' photograph. Summary judgment may be an appropriate remedy in copyright infringement suits. *See, e.g., Peter Pan Fabrics, Inc. v. Dan River Mills, Inc.*, 295 F.Supp. 1366, 1369 (S.D.N.Y.), *aff'd*, 415 F.2d 1007 (2d Cir.1969). Yet, such relief will be denied when the question of substantial similarity is one on which reasonable minds could differ. *See, e.g., Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1329 (9th Cir. 1983).

Here, the trial court found original elements of creative expression in the copyrighted work were copied and that the copying was so blatantly apparent as not to require a trial. We agree that no reasonable juror could find that copying did not occur in this case. First, this case presents the rare scenario where there is direct evidence of copying. Koons admittedly gave a copy of the photograph to the Italian artisans with the explicit instruction that the work be copied. Moreover, the importance of copying the very details of the photograph that embodied plaintiff's original contribution—the poses, the shading, the expressions—was stressed by Koons throughout the creation of the sculpture. His instructions invariably implored that the creation must be designed "as per photo." This undisputed direct evidence of copying is sufficient to support the district court's granting of summary judgment.

[5] Further, even were such direct evidence of copying unavailable, the district court's decision could be upheld in this case on the basis that defendant Koons' access to the copyrighted work is conceded, and the accused work is so substantially similar to the copyrighted work that reasonable jurors could not differ on this issue. *See Warner Brothers, Inc. v. American Broadcasting Cos., Inc.*, 654 F.2d 204, 207 (2d Cir.1981).

Substantial similarity does not require literally identical copying of every detail. *See* 3 Nimmer, § 13.03[A]. *See also Comptone Company Ltd. v. Rayex Corp.*, 251 F.2d 487, 488 (2d Cir.1958). Such similarity is determined by the ordinary observer test: the inquiry is "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir.1966). Or, stated another way, whether "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same." *Peter Pan*

Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir.1960). Thus, Koons' allegation that a trial judge uneducated in art is not an appropriate decision-maker misses the mark; the decision-maker, whether it be a judge or a jury, need not have any special skills other than to be a reasonable and average lay person.

[6] We recognize that ideas, concepts, and the like found in the common domain are the inheritance of everyone. What is protected is the original or unique way that an author expresses those ideas, concepts, principles or processes. Hence, in looking at these two works of art to determine whether they are substantially similar, focus must be on the similarity of the *expression* of an idea or fact, not on the similarity of the facts, ideas or concepts themselves. *See Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 912 (2d Cir.1980). It is not therefore the idea of a couple with eight small puppies seated on a bench that is protected, but rather Roger's *expression* of this idea—as caught in the placement, in the particular light, and in the expressions of the subjects—that gives the photograph its charming and unique character, that is to say, makes it original and copyrightable.

Thus, had appellant simply used the *idea* presented by the photo, there would not have been infringing copying. But here Koons used the identical expression of the idea that Rogers created; the composition, the poses, and the expressions were all incorporated into the sculpture to the extent that, under the ordinary observer test, we conclude that no reasonable jury could have differed on the issue of substantial similarity. For this reason, the district court properly held that Koons "copied" the original.

[7, 8] Moreover, no copier may defend the act of plagiarism by pointing out how much of the copy he has not pirated. *See Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir.) (L. Hand, J.), *cert. denied*, 298 U.S. 669, 56 S.Ct. 835, 80 L.Ed. 1392 (1936). Thus, where substantial similarity is found, small changes here and there made by the copier are unavailing. It is only where the points of dissimilarity exceed those that are similar and those similar are—when compared to the original work—of small import quantitatively or qualitatively that a finding of no infringement is appropriate. *See* 3 Nimmer § 13.03[B][1][a]. This is not the case here. Koons' additions, such as the flowers in the hair of the couple and the bulbous noses of the puppies, are insufficient to raise a genuine issue of material fact with regard to copying in light of the overwhelming similarity to the protected expression of the original work.

Because of Koons' extensive use of the same expression of the idea that Rogers' created, it was properly held that he "copied" the protected features of the original. No genuine issue of material fact exists with respect to this finding; "String of Puppies" was copied from the photograph "Puppies" based either on the direct evidence of copying or on proof of access and substantial similarity. In light of this summary judgment was properly granted on this issue.

III The Fair Use Doctrine

Defendant Koons further defends his use of Rogers' work "Puppies" to craft "String of Puppies" under a claim of a privilege of "fair use." This equitable doctrine permits other people to use copyrighted material without the owner's consent in a reasonable manner for certain purposes. Codified in § 107 of the 1976 Copyright Act, it is of ancient lineage. Section 107 states that an original work copied for purposes such as criticism or comment may not constitute infringement, but instead may be a fair use. The section provides an illustrative—but not exhaustive—list of factors for determining when a use is "fair." These factors include (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the work used, and (4) the effect of the use on the market value of the original. 17 U.S.C. § 107.

The fact that the test envisioned by the Act is dependent on the circumstances of each case, *see* 3 Nimmer, § 13.05[A], might suggest summary judgment is unavailable

when fair use is the issue, but such relief may be granted when appropriate. *See e.g., Stewart v. Abend*, 495 U.S. 207, 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990) (summary judgment granted upon finding of no fair use). The trial court found no genuine issues of fact present regarding the fair use exception and granted summary judgment to plaintiff on this issue also. We proceed therefore to analyze the fair use factors in the circumstances of the case at hand. Our examination of these factors leads us to conclude that the district court properly granted summary judgment in favor of plaintiff.

1. *Purpose and Character of the Use*

The first factor, purpose and character of the use, asks whether the original was copied in good faith to benefit the public or primarily for the commercial interests of the infringer. *See MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir.1981). Knowing exploitation of a copyrighted work for personal gain militates against a finding of fair use. And—because it is an equitable doctrine—wrongful denial of exploitative conduct towards the work of another may bar an otherwise legitimate fair use claim. *See* 3 Nimmer, § 13.05[A][1]. Relevant to this issue is Koons' conduct, especially his action in tearing the copyright mark off of a Rogers notecard prior to sending it to the Italian artisans. This action suggests bad faith in defendant's use of plaintiff's work, and militates against a finding of fair use.

[9] The Supreme Court has held that copies made for commercial or profit-making purposes are presumptively unfair. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449, 104 S.Ct. 774, 792, 78 L.Ed.2d 574 (1984). The Court explained in a subsequent case that the "crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562, 105 S.Ct. 2218, 2231, 85 L.Ed.2d 588 (1985). We have stated that, though it is a significant factor, whether the profit element of the fair use calculus affects the ultimate determination of whether there is a fair use depends on the totality of the factors considered; it is not itself controlling. *See Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1262 (2d Cir.1986), *cert. denied*, 481 U.S. 1059, 107 S.Ct. 2201, 95 L.Ed.2d 856 (1987). Thus, while we note that Koons' substantial profit from his intentionally exploitive use of Rogers' work also militates against the finding of fair use, we turn next to consider his contention that the primary purpose of the use was for social comment.

Parody or Satire as Fair Use: The Act expressly provides that comment on or criticism of a copyrighted work may be a valid use under the fair use doctrine. We must analyze therefore whether "String of Puppies" is properly considered a comment on or criticism of the photograph "Puppies." Koons argues that his sculpture is a satire or parody of society at large. He insists that "String of Puppies" is a fair social criticism and asserts to support that proposition that he belongs to the school of American artists who believe the mass production of commodities and media images has caused a deterioration in the quality of society, and this artistic tradition of which he is a member proposes through incorporating these images into works of art to comment critically both on the incorporated object and the political and economic system that created it. These themes, Koons states, draw upon the artistic movements of Cubism and Dadaism, with particular influence attributed to Marcel Duchamp, who in 1913 became the first to incorporate manufactured objects (readymades) into a work of art, directly influencing Koons' work and the work of other contemporary American artists. We accept this definition of the objective of this group of American artists.

To analyze Koons' parody defense, we must first define it. Parody or satire, as we understand it, is when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression

of the original. Under our cases parody and satire are valued forms of criticism, encouraged because this sort of criticism itself fosters the creativity protected by the copyright law. *See Warner Bros., Inc. v. American Broadcasting Cos., Inc.*, 720 F.2d 231, 242 (2d Cir.1983). We have consistently held that a parody entitles its creator under the fair use doctrine to more extensive use of the copied work than is ordinarily allowed under the substantial similarity test. *See Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 (2d Cir.1980) (per curiam).

[10] Hence, it must first be determined whether "String of Puppies" is a parody of Rogers' work for purposes of the fair use doctrine. We agree with the district court that it is not. It is the rule in this Circuit that though the satire need not be only of the copied work and may, as appellants urge of "String of Puppies," also be a parody of modern society, the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work. *See MCA, Inc. v. Wilson*, 677 F.2d at 185; 3 Nimmer, § 13.05[C] n. 60.9.

[11] We think this is a necessary rule, as were it otherwise there would be no real limitation on the copier's use of another's copyrighted work to make a statement on some aspect of society at large. If an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer's claim to a higher or different artistic use—without insuring public awareness of the original work—there would be no practicable boundary to the fair use defense. Koons' claim that his infringement of Rogers' work is fair use solely because he is acting within an artistic tradition of commenting upon the commonplace thus cannot be accepted. The rule's function is to insure that credit is given where credit is due. By requiring that the copied work be an object of the parody, we merely insist that the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist. This awareness may come from the fact that the copied work is publicly known or because its existence is in some manner acknowledged by the parodist in connection with the parody. Of course, while our view of this matter does not necessarily prevent Koons' expression, although it may, it does recognize that any such exploitation must at least entail "paying the customary price." *Harper & Row Publishers, Inc.*, 471 U.S. at 562, 105 S.Ct. at 2231.

The problem in the instant case is that even given that "String of Puppies" is a satirical critique of our materialistic society, it is difficult to discern any parody of the photograph "Puppies" itself. We conclude therefore that this first factor of the fair use doctrine cuts against a finding of fair use. The circumstances of this case indicate that Koons' copying of the photograph "Puppies" was done in bad faith, primarily for profit-making motives, and did not constitute a parody of the original work.

2. *Nature of the Copyrighted Work*

[12] The next fair use factor asks what is the nature of the work that has been copied. Where the original work is factual rather than fictional the scope of fair use is broader. *See New Era Publications, Int'l. v. Carol Publishing Group*, 904 F.2d 152, 157 (2d Cir.), *cert. denied*, — U.S. —, 111 S.Ct. 297, 112 L.Ed.2d 251 (1990). Whether the original is creative, imaginative, or represents an investment of time in anticipation of a financial return also should be considered. *MCA, Inc. v. Wilson*, 677 F.2d at 182. Here "Puppies" was a published work of art. As an original expression it has more in common with fiction than with works based on facts, such as, for example, biographies or telephone directories. Since "Puppies" was creative and imaginative and Rogers, who makes his living as a photographer, hopes to gain a financial return for his efforts with this photograph, this factor militates against a finding of fair use.

3. *Amount and Substantiality of Work Used*

[13] Where the amount of copying exceeds permissible levels, summary judg-

ment has been upheld. *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758 (9th Cir.1978), *cert. denied*, 439 U.S. 1132, 99 S.Ct. 1054, 59 L.Ed.2d 94 (1979). To a large degree, this factor involves the same analysis as that used when determining if the copy is substantially similar to the original. Sometimes wholesale copying may be permitted, while in other cases taking even a small percentage of the original work has been held unfair use. *See Maxtone-Graham*, 803 F.2d at 1263. "[W]hat is relevant is the amount and substantiality of the copyrighted *expression* that has been used, not the *factual content* of the material in the copyrighted works." *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir.) (emphasis in original), *reh'g denied*, 818 F.2d 252, *cert. denied*, 484 U.S. 890, 108 S.Ct. 213, 98 L.Ed.2d 177 (1987). It is not fair use when more of the original is copied than necessary. Even more critical than the quantity is the qualitative degree of the copying: what degree of the essence of the original is copied in relation to its whole. *Id.* at 98; *see also New Era Publications Int'l.*, 904 F.2d at 159.

Appellants claim that under a parody defense their use of Rogers' work did not exceed the level permitted under the fair use doctrine. As discussed previously, this Circuit has traditionally afforded parodists significant leeway with respect to the extent and nature of their copying. *See Elsmere*, 623 F.2d at 253, n. 1; *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33 (1964). Yet, even under such a defense there are limitations on what constitutes fair use. *See MCA v. Wilson*, 677 F.2d at 185. Here, the essence of Rogers' photograph was copied nearly *in toto*, much more than would have been necessary even if the sculpture had been a parody of plaintiff's work. In short, it is not really the parody flag that appellants are sailing under, but rather the flag of piracy. Moreover, because we have already determined that "String of Puppies" is not a parody of Rogers' work, appellants cannot avail themselves of this heightened tolerance under a parody defense.

Nor does *Sony Corp. of America*, 464 U.S. at 449–50, 104 S.Ct. at 792–93, bear the weight that appellants place on it for the proposition that even 100 percent copying does not preclude a fair use finding. Although correct as a general statement, it applied in *Sony* to a narrow set of circumstances. Sony's copying equipment (Betamax VCRs) was used by members of the public to record television programs—the copyright of which was owned by plaintiffs. The question was whether Sony's selling of the copying equipment violated plaintiffs' rights under the Copyright Act. The Supreme Court said "no" because "time-shifting" for those watching a television program enlarges the viewing audience, and does not impair plaintiffs' commercial right in the value of the copyright. Hence, no basis existed under the Act upon which plaintiffs could hold Sony liable for selling VCR's to the general public. *Id.* at 421, 104 S.Ct. at 778.

Those are not the facts found here. Instead, Koons' copying of Rogers' work was the essence of the photograph, and designedly done as the notes to the Italian artisans conclusively reveal. Koons went well beyond the factual subject matter of the photograph to incorporate the very expression of the work created by Rogers. We find that no reasonable jury could conclude that Koons did not exceed a permissible level of copying under the fair use doctrine.

4. *Effect of the Use on the Market Value of the Original*

The fourth factor looks at the effect of the use on the market value of the original. The Supreme Court in *Stewart*, 495 U.S. 207, 110 S.Ct. 1750, 109 L.Ed.2d 184, stated that the fourth factor "is the 'most important, and indeed, central fair use factor.'" *Id.* at 236, 110 S.Ct. at 1769 (quoting 3 Nimmer § 13.05[A]); *see also Harper & Row*, 471 U.S. at 566, 105 S.Ct. at 2233. Under this factor a balance must be struck between the benefit gained by the copyright owner when the copying is found an unfair use and the benefit gained by the public when the use is held to be fair. The less adverse impact on the owner, the less

public benefit need be shown to sustain non-commercial fair use. It is plain that where a use has no demonstrable impact on a copyright owners' potential market, the use need not be prohibited to protect the artist's incentive to pursue his inventive skills. Yet where the use is intended for commercial gain some meaningful likelihood of future harm is presumed. *See Sony Corp. of America*, 464 U.S. at 451, 104 S.Ct. at 793.

A critical inquiry under this factor then is whether defendants Koons and Sonnabend planned to profit from their exploitation of "Puppies" without paying Rogers for their use of his photo—that is, whether Koons' work is primarily commercial in nature. We have already concluded that it is. In this case, of course, the copy was in a different medium than the original: one was a three-dimensional piece of sculpture, and the other a two-dimensional black and white photo. But the owner of a copyright with respect to this market-factor need only demonstrate that if the unauthorized use becomes "widespread" it would prejudice his potential market for his work. *See id.; Harper & Row*, 471 U.S. at 568, 105 S.Ct. at 2234. The reason for this rule relates to a central concern of copyright law that unfair copying undercuts demand for the original work and, as an inevitable consequence, chills creation of such works. Hence the inquiry considers not only harm to the market for the original photograph, but also harm to the market for derivative works. It is obviously not implausible that another artist, who would be willing to purchase the rights from Rogers, would want to produce a sculpture like Rogers' photo and, with Koons' work extant, such market is reduced. Similarly, defendants could take and sell photos of "String of Puppies," which would prejudice Rogers' potential market for the sale of the "Puppies" notecards, in addition to any other derivative use he might plan.

Further, in discussing this fourth factor, the leading scholar in this area of the law uses an example that closely parallels the facts of the present case and demonstrates the irrelevance of copying in a different medium when analyzing this factor: a movie adaptation is made of a book. Even though the movie may boost book sales, it is an unfair use because of the effect on the potential sale of adaptation rights. 3 Nimmer, § 13.05[B]. The function of demand for each original work of art is a relevant facet in this factor's analysis; that is, fair use permits lyrics or music to be copied in a literary magazine, but where the same material is published in a song sheet magazine, purchased for playing and not simply for reading, it is an unfair use. *Id.*

Here there is simply nothing in the record to support a view that Koons produced "String of Puppies" for anything other than sale as high-priced art. Hence, the likelihood of future harm to Rogers' photograph is presumed, and plaintiff's market for his work has been prejudiced.

IV Infringing Profits

[14] The next issue concerns Rogers' claim for infringing profits in the amount of $367,000. Under 17 U.S.C. § 504(b) a copyright owner is entitled to recover actual damages suffered as a result of the infringement as well as apportioned profits. The section states: "In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work." Alternatively, in place of actual damages and apportioned profits, a copyright owner may elect to recover an award of statutory damages. *See* 17 U.S.C. § 504(c).

In Rogers' cross-appeal he asserts, in response to defendants' argument that we lack appellate jurisdiction over this issue, that jurisdiction exists on two independent bases. He further contends that there are no issues of fact and that the matter should be remanded simply to enter an award in his favor. Although we agree with Rogers that jurisdiction over this aspect of the judgment appealed from exists, we are unable to grant the award he seeks.

The district court stated that deposition and documentary evidence regarding the deductible expenses referred to in § 504(b) are present in the record. We are satisfied that defendants have incurred deductible expenses in some amount and that they should have an opportunity to prove them as an offset to plaintiff's evidence of infringing damages. Further, the amount of actual damages incurred by Rogers, as well as the proper apportionment of Koons' profits between Rogers and Koons, remain to be determined on remand. With respect to the calculation of actual damages, "the primary measure of recovery is the extent to which the market value of the copyrighted work at the time of the infringement has been injured or destroyed by the infringement." *Fitzgerald Pub. Co., Inc. v. Baylor Pub. Co., Inc.*, 807 F.2d 1110, 1118 (2d Cir.1986). While we leave the ascertainment of damages to the district court, under the circumstances of this case, we think that a reasonable license fee for the use of "Puppies" best approximates the market injury sustained by Rogers as a result of Koons' misappropriation. *See Deltak, Inc. v. Advanced Systems, Inc.*, 767 F.2d 357, 360–61 (7th Cir.1985) ("The value of the infringer's use is a permissible basis for estimating actual damages."); *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1174 (9th Cir.1977) (same).

On the subject of apportioning profits, the copyright law requires that Koons have the opportunity to establish those "elements of profit attributable to factors other than the copyrighted work." 17 U.S.C. § 504(b). These "elements" may include Koons' own notoriety and his related ability to command high prices for his work. *See Sheldon v. Metro–Goldwyn Corp.*, 309 U.S. 390, 407–09, 60 S.Ct. 681, 687–88, 84 L.Ed. 825 (1940) (considering "the drawing power of the 'motion picture stars' ... the artistic conceptions ... and ... the expert supervision and direction of the various processes which made possible the composite result"); *Frank Music Corp. v. Metro–Goldwyn–Mayer Inc.*, 886 F.2d 1545, 1549 (9th Cir.1989), *cert. denied*, 494 U.S. 1017, 110 S.Ct. 1321, 108 L.Ed.2d 496 (1990) ("Where a defendant alters infringing material to suit its own unique purposes, those alterations and the creativity behind them should be taken into account in apportioning the profits of the infringing work."); *Abend v. MCA, Inc.*, 863 F.2d 1465, 1478, *aff'd sub nom. Stewart v. Abend*, 495 U.S. 207, 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990) (considering outstanding performances and brilliant direction); *ABKCO Music, Inc. v. Harrisongs Music*, 508 F.Supp. 798, 801 (S.D.N.Y.1981), *modified*, 722 F.2d 988 (2d Cir.1983) (considering "international 'name' " of infringing recording artist). *See also* 3 Nimmer § 14.03[C]. To the extent that Koons is able to prove that the profits at issue derive solely from his own position in the art world, he should be allowed to retain them.

Finally, we note that Rogers remains at liberty to elect statutory damages in lieu of an award of actual damages and apportioned profits. *See* 17 U.S.C. § 504(c). In fact, given Koons' wilful and egregious behavior, we think Rogers may be a good candidate for enhanced statutory damages pursuant to 17 U.S.C. § 504(c)(2). *See Fitzgerald Pub. Co.*, 807 F.2d at 1115. Of course, that determination remains for the district court to make in the first instance.

The case must be remanded therefore for the district court to determine the amount of the award, a matter which it had reserved to itself prior to the institution of this appeal.

V The Turn–Over Order

[15] Finally, the turn-over order of the artist's copy is an equitable remedy issued under the broad powers vested in a trial judge under 17 U.S.C. § 503(b) (court may order destruction or other reasonable disposition of infringing copies). In this case, after Judge Haight issued his turn-over order, Koons arranged to ship the fourth or artist's copy of "String of Puppies" from the United States to Germany. We see no abuse of the district court's discretion in directing turn-over and, under the circumstances, the contempt order for the direct violation of the turn-over order was entirely proper.

CONCLUSION

Accordingly, the judgment of the district court is affirmed in all respects.



Burt L. LEVIN, Plaintiff-Appellant,

v.

ANALYSIS & TECHNOLOGY, INC., Defendant-Appellee.

No. 479, Docket 91-7684.

United States Court of Appeals, Second Circuit.

Argued Dec. 5, 1991.

Decided April 3, 1992.

Military analyst filed pro se age discrimination suit against defense contractor that had discharged him. The United States District Court for the District of Connecticut, Alan H. Nevas, J., granted contractor's summary judgment motion. Analyst appealed. The Court of Appeals, Altimari, Circuit Judge, held that analyst had established prima facie case of age discrimination, and even raised genuine triable issues of fact with regard to whether contractor's reasons for discharging him were pretextual, thus making summary judgment for contractor improper.

Reversed and remanded.

1. Federal Civil Procedure ⇐2543

In ruling on motion for summary judgment, court must resolve all ambiguities and inferences from the underlying facts in favor of the nonmoving party. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

2. Federal Courts ⇐776

Court of Appeals reviews district court's grant of summary judgment de novo.

3. Civil Rights ⇐388

Plaintiff establishes prima facie case of discharge based on age discrimination by showing that he or she is a member of protected age group, was qualified to perform duties required by position, and was discharged, and that discharge occurred under circumstances suggesting that age was a factor. Age Discrimination In Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

4. Civil Rights ⇐170

In meeting ultimate burden of demonstrating by preponderance of the evidence that employer's stated reasons for discharge are merely a pretext for discrimination, ADEA plaintiff need not show that age was the only factor in employer's discharge decision but that it was a determinative factor. Age Discrimination In Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

5. Federal Civil Procedure ⇐2497

Military analyst established prima facie case of age discrimination in connection with his discharge and even raised genuine triable issues of fact with regard to whether defense contractor's reason for that discharge were pretextual, thus making summary judgment for contractor in age discrimination suit improper. Age Discrimination In Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

Burt L. Levin, pro se.

Marc L. Zaken, Hartford, Conn. (Jay E. Bovilsky, William H. Narwold, Cummings & Lockwood, of counsel), for defendant-appellee.

Before: MINER and ALTIMARI, Circuit Judges.*

* Judge Kaufman, originally a member of the panel, died on February 1, 1992. The appeal is being decided by the remaining members of the panel pursuant to Local Rule § 0.14(b).

in April of 1987, which is more than three years after the last loan was made to those corporations. The action is therefore time-barred. *See Fleet Factors*, 114 A.D.2d at 997, 495 N.Y.S.2d at 436.

Plaintiffs argue that the statute of limitations must be tolled because the loans to the corporations were made at a 15% rate of interest which continues to accrue until the present date. They argue that the statute of limitations is tolled until they can demand that the entire debt, including interest, must be paid and that since the interest continues to accrue, such a demand may not be made. No authority has been cited for this novel proposition which would extend a statute of limitations indefinitely in any case where a borrower defaults upon a debt that continues to bear interest. Indeed, to accept such a contention would entirely subvert the policies of repose served by statutes of limitations. Accordingly, the Court rejects plaintiffs' argument.[5]

CONCLUSION

For the reasons stated above, defendant's motion for summary judgment is granted and the action is dismissed. The Clerk of the Court is directed to close the above-captioned action.

It is SO ORDERED.



but must show by affidavit or other evidentiary material a genuine issue of fact which would justify a trial. *See* Fed.R.Civ.P. 56(e). Here, plaintiffs' testimony and documents show that the last loan to the corporations was November 13, 1982, not 1985. Moreover, both plaintiffs were requested to supplement their discovery responses if they recalled any other loans in addition to the ones they identified, *See* Deposition of Martin Cohen ("M. Cohen Dep.") at 61-62 (annexed to Abrahams Aff. at Ex. D); Deposition of Irene Cohen ("I. Cohen Dep.") at 12-14 (annexed to Abrahams Aff. at Ex. E), but have not produced any evidence of additional loans.

5. Immediately before defendant filed his motion, but after the motion had been discussed at a Telephone Pre-Motion Conference, plaintiffs wrote to the Court seeking the Court's advice regarding procedures for taking a written deposition of defendant. However, in view of the fact that plaintiff was and is aware of all of the facts relevant to the defendant's defense that the statute of limitations bars his action, any further discovery of the defendant by written deposition or otherwise could add nothing to the disposition of this motion on that ground. *See Burlington Coat Factory Warehouse Corp. v. Esprit de Corp.*, 769 F.2d 919, 925-27 (2d Cir.1985); *Federal Republic of Germany v. Elicofon*, 536 F.Supp. 813, 827-28 (E.D.N.Y.1978), *aff'd*, 678 F.2d 1150 (2d Cir.1982).

Art ROGERS, Plaintiff.

v.

Jeff KOONS and Sonnabend Gallery, Inc., Defendants.

No. 89 Civ. 6707 (CSH).

United States District Court, S.D. New York.

Dec. 13, 1990.

Owner of copyrighted photograph brought action against sculptor and art gallery for copyright infringement. On plaintiff's motion for summary judgment, the District Court, Haight, J., held that: (1) reproduction of copyrighted photograph in sculpture form did not preclude finding of copyright infringement; (2) reproduction was not fair use of photograph; and (3) art gallery's conduct in advertising and displaying sculptures that infringed on copyrighted photograph did not make gallery liable as contributory infringer.

Motion granted in part and denied in part.

1. Copyrights and Intellectual Property ⇐53.1

Reproduction of copyrighted photograph in sculpture form did not preclude finding of copyright infringement; sculpture was derivative work based upon photograph. 17 U.S.C.A. §§ 101, 106, 106(2).

2. Copyrights and Intellectual Property ⇐64

Reproduction of copyrighted photograph in sculpture form was not fair use of photograph, where use of photograph did not criticize or comment upon it, was of a commercial nature, and undermined new uses of the photograph. 17 U.S.C.A. § 107.

3. Copyrights and Intellectual Property ⇐89(2)

In copyright infringement action arising from reproduction of copyrighted photograph in sculpture form, fact issue as to alleged infringer's deductible expenses precluded summary judgment on issue of money damages. 17 U.S.C.A. § 504(b).

4. Copyrights and Intellectual Property ⇐77

Art gallery's conduct in advertising and displaying sculptures that infringed on copyrighted photograph did not make gallery liable as contributory infringer in copyright infringement action, absent evidence that gallery had knowledge of infringing activity. 17 U.S.C.A. § 504(b).

Stecher Jaglom & Prutzman, New York City, for plaintiff; L. Donald Prutzman, Jr., Andrea Galbo, New York City, of counsel.

John B. Koegel, New York City, for Jeff Koons and Sonnabend Gallery, Inc.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

Plaintiff, a professional photographer, brings this action against defendants, a sculptor and an art gallery, for copyright infringement under the Copyright Act, Lanham Act violations, and unfair competition under the laws of New York and California. Plaintiff moves under Rule 56, Fed.R.Civ.P., for summary judgment on his first cause of action for copyright infringement. Defendants cross-move for summary judgment dismissing the complaint.

Background

The facts are largely undisputed. Plaintiff Art Rogers is a professional photographer resident in California. In 1980 Jim Scanlon, another California resident familiar with Rogers' work, commissioned Rogers to make a photographic portrait of the Scanlons' new litter of eight German Shepherd puppies. Rogers went to the Scanlon home. Rather than attempting to pose the puppies alone, he included Scanlon and his wife Mary, who were photographed sitting on a bench holding the puppies. Rogers succeeded in getting two adults and eight puppies to hold still long enough to produce a charming photograph which Rogers named "Puppies." "Puppies" was published in Rogers' photography column in a local newspaper in 1980. The photograph was exhibited, along with other works by Rogers, at the San Francisco Museum of Modern Art in 1982. In 1984 Rogers licensed "Puppies" along with other works to Museum Graphics, a company that produces and sells notecards and postcards with high quality reproductions of photographs by American photographers, including Ansel Adams. Museum Graphics has produced and distributed the "Puppies" notecard since 1984. A signed print of "Puppies" has been sold to a private collector. In 1989 Rogers licensed the photograph for use in an anthology called "Dog Days." Rogers has stated in an affidavit that he plans to use "Puppies" in a series of hand tinted prints of his works.

Defendant Jeff Koons is a well-known American artist and sculptor resident in New York whose works are exhibited at galleries and museums in the United States and elsewhere and sold to the public. Defendant Sonnabend Gallery represents Koons and serves as his agent in connection with the display and sale of his works. In October 1986 Koons began the process of creating sculptures for what he eventually termed his "Banality Show." His work extended over two years. The exhibition opened at Sonnabend Gallery on November 19, 1988. The exhibition consisted of 20 sculptural works. In Koons' perception, "the subject for the show would be Banality but the message would be a spiri-

tual one. And while being uplifting, the also work would be [sic] critical commentary on conspicuous consumption, greed, and self indulgence." Defendants' Main Brief at 6. All the works were sculptures in various media, including several in "polychromed wood," which is wood painted different colors with oil paint. Each work was produced in an "edition" of three, so that three copies were available for sale to the public. An "artist's proof" of each sculpture was also produced for Koons which he could sell later if he wished.

During the fall and winter of 1986 and throughout 1987 Koons collected material for possible sculptures. He then located and contracted with workshops that could craft the desired materials in the fashion that Koons desired.

At the end of 1987 or in 1988 Koons purchased at least two Museum Graphics notecards displaying Rogers' "Puppies" photograph. These cards were imprinted with Rogers' copyright, although the photograph had not yet been registered. Koons decided to use the photograph for one of the sculptures to be exhibited in the Banality Show. He tore off that portion of the notecard showing the copyright notice and sent the photograph to the Demetz Arts Studio in Italy, with instructions to make a polychromed wood sculptural version of the photograph, a work that Koons instructed Demetz "must be just like photo." Ex. 15 to Koons deposition (notes Koons furnished to Demetz in connection with producing the sculpture). Koons continued to communicate with Demetz, reiterating that the features of the humans and the puppies be reproduced "as per photo." Ex. 16. As to the painting of the sculpture, Koons gave Demetz a chart with an enlarged photocopy of "Puppies" in the center, and on which he noted painting directions in the margin with arrows drawn to various areas of the photograph. Koons instructed Demetz to paint the puppies in shades of "blue," with "variation of light-to-dark as per photo." The man's hair was to be "white with shades of grey as per black and white photo.") Ex. 14.

The end result was a polychromed wood sculpture 42 inches by 62 inches by 3[illegible] inches (not including the base which is 2[illegible] inches by 67 by 31 inches). Koons called the sculpture "String of Puppies."

Following the display of "String of Puppies" at the Sonnabend Gallery in December 1988, Koons sold the edition of three sculptures to collectors for a total of $367,000. Two were sold for the price stated by the Gallery of $125,000. The third buyer paid $117,000. Koons retains a fourth "String of Puppies" sculpture at his storage facility.

Rogers learned of the sculpture through Scanlon. A friend of Scanlon's familiar with the notecard called Scanlon and said that the photograph "Puppies" was on the front page of the calendar section of the Sunday Los Angeles Times, but had been "colorized." Scanlon, having obtained and read the article, realized that it was not a tinted version of the photograph "Puppies," but rather was a photograph of Koons' sculpture "String of Puppies," then on exhibition at the Los Angeles Museum of Contemporary Art. Scanlon told Rogers about it.

Rogers registered his photograph "Puppies" with the United States Copyright Office, obtaining registration number VA 352/001. The effective date of the registration is July 6, 1989. The certificate recites a date of first publication in the United States of November 20, 1980.

Rogers filed this action against Koons and Sonnabend Gallery on October 11, 1989.

It is common ground that Koons did not inform Rogers of his intended use of the photograph, and that Rogers had no knowledge of that use until Scanlon informed him.

Rogers now moves for summary judgment on the first cause of action in the complaint, for copyright infringement. Defendants cross-move for summary judgment dismissing all causes of action.

Discussion

Koons concedes, as he must, that he "used" Rogers' photograph "Puppies" as

"source material" for his sculpture "String of Puppies." Koons prefers to avoid the verb "copied." Semantics do not decide the issue, which is whether or not Koons' conduct constitutes copyright infringement.

Koons says it does not for two principal reasons. First, he argues that Rogers' copyright protection "is strictly limited to the work *as a photograph.*" Main Brief at 21 fn. (emphasis added). At oral argument, Koons' counsel carried that argument to its logical conclusion and contended that any sculptor could "use" or "copy" any copyrighted photograph without incurring liability as an infringer. Secondly, Koons relies upon the doctrine of fair use. I discuss these contentions in turn.

Use

[1] Koons' main contention under this heading is that the use he made of the Rogers photograph related only to non-copyrightable elements. Koons relies upon the familiar rule that copyright protection extends only to original acts of expression, so that purely factual information is in the public domain. *See, e.g. Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir.1980).

That rule has no meaningful application here. Koons does not articulate what non-protectible factual information he regards himself as having used. It is of course the fact that Mr. and Mrs. Scanlon's German Shepherd produced a litter of eight puppies; that the Scanlons thought the puppies were cute; and that they asked Rogers to photograph them. But the manner in which Rogers arranged his subjects and carried out his photographer's art constitutes a protectible original act of expression, as the certificate issued by the Copyright Office reflects.

Koons' reproduction of the Rogers photograph in sculpture form does not preclude a finding of copyright infringement. The Copyright Act, 17 U.S.C. § 106, confers upon the copyright owner "the exclusive rights to do and to authorize," *inter alia*, the preparation of "derivative works based upon the copyrighted work." § 106(2). The statute defines a "derivative work" as a work "based upon one or more preexisting works, such as [an] ... art reproduction, ... or any other form in which a work may be recast, transformed, or adapted." § 101. Under the plain wording of the statute, Koons' sculpture is a derivative work based upon Rogers' photograph; and Rogers as copyright owner had the exclusive right to authorize derivative work. It is well settled that a photographer's originality in photographic expression is entitled to full copyright protection. *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 55, 4 S.Ct. 279, 279–80, 28 L.Ed. 349 (1884).

Koons' effort to limit that protection to the photograph "as a photograph" runs counter to caselaw. In copyright law the medium is not the message, and a change in medium does not preclude infringement. That has long been the rule of this Court and the Second Circuit. In *Falk v. T.P. Howell & Co.*, 37 F. 202 (S.D.N.Y.1988), defendant, a chair manufacturer, copied plaintiff's copyrighted photograph "and stamped a raised figure, like the picture, on the leather of which the bottoms and backs of chairs are made." Judge Coxe cited *Burrow-Giles Co. v. Sarony, supra*, for the proposition that a photograph may be the subject of a copyright, and then said:

> The only question is, do the defendants infringe? That their design is copied directly from the copyrighted photograph is not denied, but it is urged that infringement is avoided, because it is larger than the photograph, and is stamped on leather, and is intended for the bottom or back of a chair. It is thought that this proposition cannot be maintained. Differences which relate merely to size and material are not important.

The Second Circuit cited that language with approval in *King Features Syndicate v. Fleischer*, 299 F. 533 (2d Cir.1924), where the defendant copied plaintiff's cartoon character for the manufacture of a toy. The court of appeals said generally at 535:

> We do not think it avoids the infringement of the copyright to take the substance or idea, and produce it through a different medium, and picturing in shape

> and details insufficient imitation to make a true copy of the character thought of by the appellant's employee. Doing this is omitting the work of the artisan, but appropriating the genius of the artist.

After quoting the indicated language from *Falk*, the court of appeals then observed at 536:

> A piece of statuary may be infringed by the picture of the statuary for the Copyright Act secured to the author the original and natural rights, and it is the intendment of the law of copyrights that they shall have a liberal construction in order to give effect to what may be considered as an inherent right of the author in his work.[1]

The Second Circuit reached the same result without discussion in *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F.2d 276 (2d Cir.1934), where the defendant manufactured dolls copying the plaintiff's copyrighted book of cartoons.

These cases are closely analogous to the case at bar. Three-dimensional toys or dolls copied from two-dimensional cartoons are the functional equivalents of a three-dimensional sculpture copied from a two-dimensional photograph. Such cases are consistent with the general principle stated in 1 M. and D. Nimmer, *Nimmer on Copyright*, (1989) § 2.08(E) at 2-123 to 2-124, where the authors state that it is

> fundamental that copyright in a work protects against unauthorized copying not only in the original medium in which the work was produced, but also in any one medium as well.... The fact that a work in one medium has been copied from a work in another medium does not render it any less a "copy".

By way of contrast, Koons cites no authority for his blanket proposition that a sculpture cannot in law infringe a copyrighted photograph. That proposition seems to me contrary to the Copyright Act and these cases construing the statute, and I reject it.

Koons argues that Rogers must show substantial similarity between the photograph and the sculpture to sustain a claim of infringement, and that the differences in size, texture and color preclude such a finding. This is really the discredited "substitute medium" argument in a different form. Rogers says that where direct copying is conceded, substantial similarity drops out of the analysis. He cites *Illinois Bell Telephone v. Haines & Co., Inc.* 905 F.2d 1081, 1086 (7th Cir.1990) ("To satisfy the copying element of infringement, direct evidence of copying will suffice.... Establishing substantial similarity is necessary only when direct evidence of copying is unavailable"), and *Rural Telephone Service Company, Inc. v. Feist Publications, Inc.*, 663 F.Supp. 214, 218 (D.Kan.1987) ("The 'substantial similarity' test is used when there is no direct evidence of copying.") For that proposition the district court in *Rural Telephone* cited *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 911-12 (2d Cir.1980). I do not find that particular rule clearly stated in *Durham Industries*, but the case does demonstrate that the present test of substantial similarity in the Second Circuit is "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." *See* discussion at 630 F.2d at 911-12 (*citing and quoting Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir.1966)).

There is no question in the case at bar that "an average lay observer" would recognize the sculpture "String of Puppies" as "having been appropriated from" the photograph "Puppies." Questions of size and color aside, the sculpture is as exact a copy of the photograph as Koons' hired artisans could fashion, which is precisely what Koons told them to do. Indeed, Scanlon's friend, having observed a newspaper picture of the sculpture, assumed that it was Rogers' photograph, having been "colorized."

Koons' copying of Rogers' photograph constitutes copyright infringement, unless Koons' conduct may be characterized as "fair use."

1. The case at bar presents the converse proposition. If a picture of a piece of statuary may infringe the sculptor's copyright, so may sculpture infringe a photographer's copyright.

Fair Use

[2] Koons asserts that even if his use of Rogers' photograph constituted unauthorized copying, it is a fair use and therefore not infringing.

The fair use doctrine, which is incorporated into the 1976 Copyright Act, has been considered in three recent Supreme Court decisions: *Stewart v. Abend*, — U.S. —, 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 85 L.Ed.2d 588 (1985); and *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984). The fair use doctrine evolved in response to the rigid and inflexible common law rule that the author's property in his intellectual creation was absolute until he voluntarily parted with it. *Stewart*, 110 S.Ct. at 1768. The doctrine is an "equitable rule of reason", *Sony*, 464 U.S. at 448, 104 S.Ct. at 792, which "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Stewart*, 110 S.Ct. at 1768 (*citing and quoting Iowa State University Research Foundation, Inc. v. American Broadcasting Companies*, 621 F.2d 57, 60 (2d Cir. 1980)).

17 U.S.C. § 107 provides "that fair use of a copyrighted work ... is not an infringement of copyright." The statute attempts no generally applicable definition of fair use, since the doctrine, an equitable rule of reason, is fact-oriented. But Congress did provide in § 107 examples of fair use, and factors to be considered in determining whether a particular case falls within the doctrine. The examples are copying "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." The four non-exclusive factors the courts must consider in determining whether an unauthorized use is not infringing are:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Koons' sculpture does not fall within any statutory examples. There was a faint suggestion in his argument that the sculpture, together with the other works in the "Banality Show, were intended to comment satirically upon contemporary values. But I construe the words "criticism" and "comment" as used in § 107 to refer to such usage specifically addressed to the copyrighted work. Koons' sculpture does not criticize or comment upon Rogers' photograph. It simply appropriates it.

Turning from the statutory examples to § 107's four factors, the first involves consideration of whether Koons' use of the Rogers photograph "is of a commercial nature or is for non-profit educational purposes ..." Clearly Koons' sculpture is not for "non-profit educational purposes." But I do not think Congress intended that phrase to embrace all non-commercial use. Use of a copyrighted work by a church, synagogue or mosque for purposes of spiritual inspiration would not, I should think, be regarded as use "of a commercial nature." However, the Koons sculpture does not fall in that category either; and, notwithstanding its unquestioned status as a work of art, the sculpture is not unsullied by considerations of commerce. Koons actively markets his sculptures, by displaying them at galleries and through published advertisements, and they bring considerable sums from the public, as the sale of the "String of Puppies" sculptures indicates. In *Stewart v. Abend* the infringing use was a motion picture based upon a copyrighted story. The re-release of the motion picture earned the defendants $12 million. The Ninth Circuit rejected defendants' "bold proposition that a work's popularity may make its value educational rather than commercial. Clearly, the defendants' 'use is of a commercial nature.'" *Abend v. MCA, Inc.*, 863 F.2d 1465, 1481 (2d Cir.

1988). The Supreme Court approved that conclusion at 110 S.Ct. 1768:

> [Defendants] asserted before the Court of Appeals that their use was educational rather than commercial. The Court of Appeals found nothing in the record to support this assertion, nor do we.

In the case at bar, given the plain wording of the statute and this recent construction, I conclude that Koons' use of the Rogers photograph was of a commercial nature.

As to the second factor, the Supreme Court in *Stewart* approved the observation of the Ninth Circuit that "[a] use is less likely to be deemed fair when the copyrighted work is a creative product," 863 F.2d at 1481, adding: "In general, fair use is more likely to be found in factual works than that in fictional works." 110 S.Ct. at 1769. Rogers' photograph is a creative work, more closely akin to fiction.

The third factor considers the amount and substantiality of the portion used in relation to the copyrighted work as a whole. Koons appropriated the entire photograph.

The fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, is regarded as "the most important, and indeed, central fair use factor." *Stewart* at 1769, quoting the *Nimmer* text. Koons argues that this factor militates in favor of fair use because his sculpture does not compete directly in the market place with Rogers' photograph. But it need not do so. In *Stewart* the owners of the infringing motion picture argued that the film would not prejudice the story's sale in book form, and that the re-release of the film may even "have promoted sales of the underlying story in the book medium." 863 F.2d at 1482. That argument failed because, in the Ninth Circuit's view, the film distributors' commercial use of a copyrighted story "adversely affects the story owner's adaptation rights." *Ibid.* The Supreme Court accepted that conclusion as well, stating 110 S.Ct. at 1769:

> The record supports the Court of Appeals' conclusion that re-release of the film impinged on the ability to market new versions of the story. Common sense would yield the same conclusion.

The focus, in other words, is upon potential markets. In the case at bar, Rogers has shown through the affidavits of competent experts that photographers may earn additional income through the sale of "art rendering" rights, namely, creating an art work based on the photograph in a medium other than photography. *See* affidavits of Arnold Newman and Jane S. Kinne. Counsel for Koons said at oral argument that Rogers had expressed no prior interest in the art rendering submarket prior to this litigation. Rogers states in his affidavit that he is contemplating additional uses for his photograph. I do not think the case turns upon Rogers' past conduct or present intention as much as it does upon the existence of a recognized market for new versions or new uses of the photograph, which unauthorized use clearly undermines.

I conclude that this factor, together with the others, militates against fair use.

In *Stewart* the Supreme Court said:

> The motion picture neither falls into any of the categories enumerated in § 107 nor meets the four criteria set forth in § 107. "[E]very [unauthorized] commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony Corp. of America v. Universal Studios, Inc., supra*, 464 U.S., at 451, 104 S.Ct., at 793.

In those circumstances the Court held that defendants' use of the motion picture was not fair use. I reach the same conclusion with respect to Koons' use in his sculpture of the Rogers photograph.

Accordingly plaintiff is entitled to injunctive relief against both defendants.

Claim for Money Damages

[3] Rogers seeks summary judgment against both defendants for money damages in the amount of $367,000. He contends that amount constitutes the "infringing profits" as specified by 17 U.S.C. § 504(b), which provides:

The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

As to "deductible expenses," Rogers contends that Koons has not sufficiently quantified them in his summary judgment papers.

I agree that Koons did not attempt in his motion papers a detailed accounting of deductible expenses. But he did refer in his brief to deposition and documentary evidence addressing the issue. Rogers' reply brief quarrels with the deductibility of some of the expenses referred to in the documents produced in discovery. That demonstrates the existence of triable factual issues on the point. I decline to construe Rule 56 so as to preclude Koons from an opportunity to prove at trial the amount of deductible expenses, where it is clear that they must have been incurred in some amount and Koons has indicated in discovery the sort of proof upon which he will rely.

[4] Rogers also seeks damages against Sonnabend Gallery, Inc., Koons' principal gallery which displayed the infringing sculptures. Plaintiff's claim against Sonnabend is not addressed in the briefs. His theory of recovery against Sonnabend is not entirely clear. There is no contention that Sonnabend had anything to do with the creation of the sculpture. Presumably Rogers proceeds against Sonnabend on the theory that "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir.1971) (footnote omitted). I accept that Sonnabend's conduct in advertising and displaying the infringing sculptures materially contributed to Koons' infringing conduct. But Sonnabend must have had knowledge of the infringing activity to be liable on this theory. Plaintiff does not call my attention to any evidence in the record that responsible persons at Sonnabend knew Koons had copied the Rogers photograph.

On this record, therefore, plaintiff's motion for summary judgment for money damages is denied as to both defendants.

Defendants' cross-motion for summary judgment dismissing the complaint is denied for reasons that appear sufficiently from the foregoing discussion.

Plaintiff's motion summary judgment is granted in part and denied in part. Defendants' cross-motion for summary judgment is denied. Plaintiff's counsel is directed to settle an Order and Judgment on seven (7) days' notice within thirty (30) days of the date of this Opinion. The case will thereafter be called for further status conference.

It is SO ORDERED.



Mr. HUGHES. How long did it take you to arrange the puppies in that particular photograph?

Mr. ROGERS. They squirmed quite a bit.

Mr. HUGHES. How did you get all of them to look at you at one time?

Mr. ROGERS. I make a lot of noises.

Mr. HUGHES. Anyway, it is a wonderful, wonderful photograph, as are the photographs in Life magazine.

Let me ask you: When you say that you are out of pocket now $40,000—that includes court costs and attorney's fees?

Mr. ROGERS. No attorney's fees. It has all been the expenses of going to court—xeroxes, we have had some expert witnesses, affidavits, recording, travel; I have had to go to New York——

Mr. HUGHES. So you have put nothing out in attorney's fees so far—no retainer, nothing like that to attorneys?

Mr. ROGERS. No, sir.

Mr. HUGHES. Well, that is a substantial amount of money.

Aside from the obvious benefits that would accrue if you were able to collect attorney's fees and statutory damages, were there any other advantages, as you see it, that you would have had if, in fact, H.R. 897 were the law?

Mr. ROGERS. That alone——

Mr. HUGHES. Well, deterrence is obviously hurt, I realize.

Mr. ROGERS. It would be the deterrence. There would be, like I said, the possibility of a settlement.

Mr. HUGHES. How about you, Mr. Weisgrau? I think that was your point, that most of these cases are settled, almost without exception.

Mr. WEISGRAU. When people see attorneys' fees, Mr. Chairman, they settle. It is like committing suicide if you don't, if you are an infringer.

Mr. HUGHES. As I understood you, Mr. Weisgrau, you felt that if H.R. 897 were to pass, litigation would not increase substantially. Did I understand your testimony to that effect?

Mr. WEISGRAU. That is my belief, that litigation would not increase.

Mr. HUGHES. What do you base that on?

Mr. WEISGRAU. Again, I base that upon the experience that any time I have seen attorney's fees available to a photographer, I have never, in 5 years of dealing with these matters, seen a case go to court.

Mr. OSSOLA. Mr. Chairman, may I expand upon that as counsel for ASMP?

Mr. HUGHES. Sure. Mr. Ossola, is it?

Mr. OSSOLA. Yes, it is Mr. Ossola. Thank you.

Mr. Chairman, the situation with and without statutory damages and attorney's fees is very simple. If a copyright owner does not have the right to those remedies, the infringer most of the time ignores the copyright owner; you never get a response; you never get a meeting; you never get a letter; you get nothing.

When you get in the door, you are told, "You know as well as I do that you can't litigate this, because all that is of issue is our unauthorized use of this. It will cost you far more to litigate it. You can't hit us with statutory damages. You will be confined to actual

damages, or you will have to go through a profits trial, where we will drag it out for a year. You can't do anything about this, so go away, or go ahead and litigate."

Mr. Chairman, the vast majority of infringements cannot be litigated for that reason. Mr. Weisgrau and I have been in that situation many times, and I have been in that situation without Mr. Weisgrau many times. It is simple: "Go ahead and sue us. We dare you. We know you can't."

Let me contrast that to the situation where the remedies are available. You get a meeting, and you say quite simply to the infringer, "Here is our evidence of infringement. We know what you have done. We want to hold you responsible for it; and, most important of all, we want your commitment to stop doing it," because that, Mr. Chairman, is the preeminent desire of the copyright owner. And you can also say, "If you don't cooperate with us, then you are going to pay two sets of legal fees; you are going to pay your lawyer, and you are going to pay us;" and, Mr. Chairman, no businessman, even the willful infringer, likes to pay one lawyer, much less two lawyers. This will deter litigation. Most of these cases don't ever get into court if you have these remedies because the infringer cannot afford to do it. The burden is reversed; the burden is on them, and a settlement results. That is what really happens out there, and the difference is always these remedies.

Mr. HUGHES. So your view is, if anything, you would have a reduction of litigation, not an increase.

Mr. OSSOLA. That is correct, and you will have, I think most importantly, the enforcement of legitimate copyright rights, the protection of legitimate copyrights, and for those infringers who will not settle the matter, the courts ought to hear those. That is why they are there; that is why the Federal courts have exclusive jurisdiction. Legitimate copyright claims ought to be heard, and now they are not, and that is the problem with the way the law is working.

Mr. HUGHES. Thank you very much.

I don't have any further questions. I just want to thank you again for coming such long distances to be with us and to bring the photographs and the sculptural copy. We appreciate that very much. You have been very helpful to us today, and we thank you.

Our next panel consists of Andy Foster, the executive director of Professional Photographers of America; and Olan Mills II, of Olan Mills Corp. Mr. Foster has been a professional photographer since childhood and has received a number of awards for his work. Mr. Mills is chairman of the board of Olan Mills, Inc. Olan Mills was founded in 1932 and has grown to 900 photographic studios throughout the United States. These studios generate an amazing 100,000 photographic portraits each week.

We welcome you, gentlemen, to today's hearing. We have copies of your formal statements, which, without objection, will be made a part of the record in full, and I'm going to ask you, and I'm going to insist, that you summarize. I have read the statements, and I would like to try to get right to questions.

Let me begin with you, Mr. Foster. We welcome you.

STATEMENT OF ANDREW FOSTER, EXECUTIVE DIRECTOR, PROFESSIONAL PHOTOGRAPHERS OF AMERICA, INC.

Mr. FOSTER. Mr. Chairman and members of the subcommittee, my name is Andrew Foster, and, as you have heard, I am the executive director of the Professional Photographers of America. We have approximately 16,000 members that represent almost every discipline of professional photography—wedding photographers, portrait photographers, advertising, commercial, industrial, and legal photography. Almost every discipline is represented by our organizations, and I thank you for inviting us here today to testify. I am really pleased to convey the PPA's support for the repeal of sections 411(a) and 412 of the Copyright Act, as proposed by the Copyright Reform Act of 1993.

The life blood of every professional photographer is his exclusive right to the copyright of his work and to sell the copies of his or her work and grant the rights to others to reproduce and distribute this work. Unauthorized copying really strikes at the economic heart of every photographer.

I am here today as a representative of these photographers. I am not an attorney but would like to discuss the practical problems faced by photographers. I am not a copyright lawyer and don't pretend to be able to discuss a lot of these technical legal issues.

Our members have, for the last 4 years, contributed to a copyright fund as part of their annual dues. They are very interested in and very strongly support PPA's work on copyright issues and all four efforts that have gone forth to this point. We use this fund to defend copyrights and in research and development of the various aspects of that.

We have met with a tremendous amount of frustration in our efforts, which is directly caused by the requirements of sections 411(a) and 412 of the Copyright Act. Most of the members of our association are photographers who operate very small businesses, almost to the point of "mom and pop" operations. Every sale is extremely important to them, and there really is no spare money to spend for attorneys or anything. They are in the business of producing photographs and selling photographs and not in the business of hiring attorneys to defend their rights.

They consider many of the requirements that have been put on them to be a waste of time and therefore they do not and cannot register their copyrights.

A typical professional photographer takes dozens or hundreds of photographs each working day. The task would be impossible to take and duplicate these and send them off for registration. Also, they don't really know which ones the customers want or which ones are likely to be infringed upon so they cannot select which photographs to register. The registration provisions require the photographer to make an extra image of each photograph, as has been brought out in previous testimony, and deposit it with the Copyright Office.

When the photograph is considered to have been published is also an issue. My lawyers advise me that this can be a very uncertain thing in the law as it stands today, so the photographer must fill out the two-page form and send a $20 fee for each photograph.

Many small businessmen are trying to squeeze the value out of every hour that they have during the day, and these tasks are very impractical and burdensome for them. Moreover, as far as the PPA can tell, advanced registration really serves no useful purpose. Infringers do not check with the Copyright Office before copying, nor could such a check assure lawfulness since copying remains unlawful even if the image is not registered. So photographers are being asked to bear an essentially pointless burden.

One service the PPA does provide to its members is an opportunity to talk to one of our copyright attorneys about apparent infringements. Our lawyers tell me that time after time they have to tell the photographer that a clear case of infringement has occurred but nothing can be done. While the photographer can theoretically register the photograph, assuming it is still in his or her possession, and sue for actual damages, this is simply not economically viable in the absence of statutory damages and attorney's fees. Actual damage for any single infringement is usually very small. It is the cumulative effect of repeated copying by offenders that really creates the problem.

What this means is that our attorneys tell our members when they talk to them: "Yes, you have a clear right given to you by Congress; yes, that right has clearly been violated; and you have been wronged. Unfortunately, there is no meaningful remedy."

You have no idea how strongly that news affects the typical photographer. Frankly, he or she feels betrayed by our legal system and convinced that whoever made the law was toying with justice. This is not a good way for citizens to feel.

Now I hasten to add that routine infringers are taking a real risk. PPA has funded lawsuits against routine infringers and obtained substantial recoveries, but the suits have cost us hundreds of thousands of dollars and only the most flagrant infringers can be sued. Even in these cases of ongoing, routine infringement, the requirement of advanced registration has caused great mischief. To make the cases viable, we base them on copying done in response to investigative orders submitted after warnings have failed. Although this is a time-honored technique, in each case we have brought we have had to deal with claims that we "set-up" or participated in the infringement. With one exception now on appeal, courts have recognized the necessity of such investigative orders and have rejected motions to dismiss. However, this issue is a major distraction, wastes a lot of resources, and diffuses the moral thrust of our suits.

In PPA's view, a meaningful right must be protected by a meaningful remedy. Our experience has been that the requirement of prior registration as a condition for obtaining statutory damages and attorney's fees has deprived most photographers of meaningful copyright protection. We are concerned that the requirement of registration prior to litigation has caused courts to question their ability to grant meaningful injunctive relief. For those reasons, we support the repeal of these requirements.

One final note. I understand that there are provisions of the Copyright Reform Act of 1993 that are not related to the question of copyright registration. PPA is not affected by those provisions and takes no position on them. However, we believe that whatever

the fate of those positions, that section 102 of the bill is good law and should be enacted.

Thank you.

Mr. HUGHES. Thank you, Mr. Foster.

[The prepared statement of Mr. Foster follows:]

STATEMENT OF
ANDREW FOSTER, JR.
EXECUTIVE DIRECTOR
PROFESSIONAL PHOTOGRAPHERS OF AMERICA

Regarding H.R. 897
THE COPYRIGHT REFORM ACT OF 1993

before the
Subcommittee on Intellectual Property
and Judicial Administration
Committee on the Judiciary
U.S. House of Representatives

March 4, 1993

Mr. Chairman and Members of the Subcommittee:

My name is Andrew Foster, Jr. I am Executive Director of the Professional Photographers of America ("PPA"). PPA is the largest association of professional photographers in the United States, with some 16,000 members throughout the nation. We represent photographers in all fields of professional photography, including portrait photography and commercial and magazine photography, wedding and industrial photography, legal forensics, and the new field of electronic imagers. Thank you for inviting me to testify today. I am pleased to convey PPA's unqualified support for the repeal of sections 411(a) and 412 of the Copyright Act as proposed by the Copyright Reform Act of 1993.

The lifeblood of a professional photographer is the exclusive rights granted by copyright to sell copies of his or her work and to grant rights to others to reproduce and distribute that work. Unauthorized copying strikes at the photographer's economic heart.

I am here to talk to you about the practical problems of photographers and their practical concerns over the copyright laws. I am not a copyright lawyer, and do not pretend to be in a position to opine on legal questions.

Because of the importance of copyright to our members, PPA has become increasingly active in protecting and enforcing those copyrights and in educating the public concerning the rights of photographers. Our members feel so strongly about this problem that, for the past 4 years, they have imposed a special assessment on themselves to fund these efforts. We have met with much success in both litigation and education.

Unfortunately, we have also met with much frustration. This frustration has been directly caused by the sections of the Copyright Act you are considering repealing today, sections 411(a) and 412 and their requirements of advance copyright registration as a prerequisite for meaningful copyright protection.

To understand the mischief caused by these requirements, you must understand the realities of professional photography. Most professional photographers are small businessmen and women operating on very tight margins. This means two things: (1) every sale is important, and (2) there is no spare money or time to spend on lawyers or on

burdensome bureaucratic requirements that may prove to have been a waste of time.

For these people the registration requirement is truly burdensome. A typical professional photographer takes dozens, or even hundreds of photographs each working day. At the time the photographs are taken, it is impossible to know which will be valuable, which customers will want, and which is likely to be infringed. To obtain the full protection of copyright, the photographer currently must register virtually every one of those photographs. Of course, with respect to the great majority of photographs, this effort will prove to have been a complete waste of time.

And what does registration require. It requires the photographer to make an extra image of literally every work for deposit with the Copyright Office. Where the photograph is considered to have been published, an issue which my lawyers advise me is often uncertain under the law, the photographer must fill out a two-page form and pay a $20.00 fee for each photograph!

For small business people trying to squeeze value out of every hour, since it is the last dollars earned that go to the bottom line, these tasks are an impractical burden.

Then there are photographers who simply cannot register their works. It is common practice in some fields of photography for the photographer to turn the film over to the

client for processing and use. The photographer has nothing to deposit with the Copyright Office; nothing to register.

Moreover, so far as PP of A can tell, advance registration serves no useful purpose. Infringers do not check with the copyright office before copying. Nor could such a check assure lawfulness, since copying remains unlawful even if the image is not registered. So photographers are being asked to bear an essentially pointless burden.

One service PPA provides our members is the opportunity to talk to one of the PPA copyright lawyers about apparent infringements. Our lawyers tell me that, time after time, they have to tell the photographer that a clear case of infringement has occurred but that nothing can be done. While the photographer can theoretically register the photograph (assuming it is still in his or her possession) and sue for actual damages, that is simply not economically viable in the absence of statutory damages and attorneys fees. After all, the actual damages caused by any single act of copying is usually small. It is the cumulative effect of repeated copying (which is often undetected, or involves works that are not identified) that creates the problem.

Even where the individual photograph is particularly valuable, say with actual damages of $1,500, litigation is not a viable option. How many hours of a copyright lawyer's

time can you buy for $1,500? Not enough to bring a copyright suit, I can assure you.

What this means is that our lawyers have to tell our members:

> Yes, you have a clear right given to you by Congress. Yes, that right has clearly been violated and you have been wronged. Unfortunately, there is no meaningful remedy.

You have no idea how strongly that news affects the typical photographer. Frankly, he or she feels betrayed by the legal system and convinced that whoever made the law was toying with justice. That is not a good way for citizens to feel.

Now, I hasten to add that routine infringers are taking a real risk. PPA has funded lawsuits against routine infringers and has obtained substantial recoveries. But the suits have cost us hundreds of thousands of dollars, and only the most flagrant infringers can be sued.

Even in these cases of ongoing, routine infringement, the requirement of advance registration has caused great mischief. To make the cases viable, we base them on copying done in response to investigative orders submitted after warnings have failed. Although this is a time-honored technique, in each case we have brought we have had to deal against claims that we "set up" or participated in the infringement. With one exception -- now on appeal -- courts have recognized the necessity of such investigative orders

and have rejected motions to dismiss. However, this issue is a major distraction, wastes a lot of resources and diffuses the moral thrust of our suits.

The lawyers tell me that some courts have been raising questions about whether the requirement that a copyright owner register a work prior to suit precludes the granting of meaningful injunctive relief with respect to unregistered works and future works. While I do not fully know the state of the law on this issue, I will say that it is essential that injunctions granted against systematic infringers cover all works of the infringed photographer. By the time an action has been brought with respect to one photograph, it is not likely that the particular photograph will again be infringed. It is the future work of that photographer that is most vulnerable. Any provision of the law that raises doubt about a court's ability to grant meaningful injunctive relief against such copying severely hurts photographers.

In PPA's view, a meaningful right must be protected by a meaningful remedy. Our experience has been that the requirement of prior registration, as a condition for obtaining statutory damages and attorney's fees, has deprived most photographers of meaningful copyright protection. We are concerned that the requirement of registration prior to litigation has caused courts to question their ability to

grant meaningful injunctive relief. For those reasons, we support the repeal of those requirements.

One final note. I understand that there are other provisions of the Copyright Reform Act of 1993 that are not related to the question of copyright registration. PPA is not affected by those provisions and takes no position on them. However, we believe, whatever the fate of those provisions, that section 102 of the bill is good law, and should be enacted.

Thank you.

Mr. HUGHES. Mr. Mills, welcome.

STATEMENT OF OLAN MILLS II, CHAIRMAN OF THE BOARD, OLAN MILLS CORP.

Mr. MILLS. My name is Olan Mills II. I am chairman of the Olan Mills Studios, a company founded in the Depression by my mother and father. We are in the family photography business and now have in excess of 900 studios throughout the United States.

I am honored to appear here today to testify in support of the proposal in H.R. 897 to remove the advanced registration and deposit burdens from the Copyright Act. I am speaking as a businessman, and I would like to tell you about the practical problems that I see in our business brought on by those provisions.

Our industry is a very competitive one. There are thousands of photographers all over the country, and we all face the same problem, and that is to get the customer in front of the camera, the acquisition problem. My father and mother worked on that problem by going door to door when they started the business. They would offer the customer a portrait at a special price and then hope that, if they did a good enough job, they would be able to sell additional portraits at the regular price when the customer saw them.

We do essentially that today, although we are not going door to door any longer. We have a club plan where the customer receives three sittings in about a year's time and each time receives an 8-by-10-inch portrait, and that is sold to the customer for about $15, well below our actual costs. We recoup our cost by selling additional portraits to that customer if he or she desires them. We recover not only that cost but also the money we spent to attract our customer, pay for our studio, our personnel, our plant production, and general administrative costs. We profit only through the sale of the additional portraits. This system puts the customer really in the driver's seat. If we do a good job, they buy; if we don't, they buy less or perhaps nothing at all.

It is important to understand that the market for these portraits is quite limited. They can only be sold to the subject customer. It is of them or their family. It is not really available to be sold on the open market. If an infringer comes on to the scene and copies our work, then our entire market can be destroyed.

Technology has advanced to the point that good copies are now being offered at convenient places such as drug stores and photo shops without the need of our negatives. The infringer avoids all the difficult parts of the business—that is, attracting the customer into the studio and producing an attractive and high-quality portrait.

Such copying is hard to detect, and we cannot quantify its impact with precision, but as a business we have made the hard judgment to spend hundreds of thousands of dollars in legal fees and hundreds of hours of time fighting just the most flagrant infringers.

Mr. HUGHES. Mr. Mills, let me just interrupt you right there. I am going to have to recess for a little bit so I can go catch that vote—I have got about 6 minutes—and then we will come back and take the balance of your testimony. I apologize for that.

The subcommittee stands recessed.

[Recess.]

Mr. HUGHES. The subcommittee will come to order.

Mr. Mills, I am sorry for the interruption. You may proceed.

Mr. MILLS. Mr. Chairman, simply stated, advanced registration would be an enormous burden to us. We do not know which photographs will be infringed, so we would need to register each and every photograph.

As I said before, we have about 900 studies; and, Mr. Chairman, there was a miscommunication when I sent my information up to you; it said 100,000 photographs per week; it is actually 100,000 sittings, which would be maybe seven photographs apiece; so the number of photographs we take is actually about 700,000 per week, not 100,000.

If we were to register each day's production at the studio with the depository, it could amount to 27,000 registrations per month; that is, taking each day's photography for each studio. We can only imagine the amount of paperwork involved and the burden put upon us and the Library to handle all of that, and it seems to me that it serves little purpose.

The Library of Congress has expressed a concern that repeal of 411(a) and 412 would deprive it of its ability to obtain materials for its collections. I don't quite understand that concern. Several years ago, our attorney called the Copyright Office to ask whether we should deposit copies of our output. We were advised at the time quite clearly that hundreds of thousands of Olan Mills photographs were not wanted, and the message was essentially, "Don't call us, we'll call you."

Olan Mills, of course, like all photographers, would be more than happy to provide anything that the Library of Congress would require or ask us, but we do think that, looking at the total scope of our business, the current requirement of advance registration would create a large paperwork mess for us if we were to attempt it.

The Copyright Office had said here today in earlier testimony that our real problem is, who owns the rights to the photographs, and I think that is not right. As Ms. Schrader pointed out, the law was clearly changed in 1978 to make clear that the photographer owns that right. The change was made by Congress recognizing some special problems of the photographer.

There is a problem of public perception, but that perception is fueled by infringers who offer to copy our portraits for very low prices that do not reflect the cost of creation. This is a tough incentive for our customers to pass up. Our real problem is registration. Where we find a habitual infringer, we now under current law need to use an investigator to pose as a normal customer to present a registered photo for copying. One court has now told us we can't do that. The court said the investigator authorized the copy. Without the advanced registration requirement, we could act when we learn about these types of infringements.

My message to you today is that advanced registration and deposit requirements pose huge practical problems for our business and, I gather, for other similar businesses. Unless we can demonstrate equally compelling benefits—and that is for you to judge—we support repeal of sections 411(a) and 412.

Thank you.

Mr. HUGHES. Thank you, Mr. Mills.
[The prepared statement of Mr. Mills follows:]

STATEMENT OF
OLAN MILLS II
CHAIRMAN OF THE BOARD
OLAN MILLS, INC.

Regarding H.R. 897,
THE COPYRIGHT REFORM ACT OF 1993

before the

Subcommittee on Intellectual Property
and Judicial Administration
Committee on the Judiciary
U.S. House of Representatives

March 4, 1993

Mr. Chairman and Members of the Subcommittee:

My name is Olan Mills II. I am Chairman of the Board of Olan Mills, Inc., a Company founded during the Depression in 1932 by my father and mother. The company has been in business under the same family ownership and management for over sixty years. We specialize in family portraits and consider ourselves "America's Family Photographer." Over the years our business has grown. We now have more than 900 studios located throughout the United States.

I am honored to appear before you today to testify in support of the proposal in H.R. 897 to remove the advance registration and deposit burdens from the Copyright Act. I am a businessman. Speaking as a businessman, I want to tell you about the practical problems created by the prior registration requirements for my business. I am speaking as a businessman, not a lawyer, about real business concerns.

To begin with, let me say that our industry is a very competitive one. One glance at the yellow pages under "photographers" in any city's phone book reveals the extent

of the competition. While there are thousands of photographers trying to build their businesses, the difficulty for them all -- the really tough part-- is attracting customers into their studios to sit for a photograph. This was the single biggest challenge in the business in 1932 and it still is today. My father and mother went door to door and started the business by offering a loss leader plan in which the customer would receive a special price for the first photograph with additional copies available at a higher price.

We still use the same approach today, although we of course don't go door-to-door anymore. In our Club Plan we offer the customer three separate sittings in our studio and an 8 x 10 color portrait from each sitting at a total price of $15, well below our actual costs. We recoup the cost of attracting the customer, the studio, the plant production, general and administrative costs, and a profit only through the sale of additional portraits in various sizes and finishes to the customer for his friends and family. We try to do a good enough job that the customer will buy several copies, perhaps of several poses.

This system puts the customer in the driver's seat. The customer decides how much to purchase based on how good a job we did, what is needed, and what the customer can afford. If we do a poor job, or if the customer can afford only one

copy, we lose money. But if the customer likes our work, he or she has the option to purchase additional copies. So the customer pays in proportion to how well we perform and how satisfied the customer is.

It is important to understand that the market for these photographs is quite limited. Because of privacy and other concerns, portraits can only be sold to the customer, and not to unrelated third parties. If a customer takes the portrait we offer him under our loss-leader plan and hires an infringer to copy it elsewhere, then our entire market for that portrait is utterly destroyed.

Technology has advanced to where good copies of our work could be made by the corner drug store or photo shop without the need for our negatives. We found these businesses taking advantage of our ability to create a pleasing image by offering to copy our work at prices far lower than we were able to charge. After all, they did not incur all of the costs we incurred in taking the photograph.

The infringer avoids all the difficult parts of the business, that is attracting the customer into the studio, and producing an attractive and high quality portrait.

Such unauthorized copying breaks the link between the quality of our work and our return. A customer may be absolutely delighted with our portrait and want copies for everyone in the family, but may still buy only one copy from

us. Infringers hurt not only our company but our employees. Our photographers and our sales persons are paid, not only by the hour, but they receive in addition a commission, as a sales incentive. Such commissions are common throughout the industry. When our employees do a good job for the customer but lose commissions to infringers, it hurts morale, increases employee turnover, and costs them income.

Thus, unauthorized copying of our portraits is a major threat to our business, and it increases as copying technology improves. Such copying is hard to detect, and we cannot quantify its impact with precision, but as a business we have made the hard judgment to spend hundreds of thousands of dollars in legal fees, and hundreds of hours of time, fighting just the most flagrant infringers. What we have recovered in these legal fights does not cover our legal costs of making these challenges.

We have brought suits against routine infringers generally in cooperation with the Professional Photographers of America, Inc. These suits have reduced the rate of open and flagrant copying, but at great expense. Our lawyers tell us that the prior registration requirements have greatly complicated that enforcement effort. So, you might ask, why don't we register?

Simply stated, advance registration would be an enormous burden. We do not know what photographs will be infringed,

so we would need to register each and every photograph. As I said before, we have 900 studios. In total, our company produces well over 100,000 photographs per week. If we were to register each week's production at each studio as an unpublished collection, we would make nearly 50,000 group registrations per year. These registrations would need to be accompanied by some form of deposit showing each of the thousands of photographs taken each day. Imagine the paperwork burdens alone that this would place on our company, to administer these documents. Imagine the paperwork burden this would impose on the Copyright Office.

Moreover, this huge burden would serve no purpose. Nobody ever would sift through all of the paperwork and copies -- except maybe lawyers after suit had been brought looking for some after-the-fact excuse.

I am told that the Library of Congress has expressed a concern that repeal of sections 411(a) and 412 would deprive it of its ability to obtain materials for its collections. I do not understand this concern. Several years ago, our lawyer called the Copyright Office to ask whether we should deposit copies of our output. We were advised quite clearly that hundreds of thousands of Olan Mills photographs were not wanted. The message was in essence, "don't call us, we'll call you." No one ever has.

Olan Mills, Inc. (and I suspect most responsible businesses) will provide the Library of Congress with any copies of works that it wants. But we should not be required to flood it with hundreds of thousands of portraits of no general interest to anyone. Nor should we be mired in paperwork intended to facilitate such a wasteful exercise.

I am a businessman, not a politician. As a businessman, I know that one key to an efficient and competitive business is the identification and elimination of procedures that serve no useful purpose, or whose utility is outweighed by their cost. This is a difficult process. As practices grow up, they put down deep roots. Like farmers, we have to do some weeding from time to time.

My message to you today is that advance registration and deposit requirements pose huge practical problems for my business and, I gather, for other similar businesses. Unless someone can demonstrate equally compelling benefits -- and that is for you to judge -- we support repeal of Sections 411(c) and 412.

Thank you.

Mr. HUGHES. In your opinion, Mr. Mills, can the current system be effectively changed to permit you to adequately enforce your rights?

Mr. MILLS. As I said, our feeling is that the repeal of those two sections would give us the best opportunity to deter infringement.

Mr. HUGHES. Do you have any other suggestions besides that?

Mr. MILLS. No, sir. We are doing only a partial job of deterring the infringers now.

Mr. HUGHES. Mr. Foster, what kind of practical benefits will H.R. 897 have to your members if it is enacted?

Mr. FOSTER. Most of our members are, as I stated before, very small businesses, and they don't really have the wherewithal or the moneys to do all of the registration and to be able to go to court with no real assurance of getting statutory damages and getting legal fees. So it will be a real benefit to them from that standpoint.

Most photographers do not and cannot register their work. They go unregistered, and then they find out later they should have.

Mr. HUGHES. Do you have any other practical suggestions on how we can deal with your particular problems in the context of existing law, aside from repeal of these sections?

Mr. FOSTER. I believe that most of the photographers are interested in working as photographers and they want the laws there to protect them and to assure them of their rights, and I believe that if sections 411(a) and 412 are repealed that it would help in that manner. I haven't seen all of the suggestions. If there are other suggestions, we would be happy to consider them.

PPA is willing to work in any way that it can to offer any advice and help in any way to help this bill go through.

Mr. HUGHES. OK. Well, thank you. I don't have any further questions. We appreciate your testimony. You have been very helpful to the panel today.

Our final panel consists of Mr. Paul Basista, executive director of the Graphic Artists Guild and Mr. Paul Warren, Intellectual Property Committee, Newsletter Publishers Association. Mr. Basista has been the executive director of the Graphic Artists Guild since 1987. The guild represents nearly 3,000 professional creators. Mr. Warren is the senior editor and executive publisher of Warren Publishing, which publishes some 13 newsletters in the telecommunications field, and I alluded to his work in a letter that he received from the Copyright Office earlier in today's hearings. The Newsletter Publishers Association is a trade association representing publishers of approximately 2,000 newsletters and other specialized information services.

We welcome you here today. We appreciate your willingness to testify. We have your formal statements, which will be made a part of the record in full, and I would like you to summarize your testimony.

Mr. Basista, welcome.

STATEMENT OF PAUL BASISTA, EXECUTIVE DIRECTOR, GRAPHIC ARTISTS GUILD, INC.

Mr. BASISTA. Thank you, Mr. Chairman.

My name is Paul Basista. I am the national executive director of the Graphic Artists Guild, and on behalf of its leaders and mem-

bers I thank you for the opportunity to voice our support of H.R. 897, the Copyright Reform Act of 1993.

Now that you have heard about photographers from different points of view, I think you should know that they are not alone. The Graphic Artists Guild is the country's foremost advocacy organization representing the broadest spectrum of professional graphic artists working in all disciplines, including illustration, graphic design, surface and textile design, computer arts, cartooning, photography, and others. They work in all the markets engaged in the visual communication industries, including advertising, book and magazine publishing, the corporate market, and the consumer markets. Their work touches our lives every hour of the day.

Of the approximately 2,800 guild members in 8 chapters across the country, 90 percent of them are freelancers working as independent businesses. All of them rely on their copyrights for their livelihood.

In its 26 years, the guild has proven itself to be an effective leader, protecting and advancing the legitimate interests of all the professionals in the visual communications industry, and we strongly support H.R. 897 because it will empower creators to effectively protect their rights.

Individual authors need better remedies to protect their rights, and apparently the Copyright Office agrees with this point of view. When testifying before this very subcommittee on April 5, 1990, the Register of Copyrights, Mr. Ralph Oman said, "Individual authors emphasize the clearest link to carrying out the constitutional purpose to encourage authorship, part of which is to discourage infringement that harms authors." He reasoned that—and here is another quote by him—"Congress indicates that attorney's fees are closely associated with penalizing wrongdoing," and that deterrent, if available, would—and here is another quote—"give the individual author additional leverage, making legal resources more equally available according to the merits of the case."

Unfortunately, the practical effect of current law is to penalize the victims of theft while rewarding the thieves. Specifically, because the vast majority of creators do not timely register the copyright to their work, they are barred from the strongest deterrents to infringement—those which threaten the infringer with having to pay attorneys' fees and/or statutory damages.

According to data that we have compiled, approximately 78 percent of all graphic artists never register their copyrights, and in those disciplines which work mainly on commission, like illustration, it rises to over 82 percent. Overall, approximately 16 percent register their work only some of the time while only 6 percent of the graphic artist population diligently register their work. Ironically, approximately 32 percent of these individual authors have had their works reproduced without their permission.

These figures reflect the industry as of 1990, the same year that the Register expressed such sensitivity to the individual creators' situation, and were incorporated into the survey process that resulted in the seventh edition of the "Graphic Artists Guild Handbook, Pricing and Ethical Guidelines." This book has nearly 52,000 copies in print, and it is the industry's most widely accepted business reference used by creators and their clients. I am happy to

make a copy of this book available to you, Mr. Chairman and the other members of the subcommittee.

The fact of the matter is that the requirement to register is such an extreme administrative and financial burden that the vast majority of professionals just don't do it, despite the so-called incentives designed to encourage the registration process. This fact is underscored by the meager number of registrations that are processed by the Office of the Register compared to the number of works that are created.

Graphic artists run high-volume, short-deadline businesses. While devoting the bulk of their time to producing their creative work, they must also be their own marketing and advertising department, their own legal department, and their own accounting department. Registering copyrights is an administrative burden that most artists cannot devote their valuable time to, and in many cases artwork is not returned by the client in time to register within the 3-month window of opportunity following the publication of the work. Because the artists do not have access to the work in time to timely register it, he or she is denied the protection that Congress intended.

Many jobs are initially commissioned for relatively small fees. A quarter-page illustration, for example, commissioned for one-time use in a magazine could conceivably sell for $300. The registration fee alone reflects an additional 7 percent tax on gross income. Once you factor in the time to complete the paperwork and the expense in preparing the appropriate deposit copies, that tax could conceivably jump to 30 percent of gross income. This is a burden that no business can endure.

Compounding the problem for individual creators is that infringements are on the rise and the victims of infringement are left with no recourse to rectify the harm they have experienced.

A typical case is that of guild member Mona Kiely, who executed a small job for her client, the National Taxpayers Union. Unknown to her or to her client, the mailing house that printed the job misappropriated her work and sold it later to a third party. Because she had not registered the work, she was prevented from pursuing this case.

Furthermore, as the new technologies develop, it is becoming easier and easier to infringe upon works. In fact, sellers of new technologies even encourage the scanning and alteration of visual material. For example, DAK Industries ran a full-page ad advertising a computer scanner in its catalog that was headlined "Rip-off Artist."

As it becomes easier for works to be stolen, copyright owners must have the ability to protect their creative material. The ramifications of the current situation are severe for individual authors. Without the deterrents, artists are ripe for exploitation. Without the possibility of attorney's fees or statutory damages, individual creators are effectively prevented from pursuing an infringement case, because in most cases actual damages involved are negligible relative to the costs of litigating a claim.

The Copyright Office understands this to be true. In his testimony to you in 1990, Mr. Oman concluded—and once again I quote—"Individual authors almost always have fewer available

funds and without a clear right to attorney's fees may be afraid to enforce their rights, leaving them unprotected for practical purposes."

Individual creators have a right to expect that the copyright laws should protect their work. In fact, this just is not the case. Only by repealing the requirement to register the copyright to a creative work for individual authors to be eligible to receive attorney's fees and statutory damages will we be able to discourage infringement and effectively penalize wrongdoing. The best way to achieve that end is to enact H.R. 897.

We urge you to take the necessary steps to repeal the requirements to require to register a work in order to have access to all the leverage available to deter infringements.

Mr. Chairman, thank you. I would be happy to answer any questions you may have.

Mr. HUGHES. Thank you very much.

[The prepared statement of Mr. Basista follows:]

PREPARED STATEMENT OF PAUL BASISTA, EXECUTIVE DIRECTOR, GRAPHIC ARTISTS GUILD, INC.

Mr. Chairman and Members of the Subcommittee, my name is Paul Basista and I am the National Executive Director of the Graphic Artists Guild. Thank you for the opportunity to voice our support of H.R. 897, *The Copyright Reform Act of 1993*.

As the country's foremost advocacy organization representing professional graphic artists, the Guild has a proven track record protecting and advancing the legitimate interests of illustrators, graphic designers, surface and textile designers, computer artists and other graphic artists. Approximately ninety per cent of Guild members are independent, working free lance in the advertising, publishing, consumer, corporate and other markets.

The Graphic Artists Guild strongly supports H.R. 897, *The Copyright Reform Act of 1993*. If the bill is enacted, individual creators will be able to effectively protect the fruits of their creative efforts from infringement.

The Practical Effects of Current Law Do Not Reflect the Intent of Congress

Graphic artists are too often prevented from effectively pursuing an infringement in federal court, because their work was not formally registered with the Library of Congress. Current law bars them from recouping attorney's fees or statutory damages if a work has not been timely registered. The practical consequence of this situation is to punish the victims of theft while rewarding the thieves, a result Congress did not intend. As Ralph Oman, the Register of Copyrights once said, "... Congress indicates that attorney's fees are closely associated with penalizing wrong doing."[1]

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1 Statement of Ralph Oman, Register of Copyrights and Librarian for Copyright Services, Before the Subcommittee on Courts, Intellectual Property and the Administration of Justice, Committee on the Judiciary, House of Representatives, 101st Congress, Second Session, April 5, 1990, page 11.

Mr. Chairman, you and your colleagues may not be aware that most copyright attorneys will not pursue a copyright infringement case unless attorney's fees and statutory damages are possible. Since actual damages in the majority of cases are negligible, there is little incentive for an attorney to take on a case on contingency, and artists can rarely afford or justify the hourly fees accrued in litigation. The circumstances described by Graphic Artists Guild member Mona Kiely, whose statement is attached for the record, is typical of the kind of infringements that occur.

The changes proposed in H.R. 897 will bring a welcome change to the visual communication industries. Removing the requirement to formally register a work to be eligible to bring suit in federal court or to receive attorney's fees or statutory damages will finally take the burden away from the injured party and will force infringers to change their behavior.

Copyright infringement is on the rise and new technologies now affect all kinds of intellectual property: video recorders and digital audio tape recorders; photocopiers and computer scanners. As it becomes easier to rip off copyrighted material, more and more consumers tend to think it's permissible to do so.

For example, "Dak Industries" boasts a full catalog page headlined "Rip Off Artist," advertising a computer scanner. In its efforts to "Be a Rip-Off Artist Risk Free," it encourages the scanning and alteration of visual material. Buried within an entire page of advertising copy is one sentence that reads, "Be sure you get legal permission before you print copyrighted images for commercial purposes." A copy of this advertisement is attached to my statement.

In this age of more and more advanced technology, the misappropriation of protected works becomes easier and easier. As it becomes easier for works to be stolen, copyright owners must have the ability to protect their creative material. Removing the registration requirement is an important step towards that goal.

Registration is Not Required For the Library of Congress to Acquire Works

The underlying premise for requiring registrations is for the Library of Congress to acquire works. Yet, the Library has the authority and the wherewithal to demand its acquisitions without preventing artists from effectively protecting their work. Foe example, in 1987 the Graphic Artists Guild inadvertently neglected to formally register the copyright of the 6th edition of the *Graphic Artists Guild Handbook, Pricing & Ethical Guidelines*. In March, 1990, we received a "Notice for Mandatory Deposit of Copies" from the Copyright Acquisitions Librarian which demanded "two complete copies of the best edition" of a Guild work. The notice further stated that "the obligation to deposit exists independently of whether the copyright owner decides to seek copyright registration with the Copyright Office". Further, we were warned that the Guild's failure to comply with the Library's demand would have made the Guild liable for $250.00 for the work plus the retail price of the two copies demanded. Clearly, the Library has effective administrative systems and procedures to accomplish its objectives without penalizing creators for not registering their works. A copy of this demand letter is attached to this statement.

Despite So-Called Incentives, The Vast Majority of Graphic Artists Do Not Register Their Works

As the publisher of the *Graphic Artists Guild Handbook, Pricing & Ethical Guidelines*, the Guild extensively researches the various markets of the visual communications industries, including advertising, publishing, editorial, the corporate markets, retail and others.

The attached tabular information indicates that nearly 79% of all graphic artists never register their copyrights. Yet, nearly 32% have had work reproduced without the author's permission, and an even higher percentage have had work altered without permission. Despite the so-called incentives designed to encourage the

registration of works, the simple truth is that copyright registration is an administrative and financial burden for graphic artists and other individual creators.

Graphic artists run high-volume, short deadline businesses. Their primary responsibility is to solve a client's problem creatively, on time and within budget. Working on tight deadlines, they must devote the bulk of their time to produce their creative work. Yet, to remain in business, they must still develop and execute a marketing plan; negotiate their own fees and terms; bill and collect on accounts receivable; remit payments on accounts payable and track the location of artwork. Once the artwork is returned (or published), the artist must then formally register the work.

In many cases, the work is not returned soon enough to register the work in a timely manner, or the artist may not be informed that the work has even been published. For example, a magazine publisher plans to publish a piece in next July's issue, three months away, but actually publishes it in August. The artist is rarely informed of the actual publication date, and normally is not supplied with tear sheets. It is not uncommon for another three months to pass until the publisher finally gets around to returning the artwork. By then, the opportunity to register the work within the three-month window from publication has already closed. Because the artist did not have access to his or her own work in time to register it in a timely manner, the artist is prevented from receiving the protections Congress intended.

Many jobs are initially commissioned for limited use for relatively small fees. A quarter-page illustration, for example, commissioned for one-time editorial use in a magazine could conceivably sell for only $300. Registering that work for $20.00 reflects an additional seven per cent tax on gross income. Contrast this to a newspaper publisher, for example, who projects revenues in the hundreds of thousands of dollars or more for each issue. As a business expense, registration reflects an insignificant fraction of expenses.

The current system clearly penalizes the victim. The proposed legislation will make it easier for the victim to place the blame where it belongs.

Permissive Registration Should Be Encouraged

Our support of this Bill does not imply our opposition of the copyright registration process. On the contrary, the Graphic Artists Guild believes that registration is the surest safeguard against any potential confusion over a work's origination or ownership. Registration provides a "record of ownership," making it the surest provenance of one's claim to a work, and enactment of the proposed legislation will not change that. However, we believe it is better to provide additional incentives to encourage the formal registration of copyright, rather than punish those who do not comply.

For years the Guild has been using its best efforts to educate graphic artists (and their clients) to the importance of formal copyright registration, primarily through the publication of the *Graphic Artists Guild Handbook, Pricing & Ethical Guidelines*. Now in its 7th edition, the *Handbook* explains the advantages of registration and provides detailed instructions on how to comply with all the necessary registration requirements. With nearly 52,000 copies of the current edition in circulation today, we are confident that our educational message is being received. Mr. Chairman, I am happy to present you and the members of the Subcommittee with copies of the *Handbook* for your files.

In addition, we supply copyright registration forms to every member of the Guild upon their joining and provide additional copies upon request.

In our view, positively reinforcing the voluntary registration of works will go a long way towards achieving the Library's goal, as stated by the Register, "... to encourage prompt registration for creation of a complete registration record in the

Copyright Office."[2] Considering the small number of graphic artists who actually register their works, it would certainly work better than continuing to deprive a victim of infringement of the ability to bring a lawsuit into Federal Court or denying him or her the ability to recoup attorney's fees or statutory damages, as current law provides. For example, lowering the registration fee or easing the requirements for group or multiple registrations might be the kind of incentives that would encourage more registrations to occur by individual authors.

The Guild Supports Abolition Of The Copyright Royalty Tribunal

The Graphic Artists Guild, having participated in the rate hearings of the Copyright Royalty Tribunal since its inception, strongly urge its abolition. Over the years, the Tribunal has exercised its rate setting function in a manner that, in our opinion, has set extremely low rates for the reuse of published pictorial, graphic and sculptural works by Public Broadcasting Service and its affiliate stations.

We believe the rate setting function of the Tribunal could be equally well exercised by ad hoc arbitration panels under the supervision of the Copyright Office. In fact, the Copyright Office undoubtedly has far greater familiarity with the field of the visual arts than the Copyright Royalty Tribunal.

Moreover, we wish to put the Guild on the record once again, as strongly opposing the compulsory license for pictorial, graphic and sculptural works under the Copyright Act. We believe that this compulsory license deprives the copyright owner of his or her Constitutional right to choose the parties to whom rights will be licensed. Further, the Public Broadcasting Service and its affiliates, report only relatively small amounts of usage of the license. This means that either the license is not used, or uses are not reported. In either event, the license should be abolished, since the creator's rights should weigh more heavily than the apparently minimal need of PBS

2 Ibid., page 13.

for "free" usage. I use the word "free" advisedly, since almost no payments have been made to artists under the compulsory licensing provisions. As was pointed out in the last rate hearing, even as well known a photographer as Jay Maisel was listed as "location unknown," and the $18.75 due him was not paid until a protest was made at the rate hearing that he was an internationally famous photographer who had maintained the same studio location for 25 years. And of course, the license fee made for the use would have been far, far in excess of the $18.75 paid.

For all of these reasons we support the abolition of the Copyright Royalty Tribunal and will request that the Copyright Office review the need for the compulsory licensing of pictorial graphic and sculptural works if the functions of the Tribunal are taken over by the Copyright Office.

Conclusion

Mr. Chairman, the Graphic Artists Guild applauds your efforts to rectify a situation that was in long need of repair. We are convinced that these added protections and proposed changes will encourage the development of new works; works from which the public will benefit. The Guild pledges its good offices to assist the Subcommittee in the passage of this legislation. I would be happy to answer any questions you may have.

M & M Communications
7600 Marietta Lane Berwyn Heights, Maryland 20740
Tel: (301) 441-9119 Fax: (301) 220-3077

WRITTEN TESTIMONY OF MONA L. KIELY
BILL HR.897

In 1986 I was hired by National Taxpayers Union to design a 4-page brochure which included typesetting, layout, clip art, and spot line illustrations. NTU sent the printing to be handled by MediAmerica, a full-service mailshop in Lorton, Virginia. Because of the quick turnaround prior to publication and the cost of registration, I did not file for copyright registration.

Approximately 6 months later, I received a call from Rita Smith, Administrative Director of NTU. She asked me if I had sold one of the spot illustrations I had done for her brochure to MediAmerica. I told her I had not. Ms. Smith said that the reason why she asked was because she had received a sample of a printed direct mail package from a colleague at another nonprofit organization which had on it one of the spot illustrations. Her colleague had told her that the artwork for her package was done by the same mailshop, MediAmerica. Ms. Smith told me that when she confronted Richard Geska of MediAmerica as to where he had gotten the artwork for the other package, he admitted to taking it from the artwork NTU had sent them, but then replied something to the effect of, "But that was clip art, so it's okay." Ms. Smith called me back to verify with me that the illustration was not in fact clip art but was an illustration specifically designed by request of the director of NTU, James Davidson.

At that point she told me she would back me up if I chose to pursue a lawsuit against MediAmerica. I decided not to file a suit because I figured that the cost of hiring a lawyer and the effort of pursuing MediAmerica would far exceed the dollar value of the illustration. If I knew that I could have collected all legal fees as well as have a substantial deterring penalty imposed on MediAmerica in addition to the dollar value of the illustration, I certainly would have reconsidered pursuing the matter, since I had evidence to support my original creation of the artwork.

Signed,

Mona L. Kiely
M & M Communications
7600 Marietta Lane
Berwyn Heights, MD 20740



Snatch text, photos and artwork. Now, everything you create on your computer can have dazzling impact.

Rip-Off Artist

Lift a photo, logo or drawing and transfer it into a report, manual or article. Grab a sales chart, graph or map and slip it into a proposal, term paper or newsletter. You can even scan your signature and instantly personalize notes, memos or letters in the blink of an eye. It really works!

By Dave Lupton

It's exciting. Imagine lifting a photo and putting it into your company newsletter. Imagine snatching a diagram of the human heart for a biology term paper. And, imagine heisting a comprehensive national sales chart for your weekly purchasing report.

With this awesome new 400-dpi (dots-per-inch) scanner, you can 'lift' almost any graphic piece of art, photo or text, modify it to your exact specifications and incorporate it into anything you write.

Just let your creativity run wild. You'll easily create supercharged documents that burst to life with amazing graphics.

PICKPOCKET PUBLISHER

It's really incredible. There's no limit to the neat things you can do with this new amazing easy-to-use 400-dpi hand scanner.

You can grab a picture of the company president and instantly place it on brochures, business correspondence or handbooks.



Now scanning your signature and placing it on hundreds of personalized letters is a breeze.

You can copy drawings, photos and artwork out of encyclopedias, trade journals and almanacs for your club newsletters.

And, your children can turn in A+ term papers complete with illustrations and diagrams that were never possible before.

And, look at this. You can even scan your own signature to add a truly personalized touch to hundreds of your thank-you notes and fund-raising letters. It's a must if you do multiple business mailings.

Note for Desktop Publishers: If you're into desktop publishing, the Rip-Off Artist is a great way to create your own library of personalized clip art.

You can revise your snatched graphic any way you like. You'll be able to rotate it,



Everything you need to quickly scan diagrams, photos and drawings and copy them into your reports, proposals and documents is included.

magnify it, crop only the part you want, erase any area of the image and print it out.

Plus, the Rip-Off Artist includes Halo Desktop Publishing Editor software so you can even create graphic images from scratch.

Caution: The Rip-Off Artist reproduces images so precisely you might be tempted to use copyrighted artwork from books, magazines and newspapers. Be sure you get legal permission before you print copyrighted images for commercial purposes.

It's great for your personal projects. It's fast. It's easy. And, the results are incredibly impressive. But, be sure you always get permission from the copyright owner first.

Plus, if you have a fax card in your computer, you can scan reports, memos, letters, cancelled checks, signatures, photos, or anything you can think of with amazing 400-dpi resolution.

Then, you can fax your scanned images quickly and effortlessly anywhere.

LATEST SCANNING TECHNOLOGY

The Rip-Off Artist bounces a newly-improved yellow-green (not red) LCD light off the page you're scanning and precisely measures how much light comes back (a yellow-green scan beam produces superb black & white images from color photographs).

Plus, the scanner has a window (so you can see what you're scanning) and guide rollers that ensure you get accurate, distortion-free images every time.

You can adjust the resolution of your image (up to 400-dpi). And, there's a brightness control. So you can fine-tune the contrast. And, there's even 3 different gray-scale ditherings. Wow!

So, whether the image you're heisting is black and white, or in color, you'll always capture a great-looking black and white copy.

Once you've scanned an image, you can incorporate it into any good word processing, paint program and desktop publishing program like WordStar, PC Paintbrush, Microsoft Word, GEM Desktop Publishing, WordPerfect (5.0), MultiMate Advantage II, PageMaker, and Windows Paint.

PUT IN THE KEY AND START IT UP

Simply slip the Rip-Off Artist into an expansion slot of your IBM PC, XT, AT or compatible computer with standard Hercules, CGA, EGA or VGA graphics. It's really easy. The manual takes you through every step.

Note: A hard drive and a minimum of 512K memory is required.

Whatever you capture you can quickly and easily manipulate with the included Halo Desktop Publishing software. You'll be infusing your reports, newsletters or any document you create with graphics, text and signatures in minutes.

And, the Rip-Off Artist is compatible with virtually all dot-matrix and HP LaserJet II or compatible laser printers.

It's engineered by Marstek, Inc. and backed by their standard limited warranty.

BE A RIP-OFF ARTIST RISK FREE

Forget cutting up drawings and artwork and pasting them onto a layout. Forget trying to trace maps and graphs. And, best of all forget dull, boring documents.

Just pass the 4.13" wide hand scanner over anything you want and you'll captivate your readers with stunning graphics.

You can even make two passes on a long document and easily connect them together with the included Halo DTP software.

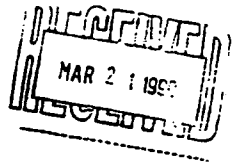
If you're not 100% thrilled, simply return it to DAK in its original box within 30 days for a courteous refund.

To order your Marstek 400-dpi Hand Scanner with Expansion Card, Guide Rail for Accurate Distortion-Free Scanning, Scan-kit Software and Halo Desktop Publishing Software for Combining and Editing Images risk free with your credit card, call toll free or send your check not for the $299 suggested retail price, but for DAK's limited Blow-Out price of just $129.95 ($6 P&H). Order No. 5550. CA res add tax.

A graphic is truly worth a 1,000 words. And now, with the Rip-Off Artist, you can instantly add the visual impact of dramatic photos, descriptive drawings and concise charts to all your reports, proposals and anything you create with your computer. ®

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93b
March 16, 1990

Graphic Artists Guild
11 West 20th Street
New York, New York 10011

Notice for Mandatory Deposit of Copies

Work(s) Covered by This Demand:

GRAPHIC ARTISTS GUILD HANDBOOK: PRICING AND ETHICAL GUIDLINES.
6th Edition

LIBRARY
OF
CONGRESS

This notice constitutes formal demand for deposit under §407 of the copyright law (17 U.S.C.) of **two complete copies** of the best edition of the above work, for the use or disposition of the Library of Congress.

For works published in the United States under copyright protection, the mandatory deposit provisions of §407 obligate the owner of copyright or of the exclusive right of publication to make the required deposit within three months after publication. The Register of Copyrights may, however, make written demand for the required copies at any time after publication. The obligation to deposit exists independently of whether the copyright owner decides to seek copyright registration with the Copyright Office.

Washington
D.C.
20559

We are sending you this notice because we understand the work has been published in the United States, you are the owner of copyright or of the exclusive right of publication in the work, and our records show it has not been deposited. If this information is incorrect, please write or call me at (202) 707-7125.

To satisfy this Demand, please send **two complete copies** of the best edition to us, using the attached mailing label, and enclose the pink copy of this notice to facilitate processing.

Deposit must be made by the Statutory Deadline of June 21, 1990 . Failure to comply makes you liable to penalties prescribed by the copyright law, including a fine of not more than $250 per work and payment to the Library of the total retail price of the copies demanded. In the future you should send for deposit two complete copies of each work within 90 days after publication. You may therefore find it convenient to establish a **regular procedure** of sending **two** copies of each work to the Register of Copyrights immediately after publication. We appreciate your cooperation in complying with this request and in helping to enrich the collections of the Library of Congress.

Carroll B. Grant

Carroll B. Grant
Copyright Acquisitions Librarian
Deposits and Acquisitions Division

sp

Illustrators Who Register Their Copyrights

	Always	Sometimes	Never
Advertising	5.1%	11.5%	83.3%
Book Publishing	8.5%	9.2%	82.3%
Corporate	3.3%	8.3%	88.4%
Editorial	4.2%	11.3%	84.5%
Other	10.8%	13.5%	75.7%
Packaging	5.7%	15.1%	79.2%
Specialties	7.9%	16.5%	75.6%
Theater	3.3%	13.3%	83.3%
Overall	6.0%	12.0%	82.1%

(Specialties include architectural, cartooning, technical and fashion).

Surface Designers Who Register Their Copyrights

	Always	Sometimes	Never
Apparel	0.0%	25.0%	75.0%
China/Barware	5.3%	31.6%	63.2%
Domestics	21.4%	21.4%	57.1%
Giftwrap	25.0%	25.0%	50.0%
Home Decorative	28.6%	42.9%	28.6%
Retail/Other	15.4%	23.1%	61.5%
Overall	13.0%	28.3%	58.7%

Graphic Designers Who Register Their Copyrights

	Always	Sometimes	Never
Advertising	0.0%	24.5%	75.5%
Broadcast	0.0%	25.0%	75.0%
Consumer	2.6%	35.9%	61.5%
Corporate	2.0%	19.6%	78.4%
Theater	6.7%	26.7%	66.7%
Environmental	5.9%	35.3%	58.8%
Publication	1.4%	18.1%	80.6%
Overall	2.0%	24.3%	73.7%

Overall Percentages	5.7%	15.8%	78.6%

Illustrators Whose Work Was Reproduced Without Permission

	Yes	No
Advertising	37.1%	62.9%
Book Publishing	13.9%	86.1%
Corporate	22.9%	77.1%
Editorial	31.6%	68.4%
Other	27.6%	72.4%
Packaging	20.4%	79.6%
Specialties	57.2%	42.8%
Theater	30.4%	69.6%
Overall	32.6%	67.4%

(Specialties include architectural, cartooning, technical and fashion).

Surface Designers Whose Work Was Reproduced Without Permission

	Yes	No
Apparel	17.4%	82.6%
China/Barware	0.0%	100.0%
Domestics	0.0%	100.0%
Giftwrap	33.3%	66.7%
Home Decorative	15.0%	85.0%
Retail/Other	20.0%	80.0%
Overall	15.7%	84.3%

Graphic Designers Whose Work Was Reproduced Without Permission

	Yes	No
Advertising	43.6%	56.4%
Broadcast	44.4%	55.6%
Consumer	22.0%	78.0%
Corporate	27.8%	72.2%
Theater	43.8%	56.3%
Environmental	22.2%	77.8%
Publication	34.2%	65.8%
Overall	33.1%	66.9%
Overall Percentages	31.5%	68.5%

Illustrators Whose Work Was Altered Without Permission

	Yes	No
Advertising	38.1%	61.9%
Book Publishing	20.8%	79.2%
Corporate	25.0%	75.0%
Editorial	34.8%	65.2%
Other	14.3%	85.7%
Packaging	36.0%	64.0%
Specialties	53.3%	46.7%
Theater	30.4%	69.6%
Overall	34.6%	65.4%

(Specialties include architectural, cartooning, technical and fashion).

Surface Designers Whose Work Was Altered Without Permission

	Yes	No
Apparel	17.4%	82.6%
China/Barware	12.5%	87.5%
Domestics	35.7%	64.3%
Giftwrap	33.3%	66.7%
Home Decorative	31.8%	68.2%
Retail/Other	28.6%	71.4%
Overall	26.7%	73.3%
Overall Percentages	33.9%	66.1%

Mr. HUGHES. Mr. Warren, welcome.

STATEMENT OF PAUL WARREN, CHAIRMAN, INTELLECTUAL PROPERTY COMMITTEE, NEWSLETTER PUBLISHERS ASSOCIATION

Mr. WARREN. Thank you. I wish to thank the chairman and the members of the subcommittee for inviting me to testify here today regarding the Copyright Reform Act of 1993.

I represent the Newsletter Publishers Association. It is a trade association representing publishers of approximately 2,200 newsletters and other specialized information services. As a former reporter and currently a publisher myself, I am more accustomed to sitting at the press table. However, I am pleased to be sitting at the witness table in order to present you with the views of my colleagues, the hundreds of small and large publishers across the Nation who produce the thousands of newsletters on which business, industry, medicine, science, and the arts depend daily for the information necessary to their respective pursuits.

I'm senior editor and executive publisher of Warren Publishing. Our company was formed in 1945. We publish 13 newsletters in the telecommunications field, such as Communications Daily, Satellite Week, Audio Week, and Television Digest.

I have copies here of Communications Daily, and I would like to give some to the chairman and the rest of the committee. In fact, it carries an article about yesterday's somewhat unusual hearing.

[The newsletter follows:]

Communications Daily

The Authoritative News Service of Electronic Communications

WARREN PUBLISHING 48 YEARS OF EXCELLENCE

A SERVICE OF WARREN PUBLISHING, INC. 2115 WARD COURT, N.W., WASHINGTON, D.C. 20037. Phone: 202-872-9200

THURSDAY, MARCH 4, 1993 VOL. 13, NO. 42

Today:

AT&T PLANNING HIGHER RATES FOR 'FRESH LOOK' CUSTOMERS: Proposed tariff could boost some elements 70% for those leaving AT&T Tariff 12 arrangements. (P. 1)

COMPETITIVE CABLE SYSTEMS OFFER MORE CHANNELS, lower monthly rates than noncompetitive systems, our analysis of FCC data shows, with per-channel cost 43.1% lower for competitive systems. (P. 2)

USSB SIGNS NEW PROGRAMMERS, although Viacom and Time Warner deals may create problems for Hughes. Three companies will use same DBS bird, may compete for same programmers and markets. (P. 3)

AT&T IN PRELIMINARY AGREEMENT WITH SOME CARRIERS ON CIID CARDS: Accord on model contract would give carriers way to recover costs of handling traffic. Two snags listed. (P. 4)

BOMB BLAST TESTS METTLE OF N.Y.C. MUTUAL AID PACT: Year-old plan to keep critical telecommunications networks on-line in crisis operates without hitch first time it's activated. (P. 5)

TELECOMMUNICATIONS INDUSTRY CAN LOOK TO CLINTON FOR PROSPERITY, leaders say at CompTel '93 convention, although tax proposals stir concern. Upturn in economy cited. (P. 6)

OPPOSITION STRIDENT ON PTAR WAIVER FOR *911*: Disney and MPAA attack request by MTM, urge FCC to respect 'due process' and deny bid. Disney again asks for rulemaking to repeal PTAR. (P. 7)

COPYRIGHT TRIBUNAL CHMN. CHARGES COLLEAGUES WITH CORRUPTION: House panel hearing on bill to abolish agency is surprised by allegations. Other 2 commissioners, who want to end agency, deny charges. (P. 7)

$25,000 Monthly Fee

CUSTOMERS LEAVING AT&T TARIFF 12 COULD FACE 70% RATE INCREASES

AT&T has told major customers that it will propose shortly new rates for Tariff 12 customers that take advantage of its "fresh look" window to jump to another carrier. But according to tariff analysts who have seen drafts of proposal, those rates could cost customers millions of dollars for leaving AT&T. Analysis by Deloitte & Touche said rates would be 70% or more than what customers are paying under existing Tariff 12 deals, and higher than if they signed up with another AT&T service. Those rates would apply on month-to-month basis for customers in process of ending their AT&T network arrangements and going to another carrier. Under FCC decision, customers have 90 days, beginning May 1, to decide whether to stay with their AT&T deals or to make other arrangements.

AT&T is presenting package to customers as one in which rates have been calculated "at a level which is roughly equal to the rates AT&T would charge where no term agreement is in place." Users will have their services, which have been bundled together in custom deal, broken out into separate elements. For example, AT&T said in letter to customers that 800 features "currently provided at no charge" would be subject to charges under new month-to-month arrangements. For some companies, cost could be $50,000 or more per month. AT&T also will take away network management features that came with Tariff 12. In its place will be "standard set of transitional support services and reports" for which customer will have to pay $25,000 per month.

Tariff analysis for large and small customers showed that companies that want to opt out of Tariff 12 could pay 50% more for same voice services as under Tariff 12 and as much as 75% for data. Analysis by Deloitte & Touche was for customers that now spend $8-$22 million annually with AT&T. Steven Martin, Deloitte principal, said rates

AT&T announced it would propose were 25%-40% higher than if customer switched to Software Defined Network (SDN) service, although user then could be subject to large setup charge for new service.

Examining specific rates in tariff that AT&T was circulating, but hadn't yet filed, Martin said that 500-mile call during day on dedicated line would cost 11.3¢ per min. under month-to-month tariff, with discount of only 10% for billed amounts between $5,000 and $100,000 monthly. Generally, Tariff 12 customers pay about 6.6¢ per min. and have additional discounts written into deals to produce rates that are about 70% lower. For 500-mile off-network call during day, proposed monthly tariff would be 16.4¢ per min. Normal Tariff 12 rate is about 10¢ per min., about 64% difference, Martin said. Rates for data circuits are 40-60% higher than customers had been paying for long circuits and could double for shorter circuits, he said. Total package means that if customer whose bills Martin analyzed wanted to leave AT&T under fresh look, cost would be $1-$3 million over 3 or 4 months or so it would take to terminate arrangements.

Customers plan to protest rates when AT&T files them. Henry Levine, attorney who represents large Tariff 12 customers, said AT&T draft rates basically are aimed at making it "too expensive to leave" and that if they're approved, they would gut concept of "fresh look." He said higher rates would apply to any customers that chose "fresh look" exit, even if they have other terms for discontinuing service. Martin said rates appeared to have "punitive portion" aura.

Our Analysis of FCC Data

COMPETITIVE CABLE SYSTEMS CHARGE 43.1% LESS PER CHANNEL THAN NONCOMPETITIVE

Competitive cable systems charge average of 16.8% less for monthly basic service than do noncompetitive systems and 43.1% less on per-channel basis, according to our analysis of data from FCC cable rate survey. Data show that basic fee for noncompetitive cable systems -- i.e., those without multichannel competition -- has risen 54.1% since 1986 to average of $15.78, compared with 41.3% growth to average of $13.13 for systems facing competition. Per-channel fee for expanded basic tier fell 22.6% for noncompetitive systems and 74.1% for competitive systems, according to data analyzed by Warren Publishing's Market Research & Data Sales Div.

Difference in prices wasn't large between competitive (defined as systems with competitors that pass 50% of households in area and have 15% of subscribers) and noncompetitive systems for either basic or expanded basic tiers. For example, $5.89 average price for expanded basic for competitive systems was 12.2% below that of noncompetitive systems ($6.71), according to data. Instead of lowering prices, competitive systems appear to tend to provide more channels. On basic tier, competitive systems carried average of 23.87 channels, including 12.03 satellite-delivered cable networks and 3.7 distant signals, while noncompetitive systems averaged 19.82 channels (8.43 satellite and 2.23 distant signals). Difference was even greater on expanded basic tier. Competitive systems averaged 22.72 channels (21.28 satellite) and noncompetitive 14.93 channels (13.77 satellite). Competitive systems charged average of 65¢ per channel for basic and 28¢ per channel for expanded tier and noncompetitive systems 93¢ per channel for basic and 48¢ for expanded basic.

Handful of systems in sample owned by franchising authorities (15 systems of total of 685) charged lowest average basic cable rate, $11.66 per month, and lowest price per channel at 53¢. Same was true for expanded basic tier, $5.15 -- 36¢ per channel. Municipally owned systems also had most basic channels, average of 26.53, 3rd most expanded basic channels, 18.43, and their fees for other services almost inevitably were lowest among groups. Systems that appear to have some competition but apparently wouldn't meet effective-competition standard had prices between those of competitive and noncompetitive systems. These systems (classified in data as "NB") had lowest basic cable rates (average $11.95) but fewest channels, so per-channel rate for basic averaged 78¢. On expanded basic tier, per-channel rate was same as for noncompetitive systems, 48¢, but NB systems had more than 50% more channels on tier (average 23.21).

Data can be used -- legitimately -- to come up with various answers to most questions. For example, average price per-channel for basic tier (total number of channels for all systems divided by total price for all systems) is 83.1¢ in random sample of cable systems. But per-channel price charged by average cable system (average of per-channel prices for each system) is 97¢. Difference is like that between computing baseball team batting average by taking average of all averages (player who has one at-bat gets same weight as player with 600), vs. dividing all players' at-bats by all hits. Statistical experts say both figures are correct, disagree on which best represents actual price, agree only that each has to be labeled clearly. Following FCC lead, all of our per-channel prices here use latter method.

About our methodology: (1) All analyses are for first franchise area responses only. (2) No calculations were weighted for subscriber size or any other factor. Weighting by subscriber size may alter both actual results and relative position of results for particular analysis. (3) Results reported for top-100, small penetration and random sample surveys are for systems that fell exclusively into those categories and don't include systems classified in more than one of categories (29 systems of total 685 had multiple classifications).

Basic cable rates have climbed 54.2% since 1986 to average of $15.37 for FCC's random sample of systems, which includes both competitive and noncompetitive, while number of channels inched up 3.2% to average of 18.5, from 17.93 in 1986. Survey showed respondents from 100 largest cable systems charged average basic cable fee only slightly higher than competitive systems, $13.65 per month vs. $13.13, and per-channel rate of 63¢, vs. 65¢ for competitive systems. Lower basic service rate for top-100 systems may reflect trend toward retiering to provide low-cost basic plus expanded basic tier, data indicate. In latest data, 91.5% of top-100 cable systems had expanded basic tier, vs. 51% in 1986. In random sample, 65.7% had expanded basic, up from 39%, and 73.5% of competitive systems had 2nd tier, vs. 36% in 1986. Among noncompetitive systems, 63.2% had 2nd tier (up from 23.5% in 1986), vs. 60% (up from 37.2%) for competitive systems.

Top-100 systems dropped to 23.6 channels in basic tier from average of 24.21, and in expanded basic tier grew to 17 from 15.8 in 1986. Biggest change was in number of satellite-delivered channels in top-100 expanded tier, 15.71 now vs. 11.6 in 1986 (number of local and distant TV signals, public, educational and govt. [PEG] channels and others in expanded tier dropped sharply). Number of channels in expanded tier also increased for random sample of systems, to 14.72 from 9.78, with growth concentrated in satellite networks. For competitive systems, number of basic channels essentially was unchanged at average 23.87, and expanded basic channels more than tripled to average 22.72. Number of basic channels in competitive systems dropped 0.7% to average 19.82, and expanded basic channels increased 27.3% to 14.93.

Because of increase in number of channels, expanded basic per-channel rate actually decreased for random sample of systems, down 21% to 50¢ per channel ($6.82 now vs. $5.67 in 1986). For competitive systems, per-channel expanded basic rate fell 24% to 35¢ ($6.78 per month vs. $5.10 in 1986). Expanded basic rate dropped 2% since 1986 to average of 51¢ per channel ($8.38 vs. $6.82 per month) for top-100 systems. Per-channel rate for small-penetration systems dropped 6% to 45.3¢ (now $6.74 monthly vs. $5.82 in 1986). Data give picture of characteristic small-penetration system. Such systems have highest basic cable rates (average $16.46) and fewest channels (19.61), fewest number of satellite-delivered networks (8.98) among survey categories of systems, and by far smallest percentage of fiber (0.04%).

Installation and reconnect fees were up since 1986, data showed. For noncompetitive systems, installation fee soared 56% to average of $35.16, and competitive systems' installation fees 11.2% to $27.51. Top-100 systems' installation fee averaged $27.59, up 30.3%. For disconnect fees (only handful charge them), competitive systems were up 15.9% to $20.09 and noncompetitive systems 65.7% to $27.42.

Other fees have risen more slowly since 1986. Additional outlet charge is up 51.8% for competitive systems to $3.72 per month, 21.3% for noncompetitive systems to $3.88, 24.2% for top-100 systems to $5.07. Monthly converter rental fee was up 6% to $2.66 for noncompetitive systems, 35.9% to $2.80 for competitive systems, 19.9% to $2.65 for top-100 systems. Monthly remote control rental fee grew 20.4% to $3.25 for competitive systems, 2.4% to $3.41 for noncompetitive, 2.1% to $3.41 for top-100.

Not surprisingly, top-100 systems rank first in amount of fiber and in below-ground installations. They reported 1.72% of plant is fiber, followed by 0.9% for NB systems, 0.67% for noncompetitive, 0.11% for competitive systems. Top-100 systems have most below-ground cable plant, average of 31.24%, followed by NB at 30.36%, noncompetitive at 24.78%, competitive at 22.13%.

Divided Bird?

USSB SIGNS UP VIACOM AND TIME WARNER; DEAL MAY CREATE PROBLEMS FOR HUGHES

Minneapolis-based U.S. Satellite Broig. (USSB) announced Wed. it had signed 8 new channels for its proposed direct broadcast satellite (DBS) package, raising total to 15. However, deal is likely to cause sticky situation for owner of DBS bird, Hughes Aircraft. Hughes' subsidiary Hughes Communications (HCI) is working on deal with National Rural Telecommunications Cooperative (NRTC) to offer 20-channel DBS package to homes outside cable's reach, and is trying to sign same programmers under its DirecTv proposed DBS system. Complicating matters, DirecTv also is trying to sign programmers for its own DBS offering.

All players involved publicly were greeting news of USSB deal -- USSB signed with Viacom to provide Showtime, Movie Channel, Flix, MTV, VH-1, Nickelodeon/Nick at Nite, Time Warner's multiplexed HBO and Cinemax. They said it would improve image and marketing prospects for DBS. Trouble is, USSB, HCI (DirecTv) and NRTC (from DirecTv) have made arrangements to use transponders on same Hughes HS-601 bird, to be launched in Dec. Under deals so far, USSB will lease 5 transponders (20-40 channels, with digital compression), NRTC will use 5 (20-channel package, with compression) and DirecTv will use rest of bird's 16 high-powered (120w) transponders, plus 16 more on 2nd bird to be launched in 1994. On one hand, Hughes is under pressure to fulfill obligations to offer 20-channel package to NRTC (under terms of deal, NRTC will pay $250 million for package), and 2 big programmers that USSB has signed. Although Viacom and Time Warner spokesmen told us there's nothing in USSB deal that excludes them from making similar arrangements with DirecTv (they said they hadn't signed deals yet), industry observers said result would be inefficient use of satellite: Should same services be offered on multiple transponders -- on same bird?

DirecTv has released name of only one programmer for NRTC deal -- Disney -- although DirecTv and Hughes have said that they have fulfilled majority of mutual terms of 20-program deal. DirecTv also has signed Paramount Pictures pay-per-view movie service as part of its own 80-channel package, deal that isn't part of NRTC arrangement. USSB Pres. Stanley Hubbard II told us that putting same programmers on different transponders would be inefficient use of bird. If Hughes feels same way, DirecTv and NRTC would be left with few options: Turner Bcstg. Channels, Arts & Entertainment, Lifetime, Black Entertainment Channel, ESPN. One industry watcher asked: "That's a good package, but is it worth $250 million?"

Meanwhile, NRTC spokesman Jeff Almen told us Wed. that rural utility consortium was "real positive about" USSB deal as "value to the whole DBS industry." Programmers showed similar enthusiasm. "We're able to talk to anybody within the DBS industry," Viacom spokesman Mack Libscomb said, but he wouldn't comment on what Hughes and NRTC are doing: "We're delighted to be doing business with the Hubbards. We are wholesalers of programming. How the distribution takes place is not part of our decision-making process. We signed a deal with a savvy group of entrepreneurs in an emerging technology." Libscomb said: "We would like to make our programming available to every household in America," adding that Viacom hadn't signed any agreements with any other DBS providers.

At same time, Hughes DirecTv spokesman Thomas Bracken said Wed. that company is trying to work deals with Viacom and Time Warner. He said DirecTv has assembled "core group" of "best of cable" programmers for NRTC deal. "We have 27 transponders," he said, confirming that company hadn't signed with Viacom or Time Warner. "We are responsible for offering a 20-channel best-of-cable package. Stan Hubbard has chosen to put together 15 services on his 5 transponders. That's good for his business plan. It doesn't preclude us from distributing cable programming from either of those sources. The important point is that the leaders in the industry have committed to DBS distribution. Hubbard can do what he wants with his own transponders. That's his own business decision."

TVRO dish dealer Echosphere's Chmn. Charlie Ergin, who hopes to launch competing DBS system -- Echostar in 1995 using GE 7000 series birds, also hailed USSB news, saying it would help improve marketing capability of new technology. "This will help build the bare market for DBS," he told us. Hubbard told us that unlike cable, com petition would be good for DBS industry, even if multiple program packagers compete for same households. "The important thing is that there will be plenty of business for everybody," he said. "Consumers who subscribe to us aren't prohibited from subscribing to DirecTv or NRTC." He said they will be able to choose, mix and match because all players will be using same hardware: 18" satellite dishes and decoders manufactured by Thomson Consumer Electronics under RCA brand name.

AT&T and CompTel Talk

PRELIMINARY ACCORD SET ON COMPENSATION FOR CIID CARD CARRIERS

BOSTON -- Competitive Telecommunications Assn. (CompTel) and AT&T have reached preliminary agreemen on how to handle billing for calls made on AT&T's proprietary Card Issuer Identification Code (CIID) cards, said Bradley Mutschelknaus, chief negotiator for Assn. On CompTel '93 panel here, Mutschelknaus said discussions on so-called "model contract" are stalled temporarily by 2 issues: (1) How to invoice and audit invoices. (2) Term covered by contract. He told us later that he doesn't believe negotiations, in which he's representing about 30 Comp Tel members, would usurp FCC's need to take position on issue. "We are getting closer, but I can't get into too man details."

AT&T introduced CIID calling card to 25 million customers last year, offering enhanced services but eliminating access by other carriers to billing and verification databanks. For example, when customer makes call on phone presubscribed to Sprint, carrier would have to route it to AT&T network without compensation, which is crux of dispute. Last May, FCC began rulemaking on broader 0+ calling card issue and considered putting all 0+ service in public domain. Any carrier using 0+ access would have to share validation and billing information, under proposal. In Oct., FCC temporarily turned down 0+ in public domain, but kept issue open. To correct wrongs raised by CompTel, Commission suggested that Operator-Service Providers (OSPs) transfer calls to AT&T and be compensated for them. It also ordered AT&T to educate CIID card users on correct way to use card to eliminate link to other carriers' networks. AT&T has opposed 0+ in public domain.

Under model contract, OSPs would get 40¢ for assistance, CompTel member John Fudesco said. Mutschelknaus said he would "neither confirm nor deny" specific figure. Fudesco suggested that CIID carriers be allowed to take calls and bill customers directly at whatever rate AT&T would have used. "We think that is a solution," he said. "It's better than getting nothing, or more than taking 40 cents for operator assistance." Without access to CIID validation and billing information, system is unworkable, Mutschelknaus said. "The customer could be asked to use a credit card to bill to." CompTel is advising customers to keep careful record of CIID card usage on their networks, including origination location and other technical details, because contract may be made retroactive to some past date.

Reaction Within Min.

N.Y.C. TELECOMMUNICATIONS DISASTER PACT PAYS OFF IN FIRST CRISIS

When bomb rocked World Trade Center (CD March 2 p2), N.Y.C.'s 14 telecommunications companies didn't panic. Within min. of blast, year-old mutual aid and restoration pact kicked in, immediately pulling 14 of city's fiercest competitors into high-tech troubleshooting team. "We implemented the plan without a hitch," said N.Y.C. Dept. of Telecommunications & Energy (DTE) Comr. William Squadron. "You hope you never have to prove that something like [this plan] works," he said. "But it's reassuring that when you need it, it works." Working under direction of DTE, each carrier was alerted to crisis within min. of blast and had representative on-line in conference call with DTE Deputy Comr. Thomas Dunleavy directing operations from N.Y. Telephone hq.

Working according to detailed plan, each carrier was apprised of situation and began allocating resources, Squadron said. Each carrier shifted into action as previously agreed, averting "a higher level of chaos and confusion," Dunleavy said. Agreement was signed Feb. 18, 1992, and carriers have performed "months of simulated testing" to work out bugs, Squadron said. Conference call, known as "the Bridge," was kept going for 8 hours as representatives provided instant updates throughout crisis, he said.

Pact is only one of its kind in nation, Squadron said. It grew out of study of city's telecommunications vulnerabilities that was prompted by disastrous network outage in 1990 that crippled all of telecommunications services and left air traffic controllers unable to contact hundreds of planes in flight. No plan is perfect, he said, "but frankly, it was reassuring that there were no glaring procedural errors we'd overlooked." He said plan was undergoing analysis, "but nothing jumped off the page" that needed immediate attention.

Blast didn't cut any telecommunications cables, but it did knock out power generators of Teleport Communications Group, which operated in and near trade center. Teleport's equipment automatically switched to battery backup. Main problem Teleport confronted was burst water pipes that were flooding basement, threatening to damage equipment. Conference call directed by DTE had crews from N.Y. Telephone deployed to basement with pumps, which began removing water with "just inches to spare" before level reached equipment, Teleport spokesman said. At height of crisis, N.Y. Telephone said it handled about 700,000 calls during "first few hours" to and from World Trade Center.

N.Y.C. Fire Dept. asked that power grid to World Trade Center be cut to avert power-related explosions, but that also cut power to N.Y. Telephone's 3 central switches in area, spokesman Paul Davidson said. When that happened, N.Y. Telephone switches "went to backup generators," operating on battery power that's rated for only 6 hours. Davidson said company was "afraid that power would be out longer and that our batteries would run out," leaving area without telephone service. That problem was handled outside of disaster plan, Squadron said. N.Y. Telephone "shut down some of the switches' unneeded redundancy capacity to squeeze more life out of the batteries," Davidson said. Move worked and "bought [power company] enough time to bring the grid back on-line," he said.

In meantime, N.Y. Telephone began process of rerouting more than 1,200 lines while installing more than 2,500 new lines, Davidson said. Company technicians also installed about 140 dedicated high-speed lines to handle

capacity needed for city's financial district. Previous layoffs by N.Y. Telephone provided unanticipated disaster benefit: Thousands of square feet of office space was available "immediately" for telco to lend to hundreds of its displaced customers, Davidson said.

MCI set up Public Booth operation so occupants of World Trade Center could send and receive faxes and telexes. MCI said service was open to anyone, not only its own customers. It said that at request of clients it began rerouting telex calls so they could be delivered on alternate telex terminals outside of affected downtown Manhattan area. Large volume of international trade with developing countries is done from N.Y.C. via telex, MCI said. "The financial area represents one of our largest customer bases," MCI Vp International Mktg. Jerry DeMartino said. "In this emergency we are also making our facilities available to non-MCI customers that need our services."

Leaders Speak Out

INDUSTRY SHOULD BE HOPEFUL OF CLINTON TELECOMMUNICATIONS PLANS, LEADERS SAY

BOSTON -- Tone of business leaders at CompTel '93 here reflects potential for economic prosperity in changing market. Incoming CompTel Pres. Bernard Ebbers said: "In general, this [Clinton] Administration is good for our business, bad for our pocketbooks." Ebbers, pres. of LDDS Communications, is Canadian-born former college basketball star and rodeo rider whose company will be new No. 4 long distance carrier when it merges with Metromedia Communications and Resurgens Communications Group. "The economy, even though it's growing slowly, is on a continual upturn, and will be for the next several years," Ebbers said.

Williams Telecommunications Pres. Roy Wilkins, former CompTel chmn., said that under Clinton telecommunications industry faces prospect of "being taxed and taxed and taxed. But will adding a penny or 2 cents [to each long distance call] give a downward turn to competition? I think not." From Wilkins' perspective, Clinton Administration "has to be better than the last one" in part because he expects it will look at small business more favorably "and the FCC will have a larger ear in the White House." EMI Communications Pres. Dennis Dundon, another former CompTel chmn., said new Administration "is more in touch with technology issues." It would be most important for govt. to "partner with American industry to make this country competitive on a global basis," he said.

Outgoing CompTel Pres. James Smith said he's "hopeful" on new Administration. "My watchwords [for Administration] are to be a little more skeptical than we are about the level of competition in the telecommunications industry than during the Sikes Commission years." Smith said AT&T still has residual monopoly on process and massive lobbying force to back up its market power. Still, he said: "We've already seen some hopeful signs. The FCC interim policy, it seems, is to impose the least possible regulation on small carriers."

In panel sessions this week, FCC staffers and aides to key members of Congress drummed same beat: Harmony should prevail. Gerry Waldron, senior counsel to House Telecommunications Subcommittee, said expectations are running high, but proof of relationship won't be seen until new chmn. is in place at FCC and key positions at Justice Dept. are staffed. "Until those jobs are filled, I don't think anyone can say how these views are going to be voiced."

All executive speakers said legislative solutions aren't best answer in regulatory environment and would like time to see how responsive FCC can be. On critical issues, none of speakers expressed strong concern about any single bill. On Mon., Rep. Markey (D-Mass.), chmn. of House Telecom Subcommittee, said spectrum auction bill and other legislation remained on tap, but also indicated restraint. On need to codify MFJ, he said time isn't right. Waldron said House will move industry safeguards bill and separate legislation to allow RBOCs to enter manufacturing. He said there still was problem with responsibilities shared by House Commerce and Judiciary Committees. "These may be obscure jurisdictional lines, but they are very real," he said. Waldron said Telecom Subcommittee staff members have talked with those of Rep. Brooks (D-Tex.), who heads Judiciary, to resolve problems. He said talks were "harmonious and preliminary."

John Windhousen, staff counsel to Senate Commerce Committee, said neither Chmn. Hollings (D-S.C.) nor Communications Subcommittee Chmn. Inouye (D-Hawaii) had any plan to reintroduce manufacturing or information bills that were pending in 1992. "People are tired of those issues, and infrastructure and issues involving local competition are likely to take center stage in the current Congress." Windhousen said: "The President is doing a pretty good job so far. He's listening to people who are advising him when he's making a mistake." Windhousen, who has been mentioned as possible chief of FCC Common Carrier Bureau, said Administration already has taken careful steps to work with Hollings on issues and appointments: "The coming FCC is likely to be much less ideological than its predecessor."

CompTel Notebook...

When is an infrastructure bill not an infrastructure bill? When it's S-4, legislation that has come to be known as an infrastructure bill for telecommunications. John Windhousen, counsel to Senate Commerce Committee, said on CompTel panel that industry shouldn't be misled: "The press is confused." He said bill is designed to promote manufacturing R&D technology in Commerce Dept. and to focus on supercomputing. Proposals were added in S-4 to 1992 version of legislation to include networks. "But these are not telecommunications networks; they are computer networks. The press has labeled this an infrastructure bill -- that's not our intention."

Comsat World Systems played major role at CompTel '93, offering major speech and hosting luncheon for keynote address by Rep. Markey (D-Mass.). Comsat Legal Affairs Vp Howard Polsky said markets are opening up in international arena at unprecedented pace. Company began serving 14 additional locations in 1992 -- Bolivia, Cameroon, Cayman Islands, Congo, Ecuador, Guatemala, Netherlands Antilles, Poland, Russia, S. Africa, Surinam, Ukraine, Venezuela, Wake Island. "Many foreign administrations will recognize a new carrier only if they are convinced that the carrier will stimulate new traffic to and from the country," Polsky said. "Others may have different standards, depending on whether private line or switched services are involved. Although operating agreements are easier to obtain than in the past, the process can still take from 3 months to one year for each country."

MPAA 'Alarmed'

OPPOSITION STRIDENT TO REQUEST FOR *911* PTAR WAIVER

Disney Co. and MPAA have joined INTV in strong oppositions to MTM TV's request for FCC waiver of prime-time access rule (PTAR) for *Rescue 911* on ground that program is "reality-based" and thus should fall under documentary exclusion from PTAR (CD Feb 10 p8). Also pending at FCC is waiver request for syndicated series to be based on old *Ed Sullivan Show*. Both requests were filed with FCC Mass Media Bureau, and neither has been put out for comment.

MPAA said it's "alarmed at the failure of MTM to follow, and the Commission to demand, adherence to established procedures... We urge the Commission not to abandon essential procedural protection of the rights of the public through cavalier treatment of PTAR-related requests" and to put them out for public comment. MPAA said there has been "spate" of waiver requests in last 2 years, causing Assn. to urge FCC "to avoid setting forth down a path of 'rulemaking by waiver,' dealing with PTAR in a piecemeal, ad hoc fashion oblivious to the implications for the programming marketplace." Only appropriate course of action for FCC is to reiterate to MTM that agency doesn't issue declaratory rulings in this area, MPAA said. It noted that one of its members, 20th Century Fox Film, didn't subscribe to its position.

Disney, which has had request pending at FCC for 2 years for repeal of portion of PTAR that prohibits network affiliates in top 50 markets from airing off-network programming 7-8 p.m. (CD Oct 7 p4), told FCC: "Rather than embark down a winding path of ad hoc waiver decisions -- a treacherous path that threatens both illegalities and inequities -- the Commission should examine whether the underlying off-network prohibition should be eliminated... Applying Band-Aids haphazardly is neither good policy nor fair to those who do not receive them." In no event, said Disney, should FCC grant waivers sought by *911* and *Ed Sullivan Show*: "Neither request has a substantive merit."

PTAR has been contentious issue at Commission for some time. Ex-Chmn. Sikes attempted last Sept., and again for his last meeting in Jan., to place proposed rulemaking to repeal rule on agenda. He was stymied both times by current Chmn. Quello, who said any proposal to repeal PTAR should await resolution of finsyn issue.

'Please Try To Get Along'

COPYRIGHT TRIBUNAL CHMN. ACCUSES COLLEAGUES OF CORRUPTION

House Intellectual Property Subcommittee hearing Wed. called to take testimony on bill to abolish Copyright Royalty Tribunal (CRT) veered from issues into personal attacks as CRT Chmn. Cindy Daub charged other 2 commissioners with "corruption and abuse" of agency assets by conducting private business on govt. property, wrongly approving financial disclosure forms and failing to follow agency procedures. Other commissioners, Bruce Goodman and Edward Damich, denied allegations.

All 3 were testifying on legislation (HR-897) by Subcommittee Chmn. Hughes (D-N.J.) to abolish CRT. Daub opposes move, while her colleagues support it. In at times emotional testimony, she said other commissioners tried to oust her from chairmanship. Daub, who has been member since 1989, is wife of ex-Rep. Hal Daub (R-Neb.). All

3 are Republicans. Goodman and Damich are recess appointees named in Sept. who will leave when Clinton Administration names new tribunal members. Daub's term lasts until 1996.

In statement to Subcommittee, Daub said Goodman conducted personal business from CRT offices in connection with FYI Network, company he was trying to start. She gave committee copies of "Confidential Disclosure Agreement" between FYI Network and investor in company that was sent from CRT's fax machine and signed by Goodman. She told panel that address Goodman gave for his business was same as suite of law offices occupied by firm, Baraff, Koerner, Olender & Hochberg, that has clients participating in royalty distributions. Daub said that "it became clear as time passed that one of the Commissioners may be conducting private business for profit within CRT's office." She said materials "raise conflict-of-interest concerns" and said conduct of Goodman's "private business in CRT's office often interferes with the agency's own work." At hearing, Goodman declined to answer charge, but said later that allegation was "absurd" and dealt with company he was trying to start that didn't "get off the ground." Attorney Philip Hochberg, whose firm represents NBA and NHL, said firm leased to space to Goodman May 1991-May 1992.

Daub also alleged that other 2 commissioners had ordered "expensive personal items which the agency did not need." She listed personal computers and printers and "additional parts, such as modems, that were compatible with home systems, for their private offices, requests for speakerphones and dictaphone equipment." Daub said she had tried to prevent purchases, because CRT didn't have any money, but was told to delay hiring date of gen. counsel instead. After hearing, Damich and Goodman said they found on coming to CRT that commissioners had no computers and wanted them so that they could write their own opinions. One item on which all 3 agreed is that quality of appointees to panel has been low, with many commissioners having little background or knowledge of field.

Damich, law prof. from George Mason U., called allegations "sheer nonsense," said he wanted modem to connect to databases and that equipment was purchased with funds left over from FY 1992 budget. Goodman and Damich said they wanted computers on which to write their own opinions and said Daub opposed them because CRT's gen. counsel had opinion-writing tasks. Daub also said other 2 had used govt. funds to pay for their swearing-in ceremony. They denied allegation, saying that funds were used to mail invitations because event would allow parties before Tribunal to meet new panel, but Damich said he and Goodman had paid for refreshments. Daub also said other 2 had signed each other's financial disclosure papers when forms should have been signed by independent reviewer.

Daub made allegations in oral testimony that, unlike written statement, wasn't given to Subcommittee before hearing as usually is case. When asked by Chmn. Hughes (D-N.J.), why that was so, Daub replied that Hughes' staff and other 2 commissioners had been talking with one another and she didn't want word to get back to her colleagues via Hill staff about allegations.

Charges and denials came in hearing to determine what to do about federal agency with 9 employes for which govt. pays only 14% of budget. Rest, about $800,000, is paid through copyright royalties. Hughes and other members of Subcommittee tried to keep testimony on track of legislation (HR-897) to abolish agency, but legislators kept coming back to disputes among members. They disagreed whether there's enough work to keep CRT busy. Daub said there was, but Goodman noted former Chmn. Mario Aguero moved to Fla. month before his term expired last year and before recess appointments were made.

At one point, Rep. Moorhead (R-Cal.), senior Republican on panel, told CRT commissioners: "Please try to get along." Hughes has charged that agency is "dysfunctional" and said testimony at hearing confirmed his analysis. When he tried to ask Daub about specific instances in which she acted against other 2 commissioners, she attempted to answer by detailing circumstances involved. Hughes didn't want to hear it, but Daub persisted, telling Hughes at one point that if her colleagues voted to rob bank, she wouldn't go along.

Subcommittee also is considering whether to make changes in CRT, rather than abolishing it. Options include putting functions under Librarian of Congress or Register of Copyright, using arbitration panels, administrative law judges, or new commission. Bill would make Register of Copyright a Presidential appointee.

COMMUNICATIONS PERSONALS

William Sumner appointed senior vp-information systems, Sony Pictures Entertainment, succeeding **Peter Schemenia**, resigned... **Arthur Bell** promoted to senior vp-mktg., Comedy Central... **Phillip Marella** advanced to senior vp-legal and business affairs, Worldvision Enterprises... **Bernard Windon** appointed senior vp-corporate communications, Ameritech... **Loretta Ucelli**, onetime NAB lobbyist, appointed chief spokesperson, Environmental Protection Agency... **Wendy Menzies**, ex-ABC Radio Networks, joins Cable Networks as mgr.-sales planning.

N.Y... Elected by Ariz. Cable TV Assn.: **Gregg Holmes**, Times Mirror Cable of Ariz., Phoenix, pres.; **Cathy Hollingsworth**, Tucson Cablevision, pres.-elect; **Karen Fleetwood**, Century Cable, Yuma, secy.-treas.

TELEPHONY

Sprint asked U.S. Dist. Court, D.C., to dismiss suit filed recently by AT&T (CD Feb 11 p1) alleging that Sprint, MCI and WilTel had signed "secret deals" while failing to file proper tariffs with FCC. Sprint called AT&T suit "an obvious marketing ploy aimed at stemming AT&T's customer losses." After filing suit, AT&T sent barrage of letters to Sprint, MCI and WilTel customers, claiming they had made deals that were "secret" and "den[ied] customers the advantages of competition," according to AT&T letters we obtained. Letters charged Sprint deals were "illegal activities" that "damage the entire telecommunications industry." Sprint External Affairs Senior Vp John Hoffman said: "This simply is not the truth. Sprint has always complied with the Communications Act and applicable FCC rules." Sprint's suit accuses AT&T of "attempting to scare the marketplace into believing that they shouldn't do business with other carriers." All long distance carriers are locked into fierce battle for 800 service, with FCC allowing companies to switch 800 carriers in May without losing rights to number. All carriers are spending millions advertising their own 800 services. Sprint's suit said AT&T's suit "has little to do with the law and everything to do with marketing." Sprint also said FCC should be entity to decide tariffing issues. It said courts "should be particularly intolerant of a redundant lawsuit that appears to have been brought to provide material for sales presentations and to generate copy for a publicity campaign."

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Govt.'s FTS 2000 program has "achieved savings of more than $800 million through fiscal year 1992 compared to the old system," General Services Administration (GSA) said in report to Congress March 1. Specifically, GSA reported that "the government's telecommunications needs met by FTS 2000, including unique government requirements, could not be met at lower prices by commercial equivalent services." It said FTS 2000, when compared with similar commercial services, saved govt. up to $52.4 million per year. Report concluded that FTS 2000 prices "in aggregate, are at least as good as the best equivalent commercial prices without considering the value of unique government requirements." GSA said that when value of "special needs," including national security and emergency preparedness, is factored in, program is "significantly less expensive."

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AT&T introduced 800 service that allows customers to turn service on and off as often as needed. Called "800 On Reserve,' program is aimed at small businesses that don't require permanent 800 number but might want to take advantage of service for special promotions or in peak seasons, AT&T said. New plan allows businesses to retain special 800 numbers even when they aren't active, AT&T said. Previously, customers had to pay for service even if they weren't using it or they risked having number assigned to someone else. Number can be turned on and off on 24-hour notice, and when shut off, AT&T will provide voice response informing callers that 800 number isn't in service. Service costs $35 per month when number is active and $5 per month when idle. Installation is $43.50 for each 800 number and usage rates vary, AT&T said. Each time customer reactivates number it costs $5, AT&T said.

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AT&T has Nauru, island nation in S. Pacific, under multimillion-dollar contract. AT&T is to digitize country's telephone system and set up direct dial international service. By July, nation with population of only 9,000 will have "digital communications network 2nd to none in the Pacific," AT&T International Operations Div. Managing Dir. Robert Fullerton said. Until recently, Nauru was served by earth station routing calls and telex transmissions through Australia. Until contract was signed, country had 5-year waiting list for phone service, AT&T said, "but come July,

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everyone will have direct dial service." Contract calls for AT&T to install $5-million 5ESS switching system. Nauru has one of world's richest phosphate deposits and one of world's highest per capita incomes, $21,000.

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S. China Morning Post, newspaper published in Hong Kong, quotes officials as saying they were seeking govt. permission to build 2nd public telephone network that would compete directly with China's Ministry of Post & Telecommunications (MPT). Current telephone network is owned and run by MPT as full monopoly. Proposal for 2nd network has backing of China's Vice Premier Zhu Rongji, who is main architect of nation's partial transition from Communist to capitalist economy. Rongji favors opening entire telecommunications market -- including lucrative local and long distance voice service -- to full competition, Asian experts said. Newspaper said Rongji sees competition in telecommunications as way to speed up full modernization. Experts said Rongji holds high political stature in China's power structure and has been widely touted as country's next leader. Backers of 2nd network are said to include officials of rail and energy ministries, possibly building off networks those govt. agencies have developed independently, experts said, as well as military leaders. Last week, Beijing govt. signed up AT&T as joint partner (CD Feb 24 p1) to help build up country's telecommunications infrastructure. China's State Planning Commission has appropriated $7 billion for 1993 alone for network upgrade projects. MPT is opposing 2nd network, paper said, calling it "unrealistic," and objects to opening its network to any kind of competition.

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GTE has signed agreement with HighwayMaster, Dallas-based mobile communications and information supplier to trucking industry. GTE's cellular business will provide number activation, cellular network service, database management, validation services and vehicle location information to HighwayMaster. Terms weren't disclosed. Market for HighwayMaster services represents about 10 billion min. of airtime, Pres. William Saunders said. Other cellular providers in HighwayMaster network include Alltel, Southern New England Telephone, Southwestern Bell. Saunders said 6 other "major carriers" have signed letters of intent to join network, expects agreements to be finalized within 2 weeks.

MASS MEDIA

CNN, ABC and CBS news broadcasts were in near dead heat for "believability" in just-released poll by Times Mirror Center for the People and the Press, while NBC slipped to 4th from first from similar poll 4 years ago. CNN and ABC both scored 76% in public ratings for "believability," CBS 75%, NBC 73%. NBC had been rated most believable in previous survey. Only 14% gave CNN low rating, 21% for both ABC and CBS, 24% for NBC. Said Survey Dir. Andrew Kohut: "I think what the survey shows is that NBC paid a cost in diminished believability as a consequence of staging the truck explosion" (CD Feb 11 p9). Newspapers slipped from 67% believable rating 4 years ago to 63% in Feb. 12-21 survey of 2,001 adults.

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Selection of HDTV standard should be based in part on which system creates most jobs in U.S., Labor Secy. Robert Reich said in letter to FCC. Letter said job creation should be given "significant weight" in selection process. Advanced TV Research Consortium, including NBC, Philips, Sarnoff Labs, Thomson and Compression Labs. has said that its system would generate most U.S. jobs, and has won backing of several labor unions on that basis. But General Instrument (GI), among others, is disputing claim. GI Govt. Affairs Dir. Quincy Rodgers said there's no difference among systems in job creation since virtually all HDTV sets will be built in U.S., regardless of which system wins: "The real job issue is to get the standard written without undue further delay so we can get on with creating jobs."

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Sixteen media groups, with Action for Children's TV in forefront, have asked U.S. Appeals Court,, D.C., to clarify its Feb. 23 action staying "safe harbor" of midnight-6 a.m. established by FCC for airing of indecent programming (CD Feb 24 p9). As result of Court's action, Commission next day went back to old safe harbor prohibiting indecent programming 6 a.m.-8 p.m. That's not what Court ordered, coalition said in seeking clarification.

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Mediacenter and MediaSource have combined to provide sales and marketing data to cable systems, outdoor advertising, newspapers, magazines, Yellow Pages, direct marketing, stations. Information in 14 categories is sent to provide sales depts. with "vast amounts of information," MediaSource said. "This venture provides TV stations with the first opportunity to tap into the same information now used by media planners." Information is downloaded into subscriber's word processor, putting it "in a clear, concise, usable format that's easy to access and use," said Barbara Zeiger of Mediacenter -- 212-207-8480.

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Program Notes: **Tele-UNO** satellite-delivered cable channel began operation throughout Mexico March 1 and will be available in other parts of Latin America later this year. Tele-UNO is owned by Spelling Satellite Networks... International Family Network is laying off at least 20% of employes of **MTM Entertainment**, including CEO Robert Klosterman and Chief Financial Officer Edward Bowen, as it assumes control of TV production company.

Mr. WARREN. In relative terms, our publications have small subscription bases, but I think it is fair to say that they play an extremely important role in their field.

I am also currently the chairman of the NPA's Intellectual Property Committee, and it is on behalf of our membership that I today urge you to pass section 102 of the Copyright Reform Act of 1993, and I must emphasize, I am only addressing that section today.

One characteristic that distinguishes almost all of our members from other types of publishers is that we are dependent solely upon subscription revenues for our income. For the reasons that follow, we consider passage of section 102 of the Copyright Reform Act of great importance to us.

Section 102 removes the requirement that a work be registered before an action to enforce the copyright could be commenced. It repeals the requirement that the work must be registered within 3 months of publication in order to qualify for an award of statutory damages and attorney's fees.

Newsletter publishers are particularly vulnerable to copyright infringement. Indeed, Congress expressly recognized that fact in its report on the Copyright Act of 1976. We are vulnerable because newsletters tend to be very time sensitive, relatively short in length, and newsletters tend to be more expensive than typical trade journals. These factors, taken together, are an engraved invitation to copyright infringement.

Some corporate customers, law firms, and others choose to pay for only one subscription and then violate the publisher's copyright by making cover-to-cover photocopies of every issue, sometimes for hundreds of employees. This cover-to-cover photocopying is the primary reason why an effective legal remedy for copyright violations is critical to NPA members. It is the only way we have to protect our publications and thus our livelihoods.

Let me say that the courts have not hesitated to enforce their copyrights once we get to court. The problem for most newsletter publishers is not proving infringement but getting to court in the first place and, once there, quantifying the damages.

As it currently stands, section 411 of the Copyright Act requires that a work be registered before suit can be filed to enforce the copyright in that work. The simple fact is that most newsletter publishers cannot afford the cost of registering every issue of their publication. The cost of registering a single daily newsletter, including the staff time required for preparing, submitting, and tracking the registration applications runs into thousands of dollars annually. Multiply that figure by the dozen or more titles some publishers offer, and you begin to understand why small publishers simply cannot afford to register their publications as they roll off the presses.

The commonsense response would be for a publisher to wait until evidence of infringement appears and then to register the infringed issues immediately prior to filing suit. However, section 412 of the current Copyright Act makes that impracticable. As you know, section 412 limits the award of statutory damages and attorney's fees to cases in which the infringed works were registered prior to infringement or within 3 months of first publication. In almost all cases, the newsletter publisher who does not contemporaneously

register each and every issue he or she creates will be reduced to a claim for injunctive relief and actual damages. Determining actual damages in the newsletter context, to borrow the words of one jurist, is like nailing a jellyfish to the wall.

Consider, for example, one of the infringement problems my own company is attempting to resolve. A number of years ago, we discovered that one of our subscribers was making multiple cover-to-cover photocopies of one of our daily publications and that the company had been making the copies every single day for more than 5 years.

Unfortunately, although we believe in registering our publications, because of the cost and the administrative burden involved, we had failed to register on a timely basis more than a handful of the issues affected, and so, except for those few issues, we do not qualify for statutory damages and attorney's fees. Because the copying is so egregious, we have no choice but to seek injunctive relief. With luck, we will recover enough in actual damages to cover our legal bills.

I understand that some critics of H.R. 897 have argued that the bill will discourage authors not only from registering their works but from depositing them in the collection of the Library of Congress. I am reasonably certain that of those newsletter publishers who regularly deposit their works with the Library few are likely to stop depositing their works merely because of this legislation. It is relatively easy and inexpensive simply to include complementary subscriptions for the Library on their regular subscription list. Besides, as you mentioned earlier today, the Register of Copyrights recently informed me in a letter that, "The Library's interest in acquiring daily newsletters can be fully satisfied by a few purchases and mandatory deposits."

Neither the purchasing authority of the Register nor the mandatory deposit provisions of the current law are affected by this bill.

In sum, section 102 of the Copyright Reform Act of 1993 is an important step toward the preservation of the primary asset of a newsletter publisher, his or her copyright.

The NPA thanks the subcommittee for its attention to legislation, and NPA would be pleased to assist the subcommittee in any manner in its consideration of section 102 of H.R. 897.

[The prepared statement of Mr. Warren follows:]

Statement of

Paul Warren
Chairman, Intellectual Property Committee,
Newsletter Publishers Association

on

H.R. 897, The Copyright Reform Act of 1993

I wish to thank the Chairman and the members of the Subcommittee for inviting me to testify here today regarding the Copyright Reform Act of 1993. I appear on behalf of the Newsletter Publishers Association (NPA), a trade association representing publishers of approximately 2,200 newsletters and other specialized information services. As a former reporter and current publisher myself, I am more accustomed to sitting at the press table. However, I am pleased to be sitting at the witness table in order to present you with the views of my colleagues, the hundreds of small and large publishers across the nation who produce the thousands of newsletters on which business, industry, medicine, science, and the arts depend daily for the information necessary to their respective pursuits.

Permit me first fully to introduce myself and my organization. I am the Senior Editor and Executive Publisher of Warren Publishing. We publish 13 newsletters in the telecommunications field on such subjects as satellite technology, television, public broadcasting and consumer

electronics. In relative terms, our publications have small subscription bases, but I think it fair to say that they play an extremely important role in their fields.

I am also currently the chairman of the NPA's Intellectual Property Committee. I am a past president of the Association as well. It is on behalf of our membership that I today urge you to pass the Copyright Reform Act of 1993. The NPA's members, some larger than Warren, most smaller, are -- in a very real sense -- the modern-day "lonely pamphleteers." Collectively, members of the NPA publish on virtually every major subject of concern in this country, quite literally from A to Z. Our members' titles run from the AIDS Clinical Digest to Insurance Buyers News through the Microprocessor Report and on to the Zoning Bulletin.

One characteristic that distinguishes almost all of our members from other types of publishers is that, for the most part, we are dependent solely upon subscription revenues for our income. For the reasons that follow, we consider passage of the Copyright Reform Act of 1993 of great importance not only to our success as small businessmen and women, but to our continuing viability as independent publishers.

I need not review for you, as members of the Subcommittee, the purpose of the bill. Allow me, therefore, to move directly to the question of why the NPA urges passage of Section 102 of the Copyright Reform Act. That section, first, removes the requirement that a work be registered before an

action to enforce the copyright can be commenced, and, second, repeals the requirement that a work must be registered within three months of publication in order to qualify for an award of statutory damages and attorneys' fees.

Newsletter publishers are particularly vulnerable to copyright infringement. Indeed, Congress expressly recognized this fact during debate over the Copyright Act of 1976. See H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 73-74 (1976). We are vulnerable because newsletters tend to be time-sensitive, relatively short in length, and -- because newsletter publishers generally eschew the sale of advertising space in order to maintain their editorial integrity -- newsletters tend to be more expensive than typical trade journals. These factors, taken together, are an engraved invitation to copyright infringement. Although most of our members offer bulk subscription discounts, some corporate customers nonetheless repeatedly choose to pay for only one subscription to a given publication, and then violate the publisher's copyright by making cover-to-cover photocopies of every issue, sometimes for hundreds of employees. This cover-to-cover photocopying is the primary reason why an effective legal remedy for copyright violations is critical to NPA members -- it is the only way we have to protect our publications and, thus, our livelihoods.

And let me say that the courts have not hesitated to enforce our copyrights, once we get to court. Where a newsletter publisher can prove regular, cover-to-cover photocopying, courts

do not hesitate to find infringement. See, e.g., Pasha Publications, Inc. v. Enmark Gas Corp., 19 Media L. Rep. (BNA) 2062 (N.D. Tex. 1992).

The problem for most newsletter publishers, however, including my company, is not proving infringement, but getting to court in the first place and, once there, quantifying the damages. As it currently stands, section 411 of the Copyright Act requires that a work be registered before a suit can be filed to enforce the copyright in that work. The simple fact is that most newsletter publishers cannot afford the cost of registering every issue of their publications. The cost of registering a single daily newsletter, including the staff time required for preparing, submitting and tracking the registration applications, runs into thousands of dollars annually. Multiply that figure by the dozen or more titles many publishers offer, and you begin to understand why small publishers simply cannot afford to register their publications as they roll off the presses.

The commonsense response, one would think, would be for a publisher to wait until evidence of infringement appears, and then to register the infringed issues immediately prior to filing suit. However, section 412 of the current Copyright Act makes that impracticable. As you know, section 412 limits the award of statutory damages and attorneys' fees to cases in which the infringed works were registered prior to infringement or within three months of first publication. In almost all cases, a newsletter publisher who does not contemporaneously register each

and every issue he or she creates will be reduced to a claim for injunctive relief and actual damages. Determining "actual damages" in the newsletter context, to borrow the words of one jurist, is "like nailing a jellyfish to the wall." Even where it is possible to prove some actual loss of revenue, that loss -- usually measured by the subscription price -- is typically dwarfed by the legal fees required to prove it.

Consider, for example, one of the infringement problems my own company is attempting to resolve. Some time ago, we discovered that one of our subscribers was making multiple, cover-to-cover photocopies of one of our daily publications, and that the company had been making the copies every single day for more than five years. Unfortunately, although we believe in registering our publications, because of the cost and administrative burden involved, we had failed to register on a timely basis more than a handful of the issues affected, and so, except for those few issues, we do not qualify for statutory damages and attorneys' fees. Because the copying is so egregious, we have no choice but to seek injunctive relief. With luck, we will recover enough in actual damages to cover our legal bills.

My company is not alone; these problems confront virtually every newsletter publisher. One NPA member recently learned that, for the past two years, a subscriber has regularly been photocopying eight different newsletters published by his company, making approximately 10 photocopies of every issue of

all eight newsletters. Because of the burdensome cost and staff time required, virtually none of the more than 700 issues copied were registered within three months of publication. As I testify today, the publisher has staff working to register all of the issues so that he can file suit seeking an injunction. Of course, under present law, the publisher is also entitled to actual damages. Such damages are generally calculated by determining the subscription price for the copied issues. The eight newsletters in question cost approximately $400 each annually. Thus, as simple multiplication will tell you, assuming that the publisher proves infringement, the actual damages will be just about enough to pay the publisher's attorneys' fees -- which the publisher otherwise cannot recover because of his untimely registration. In short, the publisher's "actual damages" will actually go just to pay the cost of obtaining an injunction, with little or nothing left to make the publisher whole for the damage caused by the infringer.

If H.R. 897 were to become law, however, the publisher would be able to file his suit for injunctive relief at the same time that he is processing the registration of his publications. More importantly, after registration and upon proving infringement of the 700 issues, this publisher would be entitled to statutory damages and, in addition, an award of his attorneys' fees. This would not only appropriately compensate the publisher for his lost revenue, but, perhaps most significantly, also make the lawsuit viable in the first place. A viable legal remedy --

which H.R. 897 provides -- would effectively deter this kind of conduct by corporate subscribers who suffer from a "Goliath" complex, that is, subscribers who know that small publishers simply cannot afford to fight them under the law as it currently stands, and therefore take whatever they want with impunity. And even those undeterred in their photocopying by the existence of a realistic remedy will nonetheless be more likely to settle a claim of infringement once they are caught, thereby reducing the amount of actual litigation over such claims. The benefit to both victims of infringement and the judicial system is likely to be substantial.

Other examples of the incongruous results produced by current law, which H.R. 897 would eliminate, abound. One newsletter publisher recently learned that another business, over a period of several years, had been copying verbatim items from his newsletters and selling them for profit to third parties. In order to determine whether he could afford to file suit to protect his copyright, the publisher was compelled to undertake a costly analysis of the registrations of his multiple publications in order to determine which ones had been timely registered and were therefore eligible for statutory damages and attorneys' fees. Although all of this publisher's issues were registered, fewer than half were registered within three months of first publication. The good news for this publisher is that a sufficient number of issues qualify for statutory damages that he can afford to go forward with his lawsuit. The bad news, which

illustrates the incongruous result current law can produce, is that he will receive little or nothing for the majority of the work that was stolen from him by the infringer, simply because it took him more than three months to register those issues. Were H.R. 897 to become law, however, this publisher would be entitled to receive appropriate damages for every work copied by the infringer. Moreover, the publisher would have known from the outset, because of the availability of attorneys' fees, that he would be able to afford to enforce his copyright.

I understand that some critics of H.R. 897 have argued that the bill will discourage authors not only from registering their works, but from depositing them in the collection of the Library of Congress. I cannot speak for other types of publishers or authors, but I am reasonably certain that, of those newsletter publishers who regularly deposit their works with the Library, few are likely to stop depositing their works merely because of this legislation. Particularly for the larger publishers, it is relatively easy and inexpensive simply to include complementary subscriptions for the Library on their regular subscription lists. This, coupled with the secondary advantages of having one's publications on file and accessible at the Library, leads me to conclude that the bill will not likely have much impact on newsletter publishers who already deposit their works regularly. Indeed, as the Register of Copyrights recently informed me in a letter, "The Library's interest in acquiring daily newsletters can be fully satisfied by a few

purchases and mandatory deposits." Neither the purchasing authority of the Library nor the mandatory deposit provision of the current copyright law are affected by H.R. 897. A copy of the Register's letter, dated January 4, 1993, is attached to my statement.

In sum, The Copyright Reform Act of 1993 is an important step toward the preservation of the primary asset of a newsletter publisher: his or her copyrights. Without effective and cost-effective means to protect that asset, not only are small publishing businesses imperiled, but significant outlets of information and ideas may ultimately be stifled. The purpose of the Copyright law is, of course, precisely the opposite, and H.R. 897 will go far toward ensuring achievement of the goals to which Congress and the American people subscribed when they adopted the original Copyright Act.

The NPA thanks the entire Subcommittee for its attention to this legislation. As a group, the members of the NPA would be pleased to assist the Subcommittee in any manner in its consideration of H.R. 897.

The Register of Copyrights
of the
United States of America

Library of Congress
Department 17
Washington, D.C. 20540

January 4, 1993

Dear Mr. Warren:

As you requested in your letters of September 8, 1992 and October 23, 1992, the Library of Congress and the Copyright Office have considered the possible extension of the group registration procedure to daily newsletters. Your request actually concerned "commercial" daily newsletters, but the Copyright Office would not have the authority to grant a registration privilege to commercial newsletters that the Office withheld from nonprofit or noncommercial daily newsletters.

Under the Copyright Act, section 408(c)(1), the group registration procedure is available only at the discretion of the Library of Congress and the Copyright Office. Separate registration for individual works is the normal procedure under the Copyright Act. Group registration of related works is exceptional. In allowing group registration, the Library and the Copyright Office must evaluate carefully the likely administrative burden incurred by processing group registration claims, and determine whether the potential benefits to the Library and the public justify group registration of certain works.

In the defined categories of serial publications issued at intervals of a week or more and daily newspapers, we made a preliminary finding that the potential benefits of group registration outweighed the administrative burdens. We continue to monitor these procedures because certain operating divisions remain doubtful that the benefits outweigh the costs. We are reluctant to extend group registration any further while these doubts remain about the cost burden of the existing procedures.

After consideration of your proposal, the Library and the Copyright Office have decided not to expand group registration at this time to daily newsletters. The library acquisition specialists believe the universe of daily newsletters in the United States alone exceeds 125 (many of these are college campus newspapers which are not defined as newspapers by the Library). The Library's interest in acquiring daily newsletters can be fully satisfied by a few purchases and mandatory deposit. The Library finds at this time that the

potential administrative burden of processing daily newsletters that are not wanted for the collections exceeds the possible benefit of acquiring through registration the few titles that the Library would want to keep.

Sincerely,

Ralph Oman
Register of Copyrights

Mr. Paul Warren
Executive Publisher
Warren Publishing, Inc.
2115 Ward Court, N.W.
Washington, D.C. 20037

Mr. HUGHES. Can either one of the witnesses tell me whether they have thought about any other way that we could perhaps address the problems, the practical problems, you are experiencing without a repeal of these sections?

Mr. BASISTA. No, Mr. Chairman. As far as we can tell, the only way to really empower individual authors and artists to be able to protect their work, is not to require them to register the work.

Mr. HUGHES. How widespread is the infringement in your own particular area, graphics?

Mr. BASISTA. Well, according to our data, we know that approximately one-third of the graphic artists' population has experienced an infringement of some kind, a reproduction without authorization, and an even larger number have experienced an alteration of their work without their knowledge.

Mr. HUGHES. Has that grown over the years, or has that been relatively stable?

Mr. BASISTA. In our opinion, especially with the exponential growth of the new technologies, these infringements will become more and more frequent. There is a tendency among the general population to think that if something is easy to steal, that must be a tacit permission that it is OK to do so. In fact, it is not. It means that we have to be much more vigilant and have to be given the powers necessary to defend our property.

Mr. HUGHES. What is the impact of the new technologies, like digital? What is that going to do?

Mr. BASISTA. Well, it creates tremendous new challenges for individual creators and authors to protect the fruits of their labor. The new technologies will make it much more difficult to even detect infringements when they occur.

Mr. HUGHES. Mr. Warren, how about in your industry, the newsletter industry? What has been your experience? Have the incidents of infringement increased, decreased, or remained about the same?

Mr. WARREN. I think it has probably remained the same, although to some extent people are more aware; the consciousness has been raised in recent years. The photocopying persists, but I think it is on a more deliberate basis—that is, a more conscious decision to violate the copyright—than it used to be when there was sort of an ignorance about it.

We have made an effort to inform our subscribers, as our many publishers, and I think mostly if there is photocopying being made, it is very deliberate, and it is an attempt to avoid paying for additional subscriptions. But it continues to be a chronic problem, and it is really the number one problem of the newsletter industry.

Mr. HUGHES. How many infringement suits were brought by your folks last year?

Mr. WARREN. Newsletter publishers—actually filed, there might have been a handful.

Mr. HUGHES. A handful?

Mr. WARREN. At most.

Mr. HUGHES. Compared to the extent of the infringements that you have alluded to, can you explain that? Because it is just not worth it, or what?

Mr. WARREN. The issue is the same in part. Well, first of all, you are in a situation of having to sue your subscribers, and there is a reluctance to do that. But the other thing is, there is certainly an awareness that if you haven't registered you are not going to get much, the benefits of recovering much are not really there, and the expenses of a lawyer are too high.

Mr. HUGHES. That is really my question. How much of a factor is that, the fact that you can't get statutory damages or attorney's fees?

Mr. WARREN. It is a very significant factor. My experience is that when you go to a firm that has been making photocopies, as some of the other people testified, and you have that behind you, they listen to you; otherwise, they are not as concerned.

Mr. HUGHES. Do you have any hard data on that?

Mr. WARREN. I don't have any hard data on that.

Mr. HUGHES. Has your organization ever attempted to try to get that kind of data?

Mr. WARREN. No, sir.

Mr. HUGHES. That would be interesting, if we could get that kind of data.

Mr. WARREN. We will look into it.

Mr. HUGHES. The same thing with the graphic artists.

Mr. BASISTA. Some of the data I have provided. I do not have data, however, regarding the number of infringement suits that may have been initiated.

Mr. HUGHES. OK. Well, thank you. I don't have any further questions. Let me apologize for the delays today. But, again, you have been very helpful to us, and we appreciate it.

That concludes the hearing for today, and the subcommittee stands adjourned.

[Whereupon, at 1:27 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX 1.—LETTER FROM COMMISSIONERS MARIO F. AGUERO AND J.C. ARGETSINGER, TO MARTHA L. GIRARD, DIRECTOR, OFFICE OF THE FEDERAL REGISTER, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, MARCH 31, 1992

Ms. Martha L. Girard
Director, Office of the Federal Register
National Archives & Records Administration
Washington, DC 20408

Dear Ms. Girard:

We certainly regret that we have put the Federal Register in a difficult situation. As our general counsel, Robert Cassler, explained to your staff, our statute 17 USC 801 and following refers only to the powers of the "Tribunal"--e.g. "The Tribunal shall adopt regulations" (sec. 803) and does not specify any powers to the Chairman in this or other regard. The Chairmanship rotates annually.

We have repeatedly asked the Chairman, pursuant to our current regulations, to hold a meeting. 37 CFR 301.4(b). She has repeatedly refused this lawful request. Enclosed are memos to this effect and her response.

Also enclosed is a notice to the Chairman of March 30, requesting her participation in notational voting. This notice was sufficient to cause her to be aware of the issue enabling her to write you yesterday directing that no publication be printed signed by the two other commissioners. This notice of notational voting was duly signed by the undersigned. Also, enclosed is a copy of our final decision in this matter forwarded to the Chairman.

Thank you for your patience and assistance in this difficult matter.

Sincerely,

Mario F. Aguero
Commissioner

J.C. Argetsinger
Commissioner

MFA/jg

Enclosures

APPENDIX 2.—LETTER FROM CINDY DAUB, CHAIRMAN, COPYRIGHT ROYALTY TRIBUNAL (WITH ATTACHMENTS), TO HON. WILLIAM J. HUGHES, CHAIRMAN, SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION, MARCH 11, 1993

Honorable William J. Hughes
Chairman
Subcommittee on Intellectual Property
and Judicial Administration
Room 341. Cannon House Office Building
Washington, D.C. 20515-3002

Dear Chairman Hughes:

Thank you for the opportunity to express my views on the Copyright Reform Act of 1993 (Bill), during last Wednesday's Legislative Hearing before your Subcommittee.

There are a few issues that were raised during the hearing which, due to the limited time available, I was not able to fully address. I would, therefore, like to briefly address and clarify the following issues in this letter:

Arbitration Panel Proposal

In your statement that accompanied the Bill, and during the hearing, you maintained that the positive experience with arbitration under the Section 119 statutory license (satellite carrier compulsory license), 17 U.S.C. § 119, indicates that the approach proposed in the Bill can work for the other royalty schemes in title 17. I agree that the experience with arbitration for adjusting satellite carrier rates was a positive one. However, assuming that because arbitration worked in one limited area of compulsory license, it will work for other compulsory schemes, is oversimplifying a complicated issue.

Specifically, with regard to satellite carriers, the statute enacted an arbitration model solely with regard to ***rate adjustment***. Rate adjustments, which comprise less than 20% of

the Copyright Royalty Tribunal's responsibilities, are more amenable to some type of arbitrated procedure. Unlike royalty distribution scenarios, rate adjustments basically involve two view points; the copyright owners, and the copyright users. Therefore, the Section 119 arbitration model, which allows for the copyright owners and the copyright users to each choose an arbitrator, permits the opposing viewpoints to be represented in the rate adjustment proceeding.

Royalty distribution proceedings, on the other hand, involve nearly a dozen viewpoints, with no clear demarcation of "sides." The Bill proposes to have the Register, alone, choose two of the arbitrators. Although the Register must choose the two arbitrators from a list of arbitrators compiled by the parties, the ultimate choice of arbitrators will be in the hands of one person. Equally troubling is the fact that the one person who has the awesome responsibility of choosing the arbitrators will be a political appointee, thereby seriously politicizing a process which involves hundreds of millions of dollars.

This method of choosing a panel of decision makers will force a battle even before the commencement of the actual proceeding. Parties, who feel that because they are not "political heavy weights" their viewpoints are not fairly represented in the arbitrator selection process, will fight the selection process before and after the distribution proceeding. Consequently, the resolution of the selection issue, an issue which will prove to be a hotly contested one, will prolong the distribution process.

Comparing the arbitration method required under Section 119 to the method proposed in the Bill is not appropriate because there is an essential difference between the two methods. The Section 119 arbitration was managed by the Tribunal. Specifically, the Tribunal handled all pre-controversy, interlocutory matters, and settlement facilitation. The Tribunal also insured that the arbitration panel remained on its statutorily designated time table. Moreover, the Tribunal reviewed the panel's decision, in light of the record and the statutory guidelines. The success of the Section 119 arbitrated rate adjustment, therefore, was greatly assured due to the Tribunal's pre-controversy activities and its careful oversight of the proceeding.

In sum, the arbitration panel model will not work for all the compulsory license distribution and rate adjustment proceedings. As I mentioned in both my written and oral statements, arbitration panels will prolong the process because there is neither the incentive for shortening the proceeding nor the mechanism for facilitating settlements. Moreover, the fact that arbitration panels can not establish precedent will result in a dramatic escalation in the number of appeals. Increased appeals mean additional taxpayer costs for judicial administration, including both monetary, and time costs resulting from the additional crowding of already crowded court dockets. Increased suits also mean greater litigation costs for the parties that appear before the Tribunal.

Qualifications of Commissioners

My colleagues criticized the qualifications of current and past Commissioners of the Tribunal. My colleagues believe that Commissioners should be lawyers. However, I am not aware of any Commission that requires a legal degree of its Commissioners. In fact, an informal survey of eight major Federal agencies revealed that out of thirty-eight Commissioners, only about 7% have legal degrees. *See* Attachment A. Notably, commissioners without law degrees or technical backgrounds, but with high ethical standards and dedication, have been known to succeed in prominent and technical positions. *See* Attachment B.

It should be noted, that even judges, in some jurisdictions, are not required to be lawyers. The most important requirement of Commissioners, in my opinion, is that they be free of any conflicts of interest, even the appearance of impropriety. These qualifications are essential because of the judicial nature of the Commissioners' responsibilities and the huge sums of money that the Tribunal distributes. The issue is one of fairness and neutrality. The Commissioners should come from a variety of walks of life, such as legal, consumer, and business. In this way, the viewpoints of the diverse community which appears before the Tribunal may be represented.

Majority Rule

Chairman Hughes, during the hearing you raised questions regarding the operation of majority rule at the Tribunal. Your questions involved several particular instances which you believe demonstrate my refusal to abide by majority rule. I would like to shed some light on these instances.

The first instance, which occurred in early 1992, involved what I believed then, and still believe now, to be the questionable expenditure of Federal funds. Since the Chairman is contracting officer and, therefore, responsible for expenditures of Federal funds, I felt personally responsible to prevent the misappropriation of agency funds. The Agency was also faced with the Anti-Deficiency Act.

The entire controversy revolved around the Tribunal's then departing General Counsel, Bob Cassler. Mr. Cassler resigned from his position on January 23, 1992. Thereafter, Mr Cassler and my then colleagues, J.C. Argetsinger and Mario Aguero negotiated a legally questionable compensation package, which included: two weeks of administrative leave with full pay; a cash bonus of $2,141; and the right to work out of his home. *See* Attachment C.

Mr. Cassler, in fact, used Tribunal work, with a statutory deadline, as a pawn in his attempt to extract a bonus from the Tribunal. I felt that not only was the compensation package legally questionable, Mr. Cassler's attempt to use the Tribunal's work as a hostage to extract a bonus was highly unethical. Commissioners Aguero and Argetsinger enlisted the assistance of your staff to force me to approve the expenditure. I apprised your staff of the circumstances surrounding the "majority rule" issue. Nonetheless, I was directed to approve the expenditure, which I did, against my better judgment. *Id.*

The second instance involves my current colleagues and the amendment of the chairmanship rule, 37 C.F.R. § 301.4. The history of this rule, which involves the rotation of the chairmanship has been one of changes at the whim of the Commissioners. My predecessors changed the rule shortly prior to my arrival at the Tribunal. Consequently, I did not become the Chairman for twenty-three months. Their policy reason for changing the rule, which they claimed was that a Commissioner should have at least one year of experience at the Tribunal before assuming the chairmanship, made eminently good sense to me. I did not feel that I was in any way prejudiced by the one year requirement.

However, it appears that my current colleagues, whose terms are temporary, were more concerned with the length of their terms than with sound policy. Almost a month into my 1992-1993 term as Chairman, Commissioner Goodman decided to change the rule so that he could become Chairman immediately.

In light of the history of this rule, my position was and still is, that a close look should be taken into numerous legal and policy questions before any more changes in the rule are made. I believe that there are long term policy implications resulting from my colleagues' proposed rule change which supersede any one Commissioner's limited term or self interest.

Also significant is the fact that Leon E. Panetta, Director of the Office of Management and Budget, at the instruction of the President, issued a memorandum requesting that Federal agencies refrain from issuing proposed final regulations until President Clinton's appointees have an opportunity to review and approve them. *See* Attachment D. The request specifically included internal regulations of the type proposed to be changed by my colleagues. Although it is unclear whether the request technically applies to the Tribunal, it is clear that, in spirit, it does apply to the issue of changing an internal rule which will have a long term effect on the workings of the Tribunal. My colleagues, however, did not concur because they were more concerned with rushing a rule change through to assure Commissioner Goodman his turn as Chairman.

Agency Position on H.R. 897

Finally, you took issue with the fact that the Tribunal had not presented an agency position. However, as I stated during the hearing, your subcommittee sent a separate invitation to testify to each of the Commissioners. *See* Attachment E. The invitation included instructions for submitting the written testimony of each witness. In fact, your staff personally informed the Tribunal's General Counsel that the Subcommittee did not care if the Commissioners submitted one or several statements. Since the Tribunal had not been asked for an agency position, and the Commissioners' positions were so diverse (Commissioner Damich's public position prior to the hearing was not to abolish the Tribunal but to restructure it), it seemed apparent to me that separate statements were warranted.

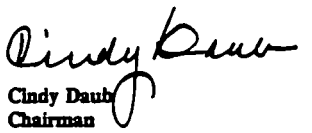
Mr. Chairman, I ask you to carefully study the impact of transferring CRT's current functions to the Copyright Office with use of Arbitration Panels. It does not meet your expressed intentions. There is no tax savings, no savings for the claimants, no downsizing of Government to be achieved. In fact, the use of Arbitration Panels could lead to protracted legal battles and the parties who are affected by this change must feel uneasiness. The change itself will create substantial uncertainty for claimants for the next two or three years.

Mr. Chairman, I ask you once again to consider adopting my recommendations submitted to you at the Subcommittee Hearing; that the Tribunal be fully funded by royalties, thus saving a small amount of taxpayers money, and staggering 3 Commissioners' terms. The staggered terms will guarantee that the majority of the Tribunal will remain in place through each and every change in Commissioners, which in my view, should remedy concerns you and your staff have with regard to majority rule.

Mr. Chairman, in closing, I would like to underscore my belief that the Tribunal is a worthwhile and efficient agency. I dare say, few would argue that the Tribunal's responsibilities are not difficult and subjective. The difficult nature of the Tribunal's responsibilities, however, stem not from the manner in which the Tribunal has carried out its responsibilities, but from the statutory restraints under which it must operate - the same statutory restraints under which any other entity authorized to implement compulsory license would have to operate. If compulsory license is to remain in effect, then the Tribunal should not be abolished. The evidence, past and present, reveals that the Tribunal is the best equipped entity to implement compulsory license.

I appreciate this opportunity to clarify my position. I remain ready to provide you or any member of the Subcommittee with any additional information regarding this complex and important issue – whether to abolish the Tribunal.

Sincerely,



Cindy Daub
Chairman

Enclosures

cc: All Subcommittee Members
Mr. Hayden Gregory/Mr. Bill Patry
Mr. Thomas Mooney

NUMBER OF NON-LAWYER COMMISSIONERS IN MAJOR FEDERAL AGENCIES

COMMODITY FUTURE TRADING COMMISSION

Chairman is not a lawyer.
Three of four Commissioners are non-lawyers.

U.S. INTERNATIONAL TRADE COMMISSION

Chairman is not a lawyer.
Five of six are non-lawyers.

CONSUMER PRODUCT SAFETY COMMISSION

Two of three are non-lawyers.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Three of five are non-lawyers.

INTERSTATE COMMERCE COMMISSION

Four of five are non-lawyers.

NUCLEAR REGULATORY COMMISSION

Chairman is not a lawyer.
Four of five are non-lawyers.

POSTAL RATE COMMISSION

Four of five are non-lawyers.

FEDERAL TRADE COMMISSION

Chairman is not a lawyer.
Two of five are non-lawyers.

Source: 1992 Federal Staff Directory

The Washington Post

ATTACHMENT B

Dec. 2, 1992

David S. Broder

Please, Let Her Keep Her Job

President-elect Clinton says he wants to include women and Republicans and people with unconventional credentials in his administration. On all those counts, Janet Steiger is a strong contender.

The only problem is that she already has the job she wants—and is doing it damn well. Her friend of 25 years, George Bush, named her in 1989 as chairman of the Federal Trade Commission, and her record in reviving the oldest antitrust and customer protection agency has won a remarkable round of praise from both business and consumer advocates.

Steiger's term as a member of the commission extends to 1995, but it will be up to Clinton to decide if she remains as chairman of the FTC or is replaced in that leadership role.

Steiger is not lobbying to keep the job, but there are many inside and outside the commission who hope she is retained. In that respect, she is typical of something we in the press know but do not often acknowledge: When a president's term ends, it also ends the opportunity for further public service by many political appointees who have become very good at their jobs.

That's the way the system works, but in the rush to greet the incoming administration, few bother to say thanks or even goodbye to those who are being shown out the door.

Let me confess my bias. I was a great admirer of Janet Steiger's husband, the late Rep. William Steiger of Wisconsin, one of the most honorable and effective members of the Republican minority in the House, and I have known the Steiger family for a long time. I am also prejudiced in the inordinate delight I take in the fact that, unlike most of her predecessors in the FTC chairmanship, Janet Steiger is not a lawyer and not an economist. Instead, she possesses the key to the good life: a liberal arts education from a first-class Midwestern school, Lawrence University in Appleton, Wis.

When I asked Chairman Steiger last week what she had learned about business in her job, she said she now understands that "it is very important to business itself that it remain competitive. It wants reasonable rules of the road, and it will accept them as long as it is convinced they are even-handed and fair."

And when I asked what she had learned about government, she said, "I'm proud of it. When there is a clearly articulated goal and the leadership is committed to that goal and to making the work experience the best possible, and to fighting for adequate funding, you can attract excellent people and see them perform. People here believe in what they're doing and they can see the results. . . . They can see that because of their efforts, competition is protected and consumers are treated fairly."

The folk wisdom of Washington is that government agencies operate at high energy and efficiency only in the first years after their birth, then settle down into deadly bureaucratic routine. But the FTC was created way back in 1914. Its budget, its staffing and its morale were all cut to shreds during the Reagan years of hostility to anything smacking of consumerism or regulation of the merger-mania of the '80s.

Steiger assured herself before taking the job that Bush would give her adequate financing and political support, and in remarkably short order she revived the FTC as a watchdog against shoddy market practices.

In a laudatory article in The Post's business section last year, Michael Pertschuk, the activist FTC chairman of the Carter years, said that under Steiger, "there really is a seriousness about enforcing the law." From the business side, Adweek magazine reported last month that "advertising industry insiders hope [Steiger] gets to stay on."

Among her notable victories were price-fixing cases against Nintendo, the video game giant, and against two leading manufacturers of infant formula. She has cracked down on deceptive advertising practices by liquid diet programs, travel clubs and a host of other shady operations.

A summary of the FTC's actions during her first three years as chairman runs to 17 single-spaced pages, starting with a move against a firm making false cholesterol claims for its olive oil and ending, appropriately enough, with a $100,000 penalty against a company charged with fraud for selling supposedly waterproof burial vaults that leaked.

In large cases and small, the FTC obtained millions of dollars in "redress" payments for gypped consumers of fraudulent telemarketing schemes. Equally important, it gave thousands of people who had been conned by promoters of health products, energy-saving devices and an amazing variety of other things the sense that their government was fighting to protect their rights.

Just a few months ago, Steiger announced guidelines for environmental claims for consumer products that won praise from both the advertising industry and consumer groups.

She has shown what straightforward, ethical leadership can do in a government agency and has set a standard the Clinton administration will be hard-pressed to surpass.

Attachment C

1825 Connecticut Avenue, N.W.
Suite 918
Washington, DC 20009
(202) 606-4400
FAX (202) 606-4407

MEMORANDUM

Date: January 23, 1992

To: Chairwoman Cindy Daub
Commissioner Mario F. Aguero
Commissioner J.C. Argetsinger
Barbara Gray, Office Manager.

Effective today, I am resigning as General Counsel of the Copyright Royalty Tribunal.

Robert Cassler
General Counsel

1825 Connecticut Avenue, N.W.
Suite 918
Washington, DC 20009
(202) 606-1400
FAX (202) 606-4407

MEMORANDUM
OF UNDERSTANDING

Date: January 23, 1992

To: Mario Aguero and J.C. Argetsinger

From: Robert Cassler

As we have agreed, I will continue my employment with the Tribunal with the following understanding.

(1) Robert Cassler will take immediately two weeks of administrative leave with full pay.

(2) Robert Cassler will receive a bonus amounting to one step increase.

(3) Robert Cassler will work at home for the remainder of his employment with the Tribunal.

(4) Robert Cassler will receive a termination notice at the end of his employment which states that he is being let go with good standing in the office.

1825 Connecticut Avenue, N.W.
Suite 918
Washington, DC 20009
(202) 606-4400
FAX (202) 606-4407

January 27, 1992

Mr. Robert Cassler
Apt. #1009
5300 Holmes Run Parkway
Alexandria, VA 22304

Dear Mr. Cassler:

This letter is written to confirm that your resignation as General Counsel of the Copyright Royalty Tribunal has been accepted effective April 30, 1992.

It is understood that you will be discharging your normal duties as General Counsel with respect to all matters properly before the Tribunal between now and that date.

Sincerely,

Cindy Daub
Chairman

cc: Commissioner Mario Aguero
Commissioner J.C. Argetsinger
Ms. Barbara Gray

1825 Connecticut Avenue, N.W.
Suite 518
Washington, DC 20009
(202) 673-5400
FAX (202) 673-5407

January 27, 1992

Mr. Robert Cassler
Apartment 1003
5300 Holmes Run Parkway
Alexandria, VA 22304

Dear Bob:

If you receive a letter from Commissioner Daub, dated January 27, 1992, regarding your employment status, please disregard it. This letter was sent without our knowledge and approval and as such it is not a valid statement of the situation.

As a majority of the Tribunal, we affirm the provisions of your memorandum of January 23, 1992 regarding your continued employment.

Sincerely,

Mario F. Aguero
Commissioner

J. C. Argetsinger
Commissioner

cc: Commissioner Cindy Daub
Ms. Barbara Gray

MEMORANDUM (Confidential)

~~TO:~~ Commissioner Cindy Daub

FROM: Commissioner Mario F. Aguero
Commissioner J. C. Argetsinger

RE: Robert Cassler's Employment Status

DATE: ~~January 29, 1992~~

To stop the resignation and provoke a major scandal with all the claimants and embarrassment to the current Administration, especially with the media eager for news and perhaps the closing of the agency by the U. S. Congress, Commissioner Mario F. Aguero and Commissioner J. C. Argetsinger held a meeting on January 23, 1992 with General Counsel, Robert Cassler.

The Copyright Royalty Tribunal is facing ~~one of the~~ most sensitive and difficult decisions, ~~in its existence,~~ the 1989 Cable Royalty Distribution. The determination itself is expected to run some 200 type-written pages, as did the 1983 version.

The expertise and experience that General Counsel, Robert Cassler gained during his tenure in the last seven years are needed to write, in accordance with the Commissioners' guidelines and approval, the Phase I and, if necessary, Phase II of the final determination of the 1989 Cable Royalty Distribution which is to be published in the Federal Register on or before April 27, 1992.

~~Commissioner Mario F. Aguero and Commissioner J. C. Argetsinger submit to Commissioner Cindy Daub, for her acceptance,~~ the terms and conditions we agreed to with Robert Cassler on January 23, 1992 in reference to the continuation of his employment with the Copyright Royalty Tribunal, with the following understanding:

1) Robert Cassler will take immediately two weeks of administrative leave with full pay.

2) ~~Robert Cassler will receive a bonus amounting~~ to a one step increase.

3) Robert Cassler will work at home for the remainder of his employment with the Tribunal.

4) Robert Cassler will come to the office, ~~as necessary~~, and meet with the Commissioners at the established dates and times to take the minutes of the closed meeting, as always, to establish the allocation to the five pending claimants, Program Suppliers, Joint Sports, National Association of Broadcasters, Public Television, and Devotionals. The other claimants, Music, Canadians, and National Public Radio have a previous settlement agreement and are not involved in the pending allocation.

5) Robert Cassler will deliver to the Commissioners, as always, partial drafts of the Phase I and, if necessary, Phase II final determination of the 1989 Cable Royalty Distribution, for their approval. On each occasion the Commissioners will make the necessary changes on each partial draft and give them to Robert Cassler and discuss the changes.

6) Robert Cassler will receive a termination notice at the end of his employment, May 15, or the closest pay period, which states that he is being let go with good standing in the office.

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MEMORANDUM

TO: Robert L. Cassler

FROM: Chairman Cindy S. Daub
Commissioner Mario F. Aguero
Commissioner J.C. Argetsinger

RE: Robert Cassler's Employment Status with CRT

DATE: January 30, 1992

The Copyright Royalty Tribunal is facing a sensitive and difficult decision in the 1989 Cable Royalty Distribution. The determination itself is expected to run some 200 type-written pages, as did the 1983 version.

The expertise and experience that General Counsel, Robert Cassler gained during his tenure in the last seven years are needed to write, in accordance with the Commissioners' guidelines and approval, the Phase I and, if necessary, Phase II of the final determination of the 1989 Cable Royalty Distribution which is to be published in the Federal Register on or before April 27, 1992.

The terms and conditions we agreed to with Robert Cassler on January 23, 1992 in reference to the continuation of his employment with the Copyright Royalty Tribunal , with the following understanding:

1) Robert Cassler will take immediately two weeks of administrative leave with full pay.

2) Robert Cassler will receive a cash bonus amounting to a one step increase ($2,141).

3) Robert Cassler will come to the office, as necessary, and meet with the Commissioners at the established dates and times to take the minutes of the closed meeting, as always, to establish the allocation to the five pending claimants, Program Suppliers, Joint Sports, National Association of Broadcasters, Public Television, and Devotionals. The other claimants, Music, Canadians, and National Public Radio have a previous settlement agreement and are not involved in the pending allocation.

4) Robert Cassler will deliver to the Commissioners, as always, partial drafts of the Phase I and, if necessary, Phase II final determination of the 1989 Cable Royalty Distribution, for their approval. On each occasion the Commissioners will make the necessary changes on each partial draft and give them to Robert Cassler and discuss the changes.

5) Robert Cassler will receive a termination notice at the end of his employment, May 16, which states that he is being let go with good standing in the office.

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MEMORANDUM

TO: Commissioners Aguero and Argetsinger

FROM: Commissioner Cindy Daub, Chairman

SUBJECT: Bonus for our General Counsel

DATE: March 25, 1992

- -

As we are all aware, the 1992 budget for the Copyright Royalty Tribunal is extremely tight to begin with, and with the recent proposal to commence a rescission from the White House and the demand from Congress to reduce appropriated funds, it is imminently difficult for us to justify giving anyone a bonus at this time. When this agency had the money last November, and the bonus matter for our general counsel Robert Cassler was discussed, both of you effectively denied him that bonus.

It is our responsibility to operate this agency within its budget and it is my duty, administratively, to insure that this occurs. Under current budget constraints, it is hard to justify a cash bonus to an employee of this agency who has resigned and is now evidently threatening "to immediately depart if his bonus is not paid". (See Commissioner Argetsinger's memo of March 23). It is beyond anyone's comprehension for an employee to demand a cash bonus, and to withhold the writing of the final determination of the 1989 cable royalty distribution proceedings until he receives this bonus, especially since he has been paid as a full-time employee since his physical departure from this office on January 23, 1992, and was also awarded two weeks of administrative leave with pay. He has said to me personally that he is devoting his full time to the writing of this determination.

This agency has no assurance of receiving the report in a timely fashion, nor that the report will be satisfactory, after he gets the bonus.

For the reasons I have stated, I suggest that our current counsel, Robert Cassler, submit his first draft of the 1989 cable royalty distribution proceeding determination by April 1st, 1992, and the final writing be submitted by April 10th, 1992. The sooner the work is completed, the quicker the benefit of the bargain can be processed.

At that time, if CRT is satisfied with the writing of the determination, it is my intention to process the paper work for the cash award. Our effort must be to insure that there is no misunderstanding with respect to Mr. Cassler's departure; e.g., no perception or inference of threats, intimidation, blackmail or bribery.

cc: Barbara Gray, Staff Administrator

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MEMORANDUM

TO: Christine Michelson, Manager
Human Resources Operations
Library of Congress

FROM: Commissioner Mario F. Aguero
Commissioner J.C. Argetsinger

DATE: March 31, 1992

RE: Authorization of Cash Awards

This memorandum is to authorize the processing of a cash award to the following employee of the Copyright Royalty Tribunal for his meritorious service during the past year. The cash award is effective immediately for payment in the next paycheck in the amount indicated below.

Employee	Social Security No.	Amount of Cash Award
Robert Cassler	[redacted]	$2,141

Per our discussion, attached is a copy of the pertinent portions of the Tribunal's statutory authorization and resolution adopted regarding this cash award.

Please note that in the future all personnel actions require the signature of two commissioners.



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March 31, 1992

Ms. Christine Michelson
Director, Human Resources
Operations
Library of Congress
Washington, D.C. 20540

Dear Ms. Michelson:

The purpose of this letter is to ask you to disregard any request for a cash award to Bob Cassler who has resigned from this office. The document went to you without the authorizing signature of the Agency. The 37 CFR III, Sec. 301.4 states clearly "The Chairman is the initial authority for all communications with other government officials or agencies and is the contracting officer."

In order to facilitate a questionable cash bonus to a resigned employee, the two commissioners whose terms have expired last September and who are on their way out, with the help of Mr. Cassler, are attempting to amend our internal rules through publication on the Federal Register only for this purpose. No notice, discussion, or formal meeting for the purpose of amending our rules has occurred. Amending CFR would require formal meeting, recorded votes and minutes taken by the General Counsel.

At the present time, the Federal Register's office is holding the publication of the notice request.

As the Library of Congress is well aware, the Copyright Royalty Tribunal's budget is nearly at its bottom with six more months to go until the new fiscal year begins. We are faced with the recent proposal to commence a rescission from the White House and the request from Congress to reduce appropriated funds. It is imminently difficult for us to justify giving anyone a bonus at this time.

It is my responsibility as the only remaining Commissioner who also happens to be the Chairman to operate this Agency within its budget and it is my duty, administratively, to insure that this occurs.

Although Mr. Cassler receives full salary as our agency's general counsel, he has not been in the office since January 23.

This blatant attempt to abuse the process to serve what may very well be an illegal purpose will obstruct the proper conduct of the Agency's business.

Your cooperation on this matter will be most appreciated, and if you have any questions, please call me. My number is 606-4399.

Sincerely,

Cindy Daub

Cindy Daub
Chairman



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MEMORANDUM

Date: April 2, 1992

To: Commissioner Daub, Chairman
Commissioner Mario Aguero
Commissioner J.C. Argetsinger

From: Robert Cassler, General Counsel Robert Cassler

Subject: Majority rule at the Tribunal

The question of majority rule has come up at the Tribunal. The following is my legal advice.

The Tribunal is a collegial body established by the Copyright Act of 1976. (See, for example, Title 5, Section 552b(a)(1) which describes agencies subject to the Sunshine Act as those "headed by a collegial body composed of two or more individual members . . . ") A collegial body, by definition, operates by majority rule. The legislative history of the Copyright Act states that Congress intended that the staff of the Tribunal should remain small and that the Commissioners should do most of the necessary work of the agency. The Tribunal is therefore unusual in the sense that there is no large staff carrying out the agency's functions pursuant to delegated authority. The day-to-day operations of the Tribunal are often performed by the Commissioners themselves working together.

Therefore, every time the word Tribunal is used in the Copyright Act, it is used in the sense of the collegial body acting together by majority. Section 803(a) says "The Tribunal shall adopt regulations . . ." This can only mean that the Tribunal, by majority rule, adopts regulations, and there is no authority for any one Commissioner under the Copyright Act, to thwart the majority will. Similarly, Section 805(a) says "The Tribunal is authorized to appoint and fix the compensation of such employees . . ." Again, the hiring of personnel, and their compensation, is decided

by the majority.

Concerning the Chairman, Section 802(b) only describes the process by which he or she is selected each year. It confers no special powers. Sections 804(a)(2) and 804(d) gives the Chairman the responsibility of publishing certain documents in the Federal Register, but significantly this is simply a ministerial function that follows a determination made by the Tribunal that either a petitioner has a significant interest in the requested rate (804(a)(2), or that a distribution controversy exists (804(d)).

Accordingly, since the Copyright Act only talks about the powers of the Tribunal and not about the powers of any single Commissioner or of the Chairman, any source for the particular powers of the Chairman, whatever they may be, must come from the Tribunal's own regulations.

The current Chairman asserts that Section 301.4 confers upon her special powers. It does not. Section 301.4 talks about the responsibilities of the Chairman, not her powers. It is the responsibility of the Chairman to preside at hearings, to speak before Congress and other bodies, and to correspond with other agencies. It is additional work. But it is not an additional power. These responsibilities are set out in Sec. 301.4 for the practical reason that only one person can hold the gavel, or talk for the agency at a time.

Similarly, Section 301.6 describes administrative responsibilities that under current circumstances are carried out by either Barbara Gray, the Office Manager, or someone she designates to do the work, or by the General Counsel. Section 301.6 says that if these responsibilities are not met, it will be the Chairman's duty to see that they are met, but this gives no power to the Chairman, adverse to the rights of the other Commissioners, to make substantive decisions within the agency. Once again, it is a responsibility, not a power.

There is no other discussion in the Tribunal's rules regarding the role of the Chairman, except for Sec. 301.47 which describes that all decisions at hearing are taken by majority vote.

Furthermore, since the day the Tribunal's offices opened in November, 1977, majority rule has been observed without exception and without question by every Commissioner except the current Chairman. The Commissioners I am referring to are: Thomas Brennan, Douglas Coulter, Mary Lou Burg, Clarence James, Frances Garcia, Edward Ray, Katherine

Ortega, Marianne Hall, Mario Aguero and J.C. Argetsinger. Each one of these Commissioners, except Katherine Ortega, served at least once as Chairman. Each one of them observed the majority wishes of the Tribunal, and not one ever withheld his or her signature from a Tribunal document because he or she voted in the minority.

I have personally observed in seven years' service to the Tribunal countless times when Mr. Ray, Mr. Aguero or Mr. Argetsinger carried out the majority wishes even when it went against their own views and I have never once seen this principle violated until this year.

The current Chairman has asserted other reasons why she thinks she may act alone. In one memorandum, she said that since the need for finding a new general counsel was acknowledged by all Commissioners, and only the timing remained to be considered, then she had the power to determine the timing of the new counsel's hiring. This is not true. The Tribunal members decide all things by majority rule - the who, what, where, why and when.

Another assertion that has appeared in writing is that since the two current Commissioners' terms have expired, the Chairman has the power to act alone. Not so. Section 802(a) says that a Commissioner may serve after the expiration of his or her term until a successor has taken office. This being the case, the Commissioners who are continuing to serve have full powers as Commissioners to vote on every matter before the Tribunal.

On Monday, March 30,1992, the Tribunal voted by 2-0, the Chairman not voting, to amend its regulations to clarify that the Tribunal operates by majority rule. As shown by the above legal analysis, this was a clarification of existing law. It in no way changed any aspect of the Copyright Act or the Tribunal's regulation or years of Tribunal practice.

The matter of majority rule at the Tribunal is quite serious and strikes at the heart of our democratic system. Yet, for the past two months, I have witnessed numerous instances of unilateral actions taken by the current Chairman. In my role as an independent General Counsel to the Tribunal, it is my duty to advise against unlawful actions. Furthermore, it is my considered opinion that there exists no reasonable doubt concerning my advice.

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MEMORANDUM

TO: Commissioners Aguero and Argetsinger

FROM: Commissioner Cindy Daub, Chairman

SUBJECT: Bob Cassler Bonus and Official CRT Business

DATE: April 8, 1992

- -

This date I signed for submission the original copy initiating the request for a cash award to the departing general counsel, Robert Cassler, which is attached for your signature also. This compensation will be received either in his April 16th or April 30th, 1992 paycheck, and of course will be a part of his 1992 gross income and CSRS calculation.

The agreement I was asked to sign did not encompass the cash award being paid in March or any specific time, and my viewing it as due on completion of his work is entirely reasonable.

But we have a higher duty than to allow principled disagreement over questions of timing - - - that's the only circumstances of dispute, unless personality and ego are allowed to control the outcomes - - - to hold up the statutorily-mandated business of the Tribunal.

Your request has been met by my signing this document for Mr. Cassler to receive his bonus.

Please notify my assistant, as I had hoped you would have already done per my April 3rd memo, of the date and time that is acceptable with you both for discharging our duties.

It will not only be legally important to properly publish the Sunshine Act notice, but helpful to have sufficient time for the general counsel to complete the outcome of our meeting on the Arbitration Panel report, and for the review of the final draft of the '89 cable distribution determination so that they can be published within the mandated time limitation.

It is for the welfare of CRT that I take this course, and I hope this concludes any controversy.

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April 8, 1992

Mr. Hayden Gregory
Chief Counsel
Subcommittee on Intellectual Property
and Judicial Administration
Cannon House Office Building, Room 207
Washington,D.C. 20515-6219

Dear Hayden:

Thank you for taking the time to meet with me on Monday. The attached memorandum appears to be a satisfactory resolution of the disputes brought to your attention by Commissioners Argetsinger and Aguero.

It would seem to be in line with your views, and I hope this puts all matters to rest, and that you will support the completion of the Agency's work by all parties concerned without further delay.

Thank you for your concern and attention to this matter.

Sincerely,

Cindy Daub

Enclosure

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April 8, 1992

Mr. William Patry
Assistant Counsel
Subcommittee on Intellectual Property
and Judicial Administration
Cannon House Office Building, Room 207
Washington,D.C. 20515-6219

Dear Bill:

Thank you for taking the time to meet with me on Monday. The attached memorandum appears to be a satisfactory resolution of the disputes brought to your attention by Commissioners Argetsinger and Aguero.

It would seem to be in line with your views, and I hope this puts all matters to rest, and that you will support the completion of the Agency's work by all parties concerned without further delay.

Thank you for your concern and attention to this matter.

Sincerely,

Cindy Daub

Enclosure



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MEMORANDUM

TO : Christine Michelson, Director
Human Resources Operations, Library of Congress

FROM : Chairman Cindy S. Daub
Commissioner Mario F. Aguero
Commissioner J.C. Argetsinger

DATE : April 8, 1992

SUBJ : Authorization of Cash Performance Award

The Commissioners, unanimously, authorize the processing of a cash performance award to the following employee of the Copyright Royalty Tribunal in the amount indicated below. The cash award is effective April 5, 1992.

Employee	Social Security No.	Amount of Cash Award
Robert L. Cassler	[redacted]	$2,141.00

ATTACHMENT D

Federal Register / Vol. 58, No. 14 / Monday, January 25, 1993 / Notices

OFFICE OF MANAGEMENT AND BUDGET

Regulatory Review

AGENCY: Office of Management and Budget.

ACTION: Request to Agencies.

SUMMARY: On January 22, 1993, the Office of Management and Budget issued a memorandum to regulatory agencies requesting that President Clinton's appointees have an opportunity to review and approve new regulations.

FOR FURTHER INFORMATION CONTACT: James B. MacRae, Jr., Acting Administrator and Deputy Administrator, Office of Information and Regulatory Affairs, (202) 395–5897.

SUPPLEMENTARY INFORMATION: The Director of the Office of Management and Budget issued the following memorandum, requesting the agencies to take certain actions with respect to regulatory activities. This memorandum is printed below in its entirety.

John B. Arthur,

Assistant Director for Administration.

Memorandum For the Heads and Acting Heads of Agencies Described in Section 1(d) of Executive Order 12291

From: Leon E. Panetta, Director.

Subject: Regulatory Review.

It is important that President Clinton's appointees have an opportunity to review and approve new regulations. Therefore, at the direction of the President, I am requesting that you please implement the following, effective immediately:

1. Subject to such exceptions as the Director of the Office of Management and Budget (the "Director") may determine for emergency situations or otherwise, no proposed or final regulation should be sent to the Federal Register for publication until it has been approved by an agency head or the delegee of an agency head who, in either case, is a person appointed by President Clinton and confirmed by the Senate.

2. You are requested to withdraw from the Federal Register for approval in accordance with paragraph 1, all regulations that have not yet been published in the Federal Register and that may be withdrawn under existing procedures of the Office of the Federal Register.

3. The requirements set out above do not apply to regulations that must be issued immediately because of a statutory or judicial deadline. Please notify the Director promptly of any such regulations.

4. If there are other regulations that you believe should not be subject to these requirements, please notify the Director immediately in the case of any regulations that have been submitted to the Federal Register and in a timely manner for any other regulations so that the Director may consider whether an exception to the requirements set out above may be appropriate.

5. Pending completion of a review, existing Executive Orders on regulatory management will continue to apply.

6. The term "regulation" in this memorandum has the meaning set forth in section 1(a) of Executive Order 12291, except that it includes regulations related to agency organization, management, or personnel.

This memorandum shall be published in the Federal Register.

[FR Doc. 93–1969 Filed 1–22–93; 12:05 pm]

BILLING CODE 3110–01–M

ATTACHMENT E-1



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TO: Bruce and Ed

FROM: Cindy
cc: Linda

RE: Hughes Bill Hearing

DATE: February 24, 1993

It is clear from your written statements and my oral statements to the media that our positions differ. The Commissioners have been invited, not required, to testify at the hearing. No agency position has been requested, nor is appropriate in light of the fact that there is no consensus on this matter.

Bill Patrie, himself, told Linda that the Committee did not care whether there was one statement or multiple statements by the Commissioners. He underscored that the Committee is inviting the Commissioners to testify, not subpoenaing them to testify. As you are aware, Mr. Brooks sent three personal "invitations."

Consequently, it is up to you whether you two want to meet to discuss your individual statements.

In sum, there is no agency position.

ATTACHMENT E-2

MAJORITY MEMBERS:
JACK BROOKS, TEXAS, Chairman
BOB EDWARDS, CALIFORNIA
JOHN CONYERS, JR., MICHIGAN
ROMANO L. MAZZOLI, KENTUCKY
WILLIAM J. HUGHES, NEW JERSEY
MIKE SYNAR, OKLAHOMA
PATRICIA SCHROEDER, COLORADO
DAN GLICKMAN, KANSAS
BARNEY FRANK, MASSACHUSETTS
CHARLES E. SCHUMER, NEW YORK
HOWARD L. BERMAN, CALIFORNIA
RICK BOUCHER, VIRGINIA
JOHN BRYANT, TEXAS
GEORGE E. SANGMEISTER, ILLINOIS
CRAIG A. WASHINGTON, TEXAS
JACK REED, RHODE ISLAND
JERROLD NADLER, NEW YORK
ROBERT C. SCOTT, VIRGINIA
DAVID MANN, OHIO
MELVIN L. WATT, NORTH CAROLINA
XAVIER BECERRA, CALIFORNIA

ONE HUNDRED THIRD CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6216

MINORITY MEMBERS:
HAMILTON FISH, JR., NEW YORK
CARLOS J. MOORHEAD, CALIFORNIA
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JIM RAMSTAD, MINNESOTA
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CHARLES T. CANADY, FLORIDA
BOB INGLIS, SOUTH CAROLINA
BOB GOODLATTE, VIRGINIA
MAJORITY—225-3951
MINORITY—225-6906

February 19, 1993

Ms. Cindy Daub
Copyright Royalty Tribunal
1825 Connecticut Avenue, N.W.
Suite 918
Washington, D.C. 20009

Dear Ms. Daub:

The Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary is planning to hold a hearing on H.R. 897, the "Copyright Reform Act of 1993." The hearing will be held March 3, 1993, at 10:00 a.m., in Room 2325 Rayburn House Office Building.

You are invited to appear and testify before the Subcommittee at this hearing.

Your prepared statement should be submitted for entry into the record. We also ask that you submit a one-page summary. You will be invited to make an oral presentation and answer any questions the Subcommittee members might have. It is requested that you comply with the enclosed "Notice to Witnesses" and submit the copies of your prepared statement to the Subcommittee on Intellectual Property and Judicial Administration, 207 Cannon House Office Building, Washington, D.C. 20515 by March 1, 1993.

If you have any questions regarding this invitation, please do not hesitate to contact the Committee.

Sincerely,

JACK BROOKS
Chairman

Enclosure

APPENDIX 3.—LETTER FROM CINDY DAUB, CHAIRMAN, COPYRIGHT ROYALTY TRIBUNAL (WITH ATTACHMENTS), TO HON. WILLIAM J. HUGHES, CHAIRMAN, MARCH 26, 1993

Honorable William J. Hughes
Chairman, Subcommittee on Intellectual
Property and Judicial Administration
Room 341, Cannon House Office Building
Washington, D.C. 20515-3002

Dear Chairman Hughes:

I am pleased to submit this letter and the Copyright Royalty Tribunal's hearing data as requested. My letter and the hearing data are to be inserted at the conclusion of my remarks as part of the record. At the outset it should be noted that *hearings represent only a portion of the Tribunal's work.*

The enclosed Dockets describe activities surrounding each hearing and importantly reflect the number of motions and literally hundreds and hundreds of pages of legal briefs which are filed.. Each Commissioner must read, study and evaluate these numerous filings before an oral hearing is held. Paper hearings equally require the evaluation of voluminous documents before determinations can be rendered.

The Tribunal held 52 days of oral hearings for distribution and rate adjustments for Cable, Satellite and Public Broadcasting during the last three years. Hearings initiated during one fiscal year can often be continued through the next fiscal year. In the case of 1992 Adjustment for Public Broadcasting Rates and Terms, a *paper hearing* was held from June through December 7, 1992.

The Tribunal also makes cost of living adjustments to the Noncommercial Broadcasting Royalty Rate (annually), and the Mechanical Royalty Rate (every two years).

Much of the Tribunal's work involves the role of facilitator/mediator for the claimants. It can be said that the ultimate goal for the Agency is to encourage universal settlement among the various parties. This prevents protracted hearings before the Tribunal. The Tribunal's precedents and our active role have been the impetus for many of the rate and distribution settlements just before the scheduled hearings. *When all efforts fail for voluntary settlements, oral hearings take place as a last resort.*

Rate adjustment and distribution proceedings are just a part of the substantial workload of the Tribunal. Each year, the *Tribunal also processes approximately 800 cable claims, and 200-250 satellite claims. As of 1993, the Tribunal also processes DART claims.*

In the case of DART, the Tribunal issued *Interim Regulations* to implement the Audio Home Recording Act of 1992 after numerous meetings with affected parties, and notices to the Federal Register for comments and replies.

Since actual hearings comprise just a small portion of the Tribunal's work, I look forward to hearing from you if you need additional information.

Sincerely,

Cindy Daub
Chairman

Enclosure

89-2-87CD DOCKET STATEMENT

1987 CABLE DISTRIBUTION PROCEEDING COMMENCED IN OCTOBER 1988, WAS COMPLETED MARCH 1990.

SUMMARY OF ACTIVITY

Category	Number of Pages
Devotionals	
Direct Cases	243
Oral Hearing Transcripts of Phase I	232
Direct Cases - Rebuttal	69
Oral Hearing - Rebuttal Transcripts	217
Proposed Findings	64
Reply Findings	42
Final Determination	22
Music	
Direct Cases	526
Oral Hearing Transcripts	730
Direct Cases - Rebuttal	268
Oral Hearing - Rebuttal Transcripts	300
Proposed Findings	148
Reply Findings	56
Final Determination	29

Actual number of pages of briefs for each category is indicated throughout docket.

FILING	DATE	PARTY	SUBJECT/DESCRIPTION
Motion	10/28/88	SESAC	To accept 1987 late claim
ORDER	10/31/88	Tribunal	Requesting Comments on 10/28 Motion Re: SESAC due 11/10/88
Comment	11/03/88	JSC	Oppose SESAC's 10/28 Mtn. for Leave.
Comment	11/07/88	PS	On 10/28/88 Mtn. of SESAC
Comment	11/10/88	Devotional ASCAP/BMI	On 10/28/88 Mtn. of SESAC (See 87 Jukebox File)
Letter	11/15/88	Christian TV Corp	Robert Kennedy will represent
Order	12/7/88	CRT	Addl Comments on 12/22 re: SESAC late filed claim

Title	Date	Party	Content
Notice	02/01/89	CRT	3/23/89 deadline for notification of controversy (Notice dated 1/26/89)
Comment	2/9/89	CTC	Controversy & Intent to Part
Comment	3/14/89	Multimedia	Controversy & Intent to Part
Comment	3/20/89	PTL	Controversy & Intent to Part
Comment	3/22/89	OTGH	Controversy & Intent to Part
Comment	3/22/89	CBN	Controversy & Intent to Part
Comment	3/23/89	ITM, Inc	Controversy & Intent to Part
Comment	3/23/89	OREA	Controversy & Intent to Part
Comment	3/23/89	BMI	Controversy & Intent to Part
Comment	3/23/89	ASCAP	Controversy & Intent to Part
Comment	3/23/89	Canadian	Controversy & Intent to Part
Comment	3/23/89	NAB	Controversy & Intent to Part
Comment	3/23/89	PS	Controversy & Intent to Part
Comment	3/23/89	JS	Controversy & Intent to Part
Comment	3/23/89	PBS	Controversy & Intent to Part
Comment	3/23/89	NPR	Controversy & Intent to Part
Supplement	3/24/89	PBS	Supple.to Stmt of Contro/3/23/89
Petition	3/24/89	1st Century	leave to file comments
Comments	3/24/89	1st Century	Contoversy & Intent to Part
Notice	3/30/89	CRT	Decl.of Contro (4/3) & request for comments on part dist (Order signed 3/27/89)
Letter	4/4/89	PBS	Wellbery to replace Weiss on mailing lists

Title	Date	Party	Content
Comments	4/10/89	Multimedia	100% 87 CD distribution
Comments	4/14/89	PS	100%
		ASCAP	100%
		BMI	100%
		JS	100%
		Canadian	100%
		NAB	100%
		PBS	100%
		Devotionals	100-95%
		CTC	55% (withhold 45%) of Devos
		ITM OREA KFCB	75% of Devos
Joint Comment	4/14/89	Phase I parties	100%
FR Notice	4/24/89	CRT	Phase I settlement & partial distribution (Notice dated 4/18/89)
Letter	4/24/89	Acemla	Reached Settlement
Letter	5/8/89	Grammont Grange	Richard Campanelli representing ITM, oral Roberts & Century
Letter	4/24/89	ACEMLA	Letter withdrawing Claim
Comments	5/12/89	BMI, ITM, OREA KFCB, CTC, MPAA OTGH, ASCAP PBS Inspriation Network Multimedia, CBN	Procedural schedule for 87CD proceeding.
ORDER	6/8/89	CRT	Phase II Schedule
Motion	6/15/89	PS	Motion to change schedule
Comments	6/23/89	NAB	Support of PS motion to change schedule
	6/30/89	Devotional	" "
	6/29/89	BMI	" "
	6/28/89	ASCAP	
Letter	7/12/89	PBS	Notice of new counsel - Thomas Olson
ORDER	7/12/89	CRT	Phase II Schedule change

Title	Date	Party	Content
Motion	8/04/89	OTGH & TIN	To Disqualify Counsel-Gammon & Grange for conflict of interests. (Supplemental Certificate of Service filed 8/8/89) (DENIED by CRT ORDER 9/1/89)
Request	08/15/89	Minority Devo's	Request to File Comments on Motion to Disqualify
Letter to OTGH & TIN	08/23/89	Tribunal	Letter directing OTGH and TIN to respond by 8/30/89 re: Motion of 8/4/89
Opposition	08/23/89	OTGH & TIN	Opposition to Request to File Comments on Motion
Letter	08/23/89	Tribunal	Letter ordering OREA & ITM to respond by 8/30/89
Response	08/29/89	OTGH/TIN	Correcting typo in Motion to Disqualify (8/4/89)
Opposition	08/30/89	OREA/ITN/KFCB	Opposition to Motion to Disqualify (8/4/89)
ORDER	09/01/89	Tribunal	Order DENYING OTGH and TIN
Settlement In Phase II	09/14/89	MinorityDevos	Letter stating that Minority Devotionals have reached a Settlement
Settlement In Phase II	09/15/89	PBS & Prog.Sup.	Settlement Agreement
Settlement In Phase II	09/15/89	MPAA, NAB & Multimedia	Settlement Agreement
Direct Case	09/20/89	Settling Devo CTC	Phase II Direct Case 213 PGS
Direct Case	09/22/89	BMI	Phase II Direct Case 318 PGS
Direct Case	09/22/89	ASCAP	Phase II Direct Case 208 PGS
Direct Case	09/28/89	Settling Devo. Claimants	Amended Direct Case
ORDER	09/29/89	Tribunal	CRT Order Rescheduling Hearing Schedule to 10/25-27/89

Title	Date	Party	Content
Notice	10/04/89	ASCAP	Represented by B. Korman F. Koenigsberg
Motion	10/04/89	Settling Devo	Motion to Strike portion of Direct Case for CTC Order dated 10/17/89
ORDER	10/05/89	Tribunal	Rescheduling Rebuttal case 12/14-19
Objections	10/06/89	BMI	Pre-Hearing Objections to Ph II Direct Case of ASCAP filed 9/22/89 Overruled by CRT Order dated 10/17/89)
Response	10/13/89	ASCAP	Response of ASCAP to Pre-Hearing Objections of BMI
Response	10/13/89	CTC	Response of CTC to Settling Claimants "Motion to Strike" dated 10/4/89
ORDER	10/17/89	CRT	Order Ruling on Settling Devotionals 29 Objections to CTC
Amendment	10/19/89	CTC	Amendments to Objections of the Settling Devotionals
ORDER	10/24/89	CRT	Overrules BMI 10/6 Objections
Oral Hearing	10/25/89		Transcript of Hearing of '87CD Phase II : Witnesses: Dr. David W. Clark, Donald MacAllister, Thomas A. Larson
Motion	10/25/89	ASCAP	Pre-Hearing Objections & Motion to Strike Direct Case of BMI
Motion	10/25/89	BMI	Motion to Compel ASCAP to Produce Underlying Documents
Oral Hearing	10/26/89		Transcript of Hearing of '87CD Phase II: Witness: Robert Kennedy
Response	10/27/89	ASCAP	Response to Motion of 10/25

Title	Date	Party	Content
Response	10/27/89	BMI	Response to 10/25 Pre-Hearing Objection of ASCAP
ORDER	10/27/89	CRT	Tribunal orders a Pre-Hearing Conference re: Pleadings of ASCAP and BMI
Filing	10/30/89	Copyright Office	% Breakdown of 1987 Cable Royality Fees
ORDER	11/01/89	CRT	Tribunal orders ASCAP & BMI to furnish additional doc's. & Reschedules Music Direct Case to Dec. 14,15,18,19,20 Rebuttal date to be issued at a later time.
HEARING	11/01/89	CRT	Transcript of Prehearing Conference
Filing	11/10/89	BMI	Additional underlying documents agreed to at Pre-Hearing Conference
Filing	11/15/89	ASCAP	Additional documents in accordance with pre-hearing understanding
Filing	11/15/89	BMI	Revised Exhibits B-8, B-9, B-10, B-11, and B-12
Rebuttal	11/17/79	CTC	Phase II Rebuttal Case of Christian TV Corp. 30 PGS
Rebuttal	11/17/89	SettlingDevo's	Ph. II Rebuttal Case 39 PGS
Comments	11/20/89	BMI	Comments re: BMI Motion
Letter	11/20/89	ASCAP	Letter stating that neither ASCAP nor BMI was renewing motions of 10/25
Letter	11/21/89	ASCAP	Information copy of letter to BMI providing additional reports for 53-station survey
Letter	11/22/89	ASCAP	Copy of letter to Charlie Duncan from Bennett Lincoff with quarterly detail reports
Motion	11/22/89	SettlingDevo's (SDC)	Motion to Strike Rebuttal Case of "CTC"(See CRT Order of 11/29)

Title	Date	Party	Content
Motion	11/22/89	SettlingDevo's (SDC)	Motion for Further Partial Distribution of Devotional Award
Filing	11/27/89	ASCAP	Corrected Phase II Direct Case (Orig. 9/22/89)
ORDER	11/27/89	Tribunal	Order Directing Further Partial Distribution of Fund for Devotional Claim.
Response	11/28/89 Rec'd 12/07/89	CTN	Response to CTC Motion to Strike Rebuttal (11/22)
ORDER	11/29/89	Tribunal	Order re: 10 Objections of Settling Devotionals (11/22)
Filing/Ltr.	12/04/89	BMI	Revised Direct Case
Oral Hearing	12/04/89	Tribunal	Hearing Transcript of Devotional Rebuttal/Phase II Witnesses: Dr. Daviw W. Clark Christina Moldenhauer Bruce Jacobs Ann K. Ford
Oral Hearing	12/05/89	Tribunal	Hearing Transcript of Devotional Rebuttal/Phase II Witness: Robert Kennedy
ORDER	12/05/89	Tribunal	Order setting Music Hearing schedule
Response	12/06/89 Rec'd on 12/07/89	Set'lingDevo's	Response to rulings of CRT requiring additional info.
Oral Hearing	12/14/89	Tribunal	Hearing Transcript of Music Direct Case Phase II Witnesses: Gloria Messinger Dr. Peter Boyle
Oral Hearing	12/15/89	Tribunal	Hearing Transcript of BMI Witnesses:
Oral Hearing	12/18/89	Tribunal	Hearing Transcript BMI Witness: Robert Ahrold Marvin Berenson

Title	Date	Party	Content
Filing	12/20/89	CTC	Phase II Proposed Findings of Fact & Conclusions of Law 27 PGS
Filing	12/20/89	Set'l Devo's	Phase II Proposed Findings of Fact & Conclusions of Law 37 PGS
Comments	12/29/89	ASCAP	Comments Regarding Confidential Info. in BMI Ex. X-1
Sunshine Act Meeting	01/03/90	Tribunal	Adjudication of Devotional Claimants category of 87 CD
FR NOTICE	01/08/90	Tribunal	Closed Sunshine Act Mtg. 1/17/90
Filing	01/10/90	ASCAP	Ph. II Rebuttal Case 55 PGS
Filing	01/10/90	BMI	Ph. II Rebuttal Case 213 PGS
Filing	01/10/90	Set'l Devo's	Reply Findings and Conclusion of Law 32 PGS
Motion	01/12/90	CTC	Motion for Acceptance of Late Filing
Filing	01/12/90	CTC	Reply to Settling Devo's Proposed Findings and Conclusions of Law (12/20)
Filing	01/12/90	BMI	Additional Information re: Direct Case as requested by Tribunal at hearing
Filing	01/16/90	BMI	Results of BMI Title-by-Title Analysis Requested by Tribunal
Filing	01/17/90	ASCAP	Corrected copy of ASCAP's Rebuttal Case
Oral Hearing	01/18/90	Tribunal	Phase II Rebuttal Hearing ASCAP & BMI Witnesses: Gloria Messenger Dr. Peter Boyle
Offer of Proof	01/18/90	BMI	Offer of Proof--NOT A PART OF THE RECORD

Title	Date	Party	Content
Oral Hearing	01/19/90	Tribunal	Phase II Rebuttal Hearing (ASCAP & BMI) Witnesses: Alan H. Smith David E. Black Marvin L. Berenson
Motion	01/26/90	CBN	Motion for Further Devotional Distribution
Notice	02/07/90	Tribunal	Certification of Sunshine Act Meeting to be held 2/22 (Notice Dated 2/5/90)
Filing	02/09/90	ASCAP	Proposed Findings of Fact & Conclusions of Law 70 PGS
Filing	02/09/90	BMI	Proposed Findings of Fact & Conclusions of Law 78 PGS
Request	02/15/90	CTN	Request for Immediate Distribution of 87CD to Devo's
Request	02/16/90	SDC	Waive of right to appeal. Request immediate distribution of 87CD Royalties
Filing	02/16/90	ASCAP	Reply Finding of Fact & Conclusions of Law
Filing	2/16/90	ASCAP	(Proposed Findings Table of Contents Filed Separately 2/16/90)
Filing	02/16/90	BMI	Reply findings of Fact & Conclusions of Law
Fed.Reg.	02/16/90	Tribunal	Notice of Final determination of Devotional Claimants Controversy (Dated 2/9/90) 22 PGS
FR NOTICE	03/30/90	Tribunal	Notice of Final Determination of Music Controversy (Notice dated 3/27/90) 29 PGS
FR CORRECTION	04/16/90	Tribunal	Corrections to 3/30/90 Notice

1989 CABLE RATE ADJUSTMENT

CATA/NCTA CABLE SYNDEX DOCKET
89-5-CRA

This proceeding began in May 1989 and continued through March 1991.

SUMMARY OF ACTIVITY

Category	*Number of Pages*
Direct Cases	*320*
Oral Hearing Transcripts of Phase I	*533*
Rebuttal Cases	*71*
Oral Hearing Rebuttal Transcripts	*165*
Proposed Findings	*153*
Reply Findings	*142*
Final Determination	*47*

Actual number of pages of briefs for each category is indicated throughout docket, shown in italics.

FILING	DATE	PARTY	SUBJECT/DESCRIPTION
Petition	5/26/89	CATA	Petition to waive rule & to initiate cable rate adjustment
NOTICE	6/6/89	CRT	Request for comments
FED. REG.	6/9/89	CRT	CATA Petition to Eliminate Syndex; Comments due 7/24/89
Petition	6/15/89	NCTA	Petition to adjust cable rate
NOTICE	6/16/89	CRT	Request for comments on CATA & NCTA petitions for syndex adjustment - Due 8/1/89
Motion	6/27/89	Program Suppliers	Motion to Dismiss Petitions
Supplement	7/5/89	Program Suppliers	Supplement to Motion of 6/27/89
Comments	7/12/89	NAB	Comments re NCTA & CATA petitions in support of Program Suppliers Motion
Supplement	7/14/89	NAB	Attachments to 7/12/89 Comments
Comments	7/19/89	ASCAP	Support of MPAA Motion to Dismiss.

ORDER	8/8/89	CRT	Requesting Additional Comments Due 9/1/89
Motion	8/11/89	Program Suppliers	Motion for Extension of Time (Granted by CRT Order of 8/14/89)
Statement	8/11/89	NCTA	Statement - Request for Time
ORDER	8/14/89	CRT	Extending comment period of 8/8/89 Order to 9/6/89
Comments	9/6/89	ASCAP	Additional Comments re Petitions of NCTA & CATA
Comments	9/6/89	Program Suppliers	" " "
Comments	9/6/89	CATA	" " "
Comments	9/6/89	BMI	" " "
Comments	9/6/89	Joint Sports	" " "
Comments	9/6/89	PBS	" " "
Comments	9/6/89	NCTA	" " "
Comments	9/7/89	Program Suppliers	Supplement to Comments of 9/6/89
FED. REG.	9/15/89	CRT	CRT Denies CATA/NCTA Motions for Immediate Hearings
Comments	9/15/89	NPR	Statement in support of Program Suppliers Comments
Petition	1/2/90	CATA	Petition to Initiate Cable TV Copyright Royalty Fee Adjustment
Petition	1/2/90	NCTA	Resubmission of Petition to Initiate Rate Adjustment Proceeding
FED. REG.	1/4/90	CRT	Notice of Commencement of Proceedings
Notice	1/25/90	PBS	Notice of Intent to Participate - Adjustment of the Syndicated Exclusivity Surcharge
Comments	2/8/90	Paul Glist	Comments against oral hearings in the Syndicated Exclusivity Proceedings.

Comments	2/8/90	ASCAP, BMI, SESAC	Comments in favor of Oral Hearings in Syndicated Exclusivity Proceedings
Comments	2/8/90	Cohn & Morks	Notice of Intent to Participate
Comments in	2/8/90	PBS	Comments in Favor of Oral Hearings Syndicated Exclusivity Proceedings
Notice	2/8/90	NAB	Notice of Intent to Participate
Notice	2/8/90	Joint Sports	Comments in Favor of Oral Hearings in Syndicated Exclusivity Proceedings.
Comments	2/8/90	NCTA	Comments Against Oral Hearings in the Syndicated Exclusivity Proceedings.
Comments	2/8/90	CATA	Comments Against Oral Hearings in the Syndicated Exclusivity Proceedings.
Comments	2/8/90	NPR	Comments in Favor of Oral Hearings in Syndicated Exclusivity Proceedings.
Comments	2/8/90	Program Suppliers	Comments in Favor of Consolidating Oral Adjustment Hearings
Notice	2/8/90	Canadian Claimants	Notice of Intent to Participate in Syndicated Exclusivity Proceedings
ORDER	2/14/90	CRT	Re: Hearing Schedule
Motion	2/26/90	Program Suppliers	Motion for Extension of Procedural Dates - Requests May 15, 1990
Motion	2/28/90	ASCAP BMI SESAC	Motion of ASCAP, BMI and SESAC for Clarification of 2/14/90 Order by CRT
Motion	3/2/90	NCTA	Response to Motion for Extension of Procedural Dates

Motion	3/7/90	Joint Sports	Motion to Delete Issue
Supports Motion	3/8/90	PBS	Supports Motion by ASCAP, BMI, and SESAC for clarification of 2/14/90 Order by CRT
Opposition to Motion	3/9/90	NCTA	Opposition to the Music Claimants Motion for Clarification
Reply	3/12/90	Music Claimants	Reply of the Music Claimants to Comments of NCTA
Opposition	3/12/90	Program Suppliers	Opposition to Request for Suspension of Surcharge and for Retroactive Effective Date
Motion	3/14/90	Music Claimants	Motion for Leave to File Reply to NCTA's Opposition to Motion for Clarification
Response	3/16/90	NCTA	Response of the National Cable Television Association, Inc. to Joint Sports Claimants' Motion to Delete Issue
Notice	3/16/90	NCTA	Notice of Addition to Service List
Motion	3/23/90	Joint Sports	Motion of the Joint Sports Claimant for Leave to File Reply to NCTA Response
Reply	3/23/90	Joint Sports	Reply of Joint Sports Claimants to JCTA Response
Order	3/14/90	CRT	New Procedural Dates
Order	3/14/90	CRT	Procedures for Proceeding
Order	3/30/90	CRT	CRT denies motion of Joint Sports and findings requested by NCTA
Direct Case	*4/23/90*	*ASCAP, BMI & SESAC*	*24 Pages*
Statement of Position	*4/23/90*	*PBS*	*7 Pages*
Prehearing Statement	*4/23/90*	*Joint Sports*	*6 Pages*

Direct Case	*4/23/90*	*MAB*	*4 Pages*
Memorandum of Law & Direct Case	*4/23/90*	*Program Suppliers*	*Supports direct case of Music Claimants* *134 Pages*
Statement	*4/23/90*	*ASCAP, BMI & SESAC*	*Support of Program Suppliers' Memorandum of Law*
Direct Case	*4/23/90*	*Joint Cable Parties*	*164 Pages*
ORDER	4/25/90	CRT	Hearings Commence May 8, 9, 10, 17 & 18
Motion	*5/2/90*	*Program Suppliers & Music Claimants*	*Prehearing Objections and Motion to Strike 11 Pages*
Opposition	*5/4/90*	*Joint Cable Parties*	*Opposition to Prehearing Objections and Motion to Strike 21 Pages*
ORDER	5/4/90	CRT	Copyright Owners' Objections Overruled and the Motion to Strike is Denied
Oral Hearing Transcript	*5/8/90*	*NCTA*	*Witness - Seth Davidson*
Oral Hearing Transcript	*5/9/90*	*NCTA*	*Witness - Seth Davidson*
		MPAA	*Witness - Stanley Besen*
NOTICE	5/10/90	CRT	Requests comments whether hearings should consider blackout only or also cost of living adjustment and adjustment of 3.75
Oral Hearing Transcript	*5/17/90*	*Music*	*Witnesses - Peter Boyle* *David Black*
		MPAA	*Witness - Marsha Kessler*
Brief	5/31/90	ASCAP, BMI & SESAC	Responding to questions by CRT during the hearings

Statement	*5/31/90*	*NAB*	*Statement in lieu of rebuttal case*
Comments	*5/31/90*	*Program Suppliers*	*Comments regarding past hearing and answers to questions*
Position Paper	*5/31/90*	*Turner Broadcasting System, Inc.*	*Position Paper on the Copyright Royalty Tribunal's National Rights Questions*
Comments	*5/31/90*	*NAB*	*Comments of NAB regarding a "National Rights" Surcharge*
Comments	*5/31/90*	*CATA*	*Further information on the national program rights issue*
Rebuttal Case & Memo	*5/31/90*	*Joint Cable Parties*	*Rebuttal Case and also Memorandum on the National Rights Issue 34 Pages*
Letter Daub	5/31/90	Program Suppliers	Letter addressed to Commissioner answering question whether Program Suppliers argued in FCC's syndex rulemaking for the 35-mile zone or the Grade B Contour...
ORDER	**6/4/90**	**CRT**	**Modification of Hearing Schedule**
Letter Daub	6/12/90	Joint Cable Parties	Letter addressed to Commissioner in response to 5/31/90 letter from Program Suppliers to Commissioner Daub
Oral Hearing Transcript	*6/13/90*	*Cable*	*Rebuttal Hearing Transcript Witness - Gregory Klein*
		MPAA	*- Stanley Besan*
		MPAA	*- Marsha Kessler*
Proposed Findings	*6/29/90*	*Joint Cable Parties*	*Proposed Findings of Fact and Conclusions of Law by the Joint Cable Parties 50 Pgs.*
Proposed Findings	*6/29/90*	*Program Suppliers*	*Proposed Findings of Fact and Conclusions of Law by the Program Suppliers 62 Pgs.*

Supplemental Proposed Findings	*6/29/90*	*Turner Broadcasting System, Inc.*	*Turner Broadcasting System, Inc.'s Supplemental Proposed Findings of Fact and Conclusions of Law 14 Pgs.*
Proposed Findings	*6/29/90*	*ASCAP BMI, SESAC*	*Proposed Findings of Fact and Conclusions of Law of ASCAP, BMI and SESAC 21 Pgs.*
Post-Hearing Statements	*6/29/90*	*Joint Sports*	*Post-Hearing Statement of the Joint Sports Claimants 6 Pgs.*
Reply Proposed Findings	*7/9/70*	*Joint Sports*	*Reply of the Joint Sports Claimants 15 Pgs.*
Reply Findings of Fact	*7/9/90*	*ASCAP, BMI, SESAC*	*Reply Findings of Fact and Conclusions of Law of the ASCAP, BMI & SESAC 14 Pgs.*
Reply Findings of Fact	*7/9/90*	*Joint Cable Parties*	*Reply Findings of Fact and Conclusions of Law by the Joint Cable Parties 65 Pgs.*
Reply Findings of Fact	*7/9/90*	*Program Suppliers*	*Program Suppliers' Reply Findings of Fact and Conclusions of Law 38 Pgs.*
Supplemental Reply Proposed Findings	*7/9/90*	*Turner Broadcasting System*	*Supplemental Reply Proposed Findings of Fact and Conclusions of Law of Turner Broadcasting System, Inc. 5 Pgs.*
Reply Findings & Conclusions	*7/9/90*	*NAB*	*Reply Findings and Conclusions of the National Association of Broadcasters 5 Pgs.*
ORDER	*7/18/90*	*CRT*	*Elimination of Syndex Surcharge Except Grade B Contour Exemption*
FINAL RULE	*8/9/90*	*CRT*	*Elimination of Syndicated Exclusivity Surcharge Except Grade B Contour Exemption 47 Pgs.*
FED. REG.	*8/16/90*	*CRT*	*Published Adjustment of the Syndicated Exclusivity Surcharge; Final Rule; Final Determination*

FED. REG.	*11/21/90*	*CRT*	*Published correction of the wording of the final rule which appeared August 16, 1990.*
MOTION	12/28/90	Program Suppliers	Motion Requesting Revision of Proposed Section 308.2(d)(1)
NOTICE	1/17/91	CRT	Requests comments on Program Suppliers' requested rule change to clarify wording of syndicated exclusivity surcharge rule.
FED. REG.	1/24/91	CRT	Notice of Proposed Rulemaking - Program Suppliers purporting to clarify wording of Syndex rule. Asks public to comment on rule change.
Comments	2/4/91	Joint Sports	Comments concerning Program Suppliers' "Motion Requesting Revision of Proposed Section 308.2(d)(1)".
Comments	2/25/91	NCTA	Comments concerning Program Suppliers' "Motion Requesting Revision of Proposed Section 308.2(d)(1)".
Comments	2/25/91	ASCAP, BMI & SESAC	Comments concerning Program Suppliers' "Motion Requesting Revision of Proposed Section 308.2(d)(1)".
Reply Comments	3/11/91	Program Suppliers	Reply Comments on Revision of Proposed Section 308.2(d)(1).
FINAL RULE	*3/18/91*	*CRT*	*Revision of Proposed Section 308.2(d)(1) - clarifies wording re 35-mile zone. 4 Pages*
FED. REG.	3/22/91	CRT	Final Rule - Revision of Proposed Section 308.2(d)(1) - clarifies wording re 35-mile zone

SATELLITE CARRIER DISTRIBUTIONS

92-2-89,90,91 SCD
DOCKET STATEMENT

Proceeding began in December 1990 and continued through December 1992.

SUMMARY OF ACTIVITY

Category	*Number of Pages*
Transcript of Pre-Hearing Conference	*43*
Comments of Settlement	*90*
Reply Comments	*25*
Final Determination	*42*

Actual number of pages of briefs for each category is indicated throughout docket, shown in italics.

FILING	DATE	PARTY	SUBJECT/DESCRIPTION
MOTION	12/28/90	PROGRAM SUPPLIERS	REQUEST DECLARATORY RULING/ENTITLEMENT
FED.REG.	**01/17/91**	**CRT**	**DECLARATORY RULING REQUEST**
COMMENTS	02/25/91	SESAC	STATUS OF NETWORKS/ ENTITLEMENT TO ROYALTIES
COMMENTS	02/25/91	PBS	STATUS OF NETWORKS/ ENTITLEMENT TO ROYALTIES
COMMENTS	02/25/91	ASCAP	STATUS OF NETWORKS/ ENTITLEMENT TO ROYALTIES
COMMENTS	02/25/91	BMI	STATUS OF NETWORKS/ ENTITLEMENT TO ROYALTIES
COMMENTS	02/25/91	BROADCAST	STATUS OF NETWORKS/ ENTITLEMENT TO ROYALTIES
COMMENTS	02/25/91	NBA/NHA	STATUS OF NETWORKS/ ENTITLEMENT TO ROYALTIES
COMMENTS	02/25/91	NCAA	STATUS OF NETWORKS/ ENTITLEMENT TO ROYALTIES
COMMENTS	02/25/91	BASEBALL	STATUS OF NETWORKS/ ENTITLEMENT TO ROYALTIES

COMMENTS	02/26/91	NETWORKS	STATUS OF NETWORKS/ ENTITLEMENT TO ROYALTIES
REPLY COMMENTS	3/11/91	NETWORKS	SHVA PROVIDES FOR PAYMENT OF ROYALTIES TO THE COPYRIGHT OWNERS OF NETWORKS
REPLY COMMENTS	3/11/91	BROADCAST	IN SUPPORT OF DECLARATORY RULING
REPLY COMMENTS	3/11/91	PROGRAM SUPPLIERS	IN SUPPORT OF DECLARATORY RULING
REPLY COMMENTS	3/11/91	BMI	IN SUPPORT OF DECLARATORY RULING
REPLY COMMENTS	3/11/91	ASCAP	IN SUPPORT OF DECLARATORY RULING
MOTION	03/13/91	ASCAP	LATE-FILED PLEADING
ORDER	**03/12/91**	**CRT**	**CRT GRANTS ASCAP THE MOTION FOR LATE-FILED PLEADING**
FED.REG.	**05/03/91**	**CRT**	**NOTICE OF DECLARATORY RULING/IN SUPPORT OF PROGRAM OWNERS GETTING ROYALTIES.**
FED.REG.	**05/14/91**	**CRT**	**ASCERTAINMENT OF WHETHER CONTROVERSY EXISTS**
LETTER	06/21/91	PBS NAB CANADIAN NPR	JOINT MOTION FOR EXTENSION OF TIME
COMMENTS	06/21/91	PBS	INTENT TO PARTICIPATE
COMMENTS	06/24/91	ASCAP BMI SESAC	INTENT TO PARTICIPATE
COMMENTS	06/24/91	BROADCASTERS	INTENT TO PARTICIPATE
COMMENTS	06/24/91	PROGRAM SUPPLIERS	INTENT TO PARTICIPATE

COMMENTS	06/24/91	ABC CBS NBC	INTENT TO PARTICIPATE
COMMENTS	06/24/91	JOINT SPORTS	INTENT TO PARTICIPATE
COMMENTS	06/24/91	WFAA TV/ A.H. BELO.	INTENT TO PARTICIPATE
COMMENTS	06/24/91	MULTIMEDIA	INTENT TO PARTICIPATE
COMMENTS	06/24/91	TELEREP/ COX COMM.	INTENT TO PARTICIPATE
COMMENTS	06/24/91	GANNETT CO., INC.	INTENT TO PARTICIPATE
LETTER	06/25/91	GANNETT CO., INC.	AMENDMENT TO ORIGINAL 06/24/91 FILING
COMMENTS	06/26/91	DEVOTIONALS	INTENT TO PARTICIPATE
LETTER	07/10/91	MPAA TO HUGHES CC: BOB GARRETT	DISCONTENT W/CRT'S DECISION ENTITLING NETWORKS TO GET ROYALTIES
LETTER	07/11/91	CRT TO REMINGTON	COPY OF MPAA LETTER
LETTER	07/25/91	BASEBALL TO HUGHES	SUPPORTS CRT'S RULING
FED.REG.	08/02/91	CRT	ASCERTAINMENT OF WHETHER CONTROVERSY EXISTS
COMMENTS	08/26/91	JOINT NETWORKS	EXISTENCE OF CONTROVERSY & INTENT TO PARTICIPATE
COMMENTS	09/06/91	MUSIC CLAIMANTS	EXISTENCE OF CONTROVERSY & INTENT TO PARTICIPATE
COMMENTS	09/06/91	PROGRAM SUPPLIERS	EXISTENCE OF CONTROVERSY & INTENT TO PARTICIPATE
COMMENTS	09/06/91	PBS	EXISTENCE OF CONTROVERSY & INTENT TO PARTICIPATE
COMMENTS	09/06/91	MULTIMEDIA	EXISTENCE OF CONTROVERSY & INTENT TO PARTICIPATE

COMMENTS	09/06/91	GANNETT	EXISTENCE OF CONTROVERSY & INTENT TO PARTICIPATE
COMMENTS	09/06/91	WFAA	EXISTENCE OF CONTROVERSY & INTENT TO PARTICIPATE
COMMENTS	09/06/91	TELEREP/KTVU	EXISTENCE OF CONTROVERSY & INTENT TO PARTICIPATE
COMMENTS	09/06/91	BROADCASTERS	EXISTENCE OF CONTROVERSY & INTENT TO PARTICIPATE
COMMENTS	09/06/91	JOINT SPORTS	EXISTENCE OF CONTROVERSY & INTENT TO PARTICIPATE
COMMENTS	09/10/91	DEVOTIONALS	INTENT TO PARTICIPATE
COMMENTS	09/11/91	ITM, CRM, OREA	EXISTENCE OF CONTROVERSY & INTENT TO PARTICIPATE
WITHDRAWAL OF COMMENTS	09/19/91	ITM, CRM, OREA	WITHDRAWAL OF NOTICE OF INTENT TO PARTICIPATE
ORDER/LETTER	07/01/92	CRT	CONSOLIDATION OF PROCEEDING - SENT TO '89-90 SERVICE LIST
COMMENTS	07/24/92	COPYRIGHT OWNERS	REQUEST TO CONSOLIDATE HEARINGS & SUGGESTED CRT AGENDA
FED.REG.	08/03/92	CRT	ASCERTAINMENT OF WHETHER CONTROVERSY EXISTS
COMMENTS	08/19/92	JOINT SPORTS	INTENT TO PARTICIPATE
COMMENTS	08/24/92	JOINT	INTENT TO PARTICIPATE
COMMENTS	08/24/92	PROGRAM SUPPLIERS	INTENT TO PARTICIPATE
COMMENTS	08/24/92	ASCAP & BMI	INTENT TO PARTICIPATE
COMMENTS	08/24/92	COMMERCIAL BROADCASTERS	INTENT TO PARTICIPATE
COMMENTS	08/24/92	CHRISTIAN BROADCASTERS	INTENT TO PARTICIPATE

COMMENTS	08/25/92	PBS	INTENT TO PARTICIPATE
COMMENTS	08/25/92	SESAC	INTENT TO PARTICIPATE
COMMENTS	08/25/92	ITM/ ORAL ROBERTS/ CORAL RIDGE	INTENT TO PARTICIPATE
COMMENTS	08/26/92	MULTIMEDIA/ GANNET, HOME SHOPPING/ KTVU/TELEREP	INTENT TO PARTICIPATE
COMMENTS	09/15/92	COPYRIGHT OWNERS	NEGOTIATIONS CONTINUE/CRT SHOULD DECLARE A CONTROVERSY
COMMENTS	09/15/92	BMI & ASCAP	CRT SHOULD REJECT JAMES CANNING'S SATELLITE CLAIM. THEREFORE, A PHASE II CONTROVERSY EXISTS.
COMMENTS	09/15/92	MULTIMEDIA/ HOME SHOPPING NETWORK	THESE PARTIES ARE PHASE II CLAIMANTS
COMMENTS	09/15/92	JOINT NETWORKS	DEFER DECLARATION OF A CONTROVERSY UNTIL OCT 15
COMMENTS	09/17/92	PBS	PREMATURE FOR THE CRT TO DECLARE A CONTROVERSY
ORDER (faxed and mailed)	09/17/92	CRT	IF THERE IS NO SETTLEMENT BY 10/15/92, A CONTROVERSY WILL BE DECLARED
COMMENTS	10/15/92	COPYRIGHT OWNERS	PHASE I CONTROVERSY EXISTS
COMMENTS	10/15/92	JOINT NETWORKS	CONTROVERSY EXISTS
COMMENTS	10/15/92	PBS	CONTROVERSY EXISTS

REPLY	10/21/92	PBS	SCOPE OF PHASE I AND PROPOSING 2-STAGE PROCEEDING
MOTION	10/23/92	COPYRIGHT OWNERS	PARTIAL DISTRIBUTION
ORAL HEARING TRANSCRIPT	*10/27/92*		*10/26/92 WAS PRE-HEARING CONFERENCE/2 MOTIONS DISCUSSED 43 PGS.*
COMMENTS	11/02/92	PBS	PBS WILL NOT BE PARTICIPATING
COMMENTS	11/03/92	JOINT NETWORKS	IN SUPPORT OF PBS' MOTION OPPOSING
COMMENTS	11/03/92	COPYRIGHT OWNERS	SETTLEMENT WITH PBS
REPLY BRIEF	11/10/92	JOINT NETWORKS	SUPPORT OF PBS' MOTION OPPOSING A PAY-IN/PAY-OUT METHODOLOGY
REPLY BRIEF	11/10/92	COPYRIGHT OWNERS	DISAGREEMENT REGARDING WHAT PRECEDENCE APPLIES
LETTER	11/12/92	ABC/VANLIER	CORRECTED P. 11 OF REPLY OF 11/10/92
FED.REG.	**12/03/92**	**CRT**	**SCHEDULE**
ORDER WITH DISSENT	**12/04/92**	**CRT**	**FED.REG. NOTICE OF 12/03/92 AND THIS ORDER WERE MAILED OUT TO THE SERVICE LIST. THE SUBJECT WAS THE PAY-IN/PAY-OUT METHODOLOGY AND ROYALTY PAYMENT FOR NETWORKS.**
COMMENTS	12/11/92	PBS	MOTION FOR PARTIAL DISTRIBUTION
COMMENTS	12/21/92	JOINT NETWORKS COPYRIGHT OWNERS	THEY HAVE REACHED A SETTLEMENT RE DISTRIBUTION

FINAL RULE	*12/30/92*	*CRT*	*FED.REG. NOTICE OF FINAL DETERMINATION.* *APPENDIX OF THIS NOTICE IS THE ORDER WITH DISSENT (SEE 12/4/92). 42 PGS.*
LETTER	01/08/93	SPORTS R.GARRETT	COLLECTION AGENT IS MAJOR LEAGUE BASEBALL

1989 CABLE ROYALTY DISTRIBUTION PROCEEDING

91-2-89CD

DOCKET

This proceeding began in February 1991 and continued through May 1992.

SUMMARY OF ACTIVITY

Category	*Number of Pages*
Direct Cases	*2766*
Oral Hearing Transcripts of Phase I	*4164*
Rebuttal Cases	*274*
Oral Hearing Rebuttal Transcripts	*876*
Proposed Findings	*474*
Reply Findings	*204*
Final Determination	*82*

Actual number of pages of briefs for each category is indicated throughout docket, shown in italics.

FILING	DATE	PARTY	SUBJECT/DESCRIPTION
NOTICE	2/14/91	CRT	Ascertainment of Whether Controversy Exists Concerning Distribution of 1989 Cable Royalty Fund
FED REG	2/14/91	CRT	Ascertainment of Whether Controversy Exists Concerning Distribution of 1989 Cable Royalty Fund
MOTION	2/25/91	Joint Sports	Motion to Commence 1989 Cable Proceedings, and to Declare a Controversy
ORDER	2/27/91	CRT	Request for comments from interested parties on Motion from Joint Sports to Commence Proceedings - Due 3/21/91
Comments	3/21/91	Program Suppliers	Comments on Motion by Joint Sports to commence proceedings.
Comments	3/21/91	NPR	Comments on Motion by Joint Sports to commence proceedings.
Comments	3/21/91	PBS	Comments on Motion by Joint Sports to commence proceedings.

Comments	3/21/91	Canadian Claimants	Comments on Motion by Joint Sports to commence proceedings.
Comments	3/21/91	NAB	Comments on Motion by Joint Sports to commence proceedings.
Comments	3/21/91	ASCAP, BMI & ASCAP	Comments on Motion by Joint Sports to commence proceedings.
Comments	3/21/91	Devotional Claimants	Comments on Motion by Joint Sports to commence proceedings
Comments	3/25/91	CTC	Comments Regarding Existence of a Controversy and Notice to Participate in Phase I & II.
ORDER	**3/26/91**	**CRT**	**CRT denies Joint Sports Motion to set April 19 as the date for submission of direct cases. CRT orders that comments on existence of controversy be filed by April 19, 1991.**
Letter	4/18/91	CTC	Notice of Intent to Participate in Phase II proceedings in the event a controversy arises.
Comments	4/18/91	CBN	Comments of CBN on Existence of Controversy and Notice of Intent to Participate in Phase I and II
Comments	4/19/91	ASCAP BMI & SESAC	Comments on Existence of a Controversy and Notice of Intent to Participate in Phase I and II
Comments	4/19/91	PBS	Comments of PBS on Existence of Controversy and Notice of Intent to Participate in Phase I and, if necessary, Phase II
Comments	4/19/91	OTGH	Comments with respect to Controversies and Notice of Intent to Participate in Phase I and, if necessary, Phase II

Comments	4/19/91	Oral Roberts Evan.Assn. ITM & CRM	Comments regarding Existence of Controversy and Notice of Intent to Participate
Comments	4/19/91	Program Suppliers	Comments on Existence of Controversy and Notice of Intent to Participate in Phase I and II
Comments	4/19/91	NAB	Comments re Existence of Controversy and Notice of Intent to Participate in Phase I and II
Comments	4/19/91	Multi-Media	Comments re Existence of Controversy and Notice of Intent to Participate in Phase I and II
Comments	4/19/91	Home Shopping Network	Comments on Existence of Controversy and Notice of Intent to Participate in Phase I and II
Comments	4/19/91	NPR	Comments re Existence of Controversy and Notice of Intent to Participate
Comments	4/19/91	Canadian Claimants	Comments on the Existence of of a Controversy and Notice of Intent to Participate in Phase I and II
Comments	4/19/91	Joint Sports	Comments on the Existence of a Controversy and Notice of Intent to Participate in Phase I
Notice	**4/23/91**	**CRT**	**Notice commencing 1989 cable distribution proceeding**
FED REG	**4/26/91**	**CRT**	**Notice commencing 1989 cable distribution proceeding**
Comments	5/10/91	NPR	Comments on Partial Distribution of the 1989 Cable Royalty Fund
Comments	5/10/91	ASCAP BMI SESAC	Comments on Partial Distribution of the 1989 Cable Royalty Fund

Comments	5/10/91	Program Suppliers	Comments on Partial Distribution of the 1989 Cable Royalty Fund
Comments	5/10/91	Multi-Media	Comments on Partial Distribution of the 1989 Cable Royalty Fund
Comments	5/10/91	HSN	Comments on Partial Distribution of the 1989 Cable Royalty Fund
Comments	5/10/91	Joint Sports	Comments on Partial Distribution of the 1989 Cable Royalty Fund
Comments	5/10/91	PBS	Comments on Partial Distribution of the 1989 Cable Royalty Fund
Comments	5/10/91	Devo-tional	Comments on Partial Distribution of the 1989 Cable Royalty Fund
Comments	5/10/91	NAB	Comments on Partial Distribution of the 1989 Cable Royalty Fund
Comments	5/10/91	Canadian Claimants	Comments on Partial Distribution of the 1989 Cable Royalty Fund
ORDER	**5/14/91**	**CRT**	**CRT orders that 70% of the 1989 Cable Royalty Fund be distributed on May 23, 1991.**
ORDER	**5/14/91**	**CRT**	**CRT establishes a schedule for Phase I in 1989 Cable Royalty Distribution Proceedings.**
Motion	6/17/91	NAB, PBS, CC, & NPR	Joint Motion for Extension of Time for Filing Direct Cases
ORDER	**6/18/91**	**CRT**	**Requests comments on joint motion for extension of time to file Phase I direct cases. Comments are due June 21, 1991.**
Comments	6/21/91	Devo-tional	Concur with Joint Motion for Extension of Time
ORDER	**6/21/91**	**CRT**	**Grants motion of NAB, PBS, CC and NPR for Extension of Time to File, and Extends Other Procedural Dates**
Motion	8/12/91	ASCAP BMI SESAC	Notice of Settlement and Motion for Partial Termination of Proceeding (Regarding Syndex)

Direct Case	*8/16/91*	*MPAA*	*Phase I*	*429 Pages*
Direct Case	*8/16/91*	*PBS*	*Phase I*	*700 Pages*
Direct Case	*8/16/91*	*NAB*	*Phase I*	*231 Pages*
Direct Case	*8/16/91*	*NPR*	*Phase I*	*564 Pages*
Direct Case	*8/16/91*	*Music Claimants*	*Phase I*	*109 Pages*
Direct Case	*8/16/91*	*Canadian Claimants*	*Phase I*	*354 Pages*
Direct Case	*8/16/91*	*Joint Sports Claimants*	*Phase I*	*273 Pages*
Direct Case	*8/16/91*	*Devotional Claimants*	*Phase I*	*106 Pages*
Letter	8/20/91	Midlen	Letter informing Tribunal of copy of claim which is included in Devotional Exhibit No. 2.	
Opposition	8/21/91	Public TV	Opposition of Public Television Claimants to Motion for Termination of Proceedings with Respect to Syndex Fund	
ORDER	**8/22/91**	**CRT**	**Requests comments on Joint Motion by Program Suppliers and Music Claimants, asking Tribunal to declare that no controversy exists concerning syndex portion of the fund.**	
Comments	8/23/91	Joint Sports	Requests further consideration by Tribunal with regard to allocation of the Syndex Fund	
Withdrawal	8/26/91	NPR	NPR withdraws its Written Case in the 1989 Cable Royalty Distribution Proceeding - Attaches Stipulation of Settlement.	
Motion	8/26/91	Program Suppliers	Motion to Compel - Requests Tribunal to issue an Order directing NAB to make available certain documents.	