Order Code RL31626

Report for Congress

Distributed by Penny Hill Press http://pennyhill.com

Copyright Law: Statutory Royalty Rates for Webcasters

Updated December 10, 2002

Robin Jeweler
Legislative Attorney
American Law Division

Copyright Law: Statutory Royalty Rates for Webcasters

Summary

This report surveys the procedures for and the results of the Copyright Arbitration Royalty Panel's (CARP's) February 20, 2002 Report making recommendations for statutory royalty rates for eligible nonsubscription webcasters. The Panel was implementing compulsory license rates for public performances by digital transmissions, 17 U.S.C. § 114, and ephemeral copies to facilitate transmission, 17 U.S.C. § 112. Among various classes of potential licensees, the CARP recommended a public performance fee of 0.14¢ per performance and an ephemeral license fee of 9% of performance fees due for Internet transmissions by qualifying webcasters. On May 21, 2002, the Librarian of Congress, upon the recommendation of the Register of Copyrights, rejected the CARP's proposed rates. On June 20, 2002, the Librarian issued a Final Regulation that sets royalty rates for Internet transmissions at 0.07¢ per performance and ephemeral licensing at 8.8% of performance fees due. Parties affected by the ruling announced their intention to appeal the Librarian's decision.

Members of Congress have reacted to the controversy surrounding royalty rates for webcasters. Several bills were introduced. H.R. 5285 entitled the "Internet Radio Fairness Act" was introduced in the House on July 26, 2002, This bill, which was not enacted, would have set aside the Librarian's decision and established new rate-making standards for small businesses and eliminate certain licensing fees for ephemeral recordings.

On September 26, 2002, H.R. 5469, the "Small Webcasters Amendments Act of 2002" was introduced. As introduced, the bill would have suspended the Librarian's royalty rates for six months. After its introduction, however, affected parties entered into negotiations and came to an agreement over acceptable royalty rates. The terms of the agreement were passed by the House as a managers-amendment to H.R. 5469 on October 7, 2002. The Senate did not take up the bill before recess.

During the short legislative session between recess and adjournment *sine die* of the 107th Congress, an amended version of H.R. 5469 was passed. Signed by President Bush on December 4, 2002, P.L. 107-321 is entitled the "Small Webcaster Settlement Act of 2002." Rather than codify the terms of the settlement described above, the Small Webcaster Settlement Act extends the due date for royalty payments and permits more broadly negotiated agreements that deviate from the Librarian's order. The agreements, however, are to include provisions for payment of royalties on the basis of a percentage of revenue or expenses, or both, and include a minimum fee.

Contents

Background 1
Compulsory Licenses 1
Establishing Statutory Royalty Rates: The Copyright Arbitration Royalty Panel (CARP) 2
The CARP'S Recommendation 3
The Librarian Rejects the CARP Recommendations 4
The Librarian's Decision 5
Proposed Legislative Intervention 6
P.L. 107-321, the Small Webcaster Settlement Act of 2002 8

Copyright Law: Statutory Royalty Rates for Webcasters

Background. Copyright owners have exclusive control over protected material, including the right to authorize the reproduction, distribution and public performance of their work.[1] Historically, copyright owners of sound recordings did not enjoy a public performance right. Hence, when a radio broadcaster plays a song over the airwaves, it pays a public performance royalty to the music's composer, but not to the copyright owner of the sound recording. In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act (DPRA),[2] which created a *limited* public performance right for sound recordings. Copyright owners of sound recordings – record companies and recording artists – now enjoy the exclusive right to control or authorize public performances *by means of digital transmission.*[3] This public performance right is triggered when sound recordings are transmitted over the Internet, or "webcast."

Compulsory Licenses. The U.S. Copyright Act allows one who wishes to use copyrighted material, in certain instances, to obtain a compulsory license to do so. Ordinarily, royalties and licenses for the use of protected material are the product of direct negotiations between copyright owners and users. When a compulsory, or statutory, license is available, a permitted user need only adhere to statutory requirements, including payment of established royalty rates, to use the work.

In 1998, in the Digital Millennium Copyright Act (DMCA),[4] Congress amended several compulsory licensing statutes to provide for and clarify the treatment of different types of webcasting. Some types of digital transmissions of sound recordings are *exempt* from the public performance right, for example, a nonsubscription broadcast transmission;[5] a retransmission of a radio station's broadcast within 150 miles of its transmitter; and a transmission to a business

---

[1] 17 U.S.C. § 106.

[2] P.L. 104-39 (Nov. 1, 1995).

[3] 17 U.S.C. § 106(6).

[4] P.L. 105-304 (Oct. 28, 1995).

[5] FCC- licensed radio broadcasters have argued, unsuccessfully to date, that their simultaneous streaming on the Internet of broadcast sound recordings is fully exempt from a public performance license requirement. *See, Bonneville International Corp. v. Peters,* 153 F.Supp.2d 763 (E.D.Pa. 2001), appeal pending.

establishment for use in the ordinary course of its business.[6] In contrast, a digital transmission by an "interactive service" does *not* qualify for *any* compulsory license, nor is it exempt from the public performance right. The owner of an interactive service – one which enables a member of the public to request or customize the music that he or she receives – must negotiate a license, including royalty rates, directly with copyright owners.

But, a category of webcasting that *does* qualify for a compulsory license is "an eligible nonsubscription transmission." A subscription service is one that is limited to paying customers. Hence, webcasters who transmit music over the Internet on a nonsubscription, noninteractive basis may qualify for the statutory license under 17 U.S.C. § 114(d).

A licensee under § 114 may also qualify for a statutory license under 17 U.S.C. § 112(e) to make multiple "ephemeral" – or temporary – copies of sound recordings solely for the purpose of transmitting the work by an entity legally entitled to publicly perform it.[7]

Establishing Statutory Royalty Rates: The Copyright Arbitration Royalty Panel (CARP). The Copyright Act creates a procedure to set royalty rates for statutory licenses. At the behest of the Librarian of Congress, upon the recommendation of the Copyright Office, a CARP may be convened to take testimony from interested parties and recommend a statutory royalty rate. A CARP is made up of three professional arbitrators. At the conclusion of its proceedings, it issues a report to the Librarian. The Librarian, upon the recommendation of the Copyright Office, will adopt the fees proposed by the CARP unless, based on the record, its determinations are found to be arbitrary or contrary to copyright law. If the Librarian rejects the proposed fees, he may, after an examination of the record and an additional 30 days, issue an order setting them. An aggrieved party who is bound by the Librarian's decision may appeal to the U.S. Court of Appeals for the D.C. Circuit.[8]

In the case of statutory licenses under § 114, the Librarian initiated voluntary negotiation proceedings to determine "reasonable terms and rates of royalty payments for public performances of sound recordings by means of eligible nonsubscription transmissions and transmissions by new subscription services[.]"[9] Voluntary negotiations take place for a six month period. After that, a party may petition the Librarian to appoint a CARP to establish a schedule of rates and terms binding upon all parties. The Recording Industry Assoc. of America (RIAA) did so. The CARP is directed to determine rates based, in part, upon the following criteria:

---

[6] 17 U.S.C. § 114(d)(1).

[7] The statutory license for ephemeral copies is based upon the copyright owners right to control reproduction of a protected work.

[8] 17 U.S.C. § 802.

[9] 17 U.S.C § 114(f)(2)(A).

> Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers. In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall base its decision on economic, competitive and programming information presented by the parties, including--
>
> (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and
>
> (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.
>
> In establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements...[.][10]

In short, the CARP is statutorily directed to determine a royalty rate that approximates the value a "willing buyer and willing seller" would assign to digital public performance and ephemeral copy rights. To do so, the panel may consider such factors as the impact of the public performance upon the copyright owner's commercial interests, the nature of the webcasting service, and market rates established by voluntarily negotiated licenses.

The CARP'S Recommendation. The Report of the Copyright Arbitration Royalty Panel entitled "*In re rate setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings*" was issued on February 20, 2002.[11] It considers proposed rates for two time periods, October 28, 1998 - December 31, 2000 and January 1, 2001 to December 31, 2002.

In a lengthy opinion based upon thousands of pages of testimony and evidence, the CARP recommended a public performance fee of 0.14¢ per performance and an ephemeral license fee of 9% of performance fees due for Internet transmissions by qualifying webcasters and commercial broadcasters. For simultaneous Internet retransmission of over-the-air AM or FM radio broadcasts, the proposed performance fee was 0.07¢ per performance and an ephemeral license fee of 9% of performance fees due. Fees for noncommercial broadcasters who webcast (*i.e.*, those not affiliated

---

[10] 17 U.S.C. 114(f)(2)(B).

[11] The report, in its entirety, is posted online at the U.S. Copyright Office's website at [http://www.loc.gov/copyright/carp/webcasting_rates.pdf].

with the Corp. for Public Broadcasting) were proposed as 0.02¢ per performance and an ephemeral license fee of 9% of performance fees due for simultaneous retransmission of over-the-air AM or FM broadcasts. Other Internet transmissions for noncommercial broadcasters were 0.05¢ and 9% of performance fees (Other side channels transmissions were proposed at 0.14¢ and 9% of performance fees due.) The CARP also recommended a minimum fee of $500 per year for each license, which would cover both the performance and ephemeral licenses.[12]

The CARP's findings are reported in detail and highlight the evidence and testimony found by it to be significant or of little persuasiveness. A sampling of its findings include:

- the net impact of Internet webcasting on record sales is indeterminate;[13]

- a "per performance" royalty metric is preferable to a percentage of revenue option because, in part, many webcasters are currently generating very little revenue. Basing royalties on percentage of revenue could result in an undesirable situation where copyright owners are forced to allow extensive use of their property with little or no compensation; and[14]

- although previously negotiated licenses are a valuable benchmark for market value, it was difficult to rely upon them in the case before it because the preexisting agreements were all recently negotiated in the context of a newly emerged webcasting industry involving newly-created rights. Thus the new licenses were negotiated without benefit of established historical standards.[15] The RIAA's negotiation and license agreement with a sophisticated business user, Yahoo, was more persuasive to it than RIAA licenses with minor services.

The Librarian Rejects the CARP Recommendations. Shortly after the release of the CARP report, many webcasting groups predicted that the proposed royalty rates, if adopted, would "kill" the development of webcasting, including simultaneous streaming of radio broadcasts.[16] Others defend the rates or argue that such predictions are premature. On May 15, 2002, the Senate Judiciary Committee held a hearing to allow parties to air concerns over the proposals.[17] On May 21,

---

[12] A chart setting forth the proposed royalties appears in Appendix A to the CARP Report at [http://www.loc.gov/copyright/carp/webcasting_rates_a.pdf].

[13] CARP Report at 34.

[14] *Id.* at 37.

[15] *Id.* at 47.

[16] *See, e.g.*, [http://www.saveinternetradio.org/]. This website urges visitors to write their Congressmen.

[17] Hearing before the Senate Judiciary Committee, *Copyright Royalties: Where is the Right*

(continued...)

2002, the Librarian, upon the recommendation of the Copyright Office, issued an order rejecting the proposed rates.[18]

The Librarian's Decision. On June 20, 2002, the Librarian issued a Final Regulation establishing new rates.[19] The major differences between the CARP recommendations and the new rates are as follows:

- Performance fees (per performance, per listener) for Internet transmission rates for eligible nonsubscription services was reduced from 0.14¢ to 0.07¢ (which is the same rate as that set for simultaneous Internet retransmission of over-the-air AM or FM radio broadcasts);

- Ephemeral license fees were reduced from 9% of performance fees due to 8.8%.

The CARP had recommended different rates for Internet-only transmission (0.14¢) and retransmission of over-the-air broadcasts (0.07¢) because it concluded that retransmission of radio broadcasts has a substantial promotional value in the sales of sound recordings. The Copyright Office and the Librarian found this reasoning to be arbitrary and unsupported by evidence before the CARP. Reexamining the RIAA's licensing agreement with YAHOO, the Librarian found that 0.07¢ per performance per listener more accurately represents the blended contract rate for all transmissions under the RIAA/YAHOO licensing agreement.

Likewise, the Copyright Office and the Librarian found that the ephemeral recording license fee under the RIAA/YAHOO agreement was effectively 8.8% of performance fees due. The CARP had factored in higher rates from other agreements to set a rate of 9% of performance fees. Finding those agreements unpersuasive, the Librarian rolled back the rate to 8.8%.

The Librarian's Final Regulation makes additional adjustments to the CARP recommendations. For example, fees for noncommercial broadcasters who webcast (*i.e.,* those not affiliated with the Corp. for Public Broadcasting) were proposed by the CARP as 0.02¢ per performance and an ephemeral license fee of 9% of performance fees due for simultaneous retransmission of over-the-air AM or FM broadcasts. The Librarian accepted the 0.02¢ performance fee but adjusted the

---

[17] (...continued)
Spot On The Dial For Webcasting, 107th Cong., 2d Sess. (May 15, 2002) at [http://judiciary.senate.gov/hearing.cfm?id=258].

[18] In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1&2, available online at the U.S. Copyright Office website, [http://www.copyright.gov/carp/webcasting-rates-order.html].

[19] Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule, 67 Fed. Reg. 45239 (July 8, 2002). The effective date of the Final Rule is July 8, 2002. *See also,* Summary of the Determination of the Librarian of Congress on Rates and Terms for Webcasting and Ephemeral Recordings at [http://www.copyright.gov/carp/webcasting_rates_final.html].

ephemeral license fee to 8.8%. Other Internet transmission fees for noncommercial broadcasters, including archived programming, substituted programing and up to two side channels, were adjusted downwards from 0.05¢ to 0.02¢ per performance and 8.8% of performance fees (Other side channels transmissions were adjusted from 0.14¢ to 0.07¢ per performance and 8.8% of performance fees due.) The Regulation adopts the CARP-recommended minimum fee of $500 per year for each license, which would cover both the performance and ephemeral licenses. But, it adds a new minimum fee of $10,000 to make ephemeral recordings for business establishment service exempt from the performance royalty.

The Final Regulation establishes September 1, 2002 as the effective date for payment of rates due for activities dating back to October 28, 1998. Webcasters using the statutory licenses will have until October 20, 2002 to make full payment for pre-September 1 activities.

Both the RIAA and a coalition of Internet radio stations have announced their intention to appeal the rates set by the Librarian.[20]

Proposed Legislative Intervention.

H.R. 5285: The "Internet Radio Fairness Act". On July 26, Representative Inslee introduced H.R. 5285, 107th Cong., 2d Sess. (2002). The bill made royalty fees inapplicable to a "small entity"as defined by the Small Business Administration (SBA) pending implementation of a new standard for determining royalty rates.[21] Among its highlights, the bill:

- abandoned the DMCA's "willing buyer/willing seller" market standard for establishing royalty rates. A new rate structure, which would have covered the time periods discussed above was created for "small entities." The applicable standard, set forth at 17 U.S.C. § 801, would have allowed another CARP to set rates to achieve expressed objectives including: maximizing the availability of creative works to the public; affording copyright owners a fair return and copyright users a fair income; reflecting the relative roles of copyright owners and users in creative contribution, capital investment, cost, risk, and contribution to the opening of new markets; and minimizing disruptive impact on the structure of the industries involved;

- exempted *all* webcasters, including radio broadcasters transmitting digital sound recordings on a nonsubscription basis, from ephemeral licensing fees under § 112 if the copy of the recording was used

---

[20] IOMedia Partners, Inc. v. Librarian of Congress, No. 02-1224 (D.C.Cir., filed Oct. 15, 2002).

[21] The Small Business Administration, under its "Small Business Standard" rule, includes Internet Broadcasters with annual receipts of less than 6 million dollars. 67 Fed. Reg. 52601 (Aug. 13, 2002).

solely for the purpose of transmitting, or for archival preservation or security;

- exempted small entities from shouldering the costs of CARP proceedings. Under current law, parties to the ratemaking proceedings are responsible for the entire cost of the arbitration, in proportions that the CARP may allocate. Small webcasters have argued that they are unable to participate in the proceedings because the costs incurred would be prohibitive.

H.R. 5469: The Small Webcaster Amendments Act of 2002. Introduced in the House by Representative Sensenbrenner on September 26, 2002, H.R. 5469 initially provided:

> The determination by the Librarian of Congress of July 8, 2002, of rates and terms for the digital performance of sound recordings and ephemeral recordings, pursuant to section 112 and section 114 of title 17, United States Code, shall not apply during the 6-month period beginning on October 20, 2002.

Apparently motivated by the proposed rate suspension, affected parties, *i.e.*, vocalists, recording artists, background musicians, record labels, and small webcasters, were encouraged to reach a negotiated agreement creating a "small webcaster" royalty rate.[22] Passed by the House under suspension of the rules, a complex, technical 30-page manager's amendment purported to codify the terms of the agreement.[23] The primary feature of the bill, however, reflected a goal long sought by webcasters, namely, a royalty based on a percentage of webcasters' revenues rather than on a "per song per listener" basis. Specifically, the bill:

- defined "small webcasters" as webcasters[24] whose gross revenues from Nov. 1998 to June 2002 were no more than $1,000,000; whose gross revenues for 2003 are no more than $500,000; and, whose gross revenues for 2004 are not more than $1,250,000;

- stipulated that royalties for ephemeral recordings under 17 U.S.C. § 112 used solely to facilitate transmissions by small webcasters were deemed to be included in royalties paid under § 114;

---

[22] 148 CONG. REC. H7047 (daily ed. Oct. 7, 2002)(Statement of Rep. Sensenbrenner)("I am happy to report that introduction of this bill placed a burr under the saddle of both the copyright holders and the small webcasters to conclude negotiations on these matters that began last summer. Since last week, the parties have negotiated around the clock. They have now arrived at a deal that sets new rates and payment terms that will obviate the need for further legal and administrative intervention. The manager's amendment simply codifies the terms of that deal.")

[23] *Id.* at H7048.

[24] The bill incorporates the definition of a "webcaster" from 37 C.F.R. Part 261.2 (2000): A licensee, other than a commercial broadcaster , Non-Corp. for Public Broadcasting, non-commercial broadcaster or business establishment service, that makes eligible non-subscription transmissions of digital audio programming over the Internet through a Web Site.

- permitted small webcasters to elect to pay royalties established by the bill rather than those established by the Librarian. The rate for 1998-2002 was 8% of the webcasters gross revenues, or 5 % of expenses, whichever is greater;

- set the royalty rate for 2003 and 2004 as 10% of the first $250,000 in gross revenue and 12 % of gross revenues in excess of $250,000, or 7% of expenses, whichever is greater;

- imposed a minium fee for 1998 of $500; for each year between 1999 and 2002, the minimum fee was $2,000; for 2003-2004, $2,000 for webcasters with gross revenue of $50,000 for the preceding year and $5,000 if the webcaster had gross revenue exceeding $50,000 for the preceding year;

- established a rate of 0.02¢ per performance for noncommercial, non-FCC webcasters for the years 1998 - 2004, including a minimum annual fee of $500 (creditable towards royalties due).

H.R. 5469 also stipulated that its rates and terms "shall not constitute evidence of rates and terms that would have been negotiated between a willing buyer and a willing seller[.]"

With respect to notice and recordkeeping, another area of controversy between webcasters and copyright owners, the bill established requirements for the years the years 2003 and 2004.

The Senate did not take up the bill prior to its October 2002 recess.

P.L. 107-321, the Small Webcaster Settlement Act of 2002. During the short legislative session between recess and adjournment *sine die* of the 107th Congress, an amended version of H.R. 5469 was passed.[25] Rather than codify the terms of the settlement described above, the Small Webcaster Settlement Act extends the due date for royalty payments and permits more broadly negotiated agreements that deviate from the Librarian's order. Among other things, it:

- extends the due date for royalty payments which have not already been paid from noncommercial webcasters for the period from October 28,1998 to May 31, 2003, to June 20, 2003;

- suspends the due date for payments by small commercial webcasters to December 15, 2002 to permit settlement negotiations between them and designated receiving agents;[26]

---

[25] *See,* S. Amdt. 4955, 107th Cong., 2d Sess. 2002.

[26] A "receiving agent" is an agent designated by the Librarian of Congress for collection of royalty payments made by licensees for distribution to designated agents of copyright owners. SoundExchange is a designated agent for distribution of performance royalties. Determination of Reasonable Rates and Terms for the Digital Performance of Sound

(continued...)

- amends the Copyright Act, 17 U.S.C. § 114, to permit receiving agents to enter into royalty rate agreements for the period from October 28, 1998 to December 31, 2004 with any one or more small commercial webcasters or noncommercial webcasters. Final agreements will be published in the Federal Register (but not in the Code of Federal Regulations) and will be binding on all copyright owners. Agreements for small commercial webcasters "shall include provisions for payment of royalties on the basis of a percentage of revenue or expenses, or both, and include a minimum fee." [27] Parties may negotiate other terms and conditions, such as notice and record keeping. A receiving agent is not required to negotiate an agreement and will not be liable to a copyright owner for entering into one.

The extension of time to facilitate negotiations by noncommercial webcasters is apparently intended to address an "anomaly" in the Librarian's final order. Namely, rates were established at 0.02¢ per song per listener for FCC-licensed noncommercial webcasters, but that classification inadvertently excluded non-FCC licensed, noncommercial webcasters, such as those operating at colleges and universities.[28]

"Small webcasters" are not defined in the law. Presumably, guidance as to the intended class may be gleaned by reference to the initial House-passed version of H.R. 5469.[29] Or, the question may be another subject of negotiation between the parties.

The law lays particular emphasis on the principle that no agreement may be admissible as evidence or taken into account in any pending or subsequent administrative, judicial, or government royalty ratemaking proceeding, including litigation appealing the Librarian's July 8, 2002 order pending before the U.S. Court of Appeals for the D.C. Cir. By way of explanation, the statute provides:

> It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of small webcasters, copyright

---

[26] (...continued)
Recordings and Ephemeral Recordings; Final Rule, 67 Fed. Reg. 45240, 45272-73 (July 8, 2002)(to be codified at 37 C.F.R. Part 261).

[27] P.L. 107-321, § 4.

[28] *See,* 148 CONG. REC. S11727 (daily ed. Nov. 20, 2002)(Statement of Sen. Leahy)("The Librarian's decision contained an anomaly under which nonprofit entities that held FCC licenses were given a lower per performance rate than were commercial entities, but no such provision was made for noncommercial entities that were not FCC licensees.")

[29] *Id.* (Statement of Sen. Leahy)("The agreement to be negotiated between Sound Exchange and small webcasters will likely reflect the rates and terms set forth in the original House-passed bill.")

> owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b).[30]

Thus, the legislation creates a temporary intervention to authorize direct negotiations between the parties, not a permanent reordering of ratemaking standards.

In addition to the foregoing, the new law includes provisions governing the deductibility of costs and expenses by agents charged with distributing digital transmission royalty payments to copyright holders and performers.[31] Nonprofit designated receiving agents are permitted to deduct, prior to distribution of receipts, reasonable costs incurred in administration and calculation of the royalties; reasonable costs for the settlement of disputes relating to the collection and calculation of the royalties; and, reasonable costs for the licensing and enforcement of rights related to ephemeral recordings and licensing under 17 U.S.C. § 112. Designated agents who have entered contractual agreements with copyright owners and performers may also deduct costs which were incurred after November 1, 1995. for these expenses

---

[30] P.L. 107-321, § 4. Congressional findings in § 2(5)-(6) also emphasize that Congress makes no determination that the agreement reached between small webcasters and copyright owners is fair and reasonable or represents terms that would be negotiated by a willing buyer and a willing seller. The D.C. Court of Appeals is directed not to take the law into account in considering the Librarian's order. *See also,* 148 CONG. REC. S11727 (daily ed. Nov. 19, 2002)(Statement of Sen. Helms)("[A]s enacted, this bill will ensure that privately negotiated settlements will not be enacted into positive law, thereby negatively impacting, either directly or indirectly, any industry or entity that does not or cannot yet settle their liabilities for these royalties.")

[31] P.L. 107-321, § 5.