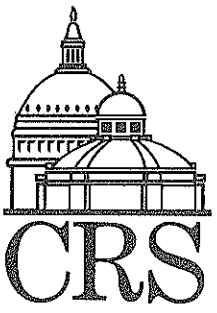
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CRS Report for Congress

Copyright Term Extension and Music Licensing: Analysis of Sonny Bono Copyright Term Extension Act and Fairness in Music Licensing Act, P.L. 105-298

October 27, 1998

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ABSTRACT

P.L. 105-298, extends the term of copyright protection by an additional 20 years and makes two major reforms in music licensing practices. Title I of the Public Law is also known as the Sonny Bono Copyright Term Extension Act. In addition to term extension, Title I creates a new termination right during the 20-year added period and grants libraries and nonprofit educational institutions an exemption to reproduce works that are not commercially exploited and are not available at a reasonable price during the 20-year added period. Title II of the Public Law is also known as the Fairness in Music Licensing Act. This Title expands the exemption from the music performing right for businesses playing music by turning on radios and televisions in public places, and requires local judicial review of the licensing rates set by the performing rights societies that license the performance of nondramatic music. This report explains the provisions of PL 105-298, reviews key aspects of the legislative history and notes changes from prior law.

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Copyright Term Extension and Music Licensing: Analysis of Sonny Bono Copyright Term Extension Act and the Fairness in Music Licensing Act P.L. 105-298

Summary

P.L. 105-298, extends the terms of all subsisting and future copyrights by 20 years and makes two major reforms in music licensing practices. This report analyzes the amendments made by the new law to the Copyright Act.

Title I, the Sonny Bono Copyright Term Extension Act, extends the copyright terms for all categories of copyrightable works by an additional 20 years. Title II, the Fairness in Music Licensing Act, expands the exemption of 17 U.S.C. 110 for the benefit of businesses that perform music publicly by turning on radio or television sets in their places of business and makes statutory provision for regional judicial review of the reasonableness of the rates charged by the music performing rights societies.

The new copyright term for post-1977 personal works is life of the author plus 70 years. For works made for hire, anonymous and pseudonymous works, the term is a fixed period of 95 years after publication or 120 years after creation, whichever is shorter. For pre-1978 works, the term is a fixed period of 95 years from the date copyright was secured.

In addition to adding 20 years to the copyright term, the Sonny Bono Act 1) grants a new, limited termination right with respect to the 20-year added period for certain pre-1978 works; 2) expands the classes of persons eligible to terminate licensing contracts; and 3) grants libraries and nonprofit educational institutions a narrow exemption to use copyrighted works during the 20-year added period, if the works are not commercially exploited in that period and copies are not available at a reasonable price.

The Music Licensing Act in general exempts food and drinking establishments of less than 3750 square feet, and other business establishments of less than 2000 square feet, from paying licensing fees for performing music by playing a radio or television in their place of business. Businesses that exceed the respective 3750 and square foot limits can still qualify for an exemption by restricting the receiving equipment as follows: if audio only, no more than 6 speakers and no more than 4 speakers in one room; in the case of audiovisual equipment, no more than 4 pieces of equipment, of which no more than 1 device is in any one room and no device has a diagonal screen greater than 55 inches, and the audio portion meets the restrictions for audio only.

Concerning review of Performing Rights Societies' licensing fees, the Act adds a new Section 512 to title 17 U.S.C. giving an individual business proprietor who operates fewer than 7 non-publicly traded establishments, the right to request regional judicial review of the fees in lieu of filing for review only in New York, as required by the former law.

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Copyright Term Extension and Music Licensing: Analysis of Sonny Bono Copyright Term Extension and Fairness in Music Licensing Act, P.L. 105-298

Duration of copyright is one of the major parameters for establishing the amount of protection accorded to authors and other owners of copyright. It is also the principal dividing line between the property rights of such owners and the public domain — that is, the domain of unprotected works which are available to the public for unrestricted, uncompensated use. Under the United States Constitution, Art. I, Sec. 8, Cl. 8, Congress is authorized to grant copyright protection only for "limited Times."

P.L. 105-298, extends copyrights by 20 years and broadens the business exemption for performing music by playing a radio or television at the place of business.

Title I of the new law, the Sonny Bono Copyright Term Extension Act, amends the Copyright Act[1] by extending the copyright terms for all categories of copyrightable works by an additional 20 years. The added 20-year period applies retroactively to all works in which copyright subsists.

Title II of the new law, the Fairness in Music Licensing Act, makes two reforms relating to the licensing of music for public performance. One amendment of 17 U.S.C. 110 expands the exemptions available to businesses that perform music publicly by turning on radio and television sets in their places of business. The second amendment makes statutory provision for regional judicial review of the reasonableness of the rates charged by the music performing rights societies ("PRS") that license the public performance of nondramatic music on behalf of music copyright owners.

This report reviews the background of this legislation and summarizes the main provisions of the Sonny Bono Copyright Term Extension Act (hereafter: "Sonny Bono Act") and the Fairness in Music Licensing Act (hereafter: "Music Licensing Act").

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[1] The Copyright Act of 1976, as amended, is codified at title 17 of the U.S. Code, sections 101 *et seq.* The basic Act was enacted on October 19, 1976 by Public Law 94-553, with an effective date of January 1, 1978.

Sonny Bono Copyright Term Extension Act — Title I

Background

Under the copyright law in effect before enactment of S. 505, copyright generally endured for a fixed term of 75 years from publication, or for the life of the author plus 50 years after the author's death. Specifically, for post-1977 works (i.e., works that secured copyright on or after January 1, 1978), the term for personal works (i.e., works created by known authors who are not employees of another person or entity) was the life of the author plus 50 years after death. For impersonal works copyrighted on or after January 1, 1978, the term was the shorter of 75 years from publication or 100 years from creation. For pre-1978 copyrighted works, the term was a fixed period of 75 years, computed from the date copyright was secured either by publication with notice of copyright or by registration as an unpublished work with the Copyright Office.

If a personal work is created jointly by two or more authors, the post-1977 term is measured by the life of the last surviving author.

These former terms of copyright had been established by the last general revision of the copyright law, the Copyright Act of 1976, which was effective January 1, 1978. Before that date, the copyright term under the Copyright Act of 1909 was a fixed period of years, consisting of a 28 year original term which could be renewed for an additional 28 years. For various reasons, including fairness and the wish to avoid possible impairment of contracts, Congress changed the basis for computing the copyright term under the 1976 Act only for post-1977 works. Congress adopted the "life-plus-50" basis for works copyrighted on or after January 1, 1978, and retained the fixed period of copyright for pre-1978 works. However, to balance the two methods of computing copyright terms, Congress added a 19-year period to the maximum 56-year period that otherwise would have applied to pre-1978 works; the resulting term was a total of 75 years.

Proponents of extending the copyright term an additional 20 years by legislation in the 105th Congress made two principal arguments: 1) they argued that economic fairness to the heirs of authors justified the 20 year increase because longevity has increased since the "life-plus-50" standard was first adopted by the Berne Copyright Convention[2] in 1908; and 2) they argued that the United States must match the recent 20-year extension of the copyright term adopted by the European Union[3] in order to avoid application of the rule of the shorter term[4] for musical works and other

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[2] The Berne Copyright Convention is the major international treaty relating to protection of copyright subject matter. The United States became a member on March 1, 1989.

[3] The European Union adopted a Directive on Copyright Duration, effective July 1, 1995, which generally set a copyright term of life-plus-70 for personal works, 70 years for works copyrighted by legal persons, and 50 years for related rights protection for the rights of producers of motion pictures and sound recordings.

[4] The "rule of the shorter term" is an exception to the general principle of the Berne (continued...)

personal works and to enhance the bargaining position of the U.S. Government and U.S. copyright industries in international trade negotiations affecting intellectual property rights.

Several bills were introduced in the 105th Congress to extend the copyright terms by an additional 20 years.[5] The House Judiciary Committee favorably reported H.R. 2589 on March 18, 1998.[6] The House passed the bill on March 25, 1998 with several amendments, including the core provisions of the music licensing bill, H.R. 789. The Senate passed S. 505 on October 7, 1998, Title II of which included a compromise version of the music licensing provisions. The House also passed S. 505 on October 7, 1998. The President signed S. 505 into law on October 27, 1998.

Summary of Sonny Bono Act

The Sonny Bono Act increased the term of existing and future copyrights by 20 years. Other sections of the Act: 1) grant a new, limited termination right[7] with respect to the 20-year period; 2) expand the classes of persons eligible to terminate licensing contracts; 3) grant libraries and nonprofit educational institutions a narrow exemption to use copyrighted works during the 20-year period, if the works are not commercially exploited in that period and copies are not available at a reasonable price; and 4) express a "sense of Congress" view encouraging private sector negotiations to reach voluntary agreements about establishment of an audiovisual works fund to allocate royalties received during the 20-year period from the exploitation of motion pictures.

Copyright term provisions. The Sonny Bono Act establishes the following terms of copyright protection:

- For post-1977 personal works, life of the author plus 70 years;
- For post-1977 impersonal works (works made for hire, anonymous or pseudonymous works), the shorter of 95 years from publication or 120 years from creation;

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[4](...continued)
Convention that works of foreign authors shall be given the same protection as works of nationals of the country where protection is claimed (i.e., "national treatment"). Article 7 of the Berne Convention permits reciprocity concerning the duration of copyright. The country where protection is claimed is entitled to compare the copyright term of its law with that of the country of origin of the work and apply the shorter term.

[5] H.R. 695, H.R. 1621, H.R. 2589, and S. 505.

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

[7] A "termination right" is an inalienable right granted by the Copyright Act to authors and their heirs to revoke an earlier contract assigning or licensing rights to another party, after a certain period of years and under certain statutory conditions.

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

All of the extended terms apply retroactively to any work in which copyright now exists, and to the works that have been retrieved from the public domain by the 1994 law implementing the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).[8]

Another special provision extends the term of works created but not copyrighted before 1978 (i.e., unpublished, unregistered works) by 20 years (by increasing their expiration date from 2027 to 2047), provided the work is published by December 31, 2002.[9] Preemption of common law/state law copyright in pre-February 15, 1972 sound recordings is also delayed another 20 years, from February 15, 2047 to February 15, 2067.[10]

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

The 1976 Copyright Act created two termination provisions. One termination clause applies to "old law works" (i.e., works copyrighted before 1978), which is found at section 304(c) of the Act. This provision applies to grants (i.e., licensing agreements) executed before January 1, 1978 by the author or any statutory renewal claimant. The holder of the termination right can terminate the pre-1978 grant with

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[8] The Uruguay Round Agreements Act, Pub. L. 103-465 (December 8, 1994). For eligible works, copyright restoration occurred automatically one year after the effective date of the entry into force of the World Trade Organization. Therefore, these copyrights were restored effective January 1, 1996. While the eligibility rules are complicated, in general copyright is restored for "foreign-origin," that is, non-United States-origin, Berne Convention works.

[9] The general revision of the copyright law effective January 1, 1978, preempted common law and state statutory copyrights in unpublished works. Congress granted these works a minimum federal term of 25 years, which could be increased to 50 years under the 1976 Act by publication on or before December 31, 2002. That maximum term is now increased to 70 years, if the work is published before 2003. The purpose of this provision has been to provide minimum federal protection for pre-1978 common law works, in order to assure the constitutionality of federal preemption, and to encourage early publication of unpublished works.

[10] Sound recordings were granted a 75-year delay in federal preemption under the 1976 Copyright Act because, unlike other categories of copyright subject matter, sound recordings did not enjoy dual common law and federal protection before February 15, 1972, the date federal copyright protection was first extended to sound recordings. Also, state common law and statutory protection for sound recordings was of recent vintage, whereas unpublished books and music, for example, might have been protected for decades or 200 years by state law, prior to federal preemption under the 1976 Act.

respect to the 19-year period added to the copyright term for "old law works" by the 1976 Act.

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

The Sonny Bono Act creates a third termination right relating to the 20-year added period for pre-1978 works and modifies who is eligible to terminate rights in both "old law" and "new law" works under the original termination provisions of the 1976 Act.

With respect to the new termination right in the 20-year added period, the Sonny Bono Act amends 17 U.S.C. 304 by adding a new paragraph (d). The new "304(d)" termination right applies to the author (in theory)[11] or other owner of a termination right in a pre-1978 grant, whose right to terminate under section 304(c) has already expired without being exercised. The basic structure of the original "304(c)" termination right is retained, but the time limit for exercising the right is changed, and the new "304(d)" termination right applies to the 20-year period added by the Sonny Bono Act to the term of copyright. Termination can be effected at any time during a 5 year period beginning at the end of the 75 year copyright term.

The new "304(d)" termination right applies only to grants executed before January 1, 1978. It was not necessary to legislate a comparable right with respect to grants executed on or after January 1, 1978 since "new law" grants are first eligible for notices of termination in 2003.[12] Holders of "new law" termination rights will receive the 20-year added period when they exercise their right of termination.

As is true of the original termination rights of the 1976 Act, the "section 304(d)" termination right does not apply to works made for hire.[13]

If the section 304(c) termination right of the 1976 Act has already been exercised, the holder of the exercised termination right owns the copyright in the 20-year added period, unless the copyright has already been re-assigned post-termination. Such re-assignments are not terminable. In that case, the assignee owns the copyright during the 20-year period added to the copyright terms by the Sonny Bono Act.

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[11] In order for an author to be able to exercise the new termination right in the 20-year added period, the author must live more than 75 years after the copyright was secured in the work. Songwriter Irving Berlin lived more than 75 years after some of his copyrights were secured, but these instances are exceedingly rare. As a rule, the author's heirs will exercise the new "304(d)" right.

[12] New law grants cannot be terminated until 35 years after their execution. The notice of termination (which also specifies the exact termination date) must be served no earlier than 10 years before the termination date.

[13] Works made for hire are defined in 17 U.S.C. 101 as works created by employees within the scope of their duties and, subject to a written agreement, certain specially ordered or commissioned works.

The second change made by the Sonny Bono Act in the termination provisions applies both to old and new law works. Sections 203(a)(2) and 304(c)(2) of title 17 U.S.C. are amended to change the persons eligible to exercise termination rights.

Under the original termination provisions of the 1976 Act, the author's executor under a will, administrator, personal representative, or trustee had no termination right. The next of kin had a termination right in transfers which they may have granted with respect to "old law" works; the next of kin had no termination rights in "new law " works.

The Sonny Bono Act grants a termination right to the author's executor to terminate the author's interest, if the author, spouse, children, and grandchildren are deceased. Also, in the absence of a will, if there is no surviving author, spouse, child, or grandchild, the administrator, personal representative, or trustee of the author's estate owns the author's termination interest in the case of both old and new law transfers by the author.

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

This exemption does not apply after notice by the copyright owner (in accordance with Copyright Office regulations) that the conditions for use are not satisfied, or to subsequent users other than the exempt entities.

Division of motion picture royalties. Most theatrical motion pictures produced in the United States are works made for hire. The contributors to motion pictures such as the screenwriters, directors, and performers ordinarily do not own the copyright nor do they have any termination rights with respect to the term of copyright. By industry custom and practice, the rights of motion picture contributors in the United States are usually acquired through collective bargaining agreements between the production companies and the guilds or unions representing the contributing artists.

During the consideration of the copyright term extension bills, motion picture contributors expressed concerns about their right to receive royalties during the 20-year added period. The Sonny Bono Act makes no change in any law concerning the division of motion picture royalties,[14] but SEC. 105 of the Act does contain a "sense

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[14] An earlier version of the Sonny Bono Act, H.R. 2589 as passed by the House in March 1998, contained an additional motion picture rights clause. SEC. 106 of H.R. 2589 would

(continued...)

of Congress" statement on this point. The statement is intended to encourage voluntary agreements between motion picture producers and the various motion picture contributors leading to the establishment of an audiovisual fund or other mechanism for the division of royalties accrued during the 20-year added period.

Agreement on the division of motion picture royalties becomes especially important with respect to the royalties that accrue from exploitation of American motion pictures in Europe.

Article 2(2) of the European Union Directive on Copyright Duration sets the term for "cinematographic or audiovisual works" at the life of the author(s) plus 70 years after the death of the last of four contributors to survive — the principal director, the author of the screenplay, the author of the dialogue, and the composer of any music specifically created for the motion picture. Another provision, Article 2(1), mandates that at least the principal director shall be considered the author of the motion picture. Article 3(3) of the EU Directive provides that the "related rights" of the motion picture producer expire 50 years after fixation or publication (if published), whichever is earlier.

Since most theatrical motion pictures produced in the U.S. are works made for hire and the director is not considered an author, it is not entirely clear what European Union term applies to U.S. motion pictures or who is entitled to collect licensing fees in Europe during the 20-year added period. United States motion picture producers and the United States Trade Representative take the position that contracts assigning rights to the producers (including collective bargaining agreements) should be recognized in Europe.

The "sense of Congress" provision in the Sonny Bono Act is intended to facilitate private negotiations concerning division of motion picture royalties between producers and artistic contributors to motion pictures.

Effective date. The Sonny Bono Copyright Term Extension Act took effect upon enactment, which was October 27, 1998.

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[14](...continued)
have amended title 28 U.S.C. by adding a new chapter 180 dealing with the assumption of contractual obligations (e.g., "residual" rights) when transferring motion picture rights. This provision was later added to another bill, H.R. 2281 (the Digital Millennium Copyright Act), and was enacted as part of that legislation.

Fairness in Music Licensing Act — Title II

Background

Under 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 include clubs, lodges, factories, summer camps, and schools; daycare, seniors, and other recreational centers; and possibly the common areas of hospitals, nursing homes, and other care facilities.

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, theaters, 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 and pay copyright fees hinges upon the availability or absence of an exemption, limitation, or exception to the music copyright owner's public performance right. If the performance is neither exempt nor subject to compulsory licensing, the music user must obtain permission or a license to perform the music by negotiating the terms and conditions with the music copyright owner or an authorized agent. With few exceptions music performing licenses for performance of nondramatic music are obtained from the performing rights societies ("PRS"), who act as agents for the music copyright owners.

By custom and practice, music publishers and composers-lyricists generally share the royalties obtained under the music performing right equally — that is, 50-50, after the PRS deducts its administrative costs. Currently, there are two major PRS who control virtually all licensing of the performing right in nondramatic music. These are the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music Inc. (BMI). Both PRS operate under antitrust consent decrees that establish restrictions and conditions on their music licensing activities.

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

The existing music performing right was enacted as part of the 1976 general revision of the copyright law, the 1976 Copyright Act. Under its predecessor, the 1909 Copyright Act, nonprofit performances of nondramatic music were exempt from copyright liability. The statute did not define "nonprofit performances," however. The term was given meaning by the courts. Although the line drawn between "for-profit" and "non-for-profit" performances was never clear, in general, the nonprofit exemption was applied fairly broadly. For example, musical performances by public broadcasting and by religious broadcasters were arguably exempt.

In the 1976 Copyright Act, Congress dropped the broad exemption for nonprofit musical performances and replaced it with a broad performance right, to which Congress applied specific, more narrowly-drawn exemptions. The 1976 Act also legislated a broad definition of the term "public," which resulted in application of the music licensing rights in "semi-public" contexts that formerly were arguably private performances.

The general effect of these changes from the 1909 Act was to create a need to obtain a music performing right license on a broader basis than under the law in effect before 1978. Expanded enforcement efforts by the PRS have generated opposition and counter-legislative proposals from groups impacted by the broader music performing right.

In the 105th Congress, music licensing reform proposals were introduced under the title of "Fairness in Music Licensing Act." Essentially identical bills (H.R. 789 and S. 28) were introduced in the House and Senate. The bills proposed several reforms including: 1) expansion of certain exemptions to the public performance right for businesses that perform music by turning on radios or televisions within their business establishments; 2) a new statutory requirement of arbitration of the fees charged by the PRS; 3) statutory conditions for radio per program licenses; 4) elimination of the vicarious and contributory infringement liability of landlords of the premises where music is performed; and 5) mandated access to PRS repertories and licensing information.

The supporters of music licensing reforms linked their legislative efforts with proposals to extend the copyright term an additional 20 years. Music licensing reform supporters argued that the additional 20-year period should be balanced by some concessions to music users. They pointed out that music copyright owners are among the principal beneficiaries of copyright term extension. Music and other

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[15] The Copyright Act had 5 active compulsory licenses as of October 15, 1998: section 111 (cable retransmissions of broadcasts); section 114(f) (subscription digital audio transmissions of sound recordings); section 115 (mechanical reproduction of 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 transmssion license (which applies to sound recordings) and the section 115 recording license (which affects only the reproduction right).

copyright owners denied that there should be any link between term extension and music licensing proposals. Copyright owners opposed the music licensing reform proposals as unfair, unnecessary, and possibly contrary to the international treaty obligations of the United States.

Over the objections of copyright owners, H.R. 2589 was amended during floor debate in the House of Representatives to include three of the core provisions from the music licensing bill as Title II of H.R. 2589.[16] The House passed H.R. 2589 in this form on March 25, 1998.

Following pre-conference discussions with the Senate, the Senate on October 7,1998 passed a version of S. 505 that included two of the music licensing reform proposals in modified form. The House agreed and passed the same version of S. 505 on the same day. Title II of the bill is the "Fairness in Music Licensing Act of 1998." The President signed S. 505 into law on October 27, 1998. As enacted, Title II broadens the business exemptions for public performance of music and creates a mechanism for regional judicial review (by means of a "circuit rider" provision) of the reasonableness of the licensing fees charged by the PRS.[17]

Summary of Music Licensing Act

Business exemptions. Under section 110(5) of the 1976 Copyright Act, performances of any work by public reception of broadcasts or other primary transmissions were exempt if — reception occurred by means of receiving equipment commonly used in private homes, there was no direct charge to see or hear the transmission, and the transmission was not further distributed. The key issues were whether the receiving equipment met the "home-style" standard and the number of receivers employed.

The Music Licensing Act broadens the business exemption of 17 U.S.C. 110(5) Distinctions are drawn between "food service/drinking establishments" and other business establishments such as stores based on the size of the business premises. A further distinction is made based on the nature and number of the receiving sets used to perform the music.

If the business qualifies for the exemption based on the size of the premises or the receiving equipment, the further conditions on availability of the exemption are that there must be no direct charge to see or hear the transmission, and the transmission itself must be licensed by the copyright owner of the musical work.

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[16] The three provisions were: expansion of the business exemptions; binding arbitration of the rates charged by the PRS; and elimination of the vicarious and contributory infringement liability of landlords.

[17] The final bill dropped the proposed elimination of vicarious and contributory infringement liability of landlords. Therefore, no change has been made in these judicially-created doctrines with respect to music licensing. With respect to the liability of Internet service providers, however, legislation was passed in the form of H.R. 2281, the Digital Millennium Copyright Act, which impacts the vicarious and contributory infringement doctrines in general.

Store exemption. The Music Licensing Act defines an "establishment" as a store, shop, or similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the nonresidential area is used for that purpose and in which nondramatic musical works are performed. The exemption is available to business establishments other than "food service/drinking establishments" if —

i) the area of the business where the music is intended to be received covers less than 2000 square feet (excluding the customer parking area); or

ii) the area where the music is intended to be received covers 2000 square feet or more (excluding the customer parking area) and (A) any audio only performance occurs via not more than 6 loudspeakers, of which no more than 4 are in any one room, or (B) an audiovisual performance occurs via no more than 4 audiovisual devices, of which no more than 1 device is located in any one room and no such device has a diagonal screen size greater than 55 inches, and the audio portion is communicated by no more than 6 loudspeakers, of which no more than 4 speakers are located in one room.

Food service/drinking establishment exemption. The Music Licensing Act defines a "food service or drinking establishment" as a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, the majority of the nonresidential area is used for that purpose, and nonndramatic musical works are performed. The exemption is available to food service/drinking establishments if—

i) the area where the music is intended to be received covers less than 3750 square feet (excluding the customer parking area); or

ii) the area where the music is intended to be received covers 3750 square feet or more (excluding the customer parking area) and the receiving equipment meets the same conditions described in Clause (ii) above for stores.

Additional damages. If a court finds that a defendant establishment, which claims the section 110(5) exemption, lacked reasonable grounds to believe its use of the work was exempt, the plaintiff shall be entitled, in addition to any award of damages, an additional award of two times the amount of the licensing fee that should have been paid during the preceding 3 years.

Retail record and audiovisual stores promotions. The Music Licensing Act also amends the section.110(7) exemption of the Copyright Act which relates to the public performance of music in stores as part of promotional efforts to vend music, records, and playback equipment. Under the 1976 Copyright Act, this exemption applied to phonorecords. The Music Licensing Act extends the section 110(7) exemption to "audiovisual or other devices utilized in ... performance" of music.

Regional review of music licensing rate disputes. In accordance with the existing antitrust decrees governing the two major performing rights societies

("PRS")[18] — ASCAP and BMI, disputes about the rates the PRS charge music users to pay for performing right music licenses under the 1976 Copyright Act could be challenged and reviewed only by the designated Rate Court in the federal district court for the Southern District of New York.[19] One of the major objectives of supporters of music licensing reform proposals was to obtain local review of the music licensing rates.

The original proposals in H.R. 789 and S. 28 would have required binding local arbitration of rate disputes at the option of persons or entities defined as "general music users."[20] A modified version of the arbitration proposal remained in H.R. 2589 as passed by the House of Representatives in March 1998. S. 505 as enacted dropped the proposal for rate review by binding local arbitration and substituted judicial rate review under a regional, "circuit-rider" procedure.

The Music Licensing Act provides that, notwithstanding existing and future consent decrees, "an individual proprietor who owns or operates fewer than 7 non-publicly traded establishments" in which music is performed and who disputes the reasonableness of the PRS rates, can obtain rate review on a regional basis. The individual proprietor files for rate review either with the designated Rate Court or in the district court at the seat of the regional Court of Appeals (other than the Court of Appeals for the Federal Circuit) in which the proprietor's establishment is located.

The rate review proceeding is presided over by the district court judge assigned to the Rate Court, who either "rides" the circuits to hear the cases or appoints a special master or magistrate judge to hear the cases in the appropriate region. Any decision of the special master or magistrate judge shall be reviewed by the Rate Court judge. The whole rate review proceeding shall be completed within 6 months after its commencement.

The final determination is binding only as to the individual proprietor who commenced the rate review. The PRS are relieved of any obligation of nondiscrimination among similarly situated music users, in complying with the regional rate decision.

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[18] ASCAP is governed by a 1950 consent decree. The decree designated the district court for the Southern District of New York as the "Rate Court" for review of ASCAP rates. BMI is governed by a 1966 consent decree, which was modified only in 1994 to establish the district court for the Southern District of New York as the forum to review BMI music licensing rates.

[19] The performing right societies can be sued in any federal district court for alleged antitrust violations, however.

[20] The original proposals distinguished between pre-litigation rate arbitration and court-annexed arbitration. The rates charged broadcasters and other transmitting organizations would not have been subject to pre-litigation arbitration, but these entities could have invoked court-annexed arbitration, if sued for copyright infringement. In H.R. 2589 as passed by the House in March 1998, broadcasters and other transmitting organizations were completely excluded from the binding arbitration proposal in that bill.

The industry rate already set by the Rate Court shall be presumed to have been reasonable at the time it was set, but this presumption "shall in no way affect a determination of whether the rate is being correctly applied to the individual proprietor." [21] "Industry rate" is defined as the PRS fee set by negotiations, or by the Rate Court, for a significant segment of the music user industry to which the individual proprietor belongs.

An individual proprietor can bring only one rate review proceeding under the new section 512 of title 17 U.S.C.

Effective date. The Fairness in Music Licensing Act takes effective 90 days after enactment, i.e., 90 days after October 27, 1998.

Conclusion

Enactment at the end of the 105th Congress of the Sonny Bono Copyright Term Extension Act extends the term of existing and future copyrights an additional 20 years. This legislation is expected to result in equivalent duration of protection for American copyrights in the European Union, or will at a minimum give United States negotiators arguments for longer terms of protection within the European Union and other foreign countries.

Within the United States, authors and other owners of the extended copyrights will profit from the increased term of copyright protection at least in the case of the relatively few works that have commercial value over a 95-year period. In those instances where the works are not commercially exploited during the 20-year added period, libraries and nonprofit educational institutions are granted an exemption to use the works, provided copies are not available at a reasonable price.

The passage of a modified version of the Fairness in Music Licensing Act responds to some of the concerns of music users about the fairness of traditional licensing practices of the performing right societies. The Act broadens the business exemption of 17 U.S.C. 110(5) for playing radios or televisions, and creates a new procedure for regional review of the licensing fees in the case of an individual proprietor of less than 7 non-publicly trade businesses. The proposals dropped from the Music Licensing Act in the final compromise (e.g., vicarious liability of landlords for performance of music on their premises and radio per program licensing fees) may or may not be the subject of new legislative proposals in the next few years.

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[21] 17 U.S.C. 512(4).