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H.R. 1417: The Copyright Royalty and Distribution Reform Act of 2004

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Summary

H.R. 1417, 108th Congress, first session (2003), was introduced on March 25, 2003 and passed by the House on March 3, 2004. If enacted, the bill would make extensive changes to the procedural framework for adjudicating royalty rates for compulsory licenses under the Copyright Act. Compulsory licenses facilitate many copyright-related activities, including digital transmissions of sound recordings in webcasting. The bill would repeal current chapter 8 of Title 17, U.S. Code, §§ 801-803, and replace it with new §§ 801-804. The current *ad hoc* three-member Copyright Arbitration Royalty Panel would be replaced by standing Copyright Royalty Judges appointed for six-year terms.

Background. The owner of a copyright generally has the exclusive right to control use and distribution of the protected work. One who wishes to use the protected work ordinarily gets permission directly from the owner (or his or her agent). The permission may take any number of forms, a common one being a license agreement.

There are several provisions in the Copyright Act that create "statutory" or compulsory licenses. In these situations, a user need not obtain permission for use from the copyright owner; permission is "compulsory." The user or licensee must abide by statutorily imposed conditions and pay prescribed royalties. Among the statutory licenses created in the Copyright Act are licenses to make and distribute phonorecords (mechanical licenses);[1] licenses for use of certain works by noncommercial broadcasting;[2] and, licenses for specified secondary transmissions by cable television and satellite

[1] 17 U.S.C. § 115.

[2] 17 U.S.C. § 118.

carriers.[3] A more recent class of compulsory licenses covers digital transmissions of sound recordings, which includes webcasting.[4]

The process of establishing royalty rates for statutory licenses is complex. The initial royalty rate-setting procedure for webcasting licenses for eligible nonsubscription transmissions proved difficult and controversial.[5] Congress intervened with passage of the Small Webcaster Settlement Act of 2002.[6] This proceeding appears to be at least partially responsible for a renewed examination of the rate-making process.[7]

Although it has been revised in the past, the Copyright Act currently vests initial decision-making for statutory royalty rates in a Copyright Arbitration Royalty Panel (CARP).[8] 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.

When the 1976 Copyright Act was originally enacted, administrative responsibility for statutory royalty rates was reposed in a Copyright Royalty Tribunal composed of three full-time Commissioners.[9] Finding that the Tribunal's workload did not justify the cost of three Commissioners, Congress enacted the Copyright Royalty Tribunal Reform Act of 1993, which established the current CARP system.[10] Among the perceived advantages of the CARP system was the fact that the panels are established on an *ad hoc* basis, saving the expense of full-time employees, and paid for by parties to the proceeding. More recently, however, the CARP process has been the subject of congressional hearings during which substantial criticism of the process was aired.[11]

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[3] 17 U.S.C. §§ 111, 119, 122.

[4] 17 U.S.C. § 112, 114.

[5] For background, see CRS Report RL31626, *Copyright Law: Statutory Royalty Rates for Webcasters*.

[6] P.L. 107-321.

[7] "*The CARP (Copyright Arbitration Royalty Panel) Structure and Process": Hearing before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary,* 107th Cong., 2d Sess. 11 (2002)(Statement of Rep. Berman.).

[8] 17 U.S.C. §§ 801-803.

[9] P.L. 94-553, § 101. 17 U.S.C. § 801 *et seq.* (Supp. III 1979).

[10] P.L. 103-198. *See* H.Rept. 103-286, 103d Cong., 1st Sess. 9 (1993).

[11] *See* note 7 *supra* and *H.R. 1417, the Copyright Royalty and Distribution Reform Act: Hearing before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on*

(continued...)

In testimony at hearings before the House Subcomm. on Courts, the Internet, and Intellectual Property, the following issues were among those raised :

- although the CARP system was intended to save money, requiring the parties before it to foot the costs of the proceeding results in some interested parties being unable to participate because of the expense;[12]

- appointing the panels on an as-needed basis results in a lack of stability and precedent in the rate-making process, and, in light of the fact that the royalty laws and economics of rate-making are extremely complex, an absence of institutional expertise from panel to panel;[13]

- procedural rules for practice before the CARP, such as those governing discovery and the admission of evidence, are presently either too restrictive, or too vague; deadlines for the CARP's issuance of a ruling are inadequate;[14] and

- under the current system, proceeds from royalties derived from cable and satellite licenses are used to subsidize the costs of unrelated compulsory license proceedings. There is no mechanism for partial distribution of uncontested royalties.[15]

H.R. 1417, 108th Cong. 1st Sess. (2003), the Copyright Royalty and Distribution Reform Act (CRDRA). Introduced on March 25, 2003 by Rep. Lamar Smith, a substitute version was approved by the House Judiciary Subcommittee on Courts, the Internet and Intellectual Property on May 20, 2003. An amendment in the nature of a substitute was reported favorably by the House Judiciary Committee on January 30, 2004.[16] On March 3, 2004, the bill went to the floor of the House on suspension of the rules and was passed by 406 votes, with none in opposition. If enacted, the CRDRA would once again make extensive changes to procedures for adjudicating compulsory license royalties. It would repeal current chapter 8 of Title 17, U.S. Code, §§ 801-803, and replace it with new §§ 801-804.

The *ad hoc* three-person CARP would be replaced by a 3 full-time Copyright Royalty Judges (CRJs), each appointed for a six-year term by the Librarian of Congress in consultation with the Register of Copyrights. The CRJS would make determinations concerning reasonable terms and royalty rates for specified statutory licenses.

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[11] (...continued)
the Judiciary, 108th Cong., 1st Sess. (2003)(H.R. 1417 Hearing).

[12] H.R. 1417 Hearing, *supra.* (Statement of Marybeth Peters, Register of Copyrights) at [http://www.house.gov/judiciary/peters040103.htm].

[13] *Id.*

[14] *Id.* (Statement of Bruce Rich).

[15] *Id* .(Statement of Robert Alan Garrett).

[16] H.Rept. 108-408, 108th Cong., 2d Sess. (2004).

The standard applied to establish a royalty rate for digital transmissions by webcasters under 17 U.S.C. § 114 was a controversial issue in the 2002 CARP proceeding. With respect to webcasting of nonsubscription services eligible for a statutory license (and other compulsory licenses), the bill would change the standard for determining a royalty rate from one based on a fair market "willing buyer and willing seller" price to one intended to achieve many objectives, including:

- maximizing the availability of creative works to the public;
- affording the copyright holder a fair return and the copyright user a fair income under existing economic conditions;
- reflecting the relative roles of owner and user in the product made available to the public with respect to creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression; and
- minimizing disruptive impact on prevailing industry structure and practice.[17]

Standards for royalties for secondary transmissions by cable systems under 17 U.S.C. § 111 are addressed as well.

The CRJs would be empowered to authorize the distribution of specified royalty payments and to accept or reject certain royalty claims and to arbitrate disputes over whether manufacturers, importers, and distributors are required to pay royalties under the Audio Home Recording Act, 17 U.S.C. § § 1001- 1010.[18]

Proposed § 802 would govern the term, qualifications, and conditions of the CRJs' tenure. Each judge must be an attorney with at least 7 years of legal experience. The Chief Copyright Royalty Judge must have at least 5 years experience in administrative hearings or court trials. The Chief Copyright Royalty Judge may hire 3 full-time staff members.

The Copyright Royalty Judges are independent, but may consult in writing and on the record with the Register of Copyrights on any matter other than a question of fact. In resolving "novel" questions of law under the Copyright Act, the Register may be required to submit a written opinion interpreting the law.

The Librarian of Congress may remove a Copyright Royalty Judge for cause.

Proposed § 803 prescribes rules of practice for proceedings before the CRJs. The Copyright Royalty Judges will ordinarily preside over proceeding *en banc* and make determinations by majority vote. The bill includes and expedited and streamlined small claims procedure for distribution of royalties. A "small claim" is defined as amounts in controversy of $10,000 or less. Decisions of the CRJs are to be rendered no later than 11

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[17] H.R. 1417, § 3 adding new 17 U.S.C. § 801.

[18] *Id.*, § 5 amending 17 U.S.C. § 1010.

months after a 21-day settlement conference period, but no later than 15 days before the expiration of then current statutory rates and terms. Appeals would be taken directly to the U.S. Court of Appeals for the D.C. Circuit. The current practice of intermediate review by the Librarian of Congress is omitted. The costs of a proceeding, exclusive of administrative costs such as the judges and staff salaries, will be supported primarily by filing fees, thus minimizing the financial burden on participants. It provide terms for the continuation of royalty rate payments during gaps when a royalty period expires but official adjustments or voluntarily negotiated agreements are not yet in effect.

Proposed § 804 addresses the time frames for instituting and concluding royalty adjudications under the Copyright Act's various statutory licenses.

Sections 4 and 5, respectively, of H.R. 1417 deal with definitions and extensive technical amendments primarily to license and royalty provisions in the Copyright Act. Section 6 provides that amendments under the bill will generally take effect within 6 months of enactment. Rate proceedings in progress when the law takes effect will not be affected.