100TH CONGRESS
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H. R. 2848

To amend title 17, United States Code, relating to copyrights, to provide for the interim statutory licensing of the secondary transmission by satellite carriers of superstations for private viewing by earth station owners

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IN THE HOUSE OF REPRESENTATIVES

JUNE 30, 1987

Mr KASTENMEIER (for himself, Mr SYNAR, Mr BOUCHER, Mr MOORHEAD, Mr HUGHES, and Mr GARCIA) introduced the following bill, which was referred to the Committee on the Judiciary

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A BILL

To amend title 17, United States Code, relating to copyrights, to provide for the interim statutory licensing of the secondary transmission by satellite carriers of superstations for private viewing by earth station owners.

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 "Satellite Home Viewer Copyright Act of 1987"

SEC. 2 AMENDMENTS TO TITLE 17, UNITED STATES CODE.

Title 17, United States Code, is amended as follows:

(1) Section 111 is amended—

(A) in subsection (a)—

(i) in clause (3) by striking "or" at the end;

(ii) by redesignating clause (4) as clause (5), and

(iii) by inserting the following after clause (3)

"(4) the secondary transmission is made by a satellite carrier for private viewing pursuant to a compulsory license under section 119; or", and

(B) in subsection (d)(2)(A) by inserting before "Such statement" the following:

"In determining the total number of subscribers and the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, the system shall not include subscribers and amounts collected from subscribers receiving secondary transmissions for private viewing pursuant to section 119."

(2) Chapter 1 of title 17, United States Code, is amended by adding at the end the following new section:

"§ 119. Limitations on exclusive rights: Secondary transmissions of superstations for private viewing

"(a) SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS.—

"(1) Subject to the provisions of clauses (2), (3), and (4) of this subsection, secondary transmissions of a primary transmission made by a superstation and embodying a performance or display of a work shall be subject to statutory licensing if the secondary transmission is made by a satellite carrier to the public for private viewing, and the carrier makes a direct charge for such retransmission service to each subscriber receiving the secondary transmission or to a distributor that has contracted with the carrier for direct or indirect delivery of the secondary transmission to the public for private viewing

"(2) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, where the satellite carrier has not deposited the statement of account and royalty fee required by subsection (b)

"(3) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcement transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the satellite carrier through changes, deletions, or additions, or is combined with programming from any other broadcast signal.

"(4) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the satellite carrier discriminates against a distributor in a manner which violates

the Communications Act of 1934 or rules issued by the Federal Communications Commission with respect to discrimination.

"(b) STATUTORY LICENSE FOR SECONDARY TRANSMISSIONS FOR PRIVATE VIEWING.—

"(1) A satellite carrier whose secondary transmissions are subject to statutory licensing under subsection (a) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal, prescribe by regulation—

"(A) a statement of account, covering the preceding 6-month period, specifying the names and locations of all superstations whose signals were transmitted, at any time during that period, to subscribers for private viewing as described in subsection (a)(1), the total number of subscribers that received such transmissions, and such other data as the Register of Copyrights may, after consultation with the Copyright Royalty Tribunal, from time to time prescribe by regulation, and

"(B) a royalty fee for that 6-month period, computed by multiplying the number of subscribers receiving each secondary transmission during each calendar month by 12 cents.

"(2) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section (other than the costs deducted under clause (4)), shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title

"(3) The royalty fees deposited under clause (2) shall, in accordance with the procedures provided by clause (4), be distributed to those copyright owners whose works were included in a secondary transmission for private viewing made by a satellite carrier during the applicable 6-month accounting period and who file a claim with the Copyright Royalty Tribunal under clause (4)

"(4) The royalty fees deposited under clause (2) shall be distributed in accordance with the following procedures:

"(A) During the month of July in each year, each person claiming to be entitled to compulsory license fees for secondary transmissions for private

viewing shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation Notwithstanding any provision of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

"(B) After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such controversy exists, the Tribunal shall, after deducting reasonable administrative costs under this clause, distribute such fees to the copyright owners entitled to receive them, or to their designated agents If the Tribunal finds the existence of a controversy, the Tribunal shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees

"(C) During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy

"(c) DETERMINATION OF ROYALTY FEES —

"(1) METHODS FOR DETERMINING ROYALTY FEES.—The rate of the royalty fee payable under subsection (b)(1)(B) shall be effective until December 31, 1991, unless a royalty fee is established under clause (2) or (3) of this subsection. After that date, the fee shall be determined either in accordance with the voluntary negotiation procedure specified in clause (2) of this subsection or in accordance with the compulsory arbitration procedure specified in clauses (3) and (4) of this subsection

"(2) FEE SET BY VOLUNTARY NEGOTIATION.—

"(A) On or before July 1, 1990, the Copyright Royalty Tribunal shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining the royalty fee to be paid by

satellite carriers under subsection (b)(1)(B) of this section.

"(B) Satellite carriers, distributors, and copyright owners entitled to royalty fees under this section shall negotiate in good faith in an effort to reach a voluntary agreement or voluntary agreements for the payment of royalty fees. Notwithstanding any provision of the antitrust laws, any such satellite carriers, distributors, and copyright owners may at any time negotiate and agree to the royalty fee, and may designate common agents to negotiate, agree to, or pay such fees If the parties fail to identify common agents, the Copyright Royalty Tribunal shall do so, after requesting recommendations from the parties to the negotiation proceeding The parties to each negotiation proceeding shall bear the entire cost thereof.

"(C) Voluntary agreements negotiated at any time in accordance with this clause shall be binding upon all satellite carriers, distributors, and copyright owners that are parties thereto. Copies of such agreements shall be filed with the Copyright Office within thirty days after execution in

accordance with regulations that the Register of Copyrights shall prescribe

"(D) The obligation to pay the royalty fees established under a voluntary agreement which has been filed with the Copyright Office in accordance with this clause shall become effective on the date specified in the agreement, and shall remain in effect until December 31, 1995.

"(3) FEE SET BY COMPULSORY ARBITRATION.—

"(A) On or before December 31, 1990, the Copyright Royalty Tribunal shall cause notice to be published in the Federal Register of the initiation of arbitration proceedings for the purpose of determining a reasonable royalty fee to be paid under subsection (b)(1)(B) of this section by satellite carriers who are not parties to a voluntary agreement filed with the Copyright Office in accordance with clause (2) of this subsection. Such notice shall include the names and qualifications of potential arbitrators chosen by the Tribunal from a list of available arbitrators obtained from the American Arbitration Association or such similar organization as the Tribunal shall select

"(B) Not later than ten days after publication of the notice initiating an arbitration proceeding,

and in accordance with procedures to be specified by the Copyright Royalty Tribunal, one arbitrator shall be selected from the published list by copyright owners who claim to be entitled to royalty fees under subsection (b)(4) of this section and who are not party to a voluntary agreement filed with the Copyright Office in accordance with clause (2) of this subsection, and one arbitrator shall be selected from the published list by satellite carriers and distributors who are not parties to such a voluntary agreement The two arbitrators so selected shall, within ten days after their selection, choose a third arbitrator from the same list, who shall serve as chairperson of the arbitrators. If either group fails to agree upon the selection of an arbitrator, or if the arbitrators selected by such groups fails to agree upon the selection of a chairperson, the Copyright Royalty Tribunal shall promptly select the arbitrator or chairperson, respectively The arbitrators selected under this paragraph shall constitute an Arbitration Panel

"(C) The Arbitration Panel shall conduct an arbitration proceeding in accordance with such procedures as it may adopt. The Panel shall act on the basis of a fully documented written record

Any copyright owner who claims to be entitled to royalty fees under subsection (b)(4) of this section, any satellite carrier, and any distributor, who is not party to a voluntary agreement filed with the Copyright Office in accordance with clause (2) of this subsection, may submit relevant information and proposals to the Panel The parties to the proceeding shall bear the entire cost thereof in such manner and proportion as the Panel shall direct.

"(D) In determining royalty fees under this clause, the Arbitration Panel shall consider the approximate average cost to a cable system for the right to secondarily transmit to the public a primary transmission made by a broadcast station, the fee established under any voluntary agreement filed with the Copyright Office in accordance with clause (2) of this subsection, and the last fee proposed by the parties, before proceedings under this clause, for the secondary transmission of superstations for private viewing. The fee shall also be calculated to achieve the following objectives:

"(i) To maximize the availability of creative works to the public.

"(ii) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions

"(iii) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication

"(iv) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices

"(E) Not later than sixty days after publication of the notice initiating an arbitration proceeding, the Arbitration Panel shall report to the Copyright Royalty Tribunal its determination concerning the royalty fee. Such report shall be accompanied by the written record, and shall set forth the facts that the Board found relevant to its determination and the reasons why its determina-

tion is consistent with the criteria set forth in paragraph (D) of this clause.

"(F) Within 60 days after receiving the report of the Arbitration Panel under paragraph (E) of this clause, the Copyright Royalty Tribunal shall adopt or reject the determination of the Panel The Tribunal shall adopt the determination of the Panel unless the Tribunal finds that the determination is clearly inconsistent with the criteria set forth in paragraph (D) of this clause. If the Tribunal rejects the determination of the Panel, the Tribunal shall, before the end of that 60-day period, and after full examination of the record created in the arbitration proceeding, issue an order, consistent with the criteria set forth in paragraph (D) of this clause, setting the royalty fee under this clause The Tribunal shall cause to be published in the Federal Register the determination of the Panel, and the decision of the Tribunal with respect to the determination (including any order issued under the preceding sentence) The Tribunal shall also publicize such determination and decision in such other manner as the Tribunal considers appropriate. The Tribunal shall also make the report of the Arbitration Panel and

the accompanying record available for public inspection and copying.

"(G) The obligation to pay the royalty fee established under a determination of the Arbitration Panel which is confirmed by the Copyright Royalty Tribunal in accordance with this clause, or established by any order issued under paragraph (F) of this clause, shall become effective on the date when the decision of the Tribunal is published in the Federal Register under paragraph (F) of this clause, and shall remain in effect until modified in accordance with clause (4) of this subsection, or until December 31, 1995

"(H) The royalty fee adopted or ordered under paragraph (F) of this clause shall be binding on all satellite carriers, distributors, and copyright owners, who are not party to a voluntary agreement filed with the Copyright Office under clause (2) of this subsection

"(4) JUDICIAL REVIEW.—Any decision of the Copyright Royalty Tribunal under clause (3) of this subsection with respect to a determination of the 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 Co-

lumbia Circuit, within thirty days after the publication of the decision in the Federal Register The pendency of an appeal under this clause shall not relieve satellite carriers of the obligation under subsection (b)(1) of this section to deposit the statement of account and royalty fees specified in that subsection The court shall have jurisdiction to modify or vacate a decision of the Tribunal only if it finds, on the basis of the record before the Tribunal and the statutory criteria set forth in clause (3)(D) of this subsection, that the Arbitration Panel or the Tribunal acted in an arbitrary manner If the court modifies the decision of the Tribunal, the court shall have jurisdiction to enter its own determination with respect to royalty fees, to order the repayment of any excess fees deposited under subsection (b)(1)(B) of this section, 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 Tribunal and remand the case for arbitration proceedings in accordance with clause (3) of this subsection.

"(d) DEFINITIONS.—As used in this section—

"(1) ANTITRUST LAWS —The term 'antitrust laws' has the meaning given that term in subsection (a)

of the first section of the Clayton Act (15 U S C. 12(a))

"(2) DISTRIBUTOR.—The term 'distributor' means an entity which contracts to distribute secondary transmissions from a satellite carrier and, either as a single channel or in a package with other programming, provides the secondary transmission either directly to individual subscribers for private viewing or indirectly through other program distribution entities.

"(3) INDEPENDENT STATION.—The term 'independent station' has the meaning given that term in section 111(f) of this title

"(4) PRIMARY TRANSMISSION.—The term 'primary transmission' has the meaning given that term in section 111(f) of this title.

"(5) PRIVATE VIEWING.—The term 'private viewing' means the viewing, for private use in an individual's dwelling unit by means of equipment which is operated by such individual, of a secondary transmission delivered by a satellite carrier of a primary transmission of a television station licensed by the Federal Communications Commission.

"(6) SATELLITE CARRIER.—The term 'satellite carrier' means a common carrier that is licensed by the Federal Communications Commission to establish and

operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases a transponder on a satellite in order to provide such point-to-multipoint distribution

"(7) SECONDARY TRANSMISSION.—The term 'secondary transmission' has the meaning given that term in section 111(f) of this title.

"(8) SUBSCRIBER.—The term 'subscriber' means an individual who receives a secondary transmission service for private viewing by means of a secondary transmission from a satellite carrier and pays a fee for the service, directly or indirectly, to the satellite carrier or to a distributor.

"(9) SUPERSTATION.—The term 'superstation' means a television broadcast station licensed by the Federal Communications Commission that—

"(A) was secondarily transmitted by a satellite carrier for nationwide distribution on June 1, 1987, or

"(B) is secondarily transmitted by a satellite carrier and is then secondarily transmitted by cable systems serving, in the aggregate, not less than 10 percent of all cable television subscribers, as reflected in the most current statements of account deposited by cable systems with the Regis-

ter of Copyrights in accordance with section 111(d)(2)(A) of this title."

(3) Section 801(b)(3) of title 17, United States Code, is amended by striking "and 116" and inserting ", 116, and 119(b)"

(4) Section 804(d) of title 17, United States Code, is amended by striking "sections 111 or 116" and inserting "section 111, 116, or 119".

(5) The table of sections for chapter 1 of title 17, United States Code, is amended by adding at the end the following new item

"119 Limitations on exclusive rights Secondary transmissions of superstations for private viewing"

SEC 3. EFFECTIVE DATE.

This Act and the amendments made by this Act take effect on January 1, 1988, except that the authority of the Copyright Royalty Tribunal to set rates pursuant to the amendments made by this Act takes effect upon the date of the enactment of this Act.

SEC. 4 TERMINATION

This Act and the amendments made by this Act cease to be effective on December 31, 1995.

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