S. HRG. 101-608

COPYRIGHT FEES AND TECHNICAL AMENDMENTS ACT, AND COPYRIGHT ROYALTY TRIBUNAL REFORM ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 1271

A BILL TO AMEND TITLE 17, UNITED STATES CODE, TO CHANGE THE FEE SCHEDULE OF THE COPYRIGHT OFFICE, AND TO MAKE CERTAIN TECHNICAL AMENDMENTS

AND

S. 1272

A BILL TO AMEND CHAPTER 8 OF TITLE 17, UNITED STATES CODE, TO REDUCE THE NUMBER OF COMMISSIONERS ON THE COPYRIGHT ROYALTY TRIBUNAL, TO PROVIDE FOR LAPSED TERMS OF SUCH COMMISSIONERS, AND FOR OTHER PURPOSES

JULY 12, 1989

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COPYRIGHT FEES AND TECHNICAL AMENDMENTS ACT, AND COPYRIGHT ROYALTY TRIBUNAL REFORM ACT

WEDNESDAY, JULY 12, 1989

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:07 a.m., in room 226, Dirksen Senate Office Building, Hon. Dennis DeConcini (chairman of the subcommittee) presiding.

Also present: Senator Grassley.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. The Subcommittee on Patents, Copyrights and Trademarks will come to order. Gentlemen, thank you for waiting. I'm sorry, there was a little traffic coming in from northern Virginia. I'm pleased to be here as chairman of the committee.

Today we're going to discuss S. 1271 and S. 1272, bills I introduced at the request of the Copyright Office, and the Copyright Royalty Tribunal. I'm glad to have been able to schedule these hearings promptly, for there are some very important matters that need to be resolved regarding these bills. Both bills are scheduled for markup on July 26, and hopefully we can meet that date.

I want to thank the three Copyright Royalty Tribunal Commissioners that are here today to discuss S. 1272. It is especially important that we act on this bill, because without its provision, the tribunal could be without a quorum in just 2 months. S. 1272 reduces the number of Commissioners on the Copyright Royalty Tribunal. It changes the salary level for those commissioners, and provides for a commissioner to retain his seat, or her seat, on the Commission after his or her term has expired until the successor is named.

Today we will also discuss S. 1271, a bill that increases the registration fees charged by the Copyright Office from $10, the fee set 10 years ago, to $20. It is time for Congress to increase the Copyright Registration fees to account for inflation over the last 10 years. I'm glad to have Mr. Irwin Karp's well thought of suggestions that he has presented in his testimony. I will definitely take them under consideration. And I welcome Mr. Oman, the Register of Copyrights, who will explain some of the policies and regulations of the Copyright Office for the record.

[Copies of S. 1271 and S. 1272 follow:]

II

101ST CONGRESS
1ST SESSION

S. 1271

To amend title 17, United States Code, to change the fee schedule of the Copyright Office, and to make certain technical amendments.

IN THE SENATE OF THE UNITED STATES

JUNE 23 (legislative day, JANUARY 3), 1989

Mr. DECONCINI (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 17, United States Code, to change the fee schedule of the Copyright Office, and to make certain technical amendments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Copyright Fees and Technical Amendments Act of 1989".

SEC. 2. FEES OF COPYRIGHT OFFICE.

(a) FEE SCHEDULE.—Section 708(a) of title 17, United States Code, is amended to read as follows:

"(a) The following fees shall be paid to the Register of Copyrights:

"(1) on filing each application under section 408 for registration of a copyright claim or for a supplementary registration, including the issuance of a certificate of registration if registration is made, $20;

"(2) on filing each application for registration of a claim for renewal of a subsisting copyright in its first term under section 304(a), including the issuance of a certificate of registration if registration is made, $12;

"(3) for the issuance of a receipt for a deposit under section 407, $4;

"(4) for the recordation, as provided by section 205, of a transfer of copyright ownership or other document covering not more than one title, $20; for additional titles, $10 for each group of not more than 10 titles;

"(5) for the filing, under section 115(b), of a notice of intention to obtain a compulsory license, $12;

"(6) for the recordation, under section 302(c), of a statement revealing the identity of an author of an anonymous or pseudonymous work, or for the recordation, under section 302(d), of a statement relating to the death of an author, $20 for a document covering not more than one title; for each additional title, $2;

"(7) for the issuance, under section 706, of an additional certificate of registration, $8;

"(8) for the issuance of any other certification, $20 for each hour or fraction of an hour consumed with respect thereto;

"(9) for the making and reporting of a search as provided by section 705, and for any related services, $20 for each hour or fraction of an hour consumed with respect thereto; and

"(10) for any other special services requiring a substantial amount of time or expense, such fees as the Register of Copyrights may fix on the basis of the cost of providing the service.

The Register of Copyrights is authorized to fix the fees for preparing copies of Copyright Office records, whether or not such copies are certified, on the basis of the cost of such preparation.".

(b) ADJUSTMENT OF FEES.—Section 708 of title 17, United States Code, is amended—

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by inserting after subsection (a) the following:

"(b) In calendar year 1995 and in each subsequent fifth calendar year, the Register of Copyrights, by regulation, may increase the fees specified in subsection (a) by the percent change in the annual average, for the preceding calendar year, of the Consumer Price Index published by the Bureau

of Labor Statistics, over the annual average of the Consumer Price Index for the fifth calendar year preceding the calendar year in which such increase is authorized.".

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall take effect 6 months after the date of the enactment of this Act and shall apply to—

(A) claims to original, supplementary, and renewal copyright received for registration, and to items received for recordation in the Copyright Office, on or after such effective date, and

(B) other requests for services received on or after such effective date, or received before such effective date for services not yet rendered as of such date.

(2) PRIOR CLAIMS.—Claims to original, supplementary, and renewal copyright received for registration and items received for recordation in acceptable form in the Copyright Office before the effective date set forth in paragraph (1), and requests for services which are rendered before such effective date shall be governed by section 708 of title 17, United States Code, as in effect before such effective date.

SEC. 3. TECHNICAL AMENDMENTS.

(a) SECTION 111.—Section 111 of title 17, United States Code, is amended—

(1) in subsection (c)(2)(B) by striking out "recorded the notice specified by subsection (d) and"; and

(2) in subsection (d)—

(A) in paragraph (2) by striking out "paragraph (1)" and inserting in lieu thereof "clause (1)";

(B) in paragraph (3) by striking out "clause (5)" and inserting in lieu thereof "clause (4)"; and

(C) in paragraph (3)(B) by striking out "clause (2)(A)" and inserting in lieu thereof "clause (1)(A)".

(b) SECTION 801.—Section 801(b)(2)(D) of title 17, United States Code, is amended by striking out "111(d)(2) (C) and (D)" and inserting in lieu thereof "111(d)(1) (C) and (D)".

(c) SECTION 804.—Section 804(a)(2)(C)(i) of title 17, United States Code, is amended by striking out "115" and inserting in lieu thereof "116".

(d) SECTION 106.—Section 106 of title 17, United States Code, is amended by striking out "118" and inserting in lieu thereof "119".

(e) EFFECTIVE DATE.—(1) The amendments made by subsections (a) and (b) shall be effective as of August 27, 1986.

(2) The amendment made by subsection (c) shall be effective as of October 31, 1988.

(2) The amendment made by subsection (d) shall be effective as of November 16, 1988.

II

101ST CONGRESS
1ST SESSION

S. 1272

To amend chapter 8 of title 17, United States Code, to reduce the number of Commissioners on the Copyright Royalty Tribunal, to provide for lapsed terms of such Commissioners, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 23 (legislative day, JANUARY 3), 1989

Mr. DECONCINI (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend chapter 8 of title 17, United States Code, to reduce the number of Commissioners on the Copyright Royalty Tribunal, to provide for lapsed terms of such Commissioners, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Copyright Royalty Tribunal Reform Act of 1989".

SEC. 2. MEMBERSHIP OF THE COPYRIGHT ROYALTY TRIBUNAL.

Section 802(a) of title 17, United States Code, is amended to read as follows:

"(a) The Tribunal shall be composed of three commissioners appointed by the President, by and with the advice and consent of the Senate. The term of office of any individual appointed as a Commissioner shall be seven years, except that a Commissioner may serve after the expiration of his or her term until a successor has taken office. Each Commissioner shall be compensated at the rate of pay in effect for level V of the Executive Schedule under section 5332 of title 5, United States Code.".

SEC. 3. EFFECTIVE DATE; BUDGET ACT.

(a) EFFECTIVE DATE.—The amendment made by section 2 shall take effect immediately.

(b) BUDGET ACT.—Any new spending authority (within the meaning of section 401 of the Congressional Budget Act of 1974) which is provided under this Act shall be effective for any fiscal year only to the extent or in such amounts as are provided in appropriations Acts.

Senator DECONCINI. At this time, I'd invite Mr. Edward Ray, Chairman of the Commission of the Copyright Royalty Tribunal, and Mr. Argetsinger, and Mr. Aguero, Commissioners of the Copyright Royalty Tribunal, to testify. And gentlemen, I would appreciate it if you would limit your testimony to 5 minutes. Your full testimony will appear in the record, in full, for our files and for our markup, so we can use all of your information.

Would you please begin, Mr. Ray?

STATEMENT OF EDWARD W. RAY, CHAIRMAN AND COMMISSIONER, COPYRIGHT ROYALTY TRIBUNAL, ACCOMPANIED BY J.C. ARGETSINGER, COMMISSIONER, MARIO E. AGUERO, COMMISSIONER, AND ROBERT CASSLER, GENERAL COUNSEL

Mr. RAY. Thank you, Mr. Chairman. I assure you it will take less than 5 minutes for our total testimony.

As you noted, we do have with us Commissioner Aguero and Commissioner Argetsinger, along with our general counsel, Mr. Robert Cassler. For the record, we represent here in this hearing about 70 percent of the total agency. So we're not a very large agency, as you can see.

Mr. Chairman, we are pleased to have the opportunity to appear before you and the subcommittee. As you know, we are a small agency in the legislative branch vested with the responsibility of administering the copyright compulsory licenses. Because we do not fall within the purview of the executive branch and OMB, we look to you and to your committee for guidance. We were, therefore, especially pleased that you introduced S. 1272 regarding our agency and that you were able to arrange a hearing so quickly.

In sum, Mr. Chairman, we are currently satisfied with the statutes which pertain to the tribunal in all matters of substance. However, there are a number of problems relating to administration which your legislation will solve. These matters are the statutory language which permits the lapsing of Commissioners' terms and what we consider the obsolete fixing of Commissioners' salaries at GS–18 level, a grade that has been phased out in the executive branch since the 1978 Civil Service Reform Act. Thus, we believe that S. 1272, if enacted, would be of benefit to our agency.

We have discussed these suggested amendments further, as well as the tribunal's procedures and workload, in our prepared statement. We would be pleased to discuss any of these matters or others which you may wish.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Ray follows:]

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Edward W. Ray, Chairman
Copyright Royalty Tribunal
July 12, 1989

SUMMARY STATEMENT

Mr. Chairman,

We are pleased to have the opportunity to appear before you and the Subcommittee. As you know, we are a small agency in the Legislative Branch vested with the responsibility of administering the copyright compulsory licenses. Because we do not fall within the purview of the Executive Branch and OMB, we look to you and your committee for guidance. We were, therefore, especially pleased that you introduced S. 1272 regarding our agency and that you were able to arrange a hearing so quickly.

We are pleased to report that our statute is working well and that the procedures which we have implemented have been successful. Our proceedings engender spirited advocacy among the various competing interests who appear before us. For the past four years, as in the previous seven years, nearly every Tribunal decision has been appealed to the Circuit Courts of Appeal. The D.C. Circuit has observed that the Tribunal faces "a highly litigious copyright-owner subculture." However, despite the number of appeals, all Tribunal decisions have been upheld.

We expect some increased activity due to the passage of the Berne Convention Implementation Act and the Satellite Home Viewer Act, and we have four 1987 Phase II controversies and the petitions filed by CATA and NCTA for cable rate adjustment to consider this fall. However, we have thoroughly reviewed both laws and find that the Tribunal will have no difficulty in carrying out its prescribed roles.

In sum, Mr. Chairman, we are currently satisfied with the statutes which pertain to the Tribunal in all matters of substance. However, there are a few small matters relating to administration which your legislation deals with. These matters are the statutory language which permits the lapsing of Commissioners' terms and what we consider the "obsolete" fixing of Commissioners' salaries at G.S. 18 level, a grade that is being phased out in the Executive Branch since the 1978 Civil Service Reform Act. Thus, we believe that S. 1272, if enacted, would be of benefit to our agency.

We have discussed these suggested amendments further, as well as the Tribunal's procedures and workload, in our prepared statement. We would be pleased to discuss any of these matters or others which you may wish.

STATEMENT OF
EDWARD W. RAY, CHAIRMAN
COPYRIGHT ROYALTY TRIBUNAL

Mr. Chairman:

We are pleased to have the opportunity to appear before you and the Subcommittee. As you know, we are a small agency in the Legislative Branch. Because we do not fall within the purview of the Executive Branch and in particular, OMB, we look to you and your committee for assistance and guidance. We are pleased that you have been able to arrange a hearing so quickly on the legislation which you introduced pertaining to our agency, S. 1272.

We will enter for the record a brief review of our history for the benefit of the newer members, and then discuss our need for enactment of S. 1272. We will be pleased to discuss further any of these matters or others which you or the Subcommittee may wish.

Creation and Membership

The Copyright Royalty Tribunal (Tribunal) was created in 1976 by the General Revision of the Copyright Law of that year. Its primary function is the distribution funds collected under compulsory license for cable and satellite retransmitted television signals and for jukebox and to set rates in these areas as well as in the area of phonorecords and noncommercial educational broadcasters.

The Tribunal is authorized to have five Commissioners who are appointed for seven-year terms by the President with the advice and consent of the Senate. At present, the Tribunal is composed of three Commissioners, with two positions vacant. In recent years, the Appropriations Committees have only provided funds for three positions. The chairmanship rotates annually on December 1 to the most senior commissioner who has not previously served as chairman.

The legislative history of the Copyright Act reflects the intention that the Tribunal remain an independent agency in which the commissioners perform all professional responsibilities themselves. The only staff of the Tribunal is a personal assistant to each commissioner and a general counsel. The general counsel position, added in 1985, has proven beneficial to the functioning of the Tribunal. In addition to the assistants and counsel positions, the Tribunal conducts a law student extern program to utilize the services of law students for which the law students receive academic credit.

General Administration & Budget

The Chairman of the Copyright Royalty Tribunal is chiefly responsible for its administration. The Library of Congress provides the Tribunal with the necessary administrative services,

including those related to budgeting, accounting, financial reporting, travel, personnel, and procurement. Pursuant to Sec. 806(a) of Title 17 U.S.C., the Library of Congress was paid $20,000 from the Tribunal's authorized FY 1988 appropriation in remuneration for these administrative services. The Library is authorized to disburse funds for the Tribunal, under regulations prescribed jointly by the Librarian of Congress and the Tribunal.

The Tribunal's budget for fiscal 1989 is $633,000. It has requested $674,000 for fiscal 1990. A breakdown of the budget is found at Appendix 1.

Statutory Responsibilities

Specifically, the Tribunal's statutory responsibilities are detailed in sections 111, 115, 116, 118, 119 and 801 et seq. of Title 17 U.S.C. The Tribunal is involved in rulemaking and in adjudication. The rulemaking proceedings consist of adjusting rates for the five compulsory licenses authorized under Title 17 which are:

1) secondary transmissions of copyrighted works by cable systems (§111),

2) production and distribution of phonorecords of non-dramatic musical works (§115),

3) public performances of nondramatic musical works by coin-operated phonorecord players (jukeboxes) (§116),

4) the use of certain copyrighted works in connection with noncommercial broadcasting (§118).

5) retransmission by satellite carriers of broadcast signals to private home viewers (§119)

Additionally, the Tribunal's adjudicatory functions are to distribute the cable, satellite carrier and jukebox royalties collected to the copyright owners. The Tribunal does not distribute royalties for phonorecords (§115) or noncommercial educational broadcasting (§118). This is handled privately by the parties involved.

New Statutory Responsibilities

Last Congress, this Subcommittee initiated two laws which affect the responsibilities of the Tribunal - the Berne Convention Implementation Act of 1988 and the Satellite Home Viewer Act of 1988, item 5 above. Although we have not previously commented on this legislation, we have thoroughly reviewed it and are

pleased to report that it will pose no undue difficulties for the Tribunal to administer.

The Berne Convention Implementation Act modifies U.S. copyright law to bring the U.S. into conformance with the minimal copyright standards required by the International Berne Convention of all its members. Since the Berne Convention guarantees to copyright owners of musical works the exclusive right to perform their works publicly, Congress decided that the jukebox compulsory license should continue to exist only as a back-up to a preferred voluntary license between owners and users.

Consequently, the Berne Convention Implementation Act calls on music owners and jukebox operators to attempt by negotiation or arbitration to reach a voluntary license. These negotiations must begin immediately after the effective date of the Act, March 1, 1989. By April 30, 1989, the Copyright Royalty Tribunal must be notified of the commencement of negotiations. If no negotiations have begun, the Tribunal is directed to announce the date and location of negotiations to start no later than May 30, 1989. We are pleased to report that negotiations have begun, and consequently the Tribunal did not have to establish negotiation dates.

The parties could choose to have their negotiations conducted by arbitration in which case the Tribunal may set by regulation the time of such arbitration.

By March 1, 1990, the Tribunal must make a finding whether enough voluntary licenses have been reached between owner and user to equal substantially the amount of music that has been formerly subject to the jukebox compulsory license. If enough voluntary licenses have been reached, the jukebox compulsory license is suspended. If not enough voluntary licenses have been reached, the jukebox compulsory license is still in effect for those persons who have not reach voluntary licenses.

Section 116A(g) makes clear that the jukebox compulsory license will stay in effect (a) temporarily, until enough voluntary licenses have been reached; (b) permanently, if not enough voluntary licenses have been reached; and (c) whenever the terms of the voluntary licenses end, if no new voluntary licenses have been reached.

Consequently, the responsibilities for the Tribunal for the jukebox compulsory license will increase in 1989 and 1990, and will decrease in the years after 1990 if negotiations prove successful. Currently, the Tribunal is engaged in a proceeding to distribute the 1987 fund. Regardless of the outcome of negotiations, there will still be the 1988 and 1989 funds to distribute, which, presumably will occur in 1990 and 1991. If the negotiations are successful, the jukebox compulsory license

will end in 1990 and no 1990 fund will be created, and no 1990 rate adjustment proceeding will be held. However, if negotiations are not successful, there will be a 1990 fund, and there will be the statutorily-scheduled 1990 jukebox rate adjustment proceeding.

The Satellite Home Viewer Act of 1988 became effective January 1, 1989, and it creates a new compulsory license. The license permits satellite carriers to retransmit television broadcast signals to the owners of satellite earth stations for their private home viewing at a Congressionally established royalty rate. The rate to be paid by satellite carriers is 12 cents per subscriber per month for the retransmission of each independent broadcast station, and 3 cents per subscriber per month for the retransmission of each network-affiliated broadcast station.

As a result of the Satellite Home Viewer Act, there will be established a 1989 satellite carrier fund, as well as a satellite carrier fund for each year following. The Tribunal has proposed establish regulations for the filing of satellite carrier claims. The first claims will be filed during July, 1990 for the 1989 fund. After August 1, 1990, the Tribunal will determine whether the copyright owners can agree concerning the distribution of the 1989 satellite carrier fund. If they cannot agree, the Tribunal will hold distribution hearings.

The satellite carrier funds will be held in accounts separate from the cable funds and the jukebox funds. The Tribunal will be making decisions concerning when and how much of the satellite carrier fund to distribute or reinvest on the same basis it has made its decisions concerning the cable and jukebox funds, that is, on how much of the fund is in controversy.

No satellite carrier rate adjustment proceedings are scheduled under the Act. Instead, the Act calls for negotiations between satellite carriers, distributors and copyright owners, for which the Tribunal is given certain monitoring responsibilities. If the parties choose to go to arbitration, the Tribunal has additional responsibilities for adopting procedures and monitoring its progress. When the arbitration panel reports its conclusions to the Tribunal, the Tribunal shall adopt the panel's decision unless the Tribunal finds that the decision is clearly inconsistent with the rate criteria established in the Act. If the Tribunal rejects the panel's decision, the Tribunal shall by April 30, 1992, publish its own determination, subject to court review.

The new satellite carrier rate will be effective until December 31, 1994, at which time the satellite carrier compulsory license will expire unless renewed by Congress.

Distribution and Rate Adjustment Proceedings

Before the passage of the Satellite Home Viewer Act of 1988, the Tribunal had six functions. The Tribunal adjusted four copyright royalty rates - cable, mechanical, jukebox and public broadcasting - and distributed two copyright royalty funds -cable and jukebox. With the enactment of the Satellite Home Viewer Act, the Tribunal has been given two additional functions. The Tribunal will distribute the satellite carrier copyright royalty fund and it will have certain monitoring and review functions concerning the adjustment of the satellite carrier rate scheduled for 1991-1992.

The Tribunal carries out its functions by holding hearings and issuing a final determination, unless the parties are able to settle their differences beforehand. The Tribunal's policy is at all times to foster settlements wherever possible.

Rate Adjustment Proceedings

The Copyright Act schedules periodic adjustments of the rates subject to the Tribunal's jurisdiction during certain "window" years. The cable rate may be adjusted in any year ending in a 0 or a 5. The mechanical rate (phonorecord) may be adjusted in any year ending in a 7. The jukebox rate may be adjusted in any year ending in a 0. The public broadcasting rate may be adjusted in any year ending in a 2 or a 7. In addition, the Copyright Act provides that any time the FCC changes its rules regarding the distant importation of broadcast signals, or regarding syndicated exclusivity, the Tribunal may be petitioned to adjust the cable copyright rate accordingly.

Rate adjustment proceedings begin with a petition filed with the Tribunal by someone who has a significant interest in the subject copyright rate (except for the public broadcasting rate adjustment which commences automatically). Once the Tribunal finds that the petitioner does indeed have a significant interest in the copyright rate, a proceeding is initiated. Hearings are held in which the expert testimony from all interested parties is heard. After the hearing is concluded, the Tribunal issues a final determination, which by law must be published in the Federal Register within a year from the commencement of the rate adjustment proceeding. Parties have 30 days to appeal to the U.S. Court of Appeals.

Since 1985, the Tribunal has held three rate adjustment proceedings. The statutory cable rates were adjusted for inflation in 1985, the mechanical rate was adjusted in 1987, and the public broadcasting rates were adjusted in 1987. Petitions were filed in 1985 to adjust the cable 3.75% rate and the syndicated exclusivity rates, but the parties withdrew their petitions before the commencement of hearings.

The cable inflation adjustments and the mechanical rate adjustments were made primarily by settlement. Through the encouragement of the Tribunal, the major parties interested in the cable and mechanical rates met and reached agreement. These agreements were then proposed by the Tribunal to the public. No opposing comments were received, and the rate adjustments were adopted as proposed. In the case of the public broadcasting rate adjustment hearing, the major public broadcasting entities, PBS and NPR, were able to reach a privately negotiated license with the major performing rights societies - ASCAP, BMI and SESAC -thereby obviating the need for the Tribunal to establish a rate for them. For the other public broadcasting entities, such as college radio stations and noncommercial educational religious broadcasters, the Tribunal took testimony and established rates.

Currently, the Tribunal has two petitions pending from the National Cable Television Association (NCTA) and Community Antenna Television Association (CATA) which request that the Tribunal adjust the cable rate in light of the FCC's action reinstating the syndicated exclusivity blackout rules. Comments on these petitions are due August 1, 1989.

Distribution Proceedings

For two of the compulsory licenses, cable and jukebox, the Copyright Act requires cable and jukebox operators who wish to obtain a compulsory license to make appropriate payments to the Copyright Office. The Copyright Office maintains these payments in discrete calendar year funds in interest-bearing accounts. The Tribunal's function is to distribute these funds to the proper copyright owners each year. A similar procedure is being established pertaining to the satellite compulsory license

Each January, copyright owners who believe they are entitled to some portion of the jukebox royalty fund file a claim with the Tribunal. Traditionally, the Tribunal receives five claims. Three are from the three performing rights societies in the U.S. - ASCAP, BMI and SESAC. The other two are from music publishers who are not signed up with any performing rights society - Asociacion de Compositores y Editores de Musica Latinoamericana (ACEMLA) and Italian Book Corporation.

Each July, copyright owners who believe they are entitled to some portion of the cable royalty fund file their claims. Approximately 700 claims are filed each year, but many more than 700 copyright owners share in the cable fund, because the Tribunal allows joint claims. For example, NPR files on its own behalf and on behalf of approximately 130 affiliated stations, so its one claim represent 130 plus copyright owners.

After the claims have been filed, the Tribunal publishes a notice in the Federal Register asking the claimants if there exists any controversies concerning the proper distribution of that particular calendar year's fund. If the parties are able to

reach a settlement, the Tribunal can make an immediate distribution. If the parties cannot reach a settlement, the Tribunal can distribute only that portion of the fund that is not in controversy.

After the parties indicate that controversies exist, the Tribunal publishes notice of this in the Federal Register and the proceeding commences. Hearings are held in which the parties submit evidence to demonstrate the amount of entitlement to the royalty fund that they believe they deserve. Within a year after commencement of the proceeding, the Tribunal publishes its final determination in the Federal Register, and parties have 30 days to appeal the Tribunal's determination to the U.S. Court of Appeals.

In the case of cable distributions, the Tribunal holds its hearings in two phases. In Phase I, the Tribunal allocates the fund among eight program categories - Program Suppliers (MPAA, Multimedia, NAB), Sports (Major League Baseball, the National Basketball Association, the National Hockey League, the National Collegiate Athletic Association), Noncommercial Television (PBS), Music (ASCAP, BMI, SESAC), U.S. Commercial Television (NAB), the Devotional Claimants (the Inspirational Network, Old-Time Gospel Hour, Christian Broadcasting Network, Christian Television Network, In Touch Ministries, Oral Roberts, First Century Broadcasting), the Canadian Claimants (CBC, CTV) and Noncommercial Radio (NPR). After this allocation is performed, if there are any disputes within a category, the Tribunal moves to Phase II and makes a further allocation within a category. For example, in the past, within the Program Suppliers category, the 90 plus syndicators represented by Motion Picture Association of America (MPAA) have not been able to reach an agreement with Multimedia Entertainment or with station-produced syndicated programs represented by NAB. The Tribunal has held hearings to resolve these controversies, and makes its allocations according to the evidence presented.

Since 1985, the Tribunal has concluded five jukebox distribution proceedings and four cable distribution proceedings. Currently, the Tribunal is engaged in Phase II of the 1987 cable distribution proceeding.

The status of royalty funds distributed as of January 31st is found at Appendix 2.

Appellate Record

Copyright Royalty Tribunal decisions are the focal point for many contending interests, each interest believing that it should have gotten a greater share of the royalty distributions, or believing that it should have gotten a higher or lower royalty rate. Consequently, regardless of the decision reached by the Tribunal, appeals to the U.S. courts have been taken nearly as a

matter of course. The United States Court of Appeals for the District of Columbia Circuit expressed its stern disapproval of this situation in 1985:

> "Given the potential monetary stakes, the claimants studied tack to date of 'boundless litigiousness.' 720 F. 2d at 1319, directed at the various nooks and crannies of the Tribunal's decisions is perhaps understandable. But with today's decision joining the ranks of our two prior exercises of review, the broad discretion necessarily conferred upon the Copyright Royalty Tribunal in making its distributions is emphatically clear. We will not hesitate henceforth, should this tack of litigation-to-the-hilt continue to characterize the aftermath of CRT distribution decisions, to refrain from elaborately responding to the myriad of claims and contentions advanced by a highly litigious copyright-owner subculture." National Association of Broadcasters v. Copyright Royalty Tribunal, 772 F. 2d 922, at 958 (D.C. Cir. 1985).

Despite the "highly litigious" nature of the claimants before the Tribunal, since the Tribunal last appeared before Congress in July, 1985, every decision rendered by the Tribunal has been either affirmed in all respects on appeal, or not appealed at all. Seven decisions have been appealed and affirmed; six decisions have not been appealed. A record of these appeals is found at Appendix 3.

Projected Workload

Although there have continued to be appeals of our decisions, the strong language of the courts in affirming may have had good effect in recent years. Many of the major parties to our proceedings have engaged in negotiation and have frequently settled major issues before hearings. For example, the present proceeding, in which we are involved, the 1986 cable distribution, was delayed at the parties' request from March 1988 until a major agreement was reached amongst most parties in December 1988. There were left only a few items in controversy which will result in a greatly reduced hearing schedule, saving both the parties and the Tribunal expense.

In those particular proceedings which have resulted in decreased hearing days, the Tribunal has experienced a corresponding increase in motions filed by the parties with which the Tribunal must deal. The Tribunal believes that its resolution of some of these preliminary motions has contributed to the settlements. The Tribunal finds that negotiation settlements are beneficial in most instances and will therefore continue to encourage such activity.

With amounts in the cable royalty fund growing rapidly, 1984, $100 million, 1988 estimated at $200 million, there is the increased potential for spirited competition for even small

percentages of the total distribution. Thus, it is impossible to state with certainty whether the number of hearing dates will decline in the future.

In addition to the annual distribution proceedings, the Tribunal expects to be petitioned in the near future regarding the FCC's changes in syndicated exclusivity. Such a petition may result in additional hearings. It is also expected that the satellite legislation will result in some additional hearings. This year the Tribunal will be involved in drafting regulations pertinent to this new legislation. Although as earlier noted, the Berne Convention will eventually greatly reduce the Tribunal's role regarding jukeboxes, it will still have responsibility for carrying out the 1987, '88 and '89 distributions, which will take place this year, in 1990 and 1991. Assuming the parties reach major agreement by 1990, the Tribunal will then have an essentially "standby" role regarding jukeboxes.

In sum, it appears that the workload will continue over the next few years at about the same level as in the recent past. We have again reviewed our situation and find that we need no major revisions of our statute to carry out our responsibilities.

Suggested Statutory Amendments

There are two minor areas, however, relating to the administration of the Tribunal which should be addressed by amending our statute. These items are reflected in S. 1272. They are the statutory language which permit the lapsing of Commissioner's terms and what we consider the "obsolete" fixing of Commissioners at the GS-18 level.

Lapsed Terms

Unlike other entities which have Commissioners appointed for fixed terms, the CRT has no provisions for lapsed terms. This is of special concern now that the CRT has three Commissioners, rather than five.

The FCC and FTC authorizations, for example, provide that a Commissioner will serve, beyond the expiration of his term, until a new Commissioner is confirmed.

At present, one CRT Commissioner's term expires September, 1989; the other two September, 1991. It would be difficult to function with less than three Commissioners for a period of time until additional ones can be appointed and confirmed. This is especially so, given the fact there is only a small staff and that much of the work must be carried out personally by the Commissioners. Under normal, and optimal, circumstances, it seems to take 6 to 8 months to screen candidates, nominate and complete Senate confirmation.

With a new Administration having just taken office, it can reasonably be expected that there will be a several month lapse in the CRT Commissioner position which expires this year.

This lapse could be easily avoided by inserting one clause or sentence in the CRT authorization to the effect that Commissioners may serve beyond the expiration of their term until their successor is confirmed and qualified.

Salary Classification Levels

The Commissioners salaries are authorized at the GS-18 level of the General Schedule. At the time of authorization, 1976, this was the highest level for Civil Service employees and equal to the entry level for Presidential appointees in the Executive Branch, Exec Level V. Subsequently, Congress, in 1978, revised the "supergrade" system supplementing it with the Senior Executive Service (SES). Since then nearly all career GS-18 positions have been converted to SES. The GS-18 position has been somewhat obsolete, with only a handful of government employees remaining in that classification. As a result, the last two recommendations of the President's Quadrennial Pay Commission did not revise the general schedule which prescribes GS-18 compensation, but did propose substantial increases for both the SES and Exec Level V. Thus, the presidentially appointed Tribunal Commissioners could receive substantially less than both the entry level Executive Branch Presidential appointees and top Civil Service employees. In order to maintain the previous parity, the Commissioners compensation should be authorized the Exec V level.

Both your bill, Mr. Chairman, S. 1272, and a similar one in the House, H.R. 1621, deal with the problems outlined above and we urge their passage.

Conclusion

Mr. Chairman, we state again our appreciation for the Subcommittee's continued interest in the Tribunal. We always welcome the Subcommittee's inquiries and suggestions and would be pleased to respond to any questions at this time or any written questions which may be submitted at a subsequent date.

APPENDIX I

COPYRIGHT ROYALTY TRIBUNAL

	FY 1989		FY 1990	
Salaries & Comp	8 pos	$398,000	8 pos	$427,000
Personnel Benefits		64,000		69,000
Travel & trans		2,000		1,000
Meetings & Conferences		2,000		2,000
Postage		1,000		1,000
Local telephone		3,000		3,000
Long distance telephone		1,000		1,000
Rental of equipment		0		0
Rental of Space		90,000		94,000
Printing, forms		20,000		23,000
Other services, misc.		1,000		1,000
Services of other agencies/LOC		20,000		20,000
Tuition & Training		2,000		2,000
Repair of equipment		3,000		4,000
Cost of hearings		25,000		20,000
Office supplies		2,000		3,000
Books & Library materials		2,000		2,000
Equipment		1,000		1,000
1988 Summit Reduction		-4,000		0
Total CRT Budget		$633,000		$674,000
Less transfer from royalty funds		510,000		539,000
Total Regular Bill Funds		$123,000		$135,000

APPENDIX II

CABLE ROYALTY FEE FUND

Year	Current Value of fund	Total Amount Distributed as of 6/30/89		Total Amount Remaining in Fund Pending Resolution of Controversy	
1978	$17,717,000	$17,717,000	(100%)	$ 0	(0%)
1979	23,732,000	23,732,000	(100%)	0	(0%)
1980	28,052,000	28,052,000	(100%)	0	(0%)
1981	35,559,000	35,559,000	(100%)	0	(0%)
1982	44,375,000	44,375,000	(100%)	0	(0%)
1983	84,317,000	84,317,000	(100%)	0	(0%)
1984	100,465,000	100,465,000	(100%)	0	(0%)
1985	113,782,000	113,782,000	(100%)	0	(0%)
1986	128,796,000	128,796,000	(100%)	0	(0%)
1987	171,125,000	170,854,000	(99%)	271,102	(1%)
1988	197,527,000	0	(0%)	197,527,000	(100%)

JUKEBOX ROYALTY FEE FUND

Year	Current Value of fund	Total Amount Distributed as of 6/30/89		Total Amount Remaining in Fund Pending Resolution of Controversy	
1978	$1,124,000	$1,124,000	(100%)	0	(0%)
1979	1,359,000	1,359,000	(100%)	0	(0%)
1980	1,227,000	1,227,000	(100%)	0	(0%)
1981	1,183,000	1,183,000	(100%)	0	(0%)
1982	3,319,000	3,319,000	(100%)	0	(0%)
1983	3,166,000	3,166,000	(100%)	0	(0%)
1984	5,991,000	5,991,000	(100%)	0	(0%)
1985	5,507,000	5,507,000	(100%)	0	(0%)
1986	5,340,000	5,340,000	(100%)	0	(0%)
1987	6,516,000	6,516,000	(100%)	0	(0%)
1988	6,631,000	0	(0%)		(100%)

APPENDIX III

Appeals Record Since July, 1985

Cable Decisions:

National Association of Broadcasters v. Copyright Royalty Tribunal, 772 F. 2d 922 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 1245 (1986). Affirmed in all respects.

National Association of Broadcasters v. Copyright Royalty Tribunal, 809 F. 2d 172 (2d. Cir. 1986). Affirmed in all respects.

National Broadcasting Company v. Copyright Royalty Tribunal, 848 F. 2d 1289 (D.C. Cir. 1988). Affirmed in all respects.

ACEMLA v. Copyright Royalty Tribunal, 854 F. 2d 10 (2d. Cir. 1988). Affirmed in all respects.

Jukebox Decisions

ACEMLA v. Copyright Royalty Tribunal, 809 F. 2d 906 (D.C. Cir. 1987) Affirmed in all respects.

ACEMLA v. Copyright Royalty Tribunal, 835 F. 2d 446 (2d. Cir. 1987). Affirmed in all respects.

ACEMLA and Italian Book Corporation v. Copyright Royalty Tribunal, 851 F. 2d 39 (2d. Cir. 1988). Affirmed in all respects.

APPENDIX III (Continued)

Tribunal Decisions Which Were Not Appealed

Rate Adjustments

1985 Cable Inflation Adjustment, 50 FR 18480 (May 1, 1985).

1987 Mechanical Rate Adjustment, 52 FR 22637 (June 23, 1987).

1987 Public Broadcasting Rate Adjustment, 52 FR 49010 (Dec. 29, 1987).

Distribution Determinations

1986 Jukebox Royalty Distribution, 53 FR 36362 (Sept. 19, 1988).

1987 Jukebox Royalty Distribution, 54 FR 19599 (May 8, 1989).

1986 Cable Royalty Distribution, 54 FR 16148 (April 21, 1989).

Senator DECONCINI. Mr. Chairman, I want to thank you very much, and your other members for being here. You have served well, in my judgment, and I think that it is important just to have you come up here and testify so that some recognition can be granted to some very, very fine public servants.

Commissioner Ray, you expressed concern that current legislation has no provision for lapsed terms, as is the case with the FCC and the Federal Trade Commission Authorization Act. Has there ever been a need for such a provision, that you know of, other than what may face us 2 months from now?

Mr. RAY. So far, it has not caused any problems, at least not since I have been here. And I've been with the Agency for 7 years.

Senator DECONCINI. So the record is very clear that if the statute stays as is, and if the President does not appoint, or if he appoints and the Senate does not confirm, at the termination of one of the Commissioners here in roughly 60 or so days, you would have no quorum and you would not be able to act, is that correct?

Mr. RAY. I don't believe it's correct, sir, that we would have no quorum, because we have briefly, in the past, had only two Commissioners.

Senator DECONCINI. You have had that experience? When was that?

Mr. RAY. Yes, only two Commissioners. It was I believe in 1985, from May 1985 to November, Mr. Aguero and myself. The problem that you have, sir, in a situation like this, we were involved in a very, very important procedure, the 3.75 and other cable rate and distribution proceedings. If Commissioner Aguero and I had been unable to reach a consensus for the final determination, not only would we have been unable to reach the deadline set by statute, but it would have been hundreds of thousands of dollars of money and resources down the drain for the parties, as well as for the Agency.

Senator DECONCINI. Then I take it from that, that you can function——

Mr. RAY. Oh, yes, sir.

Senator DECONCINI. Or you can have a quorum under your rules with only two members, is that correct?

Mr. RAY. Yes, sir.

Senator DECONCINI. I see.

Mr. ARGETSINGER. If I could add to that, Mr. Chairman.

Senator DECONCINI. Yes, Mr. Argetsinger.

Mr. ARGETSINGER. In 1985 when this transpired, it was with the acquiescence of the parties. The parties agreed. They were anxious to have the case decided. It has never been litigated. Previously we had five Commissioners. Beginning about 1984 there was no appropriation for the two additional Commissioners, so this would have never been a problem in the past. Presumably, there were five commissioners, and if there was one lapsed term, well, that would have been all right. We'd really rather not——

We have some very heated hearings coming up this fall, and we'd really rather not try this concept of whether we have a quorum or not.

Senator DECONCINI. I see. It's not practical, and quite frankly, puts a great deal of pressure to perhaps find a consensus when

there may be some honest disagreements among Commissioners——

Mr. RAY. Yes, sir.

Senator DECONCINI. If you had a full bank.

Mr. RAY. Yes.

Mr. ARGETSINGER. And even on matters of motions and objections during the hearings.

Senator DECONCINI. Now, you've indicated, Commissioner Ray, Chairman Ray, projected increased workloads, at least over the next year. You project your workload to increase substantially.

Mr. RAY. Yes, sir.

Senator DECONCINI. This is due to an increased number of motions filed and increased potential for spirited competition for distribution, because of the growth in the Cable Royalty Fund, and increased number of hearings based on the tribunal's expectations that it will be petitioned in the near future regarding the FCC changes in syndicated exclusivity, and an increased number of hearings resulting from the expected satellite legislation. Will three Commissioners be satisfactory to handle this increased caseload that you project?

Mr. RAY. Well, Mr. Chairman, it has always been my position, and I've taken the position, on record on several occasions, that three, in my opinion—even though I think there's disagreement here—three Commissioners are sufficient in my opinion to do an effective job. I don't believe it's the number of Commissioners that make the difference. The difference is in the other resources that should be made available to us if we need it, like some outside—and we have requested in the past, and the Appropriations Committee gave it to us—some additional resources for some outside studies and things of that nature. But I believe three Commissioners could adequately do the job.

Senator DECONCINI. Let me ask the other Commissioners, is there unanimity about Commissioners here? Does anybody care to express a different view? Mr. Aguero?

Mr. AGUERO. Yes, sir.

Well, I disagreed with Commissioner Ray a few years ago on the consent of the two Commissioners, because my worries were always that if a Commissioner passed away or had an accident, we run with the same program, run it with only two Commissioners. But in the last 4 years, Commissioner Ray, Commissioner Argetsinger, and myself, I think that we did an excellent job, and today, I agree with Commissioner Ray. Three Commissioners would be enough.

Senator DECONCINI. And of course, if we change the statute where a commissioner can retain his position until a successor is confirmed——

Mr. AGUERO. That would be excellent, and I hope that Commissioner Ray, who's term expires on September 26, 1989, will stay with us until the new Commissioner joins the tribunal.

Senator DECONCINI. Thank you, Mr. Aguero.

Mr. RAY. Is there an increase in salary? I'm only kidding. [Laughter.]

Senator DECONCINI. I'm going to get to that question in just a minute.

Mr. Argetsinger, do you have any——

Mr. ARGETSINGER. I concur with my Commissioners.

Senator DECONCINI. And lastly, Chairman Ray, do you know what other career GS-18 positions have not been converted to Senior Executive Service salary rates?

Mr. RAY. I would like for Commissioner Argetsinger—he did some research on this.

Senator DECONCINI. Yes, Commissioner Argetsinger?

Mr. ARGETSINGER. Well, back in 1976, of course, GS-18 was the standard that most all career people—it was at the top. As a matter of fact, that was the top cap for Senate and House employees. But since then it's been phased out and the SES has taken over as the top spot. The GS-18, today, is still equivalent to the executive level 5, which is the entry level for executive employees.

It was the concern that if in the future, if there were any pay raises, GS-18 would be overlooked, because today there are about 74 GS-18's in the Government. There were at one time 3,000 or 4,000. Most of those GS-18 that are still in the executive branch, career types, are the FBI, and in nonsupervisory positions. There are several other commissions who are statutorily GS-18 rather than executive level 5, but it's my belief that there are about 73 GS-18's, career types in the Government.

Senator DECONCINI. I don't quite understand. What's the disadvantage of being a GS-18 if the salary is the same as the Senior Executive Service?

Mr. ARGETSINGER. Well, sir, there never was any disadvantage in the past. However——

Senator DECONCINI. You're concerned about the future?

Mr. ARGETSINGER. Well, sir, we did notice that in the last two Presidential Commissions, the one of 1987 and the one of 1988, ignored GS-18.

Senator DECONCINI. I see, in considering increases in salaries?

Mr. ARGETSINGER. That's right.

Senator DECONCINI. But they did not ignore Senior Executive Service positions?

Mr. ARGETSINGER. That's correct, sir.

Senator DECONCINI. I see.

Mr. ARGETSINGER. And this is because there are so very few GS-18's any more. Most of them have been converted to SES.

Senator DECONCINI. Yes.

Mr. ARGETSINGER. And I don't know what another Presidential Commission would come out with. Right now it's a moot question. It won't make $1 difference tomorrow or the next day.

Senator DECONCINI. I understand. But it's a good point to have on the record.

I have no further questions. Senator from Iowa, do you have any opening statement or questions?

Senator GRASSLEY. No; I do not have an opening statement, but I do have several questions, only one that I am going to deal with here orally.

Is there general agreement among all of you that three is the right size of the tribunal, or do you think it still ought to be left at five? And I'm not sure how five was arrived at, or where you think it ought to be?

Mr. RAY. As of today, there is unanimous agreement among the three of us that it should be reduced to three.

Senator GRASSLEY. Can you tell me outside the fact that the Appropriations Committee only has appropriated enough money for three, is there some other reason why those other two positions were never filled? Or, I mean, how long have you been operating at three as opposed to five over the last 13 years?

Mr. RAY. Since September 1984. And there has not been any appointments made by the President. So we don't know why, but we did, at least a majority of the Commissioners, recommended to the Appropriations Committee, year after year, that we thought three were sufficient. And so we made no effort to get any greater appropriation for our Commissioners.

Senator GRASSLEY. So, it's been your opinion for quite a few years now, then, that three would be a sufficient number?

Mr. RAY. Yes, sir.

Senator GRASSLEY. Mr. Chairman, if I have any other questions I'll submit them for response in the record.

Senator DECONCINI. Thank you, Senator Grassley.

Mr. Chairman, Chairman Ray, do you have a ballpark figure of the amount of funds that were before the Commission for consideration for distribution, say last year?

Mr. RAY. Well, this year——

Senator DECONCINI. Or this year?

Mr. RAY. Sir, when we talk about years, we're talking about the distribution proceeding for this year, which is usually 2 years behind, will be approximately $125 million and it was over $100 million before.

Senator DECONCINI. So it's growing.

Mr. RAY. And the jukebox is around $7 or $8 million.

Senator DECONCINI. So it's $125 million cable, primarily?

Mr. RAY. Yes, sir. And we are projecting for next year around $200 million.

Senator DECONCINI. Around $200 million total?

Mr. RAY. No, no, just for cable.

Senator DECONCINI. Just for cable.

Mr. RAY. Jukebox will probably go down a little bit.

Senator DECONCINI. The cable is projected to continue to increase substantially over the next several years?

Mr. RAY. Well, it is depending, I guess, a lot upon what happens with the syndicated exclusivity question.

Senator DECONCINI. Thank you very much gentlemen. Thank you for your testimony and the fine work that you're involved in.

Mr. RAY. Thank you, Mr. Chairman.

Senator DECONCINI. Our next witness will be Mr. Ralph Oman, Register of Copyright and accompanying him will be Dorothy Schrader.

Mr. Oman, you may summarize your testimony. Your full statement will appear in the record. We appreciate you being here with us, and we appreciate your willingness to always come forward and give us your views on technical and substantive legislation, this one involving increases in the fees for copyrights. Please proceed.

STATEMENT OF RALPH OMAN, REGISTER OF COPYRIGHTS, ACCOMPANIED BY DOROTHY SCHRADER

Mr. OMAN. Thank you very much, Mr. Chairman. I am one of that rare breed of 72 GS-18's, but we're not here before you today on that matter.

Senator DECONCINI. Well, on that subject matter, how do you feel about that? Do you want to be converted to——

Mr. OMAN. Well, we're part of the Library of Congress family, and I suspect——

Senator DECONCINI. You're stuck?

Mr. OMAN. They're thinking of their own situation, and I'm part of that consideration.

Senator DECONCINI. OK.

Please proceed.

Mr. OMAN. On the issue of the fee increase, Mr. Chairman, I have over the past couple of years written to, and talked to, a long list of authors, users, and copyright owners and tried to explain the need for the fee increase. I've tried my best to build a consensus in favor of that increase, and I think that I have largely succeeded, even though there are a few holdouts as you will discover later in the morning.

I've received many letters of support from many different people, including a most sympathetic letter from the Authors League of America, which I request permission to insert in the hearing record. I've also tried to adjust the Copyright Office regulations, wherever possible, to reduce any burden on small publishers and on individual authors.

I have great sympathy for the men and women who struggle to make a living by writing and composing. Let me mention some of the positive things we've done to ease the plight of authors starting back in 1978. In fact, Congress made the biggest change back in 1978 when it made registration voluntary. Prior to that to get copyright protection authors had to register, they had to pay the $6 to the Copyright Office to get copyright protection. That was changed back in 1976. So today, struggling artists do not have to register to get copyright protection. Of course, the artists get very valuable benefits for registering and many of them continue to register.

We also allow individual authors to make a single registration for an unlimited number of unpublished works by grouping them into a collective work. So a writer of poems or short stories can register a year's production for only one fee. So, in other words, 100 poems could be registered for $10, or under the proposed change for $20. And we feel that this greatly eases the hardship on the struggling artist.

Congress, in addition, allowed individual authors to make group registrations for their published contributions to magazines within 1 calendar year or less. This option has become even more important, since you eliminated the notice requirement under the Berne Implementation Act last year. These authors of poems, essays, and short stories can now make group registrations for a calendar year or less at their option.

I'm also actively considering another change in our regulations, Mr. Chairman, that would allow group registration of magazines

and newsletters. We would allow daily editions to register once a week. We would allow weeklies to be registered once a month, and we would allow monthlies to be registered quarterly. So, in other words, instead of having to register seven times, or five times if you were a daily, you would register once for the $20 fee. If you were a weekly, instead of registering once a week, you would register four issues once a month for the one fee. This proposal, I think, would benefit small periodical publishers and publishers of newsletters. And I think, indirectly, it would help authors.

To help authors who write for magazines, Mr. Chairman, we changed our regulations back in 1986 to allow them to deposit a copy of just their own contribution in making registration of their contribution to a collective work, rather than having to deposit to the entire work.

And last, Mr. Chairman, to ease the burden of the possible expense of the requirement to deposit a copy of the work along with the application form, a sculptor, a painter, or a graphic artist may now satisfy the mandatory deposit requirement of section 407 of the law by submitting identifying materials, like photographs, instead of actual copies of limited edition works. And we think this also eases the hardship of the registration system.

In short, Mr. Chairman, the Copyright Office shares Congress' special concern for writers and composers who struggle to make ends meet. We have bent over backward to help them out.

I have reviewed Mr. Karp's proposals, and appreciate his concern for individual authors. As I have stated, we have already given individual authors special treatment. In fact, in 1986, I adopted by regulations, one of Mr. Karp's proposals. I am now prepared to review our office regulations. I would be pleased to give them whatever consideration we can in the future, and I would be prepared to make further adjustments to ease the hardship on individual authors if studies show that our existing practices hurt them.

Right now with registrations increasing by 25,000 a year, I don't think the fee, either $10 or $20 stands in the way of registration. Even at $20, Mr. Chairman, the copyright registration filing fee remains one of the biggest bargains in Washington. Our neighbor Canada charges $35 Canadian for copyright registration. And authors and copyright owners, in some ways, get less for their money there. And Canada, I understand, is kicking around the idea of increasing their registration fee to $70. Under our system registration entitles authors and copyright owners to a legal presumption of copyright validity which has seldom been rebutted in court. The author can get statutory damages and attorney's fees if they register and their works are infringed. Registration also greatly facilitates business transactions in copyrighted works. And all of these benefits will cost only $20 a work or even less if the author opts for group registration.

In my view, Mr. Chairman, authors get real value for their money. Thank you very much for this opportunity to make my case, Mr. Chairman, and I would be pleased to answer any questions.

[The prepared statement of Mr. Oman and additional information for the record follow:]

SUMMARY

STATEMENT OF RALPH OMAN
REGISTER OF COPYRIGHTS AND
ASSISTANT LIBRARIAN FOR COPYRIGHT SERVICES
Before the Subcommittee on Patents, Copyrights
and Trademarks
Senate Committee on the Judiciary
101st Congress, First Session

July 12, 1989

Mr. Chairman and members of the Subcommittee, I am Ralph Oman, Register of Copyrights in the Copyright Office of the Library of Congress and Assistant Librarian for Copyright Services. Thank you and the Subcommittee staff for the opportunity to appear today on the proposal of the Library of Congress and the Copyright Office, S. 1271, to increase copyright service fees to account for inflation.

The current fee schedule for Copyright Office services has been in effect for over 10 years. Inflation has cut the real price of the fees by 50 percent. A fee increase is necessary to restore the value lost to inflation and to enable the Copyright Office to provide good copyright service to authors, copyright owners, users, and the public.

Congress set the current fee schedule in the Copyright Act of 1976, which came into force on January 1, 1978. S. 1271 simply restores the original value of the fee schedule and grants the Register authority to adjust the fee schedule at five-year intervals, beginning in 1995, to account for inflation.

For the last ten years, the Copyright Office has made tremendous productivity gains in coping with an ever-increasing workload. Since fiscal year 1979, the workload has increased by 47 percent -- from 426,000 claims to 625,000 in fiscal year 1988. During this same period the staffing level has decreased 23 percent -- from 641 to 495. The Copyright Office has run out of room to maneuver. We either need legislation like S. 1271 to restore the original value of the copyright service fees set by Congress in 1976 or we face the likelihood of cuts in services and further growth of backlogs.

In its efforts to seek a consensus in favor of the fee increase, the Office has contacted many author, user, and copyright owner groups to inform them of the proposal and to explain the need for the increase. We have now received many letters of support from different sources, including the Author's League of America.

I hope my comments today will assist the Subcommittee in its deliberations on this urgently needed fee bill. The Office needs revenues at today's value in order to ensure that the public record is managed in a timely manner responsive to the needs of the creative community and the public.

STATEMENT OF RALPH OMAN
REGISTER OF COPYRIGHTS AND
ASSISTANT LIBRARIAN FOR COPYRIGHT SERVICES

Before the Subcommittee on Patents, Copyrights
and Trademarks
Senate Committee on the Judiciary
101st Congress, First Session
July 12, 1989

Mr. Chairman and members of the Subcommittee, I am Ralph Oman, Register of Copyrights in the Copyright Office of the Library of Congress and Assistant Librarian for Copyright Services. I thank you and the Subcommittee staff for giving me the opportunity to appear here today on the proposal of the Library of Congress and the Copyright Office, S. 1271, to increase copyright service fees to account for inflation.

Adjustment Only For Inflation

The current fee schedule for Copyright Office services has been in effect for over 10 years. Inflation has cut the real price of the fees by 50 percent. A fee increase is necessary to restore the value lost to inflation and to enable the Copyright Office to provide good copyright service to authors, copyright owners, users, and the public. The Copyright Office should recoup more than the current one-third of the costs associated with providing copyright services from those benefiting most directly from the services. Taxpayers must pay for costs not covered by the fees; otherwise, we will have to reduce the level of service if adequate funding is not available.

Congress set the current fee schedule in the Copyright Act of 1976. S. 1271 simply restores the original value of the fee schedule and

grants the Register authority to adjust the fee schedule at five-year intervals, beginning in 1995, to account for inflation.

Productivity Gains

For the last ten years, the Copyright Office has made tremendous productivity gains in coping with an ever-increasing workload. Since fiscal year 1979, the workload has increased by 47 percent -- from 426,000 claims to 625,000 in fiscal year 1988. During this same period the staffing level has decreased 23 percent -- from 641 to 495. Because personnel costs account for 90 percent of the Copyright Office budget, the Office simply has no more room to maneuver. We either need legislation like S. 1271 to restore the original value of the copyright service fees set by Congress in 1976 or we face the likelihood of cuts in services and further growth of backlogs.

Balance Between User Fees and Taxes

By requesting this fee increase, I am not striking out on a new path. I seek to re-establish the 1976 law's notion of the proper proportion of Copyright Office costs borne by direct beneficiaries and users of copyright services and those borne by the taxpayers. We must somehow cope with the increasing cost of maintaining the status quo, for example mandatory cost-of-living salary increases, as well as our increasing workload. In addition, we have costs associated with automation that will help us accomplish more work with fewer people.

Of course, Congress can choose simply to increase our appropriations without increasing the fees, but that places a greater share of the

costs of the copyright system on taxpayers. We recommend that about two-thirds of our costs should be paid by those to whom we provide the service. It has been eight years since we collected as much as 50 percent of the costs from the direct beneficiaries.

Since 1948 earned fees for copyright services have seldom covered the entire operating budget of the Copyright Office, and there is no reason that they should. The Copyright Office performs some services that are not directly related to maintenance of the public record. Prominent among the responsibilities are the public information services undertaken by the Copyright Office, rulemaking, participation in the development of national and international copyright policy, and the preparation of copyright studies by the Register's Office in response to Congressional requests. These activities should properly be supported by the general tax revenues.

Enactment of S. 1271 would return the Copyright Office to its historic ratio of earned fees to Office expenses. It would mean that the Copyright Office would earn approximately fourteen million dollars in fees to set off the approximately nineteen million dollars it takes to run the Office. Factoring in the deposits which are added to the Library of Congress collections through the copyright system, the operations of the Copyright Office would be virtually self-sustaining.

The fees earned by the Copyright Office are turned in to the U.S. Treasury. In the budgeting process, however, earned fees are taken into account in setting the appropriation of the Copyright Office.

Five-Year Inflation Adjustment Authority

The Copyright Office also seeks the Subcommittee's support for giving the Register the authority to adjust the fees for inflation at five-year intervals. Over time, the appropriateness of the fee schedule will always be eroded as inflation drives up the costs of delivering the services while revenues for the services are frozen by law. While historically Congress has been willing periodically to adjust the fees, there has always been a considerable time lag before this adjustment is made. In today's environment, only by achieving highly automated office operations can costs in the long run be held down. Considerable time lag between fee adjustments threatens investment in new equipment and personnel which will be necessary to maintain efficiency in the future. Enactment of the fee-adjustment authority will assist the Office in long-range planning since there will be a limit to the time costs can outstrip revenues.

Consensus-Building Efforts

In its efforts to seek a consensus in favor of the fee increase, the Copyright Office has contacted many author, user, and copyright owner groups to inform them of the proposed increase and to explain the need for the fee increase. We have now received many letters of support from different sources, including a most sympathetic letter from the Authors League of America, which I request permission to insert in the hearing record.

We have also considered possible adjustments that can be made by regulation or practice to diminish any burden on small publishers and individual authors.

Under Copyright Office practices, individual authors may make a single registration for their unpublished works by grouping them into a "collective" work. At their discretion, authors may group several months, or a year's creative output and register it as one work and pay one fee. By statute, individual authors may make a group registration for their published contributions to periodicals within a calendar year or less. This option has been made more practical by the elimination of the notice requirement in the Berne Implementation Act of 1988. Formerly, the contributions could be grouped only if published with a separate notice, and many publishers refused to publish the contributions with such separate notices. Now authors of poems, essays, and short stories who publish in periodicals can easily make group registrations for a calendar year or less, at their option.

I am also actively considering another change that would allow group registration of periodicals that qualify for a new short-form serial application. Under this option, daily editions could be registered on a weekly basis, weeklies could be registered on a monthly basis, and monthlies could be registered quarterly. This option would be conditioned on submission within thirty days of the latest publication date among the group of editions, to accommodate the Library's concern that it receive these publications on a current basis. This proposal would benefit small periodical publishers and publishers of newsletters.

Copyright Office regulations already contain other provisions giving special treatment to individual authors. Under 37 C.F.R. 202.3(c), the individual author may register his or her work as the copyright claimant even if the author has transferred all copyright interest to another. An

individual author of a pictorial, graphic, or sculptural work of a limited edition may satisfy the mandatory deposit provision of section 407 by submitting identifying material instead of actual copies of the work.

Benefits of Registration

Even at $20 the copyright registration filing fee remains one of the biggest bargains in Washington. Our neighbor, Canada, charges $35 (Canadian) for copyright registration and authors and copyright owners, in some ways, get less for their money. And Canada is kicking around the idea of increasing the fee to $70 (Canadian). Under our system, registration entitles authors and copyright owners to a legal presumption of copyright validity which has seldom been rebutted in court. Statutory damages and attorney's fees are available if registered works are infringed. Registration also greatly facilitates commercial transactions in, and licensing of, copyrighted works. And all of these benefits cost $20 a work or even less if the author invokes the options for group registration.

Conclusion

I hope my comments today will assist the Subcommittee in its deliberations on this urgently needed fee bill. The Copyright Office seeks the Subcommittee's active support for a fee increase to account for inflation. The costs of the Copyright Office are set at today's value. The Copyright Office needs revenues at today's value in order to ensure that the public record is managed in a timely manner responsive to the needs of the creative community and the public.

The Register of Copyrights
of the
United States of America

Library of Congress
Department 100
Washington, D C 20540

(202) 287-8350

July 17, 1989

The Honorable Dennis DeConcini
Chairman
Subcommittee on Patents,
Copyrights and Trademarks
Washington, D.C. 20510-0302

Dear Senator DeConcini:

I am grateful to you and your staff for taking the time to schedule an early public hearing on the copyright fee increase proposal, S. 1271. I accept the invitation in your letter of July 12, 1989 to submit additional information for the record, especially in relation to the variable fee concept and Mr. Irwin Karp's proposals. At the hearing Mr. Karp suggested that the Copyright Office had never seriously considered a system of variable fees for different works. I assure you that the Office has given careful and serious consideration to the possibility of variable fees for several years, but we do not think a variable fee system is workable or productive, for the reasons given in my attached response.

Sincerely,

Ralph Oman
Register of Copyrights

RO/dp

Enclosure

1. Why not adopt a variable fee structure?

The major problem is that variable fees for different works would be administratively unmanageable. In a volume operation like ours--now 650,000 items a year--determining different levels of fees would consume a significant amount of time all along the production line, and thus increase rather than decrease costs. Variable fees might also result in time and effort spent by applicants trying artificially to avoid the higher priced categories. Also, the Office believes the policy of nondiscrimination is best. Often applications completed by individual remitters take much longer to examine--like pro se litigants before the court--since we often have to write to them to correct mistakes. (The Copyright Office deals with more non-expert remitters than does the Patent Office, for example, which recommends that applicants first seek the help of a patent attorney before filing.) On the other hand, large corporations who repeatedly do business with the Office have experienced personnel to handle filing. On a cost-recovery basis, therefore, the "ordinary citizen" remitters would pay higher registration fees.

2. What is your response to Mr. Karp's proposal to amend Section 412 to allow a registration grace period of 24 months (after creation for unpublished works and after publication for published works) within which an unregistered work remains entitled to attorney's fees and statutory damages?

Statutory damages and attorney's fees are extraordinary remedies. No other country in the Berne Union allows statutory damages as a remedy for copyright infringement. Authors must prove actual damages. Statutory damages and attorney's fees constitute the primary incentive to make early registration of works. Since most works are infringed within a year or two of publication, a two-year grace period largely destroys the incentive to make registration; if the work is not infringed during the two-year period, registration will probably not be made. Also, timeliness is an essential feature of any good registration system to ensure that the facts alleged are correctly stated. Above all, early registration is essential so that the Library of Congress can rely on the copyright registration-deposits to build current, high quality collections for the benefit of the Congress and the public.

Even so, authors who delay in making registration are entitled to significant remedies: an injunction; actual damages and lost profits; and seizure of infringing articles. These are the remedies available in other Berne member countries. But I know that this answer won't convince Mr. Karp. He fought this same battle back in 1976 during copyright revision, and he lost then. And he's trying again.

I also disagree with Mr. Karp about the mandatory nature of registration before 1978. Registration was mandatory, and the Register of Copyrights had the authority to demand registration and deposit at any time after publication with notice of copyright.

Senator DECONCINI. Thank you, Mr. Oman. Thank you very much. You point out that the funding for the Copyright Office comes from two sources, one-third Copyright Office costs are borne by direct users of your services, the other two-thirds by taxpayers' dollars. You state that you hope the $20 fee will reestablish a proper proportion. Can I draw from that that there will be—the increase in fee—will decrease the amount of taxpayers dollars, the amount of appropriation that is necessary?

Mr. OMAN. That's the way the system works. Under our appropriations, the appropriated amount from the Treasury is offset by the amount we take in from fees. So there would be a direct—a decrease in the portion——

Senator DECONCINI. So there will be an adjustment then.

Mr. OMAN. Yes.

Senator DECONCINI. You don't anticipate a substantial expansion at this time, or as a result of these fee increases?

Mr. OMAN. No, but we are able to use the relative proportions to make our case before the Appropriations Committee. We are looking for ways to restore some of the service that we had to cut back during the cuts for Gramm-Rudman-Hollings. We are looking to automate our card catalog. Our card catalog is the world's largest. It's larger than the library's card catalog. And right now it requires individuals to go through the cards the old fashioned way. We hope to be able to reduce that card catalog to machine readable format so it can be accessed by the computer, not only in the Copyright Office, but from anywhere around the country. And I think this would be a tremendous benefit, not only to authors but to those who are engaged in the copyright business. And we hope to be able to convince the Appropriations Committee to give us a one shot infusion of dollars to make that conversion.

Senator DECONCINI. Has that request been made?

Mr. OMAN. It is part of our 1991 budget request which has been submitted.

Senator DECONCINI. And that's been approved by OMB and is before the Appropriations Committee now?

Mr. OMAN. No, that would be the 1990 budget. The 1991 budget, we're in the process of putting that together, and it's not yet out of the Library, but it will be. We will touch all the bases.

Senator DECONCINI. I see.

Mr. Oman, I've heard—we hear complaints that your office is rejecting applications for compilations of work on the grounds that the individual components do not represent original works of authorship. How do you make this determination? Can you explain your policy for the committee?

Mr. OMAN. Yes, I'd be happy to, Mr. Chairman. This issue that you're referring to has generated more mail than any other in my 4-year tenure as Register of Copyrights, even more than the issue of colorization of black and white motion pictures. The copyright law protects compilations of public domain materials, just as long as there is some human authorship involved, as long as the compiler of that material contributes something original. That contribution could be in the form of the selection of the materials in some special way, the coordination of it, the arrangement of it, but in

some way we can look at the whole work and say that there is original human authorship as required by the law.

In general the question that you raised comes up with regard to genealogies. And in most cases genealogies do contain these original contributions and we register them. The Library of Congress, in fact, very much wants to acquire these works of genealogies. Our genealogy section is one of the most frequently used in the Library and it is really a unique collection in the country.

The question came to the floor recently when one of our crackerjack examiners raised some questions about one submission. And this was a list of names and dates from a graveyard. Someone went into the graveyard and just made a list of all the names and dates, and submitted that for copyright registration. The examiner asked how the compiler had selected, arranged, organized the material. And after getting the answer, we did register the work. But that inquiry has triggered this massive deluge of mail, the fear being that we would, as a general rule, stop registering these works of genealogies, especially those lists coming from graveyards.

In fact, the office recently reviewed its practices for these fact-based compilations, and to assist the courts, which is our primary function since issues of copyright ability are always decided by the courts and not by us, to help the courts we ask all people who claim in copyright, in fact-based compilations, even those graveyard compilers, to give us a description of the nature of their original contribution and after we get that explanation we register the work. We are not refusing to register, and only Congress could make that decision by changing the law.

That's a long-winded answer to the question.

Senator DECONCINI. I think I understand. In other words, you still will register anything that's submitted, but you ask them to give some background information, is that about it?

Mr. OMAN. We do. And in all cases——

Senator DECONCINI. And if they refuse to give it, then you have basis to refuse to register?

Mr. OMAN. Well, if we did ask the question as to what the human authorship was and they said that they didn't do anything, they just went down the rows of tombstones and wrote down the names one after another without any——

Senator DECONCINI. Then you would not register that?

Mr. OMAN. Then we would not register. But they know enough to say that they did organize them alphabetically or organize them by date, did something that required some——

Senator DECONCINI. You haven't turned any down?

Mr. OMAN. Right.

Senator DECONCINI. Is that right?

Mr. OMAN. I'm sorry?

Senator DECONCINI. You haven't rejected any?

Mr. OMAN. Not to my knowledge.

Senator DECONCINI. Thank you very much, Mr. Oman. I appreciate your testimony.

Mr. OMAN. Thank you very much, Mr. Chairman. We desperately need your help. Thank you very much.

Senator DECONCINI. I can see that.

Our last witness will be Mr. Irwin Karp. Mr. Karp, if you would please summarize your statement for us, your full statement will appear in the record. We're pleased to have you with us today.

STATEMENT OF IRWIN KARP, COUNSEL FOR OFFICE ORGANIZATIONS INVOLVED IN COPYRIGHT REVISION ACT, RYE BROOK, NY

Mr. KARP. Thank you, Mr. Chairman.

I appreciate your invitation to testify on the fee increase bill. As my statement and my summary point out, I'm not here to oppose the doubling of fees. I haven't addressed myself to that. If I had intended to do so, I guess the one thing I would have suggested, is that the Copyright Office not be given a perpetual carte blanche to do this. And that the fee increase ought to be made for a limited 5-year period so that Congress could reconsider if any further increases were necessary.

But that's not the purpose of my visit. My concern is that with the provisions of section 412, which require an author to register a work as soon as it's completed, or as soon as it's published on pain of losing statutory damages and attorney's fees, a greater burden will be cast on people who write multiple works. I mean a poet who writes 20 works a year, a photographer who may create 200 or 300 photographs and such. Right now, most of these people can't afford to register in order to preserve those two remedies.

I don't hate to differ with the Register of Copyrights since I've done it before, and I probably will do it again. But on this occasion I should point out it just isn't accurate to tell you, as he did, that before 1978 registration was compulsory, and since 1978 it's voluntary. Quite the contrary, just the other way around. Before 1978 the Supreme Court had held in the Washingtonian case back in 1939 that even though the statute required registration, if an author or publisher registered long after publication, and after an infringement, he or it was entitled to all of the remedies, to claim all of the remedies, including statutory damages and attorney's fees. In 1978 the Copyright Office, which has a very vested institutional interest in the business of registering, because that is sort of the raison d'être of about—I can't give you a percentage of the staff, but a large part of the Copyright Office staff—decided it needed more incentives to make people register. And therefore, it proposed to Congress and Congress accepted the proposition embodied in 412, which is if you're a photographer and you take a picture and you send it around to people to look at so that you can find someone to publish or use it, and it's still unpublished and someone infringes for copyright in that photograph, which is vested on creation, you can't collect attorney's fees and statutory damages if you later sue for infringement. And these two remedies, as my statement points out, are the sine qua non of protection for this large array of copyright holders who create these types of works.

If an author of a short story hasn't registered before some anthology, without permission, puts the short story in the anthology, or the author of a poem is in the same situation, he can't go to court because without statutory damages and attorney's fees,

there's no way he can economically afford to sue. And I've talked to attorneys who have had to thus counsel clients in the past.

What 412 does is charge a premium, not for services, that's a bit hypocritical to talk about services. It charges a fee for the remedies of statutory damages and attorney's fees. And it was clearly intended to make authors register more frequently. Now it hasn't worked in several areas. For example, I think it's the Arizona Daily Star in Tucson, has never registered for copyright in a single issue, as far as I could tell on a quick survey of the registration records. And it was wise not to do that. It would have cost them about $43,000 if they had registered each day's issue. And even the Register's statement that he may allow them to register once a week isn't going to bring in registrations from the Star or the Capital Times in Madison, WI, or any of the 14 small daily newspapers that just were awarded prizes as the best papers in that class in the country. They don't register because they don't want to pay the Copyright Office $10 a day. Now it will be $20 a day, or even $20 a week. That's a lot of money. And they fortunately have a deep enough pocket so that if they are infringed and they want to go to court, they can sue, because, mind you, an infringement committed before registration isn't immune from all the other remedies. A newspaper which registers after an infringement and then sues can recover damages, loss of profits, get an injunction, and even have the infringing copy seized. The fact that it didn't register until after the infringement doesn't preclude these remedies.

But the author, or the poet, or the photographer, can't really get protection because damages and profits are very difficult to prove, and costs money to prove in court. Because they are barred by section 412 and can't seek these two remedies, they never go to court to begin with. And then, ironically, if they haven't registered before infringement, if they haven't complied with 412, and they do go to court, while they cannot recover attorney's fees, the defendant can, if it's successful. So you're putting—this section puts authors in a double, or even a triple bind. I don't think the Register appreciates that for a minute. Because the fact is that most authors can't afford to register. A lot of authors don't even know they're supposed to register if they want to pay all that money for this remedy, and foreign authors aren't the least bit aware of the problem. And section 412 applies to foreign authors as well as American authors.

Actually, if a poet were to comply literally with section 412, which he'd have to do in order to really be assured of protection over his career, he might have to spend as much as $10,000 or $15,000, or $20,000 in order to buy this insurance, even though he might only incur one or two infringements. He has no way of knowing which of the poems will be infringed, and if he wants those remedies, he'd have to pay insurance for them, that $10 or now $20 fee for registration.

Now the Register has recognized that group registrations are important to poets. And I recognize it because I'm the one who put it into the Copyright Act. I proposed that back in the early 1970's. That wasn't something the Copyright Office volunteered. That's something I got for the Authors League during the years I represented it in the Copyright Office in congressional hearings. But

that isn't enough, because if a poet waits for a year to accumulate all of the poems and he's infringed in the meantime, without having yet made his group registration, he's out of court on those infringements.

I really don't understand the Copyright Office's position, because 412 already prevents people from registering. I looked quickly at the registrations made by the last three poets in residence at the Library of Congress, Daniel Hoffman, Mr. Kunitz, and Mr. Neimerov. They don't register groups of unpublished works, nor do they publish single unpublished works. Either they don't know about it, although they have all the legal advice they could need down on the fourth floor of the Library of Congress building, or they can't afford it. I haven't done an inordinate amount of searching, but I think the proposition is pretty obvious. And all I'm suggesting is that section 412 be amended simply to provide that in the case of a work created by an individual author, if the work is registered within 2 years after it's created, or first published, then the author can collect, or claim the two remedies he needs most, even if the infringement occurred before. I'm not suggesting we do away with 412, only that we amend it so that the registration can be made within a grace period, and we do have a similar grace period provision for the bigger copyright owners who want prima facie effect for their copyright certificates, they can register anywhere within 5 years of first publication and get that benefit.

In addition, I think it's important to realize that unless section 412 is amended, you're going to shut out of court practically anybody who gets this type of work. In fact, while I haven't seen the Authors League's generous, I think the Copyright Register put it, letter of support, I don't know whether they're supporting the fee increase or keeping 412 the way it is. All I know is that in 1986 when I proposed to the Register, on the occasion of his last attempt to double fees, when I proposed that 412 be eliminated, because it doesn't do much good to the Copyright Office and only harms authors, that the Authors League's president, Garson Kanin, wrote a short note to me, which I'll read out loud, so the Register can have it right away:

> Dear Irwin, of course, I support with strength and passion the objection which the Authors League is making with regard to the proposed increase in Copyright Office fees. In a well-ordered society services of this kind should be free.

And Garson had a point. And I gather now he's all in favor of the $20 increase which I don't oppose. I don't know where he stands on my proposal to add this small benefit to authors.

I had another note from a young lady who was the executive director of the Authors League then and now, with which I described our proposals and her response is, "Yes, fight, signed Helen." And she may have had a change of mind, too. I have a letter that Daniel Hoffman, a member of the Author's Guild board of directors, and the former poet in residence at the Library of Congress, wrote to the Librarian of Congress, Daniel Boorstein. And in his letter he says to Mr. Boorstein, authors are not the beneficiaries of copyright registration. We are compelled by the 1978 act to register, else we lose all legal protection of our own work. Copyright protection is achieved by other nations without such registration,

hence the deficit alleged to the procedure—he means the registration procedure—is avoidable and lastly, the burden of the fee increase will fall heavily on those least able to afford it, the authors of brief works, poems, articles, short stories, essays.

I make no bones about the fact that I have educated Mr. Boorstein to the realities of the situation, but he's a professor of English at the University of Pennsylvania, a prize-winning poet, and the poet in residence, so I don't think it was just repeating without approval the arguments I had been making. And I might note that in 1986 several other organizations supported a much more drastic proposal, which was to completely eliminate 412.

Now, as far as the—you asked the Register a question about this problem over registering compilations. And it brings to mind one last point I would like to leave with you if I may.

Actually authors of poems and short stories, and music and so forth, are paying high fees for what they get. First of all, they don't have to register in order to get copyright. That comes automatically. Second, they don't have to register to sue, and third, what they do have to do is pay the Copyright Office $10 or $20 for remedies that have been in the Copyright Act since 1909. And until 1978 were available without a prior registration. That should never be forgotten. It's just hypocritical to talk about it being better now than before 1976. It is in other respects, but not here.

Also, when a manuscript for a short story or a poem is submitted to the Copyright Office it incurs very, very little expense in processing it for a very simple reason. The certificate of registration, which is inflated to be some sort of an important document, is really nothing but a receipt that that claim was made for this very simple reason. The examiner who processes an ordinary registration for a literary or dramatic work takes about 5 to 10 minutes to do it. The reason is that the most important question to be determined: Is this an original work of authorship? And here there's no generic question as there is with computer software and the like, because a short story is a short story, is a short story, as Gertrude Stein said, or almost said. And it has to be registered. The Copyright Office has no discretion. The only real element of copyright ability that has to be determined is whether that short story or poem, even if it's gibberish, whether it's original. And originality as the House report points out, and the courts have pointed out, originality of a work has nothing to do with its cultural or aesthetic value, or whether it's unique. All it has to do with is whether the author wrote it himself, or plagiarized it, or took it from the public domain. And there is no way in the world in which an examiner in the Copyright Office can make that determination. And the examiner can't even determine whether the claimant who filed the application actually is the author. All he knows, or she knows, is that the name is on the book, or the copy if it's unpublished, and the name is on the registration statement. It is really nothing more than a certificate of receipt which tells the public the most essential thing, namely that on such and such a date the author or publisher of the work entitled so and so claimed copyright.

And while it's supposed to have prima facie effect, in the courts the fact is that in an infringement suit, both parties walk in with a certificate, solemnly proclaiming that they are the author of the re-

spective works. So that what the Copyright Office is doing is in a sense loading on the backs of authors who make very little demand upon its registration process for quite considerable cost that incurred either in processing a motion picture, which costs much more money for the newer types of copyrighted works, and we have a system in which the author of a two-page poem has the right under the law to pay the same $10 or $20 to register that poem as Paramount Pictures paid $20—then $10—to register Raiders of the Lost Ark, which cost millions to produce and grossed $365 million. We proposed alternatives for the Register then. I think he never wanted to consider them, didn't consider them, and I'd be glad to submit those to the committee, if you wish, for your consideration. But that doesn't have anything to do with the bill. I'm all for passing the bill, but I do think that in justice and equity the amendment I suggest ought to be incorporated.

Thank you very much.

[The prepared statement of Mr. Karp and a letter to Senator DeConcini follow:]

July 12, 1989

SUMMARY OF STATEMENT OF IRWIN KARP ON S. 1271;
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS
AND TRADEMARKS; COMMITEE ON THE JUDICIARY

The fee-increase bill should amend sections 412 and 408 of the Copyright Act, to ameliorate the punitive effect of Section 412 on poets, photographers, writers of articles, illustrators and other individual authors of "multiple works" -- i.e. an author who creates a number of works each year.

1. Section 412 prevents authors from recovering statutory damages and attorney's fees, unless a copyright is registered before the infringement occurs. Other remedies are recoverable for infringements prior to registration.

2. Statutory damages and attorney's fees are the only effective protection for authors of multiple works. Actual damages for infringement of a poem, photograph, etc. are difficult and costly to prove. Both remedies were intended to permit these authors to protect their copyrights. Without them, they cannot afford to sue infringers.

3. Authors of multiple works cannot afford to comply with section 412, and thus preserve the right to claim statutory damages and attorney's fees against future infringements. To do that, section 412 requires that they register separately -- and for a separate fee -- each of the several poems, photographs they produce each year. Countless authors of multiple works cannot pay $200 or $300 a year (or more) to register the 20 or 30 or more works they created. With the fee doubled to $20 more authors will be unable to comply with section 412. A photographer have to pay $4000 if he produced 200 photographs in a year; a poet might pay upwards of $10,000 over a 20-year career.

4. Section 412 requires a poet to pay $10 (soon $20) to register a 2-page poem (which might earn him $500 in the next 20 years). It requires Paramount Pictures to pay the same amount - $10 (soon $20) - to register a movie like RAIDERS OF THE LOST ARK which cost millions to produce and grossed $365 million in theatrical release. Section 412 (added in 1978) exacts a price for remedies, and does so inequitably. Those who can afford to pay can claim statutory damages and attorney's fees; those who cannot afford the fees lose these essential remedies, which were establish by the 1909 Act specifically to protect them.

5. Section 412 should be amended to provide that in the case of works created by individual authors, registrations of copyright made within 24 months after the work was created or first published would entitle them to recover statutory damages and attorney's fees for infringements occurring before, as well as after, the registration (as they could prior to 1978). This amendment would enable them to make a group registration of several works -- for one $20 fee - without losing the two essential remedies in case any of the works was infringed before the registration was filed. Section 408 should be amended, as proposed in my statement, to facilitate group registrations of published and unpublished works created by individual authors.

6. The amendments will not adversely affect registrations or impair acquisitions of copies for the Library of Congress.

July 12, 1989

BEFORE THE SUBCOMMITTEE ON PATENTS,
COPYRIGHTS AND TRADEMARKS
Committee on the Judiciary
United States Senate

Statement of Irwin Karp on

S.1271, A Bill to Change the Schedule
of Copyright Office Fees

Mr. Chairman, my name is Irwin Karp. I am an attorney, and have some experience in copyright law. I represented writers' organizations in the 1960-1976 Copyright Office and Congressional hearings on revision of the 1090 Copyright Act; I have represented parties, and amici curiae, in major copyright cases; and I chaired the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, and the National Committee for the Berne Convention.

I appreciate your invitation to testify on the bill (S. 1271) that would double the fees payable to the Copyright Office under Sec. 708 for registering copyrights, recording assignments, renewing copyrights, etc.

My concern is that the present $10 registration fee, coupled with the coercive provisions of Section 412, already deprives countless authors of effective copyright protection; doubling the fee without ameliorating the punitive effect of Section 412 will deny it to many more authors.

My purpose is not to oppose the fee-increase bill, but rather to urge that your Subcommittee add to the bill provisions amending sections 412 and 408. These simple amendments, described below, would preserve effective copyright protection -- i.e. the remedies of statutory damages and attorney's fees -- for writers, photographers, composers, illustrators, and other authors of "multiple works". Such an author each year creates or publishes several poems, or photographs, or journal articles, or other copyrighted works -- and cannot afford to register each one separately, as section 412 requires, in order to preserve that protection against future infringements. With the current $10 fee, the author's total fees annually could be hundreds of dollars.

* * * *

A. How Section 412 Denies Effective Copyright Protection to the Authors of Multiple Works

1. Section 412's Purpose Is To Compel Authors To Register The Copyright In Each Work As Soon As It Is Created Or published.

Under the 1978 Act, copyright automatically vests in a work when it is created, and registration of the copyright is not required to exercise the

rights it gives the author. If an infringement occurs, the author or other copyright owner can then register the copyright, sue for the prior infringement, and can obtain various remedies: damages, profits, an injunction, and seizure of infringing copies.

However, section 412 is intended to compel authors to register each copyright as soon as a work is created or within 3 months of first publication. It does so by preventing them from recovering the two most important remedies for infringements of "multiple works" -- statutory damages and attorney's fees -- unless the copyright was registered before the infringement occurred. [1] (Footnotes at the end of the statement.] Prior to 1978, authors of published works were entitled to recover statutory damages and attorneys fees, as well as all other remedies, for infringements that occurred before they registered a copyright, as well as those that occurred after registration. [2] Authors of unpublished works could invoke similar remedies under common law, where no registration was required. [3]

2. Statutory Damages And Attorney's Fees Are The Only Effective Protection For Authors Of Multiple Works

For authors of multiple works, statutory damages (Sec. 504(c) and an award of attorney's fees (Sec. 505) are the only effective protection against infringement. Without them suits cannot be brought by these authors; bare-faced infringers cannot be persuaded to make reasonable settlements.

The actual damages, or infringer's profits, caused by an infringing use of a poem, or a photograph, or a magazine article, or illustration, or essay in a scholarly or scientific journal often are small; and, in any event, are difficult and costly to do prove. The purpose of statutory damages is give copyright owners some recompense in these circumstances (and deter infringement) by allowing the court to estimate and fix damages without proof. [4] If infringement is established, damages of at least the statutory minimum will follow. Section 412 prevents many authors from claiming this essential remedy.

The purpose of awarding attorney's fees is allow plaintiff-authors of limited means to protect their copyrights, particularly "where the commercial value of the infringed work is small and there is no economic inventive to challenge an infringement through expensive litigation." [5] Section 412 denies many authors of multiple works the essential right to recover attorneys fees if they prevail. And since they are still exposed to an adverse award of attorney's fees should the defendant prevail, section 412 increases the risk of challenging unauthorized uses of their works.

Creators of multiple works -- poets, composers, photographers, illustrators, writers of articles and essays -- are the kinds of authors who were intended to be protected by these two remedies. But the cost of registering multiple works separately is so high that the cannot comply with section 412, and it therefore denies them the only effective protection against infringement. And the fact they are unable to register these works increases the likelihood that infringements will occur

3. Authors of Multiple Works Cannot Afford To Comply With Section 412, As It Now Stands

An author who creates several works each year -- 20 or 30 poems or songs or paintings, 10 or 15 short stories or articles, several hundred photographs -- cannot forsee which of them will be infringed in the future, or when they will be infringed. Most of the works will not be infringed; perhaps none will. But since 1978, because of Sec. 412, the only way an author can insure that effective protection is preserved should one of them subsequently be infringed is to separately register the copyright in every work when it is created (before sending anyone a copy), or within 3 months after it is first published. Otherwise, he will be foreclosed from recovering statutory damages and attorney's fees should one of the works be infringed.

Many authors who create several works each year cannot afford to register each of them separately on creation or publication, as section 412 demands. The price is already too high given the present $10 fee -- $200 to register 20 works in a year; $300 for 30 works. If the fee is doubled, as S.1271 and H.R. 1622 provide, a photographer who created 200 photographs a year would have to pay $4000 in order to comply with section 412, and preserve effective copyright protection for his work. A poet who wrote 500 poems during the next 20 years would have to pay the Copyright Office $10,000 in order to comply with Section 412 under the new fee schedule; in addition, he would have the burden and costs of preparing and filing 500 application forms.

4. Section 412 Imposes An Inequitable And Discriminatory Compulsion on Individual Authors of Multiple Works

In its present form, Section 412 imposes an enormously unfair and discriminatory compulsion on poets, photographers, composers, illustrators, authors of articles and essays, etc. -- many of whom create works of cultural, scientific, or educational value that earn them a modest or minimal return. Yet if the fee-increase bill is enacted, without any modification of Section 412, such an individual author who creates 30 works in 1990 would have to pay the Copyright Office $600 for the right to claim statutory damages and attorneys fees should one of them be infringed in the future. By contrast, a motion picture company would pay the Copyright Office $20 to register its copyright in a film that cost $20 million to produce and grosses $50 million or more. And ironically, the film company would register even if section 412 were eliminated; since it, like countless other companies, has several reasons for register copyrights.

It is not surprising that motion picture companies, book publishers, record companies and other corporate copyright proprietors may support the fee-increase bill. Considering the cost of their works their works, and the income a successful film, recording, book or software program can generate, a registration fee of $20 is -- for them -- a bargain. But there is something amiss about a fee schedule that now requires a poet to pay $10 to register the copyright in a 2-page poem which might earn him a few hundred

dollars during its copyright term -- and requires Paramount Pictures to pay the same $10 to register the copyright in RAIDERS OF THE LOST ARK which cost millions of dollars to produce and grossed $365 million in theatrical release. A $1000 copyright registration fee for a commercial motion picture that cost $5 million to produce -- .0002% of its cost, would certainly be more reasonable that the $20 (.000004%) the Register proposes, and easily affordable even if the film lost money. Obviously, the Register's fee schedule is quite acceptable to copyright industry associations.

Section 412 exacts a price for essential remedies; not a fee for services. Authors who register copyright under the compulsion of the section do so to avoid losing the only two remedies that can give them effective protection. Awards of statutory damages and attorney's fees are not services or benefits provided by the Copyright Office. They are remedies which the Congress established decades before 1978; remedies which were available before 1978 even though registration was made after the infringement.

Section 412 exacts its price in an inequitable and discriminatory way. Those who can afford to pay may claim statutory damages and attorney's fees, those who cannot afford to pay are denied those remedies. The fee charged is a pittance for major copyright interests, who would register for other reasons even is section 412 were eliminated, can afford to sue even if attorney's fees were not awarded, and more often seek actual damages and profits rather than statutory damages. The fee, multiplied by the several works an individual poet or composer or photographer creates annually, is beyond their means.

Section 412, in its present form, discriminates against individual authors of multiple works, denying them protection equal to that allowed to other copyright creators who can afford to pay for the remedies. And it compels payment of a price for remedies that is set under a schedule that is plainly disproportionate. In these circumstances, its requirements violate the spirit, if not the letter, of the Constitutional requirements of due process and equal protection.

The unfairness of section 412, and the severe penalties it imposes on individual authors, could be ameliorated by simple amendments to sections 412 and 408.

B. Suggested Amendments To Sections 408 And 412

I suggest that the fee-increase bill be revised by inserting a provision that would amend section 412, and a provision that would amend section 408(c) which governs registrations of copyright.

1. Section 412

I recommend that section 412 be amended to provide that so long as a copyright registration is made

> for an unpublished work, created by an individual author, no later than 24 months after it is created, or
>
> for a published work, created by an individual author, no later than 24 months after it is first published

the author is entitled to claim statutory damages and attorney's fees for any infringements commenced before the effective date of the infringement, as well as those occurring after that date. "

"Individual author" means one entitled to the copyright under sections 302(a) and (b), and the proposed amendment does not apply to a work made for hire.. As I have noted, the heavy burden of section 412 falls on individual creators of copyrighted works, not on corporations and other business entities that acquire rights from authors or produce works-made-for-hire.

While this amendment does not restore to individual authors the unrestricted right they had before 1978 to obtain statutory damages and attorneys fees for infringements prior to registration, it would significantly ameliorate the harsh penalty now imposed on them by section 412. The 24-month grace period created by the amendment would enable authors, artists, composers and photographers to make a group registration(s), for one $20 fee, of several works they created or first published during the previous 24 months, without losing the right to claim statutory damages or attorneys fees for infringements of those works commenced prior to the registration.

I had originally recommended an 18-month grace period to Chairman Kastenmeier, but it has been suggested to me that a 2-year period would be easier to administer. Of course, a 24-month or 18 month grace period is much shorter than the grace period allowed in section 410(c) which provides that if a registration is made within 5 years after first publication of a work, the certificate shall be given prima facie evidentiary effect in any judicial proceeding.

Presently authors can make a group registration for unpublished works. But if they wait for several months or until year-end to file a registration for several works created during that period -- the only way to avoid multiple fees -- they lose statutory damages and attorney's fees for any work in the group that was infringed before the group registration was filed. They face the same risk if they wait to register a group of published works, as permitted under Section 408(c)(2)

2. Section 408(c)

I recommend that Section 408(c) be amended to explicitly permit an author to make group registrations of unpublished works, at any time, so long as the works in each group were created within the preceding 24 months. Section 408(c)(2) also should be amended to permit an author to make group registrations on the same terms and time periods for works first published as contributions to newspapers, anthologies, collective works or other compilations. At present that, the section only allows a group registration of works first published as contributions to periodicals (including news-

papers.) The clause should be amended to permit a deposit of a copy of the pages from the collective work containing the author's contribution, and not require a deposit of the entire periodical, newspaper section, anthology, encyclopedia or other collective work in which the contribution appeared.

C. The Amendments Will Not Adversely Affect Registrations

1. Adding a 2 year grace period to section 412 will not adversely affect registrations. Section 412 would still require that works be registered in order to obtain statutory damages; it would simply permit registrations to be made some time after creation or first publication.

Indeed, the grace period may well encourage many registrations by individual authors of multiple works who now cannot afford to separately register each of the poems, photographs or other works they create annually. Indeed, unless the grace period were added, it is likely that the doubling of the fee would further diminish the separate registrations of multiple works. And there is no way that section 412, as it now stands, could compel thousands and thousands of separate registrations by authors who cannot afford to make them now, and could less afford to make them if the annual cost doubled.

I should point out that many poems, photographs, articles and other multiple works by individual authors are first published in periodicals, journals, newspapers, anthologies and other collective works. It is the publisher who registers its copyright in the collective work; and the grace period added to section 412 would not apply to that copyright or its registration, only to the author's copyright in his contribution and its contribution.

Moreover, a preponderance of the 627,000 copyright registrations filed in 1988 would have been filed even if section 412 had not been added by the 1978 Revision Act. Companies that acquire rights from individual authors, or have works created by employees-for-hire register copyrights for a number of business reasons, and to obtain prima facie evidentiary effect under section 410. And companies that do not choose to register cannot be coerced to do so by section 412; they can afford to register if an infringement occurs, and sue even though they cannot obtain statutory damages and attorney's fees -- unlike individual authors of multiple works. In any event, the proposed grace period would not apply to copyright in works-made-for hire for these companies.

2. The Copyright Office may argue that a 24-month grace period would mean that it could not record the registration of works for several months after they were created or first published. But if an author cannot afford to register his multiple works, and he cannot be compelled to do so unless he chooses, then the Office can never make a registration of those works unless and until he decides to sue for an infringement - which is unlikely in the case of multiple works, for the reasons I have indicated.

3. Use of the grace period by authors of multiple works would not harm the public. Again, if authors of multiple works cannot afford to

register under the present section, the public is denied that record. And without the grace period, a greater number of multiple works will never be registered because of the 100% fee increase. Moreover, absence of a registration cannot mislead any prospective user under the present Copyright Act. Even if he found no record that copyright in a given poem, song, or photograph had registered, he could not assume he was free to publish, perform, broadcast or otherwise use the work. If he did, the copyright owner or owner of the right involved, which might be an affluent company rather than a poor author, could register the copyright and sue for damages, profits and an injunction -- and put him to the considerable cost of defending a suit.

D. The Amendments Will Not Impair Acquisition of Copies For the Library of Congress

1. As mentioned above (C.1.), many multiple works by individual authors are first published by a corporate publisher in a periodical, journal or other collective work. It is the publisher who provides copies to the Library, through the deposit of copies with its registration; or through its deposit under section 407.

2. Under section 412 as it now stands, the Library cannot obtain copies through a registration by the author if the author cannot afford to register. And for the reasons I have mentioned countless authors of multiple works presently cannot afford to register them, and even more could not afford to register separately at a $20 fee. So the Library loses nothing from the amendments, which will do more to encourage than discourage the registration of multiple works by individual authors.

3. Nothing in the proposed amendments affects the powers of the Register of Copyrights to enforce the deposit requirements of section 407.

4. Section 407 does not compel the deposit of copies of unpublished works, and that bespeaks a lack of intent by Congress that the copyright system be employed to compel the deposit of copies of unpublished works for the Library of Congress. In any event, authors of unpublished multiple works are even less likely to register them separately each year than are authors of published multiple works, given the total cost, and the doubled cost if the fee-bill is enacted without the proposed amendments. The amendments are likely to encourage rather than discourage registration of such works, to the Library's considerable advantage.

* * * *

I thank Chairman DeConcini for this opportunity to present my views to the Subcommittee.

Irwin Karp

FOOTNOTES

[1] Sec. 412

In any action under this title, other than an action instituted under sec. 411(b), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for -

(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or

(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication fo the work.

[2] Washingtonian Publishing Co. v. Pearson, 306 U.S. 30 (1939); 2 NIMMER ON COPYRIGHT, 7-113, 7-126.

[3] In actions for infringement of common law copyrights (in unpublished works) punitive damages often were awarded. Roy Export Corp v. Columbia Broadcasting Corporation, 503 F. Supp. 1137 (SDNY 1980), aff'd 762 F. 2d 1095 (2 Cir. 1982), cert. denied, 495 U.S. 826 (1982) [$400,000 in punitive damages awarded for common law copyright infringement and unfair competition.] See also, 3 NIMMER ON COPYRIGHT , 14-18, cases cited (ftn. 59)

Moreover, in common law actions for violations of rights in literary property, courts could apply the rule that where the plaintiff failed to prove his damages, the court can make "the best estimate we can, even though it is really no more than a guess (citation omitted)." Gilroy v. American Broadcasting Company, 58 App. Div. 533 (1st Dept. 1977); motion for leave to appeal dismissed, 46 N.Y. 2d 580 (1979). [The Appellate Division made an estimate of, and awarded plaintiff-author, $100,000 "as the reasonable value of that which the defendant had misappropriated."]

[4] F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228 (1952); Douglas v. Cunningham, 294 U.S. 207, 209 (1935)

[5] 3 NIMMER ON COPYRIGHT 14-67, quoting from Quinto v. Legal Times of Washington, Inc., 511 F. Supp. 579, 581 (D.D.C. 1981); Diamond v. Am-Law Publishing Corp., 745 F. 2d 142, 148 (2d Cir. 1984); Oboler v. Goldin, 714 F. 2d 211, 213 (2d Cir. 1983).

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914/939-5386

July 17, 1989

Hon. Dennis DeConcini, Chairman
Subcommittee on Patents
Copyrights and Trademarks
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman DeConcini:

My sincere thanks for the opportunity to testify on S.1271, which increases Copyright Office fees. I submit this additional comment for the record, indicating why a grace-period should be added to section 412.

As the Register of Copyrights mentioned, section 408 permits poets, photographers and other authors of multiple works to register several works created during a 12 month period "on the basis of a single deposit, application, and registration fee..." [408(c)(1)]. Mr. Kastenmeier's Report on the 1976 Revision Bill emphasized that this clause was added to prevent "unnecessary burdens and expenses on [these] authors..." caused by the "technical necessity for separate applications and fees..." It noted that "the undesireable and unnecessary results" of requiring separate registrations for each multiple work would be avoided by allowing a single group registration; for example, one registration of "a group of photographs by one photographer... or a group of poems by a single poet." H. Rep. 94-1476 (9/3/76), p. 154.

This provision was designed to allow a poet, photographer, etc, to accumulate works he or she created "within a twelve-month period" and register them as a group for the express purpose of saving authors from the "unnecessary burdens and expenses" of separately registering each work as it was created or published. But the purpose of section 412 is to compel separate registration of each work as it is created or published. Without a grace period to preserve statutory damages and attorney's for prior infringements of works submitted in a group registration at the end of the 12-month period, the objective of group registration is frustrated --authors of multiple works are still under coercion to register each work separately upon creation or publication. Adding a grace period to section 412 allows group registrations to serve their intended purpose -- it does not eliminate the requirement that multiple works must be registered in order to obtain statutory damages and attorneys fees.

Sincerely yours,

Irwin Karp

Irwin Karp

Senator DECONCINI. Mr. Karp, I would welcome your submission of that information. I guess one of the problems I see here is that if we adopted one of your suggestions of a 2-year period of time, then you lose the incentive to register. Maybe that's OK, but I'm under the impression, and maybe I'm incorrect, but I'm under the strong impression that there's a public interest here of having these registered—having artists and people put their work at the Library of Congress, at the Copyright Office for that purpose in and of itself. Now maybe that's not what was intended, but that's what I feel is important. And then you get to the fee, and I think you make a good point, there is a difference between a multimillion movie that is registered for $20 or $10, and a 2-page poem. And I think there should be some consideration given that.

But it doesn't offend me that you'd have a small fee of $20 even if you write a 2-page poem, if you want to register. If you don't want to, you don't have to. If somebody infringes, you have the right to go to court. The only thing the $20 gives you is a presumption—a prima facie case—the court still makes the decision, which it does in any other rule of evidence before it, but there must be some evidence the other way to overcome the presumption. I don't see the compelling argument other than the inequity of a multimillion picture versus a 2-page poem. I see that inequity, and I think your argument is well taken.

But as far as the 2-year period of time, it seems to me that we're just inviting people not to register. Maybe that's what you really want—to not require registration. And maybe you think this whole thing is a gimmick to create an incentive to register and to create funds for the Register's Office.

Do you care to comment?

Mr. KARP. Oh, yes, very much so. [Laughter.]

First of all, 412 is not an incentive because people can't comply with it. It's not a single fee we're worried about. It's the fact that if you create 20 poems a year, or 500 over a career, and you want to get the protection of these two remedies, you have to register on creation, otherwise you maybe infringed before you ever do register. So that we're not talking $20, we're talking—a photographer right now, at a $20 fee, would have to register as many as three or four hundred photographs a year. We're talking about, in some cases, $5,000 and $10,000. I've mentioned to you the Daily—the newspaper in Tucson as just an example. They save $43,000 or so right now.

Second, as far as public policy is concerned, the registration of a copyright does the public no good at all in terms of a warning that they may not infringe the work. That's not how you get a warning. The fact is that the Daily Star—the Daily News——

Senator DECONCINI. The Arizona Daily Star.

Mr. KARP. The Daily Star, which has never registered confine, except for individual contributions, you know, about 74 different individual pieces, feature pieces that were registered, the daily issues were not registered. But if somebody infringes the Star, because they went to the Copyright Office and found no registration for the issue of July 10, 1989, the Star can register after the infringement and go to court and collect damages, and can collect profits if there are any, and get an injunction. It can do it because I'm sure it can

afford to pay an attorney to do it. I think the New York Times owns some 40 or 50 small newspapers all over the country, not one of them registers, because they don't want to spend all that money.

The people I'm talking about don't refuse to register because they just don't like it, they can't afford it.

Now, if I haven't made—I'd just like to make that point in another way. If anybody goes to the Copyright Office records and looks at the records to determine whether a given novel has been registered and finds no registration, that doesn't give them the right to——

Senator DECONCINI. Well, do you think we'd be better off with no registration at all?

Mr. KARP. No, no. We have—the Copyright Office would be just as happy as it is now if we had voluntary registration because——

Senator DECONCINI. If you had voluntary registration, do you think as many people would register, or would it make any difference?

Mr. KARP. Yes; I think most of them would, because most of the registers, a large preponderance of the registrations come from copyright industries, like the movie industry and others, book publishing, who register for a number of business reasons, as is pointed out in your committee's report on the Berne implementation bill. And when they discuss why 411(a) can be modified so as not to apply to works of foreign Berne origin. People register to make a record in the Copyright Office for business purposes. If you go to the bank to mortgage your movie copyright, there's a record. And they do it for any number of reasons.

Also, the fact is that you can't make the Star register if it doesn't want to.

Senator DECONCINI. No; nor the poet.

Mr. KARP. And they just are not doing it because they can't—and the only——

Senator DECONCINI. And the poets are not doing it either.

Mr. KARP. Not to any significant extent. But they register as renewals in order to—you know, a copyright that was secured back in the 1950's or 1960's and the renewal term now begins after 28 years, they have to register or they lose their copyright. And that really comes down to almost the nub of it.

Senator DECONCINI. So isn't that voluntary, when they don't have to?

Mr. KARP. No. It's not voluntary——

Senator DECONCINI. Why isn't it?

Mr. KARP. Because if you need the remedy——

Senator DECONCINI. Yes; for the attorney's fees you have to register.

Mr. KARP. Yes; and that's not giving somebody something. That was taken away from authors in 1978, and prior to 1978——

Senator DECONCINI. Well, if you had no Copyright Office, no Register's Office——

Mr. KARP. I'm not suggesting——

Senator DECONCINI. I know, but if you had none, and you are a poet and somebody infringes on you, you sue them, you win, you don't collect attorney's fees, right?

Mr. KARP. You would under the Act, if you didn't have 412.

Senator DECONCINI. Yes——

Mr. KARP. Or if you had a 2-year grace period.

Senator DECONCINI. If you had no act, if you had no act at all.

Mr. KARP. If we had no Copyright Act?

Senator DECONCINI. Yes, if you had no Copyright Act and no Register's Office, you couldn't collect attorney's fees.

Mr. KARP. Oh, yes you could, because if you had no Copyright Act, you'd be protected as unpublished literary works were prior to 1976 at common law. And at common——

Senator DECONCINI. You can't collect attorney's fees under the American rule.

Mr. KARP. The common law, as my statement points out, for an infringement of an unpublished literary work, you can collect damages, but you can also collect punitive damages, which has been—I cite——

Senator DECONCINI. But you can't collect attorney's fees——

Mr. KARP. You can collect——

Senator DECONCINI [continuing]. Under the American rule, isn't that correct?

Mr. KARP. No; but the punitive damages takes that into account. That's one of the main reasons for punitive damages.

Senator DECONCINI. Maybe, maybe.

Mr. KARP. And you can also—you could have collected under Gilroy against ABC Paramount, which I cite, you could have collected at common law, the equivalent of statutory damages, which is that the judge could guess what the amount of damages was. And in the Gilroy case, which went right up to the New York Court of Appeals, Gilroy sued for the misappropriation of a basic right, the right to create novels from a screenplay he had written. And he could not prove what his damages were when the ABC Paramount, and a couple of big paperback publishers went ahead, ignored his rights, and created paperback novels based on his work. The court said, even though we can't prove damages, we can guesstimate, citing Sheldon against MGM. But the New York Court of Appeals affirmed an appellate division decision guessing that Gilroy, who couldn't prove any damages at all, guessing he had been damaged to the extent of $100,000.

Senator DECONCINI. Yes; but that's different than attorney's fees, you agree with that?

Mr. KARP. That's enough to pay the attorney's fee.

Senator DECONCINI. Well, it may be and it may not be. It would depend on the cost of the attorneys. But the point is that the attorney's fees are not part of our common law at all.

Mr. KARP. No. The attorneys fees were part of our copyright statute from 1909 on.

Senator DECONCINI. This grants a special exemption to the American rule on attorney's fees.

Mr. KARP. It has since 1909, and the Copyright Act. And from 1909 to 1978 you could get attorney's fees even if you registered after you were published.

Senator DECONCINI. And your point is that we should continue to do that?

Mr. KARP. Yes; and the other thing I really should point out is how unfair 412 is, even though it takes away attorney's fees from a

poet who sues, who decides I'm going to sue anyway, if the defendant wins, and that's a risk in infringement suits, the defendant can still get attorney's fees from the poet. And I don't think that's a fair rule of any game.

Senator DECONCINI. OK.

Mr. KARP. Thanks very much.

Senator DECONCINI. Thank you very much, Mr. Karp. The committee will stand in recess subject to the call of the chairman.

[Whereupon, at 11:05 a.m., the committee recessed subject to the call of the Chair.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

JASON S. BERMAN
President

July 11, 1989

The Honorable Dennis DeConcini
United States Senate
SH-328 Hart Senate Office Building
Washington, D.C. 20510-0302

Dear Senator DeConcini:

On behalf of the Recording Industry Association of America, I would like to let you know of our support for S. 1271, the Copyright Fees and Technical Amendments Act of 1989. I understand that this legislation is the subject of a hearing in your Subcommittee.

The Copyright Office, under the leadership of Ralph Oman, performs an important public service to composers, authors and other creators of intellectual property. Although this legislation will result in slightly higher fees for the use of these services, it is clear that they are needed if the Copyright Office is to maintain efficiency and high standards in the protection of the rights of artists.

Please do not hesitate to call on the RIAA in the future should we be able to assist you in any way.

Sincerely,

Jason S. Berman

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.
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July 17, 1989

The Honorable Dennis DeConcini, Chairman
Subcommittee on Patents, Copyrights and Trademarks
Committee on the Judiciary
United States Senate
327 Hart Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

The Association of American Publishers offers the following comments on S 1271.

The AAP does not oppose the fee increase contained in S 1271 (for the purpose described in the following paragraph), but does oppose the automatic adjustment provision. We believe that section 708 now correctly provides that Congress shall set and amend copyright office fees by statute. This enables Congress to review all matters pertinent to copyright office services and fee increases and insure that fees do not become burdensome or unduly taxing to copyright holders.

We are quite concerned, however, that current law states only that the fees, deposited by the Register of Copyrights in the Treasury of the United States, "shall be credited to the appropriation for the necessary expenses of the Copyright Office." This language does not insure that the additional fees will increase funds available to the Copyright Office and thereby improve and facilitate its services to copyright owners and the public. Copyright owners should not, in effect, be taxed for general revenue. We urge Congress to insure that the increase in fees will mean an increase in the budget of the Copyright Office.

We have been assured by the Register of Copyrights of the Office's intention to work with AAP to provide meaningful regulatory relief from multiple applications and fees for serial publishers by permitting "group registration" of works published within a 90 day period for a single fee. This assurance means that we do not have to seek statutory relief at this time.

We would be pleased to work with your staff to implement these comments including amendments to the bill to eliminate the automatic adjustment.

Sincerely

Carol A. Risher
Director of Copyright

HARCOURT BRACE JOVANOVICH, INC.

1666 CONNECTICUT AVENUE, N.W., WASHINGTON, D.C. 20009 TELEPHONE 202-387-3900

MARSHA CAROW
VICE PRESIDENT

July 20, 1989

The Honorable Dennis DeConcini
Chairman, Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
United States Senate
327 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Harcourt Brace Jovanovich, Inc. is a significant customer of the Copyright Office, registering many thousands of works each year, as well as renewals, transfers, recordations, assignments and searches. We agree with the Register of Copyrights that an increase in the current fee schedule is warranted and support the fee schedule set forward in S.1271. We do so not only in recognition of the value of the services we recieve for fees, but also in recognition of the valuable public services the Office performs.

We are appreciative of the Office's representation of U.S. copyright interests in international forums and of the Office's contributions toward public information. We acknowledge the importance of the Copyright Office's response to Congressional requests for special studies. Because the Copyright Office does fulfill functions of value to the general public, we believe that some share of the costs of the Office should be borne by the taxpayers.

We urge you, Mr. Chairman, to ensure that funds available to the Office through appropriations reflect an appropriate balance between credit for earned fees and general revenues. We would hope that the amount of general tax revenues appropriated to the Office would not be concomitantly reduced by the increased amounts contributed by users. In other words, we urge Congress to increase the Office's overall funding so that the Office may continue its important public functions while at the same time deliver more efficient services to users.

With respect to the Office's request for authority to adjust the fees for inflation at five year intervals, we cannot quarrel with the Copyright Office's anticipation of the need for

appropriate future increases, but we question whether these increases should occur automatically without an opportunity for Congressional oversight. We urge the Committee to continue its oversight function and suggest that requests to Congress for fee increases, as warranted, could provide ongoing opportunities for such oversight.

Finally, we read with interest the comments of the Register of Copyrights before your Subcommittee regarding possible modifications in the registration system to accommodate the special needs of individual authors and of periodical publishers. We look forward to the opportunity to cooperate with the staff of the Copyright Office to find mutually satisfactory solutions to these situations, and to others as changing conditions may suggest.

We appreciate this opportunity to present our views on S.1271.

Sincerely yours,

Marsha S. Carow
Vice President

MSC/smv

cc: The Honorable Orrin G. Hatch

PATENT, TRADEMARK AND COPYRIGHT LAW SECTION

THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA
1819 H STREET, N.W. — 12TH FLOOR
WASHINGTON, D.C. 20006-3690
(202) 223-6600

July 20, 1989

The Honorable Dennis DeConcini
Senate Hart Building
Room 328
Washington, D.C. 20510

Re: Copyright Fees and Technical Amendments Act of 1989 -- H.R. 1622

Dear Sen. DeConcini:

I am writing this letter on behalf of the Patent, Trademark and Copyright Law Section of the Bar Association of the District of Columbia expressing our strong support for the bill which Rep. Kastenmeier recently introduced on March 23, 1989.

Members of the private bar are generally not enthusiastic in recommending fee increases directly affecting the pocketbooks of their clients. We are, however, acutely aware of the fine job that the Copyright Office is doing with an ever dwindling staff and a perpetually increasing caseload. Unfortunately and inevitably, without additional support from the public in the form of increased fees, the quality and promptness of this service must necessarily decline to the benefit of no one and at great expense both to copyright owners who rely on the public records for protecting their copyright claims and to the general public which both requires and deserves access to an accurate record of these claims.

In light of the potential benefits of the pending bill and the obvious risks of failing to act, the modest fee increase from $10 to $20 per application, with correspondingly modest fee increases for other services, seems well justified.

We therefore urge prompt and favorable action on this bill.

Sincerely yours,

Joseph R. Magnone
Chairman, PTC Section
The Bar Association of
the District of Columbia

AMERICAN BAR ASSOCIATION

Section of Patent, Trademark and Copyright Law
750 N. Lake Shore Drive
Chicago, Illinois 60611
312/988-5595
ABA/net: ABA387

October 13, 1989

Hon. Dennis DeConcini
Senate Judiciary Committee
Subcommittee on Patents, Copyrights
& Trademarks
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator DeConcini:

I am writing to express the strong support of the Section of Patent, Trademark and Copyright Law of the American Bar Association, for H.R. 1622, Copyright Fees and Technical Amendments Act of 1989, introduced on March 23, 1989, and request that this letter be made part of the record for any hearings held on this or similar legislation. These views are submitted solely on behalf of the Patent, Trademark and Copyright Law Section. They have not been submitted to, nor considered by the ABA House of Delegates or Board of Governors and, therefore, should not be construed as representing Association policy.

The membership of the Section, at its 1989 Annual Meeting, adopted the following resolution:

> RESOLVED, that the Section of Patent, Trademark and Copyright Law favors in principle the enactment of legislation to change the fee schedule of the Copyright Office to reflect results of inflation; and specifically, the Section approves H.R. 1622 (Kastenmeier), 101st Congress, or similar legislation, to amend Title 17, United States Code, to change the fee schedule of the Copyright Office, and to make certain technical amendments.

The Section is of the opinion that the Copyright Office is doing an admirable job of keeping up with the perpetually spiraling paperwork burden with an ever decreasing staff, but has not increased its fees since the enactment of the Copyright Act of 1976, effective January 1, 1978. Unlike other administrative agencies, most of the Copyright Office fees are set by statute so that the Register of Copyrights has no discretion to increase these fees. Without a fee increase, however, the public will almost certainly see a substantial deterioration of the high quality of services they have come to routinely expect from the Copyright Office.

In an effort to maintain these high quality and much needed services, the Section strongly recommends the proposed fee increase from $10 to $20 per application, with corresponding increases in other fees.

These increases appear relatively modest given the increase in costs since 1978, and the Section urges further favorable action on this legislation.

Thank you for your consideration in this matter. If further information is needed or testimony desired, please contact me.

Sincerely,

Thomas F. Smegal, Jr.
Chairman-Elect