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SENATE

REPORT
No. 92-72

CREATION OF A LIMITED COPYRIGHT IN SOUND RECORDINGS

APRIL 20, 1971.—Ordered to be printed

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

REPORT

[To accompany S. 646]

The Committee on the Judiciary, to which was referred the bill (S. 646) to amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recordings, and for other purposes, having considered the same, reports favorably thereon, with amendments, and recommends that the bill as amended do pass.

AMENDMENTS

(1) On page 2, lines 9 and 10, strike out "single ephemeral recordings" and insert in lieu thereof "reproductions".

(2) On page 2, line 10, after the word "organizations", insert "exclusively".

(3) On page 2, line 13, after the word "recordings", strike out "other than fixations of sound accompanying a motion picture".

(4) On page 3, line 10, after the word "surface", insert "of reproductions".

(5) On page 3, line 18, after the period, insert the following:

> "Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture. "Reproductions of sound recordings" are material objects in which sounds other than those accompanying a motion picture are fixed by any method now known or later developed, and

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from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, and include the "parts of instruments serving to reproduce mechanically the musical work," "mechanical reproductions," and "interchangeable parts, such as discs or tapes for use in mechanical music-producing machines" referred to in sections 1(e) and 101(e) of this title.

(6) On page 3, between lines 18 and 19, insert the following new section:

SEC. 2. That title 17 of the United States Code is further amended in the following respect:

In section 101, title 17 of the United States Code, delete subsection (e) in its entirety and substitute the following:

"(e) INTERCHANGEABLE PARTS FOR USE IN MECHANICAL MUSIC-PRODUCING MACHINES.—Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall service notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the Copyright Office, sending to the Copyright Office a duplicate of such notice."

(7) On page 3, line 19, strike out "SEC. 2", and insert in lieu thereof "SEC. 3".

(8) On page 3, line 19, strike out "three", and insert in lieu thereof "four".

(9) On page 3, line 20, strike out the period, and insert the following:

except that section 2 of this Act shall take effect immediately upon its enactment.

(10) On page 3, line 21, after the word "Code", insert the following: "as amended by section 1 of this Act,".

PURPOSE OF AMENDMENTS

Most of the amendments are of a perfecting nature or provide for the definition of various terms. In addition the effective date of the legislation as it applies to the creation of a copyright in sound recordings is established at 4 months after enactment rather than 3 months. This amendment is at the request of the Copyright Office

which indicated that additional time would be necessary to take the various measures required to implement the provisions of this bill. S. 646 as introduced permitted the making of a single ephemeral recording by transmitting organizations for their own use. As amended the bill contains no limitation on the number of reproductions made by transmitting organizations exclusively for their own use.

A significant substantive amendment is the addition of a new section 2 relating to the remedies available to the proprietors of copyrighted music for the unauthorized use of such music in the making of sound recordings. The Copyright Act of 1909 contains special and limited remedies in the event of the unauthorized use of copyrighted music in a recording. The purpose of the new section 2 is to extend to the owners of copyrighted music used in the making of recordings the same remedies available for other copyright infringements under the act of 1909, including in a case of willful infringement for profit, the criminal prosecution provided in section 104 of title 17.

Views of Government Agencies

The Library of Congress and the Copyright Office support the enactment of this legislation.

Statement

The creation of a limited copyright in sound recordings has been under active consideration by the Congress for a number of years in connection with the program for general revision of the copyright law. The Library of Congress recommended the granting of such copyright protection in its recommendations for the general revision of the copyright law. Such a provision was included in H.R. 2512 of the 90th Congress as passed by the House of Representatives. This provision was also included in S. 597 of the 90th Congress on which this committee's Subcommittee on Patents, Trademarks, and Copyrights held extensive hearings in 1967. No further action was taken in the Senate on this legislation during the 90th Congress primarily because of developments relating to the cable television issue.

On December 10, 1969, the Senate Subcommittee on Patents, Trademarks, and Copyrights reported S. 543 of the 91st Congress, for the general revision of the copyright law with an amendment in the nature of a substitute. This bill, as amended, established a copyright in sound recordings, but again because of the situation relating to the cable television issue no further action was taken. S. 543 as reported by the subcommittee, in addition to creating a limited copyright in sound recordings, extended that protection to encompass a performance right so that record companies and performing artists would be compensated when their records were performed for commercial purposes. This provision is not included in S. 646 but will be considered subsequently when the committee acts on the legislation for the general revision of the copyright law.

Subsequently the attention of the committee was directed to the widespread unauthorized reproduction of phonograph records and tapes. While it is difficult to establish the exact volume or dollar value of current piracy activity it is estimated by reliable trade sources that the annual volume of such piracy is now in excess of $100 million. It

has been estimated that legitimate prerecorded tape sales have an annual value of approximately $300 million. The pirating of records and tapes is not only depriving legitimate manufacturers of substantial income, but of equal importance is denying performing artists and musicians of royalties and contributions to pension and welfare funds and Federal and State governments are losing tax revenues.

If the unauthorized producers pay the statutory mechanical royalty required by the Copyright Act for the use of copyrighted music there is no Federal remedy currently available to combat the unauthorized reproduction of the recording. The States of New York and California have enacted statutes intended to suppress record piracy, but in other jurisdictions the only remedy available to the legitimate producers is to seek relief in State courts on the theory of unfair competition. A number of suits have been filed in various States but even when a case is brought to a successful conclusion the remedies available are limited. In addition the jurisdiction of States to adopt legislation specifically aimed at the elimination of record and tape piracy has been challenged on the theory that the copyright clause of the Federal Constitution has preempted the field even if Congress has not granted any copyright protection to sound recordings. While the committee expresses no opinion concerning this legal question, it is clear that the extension of copyright protection to sound recordings would resolve many of the problems which have arisen in connection with the efforts to combat piracy in State courts.

On December 18, 1970, Senator John L. McClellan introduced S. 4592 of the 91st Congress which would have created a limited copyright in sound recordings. This bill was based on the provisions contained in S. 543, as approved by the subcommittee in the 91st Congress. Because of the adjournment of the 91st Congress no action was taken on that bill. On February 8, 1971, Senator McClellan on behalf of himself and Senator Hugh Scott introduced S. 646 which is identical to S. 4592. On March 16, 1971, Senator John Tower was added as a cosponsor of this legislation.

The United States recently participated in an international conference of government experts at which the draft of an international treaty to combat record piracy was prepared. It is anticipated that a diplomatic conference to sign a treaty on this subject will be held later in 1971.

The enactment of S. 646 will mark the first recognition in American copyright law of sound recordings as copyrightable works. The copyrightable work comprises the aggregation of sounds and not the tangible medium of fixation. Thus, "sound recordings" as copyrightable subject matter are distinguished from "reproductions of sound recordings," the latter being physical objects in which sounds are fixed. They are also distinguished from any copyrighted literary, dramatic, or musical works that may be reproduced on a "sound recording."

The committee believes that, as a class of subject matter, sound recordings are clearly within the scope of the "writings of an author" capable of protection under the Constitution, and that the extension of limited statutory protection to them is overdue. Aside from cases in which sounds are fixed by some purely mechanical means without originality of any kind, the committee favors copyright protection

that would prevent the reproduction and distribution of unauthorized reproductions of sound recordings.

The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable. As in the case of motion pictures, the bill does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.

This legislation extends copyright protection to sound recordings "that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture." In excluding "the sounds accompanying a motion picture" from the scope of this legislation the committee does not intend to limit or otherwise alter the rights that exist currently in such works. The exclusion reflects the committee's opinion that soundtracks or audio tracks are an integral part of the "motion pictures" already accorded protection under subsections (l) and (m) of section 1 of title 17, and that the reproduction of the sound accompanying a copyrighted motion picture is an infringement of copyright in the motion picture. This is true whatever the physical form of the reproduction, whether or not the reproduction also includes visual images, and whether the motion picture copyright owner had licensed use of the soundtrack on records.

Under the existing title 17, "motion pictures" represent a broad genus whose fundamental characteristic is a series of related images that impart an impression of motion when shown in succession, including any sounds integrally conjoined with the images. Under this concept the physical form in which the motion picture is fixed—film, tape, discs, and so forth—is irrelevant, and the same is true whether the images reproduced in the physical object can be made out with the naked eye or require optical, electronic, or other special equipment to be perceived. Thus, to take a specific example, if there is an unauthorized reproduction of the sound portion of a copyrighted television program fixed on video tape, a suit for copyright infringement could be sustained under section 1(a) of title 17 rather than under the provisions of this bill, and this would be true even if the television producer had licensed the release of a commercial phonograph record incorporating the same sounds.

This legislation grants to the owners of the copyright in sound recordings the exclusive right to "reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending," reproductions of the copyrighted work. Section 1(a) of the present title 17 gives the copyright owner the exclusive right to "print, reprint, publish, copy, and vend" the copyrighted work. As a technical matter, this is broad enough to include rental, leasing, and lending, as well as sales and gifts. The right is subject to the "first sale doctrine," under which a copyright owner who unconditionally parts with a physical

object embodying his work cannot restrain any later disposition of that physical object. However, in the case of a transaction such as a rental, lease, or loan, where the copyright owner delivers a physical object embodying his work only on certain stated conditions, distribution by any unauthorized means would violate his exclusive right to "publish."

S. 646 would add a new exclusive right with respect to sound recordings which, in addition to reproduction, would include public distribution "by sale or other transfer of ownership, or by rental, lease, or lending" of reproductions. The purpose of this language is to identify as clearly as possible the limited rights being accorded to sound recordings, and it should in no way be construed as limiting the exclusive rights of copyright owners in other types of works with respect to forms of distribution short of the outright sale of copies.

In approving the creation of a limited copyright in sound recordings it is the intention of the committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17.

Certain of the manufacturers engaged in the unauthorized reproduction of records and tapes have proposed the inclusion in the legislation of provisions granting a compulsory license to reproduce records and tapes upon payment of a statutory royalty. It has been argued that such a provision would be an appropriate adjunct to the compulsory license provided the record industry by the mechanical royalty contained in the Copyright Act. The committee sees no valid parallel. By the mechanical royalty the record company in effect receives the right to make use of raw material—in this instance a copyrighted song. The record label, the performing artist, musicians, and arrangers develop this song into the finished product—the recorded song. The committee sees no justification for the granting of a compulsory license to copy the finished product, which has been developed and promoted through the efforts of the record company and the artists. Any unauthorized manufacturer who wishes to produce a record containing the same songs may do so by paying the mechanical royalty and making the same investment in production and talent as is being done by the authorized record companies.

Sectional Analysis

Section 1(a) of the bill, as amended, adds a new subsection (f) to section 1 of title 17 of the United States Code adding to the enumerated exclusive rights of copyright proprietors the right to reproduce the copyrighted work if it be a sound recording. It is provided that the right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, or to reproductions made by transmitting organizations exclusively for their own use.

Section 1(b) amends section 5 of title 17 to add to the classification of works for copyright registration the category of "sound recordings."

Section 1(c) amends section 19 of title 17 to specify the required form of the copyright notice on sound recordings.

Section 1(d) amends section 20 of title 17 to specify the proper location of the notice of copyright as it pertains to a sound recording.

Section 1(e) amends section 26 of title 17 to enumerate the various sections of title 17 concerning which the reproduction of a sound

recording is "considered to be a copy thereof." The subsection also defines the terms "sound recordings" and "reproduction of sound recordings."

Section 2 of the bill, as amended, amends section 101 of title 17 to delete subsection (e) which relates to "Royalties for Use of Mechanical Reproduction of Musical Works." The section substitutes a new subsection (e) providing that any person engaging in the unauthorized use of copyrighted music in the mechanical reproduction of musical works shall be subject to all of the provisions of title 17 dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104. The existing statutory provision in title 17 limits the remedy for such unauthorized use of musical works to the payment of a royalty of 2 cents on each part manufactured and a discretionary award of not more than 6 cents.

Section 3 of the bill, as amended, provides that the effective date of this legislation shall be 4 months after its enactment except, that section 2 shall become effective upon the bill's enactment. It is further provided that the provisions of title 17 as amended by section 1 of this legislation apply only to sound recordings "fixed, published, and copyrighted on and after the effective date of this Act."

Attached, hereto, is the report of the Librarian of Congress, dated January 19, 1971:

THE LIBRARIAN OF CONGRESS,
Washington, D.C., January 19, 1971.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: This is in reply to your request for a report on S. 4592, a bill amending the copyright statute to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes.

I am fully and unqualifiedly in favor of the purpose the bill is intended to fulfill. The recent and very large increase in unauthorized duplication of commercial records has become a matter of public concern in this country and abroad. With the growing availability and use of inexpensive cassette and cartridge tape players, this trend seems certain to continue unless effective legal means of combating it can be found. Neither the present Federal copyright statute nor the common law or statutes of the various States are adequate for this purpose. The best solution, an amendment of the copyright law to provide limited protection against unauthorized duplication, is that embodied in S. 4592.

In general, we also support the amendatory language adopted in the bill, which draws heavily upon the language of the bill for general revision of the copyright law (S. 543), before your committee this past session. It may be that some further refinements, particularly with respect to the definition of certain terms used, would benefit the bill technically, but these improvements are more desirable than essential.

A point of some concern to libraries and librarians is the extent to which the bill would prevent library tape duplication aimed at preserving the quality of disk recordings. Although many activities of this sort would be considered "fair use" and thus automatically exempt, we would favor addition of a specific exemption along the lines of the exemption for "ephemeral recordings" in section 1(a). Another important practical question is whether the 3-month period provided in section 2 would allow the Copyright Office enough time to prepare for implementation of the new law. Recognizing the urgency of the record piracy problem, we nevertheless think that a somewhat longer period would improve the chances of an efficient registration system from the outset.

The most fundamental question raised by the bill is its relationship to the program for general revision of the copyright law. The revision bill before your committee this past session and which Senator McClellan proposes to reintroduce, has parallel provisions, and if general revision were on the threshhold of enactment, S. 4592 would be unnecessary. However, some fundamental problems impeding the progress of general revision of the copyright law, notably the issue of cable television, have not yet been resolved. We agree that the national and international problem of record piracy is too urgent to await comprehensive action on copyright law revision, and that the amendments proposed in S. 4592 are badly needed now. Upon enactment of the revision bill, they would, of course, be merged into the larger pattern of the revised statute as a whole.

I might also mention that the problem of record piracy is one of immediate concern internationally, and that a treaty closely corresponding to the content and purpose of S. 4592 is now under active development. If current plans remain unchanged, this special treaty will be signed at Paris next July, and favorable action on the domestic bill will not only help our negotiators but encourage protection of our records against the growing menace of piracy in other countries.

For the foregoing reasons, I recommend that your committee give S. 4592 its favorable consideration.

Sincerely yours,

L. QUINCY MUMFORD,
Librarian of Congress.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

COPYRIGHTS

(Act of July 30, 1947, ch. 391 (62 Stat. 652; 17 U.S.C.))

§1. Exclusive rights as to copyrighted works

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

* * * * * * *

(f) To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording: Provided, That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: Provided further, That this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by transmitting organizations exclusively for their own use.

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§5. Classification of works for registration

The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.

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(n) Sound recordings.

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§19. Notice; form

The notice of copyright required by section 10 of this title shall consist either of the word "Copyright", * * *

In the case of reproductions of works specified in subsection (n) of section 5 of this title, the notice shall consist of the symbol P (the letter P in a circle), the year of first publication of the sound recording, and the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner: Provided, That if the producer of the sound recording is named on the labels or containers of the reproduction, and if no other name appears in conjunction with the notice, his name shall be considered a part of the notice.

§ 20. Same; place of application of; one notice in each volume or number of newspaper or periodical

The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music, *or if a sound recording on the surface of reproductions thereof or on the label or container in such manner and location as to give reasonable notice of the claim of copyright.* One notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice.

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§ 26. Terms defined

In the interpretation and construction of this title "the date of publication" shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority, and the word "author" shall include an employer in the case of works made for hire.

For the purposes of this section and sections 10, 11, 13, 14, 21, 101, 106, 109, 209, 215, but not for any other purpose, a reproduction of a work described in subsection 5(n) shall be considered to be a copy thereoff "Sound recordings" are works that result from the fixation of a series o. musical, spoken, or other sounds, but not including the sounds accompanying a motion picture. "Reproductions of sound recordings" are material objects in which sounds other than those accompanying a motion picture are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, and include the "parts of instruments serving to reproduce mechanically the musical work," "mechanical reproductions," and "interchangeable parts, such as discs or tapes for use in mechanical music-producing machines" referred to in sections 1(e) and 101(e) of this title.

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Chapter 2.—INFRINGEMENT PROCEEDINGS

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§ 101. Infringement

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) INJUNCTION.—

To an injunction restraining such infringement;

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[(e) ROYALTIES FOR USE OF MECHANICAL REPRODUCTION OF MUSICAL WORKS.—Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section 1, subsection (e), of this title: Provided also, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office,

sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section 1, subsection (e), of this title, by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.]

(e) *INTERCHANGEABLE PARTS FOR USE IN MECHANICAL MUSIC-PRODUCING MACHINES.—Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice.*

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