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Copyright Term Extension and Music Licensing: Review of Recent Developments

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Dorothy Schrader
Senior Specialist, American Public Law
American Law Division

ABSTRACT

H.R. 2589, as passed by the House of Representatives in the 105th Congress, increases the term of copyright protection by an additional 20 years and enacts significant reforms of music licensing practices. The music licensing reforms: expand the exemption for businesses playing music by radios or televisions; mandate local arbitration of rates; and eliminate vicarious liability of landlords. This report summarizes the provisions H.R. 2589 reviews the arguments for and against both the term-extension and the music licensing proposals and identifies contending stakeholders. This report will be updated in the event of subsequent legislative actions.

Copyright Term Extension and Music Licensing: Review of Recent Developments

Summary

Duration of copyright is one of the major parameters for establishing the amount of protection accorded authors and other owners of copyright. It is also the principal dividing line between the property rights of these owners and the public domain — that is, the domain of unprotected works which are available to the public for unrestricted, uncompensated use.

Under current law, with several exceptions, copyright generally endures for 75 years from publication or for the life of the author plus 50 years. Pending bills (S. 505 and H.R. 2589) would extend the usual copyright term an additional 20 years — to 95 years from publication or, as applicable, life of the author plus 70 years. H.R. 2589 passed the House of Representatives on March 25, 1998. As passed by the House, H.R. 2589 was amended, among other changes, to include the Sensenbrenner Amendment. The latter amendment attached a Title II to H.R. 2589, which embodied three core provisions of H.R. 789 (the "Fairness in Musical Licensing Act").

In addition to the term extension provisions, S. 505 and H.R. 2589 would i) accord to certain authors and their heirs a new termination right in the 20-year added period, and ii) grant libraries and nonprofit educational institutions a narrow exemption to reproduce works not commercially exploited and not available at a reasonable price during the 20-year added period. The music licensing provisions added to H.R. 2589 by the Sensenbrenner Amendment do not appear in S. 505. Also, H.R. 2589 contains provisions relating to the division of royalties for licensing of motion pictures that do not appear in S. 505.

The principal arguments in favor of extending the copyright term 20 years are: 1) the need to assure fair economic benefits to authors, their heirs, and distributors of copyrighted works to encourage continued creativity; and 2) the need to conform U.S. copyright terms to the European Union standards, in order to enjoy reciprocal protection for American works in Europe and to enhance U.S. bargaining power in trade negotiations. Opponents of term-extension deny there is any economic unfairness in the existing average U.S. term of 75 years, and argue that this term already exceeds the new European Union terms in the case of most commercially significant works (i.e., works made for hire). Opponents also emphasize the value of the public domain in encouraging the creation of new works.

The music licensing provisions of H.R. 2589 (Title II) are supported by operators of restaurants, bars, taverns, hotels, and retail stores; by small business music users in general; and by landlords and other operators of premises where music is publicly performed. Title II of H.R. 2589 is opposed by music copyright owners (composers, lyricists, and music publishers), copyright owners in general, and the music performing rights societies.

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Duration of copyright is one of the major parameters for establishing the amount of protection accorded to authors and other owners of copyright. It is also the principal dividing line between the property rights of such owners and the public domain — the domain of unprotected works which are available to the public for unrestricted, uncompensated use.

Under the United States Constitution, Art. I, Sec. 8, Cl. 8, Congress is authorized to grant copyright protection only for "limited Times." Under current law, copyright in post-1977[1] works endures generally for the life of the author plus 50 years for personal works, or the shorter of 75 years from publication or 100 years from creation in the case of works made for hire, anonymous works, or pseudonymous works. If a personal work is created jointly by two or more authors, the term is measured by the life of the last surviving author. Copyright in pre-1978 works endures generally for 75 years from publication with notice of copyright or registration in the Copyright Office as an unpublished work.

Most Recent Developments

Bills pending in Congress (S. 505 and H.R.2589) would extend the existing copyright terms generally by an additional 20 years. The extended terms would apply retroactively to all works in which copyright now exists.

On March 25, 1998, the House of Representatives passed H.R. 2589 with several amendments. Title II of H.R. 2589 contains three of the core provisions of a separate bill, H.R. 789, known as the "Fairness in Musical Licensing Act." H.R. 2589 and S. 505 are under consideration by the Senate Judiciary Committee.

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[1] The last general revision of the copyright law was enacted in 1976 and took effect on January 1, 1978. Public Law 94-553, Act of October 19, 1976, codified as Title 17, U.S.Code, §§101 *et seq.* This general revision effected many important changes in the law, including a change in computation of the copyright term. For various reasons, including fairness and possible impairment of contracts, Congress changed the basis for computing the copyright term only for post-1977 works, that is, works in which copyright is secured under the conditions of the law effective January 1, 1978. For personal works (i.e., works created by known authors who are not employees of another person or entity) copyrighted after 1977, the term is based on the life of the author plus 50 years. For impersonal works, the term is a fixed period , which is the shorter of 75 years from publication or 100 years from creation. For pre-1978 copyrighted works, the term is also a fixed period of 75 years — computed from the date copyright was secured. All of an author's post-1977 copyrights expire (and enter the public domain, therefore) at the same time. Copyright in pre-1978 works expires individually for each work.

This report summarizes H.R. 2589 as passed by the House of Representatives and reviews and summarizes the arguments for and against both the term extension and the music licensing proposals.[2]

Summary of Copyright Term-Extension Provisions

Title I of H.R. 2589 would increase the term of existing and future copyrights by 20 years. Essentially the same term-extension proposals were considered but not enacted in the 104th Congress.[3] The House Judiciary Committee reported favorably on H.R. 2589 with amendments on March 18, 1998.[4] The House passed the bill with further amendments, including the music licensing provisions of Title II, on March 25, 1998.

Title I of H.R. 2589 , in addition to adding 20 years to the term of existing and future copyrights, would: 1) grant a new, limited termination right[5] with respect to the 20-year period; 2) expand the classes of persons eligible to terminate licensing contracts; 3) grant libraries and nonprofit educational institutions a narrow exemption to use copyrighted works during the 20-year period if the works are not commercially exploited and copies are not available at a reasonable price; 4) express a "sense of Congress" view encouraging private sector interests to negotiate voluntary agreements to establish an audiovisual works fund allocating royalties received from the exploitation of motion pictures during the 20-year period; and 5) require the assumption by transferees of motion picture rights of certain collective bargaining contractual obligations.

Copyright Term Extensions.

- For post-1977 personal works, the copyright term would become life of the author plus 70 years.

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[2] This report does not discuss S. 505 further, but notes that the basic term-extension provisions of S. 505 and H.R. 2589 are identical. The music licensing provisions are not included in S. 505. For a more detailed analysis of the term-extension issues, see a separate report by D. Schrader, *"Proposed U.S. Copyright Term Extension,"* CRS Report No. 95-799 S. For a more detailed analysis of the musical licensing issues, see a separate report by D. Schrader, *'Music Licensing Copyright Proposals: An Overview of H.R. 789 and S. 28,"* CRS Report No. 97-789 A.

[3] S. 483 and H.R. 989. Hearings were held on H.R. 989 by the House Subcommittee on Courts and Intellectual Property on June 1, 1995 and July 13, 1995. Senate hearings were held on September 20, 1995. The Senate Judiciary Committee reported an amended version of S. 483. S. REP. 104-315, 104th Cong., 2d Sess. (1996). No further action occurred on either bill in the 104th Congress.

[4] H.R. REP. 105-452, 105th Cong., 2d Sess. (1998).

[5] A "termination right" is an inalienable right granted by the copyright statute to authors and their heirs to revoke an earlier contract assigning or licensing rights to another party, after a certain period of years.

- For post-1977 works for hire, anonymous or pseudonymous works, the term would become the shorter of 95 years from publication or 120 years from creation.

- For pre-1978 works, the term would become 95 years from the date copyright was secured either by publication with notice of copyright, or, in the case of unpublished works, by registration.

All of the extended terms would apply retroactively to any work in which copyright now exists, and to the works that have been retrieved from the public domain by the 1994 law implementing the General Agreement on Tariffs and Trade (GATT).[6]

Another special provision would extend the term of works created but not copyrighted before 1978 (i.e., unpublished, unregistered works) by 20 years (by increasing their expiration date from 2027 to 2047), provided the work is published by December 31, 2002.[7] Preemption of common law/state law copyright in pre-February 15, 1972 sound recordings is also delayed 20 years from February 15, 2047 to February 15, 2067.

Termination Provisions of H.R. 2589 (Title I). Termination provisions affect transfer and ownership of the rights granted to authors under the copyright statute. They are a means for regulating who benefits from a statutory increase in the length of the copyright term. The exercise of termination rights essentially effects a reversion of the copyright (or other partial rights) back to the original author-owner (or the heirs of the author) notwithstanding a contractual assignment of the property to another.

Existing copyright law contains two termination provisions. One termination clause applies to "old law works" (i.e., works copyrighted before 1978), which is found at section 304 (c) of the 1976 Copyright Act. It applies to grants (i.e., licensing agreements) executed before January 1, 1978 by the author or any

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[6] Uruguay Round Agreements Act, Pub. L. No. 103-465 (December 8, 1994). For eligible works, copyright restoration occurred automatically one year after the effective date of the entry into force of the World Trade Organization. Therefore, these copyrights were restored effective January 1, 1996. While the eligibility rules are complicated, in general copyright is restored for "foreign-origin" (i.e., non-United States origin) Berne Convention works. The Berne Convention is the major international copyright treaty, of which the United States became a member on March 1, 1989.

[7] The general revision of the copyright law effective January 1, 1978, preempted common law and state statutory copyrights in unpublished works. Congress granted these works a minimum federal term of 25 years. The term can be increased to 50 years by publication on or before December 31, 2002. H.R. 2589 fixes a 70-year term, if the work is published before 2003. The purpose of the existing law was to provide minimum federal protection for pre-1978 common law works, in order to assure the constitutionality of federal preemption, and to encourage early publication of unpublished works. Since common law copyright was apparently perpetual, many of these works had been protected already for decades or hundreds of years by the states before 1978. No change is proposed to the 25-year term for works created before 1978 if they are not published by December 31, 2002.

statutory renewal claimant. The holder of the termination right can terminate the pre-1978 grant with respect to the 19-year period added to the copyright term for "old law works" by the 1976 Act.

The second termination clause of existing law applies to "new law works" (i.e., works copyrighted on or after January 1, 1978). Under section 203 of the 1976 Copyright Act, grants by the author relating to new law works can be terminated 35 years after their execution.,

H.R. 2589 would give a new termination right[8] to the author or other owner of a termination right in a pre-1978 grant, whose right to terminate under section 304(c) has already expired without being exercised. The basic structure of the existing "304(c)" termination right is retained by SEC. 102(d) of H.R. 2589. The time limit for exercising the right is changed, however, and the new "304(d)" termination right applies to the 20-year extension legislated by the bill. Termination could be effected at any time during a 5 year period beginning at the end of the 75 year copyright term.

The new "304(d)" termination right would apply only to grants executed before January 1, 1978.

If the existing section 304(c) termination right has already been exercised, the holder of the exercised termination right would own the copyright in the 20-year added period, unless the copyright has already been re-assigned post-termination. Such re-assignments are not terminable. In that case, the assignee would own the copyright during the 20-year added period.

SEC. 103 of H.R. 2589 makes a second change in the termination provisions of existing law. Unlike the first, above-discussed change, the amendment effected by SEC. 103 applies both to "old law" and "new law" works. Under existing law, the author's executor under a will, administrator, personal representative, or trustee have no termination right. The next of kin have a termination right in transfers which they may have granted with respect to "old law" works but have no termination rights in "new law" works. SEC. 103 of H.R. 2589 grants a termination right to the author's executor to terminate the author's interest, if the author, spouse, children, and grandchildren are deceased. Also, in the absence of a will and no surviving author, spouse, child, or grandchild, the administrator, personal representative, or trustee of the author's estate would own the author's termination interest in the case of both "old law" and "new law" transfers by the author.

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[8] The new termination right would be codified as section 304(d) of 17 U.S.C.

Reproduction by Libraries and Archives During the 20-Year Added Period.
Libraries, archives, and educational groups expressed concerns about diminution of the public domain as a consequence of adding 20 more years to the copyright term. In partial response to these concerns, SEC. 104 of H.R. 2589 could amend 17 U.S.C. 108 to limit the rights of copyright owners against libraries, archives, and nonprofit educational institutions during the 20-year added period. These entities will be allowed to reproduce, distribute, display, or perform in facsimile or digital form, copies of works during the 20-year period for preservation, scholarship, or research purposes, if the works are not being commercially exploited and copies or phonorecords cannot be obtained at a reasonable price.

This exemption does not apply after notice by the copyright owner that the conditions for use are not satisfied, or to subsequent users other than the exempt entities.

Motion Picture Contracts: Division of Royalties During the 20-Year Added Period. Term-extension proponents place great emphasis on the need to harmonize U.S. copyright terms with the European Union terms. They argue that this harmonization will result in increased economic benefits through the additional 20 years of royalties from foreign licensing of commercially valuable U.S. works.

In the case of motion pictures, it is not certain that term extension will result in 20 years of added royalties abroad. The question arises because of the treatment of impersonal works, works made for hire, and "related rights" in the European Union, in comparison with the treatment of these works or rights in the United States.

Under existing U.S. law, virtually all commercially significant theatrical motion pictures are "works made for hire." The copyright endures for the shorter of 75 years from publication or 100 years from creation.

The Berne Convention (to which the United States and the European Union States are bound) sets a minimum term for motion pictures at either i) life of the author plus 50 years, or ii) 50 years from making the motion picture publicly available (or if not publicly available, 50 years from the making).

Article 2(2) of the European Union Directive on Copyright Duration sets the term for "cinematographic or audiovisual works" at the life of the author(s) plus 70 years after the death of the last of four contributors to survive — the principal director, the author of the screenplay, the author of the dialogue, and the composer of the music specifically created for the motion picture. This life-based term is established in the context of another provision that mandates that at least the principal director shall be considered the author.[9] Article 3(3) of the European Union Directive provides that the "related rights" of the film producer shall expire 50 years after the fixation is made, or, if the film is lawfully published or lawfully communicated to the public during that period, 50 years from the first publication or communication to the public, whichever is earlier. The term "film" specifically

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[9] Article 2(1) of the European Union Directive on Copyright Duration (effective July 1, 1995) (hereafter, the "EU Directive").

designates a "cinematographic or audiovisual work," according to Article 3(3) of the Directive.[10]

Under these standards, what European Union term applies to U.S. motion pictures and who is entitled to collect licensing fees for uses of the motion picture in European Union countries during the extended 20-year period? The answers are not self-evident. These issues will likely be the subject of future trade negotiations between the United States and the European Union.

The fundamental conflict between U.S. and European treatment of motion picture copyrights arises because, in general, the Europeans believe that, at least some of the principal, individual creative artists who contribute to the creation of the morion picture, should be considered authors and owners of copyright. United States law, on the other hand, rests on the view that theatrical motion pictures are usually corporate, collaborative creations, and therefore the production company is generally considered the author (of a work made for hire) and the owner of copyright. Further, in the United States, the rights of the creative talent are recognized through collective bargaining agreements between the motion picture producers and the unions or guilds representing the creative artists rather than through rights under the copyright law.

In an effort to clarify further the rights of contributors to U.S. motion pictures,. H.R. 2589 contains two sections dealing with licensing of motion pictures during the 20-year period.

SEC. 105 expresses a "sense of Congress" viewpoint. It is intended to encourage voluntary agreements between the producers and the various contributors to a motion picture leading to the establishment of a fund or other mechanism for the division of royalties accrued during the 20-year extension period.

SEC. 106 of H.R. 2589 amends Part VI of title 28 U.S.C. by adding a new Chapter 180 dealing with the assumption of contractual obligations when transferring motion picture rights. The contractual obligations referenced are those that attach to motion pictures because of collective bargaining agreements between the motion picture producers and the creative guilds or unions representing various contributors to the creation of motion pictures such as directors, screenwriters, actors and actresses, composers, lyricists, musicians, and other artistic talents. With the exception of collective bargaining agreements limited to the public performance right, SEC. 106 requires that the transfer of motion picture rights shall be deemed to incorporate the collective bargaining agreements negotiated after the enactment of H.R. 2589, if the transferee knew or had reason to know about the agreements, or if there is an existing court order against the transferor which the latter is not able to satisfy within 90 days after the order is issued.

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[10] The optional term of a fixed 70 year period for certain copyrights owned by legal persons does not seem to apply to U.S. motion pictures. The requirement of Article 2(1) to make the director an author seems to foreclose application of the "legal person" provision to theatrical motion pictures. Since the director of a theatrical motion picture is given screen credit, the naming of this "author" on the work means the "legal person" option cannot be applied.

If the transferor of motion picture rights fails to notify the transferee of the collective bargaining obligations and the transferee becomes bound by a court order to make payments under the collective bargaining agreement, the transferor is liable to a damages claim by the transferee.

Summary of Music Licensing Provisions — Title II

Under the existing law — the Copyright Act of 1976[11] — the owner of copyright in a musical work is granted the exclusive right to perform the work publicly [17 U.S.C. 106(4)], subject to specified limitations or exemptions.

A musical work is "publicly performed" if it is rendered or played directly or by means of any device or process either i) at a place open to the public or any place where a substantial number of persons outside of the normal circle of family and social acquaintances is gathered, or ii) by transmission to a place open to the public or to the unassembled public which is capable of receiving the performance (for example, by radio, television, cable, or satellite).

Performances at "semi-public" places are generally considered public performances. These places include "clubs, lodges, factories, summer camps, ...schools;[12] daycare, seniors, and other recreational centers; and possibly the common areas of hospitals, nursing homes, and other care facilities.[13]

Performances of music at public places such as restaurants, bars, taverns, nightclubs, conventions, and stores are public performances, whether the music is performed live, or by recordings or transmissions, and whether the music is used as background, incidental, or theme music. Of course, performances of music in concert halls, opera houses, stadiums , outdoor arenas, and similar places open to the public are public performances.

Although the above examples constitute public performances, the need to obtain a music performing license hinges upon the availability or absence of an exemption, limitation, or exception to the music copyright owner's public performance right. If the performance is neither exempt nor subject to compulsory licensing, the music user must obtain permission or a license to perform the music by negotiating the terms and conditions with the music copyright owner or an authorized agent. With few exceptions, music performing licenses are obtained from the performing rights societies ("PRS"), who represent music copyright owner.[14]

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[11] Public Law 94-553, 90 Stat. 2541, Act of October 19, 1976, codified as title 17 of the U.S. Code, sections 101 et.seq.

[12] H.R. REP. 1476, 94th Cong., 2d. Sess. 64 (1976) (hereafter, the "1976 House Report").

[13] Whether common areas of care facilities are "public places" has been debated but not litigated. It is likely that the private or semi-private rooms of residents or patients of care facilities are not public places.

[14] By custom and practice, music publishers and composers-lyricists generally share the royalties obtained under the music performing right equally — that is, 50-50 — after the (continued...)

The principal exemptions or limitations to the music performing right are set forth in section 110 of the Copyright Act, or in the compulsory licensing sections.[15]

The existing music performing right was enacted as part of the last general revision of the copyright law in the Copyright Act of 1976. Under the former law, the Copyright Act of 1909, nonprofit performances of nondramatic music were exempt. The statute did not define "nonprofit." The term was given meaning by the courts. Although the line drawn between "for-profit" and "nonprofit" performances was not always clear, in general the nonprofit exemption was applied fairly broadly. Musical performances by public broadcasting and by religious broadcasters were arguably exempt.

In the Copyright Act of 1976, Congress dropped the broad exemption for nonprofit musical performances and replaced it with a broad performance right, which is subject to specific, more narrowly-drawn exemptions.

The 1976 Act also legislated a broad definition of the term "public," which results in application of the music licensing rights to "semi-public" contexts that formerly were arguably considered private performances of music (e.g., performances at membership clubs, fraternal organizations, lodges, summer camps, and perhaps private schools).[16]

The general effect of these changes from the Act of 1909 was to create a need to obtain a music performing right license on a broader basis than under the law in effect before 1978. Since January 1, 1978, the performing rights societies have gradually extended their music licensing efforts to take full advantage of the new rights granted to their members (composers, lyricists, and music publishers). The expansion of music licensing efforts has generated opposition and counter-legislative proposals from groups impacted by the broader music performing right.

H.R. 789, the "Fairness in Musical Licensing Act," proposes several changes in music licensing by expanding certain exemptions to the public performance right; by requiring new licensing practices (such as arbitration of licensing rates); by

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[14](...continued)
PRS deducts its administrative costs. Currently, there are two major PRS who control virtually all of music licensing: the American Society of Composers, Authors, and Publishers ("ASCAP") and Broadcast Music Inc. ("BMI"). Both PRS operate under antitrust consent decrees.

[15] The Copyright Act has 5 active compulsory licenses: section 111 (cable retransmissions); section 114(f) (subscription digital audio transmissions of sound recordings); section 115 (mechanical reproduction of music); section 118 (public broadcasting license); and section 199 (satellite television license). All of these compulsory licenses affect public performance of music except the section 114(f) subscription transmission license and the section 115 recording license.

[16] *See, Metro-Goldwyn-Mayer Distributing Corp. Wyatt*, 21 C.O. BULL. 203 (D. Md. 1932). The House Report accompanying the bill later enacted as the Copyright Act of 1976 explicitly states the congressional intent to broaden the public performance right to put performances at semi-public places under the control of the copyright owner. 1976 House Report at 64.

establishing statutory conditions for radio per program licenses; by requiring access to PRS repertories and licensing information; and by eliminating the vicarious or contributory infringement liability of landlords and other event sponsors for the musical performances by tenants or lessees, under certain conditions.

The supporters of this music licensing bill have linked their legislative effort with the copyright term extension bills for at least two reasons. Music licensing supporters argue that the additional 20 year period of copyright protection should be balanced by some concessions to music users. Secondly, supporters of music licensing reform argue that music copyright owners are principal beneficiaries of the term extension bill.

Music and other copyright owners deny there is any appropriate link between the copyright term extension proposals and the music licensing proposals. Copyright owners support term extension but oppose the music licensing proposals of H.R. 789 and S. 28.

Over the objections of copyright owners, H.R. 2589 was amended during floor debate in the House of Representatives to include three of the core provisions from the music licensing bill in H.R. 2589 as Title II. The three music licensing provisions added to H.R. 2589 are: i) additional exemptions in section 110 for performance of music by means of playing a radio or television in a public place ["business exemptions" of SEC. 202]; binding local arbitration to review the reasonableness of the rates charged by ASCAP and BMI [SEC. 203]; and elimination of vicarious or contributory infringement liability for landlords under certain conditions [SEC. 204].

Business Exemptions. Current law exempts performances of any work by public reception of broadcasts or other primary transmissions, if -- reception occurs by means of receiving equipment commonly used in private homes, there is no direct charge to see or hear the transmission, and the transmission is not further distributed.

SEC. 202 of H.R. 2589 would expand the exemption for public performances of nondramatic music in business contexts to apply to —

i) areas of less than 3500 sq. feet where a transmission is intended to be received (excluding the customer parking area), or

ii) areas greater than 3500 sq. feet (A) if there is an audio only performance by means of not more than 6 speakers (and no more than 4 speakers in any one room) or (B) in the case of an audiovisual performance, any visual portion is communicated by no more than two devices each with a diagonal screen size no greater than 55 inches and the audio portion is transmitted under the same standards as an audio only transmission (i.e., no more than 6 speakers; no more than 4 speakers in any one room).

In addition, there can be no direct charge to see or hear the transmission , the transmission must not be further transmitted, and it must be licensed.

Amendments are also made to the existing section 110(7) exemption for performance of music in stores as part of promotional efforts to vend music and records. These changes broaden the exemption to cover audio, video and other devices used to promote retail sales of physical equipment for playing or recording music. Other relatively small amendments strike the limiting word "sole" before purpose and strike the limitation to performances "within the immediate area where the sale is occurring."

Local Arbitration of Rate Disputes. In accordance with the existing antitrust decrees[17] governing the two major performing rights societies ("PRS") -- ASCAP and BMI, disputes about the rates the PRS charge music users to pay for performing right music licenses can be challenged and reviewed only by the designated Rate Court in the federal district court for the Southern District of New York. Although rates must be challenged in the S.D.N.Y., the PRS can be sued for antitrust violations in any federal district court.

SEC. 203 of H.R. 2589 requires binding local arbitration of rate disputes at the option of persons or entities defined as "general music users." Local arbitration could be demanded either prior to any court action, or, in the context of an infringement suit, by annexation to the judicial proceeding. A "general music user" is defined to include persons who perform musical works publicly other than by transmission (unless the transmission occurs within a single commercial establishment or establishments under common ownership or control). Radio and television broadcasters, cable operators, and satellite service providers would not be able to invoke binding arbitration.[18]

Pre-litigation arbitration can be invoked by a general music user in cases of a rate dispute with a PRS. Court-annexed arbitration can be invoked by a general music user who is sued for infringement of the music performing right and admits the prior public performance of the music but contests the amount of the licensing fee.

The arbitrator fixes a "fair and reasonable fee," and is authorized to make infringement determinations about past performances as well as fix the fee for future performances for a period of not less than 3 years or more than 5 years (if the music user requests the arbitrator to set a fee for future performances).

If the arbitrator makes a finding of infringement, the arbitrator can impose a penalty which, in pre-litigation arbitration, "shall not exceed the arbitrator's determination of the fair and reasonable license fee." In short, the PRS could recover the licensing fees determined to be reasonable and nothing more. In the

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[17] ASCAP is governed by a 1950 consent decree. BMI is governed by a 1966 consent decree, which was modified only in 1994 to establish the district court for the S.D.N.Y. as the forum to review BMI music licensing rates. A different judge would be assigned to the BMI proceedings than the judge who presides at the ASCAP proceedings.

[18] The exclusion of broadcasters, cable, and satellite providers from court-annexed arbitration is a change from the original music licensing bill, H.R. 789. Under H.R. 789, broadcasters and other transmitters were excluded from pre-litigation arbitration but they could have invoked arbitration if they were sued for copyright infringement.

case of court-annexed arbitration, however, greater damages are permitted. The arbitrator's award for past infringements "shall not exceed two times the amount of the blanket license fee" during the years the performances occurred.

Prohibition of Vicarious or Contributory Infringement Liability of Landlords and Event Sponsors. Under the judicially created doctrines of vicarious or contributory infringement,[19] in addition to the actual performer of musical works, the landlord, sponsor/organizer of an event, or the owner of the facilities where unlicenced music is performed, is generally liable for the infringing performance. Liability attaches if there is a financial benefit to the landlord or other facility provider, even if the contract with the performer gives the landlord no right to select the music and requires the performer to obtain a performing right license.

By custom and practice, individual performing artists ordinarily do not obtain music performing right licenses. The PRS seek to license the landlord, event sponsor, or other owner of the facilities instead of the performer. The doctrines of vicarious and contributory infringement underwrite this practice.

SEC. 204 of H.R. 2589 would amend 17 U.S.C. 501 to eliminate this vicarious or contributory infringement liability of the landlord, event sponsor/organizer, or other owner of the premises where copyrighted works are performed by a tenant or other user of the space, if the contract with the performer prohibits infringing performances and the landlord-facility provider does not exercise actual control over selection of the copyrighted works performed.[20]

Arguments for and Against Copyright Term-Extension

The arguments in favor of term extension distill to two main points: 1) economic fairness to the heirs of authors in view of increased longevity since the life-plus-50 standard was "adopted" in 1908;[21] and 2) the "economic necessity" of matching the European Union standard of life-plus-70 in order to i) avoid application of the rule of the shorter term for musical works and other personal works[22] and ii)

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[19] The Copyright Act does not refer to vicarious or contributory infringement. The basic infringement provision, 17 U.S.C. 501(a), simply provides that "[a]nyone who violates any of the exclusive rights of the copyright owner ... is an infringer of the copyright ...."

[20] H.R. 2589 substantially broadens the elimination of vicarious or contributory infringement liability compared to H.R. 789 (the music licensing bill) since H.R. 2589 eliminates vicarious or contributory liability for public performances of any works; H.R. 789 eliminates this liability only for musical works.

[21] Although the Berne Convention recommended a term of life-plus-50 years as early as 1908, that term did not become mandatory until the 1948 Brussels Act.

[22] The direct benefit of term-extension appears limited to these categories since the European Union accords lesser protection than existing U.S. law in the case of corporate works and works made-for-hire. The "rule of the shorter term" means that a country is entitled to compare the copyright term of its law with that of another country and apply the term that is shorter. This form of reciprocity is permitted by Article 7 of the Berne Convention.

to enhance the bargaining position of the U.S. Government and U.S. copyright industries in international trade negotiations, both bilateral and multilateral.

Those who oppose term-extension, in addition to denying the validity of the proponent's arguments, argue that the public domain will be diminished to the detriment of the public and new authors, and that there is no proof (or reason to believe) that a 20-year extension of the term will motivate any author to greater creativity. Therefore, opponents assert, any possible benefits of an improved international trade position are far outweighed for the public by the added costs of 20 more years of restricted access without more creativity to balance these costs.

The argument based on increased longevity and economic fairness to authors' heirs assumes that it is appropriate to provide sufficient copyright duration to provide an income to authors' children and grandchildren. A subsidiary argument about economic fairness notes that modern technologies have increased the value of copyright properties for longer periods. The authors' heirs, it is asserted, should have the benefit of this extended value.

Opponents of term-extension argue that increased longevity has already extended the period of copyright duration under the life-based system that is the international standard. Authors live longer, and their copyrights therefore endure for additional years. With respect to income for children and grandchildren, opponents argue that many authors do not have heirs, and, even if there are heirs of the author, the real beneficiaries of the copyright in the fixed years after the death of the author are corporate interests or persons other than the heirs. With respect to the increased value of works for longer periods, opponents assert this value accrues only for a relatively small number of commercially significant works; the overwhelming bulk of works lose economic significance a few years after their public availability. While authors need copyright protection during their lifetimes as an incentive to create, opponents contend that there is no proof that 70 rather than 50 years of copyright after the death of the author has any positive impact on creativity. In fact, opponents argue that the longer term may even stifle additional creativity — older works are favored by term-extension and the added protection may depress the market for new works; also corporate authors may be more inclined to market older works whose marketability is known rather than risk capital on the creation of new works.

Supporters of term-extension counter these points by emphasizing that copyright protection — not free use — is the engine for the creation of new works. The whole theory of property rights in copyrightable subject matter is that the grant of rights induces creativity for the benefit of the public. Also, proponents contend that this copyright incentive applies both to creators and disseminators of works. The Copyright Clause of the Constitution is intended both to stimulate creativity and to encourage distribution of works to the public. Term-extension, it is asserted, will encourage copyright owners to continue to market their works for maximum public availability. This added protection will encourage further investment and lead to the creation of new works and jobs. Even if individual authors are not stimulated to greater creativity by term-extension, copyright industries will be encouraged to invest in the distribution of old and new works and in the creation of new works.

Opponents of term-extension view the argument that we need to conform to the European Union standard to protect U.S. works abroad as either a baseless or not proven contention. Since most economically significant U.S. works, other than music, are works made-for-hire, the existing U.S. term of 75 years already exceeds the new European Union terms of 50 years (for the rights of motion picture producers and record producers) or 70 years (for legal persons who own computer software). Even in the case of personal works, the benefit from avoiding application of the rule of the shorter term is arguably very slight. As a practical matter, the shorter term will not apply significantly to life-based copyrights until about the year 2040.

Supporters of term-extension respond that it would be economically foolish for the United States to allow copyright terms in U.S. works to expire before the terms set by the European Union, and that the additional years of protection are needed to enable the U.S. to bargain successfully for adequate protection of U.S. works in foreign countries.

Arguments for and Against Music Licensing Reform

The music licensing provisions of Title II of H.R. 2589 are supported by a range of music users including operators of restaurants, bars, taverns, hotels, and retail stores; by general music users (as defined in the bill); by landlords or other owners of facilities where works are performed; and by sponsors and organizers of conventions, meetings, or events where works are performed.

The music licensing provisions of H.R. 2589 are opposed by music copyright owners, copyright owners in general, and the music performing rights societies.

Proponents of music licensing reform make the following arguments —

- Music licensing payments by small businesses for public reception by means of playing radios or televisions represent unfair "double dipping" by copyright owners who have been paid already for licensed broadcasts;

- The 1976 Copyright Act failed to strike a balance between the rights of music copyright owners and the needs of music users; removal of the 1909 Act's general exemption for nonprofit public performance of music failed to take account of the needs of incidental music users who do not directly profit from performance of music;

- Small music users have no relief from PRS rates and licensing requirements since it is too expensive to challenge music rates in the Southern District of New York Rate Court; arbitration of rates would be less expensive, fairer, and more convenient and would not burden the PRS since they license and enforce music performing rights in all regions of the U.S.;

- Performing rights societies exercise their monopoly power to set arbitrary rates; the outdated antitrust consent decrees do not adequately restrain the PRS' anti-competitive licensing practices;

- The limitations and exceptions to the music performing right proposed in the bill are consistent with exceptions found in foreign copyright laws and with the obligations of the Berne Convention; the proposed exceptions can be justified as "minor reservations" to the performing right, especially in light of the broad U.S. public performance right in comparison to the lesser rights granted by the laws of many foreign countries, including Berne Convention member industrialized countries.

Opponents of the music licensing provisions of H.R. 2589 make the following arguments —

- Business establishments play music via radios and televisions for their customers because music is good for business; the creative output of American songwriters is used by restaurants, bars, hotels, taverns, retail stores, and other commercial enterprises because the business people know music attracts customers and makes money for the business;

- The Copyright Clause of the Constitution empowers Congress to legislate authors' rights because our Founders understood that fair economic reward is the engine of creativity; all of our society benefits from the creative output that is sustained by fair compensation to authors for use of their creations;

- Business establishments pay food distributors, electric and telephone companies, equipment suppliers, and other vendors for a range of products and services; musical performances in small or large businesses should be paid for since the music attracts customers to the business;

- The proposed "business exemption" would exempt nearly all musical performances by commercial establishments; this proposal would cost songwriters and music publishers tens of millions of dollars in lost income annually;

- The music licensing proposals would overthrow the commercial stability that has existed for nearly 50 years under the 1950 ASCAP consent decree; some of the changes (e.g., the elimination of vicarious and contributory infringement liability) would destroy basic principles of copyright law that have been settled for 50 years or more

- Local arbitration of rates would be costly and lead to inconsistent rates and licensing practices; the general music user is encouraged to infringe rather than agree to a license since the arbitrator in a pre-litigation context can only award a reasonable license fee as the penalty for any infringement; review of licensing rates by an expert Rate Court is more efficient, less expensive, and more reliable a method of regulation than a new, untried system of arbitrated rates; the likely result of arbitration would be different rates for identical uses of music;

- Legislation is not needed to address any perceived anti-competitive behavior of the PRS; Justice Department review, copyright infringement litigation, and

Rate Court proceedings are more than adequate to restrain any anti-competitive behavior;

- The music licensing proposals may undermine the collection of performing right revenues from foreign PRS, since foreign royalties are negotiated on the basis of revenue collections in each country; the proposed "business exemption" is inconsistent with the obligations of the United States under The Berne Convention[23].

Conclusion

As passed by the House of Representatives, H.R. 2589 increases the term of copyright by an additional 20 years and enacts significant reforms of music licensing practices. Three of the core provisions of H.R. 789 (the "Fairness in Musical Licensing Act") are included as Title II of H.R. 2589: 1) "business exemption" for public performance of music via radio or television; 2) local arbitration of disputes between general music users and the performing rights societies over licensing fees; and 3) elimination of the vicarious or contributory infringement liability of landlords and other owners of facilities where music is performed.

Proponents of copyright term-extension include authors, copyright owners, publishers, performing rights societies, and authors' heirs and other representatives of authors' estates. These groups are opposed to the music licensing reforms in Title II of the bill.

The music licensing reforms (Title II of the bill) are generally supported by operators of business establishments such as restaurants, bars, taverns, hotels, retail stores, and other places where music is performed publicly by means of radios or

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[23] The opponents' argument about a violation of the Berne Convention presents a difficult analytical issue. Treaty obligations, of course, are to be respected in enacting domestic legislation. Since the United States has been a member of the Berne Convention only since March 1, 1989, however, United States courts have had very little opportunity to interpret the treaty obligations. There has been no decision interpreting the public performance rights. Also, it is difficult, and perhaps impossible, to discern a consensus interpretation by reference to foreign laws and court decisions. The public performance rights mentioned in the Berne Convention have been added incrementally throughout the 100-year history of this treaty. The rights vary depending upon the nature of the performance (i.e., whether live, recorded, or transmitted). The basic terms are undefined in the treaty. The Berne Convention permits compulsory licensing of retransmissions of broadcasts. Under Article 10(2), national legislation may exempt certain educational uses that are "compatible with fair practice." In addition, many Berne countries assume there is an implied exception regarding performances at certain religious, cultural, and patriotic events. These countries rely upon the recognition by the 1948 Brussels Revision Conference of the so-called "minor reservations" understanding concerning exceptions to the public performance rights. The General Report on this Revision Conference expressly recognized the legitimacy of exemptions for incidental or relatively minor performances of music that do not detract from the essence of the right. General Report of the 1948 Brussels Conference at 263-4.

televisions. Supporters also include general music users and landlords or other owners of facilities where music is performed in a variety of contexts.