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The Copyright Royalty and Distribution Reform Act of 2004

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Summary

P.L. 108-419, the Copyright Royalty and Distribution Reform Act of 2004 (CRDRA), was signed into law by President Bush on November 30, 2004. The law makes 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 law repeals and reenacts chapter 8 of Title 17 of the U.S. Code, 17 U.S.C. §§ 801-805. The previous *ad hoc* three-member Copyright Arbitration Royalty Panel is 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 broadcasters;[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]

The Copyright Act, prior to CRDRA, vested 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 was convened to take testimony from interested parties and recommend a statutory royalty rate. A CARP was made up of three professional arbitrators. At the conclusion of its proceedings, it issued a report to the Librarian. The Librarian, upon the recommendation of the Copyright Office, would adopt the fees proposed by the CARP unless its determinations were found to be arbitrary or contrary to copyright law. If the Librarian rejected the proposed fees, he could, after an examination of the record and an additional 30 days, issue an order setting them. An aggrieved party who was bound by the Librarian's decision had the right to 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 CARP system.[10] Among the perceived advantages of the CARP system was the fact that the panels were established on an *ad hoc* basis thereby saving the expense of full-time employees and were paid for by parties to the proceeding. But the CARP process became 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*

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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 either too restrictive, or too vague; deadlines for the CARP's issuance of a ruling are inadequate;[14] and

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

P.L. 108-419, the Copyright Royalty and Distribution Reform Act of 2004 (CRDRA). H.R. 1417, 108th Cong. 1st Sess. (2003), was introduced on March 25, 2003 by Representative Lamar Smith. An amendment in the nature of a substitute was reported favorably by the House Judiciary Committee on January 30, 2004.[16] The bill was approved without substantive discussion by the Senate Judiciary Committee on September 21, 2004 and passed the Senate with an amendment by Unanimous Consent on October 6, 2004. The House agreed to the Senate amendment on November 17, 2004. Both chambers adopted a free-standing concurrent resolution making conforming amendments and technical corrections.[17]

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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). A substitute version was approved by the House Judiciary Subcommittee on Courts, the Internet and Intellectual Property on May 20, 2003. On March 3, 2004, the bill went to the floor of the House under suspension of the rules and passed with 406 votes, with none in opposition.

[17] Sen. Con. Res. 145, 108th Cong., 2d Sess. (2004). Among its provisions is one intended to reconcile language regarding voluntary, negotiated agreements regarding rates otherwise governed by compulsory licenses for satellite broadcasts in the Satellite Home Viewer Extension
(continued...)

The CRDRA makes extensive changes to procedures for adjudicating compulsory license royalties. It repeals 17 U.S.C. §§ 801-803 and replaces it with new §§ 801-805.

The *ad hoc* three-person CARP is 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.

Among the duties expressly conferred upon the CRJs is the authority:

- to make determinations concerning reasonable terms and royalty rates for specified statutory licenses according to delineated standards;
- to authorize distribution of specified royalty fees and adhere to specified procedures where appropriate distribution is in controversy;
- to accept or reject royalty claims and rate adjustment petitions;
- 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;
- to incorporate, or, where appropriate, decline to incorporate negotiated agreements as the basis for statutory terms and rates and distribution of royalty payments; and
- to make necessary procedural and evidentiary rulings.[18]

Amended § 802 governs the term, qualifications, and conditions of the CRJs' tenure. Each judge must be an attorney with at least seven years of legal experience. The Chief Copyright Royalty Judge must have at least five years experience in administrative hearings or court trials and may hire 3 full-time staff members. Of the other two CRJs, one must have expertise in the area of copyright law and the other economics.

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 a novel question of law, i.e., one of first impression under the Copyright Act, the Register may be required to submit a written opinion interpreting the law. And, the Register may review the CRJs' resolutions of material questions of substantive law that underlie or are contained in final determinations for legal error. Upon the finding of error, the Register is to issue a written opinion correcting it, which will become a part of the record of the proceeding.

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[17] (...continued)
and Reauthorization Act of 2004. 150 CONG. REC. H9847 (daily ed. Nov. 17, 2004)(Statement of Rep. Sensenbrenner.) *See also* CRS Report RS21768, *Satellite Television: Reauthorization of the Satellite Home Viewer Improvement Act (SHVIA)–Background and Key Issues* by Marcia S. Smith.

[18] P.L. 108-419, § 3 replacing 17 U.S.C. § 801.

The Librarian of Congress may remove a Copyright Royalty Judge for cause, including any disqualifying mental or physical disability.

Amended § 803 prescribes rules of practice for proceedings before the CRJs. The Copyright Royalty Judges will ordinarily preside over proceedings *en banc* and make determinations by majority vote. A three-month period for voluntary negotiations will be instituted after the date for filing of petitions to participate in a proceeding. The law includes a streamlined small claims procedure for distribution of royalties. A "small claim" is defined as an uncontested amount in controversy of $10,000 or less. The CRJs are permitted to decide small claim controversies based upon limited, written filings. The claimant is exempt from the filing fee. The CRJs also have discretionary authority to decide other appropriate issues on paper pleadings only when there are no genuine issues of material fact.

Detailed rules are established for the issuance of regulations and rules of practice – including evidentiary and discovery procedures – for matters before the Judges. Decisions of the CRJs are to be rendered no later than 11 months after a 21-day settlement conference period, but also no later than 15 days before the expiration of then current statutory rates and terms. Appeals are to be taken directly to the U.S. Court of Appeals for the D.C. Circuit. The previous 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. 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 are provided.

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

New § 805 establishes a general rule for voluntarily negotiated agreements. When voluntarily negotiated rates are implemented, they may remain in effect for such time as would otherwise apply although the CRJs can adjust them pursuant to voluntary negotiations to reflect inflation.

Sections 4 and 5, respectively, of the CRDRA deal with definitions and extensive technical amendments primarily to license and royalty provisions in the Copyright Act. Section 6 establishes that the law will generally take effect within six months of enactment. The Librarian of Congress is directed to appoint one or more interim CRJs within 90 days of enactment if permanent ones are not appointed within that time frame. The status of specified proceedings that are in progress when the law takes effect is addressed.