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Music Licensing Copyright Proposals: An Overview of H.R. 789 and S. 28

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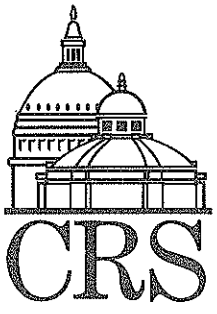

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ABSTRACT

The "Fairness in Musical Licensing Act" (S. 28 and H.R. 789) proposes several changes in the copyright licensing of nondramatic musical works. Three of the core provisions of these bills were included in the Copyright Term Extension bill (H.R. 2589) as it passed the House of Representatives on March 25, 1998. This report examines the background and history of the licensing of musical works in the United States, analyzes the pending legislation, and summarizes the arguments for and against the proposed changes in music licensing practices and the copyright liability of music users for public performance of nondramatic music.

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Music Licensing Copyright Proposals: An Overview of H.R. 789 and S. 28

Summary

The "Fairness in Musical Licensing Act of 1997" (S. 28 and H.R. 789) proposes several changes in copyright licensing of nondramatic musical works (songs and instrumental music). The bills would expand certain exceptions to the copyright owner's public performance right for the benefit of a variety of business music users, including restaurants, bars, taverns, and retail stores. Other provisions require arbitration of music licensing rate disputes between music users and the performing rights societies ("PRS") that license, monitor, and enforce the performing rights of composers, lyricists, and music publishers. The bills would also eliminate the vicarious or contributory copyright infringement liability of landlords and organizers or sponsors of conventions, meetings, and other events and set statutory conditions for radio per programming period licenses.

Three of the core provisions of H.R. 789 were included in another bill, H.R 2589 (the Copyright Term Extension bill), as it passed the House of Representatives on March 25, 1998. These provisions are: 1) expanded exemptions from liability for performing music by means of a television or radio in a public place (the "business exemptions"); 2) local arbitration of rate disputes between the performing rights societies and general music users; and 3) elimination of vicarious or contributory infringement liability for landlords and other owners of premises where music is performed publicly (provided the contract with the performing group prohibits musical performances without obtaining a license, and the landlord does not control the selection of the music that is performed).

The Copyright Act of 1976 grants the owner of copyright in a musical work the exclusive right to perform the work publicly, subject to specified limitations, exceptions, or exemptions. For music copyright owners, the public performance right is arguably the most important right, since more income is obtained from the licensing of the performing right than from exercise of the other rights.

Unless the public performance is covered by one of the limitations, exceptions, or exemptions specified in the Copyright Act, the music user must obtain a performing right license to perform the music publicly, in order to avoid the strong monetary penalties that can be imposed on copyright infringers. Two collective rights organizations (the American Society of Composers, Authors, and Publishers — ASCAP; and Broadcast Music, Inc. — BMI) serve as the licensing agents of the performing right for copyright owners of nondramatic music. Currently, in cases of disputes about rates, the music user can obtain judicial relief only by petitioning the designated "Rate Court" — the federal district court for the Southern District of New York. The activities of the PRS are regulated by antitrust consent decrees but not by the current Copyright Act.

This report examines the background and history of music performing right licensing in the United States, analyzes the pending legislation, and summarizes the arguments for and against the proposed changes in music licensing practices and copyright liability for music users.

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Since the World I War era, the licensing of public performances of nondramatic music (i.e, songs and instrumental music) has been the domain of collective organizations (performing rights societies — "PRS"). The PRS act as licensing agents for the music copyright owners — composers, lyricists, and music publishers. Originally, the PRS licensed live performances of music in restaurants, concert halls, and other arenas. With the advent of radio and later television broadcasting and recorded music, the PRS licensed musical performances via transmissions and records.

The copyright law provides the legal framework for the music licensing activities of the PRS. The current copyright statute grants owners of musical copyrights the exclusive right to perform musical works publicly.[1] This general public performance right is subject, however, to many limitations or exceptions.[2]

The "Fairness in Musical Licensing Act of 1997" (S. 28 and H.R. 789) proposes several changes in music licensing by expanding certain limitations to the public performance right for the benefit of a variety of business music users, by requiring new practices (such as arbitration of licensing rates), by setting statutory standards for radio per programming period licenses, and by eliminating the court-created vicarious copyright liability of landlords and organizers of events where music is performed.[3]

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[1] 17 U.S.C. §106(4). The Copyright Act is codified as title 17 of the U.S. Code.

[2] The principal exceptions are: 17 U.S.C. §110 (exceptions for certain performances and displays) and the compulsory licenses of the Copyright Act -- 17 U.S.C. §111 (cable retransmissions), §118 (noncommercial public broadcasting), and §119 (satellite carrier license).

[3] Under the doctrines of "contributory" or "vicarious" infringement, persons who did not directly infringe may nevertheless be held liable for copyright infringement. Someone who has the right and ability to control the infringer's actions and a financial interest in that person's use of the copyrighted work may be liable "vicariously." Shapiro, Bernstein & Co. V. H.L. Green Co., 316 F.2d 304 (2d Cir. 1962). Someone who, with knowledge of possible infringing activity, induces, causes, or materially contributes to an infringement, may be held liable as a "contributory" infringer. Gershwin Publishing Corp. V. Columbia Artists Management, Inc., 443 F.2d 1159 (2d Cir. 1971). Landlords and organizers of events have been held vicariously liable for infringing musical performances by independent contractors using their facilities for the performance. The bills would eliminate the vicarious or contributory liability of landlords and event organizers.

Most Recent Developments

On March 25, 1998, the House of Representatives passed H.R. 2589, which was originally introduced as the Copyright Term Extension bill.[4] As passed, the bill consists of two titles. Title I embodies the proposals related to extension of the copyright term for an additional 20 years. Title II embodies three of the core music licensing provisions of H.R. 789, which were added to H.R. 2589 by adoption of the Sensenbrenner Amendment during House Floor debate. The music licensing provisions added to H.R. 2589 are: 1) the "business exemptions," which expand the exemptions for performance of music by means of playing a television or radio in a public place; 2) the right of general music users to request local arbitration of music licensing fees in cases of a dispute over the fees with the performing rights societies; and 3) elimination of vicarious or contributory infringement liability for landlords and other operators of premises where musical performances occur (provided the contract with the performing group specifies that the group must obtain a music performing license and the landlord does not control the selection of music performed).

This report examines the background and history of music licensing in the United States, analyzes the pending legislation, and reviews the arguments for and against the music licensing reform proposals.

Background

Recognition of a Music Performing Right (1897)

The first public performance right in musical works was enacted 100 years ago by the Act of January 6, 1897.[5] (A public performance right in dramatic works had been enacted 40 years earlier in 1856.)[6] The civil remedies of the 1897 Act applied to public performances whether for profit or not. The statute prescribed civil damages of $100 for the first infringement and $50 for second and subsequent infringements.

The 1897 Act is also notable as the first instance of criminal penalties for copyright infringement. Criminal liability attached only if the performance was both willful and for profit. The offense was a misdemeanor, punishable by up to one year in prison.

The music performing rights societies ("PRS") did not exist in 1897 (since before enactment of the music public performance right there were no rights that could be licensed). Criminal infringement liability was justified by music copyright owners on

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[4] For a detailed review of H.R. 2589, see CRS Report No. 95-799 S by D. Schrader entitled "Proposed U.S. Copyright Term Extension," and an update of report #98-729 A entitled "Copyright Term Extension and Music Licensing: Review of Recent Developments." *See also, H.R. Rep.* 105-452, 105th Cong., 2d Sess. (1998).

[5] Act of January 6, 1897, 29 Stat. 481, amending SEC. 4966 of the Revised Statutes.

[6] Act of August 18, 1856, 11 Stat. 138.

the ground that civil remedies would be inadequate to deter unlawful performances of music. Music was performed live, on a widespread basis throughout the country, and in a variety of settings; unlicensed performances were difficult to detect or monitor.[7] In the absence of a collective mechanism to enforce the music performance right, composers-lyricists and music publishers successfully petitioned the Congress in 1897 to add the first criminal remedy for copyright infringement. Congress, however, allowed the criminal remedy only in for-profit contexts.

In the early years of this century, it appears that "licenses for public performances of nondramatic musical works were rare and income from this source was virtually nonexistent."[8] During the era of live music,before radio and television, sale of printed sheet music was the major source of royalties for music copyright owners. Individual copyright owners were not able effectively to enforce their public performance rights and many were indifferent to enforcement of the rights. "They apparently believed that public performance of songs was the best stimulus to sales of sheet music, at that time the major source of royalties."[9]

"For-Profit" Limitation to the Music Performing Right (1909)

When the copyright law was generally revised in 1909, the criminal infringement remedy was extended to all copyright subject matter, and the scope of liability was broadened to include persons who "willfully aid or abet such infringement."

During the consideration of the "aiding and abetting" language, concerns were expressed that school children, churchgoers, and other innocent infringers might become "accessories" to criminal infringements for profit. The issue of criminal liability for public performances was resolved by making the aiding and abetting offense apply only in cases of "knowing" and willful infringement.

The legislative consideration had also raised concerns about the civil liability of school children and other "innocents" for performing music. These concerns plus the relative indifference of copyright owners led to the adoption of a "for-profit" limitation to the music performing right in the Act of 1909.[10] Copyright owners came

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[7] By contrast, the public performance right for dramatic works was considered easier to enforce, perhaps because multiple persons were required for the performance and a more, formal setting, such as an established theater, was the typical venue. Also, performances of dramatic works simply are much less frequent and occur on a more circumscribed basis than performance of music.

[8] Korman, Performance Rights in Music under Sections 110 and 118 of the 1976 Copyright Act, 22 N.Y.U. L. REV. 1 (1977) (Mr. Korman was formerly the General Counsel of the American Society of Composers, Authors, and Publishers ("ASCAP"), the first music performing rights society in the United States).

[9] Id. At 3.

[10] Section 1(e) of the Act of March 4, 1909. A representative of the American Bar Association proposed the "for-profit" limitation. Hearings on S. 6330 and H.R. 19853 Before the House Committee on Patents and the Senate Committee on Patents, 59th Cong., 2d Sess.

(continued...)

to regret this concession as the years passed, new technologies brought new ways to perform music publicly, and the next general revision of the copyright law was delayed until 1976.

Music Performing Rights Societies

The first music performing right society in the United States was founded in 1914. A group of composers, lyricists, and music publishers led by composer Victor Herbert and his lawyer Nathan Burkan created the American Society of Composers, Authors, and Publishers ("ASCAP").[11] ASCAP was established to clear and license music performing rights, collect and distribute the revenues to its members, monitor compliance with the law and licensing agreements, and enforce members' performing rights through administrative actions, investigations, and litigation.

The "blanket license" became ASCAP's primary licensing mechanism. The license permits unlimited performances of any composition in the repertoire for a flat fee, usually negotiated on an annual basis. ASCAP has maintained that the blanket license is the most cost-efficient licensing method both for ASCAP members and music users. The price of the blanket license and its unlimited nature have been controversial almost from ASCAP's first days of operation, especially among small business users who perform relatively small amounts of music.

In the 1920s, radio broadcasting became a major user of music. Through litigation, ASCAP was able to establish the principle that individual stations as well as radio networks had to obtain music performing rights licenses. The price of the blanket license became so controversial that broadcasters sought relief through application of the antitrust laws to ASCAP and also formed their own performing right society. Broadcast Music, Inc. ("BMI") was established in 1939 by radio broadcasters[12] to create an alternative music licensing mechanism to counteract the market power of ASCAP.

Antitrust Laws and Music Licensing

Since the 1930s, arguments, challenges, and litigation have swirled around the performing right societies' blanket license and its lawfulness under the antitrust laws. At first blush, the antitrust concerns are fairly clear: initially one (ASCAP), now two (ASCAP and BMI) membership organizations, control virtually all music licensing in

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[10](...continued)
161 (1906). The public performance right for dramatic works was not limited to "for-profit" performances.

[11] ASCAP operates as a nonprofit membership society of more than 70,000 composers, songwriters, and music publishers. Its music licensing repertoire includes more than 4 million compositions.

[12] BMI is a nonprofit corporation. It represents about 180,000 composers, songwriters, and music publishers and licenses a music repertoire of more than 3 million compositions. Some of the original broadcaster members, such as the Columbia Broadcasting System, have divested themselves of BMI stock and membership.

the United States;[13] owners of separate legal rights act in concert or combination to fix prices and terms for users of music in performance contexts; and the licensing of one work is tied to licensing of the entire repertoire, which includes several millions of works the licensee may have no wish to perform.

After protracted litigation, however, the Supreme Court in 1979 in *BMI v. CBS, Inc.*[14] essentially blessed the blanket license as a practical solution to the unique market conditions of music performing rights. "A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided."[15] The blanket license benefits the majority of music users who want "unplanned, rapid, and indemnified access to any and all of the repertory of compositions...."[16] Music copyright owners obviously benefit from the blanket license because it provides a reliable method of collecting revenues and of monitoring and enforcing the exercise of the music performing right.

The form of the "blanket license" reviewed by the Supreme Court in the *BMI* case had already been refined and restrained as an outcome of 40 years of antitrust litigation. The first consent decree against ASCAP and BMI in 1941 regulated some aspects of their licensing activities, but both PRS were allowed to acquire exclusive rights from their members to license musical performances.

When ASCAP sought to license motion picture theater exhibitors, the exhibitors brought a successful antitrust action. District courts in *Alden-Rochelle, Inc. v. ASCAP*[17] and *M. Witmark & Sons v. Jensen*[18] held the blanket license violated the restraint of trade provisions of the antitrust laws and required ASCAP to grant "source" licenses[19] to motion picture producers, which would extend to performances in motion picture theaters.

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[13] A third licensing organization has a comparatively small repertoire and, unlike ASCAP and BMI, licenses dramatic music. This is the Society of European Stagecraft Authors and Composers ("SESAC"). At least in the case of ASCAP members, it is theoretically possible to obtain licenses direct from the copyright owner, as an alternative to the blanket license.

[14] 441 U.S. 1 (1979).

[15] 441 U.S. at 20.

[16] Ibid.

[17] 80 F. Supp. 888 (S.D.N.Y. 1948).

[18] 80 F. Supp. 843 (D. Minn. 1948), appeal dismissed, 177 F.2d 515 (8th Cir. 1949).

[19] "Source licensing" means the music performing rights are cleared at the "source" or initiating point in a performance chain for all subsequent performances. A source license obviates the need for later performers in the performance chain to obtain individual licenses. Network broadcasters clear the music in network shows at the source; their affiliated broadcast stations do not have to obtain licenses to transmit the music in network shows. The affiliated stations must, however, obtain music performing licenses for non-network shows -- music in locally produced programming or syndicated shows (i.e., programs produced by independent content providers or programs formerly marketed as network programming but now marketed off-network, directly to individual stations).

As a further consequence of the *Alden-Rochelle* litigation, the Justice Department re-opened the 1941 consent decree in the case of ASCAP. In 1950, ASCAP and the Justice Department entered an amended consent decree, known as the "Amended Final Judgment," which governs ASCAP operations today.

The 1950 consent decree prohibits ASCAP from acquiring exclusive rights to grant performing rights licenses; gives a music user the right to negotiate a license directly from the copyright owner; requires ASCAP to make the blanket license available to any requesting music user; on request of a radio or television broadcaster, requires ASCAP to offer a per program license; requires ASCAP to use its best efforts to avoid price discrimination in fee-setting; provides that any fee dispute can be judicially reviewed by application to a designated federal district court judge in the Southern District of New York (the "Rate Court"); and places the burden on ASCAP of proving the reasonableness of its rates before the Rate Court.

BMI's operations are governed by a 1966 consent decree,[20] which was modified in 1994 to establish a procedure for judicial review of licensing rate disputes between BMI and music users in a Rate Court in the federal district court for the Southern District of New York.[21]

Radio and television broadcasters have several times challenged the reasonableness of the ASCAP rates in the Rate Court. The reasonableness of the ASCAP fees for per program licenses for certain specialty broadcasters is now before the Court. In September 1995, the Rate Court judge ruled that the program licenses proposed by ASCAP for certain religious, classical and foreign language stations would violate the consent decree because the radio stations would be required to pay license fees for the entire ASCAP music repertoire even if the station (or the program producer) obtained a performing license for some music directly from the copyright owner and even if part of the performance was a fair use of the music. *United States v. ASCAP (Application of Salem Media).*[22]

The Rate Court judge agreed with ASCAP, however, that the revised program license will increase the costs of monitoring performances. The judge therefore

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[20] United States v. BMI, 1996 Trade Cases, para. 71,941 (S.D.N.Y.).

[21] The 1966 consent decree had made no provision for a Rate Court, although BMI apparently was willing to defend the reasonableness of its rates in the S.D.N.Y. district court. BMI v. CBS, Inc., 441 U.S. 1, 12 fn 20 (1979). The 1994 amended decree specifies that BMI rate cases will be heard before a different judge and magistrate than the persons assigned to hear ASCAP (or other PRS) rate cases.

[22] 902 F. Supp. 411 (S.D.N.Y. 1995). The Salem Media case involves a dispute between ASCAP and two groups of about 430 radio stations. ASCAP was able to reach an agreement on per program rates with an industry-wide group, the Radio Music Licensing Committee (RMLC), which represented thousands of radio stations, including about 640 religious format stations. The radio stations comprising the National Religious Broadcasters Association, however, did not participate in the RMLC negotiations and have elected to pursue the Salem Media Rate Court proceeding.

tentatively indicated that ASCAP could reflect this increased cost in its rates. The determination of the amount of the fee awaits the conclusion of a trial on this issue.

Types of Music Licenses

Although the blanket license is the staple of music licensing, other types of licenses are offered or theoretically available. These include "per program," "direct," and "source" licensing.

The "blanket license" gives a licensee the non-exclusive right to perform any and all of the compositions owned by the members of a given PRS as often as the licensee desires to perform music in the repertory for a stated period of time.[23] Fees for a blanket license are ordinarily a percentage of the licensee's total revenues (fee mechanism for broadcasters) or a flat dollar amount (fee mechanism for most non-broadcaster licensees such as restaurants, taverns, commercial dancing schools, etc.).

The "per program" license gives the licensee the non-exclusive right to perform any composition in the PRS's repertory for an individual broadcast program for a stated period of time. The 1950 consent decree compels ASCAP to offer a program license upon request of the broadcaster. ASCAP, however, does not have to license specific musical compositions, so the program license is not an alternative to direct licensing of individual compositions by the copyright owner. The price of the program license has been controversial. The program licensing rate is applied only to revenues from a particular program; however, the rate for the program license is significantly higher than the blanket licensing rate. In *Buffalo Broadcasting Co. v. ASCAP*,[24] the Second Circuit noted that, in rate negotiations with ASCAP, the local broadcasters had elected to press for reduction of the blanket license rate rather than the program license rate.[25]

"Direct licensing" of music occurs if the music user obtains a license directly from the music copyright owner rather than from a PRS. ASCAP must allow its members to license a music user directly under the terms of the consent decree. Nondramatic music performing rights are rarely licensed directly, however, except in the case of broadcaster-produced local programming. Much of the music in original local broadcast productions is commissioned as original compositions, for which the broadcaster may prefer to acquire rights in addition to the performing right, or may even acquire the entire copyright.

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[23] BMI v. CBS, Inc., 441 U.S. 1, 5 (1979).

[24] 744 F.2d 917 (2d Cir. 1984).

[25] 744 F.2d at 926. Since the differential in rates resulted in part from the broadcasters' negotiating strategy, the court rejected their argument that the program license was not a realistic alternative to the blanket license, in the absence of any direct evidence confirming impracticality of the program license. If the price was too high, the broadcasters were told they could challenge the rates in the Rate Court, but the Second Circuit refused to find ASCAP's music licensing practices were an unlawful restraint of trade. The Buffalo Broadcasting case involved rates for television music. The reasonableness of the radio program licensing rate is now being reviewed by the Rate Court in United States v. ASCAP (Application of Salem Media).

"Source licensing" occurs when an initial primary distributor-producer purchases performing right licenses that clear the rights at the source or beginning point of the use for the benefit not only of the initial producer but also for subsequent performances of the derivative work containing the music.

The principal example of source licensing is the license obtained by producers of motion pictures for the theatrical exhibition of motion pictures containing the music. This practice of licensing the theatrical motion picture at the source (when the motion picture is created) was mandated by the *Alden-Rochelle* court to cure an antitrust violation by ASCAP. Perhaps because the *Alden-Rochelle* decision predated syndication of motion pictures for television, performing rights in syndicated television programming are not cleared at the source.[26]

Music Performing Right and the 1976 Copyright Revision

The existing music performing right was enacted as part of the last general revision of the copyright law in the Copyright Act of 1976.[27] Under the 1909 Act, the copyright law had exempted nonprofit performances of nondramatic music, without defining the term "nonprofit." Court decisions gave meaning to the term "nonprofit." Although the line drawn between "for-profit" and "nonprofit" performances was not always clear, in general the nonprofit exemption was applied fairly broadly. For example, musical performances by religious or noncommercial broadcasters were arguably exempt.

In the Copyright Act of 1976, Congress dropped the broad exemption for nonprofit musical performances and replaced it with a broad public performance right, which is subject to specific, narrowly-drawn exemptions.[28]

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[26] There are other reasons for the differences in licensing practices for theatrical films compared to syndicated television programming. The Alden-Rochelle litigation was pressed by the theatre exhibitors, who have no involvement in exhibition of syndicated programming. Also, although major motion picture studios produce some syndicated programming, the bulk of syndicated programming is produced by independent production companies. Efforts by broadcasters to require source licensing of syndicated television programming through litigation or amendment of the copyright law have so far been unsuccessful.

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

[28] The 1976 House Report explains the decision to replace the general nonprofit exemption of the 1909 Act with specific, narrow exemptions as follows: "The approach of this bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses.
This approach is more reasonable than the outright exemption of the 1909 statute. The line between commercial and `nonprofit' organizations is increasingly difficult to draw. Many `non-profit' organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad `not for profit' exemption could not only hurt authors but could dry up

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The 1976 Act also adopted a broad definition of the term "public," which results in application of the music licensing right in "semi-public" contexts that formerly were arguably considered private performances of music (e.g., performances at membership clubs, fraternal organizations, lodges, factories, summer camps, and perhaps private schools).[29]

Since the 1976 Act went into effect on January 1, 1978, the performing rights societies have gradually extended their music licensing efforts to take full advantage of the broadened public performance right Congress granted their members and other copyright owners. With the expansion of music licensing has come opposition from the groups impacted by the broader right. To date, legislative proposals to modify the music performing right of the 1976 Act have not been successful with one exception: nonprofit veterans' and fraternal organizations petitioned Congress successfully to amend the copyright law in 1982 to exempt musical performances at their social functions.[30]

Summary of Existing Music Performance Right

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

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

Performances at "semi-public" places are generally considered public performances. These places would include "clubs, lodges, factories, summer

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[28](...continued)
their incentive to write."
H.R. REP. 94-1476, 94th Cong., 2d Sess. 62-63 (1976) (hereafter, "1976 House Report").

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

[30] Public Law 97-366, 96 Stat. 1759, Act of October 25, 1982, which added Clause (10) to the list of specific exemptions from the performance right in 17 U.S.C. §110.
The enactment of the satellite license of §119, which was added in January 1989, also impacted music licensing practices, but the amendments were not sought by music users.

camps,...schools;"[31] daycare, seniors, and other recreational centers; and possibly the common areas of hospitals, nursing homes, and other care facilities.[32]

Performances of music at public places such as restaurants, bars, taverns, nightclubs, conventions, and stores are public performances, whether the music is performed live, or by recordings or transmissions and whether the music is used as background, incidental, or theme music.

Of course, performances of music in concert halls, opera houses, stadiums, outdoor arenas, and similar places open to the public are public performances.

Although the above examples constitute public performances, the need to obtain a music performing license hinges upon the availability or absence of exemptions, limitations, or exceptions to the music copyright owner's public performance right. If the performance is neither exempt nor subject to compulsory licensing, the music user must obtain permission or a license to perform the music by negotiating the terms and conditions of the use with the music copyright owner or an authorized agent. With few exceptions, music performing licenses are obtained from the performing rights societies ("PRS"), who represent the music copyright owner.[33]

The principal exemptions or limitations to the music performing right are set forth in section 110 of the Copyright Act, or in the compulsory licensing sections.[34]

The fair use doctrine of the Act [17 U.S.C. §107] may sometimes apply to small or incidental uses of copyrighted music that do not have an impact on the copyright owner's ability to market the work or make a profit from the work. A music user ordinarily cannot confidently invoke the fair use doctrine, however. The price of the music performing license is usually low enough to make it uneconomical for a music user who might assert a fair use defense to litigate its applicability. The music user ordinarily opts for the license, unless one of the exceptions to the public performance right can be invoked.

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[31] 1976 House Report at 64.

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

[33] By custom and practice, music publishers and composers-lyricists generally share the royalties obtained under the performing right equally -- that is, 50-50 -- after the PRS deducts its administrative costs.

[34] The Copyright Act has 5 active compulsory licenses: section 111 (cable retransmissions); section 114 (f) (subscription digital audio transmissions of sound recordings); section 115 (mechanical reproduction or music); section 118 (public broadcasting license); and section 119 (satellite television license). All of these compulsory licenses affect public performance of music except the section 114(f) subscription transmission license and the section 115 recording license. Another license -- the jukebox license of section 116 -- was enacted by the Copyright Act of 1976 but was eliminated by the Copyright Royalty Tribunal Reform Act of 1993, Public Law 103-198.

Section 110 Exemptions

The Copyright Act of 1976 eliminated the broad, general exemption for nonprofit performance of music and replaced it with a series of narrowly-drawn exemptions in section 110 of the Act. The general effect was to create a need to obtain a music performing right license on a broader basis than under the 1909 Act.

Modified "nonprofit" exemption (Clause 4). The current law contains a modified general exemption for nonprofit performances of nondramatic music at 17 U.S.C. §110(4). Nonprofit performances are exempt if these conditions are met:

- no transmission (that is, neither radio, television, cable, satellite, nor any other transmitting method can be used to render the music);
- no direct or indirect commercial advantage;
- none of the performers, promoters, or organizers of the musical performance can be paid any fee for their services (except, e.g., salaried directors of military or school music programs);
- no direct or indirect admission charge, unless the proceeds are used exclusively for educational, religious, or charitable purposes (the copyright owner can object to the charitable purpose).

Reception of broadcasts in public places (Clause 5). Reception of broadcasts and other transmissions of any copyrightable work in a public place is exempt under 17 U.S.C. §110(5) if: i) the communication is received on a single, home-style receiving apparatus,[35] ii) there is no direct charge to see or hear the performance; and iii) the communication is not further transmitted to the public. This exemption applies only to transmissions (e.g., radio, television, or satellite), but it applies to any copyrightable work, including music.

Place of religious worship (Clause 3). Performance of a nondramatic literary or musical work, or of a dramatico-musical work of a religious nature, during the course of services **at a place** of worship or other religious assembly is exempt under 17 U.S.C. §110(3). This exemption does not apply to broadcasts of worship services.

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[35] The statutory language exempts reception "on a single receiving apparatus of a kind commonly used in private homes." At what point a given receiving apparatus becomes "common" in private homes has been the subject of litigation. The legislative history of the Act indicates that a 1975 decision of the Supreme Court under the 1909 Act [Twentieth Century Music Corp. V. Aiken, 422 U.S. 151], represents the outer limits of the home-style receiver exemption in terms of the number of speakers. 1976 House Report at 87. "[T]he clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial `sound system' installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification or equipment) into the equivalent of a commercial sound system." Ibid.

Nonprofit agricultural fairs (Clause 6). Performance of nondramatic musical works at an annual agricultural or horticultural fair sponsored by a governmental body or a nonprofit agricultural organization is exempt under 17 U.S.C. §110(6). The nonprofit sponsor is also not vicariously liable for infringements by concessionaires at the fair; the concessionaires are liable for their own infringements.

Retail sale of phonorecords (Clause 7). Performances of nondramatic musical works by retail establishments open to the public without any admission charge are exempt under 17 U.S.C. §110(7) if the sole purpose of the performance is promotion of retail sales of copies or recordings and there is no transmission beyond the immediate area where the sale occurs.

Other section 110 exemptions. Section 110 exempts other performances, which are not discussed in detail in this report since no change is proposed in them by the pending legislation. These other exemptions cover performances during classroom teaching (Clause 1); by instructional broadcasting (Clause 2); by transmissions to the blind or deaf (Clauses 8 and 9); and at social functions of nonprofit veterans' or fraternal organizations (Clause 10).

Compulsory Licenses

In addition to the section 110 exemptions for certain musical performances, the 1976 Copyright Act as amended includes several compulsory licenses that permit a music user to perform music without the consent of the copyright owner but require payment of statutory licensing fees. The compulsory licenses affecting musical performances are the cable,[36] public broadcasting,[37] and satellite licenses.[38] Another license -- the jukebox license -- has been transformed from a compulsory license to a negotiated license.[39]

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[36] 17 U.S.C. §111(c)-(f), primarily. The cable license applies to retransmissions of broadcasts. Cable-originated programming is not covered by the compulsory license. All rights in cable-originated programming, including music performing rights, must be obtained through voluntary negotiations.

[37] 17 U.S.C. §118.

[38] 17 U.S.C. §119.

[39] 17 U.S.C. §116. As originally enacted, section 116 created a compulsory license to allow public performance of nondramatic musical works on coin-operated phonorecord players (known as "jukeboxes"). The jukebox compulsory license was transformed into a negotiated-arbitrated license on a transitional basis by Public Law 100-568, Act of October 31, 1988, the "Berne Convention Implementation Act;" the negotiated license provision was enacted as section 116A, title 17 U.S.C. Five years later, Congress repealed the original section 116 and redesignated section 116A as the existing section 116. Public Law 103-198, Act of December 17, 1993, the "Copyright Royalty Tribunal Reform Act of 1993."

Performances covered by a section 110 exemption are free to the music user. Performances justified by a compulsory license are subject to the statutory conditions, including payment of the applicable royalties.[40]

Since the pending music licensing bills do not propose any amendment of the compulsory licenses, this report does not discuss them any further.

Summary of Music Licensing Proposals

The "Fairness in Music Licensing Act of 1997" (S. 28 and H.R. 789)[41] would make significant amendments to the Copyright Act's section 110 exemptions and add new statutory requirements relating to licensing of the music performing right. The pending bills would :

- generally exempt performances of nondramatic music by publicreception of a radio and television broadcast, cable, satellite, or other transmission, unless admission is charged specifically to see or hear the transmission or the transmission is unlicensed;

- allow a "general music user" to invoke binding arbitration of a rate dispute with a PRS as an alternative to Rate Court review of the rates for musical performances, prior to the filing of a copyright infringement suit;

- allow a defendant in a performing right infringement suit whocontests the licensing fee to invoke court-annexed arbitration to determine the fees for past and future performances

- require the PRS to offer a "per programming period" license toradio broadcasters on "reasonable terms and conditions that provide an economically and administratively viable alternative" to the PRS blanket license;

- require free online computer access to the repertoires of the PRS and access at cost to a semiannual printed directory of the PRS repertoires, on penalty of reduced infringement remedies;

- exempt landlords and convention organizers from vicarious orcontributory infringement liability for the infringing musical performances of their tenants and exhibitors;

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[40] A principal difference between compulsory license performances and PRS blanket license performances is that the Congress set the terms and conditions of the compulsory license in the statute, whereas the PRS negotiate with music users about the terms and conditions of the blanket license.

[41] The Senate and House bills are virtually identical. There are two minor differences: 1) in amending 17 U.S.C.§110(5)(A), H.R. 789 qualifies the reference to transmission with the phrase "at a particular time or on a particular date or dates;" 2) in amending 17 U.S.C. §110(7), instead of striking "vending," H.R. 789 strikes "a vending" and inserts "an."

- amend the exemption for musical performances by nonprofit sponsors of agricultural events by removing the current limitation to annual events, by expanding the exemption to exclude liability for the contributory infringements of event concessionaires, and by applying the exemption to agricultural conventions, meetings, and events as well as fairs and exhibitions;

- amend the exemption for musical performances in connection with retail sale of recordings by removing limiting references to "sole" purpose of promotion of sales and to "vending" establishment, and by expanding the exemption to include performances to promote sales of audio, video or other devices used to perform music;

- add a new exemption to section 110, as Clause 11, for the performance of nondramatic music at an organized children's camp, if the children participate in the performance or the performance is of an instructional nature; and

- require the Attorney General to submit an annual report on itsoversight of the PRS consent decrees, including a report on complaints lodged by music users and Justice Department investigations of the complaints.

Hearings were held on H.R. 789 before the House Subcommittee on Courts and Intellectual Property on July 17, 1997.

Three of the core provisions of H.R. 789 passed the House of Representatives on March 25, 1998 as an Amendment to H.R. 2589, the Copyright Term Extension bill. These music licensing provisions are: 1) the "business exemptions," which expand the exemptions from copyright liability for the performance of music by playing a television or radio in a public place; 2) the right of general music users to invoke local arbitration to resolve rate disputes with the performing rights societies; and 3) the elimination of vicarious or contributory infringement liability for landlords and other operators of premises where music is performed (provided the contract with the performers directs them to obtain a license to perform the music and the landlord has no control over the selection of the music that is performed).[42]

Analysis of Music Licensing Proposals

Public Reception of Broadcasts

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

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[42] The music licensing provisions added to H.R. 2589 are very similar to the comparable provisions in H.R. 789, but there are some differences. For a discussion of the differences, see the separate CRS Report #98-729 A updating both the copyright term extension and music licensing developments. D. Schrader, "Copyright Term Extension and Music Licensing: Review of Recent Developments."

S. 28 and H.R. 789 would expand the exemption for nondramatic music to apply to communication of the transmission by any electronic device provided the transmission is licensed.[43] The condition that no admission fee can be charged to see or hear the transmission is retained in its essential form. The prohibition of existing law against further distribution of the transmission is eliminated.

The likely effect of the proposed amendment to 17 U.S.C. §110(5) is that the PRS could not license restaurants, bars, taverns, or other small businesses which perform music by turning on a radio, television, satellite, or other transmission receiver in a public place. These performances of music would be exempt even if the most sophisticated receiving equipment were used, including for example, wall-to-wall screens, multiple receivers, and commercial sound systems.[44]

The pending bills also make a major change in the scope of the "public reception" exemption which seems inadvertent, however. The existing 110(5) exemption applies to performance of any work. The bills substitute an exemption that applies only to nondramatic musical works,[45] thereby eliminating any specific exemption for performance by public reception of the motion picture or other derivative work containing the music. Unless the fair use doctrine of 17 U.S.C. §107 or the master antenna exemption of 17 U.S.C.§111(a) applies,[46] public reception of the video programming would be infringing. An exemption to perform the music seems almost meaningless if the video portion of the work containing the music is not also exempt from the public performance right. (Radio transmissions do not present the same problem as video transmissions since radio is a solely aural medium.)

Binding Arbitration of Music Licensing Rates

In accordance with the 1950 consent decree, disputes about the rates ASCAP offers music users to pay for music licenses can be challenged and reviewed by the designated Rate Court -- a judge in the federal district court for the Southern District

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[43] SEC. 2(a) of the bill, entitled "business exemption."

[44] From the perspective of music copyright owners, the sophisticated nature of the receiving equipment is significant both because the more sophisticated the equipment, the larger the probable audience and the greater the cost of the equipment, the more likely the business proprietor could afford to pay reasonable music licensing fees.

[45] In this respect, S.28 and H.R. 789 depart from their predecessor bills in the 103rd and 104th Congresses. The predecessor bills (S. 2515 and H.R. 4936 in the 103rd Congress; S. 1137, S. 1628, and H.R. 789 in the 104th Congress) would have applied the amended 110(5) exemption to any copyrighted work -- not just to nondramatic musical works.

[46] It seems unlikely that either the fair use or master antenna exceptions would apply to most public receptions of broadcasts in restaurant and bars. An extended analysis of these exceptions is beyond the scope of this report. Briefly, however, fair use has little applicability to commercial use of entire works; the master antenna exception applies only to noncable relays to hotels, apartments, or similar dwellings and only to reception of locally available broadcast signals.

of New York.[47] ASCAP rates cannot be challenged in any other court, although ASCAP may be sued for alleged antitrust violations outside the S.D.N.Y.

The pending music licensing bills would create a statutory right to demand arbitration of music licensing rates. Arbitration could be demanded either prior to any court action or, in the context of an infringement suit, by annexation to the judicial proceeding. Who may demand arbitration and the statutory conditions vary depending upon whether pre-litigation or court-annexed arbitration is available.

A "general music user" would be given the statutory right to binding arbitration of music performing license rates prior to any court action, if the user and a performing right society ("PRS") are unable to agree on the fees.[48] This arbitration option would substitute for review of ASCAP fees by the Rate Court.

"General music user" is specially defined to include persons who perform musical works publicly other than by transmission (unless the transmission occurs within a single commercial establishment or establishments under common ownership or control). Radio and television broadcasters, cable, and satellite service providers would not be able to invoke binding arbitration of music licensing rates prior to court action.[49] Pre-litigation arbitration could be demanded by a variety of small business music users, such as restaurants, bars, taverns, and stores. Large businesses might qualify for pre-litigation arbitration if any transmissions that occur are within one establishment, or within a chain of establishments under common ownership or control.

Pre-litigation arbitration can be applied only in cases of a rate dispute between a "general music user" and a PRS. Court-annexed arbitration can be invoked by the defendant in a section 106(4) infringement suit who admits the prior public performance of a musical work but contests the amount of the licensing fee. Any music user defendant can demand court-annexed arbitration, including broadcasters, cable, satellite, or other transmitters of musical performances.

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

If the arbitrator makes a finding of infringement, the arbitrator can impose a penalty which, in pre-litigation arbitration, "shall not exceed the arbitrator's determination of the fair and reasonable license fee." In short, the PRS can recover

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[47] BMI is governed by a 1966 consent decree, which was modified in 1994 to establish the S.D.N.Y. as the forum to review BMI music licensing rates.

[48] SEC. 3 of S. 28 and H.R. 789.

[49] Broadcasters pay music licensing rates that are a percentage of revenues, as defined by negotiations. The networks and an all-industry committee bargain with the PRS to set the rates for network and "local station" performances of music, respectively. Businesses that would qualify as "general music users" under the bills commonly pay flat dollar amounts under existing licensing practices, which are computed by formulas based on the type of business, size of the premises, average number of patrons, and type of equipment.

the licensing fees determined reasonable by the arbitrator and nothing more. In the case of court-annexed arbitration, however, greater monetary compensation is permitted; the court-annexed arbitrator's award for past infringements "shall not exceed two times the amount of the blanket license fee" during the years the performances occurred.

Radio Per Programming Period License

ASCAP is required by the 1950 consent decree to offer a program license as an alternative to the blanket license, upon request by a broadcaster. Local broadcast stations unsuccessfully brought an antitrust case against ASCAP in the 1980's over the lawfulness of the blanket and program licensing practices.[50] In the pending *Salem Media* Rate Court proceeding,[51] certain specialty broadcasters have challenged ASCAP's program license rates. The music licensing bills would establish a statutory right to a radio per programming period license ("program license").[52]

A key requirement of the proposed statutory program license is that the "license shall be offered on reasonable terms and conditions that provide an economically and administratively viable alternative to the [performing right] society's blanket license."

In addition, the price of the program license shall include separate components for incidental[53] and feature[54] music performances, shall not exceed the fee for the lowest blanket license fee offered to radio broadcasters, and, in the case of broadcasters who perform only incidental music, shall vary between the incidental performance component and the blanket license fee in direct proportion to the percentage of the broadcaster's revenue attributable to feature programming periods compared to the industry average of revenues attributable to feature programming periods.

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[50] Buffalo Broadcasting Co., Inc. v. ASCAP, 744 F.2d 917 (2d Cir. 1984).

[51] United States v. ASCAP (Application of Salem Media), 902 F. Supp. 411 (S.D.N.Y. 1995) (Rate Court review of program licensing rates pursued by certain religious, classical music, and foreign language programming radio stations).

[52] SEC. 4 of S. 28 and H.R. 789 would amend 17 U.S.C. §504 by adding a new subsection (e) to establish a statutory right to a program license under terms fixed in the Copyright Act rather than in an antitrust consent decree. "Programming period" means any 15-minute interval of radio broadcasting commencing on the hour or at 15, 30, or 45 minutes past the hour.

[53] "Incidental" music means commercial jingles not exceeding 60 seconds in duration, bridges, themes or signatures, arrangements of public domain music, and background music (including music at sporting events).

[54] "Feature" music is not defined in the bills. In general, feature music means the musical performance is the focus of audience attention, such as when an artist sings a popular song on a variety show. The bills refer only to the "incidental" or "feature" music categories. Under the customs of the television industry, music is classified as either theme, background, or feature. Buffalo Broadcasting case, 744 F.2d at 920. The bills combine the categories of "theme" and "background" music into the "incidental" music category. The statutory program license applies only to radio programming.

Further, the price for the program license must "carve-out" (i.e., not include) nondramatic musical works licensed directly or at source, or whose performance is a fair use or is otherwise exempt from liability.

Compliance with the statutory program license requirements could be enforced by any radio broadcaster entitled to a program license by filing suit in federal district court.

Elimination of Vicarious or Contributory Infringement Liability of Landlords or Event Sponsors

Under the judicially created doctrines of vicarious or contributory infringement,[55] in addition to the actual performer, the landlord, sponsor or organizer of an event, or the owner of the facilities where unlicensed music is performed, is generally liable for the infringing performance. Liability attaches if there is a financial benefit to the landlord or other facility provider, even if the contract with the performer gives the landlord no right to select the music to be performed and requires the performer to obtain a performing right license.

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

The pending music licensing bills eliminate any liability of a landlord, organizer or sponsor, facility owner, or other person who controls the space where a musical performance occurs on the ground that the person has a right or ability to control such space and is compensated for its use, or had actual control over some aspects of the use of such space, if the contract with the performer prohibits infringing performances, and the landlord or other facility provider does not exercise actual control over selection of the music.[56]

Perhaps because the judicially-created doctrines of vicarious or contributory infringement have no statutory text, the proposed elimination of these doctrines with respect to landlords and similar facility providers would not be accomplished by amendment of title 17 of the U.S. Code. The change would be part of the public law but would not be codified.[57]

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

[56] SEC. 7 of S. 28 and H.R. 789.

[57] It is somewhat puzzling that the arbitration provisions would be enacted as amendments to title 17 but the prohibition on landlord vicarious or contributory infringement would not be part of title 17. Given the number of court decisions and the history of landlord vicarious liability, codifying the prohibition in the Copyright Act could achieve greater clarity.

Performances at Children's Camps

The modified, general nonprofit exemption from the music performance right [17 U.S.C. §110(4)] ordinarily can be applied to performances of music at children's camps if: i) the overall purpose of the gathering of the children is nonprofit; ii) the performers, promoters, or organizers of the musical performances at the gathering are not paid; and iii) the performances are not transmitted. Performances of music by the participants at a camp organized by a public school, a religious body, the Boy Scouts, Girl Scouts, Campfire Girls, Four-H, etc. would ordinarily qualify for the 110(4) exemption.[58] Musical performances at camps run as a business and for-profit would not qualify for the 110(4) exemption.

The music licensing bills would add a new exemption to 17 U.S.C. §110 (new Clause 11), to exempt performance of nondramatic musical works at an organized children's camp, whether the camp is a for-profit business or not.[59] To qualify for the exemption, the children must sing all or a portion of the music; the children must engage in games or dance accompanied by the music; or the musical performance must be instructional in nature.

Mandated Access to PRS Repertoires and Licensing Information

The operations of performing rights societies ("PRS") are essentially unregulated by existing copyright law. Regulation occurs under the antitrust laws: ASCAP operates under the 1950 consent decree. BMI is subject to a 1966 consent decree, which was modified in 1994. State legislatures have considered and sometimes have enacted laws regulating the performing rights societies,[60] but the state law may be preempted by the federal copyright law.[61] S. 28 and H.R. 789 would regulate the

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[58] Where the overall purpose is clearly nonprofit, eligibility for the exemption usually turns on whether or not any paid, nonsalary performers, promoters, or organizers are utilized in giving or facilitating the performances. The legislative history indicates that "the exemption would not be lost if the performers, directors, or producers of the performance, instead of being paid directly 'for the performance,' are paid a salary for duties encompassing the performance. Examples are performances by a school orchestra conducted by a music teacher who receives an annual salary, or by a service band whose members and conductors perform as part of their assigned duties and who receive military pay. The committee believes that performances of this type should be exempt, assuming the other conditions in clause (4) are met...." 1976 House Report at 85.

[59] SEC. 2(d) of S. 28 and H.R. 789.

[60] A discussion of attempts by the states to regulate the performing rights societies is beyond the scope of this report. The 1996 report of the American Bar Association's Patent-Trademark-Copyright Section notes that the legislatures in at least 18 states had PRS regulatory bills pending in 1996.

[61] 17 U.S.C. §301. A New York State law, which went into effect January 1, 1996, sought to require the PRS to notify businesses of a licensing investigation within 72 hours after the PRS investigators enter the premises of the business. A federal district court has enjoined enforcement of key provisions of this law on the ground of preemption by the federal copyright law. ASCAP v. Pataki, 930 F. Supp. 873 (S.D.N.Y. 1996).

PRS under the copyright statute by mandating access to PRS repertoires and licensing information.[62]

The bills would require a PRS to provide online computer access to its repertoire and licensing information free of charge. For each musical work, the online system must identify the work by title, author, and copyright owner and contain the names of artists known to have performed the work. The online system must permit "the efficient review of multiple musical works consistent with reasonably available technology."

At least semiannually, the online information must be available at cost in a printed directory. Musical works in the PRS repertoire more than 30 days before publication of the directory shall be included.

The PRS, on request, must document its authority to license the music performing right with respect to specific musical works.

If the PRS fails to comply with these access requirements, the PRS would be deprived of the right to initiate or participate in a copyright infringement suit with respect to any musical work not properly identified or documented.

Also, within 5 business days of a written request for licensing information from an actual or prospective licensee, the PRS must provide a schedule of its license rates and terms; the formulas used to develop the rates; and the terms of agreements entered with other similar licensees.

Agricultural Fairs Exemption

Section 110(6) currently exempts performances of nondramatic musical works by a governmental body or nonprofit agricultural or horticultural organization at an annual fair or exhibition. The exemption also expressly eliminates any vicarious liability of the governmental body or nonprofit organization for the infringements committed by fair concessionaires. A concessionaire is liable for its own infringements.

The music licensing bills would slightly expand the 110(6) exemption.[63] The limiting reference to annual events would be removed. Any "contributory infringement" liability of the exempt entities would be expressly eliminated. In addition to the fairs and exhibitions specified in existing law, the exemption would apply to qualifying "conventions," "meetings," and "events." Like existing law, however, the exemption would apply only to agricultural or horticultural events organized by a governmental body or nonprofit entity.

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[62] SEC. 5 of the bills.

[63] SEC. 2(b) of S. 28 and H.R. 789.

Retail Music/Record Sales Exemption

Section 110(7) currently exempts performances of nondramatic musical works by vending establishments where the sole purpose of the performance is sale of sheet music or recordings, provided the performance is not transmitted and occurs within the immediate area of the sale.

The pending bills would expand this exemption by making a few word changes.[64] The terms "vending" before "establishment" and "sole" before "purpose," and the phrase "within the immediate area where the sale is occurring" would be struck. The latter change would expand the number of persons who might hear or see the performance without losing the exemption from liability.

Perhaps most significantly, the exemption would be broadened to cover performances to promote retail sales of "audio, video or other devices utilized in the performance." This change would exempt promotional performances related to retail sales of physical equipment for playing or recording music.

Arguments for and Against the Music Licensing Proposals

The music licensing bills are supported by a range of music users including operators of restaurants, bars, taverns, hotels, and retail stores; religious and other specialty programming broadcasters; organizers of conventions, meetings, and camps; and owners of facilities where performances occur. The bills are opposed by music copyright owners, copyright owners in general, and the music performing right societies. Since there are a variety of proposed reforms, the arguments for and against specific parts of the reforms may not apply to other reform proposals or the bills in their entirety.

Summary of Arguments in Favor of Music Licensing Proposals[65]

- Music licensing payments by small businesses that "perform" musicmerely by turning on televisions and radios, represent unfair "double dipping" by copyright owners who have been paid already for licensed broadcasts; small businesses should be exempt from the music performing right if they "perform" merely by receiving a licensed broadcast in public, unless a direct fee is chargedto see or hear the performance

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[64] SEC. 2(c) of S. 28 and H.R. 789.

[65] The arguments for and against the music licensing proposals in the pending bills are compiled primarily from testimony at hearings on similar predecessor bills in the 103rd and 104th Congresses. Hearings on H.R. 789 Before the Committee of Small Business, May 8, 1996, 104th Cong., 2d Sess. (1996); Oversight Hearings [on Music Licensing (H.R. 1988 and H.R. 3288)] Before the House Subcommittee on Intellectual Property and Judicial Administration, February 24, 1994, 103rd Cong., 2d Sess. (1994).

- Program licenses now offered by the PRS to broadcasters are not an economical, realistic alternative to the blanket license; a specialty station performing small amounts of music might be required to pay more for a program license than the blanket fee paid by a "24-hour music" station; statutory standards are thus needed to assure the PRS grant economical and fair program licenses

- Record-keeping requirements for program licenses set by the PRS are burdensome; statutory provisions are needed to assure that program licenses are offered on administratively reasonable terms

- Performing rights societies exercise their monopoly power to set arbitrary rates for blanket and program licenses; the outdated consent decrees do not adequately restrain the anti-competitive music licensing practices; new statutory provisions are needed to assure reasonable licensing rates

- Trade shows, convention centers, and other meeting places shouldnot be compelled to purchase music performing licenses for music performed by their exhibitors; those who actually perform the music should bear the burden of obtaining a performing license; landlords and other facility owners should not be vicariously liable for music performed on their premises if the contracts with any performers or renters require the performers/renters to obtain music licenses and the landlord does not control selection of the music performed

- Performing rights societies use unfair, "bullying" tactics to collect fees from small businesses that perform relatively small amounts of music; reforms are needed to curtail the monopoly power of the PRS

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

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

- Performing rights societies should be required to disclose their repertoires and provide fair access for music users to licensing information to provide realistic licensing alternatives to the blanket music performing license

- The copyright law is an appropriate mechanism for regulating the copyright licensing practices of collective societies; it is not uncommon for foreign countries to regulate collective licensing societies under the copyright law

- The limitations and exceptions to the music performing right thatare proposed in the pending bills are consistent with exceptions found in foreign copyright

laws and with the Berne Convention; the proposed exceptions can be justified as "minor reservations" to the performing right, especially in light of the broad public performance right of U.S. law compared to the narrower public performance right found in many foreign copyright laws, including the laws of Berne member industrialized countries

Summary of Arguments Against Music Licensing Proposals

- Commercial establishments play music for their customers because music is good for business; the creative output of American songwriters is used by restaurants, bars, hotels, taverns, retail stores and other for-profit enterprises because the business people know music increases patronage and makes money for them

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

- The prosperity of the U.S. music industry and the creative output of American songwriters must be encouraged through appropriate copyright protection

- Commercial establishments pay food distributors, electric and telephone companies, equipment suppliers, and other vendors for a range of products and services; musical performances in small or large businesses, on an incidental or featured basis, should result in royalties for songwriters; parsley, which is incidental to food service, is paid for -- similarly, incidental music, which is performed because it attracts patrons, should be paid for

- The proposed section 110(5) exemption for public reception of licensed broadcasts would exempt virtually all musical performances by commercial establishments even if they used sophisticated sound systems or multiple large-screen televisions, which significantly increase the potential audience for the uncompensated music; this proposal would cost songwriters and music publishers tens of millions of dollars in lost income annually

- The music licensing proposals as a whole would overthrow the commercial stability that has existed for nearly 50 years under the 1950 consent decree; some of the changes erode basic principles of copyright law (e.g., the vicarious liability of landlords) that have been settled for 50 years

- Some of the proposals would reduce the remedies for certain blatantinfringements of the music performing right to the point where it would make economic sense to infringe rather than agree to a license; the "general music user," for example, could infringe, demand arbitration before an infringement suit is filed, and pay only a reasonable license fee as the maximum penalty

- New legislation is not needed to address any perceived anti-competitive behavior of the PRS; music licensing practices have been subjected to intense scrutiny and regulation through the antitrust consent decrees, antitrust and copyright infringement litigation, and the Rate Court proceedings; an additional layer of statutory regulation in the Copyright Act is unnecessary and inefficient; existing law, the courts, the Justice Department, and private litigants are more than adequate to restrain PRS anti-competitive behavior, if such behavior exists

- Review of PRS music licensing rates by an expert Rate Court is a more efficient, less expensive, and reliable method of regulation than a new, untried system of arbitrated rates; mandated arbitration would destroy the existing, well-settled rate determination mechanism of the Rate Court, which now results in uniform, nondiscriminatory, and nonarbitrary license fees; the likely result of arbitration would be different fees for identical uses of music

- The proposed program license provisions are unworkable and contrary to established industry practices; the statutory program license would be too expensive to administer and to determine the fee

- The courts have recognized that the program license increases the costs of the PRS in monitoring and enforcement compared to the administrative costs of the blanket license; the reasonableness of the program license rates for specialty broadcasters is now pending before the Rate Court; the Congress should await the conclusion of this case before reaching a decision on statutory standards for program licenses

- Since the repertoires of ASCAP and BMI are already available online, government-mandated access is unnecessary; regulation of online access by the government creates serious privacy issues; publication of a printed directory would be expensive, and music users are unlikely to request copies at cost

- The licensing information access requirements would require voluminous schedules of license rates and disclosure of actual fees paid by competitors; the proposed requirements are too burdensome and would unfairly disclose financial information to a competitor

- Overall, the music licensing proposals may seriously undermine the collection of performing right revenues from foreign PRS, since foreign royalties are negotiated on thebasis of revenues collected in a given country compared to U.S. collections for performances of foreign music in the U.S.

- Some of the proposed limitations on the music performing right are arguably inconsistent with the obligations of the United States under the Berne Convention[66]

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[66] A point and counterpoint assessment of the arguments by supporters and opponents of the music licensing proposals is beyond the scope of this report. The opponents' argument

(continued...)

Conclusion

Music is performed widely and pervasively in this country and abroad in a variety of business, entertainment, educational, religious, social, and cultural contexts. The federal copyright law -- the Copyright Act of 1976 as amended -- grants the owner of copyright in a musical work the exclusive right to perform the work publicly. The public performance right is arguably the most important right granted composers, lyricists, and music publishers since it is the source of the greatest amount of revenue for these copyright owners.

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[66](...continued)
about violations of the Berne Convention merits some analysis, however, since the treaty obligations likely will be receive Congressional consideration in shaping any legislation. The United States has been a member of the Berne Convention since March 1, 1989. Thus, although this Convention has a 100-year history of revision and interpretation, United States courts have had very few occasions to interpret the treaty obligations. Also, it is difficult, and perhaps impossible, to discern a consensus interpretation of certain treaty obligations by reference to foreign laws and court decisions. The public performance rights mentioned in the Berne Convention have been added incrementally, and vary depending upon the nature of the performance (live, recorded, or transmitted). The basic terms are undefined. The Berne Convention's concept of "public performance" itself is narrow, and apparently encompasses only "live" performances before a large audience assembled in a public place. [Art. 11(1)(i)]. Different nomenclature (e.g., "broadcasting" or "public communication") is used for other forms of "performances." In their totality, these performing rights may be a rough approximation of the United States public performance right, except there is apparently no firm consensus on rights in satellite transmissions and perhaps computer network transmissions. Two new intellectual property treaties were created under the aegis of the World Intellectual Property Organization ("WIPO") to upgrade international protection for public communications on computer networks, by satellite, and by other new technological means. The WIPO Copyright and Performances-Phonograms treaties are not in force. The Senate may be asked to give its advice and consent to United States ratification of the treaties this session. The following performing rights are granted in the Berne Convention to musical works under Article 11: authors enjoy the exclusive right of authorizing the public performance by any means or process, and of any communication to the public of the performance. Under Article 11bis, authors of any work (including musical works) enjoy the "exclusive rights" of authorizing the broadcasting, the public communication by any other means of wireless transmission, any public communication by wire or rebroadcasting (when the communication is made by an organization other than the original one), and public communication by loudspeaker or any other analogous instrument for transmitting or broadcasting the work. The broadcasting rights granted by Article 11bis are, however, subject to compulsory licensing and may be satisfied by an equitable remuneration. Article 10(2) grants one other express exception to the "performance" rights: domestic legislation may exempt certain educational uses that are "compatible with fair practice." In addition, many Berne countries interpret the public performance right as subject to an implied exception regarding performances at certain religious, cultural, and patriotic events. These countries rely upon the recognition by the 1948 Brussels Revision Conference of the so-called "minor reservations" understanding concerning the public performance/communications rights. The General Report on this Revision Conference expressly recognized the legitimacy of exemptions for incidental or relatively minor performances of music that do not detract from the essence of the right. General Report of the 1948 Brussels Conference at 263-4.

The music performing right is not unlimited, however. From 1909 until 1978, all "nonprofit" performances of music were exempt from copyright liability in this country.

The Copyright Act of 1976 (effective January 1, 1978) enacted a broader definition of the public performance right compared to the right in the 1909 Act, eliminated the 1909 Act's general exemption for all nonprofit performances of music, and replaced the general exemption with a series of more specific, more narrowly drawn exceptions. The Congress determined that additional protection for authors was needed to stimulate more creativity for the benefit of society, in light of new technological uses of copyrighted works. The combination of a broader right and narrower exceptions means that more music users must obtain music performing licenses to avoid the penalties of copyright infringement.

As the Supreme Court noted in the *BMI v. CBS* antitrust case, the collective performing rights societies ("PRS") such as ASCAP and BMI and the blanket performing license developed together out of the practical situation of the marketplace: "thousands of users, thousands of copyright owners, and millions of compositions."[67] Copyright owners need a collective mechanism to license, monitor, enforce, and litigate their music performing rights. Many music users also want the "unplanned, rapid, and indemnified access to any and all of the repertory of compositions"[68] provided by the PRS and the blanket license.

The music users who support the pending music licensing bills, however, object to the licensing tactics of the PRS, argue that PRS licensing rates are arbitrary and unfair, assert that a broader range of incidental performances of music should be exempt from copyright liability than are exempt under existing law, and, in the case of public reception of licensed broadcasts, argue that the music public pays twice to hear the same performance. Supporters of S. 28 and H.R. 789 argue that the alleged monopoly power of the PRS allows them to set arbitrary rates for blanket licenses and refuse to offer economically viable alternative licenses such as a fair radio program license. Supporters of the bills contend that a rate review proceeding before the single Rate Court, based in New York City, is too expensive and inconvenient a forum for small business music users to obtain relief from arbitrary music licensing rates.

The "Fairness in Musical Licensing Act of 1997" (S. 28 and H.R. 789) proposes several changes in music licensing by expanding certain exceptions to the public performance right, by requiring new practices (such as arbitration of licensing rates), by establishing statutory conditions for the radio per programming license, by requiring access to PRS repertories and licensing information, and by eliminating the vicarious or contributory infringement liability of landlords and other event sponsors for the performance of music by their tenants or lessees, under certain conditions.

The music licensing bills are generally supported by operators of restaurants, bars, taverns, hotels, and retail stores; by religious and other specialty programming broadcasters; by organizers of conventions, meetings, and camps where music is

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[67] BMI v. CBS, 441 U.S. 1, 20 (1979).

[68] Ibid.