COPYRIGHT OFFICE AND COPYRIGHT ROYALTY TRIBUNAL OVERSIGHT

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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COPYRIGHT OFFICE AND COPYRIGHT ROYALTY TRIBUNAL OVERSIGHT

THURSDAY, MARCH 16, 1989

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY,
AND THE ADMINISTRATION OF JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room B-352, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Robert W. Kastenmeier, Benjamin L. Cardin, George E. Sangmeister, William J. Hughes, Carlos J. Moorhead, Howard Coble, and F. James Sensenbrenner, Jr.

Also present: Michael J. Remington, counsel; Virginia E. Sloan, assistant counsel; Judith W. Krivit, clerk, and Thomas E. Mooney, minority counsel.

OPENING STATEMENT OF CHAIRMAN KASTENMEIER

Mr. KASTENMEIER. The committee will come to order.

Without objection, the subcommittee will permit the meeting to be covered in whole or in part by television broadcast, radio broadcast, and/or still photography, pursuant to rule 5 of the committee rules. I'm not sure that needs to be accomplished this morning but we will go through that formality in any event.

This morning the subcommittee is continuing its oversight hearings on agencies and entities within is jurisdiction. We will hear testimony from the Copyright Office and the Copyright Royalty Tribunal, two very important instrumentalities within the legislative branch of government.

The Copyright Office is a key department within the Library of Congress. The Office has diverse legislative duties and one of its most important responsibilities is to assist the Congress in responding to issues that arise in the copyright arena. Throughout my tenure on the committee, the Copyright Office has played a major role first in identifying copyright law problems and then in drafting legislative solutions to those problems.

The Copyright Royalty Tribunal was created by the Copyright Revision Act of 1976. Currently, the Tribunal is composed of three Commissioners appointed by the President, with the advice and consent of the Senate. Congress has delegated its authority to the Tribunal to make determinations concerning copyright royalty rates in the area of cable television, jukeboxes, phonograph records

and noncommercial broadcasting, and further to distribute cable, jukebox and satellite dish royalties deposited with the Register of Copyrights.

The 100th Congress produced several pieces of legislation that have an impact on both the Copyright Office and the CRT, most notably the Berne Convention Implementation Act of 1988 and the Satellite Home Viewer Act of 1988.

In addition, the Congress received two very important studies from the Copyright Office, the first on the jukebox compulsory license and the second on sovereign immunity and copyright. Just yesterday we received another important document from the Copyright Office on Technological Alterations to Motion Pictures. Hopefully, during the course of this morning's hearing, we may hear more about these subjects.

To set the tone for the hearing, I will state my view at the outset that both of the entities which appear today are functioning relatively well and meeting their statutory responsibilities. I know particularly with respect to the Copyright Royalty Tribunal this has not always been the case. I am sure that both may have problems, budgetary and statutory, and we will want to further explore those today.

Now I would like to introduce our first witness, the Register of Copyrights, Mr. Ralph Oman. Mr. Oman became Register in the fall of 1985, and has done a superb job ever since. He has devoted his professional life to public service, and his devotion to the public is manifested by his direction of the Copyright Office.

Mr. Oman, you and your colleagues, if you will identify them, are all most welcome, and you may proceed, sir, as you wish.

STATEMENT OF RALPH OMAN, REGISTER OF COPYRIGHTS AND ASSISTANT LIBRARIAN FOR COPYRIGHT SERVICES, ACCOMPANIED BY DOROTHY SCHRADER, GENERAL COUNSEL, AND KENT DUNLAP, SENIOR ATTORNEY, GENERAL COUNSEL'S OFFICE, COPYRIGHT OFFICE

Mr. OMAN. Thank you very much, Mr. Chairman. And thank you especially for your very kind words. I greatly appreciate them.

On my right is the General Counsel of the Copyright Office, well-known to the subcommittee, Dorothy Schrader; and on my left is a lawyer in the General Counsel's Office, Kent Dunlap.

I thank the subcommittee for giving me this opportunity to appear here today. The Copyright Office greatly appreciates your subcommittee's advice, counsel, and direction.

The past year was the most eventful year in American copyright since you worked on the Revision Act back in 1976. Last year you eased the United States into the Berne Convention, in recognition of the increased importance of intellectual property and international trade, and in recognition of the necessity of maintaining American competitiveness.

Your decision to promote high international standards of copyright protection around the world through Berne adherence should bode well for this country. You also passed the Satellite Home Viewer Act of 1988 and extended the record rental law for 8 years. So it was a very full year.

At this point, Mr. Chairman, I would like to give you a brief account of the state of the Copyright Office. The Copyright Office, as you've mentioned, is one of seven departments of the Library of Congress, which itself, of course, lies within the legislative branch. A central function of the Office is the examination and registration of claims to original and renewal copyrights filed by authors and other copyright owners.

In 1988, the Examining Division examined over 627,000 copyright claims, including renewals and mask works. The subject matter of these claims included an enormous variety of works—computer programs, books, music, motion pictures, sound recordings, plays, works of art, and semiconductor chips.

Before issuing a copyright registration, the Examining Division must determine that a work contains copyrightable authorship, and that other legal requirements of the copyright law have been met. The Office also records assignments and other transfers of copyright and related documents, and certain notices pertaining to the recording of musical works and the termination of rights granted earlier by authors.

A significant aspect of Copyright Office operations is its role in contributing to the collections of the Library of Congress. Under section 407 of the copyright law, two copies of works published in the United States under Federal copyright protection must be deposited with the Copyright Office. These deposits obviously benefit the collections of the Library of Congress. Last year, the market value of these Copyright Office-derived acquisitions was about $9.5 million. Of course, the actual cost to authors was probably far less than that, but the market value was that high. In many subject areas, copyright deposits form the greatest part of the Library's acquisitions.

Now, Mr. Chairman, I'd like to turn briefly to a minor technical amendment that we would propose, and that is a fee increase all across the board in the Copyright Office. Funding of the Copyright Office operations is an ongoing concern. I have said, and fully believe, that the $10 fee for copyright registration is the best bargain in town. But as it turns out, it has become too much of a bargain.

The Office is funded through a combination of earned fees and money appropriated from tax revenues. Right now the taxpayers pay two-thirds of the Office's operations and registrants pay only one-third of the cost.

The Library of Congress and the Copyright Office propose a fee increase merely to account for the inflation that has occurred since the last fee increase in 1978. The $10 fee of 1978 is worth $5 in 1989. A fee of $20 will simply restore to us the real value of the fee Congress decided would be reasonable when it passed the 1976 Copyright Act.

Since then, the Copyright Office has worked hard to keep costs in check. Unlike some Federal agencies, the Copyright Office has no discretion in processing copyright claims. We cannot simply decide to do less work; every year we see an increase in the number of applications submitted as our creative artists produce more works.

Since fiscal year 1979, the Copyright Office workload has increased 42 percent from 426,000 claims to 605,000 claims in fiscal

year 1987. During the same period, the staffing level of the Copyright Office has decreased 23 percent, from 641 individuals to 495 individuals. Because personnel costs account for 90 percent of the Copyright Office budget, the Office simply has no more room to maneuver.

The Copyright Office also seeks the subcommittee's support for authority to adjust the fees for inflation at 5-year intervals. Over time, the appropriateness of the fee schedule will always be out of whack if inflation drives up the cost of delivering the services while revenues for the services are frozen by law. While historically Congress has been willing periodically to adjust the fees, there has generally been a considerable time lag before this adjustment is made. In today's environment, only by achieving highly automated office operations can costs in the long run be held down.

Considerable time lag between fee adjustments threatens investment in new equipment and required personnel which will be necessary to maintain efficiency in the future.

Enactment of the fee adjustment authority will assist the Office in long-range planning since we won't have to always be playing catchup ball.

In summary, the Copyright Office can no longer strive for greater office efficiency while it must spend money at today's costs and receive payment at a value fixed in another era. The Copyright Office only seeks to restore our revenues to the value that they had when you, Mr. Chairman, set them in equilibrium back in 1976.

Next, Mr. Chairman, I would like to turn briefly to the legislative agenda and the various reports. I discuss these in greater detail in the written statement so I will just touch on them in passing at this point.

I also discuss in the written statement the Copyright Office's implementation of the Berne Convention Implementation Act of 1988 and the implementation of the Satellite Home Viewer Act of 1988.

In addition, we have also worked on two reports; one that you have mentioned, which was completed and delivered yesterday, on colorization of motion pictures; and the other, due in May, on the scope of protection for works of architecture.

In the 101st Congress, legislative issues concerning or related to copyright will demand much of this subcommittee's time and attention. I must confess that we are pleased to see the addition of intellectual property to the formal title of the subcommittee. That change highlights the importance of this jurisdiction of the subcommittee.

My written testimony covers 11 areas where legislative activity may be likely, including design protection, sovereign immunity, colorization of motion pictures, and moral rights for visual artists.

In light of all that's happening internationally, Mr. Chairman, I think I owe it to you to give a brief report on some of the major developments. Since our testimony was prepared, we have concluded the first meeting in Geneva of the Committee of Governmental Experts drafting a model copyright law. I have sent you a letter on this subject, Mr. Chairman, which I will make a part of my testimony, with your permission.

Mr. KASTENMEIER. Without objection, that will be accepted, and your entire statement will also be made part of the record.

Mr. OMAN. Thank you, Mr. Chairman.

I would like to discuss briefly the genesis of the model law project and what is at stake for the United States and how it may relate to the work of this subcommittee. Several U.S. international policy initiatives have suggested the utility of a model copyright law that would be acceptable to many nations. The attempt to devise a copyright standards code in the General Agreement on Tariff and Trade bears on this.

Second, the increased trade-related bilateral efforts of the executive branch to upgrade foreign copyright protection bears on this effort.

I think it's generally conceded that a fair and widely approved model copyright law might be useful.

The WIPO prepared a draft model and I expect it will be under discussion to at least the middle of 1990—probably longer. I can only briefly summarize the contents of the draft and highlight some of the major policy issues it poses for the United States.

First, the model law's structure and approach is essentially European. Many of the delegates to the meeting stressed the difficulties of accommodating civil and common law copyright traditions in a single model, and this will be a continuing problem.

Second, the model demonstrates an interesting difference between United States and foreign copyright laws, a difference that will take time to smooth out. Oversimplifying a little bit, the United States tends to be more receptive to technological authorship as coming readily within copyright than are our European friends. We see the creation, for instance, of a sound recording as copyrightable creative authorship. The same is true with computer programming and the building of factual data bases.

Although we reached broad agreement on copyright protection for computer programs, in other areas the Europeans seemed more cautious about introducing new subject matter into copyright.

On the other hand, the Europeans seem far more aggressive, at least in theory, in recognizing new exclusive rights for traditional categories of copyrighted works, including broad post-first sale rental rights, public lending rights, and rights to payment for private copying and photocopying.

so the model law goes beyond present U.S. copyright law in several important and controversial respects, including the public lending right, the general commercial lending rights, royalties for private copying, and a compulsory license applicable to a very wide range of photocopying. The United States in Geneva greeted these provisions quite warily.

Third, Mr. Chairman, the model law does not adequately recognize the work made for hire doctrine that is a tradition in U.S. copyright law. While the exact scope of employers' rights as authors of the works of their employees is controversial and they may change over time, we need some express option in the model law for employer authorship in protecting our interests. Right now those provisions are not there.

Finally, there are provisions respecting requirements for technical controls on equipment, such as we know in connection with the digital audiotape controversy. The model provisions are much more sweeping; they are not limited to DAT, for example, but I suggest

that Dr. Bogsch may have proposed them largely to promote international debate on this important subject.

Mr. KASTENMEIER. May I interrupt merely to inquire whether you are proceeding from the statement you've given us? It seems to me you're expanding considerably on what you have in your 24-page text in describing the model law; is that correct?

Mr. OMAN. You're correct, Mr. Chairman. I said in my preoration that our people returned from the model law meeting after we had prepared the formal statement, and I apologize for this information not being in there but we will give you an updated version within the next 24 hours.

What, you may inquire, does all this mean for the United States?

The model law will not be a binding instrument, but it can be used by us and foreign countries as evidence of an international consensus on minimum levels of protection. But if it can be used by us, it can also be used against us by others to show that, for example, sound recordings don't have to be protected by copyright, and this would be important.

So the entire exercise is important, not just in terms of specifics but on the relationship it has with our other attempts to protect our interests all over the world.

To the extent that we can agree on a fair and workable model, it can be very helpful in our bilateral negotiations with countries whose copyright laws are not up to snuff. It also may help with our effort to get a GATT copyright standard adopted.

As a corollary to this debate, Dr. Bogsch has proposed a study of the following issues, and I would hope that we would have a chance to discuss these with you, Mr. Chairman, over the next few weeks.

One of Dr. Bogsch's proposals is a possible protocol to the Berne Convention that would deal with questions on which we have no international consensus and on which Berne is silent. Dr. Bogsch points to a few specific areas that would be covered by this possible protocol, including computer-generated works, sound recording protection under copyright, lending rights, and the right of public display.

Such a protocol might establish rules on whether and how convention minima apply to such works and such rights.

Second, Dr. Bogsch has proposed a new treaty to govern the settlement of disputes between States over the application of intellectual property convention obligations. This would cover not only copyrights, but patents, trademarks, sound recordings, presumably, and semiconductor chips.

As a corollary to this proposal, he would propose an agreement that would set up an international dispute settlement mechanism within the WIPO for use by private parties.

These will all be quite controversial and the initial reaction so far is one of interest tempered by great caution. These programs will not be authorized until the meeting of the WIPO governing bodies in September of this year and I hope to provide you within the next few weeks with more information to bring these ambitious ideas into clearer focus.

Finally, Mr. Chairman, let me return to the domestic scene. The Copyright Office suggests two purely technical amendments to the Copyright Act. One amendment would correct technical errors that

occurred when the Senate at the last minute added amendments to the low power act.

The other technical amendment relates to the scope of the statutory charge to the Copyright Office dating back to the 1976 Copyright Act that required the Copyright Office to prepare reports at 5-year intervals regarding library reproduction of works, which we know by the buzz word of the 108(i) report or the report on library photocopying.

We think that, if the scope were slightly expanded to include new technological uses as they apply to library photocopying, the report might be more useful to you in helping you decide on your legislative agenda.

I hope, Mr. Chairman, my comments today will assist the subcommittee in its oversight responsibilities. In particular, the Copyright Office seeks this subcommittee's support for a fee increase. The costs of the Copyright Office are set at today's value. The Copyright Office needs the revenue to ensure that we manage the public record to meet the needs of the creative community and the public.

Thank you very much, Mr. Chairman. I would be pleased to answer any questions.

Mr. KASTENMEIER. Thank you, Mr. Oman.

[The prepared statement of Mr. Oman follows:]

STATEMENT OF RALPH OMAN
REGISTER OF COPYRIGHTS AND
ASSISTANT LIBRARIAN FOR COPYRIGHT SERVICES

Before the Subcommittee on Courts,
Intellectual Property and the Administration of Justice
Committee on the Judiciary
House of Representatives
101st Congress, First Session
March 16, 1989

Mr. Chairman and members of the Subcommittee, I am Ralph Oman, Register of Copyrights in the Copyright Office of the Library of Congress and Assistant Librarian for Copyright Services. I thank you and the Subcommittee staff for giving me the opportunity to appear here today. The Copyright Office looks forward to the continued benefit of your subcommittee's advice, counsel, and direction, in the exercise of your oversight responsibilities.

I believe the past year was the most eventful year for American copyright since 1976, the year of passage of the Copyright Revision Bill. I base my belief primarily on the decision of the 100th Congress to adhere to the Berne Copyright Convention. Given the increased importance of intellectual property in international trade and the necessity of maintaining American competitiveness, the decision to promote high international standards of copyright protection through Berne adherence should bode well for this country.

There are many matters that I wish to address in my testimony today. I will begin with an overview of the administration of the copyright law by the Copyright Office. Central to the discussion will be the proposal of the Copyright Office to increase fees to account for inflation. The

current fee schedule for Copyright Office services has been in effect for over 10 years. Inflation has cut the real price of the fees by 50 percent. The Copyright Office should recoup a greater proportion of the costs associated with providing the service from those benefiting from the service. Costs which are not covered by the fees must be covered either by the taxpayer or a reduction in the level of service.

In my testimony I will additionally discuss the Copyright Office's implementation of two important pieces of legislation and two studies being conducted by the Copyright Office. In the last session of Congress, this Subcommittee was an activist on copyright matters through passage of the Berne Convention Implementation Act of 1988, and the Satellite Home Viewer Copyright Act of 1988. The Copyright Office is presently in the midst of implementing both pieces of legislation. Additionally, two Copyright Office reports are being prepared for Congress concerning colorization of motion pictures, and the scope of protection for works of architecture.

In the 101st Congress, legislative issues concerning or related to copyright will demand much of this Subcommittee's time and attention. My testimony will cover eleven areas where legislative activity may be likely, including design protection, sovereign immunity, colorization of motion pictures, and moral rights of visual artists.

My last general topic will be the international developments over which this Subcommittee has oversight responsibilities. Primary among these developments is the upcoming diplomatic conference on a treaty for the protection of layout-designs of microchips to be held here in Washington in May. In addition, the World Intellectual Property Organization is coordinating the creation and adoption of a model copyright act in order to make

the protection of intellectual property rights more effective throughout the world.

I. ADMINISTRATION OF THE COPYRIGHT OFFICE.

A. State of the Copyright Office.

The Copyright Office is one of seven departments in the Library of Congress, which itself, of course, lies within the Legislative Branch. A central function of the Office is the examination and registration of claims to original and renewal copyrights filed by authors and other copyright owners. In 1988, the Examining Division of the Office examined over 627,000 copyright claims, including renewals and mask works, and the subject matter included an enormous variety of books, music, motion pictures, sound recordings, dramatic works, works of art, and semiconductor chips. Before issuing a copyright registration, the Examining Division must determine that a work contains copyrightable authorship, and other legal requirements of the copyright law have been met. The Office also records assignments and other transfers of copyright and related documents, and certain notices pertaining to the recording of musical works and the termination of rights granted earlier by authors.

The Copyright Office performs several other functions related to registration and recordation: our Cataloging Division prepares and distributes bibliographic descriptions of all registered works; it also provides basic cataloging for many of the Library's special collections.

Our Information and Reference Division searches and reports, upon request, the copyright facts contained in our records, provides certified copies of certificates of registration, and assists the public in using our

files. In 1988 this Division prepared over 9,500 search reports and searched over 224,000 titles. It also maintains a public information office to answer mail, telephone, and personal-visit inquiries about the copyright law and registration procedures. Unlike some other federal agencies, we often deal directly with individual authors and users who are not generally sophisticated in copyright and the legal aspects of registration. In 1988, the Copyright Office handled over 490,000 public information reference services. Finally, the Division has an active publication program for the distribution, free-of-charge, of circulars and similar materials on copyright.

A significant aspect of Copyright Office operations is its role in contributing to the collections of the Library of Congress. Under section 407 of the copyright law, two copies of works published in the United States under federal copyright protection must be deposited with the Copyright Office for the benefit of the collections of the Library of Congress. Due to the Berne Convention Implementation Act of 1988, the requirement that the copies contain a copyright notice was eliminated as of March 1, 1989. Deposits obtained through the Copyright Office are a principal base upon which the Library of Congress builds its collections of books, periodicals, music, maps, prints, photographs, and motion pictures. Last year, the value of those Copyright Office-derived acquisitions was about $9.5 million. In many of these subject areas, copyright deposits form the greatest part of the Library's acquisitions.

In addition to the functions described above, our Licensing Division collected substantial revenues for copyright owners under the compulsory licenses administered by the Copyright Office and the Copyright

Royalty Tribunal. Under the cable compulsory license for calendar year 1987, over 160 million dollars was made available to the CRT for distribution to copyright owners. Under the jukebox compulsory license for calendar year 1988, the figure was more than six million dollars. The administrative costs of running the Licensing Division are deducted from the proceeds before the funds are transferred for distribution.

B. Fee Increase Proposal.

On January 18, 1989, the Librarian of Congress, James H. Billington, wrote the Chairman of this Subcommittee, Representative Robert Kastenmeier, requesting that section 708 of the copyright law be amended to double the current fee schedule. In addition, the proposal of the Copyright Office would allow the Register of Copyrights to adjust the fee schedule every five years to account for inflation.

Since the current fee schedule took effect in 1978, inflation has cut the real price of the fees by 50 percent. In 1988, the Copyright Office, excluding the Licensing Division which is accounted for separately, spent slightly over 18 million dollars. The Copyright Office earned from fees slightly over seven million dollars. The shortfall between expenses and earned fees is made up by the U.S. Treasury. A doubling of the fee schedule would allow the Copyright Office to earn an additional seven million dollars.

Historically, earned fees for copyright services have never covered the entire operating budget of the Copyright Office, and there is no reason that they should. The Copyright Office performs some services that are not directly related to maintenance of the public record. Prominent

among the responsibilities are the public information services undertaken by the Copyright Office, and copyright studies conducted by the Register's Office in response to Congressional requests. These activities should properly by supported from general tax revenues.

Enactment of the Copyright Office's proposal would return the Copyright Office to its historic ratio of earned fees versus Office expenses. It would mean that Copyright Office would earn approximately fourteen million dollars in fees to set off the approximately nineteen million it takes to run the Office. Factoring in the almost 10 million dollars that the Library of Congress receives in deposits which are added to the collections, the operations of the Copyright Office would be more than self-sufficient.

Since the last revision in fees, the Copyright Office has worked hard to keep costs in check. Unlike some federal agencies, the Copyright Office has no discretion in processing copyright claims. The Office cannot simply decide to do less work; an increased number of applications are submitted as more creative works are produced. Since fiscal year 1979, the Copyright Office workload has increased 42 percent from 426,000 claims to 605,000 in fiscal year 1987. During the same period, the staffing level has decreased 23 percent - from 641 to 495. Because personnel costs account for 90 percent of the Copyright Office budget, the Office simply has no more room to maneuver.

Enactment of the Copyright Office's proposal would raise the basic registration fee to $20 from the present $10. The vast majority of the fees earned come from this basic registration fee. At twenty dollars, the registration fee is still a fantastic bargain. In order to register a claim

to copyright, examination by a professional examining staff is required to see that all the requirements of the law have been met. During the examination process, correspondence is often necessary due to the complexity of the law and the frequent use of Copyright Office services by unsophisticated remitters. After registration, the claim is catalogued by a professional cataloguing staff. The Copyright Office knows of no comparable government service, requiring similar professional expertise, which is offered for less than twenty dollars.

The fees earned by the Copyright Office are turned in to the U.S. Treasury. In the budgeting process, however, earned fees are taken into account in setting the appropriation of the Copyright Office. It is hoped that increased earnings on the part of the Copyright Office will be taken into account in supporting continued automation of the Office. Handling increased workload with smaller staffing levels has required considerable investment in computers and other expensive equipment. In 1988, most of the examining staff received a personal computer to assist in correspondence and other office related work. In order to continue to provide the public with a high level of service, support for the continued automation of the Office must be maintained.

The Copyright Office also seeks the Subcommittee's support for giving the Register the authority to adjust the fees for inflation at five year intervals. Over time, the appropriateness of the fee schedule will always be eroded as inflation drives up the costs of delivering the services while revenues for the services are frozen by law. While historically Congress has been willing periodically to adjust the fees, there has always been a considerable time lag before this adjustment is made. In today's

environment, only by achieving highly automated office operations can costs in the long run be held down. Considerable time lag between fee adjustments threatens investment in new equipment and personnel which will be necessary to maintain efficiency in the future. Enactment of the fee-adjustment authority will assist the Office in long-range planning since there will be a limit to the time costs can outstrip revenues.

In summary, the Copyright Office believes it can no longer confidently strive for greater office efficiency while it must spend money at today's costs and receive payment at a value fixed in another era. Raising the basic registration fee to twenty dollars would still represent a fantastic bargain given the professional services which are necessary to generate an accurate public record in a complex area of the law. The Copyright Office only seeks to restore revenues to the value that the 94th Congress determined they had when it enacted the 1976 Copyright Act. In light of the Copyright Office's success in completing more work with fewer people through the last decade, the Office respectfully solicits the Subcommittee's support for its proposal.

C. Implementation of Amendatory Legislation.

1. Berne Convention Act.

The Berne Convention Implementation Act of 1988[1] went into effect on March 1, 1989. While the legislation essentially took a minimalist approach whereby only the changes necessary for Berne Convention compatibility were adopted, the amendatory legislation did make several significant modifications. Among the most important changes was the elimination of the

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1 Pub. L. 100-568, 102 Stat. 2853 (October 31, 1988).

copyright notice as a formality requirement, elimination of the registration requirement for filing copyright infringement actions in federal court for works of Berne Convention origin, and modification of the jukebox compulsory licensing provision. In order to implement this legislation, I formed a task force within the Copyright Office to guide the implementation process. We reviewed the regulations and practices to ascertain the changes required by the Berne Convention Implementation Act. We drafted new circulars explaining the significance of Berne Convention adherence and the revisions made by the implementing legislation. We are revising obsolete circulars to reflect the changes in the law. We engaged in a staff training program to inform Office personnel of the prominent provisions of the Berne Convention and the changes in U.S. law. Finally, we established an outreach program designed to address questions from the copyright community and the public concerning Berne Convention adherence.

I am pleased to report that implementation is well on schedule. The new circulars have been completed on schedule, and new examining practices are in place.

2. Satellite Carrier License.

The "Satellite Home Viewer Act of 1988" went into effect on January 1, 1989, and the Copyright Office has already taken steps to implement the new satellite carrier compulsory license created by the Act. Immediately after the Act became effective, the Office published a "special announcement" highlighting the terms and conditions of the new satellite carrier license, and outlining what types of information would be required from satellite carriers seeking to avail themselves of the new license. The

special announcement was mailed to known satellite carriers, the networks, and other interested parties.

On February 28, 1989, the Office published in the Federal Register a notice of its proposed rules to implement the satellite carrier license, and invited public comment. The proposed rules track the filing requirements of the cable compulsory license, but contain several variations. Although the yearly accounting periods are the same for both the cable and satellite licenses, (January 1 to June 30 and July 1 to December 31), we propose a shorter filing period for satellite carrier statements of account and royalty fees (30 days instead of 60 days as is the case with the cable license). The 30 day filing period is reasonable because it is easier to prepare the statement of account and calculate the royalty fee. The satellite carrier royalty fee is calculated on a monthly basis, with a flat fee charge of twelve cents per subscriber per superstation signal received, and three cents per subscriber per network station signal received. Policies established under the cable license regarding corrections and execution of statements of account, supplemental payments and refunds are virtually identical to those proposed for the satellite carrier license.

The Copyright Office is currently developing the actual statement of account form, and invited public comment and suggestion at an informal meeting held on March 14, 1989. The form is expected to be available sometime in May, well before the filing deadline for the first accounting period.

D. Copyright Office Studies.

1. Works of Architecture.

Consideration of the Berne Convention Implementation Act of 1988 raised issues concerning the extent of U.S. protection for works of architecture. Article 2(1) of the Paris text of the Berne Convention enumerates "works of architecture" as material eligible for copyright protection. In the hearings on the Berne Adherence bills, no consensus arose as to whether the Berne Convention required the U.S. copyright law to be modified on the subject of works of architecture. Applying the philosophy of the minimalist approach, no change was made pending further study of the issue.

Pursuant to a request from this Subcommittee, the Copyright Office published a notice of inquiry on the subject of works of architecture in the Federal Register of June 8, 1988. The Office's inquiry touches on three broad areas: (1) the type of copyright and other forms of protection (i.e., contractual, trade dress, unfair competition, etc.) currently accorded works of architecture and works related to architecture; (2) the need, if any, for protection beyond that now available including whether perceived deficiencies are capable of resolution through private consensual arrangements; and (3) the laws and actual practices of foreign countries in protecting works of architecture and works related to architecture. We plan to complete the study during the first session of this Congress.

2. New Technology and Audiovisual Works.

Although it is unusual for copyright issues to gain high public profile, the issue of colorization of black and white motion pictures clearly generated wide spread public debate. Due to the continuing contro-

versy, this Subcommittee requested the Copyright Office to conduct an inquiry on the effect new technologies such as colorization, time compression, and panning-and-scanning have on the creation and exploitation of audiovisual works, including motion pictures and television programming.

On September 8, 1988, the Copyright Office held a hearing on the impact of new technologies on the creation of audiovisual works. The Copyright Office sought information in four broad areas: (1) the nature and impact of the technology; (2) the contractual practices underlying the creation of audiovisual works; (3) foreign practices with respect to new motion picture technologies; and (4) suggestions for possible future legislative action. A report on the findings of the Copyright Office was filed on March 15, 1989.

II. LEGISLATIVE ISSUES

Due to the increasing importance of intellectual property, this Subcommittee will likely find that numerous copyright issues will compete for its attention. This statement will briefly discuss eleven issues that may arise in the 101st Congress: sovereign immunity, design protection, visual artists/moral rights, colorization, software rental, work for hire, DAT/hometaping, performers' royalties, source licensing, cable-must carry-syndex, and hospital VCR exemption.

1. Sovereign Immunity.

Several copyright cases have recently held that the Eleventh Amendment of the Constitution establishes state immunity from suit for money damages in copyright infringement cases. In general, the courts base these cases on a finding that Congress did not clearly express an intention to

abrogate the Eleventh Amendment in the language of the Copyright Act. In June 1988, the Register of Copyrights issued to Congress a report entitled COPYRIGHT LIABILITY OF STATES AND THE ELEVENTH AMENDMENT which recommended that Congress clarify its intent regarding sovereign immunity. Chairman Kastenmeier has introduced a bill (H.R. 1131) to make this clarification. The companion bill in the Senate, S. 497, was introduced by Senator DeConcini.

2. Design Protection.

Recent concern over American competitiveness has rekindled interest in sui generis design protection for useful articles. Currently, the copyright law can extend to utilitarian articles only to the extent pictorial or sculptural features are separately identifiable from the utilitarian aspects of the article. The design patent statute, moreover, limits its protection to designs able to meet a novelty standard. Some American manufacturers argue that the current means of protecting designs are insufficient in today's competitive environment. Hearings on design proposals which would base protection on an originality standard were held in both the Senate and the House in the 100th Congress.

3. Visual Artists/ Moral Rights.

During the 100th Congress, both houses held hearings on proposals to expand the rights of visual artists. The bills would have protected visual artists from the mutilation or destruction of their works and provided for resale royalties. In general, the bills' "moral rights" provisions produced little open opposition, while the resale royalty provision was highly controversial. The issues will likely be raised anew in the 101st Congress.

4. Colorization.

In the first session of the 100th Congress, H.R. 2400, 100th Cong. 1st Sess. (1987) was introduced concerning the widely reported issue of colorization. Entitled the FILM INTEGRITY ACT OF 1987, the proposal would have given the screenwriter and director of a film the right of consent for any alteration of their work. If any alteration, including colorization, of a motion picture occurred without the consent of the artistic authors of such work, there would be no copyright in the work. The rights of the screen writer and director, however, would have been assignable. Shortly after hearings were held on the Gephardt bill, Representative Mrazek pressed for, and ultimately succeeded in obtaining, a rider to the Interior Department appropriations bill which resulted in the Film Preservation Act of 1988.[2] The law sunsets in three years. In the 101st Congress, broader legislation may be sought.

5. Software Rental.

In 1984, Congress passed the "Record Rental Amendment of 1984," giving copyright owners of sound recordings the right to control commercial rental of phonorecords. In the 100th Congress, a bill was introduced in the House proposing to give copyright owners of computer programs similar control over the rental or lease of computer software. Senator Hatch held a field hearing on the subject in the Senate, although no bill was formally introduced.

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2 Pub. L. 100-446, 102 Stat. 1782 (September 27, 1988), amending title 2, U.S.C., section 178.

6. Work for Hire.

In the last Congress, Senator Thad Cochran introduced a bill, S. 1223, 100th Cong. 1st Sess. (1987), substantially restricting the application of the work for hire doctrine. The bill would eliminate from section 101 of the Copyright Act most of the categories of works that can constitute a work for hire when they are specially ordered or commissioned. Except for motion pictures, only employees receiving salaries and other standard employment benefits could be employees for hire under the provisions of the bill. The Supreme Court granted certiorari in a case[3] involving the work made for hire issue and is expected to rule in the case before the end of its current term. In all likelihood, controversies concerning application of the work for hire doctrine will reappear in the 101st Congress.

7. DAT/Hometaping.

Concern over the introduction of digital audio recording devices capable of reproducing compact discs led to proposals being introduced in both houses of the 100th Congress which would have required the devices to include copy-code scanners. The shipment in interstate commerce of DAT machines that do not contain copy-code scanners would have been banned for 3 years after enactment. The National Bureau of Standards conducted tests on the system to determine its effect on the quality of the recording. The tests found significant degradation of sound. Unless the system is improved, this proposal seems dead. Interest in a royalty-based solution

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3 Community for Creative Non-Violence, et al. v. James Earl Reid, No. 88-293.

may be revived, especially since the refusal of record producers to record in the DAT medium has effectively inhibited sales of this equipment.

8. Performers' Royalties.

The issue of whether a right of public performance in a sound recording should be recognized in the copyright law has arisen in Congress on a number of occasions. Most proposals advancing such a right would subject the right to compulsory licensing, with the proceeds divided among the copyright owner of the sound recording and the performers. To date, broadcasters have successfully opposed all efforts to recognize such a right. Although no proposal advancing a public performance right in sound recordings was introduced in the 100th Congress, the issue might surface again in the 101st Congress.

9. Source Licensing.

In both the Senate and the House of Representatives in the 100th Congress, bills were introduced which would have prohibited the conveyance of a copyrighted audiovisual work to nonnetwork television stations without simultaneously conveying the right to perform in synchronization any copyrighted music contained in the work. Under the bills, local broadcasters would be able to go directly to the source - the producer/copyright owner- and negotiate for the broadcast right for the underlying music at the same time as they are negotiating for rights to broadcast the audiovisual work. This system, known as source licensing, would replace the current blanket licensing system run by the performing rights societies for the benefit of composers and music publishers. The bill is strongly opposed by composers, music publishers, the performing rights societies, and motion picture producers. The controversy may be revisited in the 101st Congress.

10. Cable - Must Carry - Syndex.

In the 100th Congress, a number of bills were introduced linking eligibility for cable compulsory license under the copyright law to compliance with the FCC's "must carry" rules. In 1985, these rules were found by the U.S. Court of Appeals for the District of Columbia to violate the First Amendment. See Quincy Cable TV Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985). A second set of rules was also invalidated. Enactment of the proposals would make availability of the compulsory license contingent upon the carriage by cable television of local signals, as defined by FCC rules. Consideration of the "must carry" proposals in the 101st Congress could ultimately affect the statutory compulsory license in the copyright law, and the FCC's reimposition of syndicated exclusivity.

11. Hospital VCR Exemption.

In the 100th Congress, Senator Roth introduced S. 2881, a bill to amend the copyright law to permit generally the unlicensed viewing of videos in hospitals. Under the current law, the viewing of videos in the common, public areas of a hospital is considered a public performance and subject to licensing. The bill would amend the copyright law to exempt the performance or display of a work by means of a video cassette recorder and a television set from copyright infringement, provided the performance or display occurs in a hospital, hospice, nursing home, or other group home providing health or health-related care and services to individuals on a regular basis, and provided that there is no direct charge to see or hear such performance or display and that no further transmission of the performance or display is made to the public.

III. INTERNATIONAL DEVELOPMENTS

A. Diplomatic Conference on Treaty Protecting Semiconductor Chips.

Passage in the United States of the Semiconductor Chip Protection Act of 1984 galvanized international attention on the desirability of prohibiting piracy of semiconductor chip designs. That Act not only prohibits such piracy in the United States, but attempts to advance international protection abroad. The Act authorizes the establishment of bilateral relations, either through a Presidential proclamation under section 902, or the section 914 interim system of international protection administered by the Secretary of Commerce. The Act additionally authorizes establishment of protection of foreign nationals through multilateral conventions.

The most advantageous form of international protection is membership in a multilateral convention. Bilateral arrangements, especially if they persist over decades, are cumbersome and lead to a hodge-podge quilt of rights world-wide, which are frequently subject to disparate procedures and formalities as a condition of rights. Pursuant to the goal of creating a new treaty, the World Intellectual Property Organization convened four meetings of Committees of Experts (held in November 1985, June 1986, April 1987, and November 1988) to study a draft treaty for the protection of layout-designs of microchips. This May, a diplomatic conference will be held here in Washington hopefully to finalize the treaty provisions.

The preparatory meetings were well attended by representatives from the industrialized nations, developing countries, and the socialist block. Throughout the meetings it has been apparent that serious divergent viewpoints exist between the industrialized nations and the developing

countries. The industrialized nations look to the treaty to stop piracy of microchips. Developing countries appear to be interested in the treaty from the standpoint of promoting transfer of advanced technology.

Most of the efforts of the Director General of WIPO have been towards bridging the differences between the industrialized nations and the developing countries. The present draft, which will be deliberated in the diplomatic conference, makes several improvements over earlier drafts. It incorporates consultation procedures for resolving disputes. Inclusion of this provision has been strongly supported by the United States in the preparatory meetings. As the new treaty title suggests, the focus of protection is on the layout-designs (topographies) of microchips, which is an improvement over the former focus on "integrated circuits." If a new treaty can be achieved, a major goal of the Semiconductor Chip Protection Act will be realized.

B. **WIPO Model Copyright Law Meeting.**

In the area of international copyright and intellectual property protection, the World Intellectual Property Organization (WIPO) is coordinating the creation and adoption of a model copyright law. The objective of the model code is to make protection of intellectual property rights more effective throughout the world by (1) establishing norms or standards of protection, (2) raising the level of enforcement for violations of rights, and (3) creating stricter sanctions for infringement.

Item PRG.04 of the Program and Budget of WIPO for 1988-89, entitled "Setting of Norms in the Field of Intellectual Property

Particularly Under the Paris and Berne Conventions," describes the nature and form of the norms to be proposed:

> The norms (standards) will take the form of guidelines or model provisions for national or regional legislation and, in respect of questions for which the conclusion of a multilateral treaty has serious chances of being successful, the norms (standards) will take the form of draft treaties. Guidelines are indications of how to achieve certain objectives, and 'model' provisions are mere examples ('models'). Either may or may not be obligations for anyone.
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> In the field of literary and artistic works, uniform solutions, in the form of guidelines or model provisions for legislation, will be proposed.... Such proposals will be partly based on the principles worked out for nine categories of works.... The guidelines or model provisions will strictly conform to the letter and spirit of the Berne Convention.

The "principles worked out for nine categories of works" were discussed at a series of meetings of committees of government experts convened jointly with UNESCO in the 1986-87 biennium and in the first half of 1988. The principles and comments discussed by the various committees of governmental experts were reviewed and completed by the Committee of Governmental Experts on the Evaluation and Synthesis on Various Categories of Works in Geneva during June and July of 1988.

The Committee of Experts on Model Provisions for Legislation in the Field of Copyright convened in Geneva, Switzerland for February 20 to March 3, 1989 to discuss the most recent draft of model copyright provisions. Although the provisions are generally compatible with U.S. law, certain provisions presented some difficulties. For example, the draft model law defines an "author" as solely the physical person who creates a work. U.S. copyright law permits the owner of a work made for hire (usually an employer) to also be an author, and this designation has significance for

other provisions of U.S. copyright law. Another conflict is that the draft provisions do not bring sound recordings within the protection of copyright. The U.S. delegation to the Geneva meeting vigorously argued for a change in the draft in this respect because of the serious impact it would have on the U.S. sound recording industry. I am cautiously optimistic that the next draft model law will accommodate sound recordings. Other major areas of concern include computer programs, compulsory licensing, and technological solutions to copying presented by the draft. At the recently concluded meeting, discussion of certain chapters of the model law (contract and licensing; hardware and technological solutions; and provision for developing countries) was postponed until a second meeting in November 1989. The entire model law proposal will be discussed again at a meeting in 1990.

IV. TECHNICAL AMENDMENTS TO THE COPYRIGHT ACT

The Copyright Office could suggest two technical amendments to the Copyright Act.

First, Public Law 99-397, the "low power act,"[4] contained certain technical errors (paragraphs were renumbered incorrectly) as part of an amendment eliminating the initial reporting and filing requirements formerly imposed on cable systems under section 111(d) of the Act.

Second, the Copyright Office has now prepared two reports (in 1983 and 1988) pursuant to section 108(i) of the Copyright Act. The Office has observed problems with respect to library reproduction of works by means other than photocopying, but the reporting authority of section 108(i) does not clearly extend to the new technological methods of reproduction and

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4 Act of August 27, 1986, 100 Stat. 848.

dissemination. If the Congress wishes to receive further reports regarding library reproduction of works, it would seem advisable to clarify that the new technological uses are a suitable subject for the report. The Office could suggest the following amendment.

Strike the last sentence of section 108(i) and insert the following in its place:

> "The report should also describe any problems that may have arisen, including those concerning new technological means of library reproduction and electronic dissemination of works, and present legislative or other recommendations, if warranted."

V. CONCLUSION

I hope my comments today will assist the Subcommittee in its oversight responsibilities. In particular, the Copyright Office seeks this Subcommittee's support for a fee increase to account for inflation. The costs of the Copyright Office are set at today's value. The Copyright Office needs revenue at today's value in order to insure that the public record is managed in a manner responsive to the needs of the creative community and the public.

Statement of Ralph Oman
House Subcommittee on Courts, Intellectual
Property, and the Administration of Justice
March 16, 1989

The Copyright Office is one of seven departments in the Library of Congress. In 1988, the Examining Division of the Copyright Office examined over 627,000 copyright claims, including an enormous variety of books, music, motion pictures, sound recordings, dramatic works, works of arts, and semiconductor chips. The Information and Reference Division prepared over 9,500 search reports covering 224,000 titles, and handled over 490,000 public information services. Through Copyright Office-derived acquisitions, the Library added to its collections works valued at 9.5 million. The Licensing Division collected over 165 million dollars for copyright claimants under the cable and jukebox compulsory licenses.

The Library of Congress and the Copyright Office request that section 708 of the copyright law be amended to double the current fee schedule and to allow the Register discretion to adjust the fee schedule every five years to account for inflation.

Since the current fee schedule too effect in 1978, inflation has cut the real price of the fees by 50 percent. Enactment of the Copyright Office's proposal would return the Copyright Office to its historic ratio of earned fees versus Office expenses.

The Copyright Office is presently in the midst of implementing two important pieces of legislation: the Berne Convention Implementation Act of 1988, and the Satellite Home Viewer Act of 1988. Additionally, two Copyright Office reports are being prepared for Congress concerning colorization of motion pictures, which was forwarded on March 15, 1989, and the scope of protection for works of architecture.

Numerous copyright issues will compete for the attention of this Subcommittee. Copyright issues likely to arise in the 101st Congress include sovereign immunity, design protection, visual artist/moral rights, colorization, software rental, work for hire, DAT/hometaping, performers' royalties, source licensing, cable-must carry-syndex, and hospital VCR exemption.

Mr. KASTENMEIER. Before asking any questions, I'd like to yield to my colleague from California, Mr. Moorhead, to determine if he has any opening statement or any comment he would like to make.

Mr. MOORHEAD. I did have a brief opening statement and I was going to submit it for the record but I think I summarize part of it because it deals with something that's important to you folks.

I certainly want to welcome you here today, although what I'm about to say applies primarily to the Copyright Office, it's also important to the Tribunal. This type of hearing is primarily introductory and scheduled by our chairman at the beginning of each Congress. It's purpose is primarily to acquaint our new members of the subcommittee with our overall jurisdiction and responsibility.

Ten years ago, through this type of hearing, this subcommittee learned almost by accident that our Patent and Trademark Office was in bad shape. The reason that Office was in such poor condition was that the Department of Commerce would send a Patent Commissioner up here year after year, and they would tell us how great everything was and how well they were doing. Over time, that approach resulted in the development of an office that was an international embarrassment. That's not the case now. Due to the leadership of our chairman, Bob Kastenmeier, and the hard work of this subcommittee, we can today point to the Office with pride as being the forefront of patents and trademarks.

I point this out only because it may be relevant to the Copyright Office. Fortunately, the Copyright Office is not in the condition the Patent Office was 10 years ago. But my point is that these agencies must have the support and resources necessary to do the type of job that we expect.

What concerns me, for example, is that since the fiscal year 1979, the Copyright Office workload has increased 42 percent, while during that same period the staffing level of that Office has decreased 23 percent. This decrease occurred not because of modernization or efficiency, but because of less and less money available to get that job done.

I think it's important we look into the situation today and that we correct any problems there before it does become a serious problem for us. I certainly agree with you, you need more funds.

Mr. OMAN. Thank you very much for those kind words.

Mr. KASTENMEIER. You have raised a couple of issues—Mr. Moorhead referred to one of them—the increase in fees, and I think on the surface something we would be interested in.

Of course, on the other hand, these fees are regarded in some quarters as use taxes. I'm not sure that you cleared this with the White House, have you? I know the White House has said no new taxes, but whether they need to raise the old taxes or not is another question, apparently.

I don't know whether you've preliminarily explored with the users of the Office, have you, to determine whether——

Mr. OMAN. We have had some tentative discussions with the users, and as we expected, there's support in some quarters and lack of support in other quarters, and even in certain quarters, open hostility.

But I think that all the parties would recognize that this is not an attempt to sock additional costs against those who can least

afford it. The authors all recognize the fact that unlike prior to the 1976 act, copyright registration is now entirely voluntary. If someone cannot afford the $10, or the proposed $20, they do not have to register with the Copyright Office and they get full copyright protection. They don't get certain benefits that come from registration such as the right to statutory damages and attorney fees, and the right to use their certificate to establish the prima facie validity of their copyright. But they do get copyright protection, and that is an important difference in the law which you brought about in 1976.

In fact, the increase is merely a restoration of the balance between the public interest and the services provided to the users that you established back in 1976.

Mr. KASTENMEIER. I expect we can, of course, at some point go into this in greater detail. I would also be interested in whether this would be any disincentive to register, given, as you point out, the voluntary nature of whether one has to register in the first place, whether you would expect thereby to have fewer registrations as a consequence.

Mr. OMAN. Historically, Mr. Chairman, there has been a slight dip in the number of registrations after a fee increase. But historically, also, that dip has been recovered within 1 year and the trend continues its inexorable rise thereafter.

Mr. KASTENMEIER. Of course, we are also pleased to hear at some length about the model law being contemplated. I think we would want to hear from you further on that, perhaps another time as well.

As one who has seen and seeks, for example, to have our Semiconductor Chip Act used as a model worldwide, I have no objection, obviously, to models and to emulating models. What does concern me, I guess, out of caution, is the implications of the model suggested for the United States; that is to say, that it varies from the United States, as you point out, works for hire; how recordings are treated, many other areas.

I say that because I am well aware that when we examine adherence to the Berne Convention we had many parties who had at the outset very grave reservations because of the implications of adhering to Berne, what that means for the U.S. law either specifically or by suggestion. I guess we will face the same reservations about an international model law, which, while we would not have to adhere, would not be, as you say, binding on us, would, nonetheless, suggest that parties in this country have a basis for seeking change in our own domestic laws based on a model international law on copyright; one that we, for the most part, would like to see applied to developing nations and others who may not have a sophisticated copyright law, if a law at all, currently.

Do you have any further comment on the implications for us in terms of our own domestic law and whether one could expect reservations about the U.S. interest in an international model copyright law?

Mr. OMAN. As I mentioned, it could work in our favor in terms of us promoting our copyrights, or it could be used against us in certain areas. But it has been my experience, Mr. Chairman, that the United States has been very proud of its own copyright traditions,

has given full consideration to any proposed changes in these copyright traditions, even when its copyright law has been out of step in major ways with the rest of the world.

The jukebox exemption endured in the United States for 70 years after it had been eliminated in the copyright law of many other countries. The manufacturing clause endured for almost 100 years before it was finally put out of its misery in connection with the 1976 revision and efforts subsequent thereto.

So the model law is there on the table for the U.S. Congress to consider, but it would impose no obligation on you and would really be a guide or a lodestar for you to use in judging what direction you would like to take.

Mr. KASTENMEIER. Thank you.

I have a brief question and then I'll yield to my colleagues.

With respect to my request for your Office's study of architectural works, we were informed I believe that such a report might be completed by May 1. And I know you've been very busy, you just completed the report this last week and presented it to us yesterday.

What is the current status of that report?

Mr. OMAN. We have consulted with American architects and legal scholars, and with European experts. We have discussed the issue with copyright specialists from the Max Planck Institute in Munich. We have done preparatory work in terms of gathering materials.

We have not actually sat down to start writing yet but that is the next order of business and I suspect that we will be able to meet the May 1 deadline.

Mr. KASTENMEIER. Thank you.

The gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. I want to commend you especially for your testimony this morning and the good job that you and your staff do on a day-by-day basis. I know when you're in a position like you are you get a lot more criticism and people just don't tell you what a good job you are doing. But I think it's important that people recognize that you are doing a fine job down there.

Mr. OMAN. Thank you very much, Mr. Moorhead.

Mr. KASTENMEIER. If my colleague will yield, I'd like to join him in that, excepting that I don't know that you received a great deal of criticism, do you?

Mr. MOORHEAD. Anybody in government that doesn't is in hiding.

What amounts for the most of your registrations—books, records, magazines, what area do you get the most of?

Mr. OMAN. Books, certainly; music is a large category. We divide them up not by easily definable categories. We have a category called performing arts, which includes sound recordings and other musical works. We have the category that involves textual material; that is not only books but computer programs. There's a visual arts category that includes games and toys, as well as works of art such as painting and sculpture.

Ms. Schrader has vast experience in that area, having actually worked in the Examining Division at one point. Let me ask her for her opinion.

Ms. SCHRADER. Mr. Oman really has summarized it. The book category traditionally has been about one-fourth of our registrations; periodicals another fourth; music represents 25 percent or 30 percent of the registrations; leaving about 20 to 25 percent for all of the other categories, which have been mentioned at the hearing—motion pictures, sound recordings, and so on. Each of the categories does seem to be growing, and that, of course, reflects the creative output of the United States.

Mr. MOORHEAD. I know that you are asking to raise the amount of copyright books from $10 to $20. It must take a number of hours and paperwork alone to complete the process. Then you get a hardback book and it sells somewhere around $20 to $30 a copy. That extra $10 raise, you couldn't even go to Bob's Big Boy with a couple of people and have dinner. I am surprised that you get any kind of opposition.

How do you account for that?

Mr. OMAN. Authors claim that they already contribute $10 million to the operation of the Government by contributing two copies of the best edition of their works and having that absorbed by the collections of the Library of Congress.

This, I think, slightly overstates their contribution. Certainly it doesn't cost the publisher $20 to produce the book. The actual cost of the item is probably in the order of 75 cents to a dollar. The price that you pay for a book does not bear directly on the cost of producing that book—the cost of paying the author, paying the printers, just absorbing the entire cost of the production of the work.

So when they say they contribute a book worth $20, they are not actually contributing out of their pocket $20; they are maybe contributing 75 cents to a dollar. But still they claim that they are making a substantial contribution already.

Second, they maintain that in fact the Copyright Office public record system does not benefit them personally. It benefits the creative process in the United States. It carries out the constitutional mandate to promote the progress of science and the useful arts. And that since this does promote this great public purpose, they should not be asked to bear an unfair burden in supporting the system.

But I think the short answer to that is that we are not asking them to support the burden of the entire system. Their contribution, I think, is fairly related to the benefits they get. They should pay for two-thirds of it, and the public should pay for one-third of it. I think that's on balance a fair deal.

Mr. MOORHEAD. Many of them are proud having their book in the Library of Congress, too.

Mr. OMAN. It is an added psychic boost to know that it's part of the permanent cultural history of this country.

Mr. MOORHEAD. I haven't had a chance to read it entirely, but the report issued yesterday does cause concern. I can tell you, at least with this Member, that there's no great enthusiasm going into that subject again because a lot of our people that supported entry into the Berne Convention would oppose expanding moral rights. And if they felt that that's coming up immediately, you would have lost a lot of the group that was willing to support the

entry into the Berne Convention. So it dims enthusiasm for something that I feel is a major event.

I didn't get the idea from your report, from what I have heard of, that you were really urging us to go a long ways in this direction, but you thought the subcommittee should look into the issue in the future.

Is it stronger than that?

Mr. OMAN. No, I think that sums it up, Mr. Moorhead. Regardless of what you did last year in taking the historic step toward the Berne Convention, I think this debate on moral rights would have been with you. Certainly Senator Kennedy and Congressman Markey's bills on moral rights for visual artists would have forced the issue on you whether we liked it or not. I don't think that the outcome of the debate is going to be determined by adherence to Berne Convention.

We have done, in the implementing legislation, all we have to do in regard to moral rights. We have a sufficient level of moral rights in this country now to satisfy the requirements of the Berne Convention. So I'd say the debate that follows has no relationship to the Berne Convention—it really is for you to decide what is in the best interest of this country.

Mr. MOORHEAD. Thank you again, very much.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Sangmeister.

Mr. SANGMEISTER. Thank you, Mr. Chairman. As a new member of the committee, some of my questions are going to be very basic, but as I understand it, Mr. Chairman, this is for the edification of some of the younger members. Being a practicing lawyer, I have never practiced any copyright law at all.

Be as brief as you can, because, obviously, this is knowledge that everyone else on the committee has, but what about the Berne Convention? Was our country the motivating factor to put that together? What countries participated? Give me a little background on that.

Mr. OMAN. Yes, sir. The Berne Convention has an ancient history and the United States really had very little to do with the inception of it. It relates back to the efforts of the great French author and poet, Victor Hugo, in the 1850's and 1860's, complaining that the Swiss and the Belgians were ripping him off and pirating his works. He put together a group of authors from various European countries urging that an international convention be developed to extend protection to foreign authors.

They met under the auspices of the various governments in Berne, Switzerland, in 1886. Mainly European countries participated, but there were a few countries from around the world. Haiti, for instance. The United States was there only as an observer. These countries put together the Convention and that has been the basis for international copyright cooperation and protection ever since.

Back in the early 1950's, the United States—its law still very much out of sync with the laws of the rest of the world—decided that it couldn't live by itself independently, since its works were becoming more and more important on a worldwide basis. It organized many of the same countries into another competing convention called the Universal Copyright Convention. This was finally

ratified in 1954. The United States was a member, and leader in that effort.

But, to accommodate the U.S. law and some other laws, it provided only a modest level of international protection. To join the treaty, you had to give national treatment protection to foreign authors. This was fine with the United States when we had several unusual aspects to our law.

But now, with U.S. works becoming increasingly important internationally, it was no longer in our advantage to have that low level of protection. And by joining the Berne Convention, we increased the prestige of that organization; we helped build the international consensus for high standards throughout the world, and we are able to use that to leverage the other countries of the world to give U.S. works a high level of protection.

We have finally put our laws in sync with those of the rest of the civilized world which is very much in our interest. It was a mystery to our European partners why we didn't do this 80 years ago.

Mr. SANGMEISTER. As I understand it, you are trying to work toward a uniform law; is that what you were indicating?

Mr. OMAN. The conventions really don't insist on uniformity. What they do is they insist on national treatment. In other words, you have to protect foreign authors at the same level you protect your own domestic authors. There are certain minimal levels within that; under the Berne Convention you do have to extend copyright for the life of the author, plus 50 years, which is a long time. We finally did that in 1976, under Chairman Kastenmeier's leadership.

But basically, all that you accomplish is to win the promise of equal protection. It's not necessarily uniform law, though there are certain minimal standards that are required.

Mr. SANGMEISTER. Let's say I compose a piece of music and I get a copyright here in the United States. And somebody, not even trying to hide it, there's an absolute copy of that, and attempts to sell it in a foreign country—Japan, Germany, I don't care where.

What protection do I have, or what do I do with it at that standpoint to protect my copyright that I have here in the United States?

Mr. OMAN. Presumably, if you were a member of ASCAP in this country as a composer of music, you would have ASCAP enforce your rights in the foreign jurisdictions.

They have analogous organizations in Japan, in Germany, and France, who protect the rights of composers.

Mr. SANGMEISTER. That would be through civil litigation in that country.

Mr. OMAN. That's the duty of the copyright owner. The parties themselves enforce their copyrights and the Government does not step in——

Mr. SANGMEISTER. OK, that's what I don't understand.

So you do your own thing on a contractual basis. There's no place for someone whose copyright is being abused to go to the Government anywhere and ask for any relief?

Mr. OMAN. If the behavior rises to the level of a criminal violation, then the Government will get involved, and that is sometimes a problem. In Japan, we suffer terribly from piracy of motion pic-

tures and sound recordings. We go to the Government and ask them to start enforcing the criminal laws against that activity. But they say, my goodness, we've got other priorities. We have drug problems; we have limited resources. Copyright piracy is not one of our priorities, I'm sorry. That's when we are able to use our trade leverage to get the countries to pay attention.

Mr. SANGMEISTER. Again, because I've never practiced in the area, if I want to copyright something, I send in a copy of whatever——

Mr. OMAN. Two copies of the best edition.

Mr. SANGMEISTER. Two copies of the best edition, all right. Then pay the fee.

Mr. OMAN. Ten dollars.

Mr. SANGMEISTER. And then automatically I get a copyright certificate——

Mr. OMAN. If the work is copyrightable and if you've fulfilled the requirements of the law, then you are issued a certificate with the Copyright Office seal and my signature on it, which you can then use in court to establish the validity of your copyright.

Mr. SANGMEISTER. Sorry to be so basic but I just wanted to understand a few things.

Mr. KASTENMEIER. No, I think those are excellent questions. I mean, with respect to the last question, patent law is far, far more complex in terms of complying with requirements than copyright law.

I'd like to yield to my colleague from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. Oman, it's good to have you back before us along with your able counsel, Ms. Schrader, and Mr. Dunlap.

The proposed registration fee increase may appear drastic percentagewise, but in actual dollars it is very modest. But since registration is now voluntary, do you think an increase in the registration fee would substantially reduce the number of registrations?

I am asking not to interrogate, but just to learn.

Mr. OMAN. Mr. Coble, it may initially result in a reduction in the number of registrations. Prior to the effective date of the fee increase, people will rush to register to get the lower price. So there is inevitably a gap subsequent to the effective date where people are not going to register because they rushed to register beforehand.

Over the years it has been our experience that there has been a reduction in the number of registrations after a fee increase, but that loss in the number is recovered within a year after the increase.

Mr. COBLE. It would level out or stabilize?

Mr. OMAN. It will continue its upward rise after that point.

Because registration is voluntary, it's generally those works of great value that are registered. I can't imagine if there is a work of great value—especially of great commercial value—that the difference between $10 and $20 is going to be a factor in the decision on whether or not to register.

Mr. COBLE. When you all were before our subcommittee during the last session of the Congress, we go into this, but I want my memory refreshed and perhaps would like it on the record as well.

If you will tell us again, Mr. Oman, or your colleagues, what do other copyright offices charge for registration in countries like, for example, Japan, the European Community Common Market countries?

Mr. OMAN. Mr. Coble, you get into an area on which some people in this country are very sensitive, but one in which the Copyright Office is very proud—the U.S. Copyright Office is one of the few in the world. In most countries there is no copyright office; there is no registration fee; there is no examination process; there is no central catalog maintained by the Government. This is all done by the private parties themselves. In Japan, for instance, the performing rights societies maintain records of the works of their members.

We, in this country, have decided that this is not in the public interest. The courts could not defer to the records of a private organization, but the courts do defer to the findings in the records of the Copyright Office because it is an official Government agency; it's not self-serving. It doesn't serve only the members; it serves the larger public interest.

So, by and large, we have few other models to look to in setting the fees. It's my experience that our efficiencies are far greater than the efficiencies of the private recordkeeping agencies in terms of the actual cost to the members, the overhead, and the effectiveness with which we do the job.

Mr. COBLE. Finally, one more question. And not unlike my friend from Illinois, I, too, my practice with copyrights is very, very limited. But I ask this question to you: Should there be one fee imposed against the author of, let us say, a 2-page poem and a different registration fee for the producer of a $40 million movie?

Mr. OMAN. We do allow the authors of poetry, for instance, to submit their unpublished works in compilation, as a collection, so they would not have to pay the fee for each one of their poems; they would send in a file of 100 poems and register that for the $10 fee.

But we can't deny that there is some injustice in the system because those works that are extremely valuable commercially, like a motion picture, wind up paying the same fee as the poet who can expect very little return economically from his compositions.

We have considered these possible revisions in the past and the conclusion has always been that it would be too complex to sort out at the front end—in our mailroom and data processing units—which works had to pay the $10 and which works had to pay a higher fee, and we have rejected the idea.

We are moving into the computer age more and more, Mr. Coble, and who knows, that maybe in the future, with the help of a computer, we could make these distinctions at the front end and make it viable.

Mr. COBLE. That would have some appeal for me, personally; I'm not speaking for the subcommittee.

I appreciate your comments, folks, good to have you again with us.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. I thank my colleague.

You do indicate that even if we were to increase the fees that, to quote you, "it is only hoped that increased earnings on the part of

the Copyright Office will be taken into account in supporting, in this case, continued automation of the Office or the Office itself."

You point out that the fees are turned into the U.S. Treasury. You say that the earned fees are taken into account in setting the appropriation for the Copyright Office, so it is your hope that increased fees will redound to the increased funding for the Office in terms of its functions.

Mr. OMAN. Exactly. I meant those fees would be used directly to benefit the users and the public in terms of increased service, more copyright activity related to helping the authors.

Mr. KASTENMEIER. I think I heard you say, but I will restate it anyway, just so it's clear. In an answer to a question posed by Mr. Moorhead, the fact of our adherence to the Berne Convention did not dictate that your conclusions or your analysis with reference to the report you filed yesterday. That was based on other considerations. And our adherence to Berne in that discussion really did not go to producing that report in terms of its conclusions and recommendations.

Mr. OMAN. That is correct. Yes, sir.

Mr. KASTENMEIER. I have no further questions. Do either of my colleagues?

If not, we wish to thank you for your appearance. You have always been very, very instructive and helpful. We, of course, appreciate that Ms. Schrader and Mr. Dunlap were able to accompany you.

Mr. OMAN. Thank you very much, Mr. Chairman, our pleasure.

Mr. KASTENMEIER. Now our other panel today, our last panel, will be from the Copyright Royalty Tribunal.

I might say for the benefit of my colleagues—they may or may not know this—that it is useful to ask what is the Copyright Royalty Tribunal? How does it differ from the Copyright Office?

I would say that we have to go back in history, at least to the early history of this century with respect to copyright law, wherein we established in a couple of respects what's termed compulsory licenses. This is what the law says, that a user will have access to copyrighted works irrespective of whether he negotiates with the owner of the work; that he will have access, but that he or she will have to pay a royalty which normally is established by law—since it's not negotiated. Since it's a compulsory license, the owner of the copyright doesn't have the discretion to deny the user the copyrighted works. Because of the equities and a very small number of cases, it was thought that that was the best resolution of the matter.

The compulsory license goes to mechanical recordings—these are records. It goes to, obviously, cable, which is the most notable compulsory license. It now goes to jukebox. The jukeboxes before 1976 did not have to pay a royalty to the performing rights societies—that is ASCAP, BMI, et cetera. It's sort of an anomaly in the law. We adjusted it so that, yes, they now have to pay but it's a royalty that's set.

That had historically always been a great problem of the Congress—the ratefixing; whether a mechanical royalty should be 2 cents, 3 cents, or 4½ cents. We would get monumental evidence on both sides, and that would be a long contested proceeding for us.

So when we added a couple more compulsory licenses, namely, jukebox and cable, and I think educational broadcasting, to the mechanical royalty, we decided we needed an entity to hear the equities about and to set those rates.

That is what the Copyright Royalty Tribunal does for us. It is a very considerable burden, and it's a burden which, otherwise, I guess, Congress would have to dispose of itself.

I'd like to now, if I may, introduce the three Commissioners of the Copyright Royalty Tribunal. The chairman is the Honorable Edward W. Ray; first appointed to the Tribunal in 1982. Mr. Ray has been a stabilizing force on the Tribunal since that time.

Previously, Mr. Ray had a successful professional career in the recording and music industry. He was instrumental in developing, among others, the careers of several successful artists: Fats Domino, Rick Nelson, the Osmonds, and Hank Williams, Jr.

Chairman Ray is accompanied by the two other Commissioners, the Honorable Mario Aguero and the Honorable J.C. Argetsinger.

Mr. Aguero was appointed to the Tribunal in 1984. Prior to that he was a producer in the United States of a Hispanic television series, motion pictures, and stage shows.

Mr. Argetsinger was appointed to the Tribunal in 1985. He was General Counsel of ACTION. He is no stranger to the Congress. He also served on staffs of the Senate Judiciary Committee and several well-known Senators.

Mr. Robert Cassler, a former attorney for the Federal Communications Commission, has been the General Counsel of the CRT since March, 1985.

We are delighted to have you. Chairman Ray, you may proceed as you wish.

STATEMENT OF EDWARD W. RAY, CHAIRMAN, COPYRIGHT ROYALTY TRIBUNAL, ACCOMPANIED BY MARIO F. AGUERO, COMMISSIONER; J. C. ARGETSINGER, COMMISSIONER, AND ROBERT CASSLER, GENERAL COUNSEL

Mr. RAY. Thank you very much, Mr. Chairman.

We are pleased to have the opportunity to appear before you and the subcommittee. As you know, we are a small agency in the legislative branch, vested with the responsibility of administering the copyright compulsory licenses.

Because of the long involvement of copyright law and because we do not fall within the purview of the executive branch or OMB, we look to you and to your committee for guidance.

The Tribunal currently has three Commissioners and a staff of four, including a General Counsel. Obviously, we are a very small agency.

In the nearly 4 years since we last appeared before the subcommittee, we have completed seven distribution and three rate proceedings.

At present, we are engaged in one jukebox and one cable distribution proceeding.

We are pleased to report that our statute is working well, Mr. Chairman, and that the procedures which we have implemented have been successful.

As you will remember, our proceedings engender spirited advocacy among the various competing interests who appear before us.

For the past 4 years, as in the previous 7 years, nearly every Tribunal decision has been appealed to the circuit courts of appeal. The District of Columbia Circuit has observed that the Tribunal faces, "a highly litigious copyright on the subculture."

However, despite the number of appeals, all, and I would like to emphasize, all Tribunal decisions have been affirmed.

The Tribunal expects some increased activity due to the passage of the Berne Convention Implementation Act and of the Satellite Home Viewer Act. We have thoroughly reviewed both laws and find that we will have no difficulty in carrying out its proscribed roles.

In sum, Mr. Chairman, we are currently satisfied with the statutes which pertain to the Tribunal and all matters of substance. However, there are two small matters relating to administration, which we wish the subcommittee would consider.

These matters are the statutory language which permits the lapsing of Commissioners' terms and what we consider the obsolete fixing of Commissioners' salaries at GS–18 level, a grade that has been phased out in the executive branch since the 1978 Civil Service Reform Act.

We have discussed these suggested amendments further as well as the Tribunal's procedures and workload in our prepared statement.

We would be pleased to discuss any of these matters and others which you may wish.

Thank you, Mr. Chairman.

At this time we are available to answer any questions that you or the subcommittee may have.

Mr. KASTENMEIER. Thank you, Commissioner Ray.

[The prepared statement of Mr. Ray follows:]

STATEMENT OF
EDWARD W. RAY, CHAIRMAN
COPYRIGHT ROYALTY TRIBUNAL

Mr. Chairman:

We are pleased to have the opportunity to appear before you and the Subcommittee. As you know, being the drafter of our authorizing statute, we are a small agency in the Legislative Branch. Therefore, because of your long involvement in the copyright area of the law and because we do not fall within the purview of the Executive Branch and in particular, OMB, we look to you and your committee for assistance and guidance.

We will briefly review our history for the benefit of the newer members, discuss our work load and suggest some minor changes in our statute. We will be pleased to further discuss any of these matters or others which you or the Subcommittee may wish.

Creation and Membership

The Copyright Royalty Tribunal (Tribunal) was created in 1976 by the General Revision of the Copyright Law of that year. Its primary function is the distribution funds collected under compulsory license for cable and satellite retransmitted television signals and for jukebox and to set rates in these areas as well as in the area of phonorecords and noncommercial educational broadcasters.

The Tribunal is authorized to have five Commissioners who are appointed for seven-year terms by the President with the advice and consent of the Senate. At present, the Tribunal is composed of three Commissioners, with two positions vacant. In recent years, the Appropriations Committees have only provided funds for three positions. The chairmanship rotates annually on December 1 to the most senior commissioner who has not previously served as chairman.

The legislative history of the Copyright Act reflects the intention that the Tribunal remain an independent agency in which the commissioners perform all professional responsibilities themselves. The only staff of the Tribunal is a personal assistant to each commissioner and a general counsel. The general counsel position, added in 1985, has proven beneficial to the functioning of the Tribunal. In addition to the assistants and counsel positions, the Tribunal conducts a law student extern program to utilize the services of law students for which the law students receive academic credit.

General Administration & Budget

The Chairman of the Copyright Royalty Tribunal is chiefly responsible for its administration. The Library of Congress provides the Tribunal with the necessary administrative services, including those related to budgeting, accounting, financial reporting, travel, personnel, and procurement. Pursuant to Sec. 806(a) of Title 17 U.S.C., the Library of Congress was paid $20,000 from the Tribunal's authorized FY 1988 appropriation in remuneration for these administrative services. The Library is authorized to disburse funds for the Tribunal, under regulations prescribed jointly by the Librarian of Congress and the Tribunal.

The Tribunal's budget for fiscal 1989 is $633,000. It has requested $674,000 for fiscal 1990. A breakdown of the budget is found at Appendix 1.

Statutory Responsibilities

Specifically, the Tribunal's statutory responsibilities are detailed in sections 111, 115, 116, 118, 119 and 801 et seq. of Title 17 U.S.C. The Tribunal is involved in rulemaking and in adjudication. The rulemaking proceedings consist of adjusting rates for the five compulsory licenses authorized under Title 17 which are:

1) secondary transmissions of copyrighted works by cable systems (§111),

2) production and distribution of phonorecords of nondramatic musical works (§115),

3) public performances of nondramatic musical works by coin-operated phonorecord players (jukeboxes) (§116),

4) the use of certain copyrighted works in connection with noncommercial broadcasting (§118).

5) retransmission by satellite carriers of broadcast signals to private home viewers (§119)

Additionally, the Tribunal's adjudicatory functions are to distribute the cable, satellite carrier and jukebox royalties collected to the copyright owners. The Tribunal does not distribute royalties for phonorecords (§115) or noncommercial educational broadcasting (§118). This is handled privately by the parties involved.

New Statutory Responsibilities

Last Congress, this Subcommittee initiated two laws which affect the responsibilities of the Tribunal - the Berne Convention Implementation Act of 1988 and the Satellite Home Viewer Act of 1988, item 5 above. Although we have not previously commented on this legislation, we have thoroughly reviewed it and are pleased to report that it will pose no undue difficulties for the Tribunal to administer.

The Berne Convention Implementation Act modifies U.S. copyright law to bring the U.S. into conformance with the minimal copyright standards required by the International Berne Convention of all its members. Since the Berne Convention guarantees to copyright owners of musical works the exclusive right to perform their works publicly, Congress decided that the jukebox compulsory license should continue to exist only as a back-up to a preferred voluntary license between owners and users.

Consequently, the Berne Convention Implementation Act calls on music owners and jukebox operators to attempt by negotiation or arbitration to reach a voluntary license. These negotiations must begin immediately after the effective date of the Act, March 1, 1989. By April 30, 1989, the Copyright Royalty Tribunal must be notified of the commencement of negotiations. If no negotiations have begun, the Tribunal is directed to announce the date and location of negotiations to start no later than May 30, 1989.

The parties could choose to have their negotiations conducted by arbitration in which case the Tribunal may set by regulation the time of such arbitration.

By March 1, 1990, the Tribunal must make a finding whether enough voluntary licenses have been reached between owner and user to equal substantially the amount of music that has been formerly subject to the jukebox compulsory license. If enough voluntary licenses have been reached, the jukebox compulsory license is suspended. If not enough voluntary licenses have been reached, the jukebox compulsory license is still in effect for those persons who have not reach voluntary licenses.

Section 116A(g) makes clear that the jukebox compulsory license will stay in effect (a) temporarily, until enough voluntary licenses have been reached; (b) permanently, if not enough voluntary licenses have been reached; and (c) whenever the terms of the voluntary licenses end, if no new voluntary licenses have been reached.

Consequently, the responsibilities for the Tribunal for the jukebox compulsory license will increase in 1989 and 1990, and will decrease in the years after 1990 if negotiations prove successful. Currently, the Tribunal is engaged in a proceeding

to distribute the 1987 fund. Regardless of the outcome of negotiations, there will still be the 1988 and 1989 funds to distribute, which, presumably will occur in 1990 and 1991. If the negotiations are successful, the jukebox compulsory license will end in 1990 and no 1990 fund will be created, and no 1990 rate adjustment proceeding will be held. However, if negotiations are not successful, there will be a 1990 fund, and there will be the statutorily-scheduled 1990 jukebox rate adjustment proceeding.

The Satellite Home Viewer Act of 1988 became effective January 1, 1989, and it creates a new compulsory license. The license permits satellite carriers to retransmit television broadcast signals to the owners of satellite earth stations for their private home viewing at a Congressionally established royalty rate. The rate to be paid by satellite carriers is 12 cents per subscriber per month for the retransmission of each independent broadcast station, and 3 cents per subscriber per month for the retransmission of each network-affiliated broadcast station.

As a result of the Satellite Home Viewer Act, there will be established a 1989 satellite carrier fund, as well as a satellite carrier fund for each year following. The Tribunal will need to establish regulations for the filing of satellite carrier claims. The first claims will be filed during July, 1990 for the 1989 fund. After August 1, 1990, the Tribunal will determine whether the copyright owners can agree concerning the distribution of the 1989 satellite carrier fund. If they cannot agree, the Tribunal will hold distribution hearings.

The satellite carrier funds will be held in accounts separate from the cable funds and the jukebox funds. The Tribunal will be making decisions concerning when and how much of the satellite carrier fund to distribute or reinvest on the same basis it has made its decisions concerning the cable and jukebox funds, that is, on how much of the fund is in controversy.

No satellite carrier rate adjustment proceedings are scheduled under the Act. Instead, the Act calls for negotiations between satellite carriers, distributors and copyright owners, for which the Tribunal is given certain monitoring responsibilities. If the parties choose to go to arbitration, the Tribunal has additional responsibilities for adopting procedures and monitoring its progress. When the arbitration panel reports its conclusions to the Tribunal, the Tribunal shall adopt the panel's decision unless the Tribunal finds that the decision is clearly inconsistent with the rate criteria established in the Act. If the Tribunal rejects the panel's decision, the Tribunal shall by April 30, 1992, publish its own determination, subject to court review.

The new satellite carrier rate will be effective until December 31, 1994, at which time the satellite carrier compulsory license will expire unless renewed by Congress.

Distribution and Rate Adjustment Proceedings

Before the passage of the Satellite Home Viewer Act of 1988, the Tribunal had six functions. The Tribunal adjusted four copyright royalty rates - cable, mechanical, jukebox and public broadcasting - and distributed two copyright royalty funds -cable and jukebox. With the enactment of the Satellite Home Viewer Act, the Tribunal has been given two additional functions. The Tribunal will distribute the satellite carrier copyright royalty fund and it will have certain monitoring and review functions concerning the adjustment of the satellite carrier rate scheduled for 1991-1992.

The Tribunal carries out its functions by holding hearings and issuing a final determination, unless the parties are able to settle their differences beforehand. The Tribunal's policy is at all times to foster settlements wherever possible.

Rate Adjustment Proceedings

The Copyright Act schedules periodic adjustments of the rates subject to the Tribunal's jurisdiction during certain "window" years. The cable rate may be adjusted in any year ending in a 0 or a 5. The mechanical rate (phonorecord) may be adjusted in any year ending in a 7. The jukebox rate may be adjusted in any year ending in a 0. The public broadcasting rate may be adjusted in any year ending in a 2 or a 7. In addition, the Copyright Act provides that any time the FCC changes its rules regarding the distant importation of broadcast signals, or regarding syndicated exclusivity, the Tribunal may be petitioned to adjust the cable copyright rate accordingly.

Rate adjustment proceedings begin with a petition filed with the Tribunal by someone who has a significant interest in the subject copyright rate (except for the public broadcasting rate adjustment which commences automatically). Once the Tribunal finds that the petitioner does indeed have a significant interest in the copyright rate, a proceeding is initiated. Hearings are held in which the expert testimony from all interested parties is heard. After the hearing is concluded, the Tribunal issues a final determination, which by law must be published in the Federal Register within a year from the commencement of the rate adjustment proceeding. Parties have 30 days to appeal to the U.S. Court of Appeals.

Since 1985, the Tribunal has held three rate adjustment proceedings. The statutory cable rates were adjusted for inflation in 1985, the mechanical rate was adjusted in 1987, and the public broadcasting rates were adjusted in 1987. Petitions were filed in 1985 to adjust the cable 3.75% rate and the syndicated exclusivity rates, but the parties withdrew their petitions before the commencement of hearings.

The cable inflation adjustments and the mechanical rate adjustments were made primarily by settlement. Through the encouragement of the Tribunal, the major parties interested in the cable and mechanical rates met and reached agreement. These agreements were then proposed by the Tribunal to the public. No opposing comments were received, and the rate adjustments were adopted as proposed. In the case of the public broadcasting rate adjustment hearing, the major public broadcasting entities, PBS and NPR, were able to reach a privately negotiated license with the major performing rights societies - ASCAP, BMI and SESAC -thereby obviating the need for the Tribunal to establish a rate for them. For the other public broadcasting entities, such as college radio stations and noncommercial educational religious broadcasters, the Tribunal took testimony and established rates.

Distribution Proceedings

For two of the compulsory licenses, cable and jukebox, the Copyright Act requires cable and jukebox operators who wish to obtain a compulsory license to make appropriate payments to the Copyright Office. The Copyright Office maintains these payments in discrete calendar year funds in interest-bearing accounts. The Tribunal's function is to distribute these funds to the proper copyright owners each year. A similar procedure is being established pertaining to the satellite compulsory license

Each January, copyright owners who believe they are entitled to some portion of the jukebox royalty fund file a claim with the Tribunal. Traditionally, the Tribunal receives five claims. Three are from the three performing rights societies in the U.S. - ASCAP, BMI and SESAC. The other two are from music publishers who are not signed up with any performing rights society - Asociacion de Compositores y Editores de Musica Latinoamericana (ACEMLA) and Italian Book Corporation.

Each July, copyright owners who believe they are entitled to some portion of the cable royalty fund file their claims. Approximately 700 claims are filed each year, but many more than 700 copyright owners share in the cable fund, because the Tribunal allows joint claims. For example, NPR files on its own behalf and on behalf of approximately 130 affiliated stations, so its one claim represent 130 plus copyright owners.

After the claims have been filed, the Tribunal publishes a notice in the Federal Register asking the claimants if there exists any controversies concerning the proper distribution of that particular calendar year's fund. If the parties are able to reach a settlement, the Tribunal can make an immediate distribution. If the parties cannot reach a settlement, the Tribunal can distribute only that portion of the fund that is not in controversy.

After the parties indicate that controversies exist, the Tribunal publishes notice of this in the Federal Register and the

proceeding commences. Hearings are held in which the parties submit evidence to demonstrate the amount of entitlement to the royalty fund that they believe they deserve. Within a year after commencement of the proceeding, the Tribunal publishes its final determination in the Federal Register, and parties have 30 days to appeal the Tribunal's determination to the U.S. Court of Appeals.

In the case of cable distributions, the Tribunal holds its hearings in two phases. In Phase I, the Tribunal allocates the fund among eight program categories - Program Suppliers (MPAA, Multimedia, NAB), Sports (Major League Baseball, the National Basketball Association, the National Hockey League, the National Collegiate Athletic Association), Noncommercial Television (PBS), Music (ASCAP, BMI, SESAC), U.S. Commercial Television (NAB), the Devotional Claimants (PTL, Old-Time Gospel Hour, Christian Broadcasting Network), the Canadian Claimants (CBC, CTV) and Noncommercial Radio (NPR). After this allocation is performed, if there are any disputes within a category, the Tribunal moves to Phase II and makes a further allocation within a category. For example, in the past, within the Program Suppliers category, the 90 plus syndicators represented by Motion Picture Association of America (MPAA) have not been able to reach an agreement with Multimedia Entertainment or with station-produced syndicated programs represented by NAB. The Tribunal has held hearings to resolve these controversies, and makes its allocations according to the evidence presented.

Since 1985, the Tribunal has concluded four jukebox distribution proceedings and three cable distribution proceedings. Currently, the Tribunal is engaged in the 1987 jukebox distribution proceeding and Phase II of the 1986 cable distribution proceeding. A notice asking the parties to comment whether a controversy exists concerning the distribution of the next cable fund is pending. Comments are due March 23, 1989.

The status of royalty funds distributed as of January 31st is found at Appendix 2.

Appellate Record

Copyright Royalty Tribunal decisions are the focal point for many contending interests, each interest believing that it should have gotten a greater share of the royalty distributions, or believing that it should have gotten a higher or lower royalty rate. Consequently, regardless of the decision reached by the Tribunal, appeals to the U.S. courts have been taken nearly as a matter of course. The United States Court of Appeals for the District of Columbia Circuit expressed its stern disapproval of this situation in 1985:

> "Given the potential monetary stakes, the claimants studied tack to date of 'boundless litigiousness.' 720 F. 2d at 1319, directed at the various nooks and crannies of the Tribunal's decisions is perhaps understandable.

> But with today's decision joining the ranks of our two prior exercises of review, the broad discretion necessarily conferred upon the Copyright Royalty Tribunal in making its distributions is emphatically clear. We will not hesitate henceforth, should this tack of litigation-to-the-hilt continue to characterize the aftermath of CRT distribution decisions, to refrain from elaborately responding to the myriad of claims and contentions advanced by a highly litigious copyright-owner subculture." National Association of Broadcasters v. Copyright Royalty Tribunal, 772 F. 2d 922, at 958 (D.C. Cir. 1985).

Despite the "highly litigious" nature of the claimants before the Tribunal, since the Tribunal last appeared before Congress in July, 1985, every decision rendered by the Tribunal has been either affirmed in all respects on appeal, or not appealed at all. Seven decisions have been appealed and affirmed; four decisions have not been appealed. A record of these appeals is found at Appendix 3.

Projected Workload

Although there have continued to be appeals of our decisions, the strong language of the courts in affirming may have had good effect in recent years. Many of the major parties to our proceedings have engaged in negotiation and have frequently settled major issues before hearings. For example, the present proceeding, in which we are involved, the 1986 cable distribution, was delayed at the parties' request from March 1988 until a major agreement was reached amongst most parties in December 1988. There were left only a few items in controversy which will result in a greatly reduced hearing schedule, saving both the parties and the Tribunal expense.

In those particular proceedings which have resulted in decreased hearing days, the Tribunal has experienced a corresponding increase in motions filed by the parties with which the Tribunal must deal. The Tribunal believes that its resolution of some of these preliminary motions has contributed to the settlements. The Tribunal finds that negotiation settlements are beneficial in most instances and will therefore continue to encourage such activity.

With amounts in the cable royalty fund growing rapidly, 1984, $100 million, 1988 estimated at $200 million, there is the increased potential for spirited competition for even small percentages of the total distribution. Thus, it is impossible to state with certainly whether the number of hearing dates will decline in the future.

In addition to the annual distribution proceedings, the Tribunal expects to be petitioned in the near future regarding the FCC's changes in syndicated exclusivity. Such a petition may result in additional hearings. It is also expected that the

satellite legislation will result in some additional hearings. This year the Tribunal will be involved in drafting regulations pertinent to this new legislation. Although as earlier noted, the Berne Convention will eventually greatly reduce the Tribunal's role regarding jukeboxes, it will still have responsibility for carrying out the 1987, '88 and '89 distributions, which will take place this year, in 1990 and 1991. Assuming the parties reach major agreement by 1990, the Tribunal will then have an essentially "standby" role regarding jukeboxes.

In sum, it appears that the workload will continue over the next few years at about the same level as in the recent past. We have again reviewed our situation and find that we need no major revisions of our statute to carry out our responsibilities.

Suggested Statutory Amendments

There are two minor areas, however, relating to the administration of the Tribunal which we wish to suggest for legislative amendment to the subcommittee. These items are the statutory language which permit the lapsing of Commissioner's terms and what we consider the "obsolete" fixing of Commissioners at the GS-18 level.

Lapsed Terms

Unlike other entities which have Commissioners appointed for fixed terms, the CRT has no provisions for lapsed terms. This is of special concern now that the CRT has three Commissioners, rather than five.

The FCC and FTC authorizations, for example, provide that a Commissioner will serve, beyond the expiration of his term, until a new Commissioner is confirmed.

At present, one CRT Commissioner's term expires September, 1989; the other two September, 1991. It would be difficult to function with less than three Commissioners for a period of time until additional ones can be appointed and confirmed. This is especially so, given the fact there is only a small staff and that much of the work must be carried out personally by the Commissioners. Under normal, and optimal, circumstances, it seems to take 6 to 8 months to screen candidates, nominate and complete Senate confirmation.

With a new Administration having just taken office, it can reasonably be expected that there will be a several month lapse in the CRT Commissioner position which expires this year.

This lapse could be easily avoided by inserting one clause or sentence in the CRT authorization to the effect that Commissioners may serve beyond the expiration of their term until their successor is confirmed and qualified.

Salary Classification Levels

The Commissioners salaries are authorized at the GS-18 level of the General Schedule. At the time of authorization, 1976, this was the highest level for Civil Service employees and equal to the entry level for Presidential appointees in the Executive Branch, Exec Level V. Subsequently, Congress, in 1978, revised the "supergrade" system supplementing it with the Senior Executive Service (SES). Since then nearly all career GS-18 positions have been converted to SES. The GS-18 position has been somewhat obsolete, with only a handful of government employees remaining in that classification. As a result, the last two recommendations of the President's Quadrennial Pay Commission did not revise the general schedule which prescribes GS-18 compensation, but did propose substantial increases for both the SES and Exec Level V. Thus, the presidentially appointed Tribunal Commissioners could receive substantially less than both the entry level Executive Branch Presidential appointees and top Civil Service employees. In order to maintain the previous parity, the Commissioners compensation could be authorized at either the SES or Exec V level.

A legislative proposal incorporating both these amendments is found at Appendix 4.

Conclusion

Mr. Chairman, we state again our appreciation for the Subcommittee's continued interest in the Tribunal. We always welcome the Subcommittee's inquiries and suggestions and would be pleased to respond to any questions at this time or any written questions which may be submitted at a subsequent date.

APPENDIX I

COPYRIGHT ROYALTY TRIBUNAL

	FY 1989		FY 1990	
Salaries & Comp	8 pos	$398,000	8 pos	$427,000
Personnel Benefits		64,000		69,000
Travel & trans		2,000		1,000
Meetings & Conferences.		2,000		2,000
Postage		1,000		1,000
Local telephone		3,000		3,000
Long distance telephone		1,000		1,000
Rental of equipment		0		0
Rental of Space		90,000		94,000
Printing, forms		20,000		23,000
Other services, misc.		1,000		1,000
Services of other agencies/LOC		20,000		20,000
Tuition & Training		2,000		2,000
Repair of equipment		3,000		4,000
Cost of hearings		25,000		20,000
Office supplies		2,000		3,000
Books & Library materials		2,000		2,000
Equipment		1,000		1,000
1988 Summit Reduction		-4,000		0
Total CRT Budget		$633,000		$674,000
Less transfer from royalty funds		510,000		539,000
Total Regular Bill Funds		$123,000		$135,000

APPENDIX II

CABLE ROYALTY FEE FUND

Year	Current Value of fund	Total Amount Distributed as of 1/31/89		Total Amount Remaining in Fund Pending Resolution of Controversy	
1978	$17,717,000	$17,717,000	(100%)	$ 0	(0%)
1979	23,732,000	23,732,000	(100%)	0	(0%)
1980	28,052,000	28,052,000	(100%)	0	(0%)
1981	35,559,000	35,559,000	(100%)	0	(0%)
1982	44,375,000	44,375,000	(100%)	0	(0%)
1983	84,317,000	84,317,000	(100%)	0	(0%)
1984	100,465,000	100,465,000	(100%)	0	(0%)
1985	113,782,000	113,272,000	(100%)	490,000*	(0%)
1986	126,268,000	123,363,000	(99%)	3,005,000*	(1%)
1987	169,590,000	0	(0%)	169,590,000**	(100%)
1988	93,095,000***	0	(0%)	93,095,000	(100%)

* In the 1985 fund, $490,000 was recently received in late payments. In the 1986, fund $906,000 (1%) is being held; the balance is late payments. Late payments are promptly distributed within 30-60 days after receipt.
**Notice to determine controversy is pending.
***Represents first half-year payments only. Claims to be filed July 1989.

JUKEBOX ROYALTY FEE FUND

Year	Current Value of fund	Total Amount Distributed as of 1/31/89		Total Amount Remaining in Fund Pending Resolution of Controversy	
1978	$1,124,000	$1,124,000	(100%)	0	(0%)
1979	1,359,000	1,359,000	(100%)	0	(0%)
1980	1,227,000	1,227,000	(100%)	0	(0%)
1981	1,183,000	1,183,000	(100%)	0	(0%)
1982	3,319,000	3,319,000	(100%)	0	(0%)
1983	3,166,000	3,166,000	(100%)	0	(0%)
1984	5,991,000	5,991,000	(100%)	0	(0%)
1985	5,507,000	5,507,000	(100%)	0	(0%)
1986	5,340,000	5,340,000	(100%)	0	(0%)
1987	6,515,000	6,450,000	(99%)	65,000	(1%)*
1988	5,926,000	0	(0%)		(100%)

* A Controversy has been declared in the 1987 Jukebox proceeding. If there is no settlement amongst claimants, the Tribunal will commence proceedings in Spring 1989.

APPENDIX III

Appeals Record Since July, 1985

Cable Decisions:

National Association of Broadcasters v. Copyright Royalty Tribunal, 772 F. 2d 922 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 1245 (1986). Affirmed in all respects.

National Association of Broadcasters v. Copyright Royalty Tribunal, 809 F. 2d 172 (2d. Cir. 1986). Affirmed in all respects.

National Broadcasting Company v. Copyright Royalty Tribunal, 848 F. 2d 1289 (D.C. Cir. 1988). Affirmed in all respects.

ACEMLA v. Copyright Royalty Tribunal, 854 F. 2d 10 (2d. Cir. 1988). Affirmed in all respects.

Jukebox Decisions

ACEMLA v. Copyright Royalty Tribunal, 809 F. 2d 906 (D.C. Cir. 1987) Affirmed in all respects.

ACEMLA v. Copyright Royalty Tribunal, 835 F. 2d 446 (2d. Cir. 1987). Affirmed in all respects.

ACEMLA and Italian Book Corporation v. Copyright Royalty Tribunal, 851 F. 2d 39 (2d. Cir. 1988). Affirmed in all respects.

Tribunal Decisions Which Were Not Appealed

Rate Adjustments

1985 Cable Inflation Adjustment, 50 FR 18480 (May 1, 1985).

1987 Mechanical Rate Adjustment, 52 FR 22637 (June 23, 1987).

1987 Public Broadcasting Rate Adjustment, 52 FR 49010 (Dec. 29, 1987).

Distribution Determinations

1986 Jukebox Royalty Distribution, 53 FR 36362 (Sept. 19, 1988).

APPENDIX IV

Present law showing revisions

17 U.S.C. Sec. 802. Membership of the Tribunal

(a) The Tribunal shall be composed of five commissioners appointed by the President with the advice and consent of the Senate for a term of seven years each; ~~of the first five members appointed, three shall be designated to serve for seven years from the date of the notice specified in section 801(c), and two shall be designated to serve for five years from such date, respectively.~~ provided, however that upon expiration of the term of office a Commissioner shall continue to serve until a successor shall have been appointed and shall have qualified. Commissioners shall be compensated at the highest rate now or hereafter prescribed for ~~grade 18 of the General Schedule pay rates~~ Level V of the Executive Schedule (5 U.S.C. 5332).

* * * * * * * * * * * *

Draft Legislation

Title 17 U.S.C. 802 is amended by striking paragraph (a) thereof and inserting in lieu of the following:

"(a) The Tribunal shall be composed of five members appointed by the President with the advice and consent of the Senate for a term of seven years each; provided, however, that upon expiration of the term of office a commissioner shall continue to serve until a successor shall have been appointed and shall have qualified. Commissioners shall be compensated at the highest rate now or hereafter prescribed for Level V of the Executive Schedule, (5 U.S.C. 5332)."

Mr. KASTENMEIER. I want to commend you and the Tribunal generally for your success record in the Federal courts and basically staying out of the news for the past 5 years. I think that that's very salutory.

Mr. RAY. I will agree, Mr. Chairman. This particular oversight committee is quite different from the one 4 years ago, at least on my nerves.

Mr. KASTENMEIER. We have not actually changed the act and you have suggested there may be certain statutory changes which are useful.

The act I think still authorizes five Commissioners and as a practical matter, from the administration's standpoint and from the appropriations subcommittee's standpoint, three are, I guess, funded. Is that a problem? Does that concern you at all, whether there's three of you or five of you?

Mr. RAY. Mr. Chairman, I will let each Commissioner speak for himself. But for me, I have gone on record that I am in favor of three. However, I can see the problems that can occur if something happens to one of the Commissioners. If one of the Commissioners is unable to attend the proceedings, then we could have problems with just two reaching an agreement.

It could at some point in a proceeding, it could make it almost impossible for us to render a determination and it could be very costly to the parties and——

Mr. ARGETSINGER. Could I comment on that?

Mr. KASTENMEIER. Yes, Mr. Argetsinger.

Mr. ARGETSINGER. It has been working fine with three Commissioners. But I think it's good to have the standby authority to have five Commissioners with the new satellite bill and other legislation that the subcommittee may give us in future years. In that way, then we could gear up easily; there would be some agreement that we would then have five Commissioners. If we eliminated the five and went to three now, if we found later on that we needed more Commissioners, then we would have to amend the statute.

So as a practical matter we're working with three and we would have that standby authority to have five if we needed five.

Mr. KASTENMEIER. Sure.

Mr. ARGETSINGER. As you know, the Commissioners do most of the work. We each have a personal assistant and we have the General Counsel. So if the workload increased, we could either have a larger staff or we could have more Commissioners, but it would seem to me the Commissioner route would be the way to go.

Mr. AGUERO. Mr. Chairman.

Mr. KASTENMEIER. Yes, Mr. Aguero.

Mr. AGUERO. I go along with what Commissioner Ray said. I think five Commissioners would be helpful in the future. We are doing an excellent job with three Commissioners so far today. But if I became ill tomorrow, I die tomorrow, you know, anything can happen; and that would leave only two Commissioners. These are my worries; not because I am ill.

Mr. RAY. I will state, Mr. Chairman, for the record, there was a period where there was only two of us. Fortunately, we never got to a point where there was an impasse on motions and decisions. I shudder to think what would have happened if we had.

Mr. KASTENMEIER. Could you have the same problem with four Commissioners?

Mr. RAY. Yes, same problem.

Mr. KASTENMEIER. So it has got to be three or five?

Mr. RAY. That's right.

Mr. KASTENMEIER. Salary classification levels: Could you sort of bring me up to date on your thinking in that regard? Mr. Ray or Mr. Argetsinger.

Mr. RAY. I would like to defer this to Commissioner Argetsinger. He is the expert in that area.

Mr. KASTENMEIER. Mr. Argetsinger.

Mr. ARGETSINGER. I remember when the Tribunal was formed, I was on the Senate Judiciary Committee. And at the time, GS-18 was the highest civil service position and it was equal in 1976 to the executive level 5, which is the entry level for presidential appointees in the administration branch. And, incidentally, it's equal today to executive level 5.

However, we did note with the last two reports of the President's Commission—the one this past January and the one 2 years ago, that the old supergrades, the GS-17 through GS-18 were not affected by any changes. The reason for this is, about 1978, the Civil Service Reform Act created a new system, the SES system.

Prior to 1978, there were approximately 10,000 super grades, in which the GS-18 level was. Today, there are about 70 GS-18's left in the Government. Most everyone has been converted to SES. So whenever there are any of the Presidential proposals or revisions for pay they don't pertain to GS-18 because GS-18 has become nearly obsolete—it hasn't become absolutely obsolete. The FBI has a few GS-18 positions, for whatever reason. But most every other agency has converted to SES.

I noticed in the paper, that Ms. Oakar recognized this and her bill would affect GS-18's.

But I thought since it has become somewhat obsolete, it would be good if we were changed either to the current executive level 5 or SES, whichever the subcommittee felt proper. That would mean no raise in pay at the present time, but in the future, if others were raised, then we would be in that category.

Mr. KASTENMEIER. You are saying that this change would not currently result in a raise in pay, but if there are certain other raises in pay, you could be beneficially affected?

Mr. ARGETSINGER. That's right, because at present, GS-18's and executive level 5's are paid the same amount. And if there is another presidential report, perhaps they will go back and think about the old supergrades. But I would doubt it because they are being phased out.

Mr. KASTENMEIER. Sure.

At this point I would like to yield to my colleagues. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman.

Gentlemen, good to have you all with us today.

I will address this to you, Mr. Chairman, and any of you may respond, again, for information only.

How much does the cable industry pay in fees annually for its compulsory licenses?

Mr. RAY. Mr. Coble, it has been going up each year. We anticipated that by 1987 will be approximately $225 million. I believe that the previous year was $200 million.

We have, of course, this in our report, but it is quite substantial. This is why it's becoming more difficult, even though we've been successful, in getting complete settlements. We are able to get the settlements, sir, but it takes much longer. For an example, a 1986 settlement, it was from March until December before a settlement was reached. We played an active role in that settlement by rendering certain orders on motions and things of this nature to assist them in the process. But it is over $200 million for the year.

Mr. COBLE. What sort of distribution is made? How are they distributed and who receives the largest percent?

Mr. RAY. The largest percent goes to the producers, represented by MPAA. We can give you an actual breakdown in a moment.

Mr. COBLE. What year are we talking about?

Mr. RAY. I'm talking about 1983 through 1986 percentages.

In phase 1, we have—are you familiar with the manner in which we make our distribution?

Mr. COBLE. No, I'm not.

Mr. RAY. Well, we have a phase 1 where the money is allocated to a category. Then in phase 2, we have hearings where money is allocated within a category if the parties aren't able to reach a decision. But most of the money, of course, is distributed in the phase 1.

Program suppliers represents 67 percent of what we call the basic fees. They get 72 percent of the 3.75 percent and they get 95 percent of the syndex.

But what I would be happy to do for you, Mr. Coble, is break this down for you and give you an average, and send it to you.

Mr. COBLE. That would be fine. I'd like to have that.

Mr. RAY. Because I think it might confuse you a little bit because each fund has three separate pots.

I can tell you, though, the joint sports claimants gets the second largest percentage.

Mr. COBLE. Who gets the second largest?

Mr. RAY. Joint sports.

Mr. COBLE. OK.

Mr. RAY. That's the NCAA, NBA, etc.

Mr. AGUERO. Professional basketball.

Mr. RAY. Professional basketball.

Mr. AGUERO. Baseball.

Mr. COBLE. Producers get the largest?

Mr. RAY. Yes, program producers the largest, then the sports, and then PBS, noncommercial.

Mr. COBLE. OK, if you could get that for us, I would be appreciative.

Mr. RAY. I'd be happy to get it to you.

[The information follows:]

The average percentage breakdown by copyright owner claimant groups which have participated in the Tribunal's cable distribution proceedings for the years 1983 through 1985 are as follows:

Program Suppliers	73.7%
Joint Sports	13.0%
Noncommercial TV Broadcasters	3.2%
U.S. Television Broadcasters	4.1%
Music	4.5%
Devotional Claimants	.8%
Canadian Claimants	.5%
National Public Radio	.2%

Additionally pending final resolution of distribution allocations, the Tribunal has to date authorized disbursement of approximately 99% of the 1986 cable royalty fees in comparable shares.

Mr. COBLE. You said that from years 1983 through 1986, you all normally do this in 3-year segments?

Mr. RAY. No, the reason the percentage was the same is because they reached settlements and agreed to these percentages. We hold proceedings each year.

Mr. COBLE. The FCC voted last fall—October, I think—to recommend that the Congress abolish the compulsory copyright license. I think that's about 11 or 12 years it's been going on.

If the Congress were to agree with this recommendation—I'm afraid this is a rhetorical question—but would there still be a need for CRT?

I'm sure the answer to that is yes, but elaborate a little on that.

Mr. RAY. It's difficult for me to take a position on that, Congressman Coble. My position has always been, as a Commissioner we are here to carry out the responsibility of the statute. I am hesitant to take positions like this because it might come back to prejudice me in hearings. I don't want to show any favoritism to owners or to users or anything. That's your role. In my opinion, you have an act that we feel is working extremely well.

If Congress reaches a decision that they feel there's no need for compulsory licenses, then I would 100 percent support Congress' views. I'm not trying to play politics.

Mr. COBLE. Does anybody else want to be heard on that?

Mr. AGUERO. Only one phrase. The compulsory license is the bread and butter of the Tribunal.

Mr. COBLE. That's why I asked the question because I figured that is a very significant part of what you do.

Mr. RAY. It's everything.

Mr. COBLE. Mr. Chairman, one more question, and I want to extend on the question the chairman put to you earlier. And you Commissioners may want to look to your able counsel for assistance on this.

I am concerned about the question of a quorum regarding the membership—five as opposed to three. I can see that this is a very sensitive area in which you all operate. I guess the question or the bell that's ringing in my head right now is I don't want to see us vulnerable in the event anyone challenges whether or not a quorum was present.

Have you all encountered that problem with the makeup of the membership?

Mr. RAY. Yes. Would you please explain?

Mr. CASSLER. Sure.

In 1985, from May until October, the Tribunal operated with two Commissioners. In May 1985, the first question the Tribunal addressed was whether two Commissioners could render a decision when five Commissioners are called for in the statute.

There are two cases on point. *FTC* v. *Flotill Products* was a Supreme Court case in which the FTC rendered a decision with only two Commissioners—no, it was a 2-to-1 vote. There were three Commissioners sitting. The statute called for five Commissioners, and there was a 2-to-1 vote, and that decision was challenged.

The Supreme Court upheld the decision because they ruled that a quorum is a majority of sitting Commissioners, not authorized Commissioners.

There was another case involving the ICC which was authorized to have 11 Commissioners but at one time went down to 5. That did not reach the Supreme Court. But, again, the court of appeals held in favor of the ICC.

So the Tribunal proposed its conclusion to the claimants that based on those two cases it had full powers to operate and the claimants generally agreed with the conclusion of the Tribunal.

Mr. COBLE. Thank you, sir.

Thank you again, gentlemen, for being with us.

Mr. Chairman, anybody want to say anything additionally on that last question?

Mr. ARGETSINGER. That last question does tie in a little bit to the other recommendation we have to the subcommittee about lapsed terms.

Most commissions, the commissioner serves beyond the end of his or her term until a successor is nominated and qualified. The CRT does not have such a saving provision and it would be very helpful if we did. If we're in the middle of a hearing and we've had the three Commissioners sitting and the one term expires—I think this has happened in the past—the one Commissioner goes home for a week and doesn't draw any pay until he gets confirmed. Indeed he could be home a couple of months and not able to participate in the rest of the case.

This year, with a new administration, there will be a delay, I am sure, and there very well could be a substantial lapse in a term until a new person comes in or a commissioner is renominated.

Mr. COBLE. Thank you.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Sangmeister.

Mr. SANGMEISTER. Thank you, Mr. Chairman. Although the chairman was very good in his explanation to begin with as to what your function is, I am trying to get my feet on the ground here so I understand where you come from and what you do now, but I'm not quite sure that I understand in looking at your report on this cable royalty fee fund and the jukebox royalty fee fund, obviously they are royalties they are taking in.

Was it completely under your control; is that correct?

Mr. RAY. Yes, they pay them to the Copyright Office.

Mr. SANGMEISTER. You've got here a total amount remaining the fund pending resolution of controversy.

What's the controversy that arises out of the payment of those fees? They are not fair?

Mr. RAY. Where they have been unable to reach an agreement with the other parties.

Mr. SANGMEISTER. That total amount, though, is being held by you and then you are going to——

Mr. RAY. We make a determination as to the percentage that is in controversy. It is not necessarily the amount claimed by the party. A party may claim 10 percent. We know, from previous records, that that's quite high, because the party may not have gotten anymore than 1 percent in any prior proceeding. So we don't hold back 10 percent. We may make a decision to hold back 4 percent or 2 percent.

Mr. ARGETSINGER. I think, Congressman, what you're interested in is this 1988—$93 million. The 1988 fund collection does not end until March of this year. The money is still being paid into and being held by the Copyright Office, not by the Copyright Royalty Tribunal. Then under the law, in July of this year, parties will file their claims for the money from 1988. We're always a year or two behind the calendar year with the actual distributions.

Mr. SANGMEISTER. I see.

Mr. ARGETSINGER. So that money isn't even ripe yet.

Now, the 1987 claim, there's $169 million this month—I think it's Friday, isn't it? Today, or is it Monday?

Mr. RAY. The 31st.

Mr. ARGETSINGER. The 31st, the parties will let us know whether they have reached agreement on that $169 million. And if they do, we will distribute the funds to them at whatever percentage they specify.

If they don't agree as to that $169 million and if they want to have a full-blown hearing, what they normally will do is say, fine, distribute most of it, maybe keep 10 percent in reserve, or distribute it all and the parties will all agree to reimburse each other. So we don't keep it very long.

Mr. RAY. We make an effort to get the money out just as quickly as possible.

Mr. ARGETSINGER. Right now we are still working on the 1986 proceeding even though we're in 1989. One reason was we wanted to start this last March, but at the request of the parties, we delayed and delayed. And finally in December, the parties resolved 90 percent of their controversy on their own without resorting to us having a hearing and making a decision.

So we do give the parties a chance to delay and negotiate. And if they are all willing to delay, we——

Mr. SANGMEISTER. But the funds are held actually by the Copyright Office subject to your order, then, if it's not resolved amicably; is that what happens?

Mr. ARGETSINGER. Under the law, the Copyright Office keeps the money and they deposit it in Treasury accounts. Once we reach our determination, then we request the Library of Congress to cut checks and submit it to whoever we order.

Mr. SANGMEISTER. I understand all of your decisions that have been taken up have all been sustained by the courts; is that correct?

Mr. RAY. Yes, in substance. There was a couple, I believe—early 1980's.

Mr. ARGETSINGER. Earlier there was remand on a point or two, but then were subsequently upheld. But in the last 4 years, every one of them has been upheld. The district court has even chastized the litigants, they have said, look, we've had this every year, every year. But now with a $200 million fund, you can imagine even a percentage of a point there's tremendous jockeying around.

Mr. SANGMEISTER. You are talking about a lot of money. OK, that explains it.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Does my colleague from New Jersey have any questions?

Mr. HUGHES. No, thank you, Mr. Chairman, I have no questions.

Mr. KASTENMEIER. I just have one concluding question.

Is the cable allocation the most time-consuming rate determination and activity of your commission?

Mr. RAY. Yes, it is.

Mr. KASTENMEIER. In terms of allocation of time over a several year span—I know some years, depending on cyclically when the reviews must take place over maybe a 5-year term or so—5- or 10-year term—they come up at different times. But on balance, looking back over the last 3 to 5 years, what percentage of the time of the Tribunal is devoted to the cable problem, as opposed to all the other compulsory licenses?

Mr. RAY. We would have to go back and analyze that. The reason I say so, Mr. Chairman, is because the last 2 or 3 years, believe it or not, most of our actual proceedings have been with jukebox because they didn't reach a settlement.

Mr. KASTENMEIER. I was only looking for sort of a ballpark figure in overall terms of where your efforts are.

Mr. RAY. I would say that between, in fact, this is what we presented to the appropriations subcommittee, between cable and jukebox. Those two are long. This is why we asked to recoup 80 percent. I'd say 80 percent of our efforts—and I would imagine cable would be 70 percent of the 80 percent.

Mr. KASTENMEIER. Seventy percent of the 80 percent?

Because, as you say, anyone could say if it were the case, that the compulsory license and cable were discontinued by Congress or, indeed, if the parties decided themselves to agree outside of proceedings of the Tribunal to rate changes—or in fact if that would happen in the jukebox—it would affect the future of the Tribunal in terms of its workload or possibly even of its existence.

Mr. RAY. Even the need for it.

Mr. KASTENMEIER. Yes.

Mr. RAY. Definitely.

It depends, of course, on whether under the Berne Convention, the jukebox people can get together because we only have 1987, 1988 and 1989, and we will be finished with jukebox provided the jukebox people are able to reach a negotiated agreement under the——

Mr. KASTENMEIER. That's right.

Now, as I recall, we provided sort of a backup provision, though, that you might be involved if they failed to negotiate.

Mr. RAY. Right.

Of course, the Satellite distribution, just on the face of it we don't see any difficulty—very similar to the cable as far as distribution is concerned.

Mr. KASTENMEIER. If my colleagues have no further questions, I would like to thank you, Chairman Ray, and Commissioner Aguero, Commissioner Argetsinger, as well as General Counsel Cassler, for your appearances here this morning.

We will try to work with you, and whatever problems you have we would wish you would communicate them to us. We have, of course, your statement and even a suggested form of certain statutory changes you would recommend, and we appreciate that. We

would invite your continued contact with the subcommittee in terms of assisting you in your work.

Mr. RAY. Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. This concludes the hearing this morning on Oversight of the Copyright Office and Copyright Royalty Tribunal.

The subcommittee stands adjourned.

[Whereupon, at 11:35 a.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING

101ST CONGRESS
1ST SESSION

H. R. 1621

To amend chapter 8 of title 17, United States Code, to reduce the number of Commissioners on the Copyright Royalty Tribunal, to increase the salary of such Commissioners, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 23, 1989

Mr. KASTENMEIER (for himself and Mr. MOORHEAD) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend chapter 8 of title 17, United States Code, to reduce the number of Commissioners on the Copyright Royalty Tribunal, to increase the salary of such Commissioners, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Copyright Royalty Tribunal Reform Act of 1989".

SEC. 2. MEMBERSHIP OF THE COPYRIGHT ROYALTY TRIBUNAL.

Section 802(a) of title 17, United States Code, is amended to read as follows:

"(a) The Tribunal shall be composed of three commissioners appointed by the President, by and with the advice and consent of the Senate. The term of office of any individual appointed as a Commissioner shall be seven years, except that a Commissioner may serve after the expiration of his or her term until a successor has taken office. Each Commissioner shall be compensated at the rate of pay in effect for level V of the Executive Schedule under section 5316 of title 5, United States Code.".

SEC. 3. EFFECTIVE DATE; BUDGET ACT.

(a) EFFECTIVE DATE.—The amendment made by section 2 shall take effect on October 1, 1989.

(b) BUDGET ACT.—Any new spending authority (within the meaning of section 401 of the Congressional Budget Act of 1974) which is provided under this Act shall be effective for any fiscal year only to the extent or in such amounts as are provided in appropriations Acts.

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101ST CONGRESS
1ST SESSION

H. R. 1622

To amend title 17, United States Code, to change the fee schedule of the Copyright Office, and to make certain technical amendments.

IN THE HOUSE OF REPRESENTATIVES

MARCH 23, 1989

Mr. KASTENMEIER (for himself and Mr. MOORHEAD) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 17, United States Code, to change the fee schedule of the Copyright Office, and to make certain technical amendments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Copyright Fees and Technical Amendments Act of 1989".

SEC. 2. FEES OF COPYRIGHT OFFICE.

(a) FEE SCHEDULE.—Section 708(a) of title 17, United States Code, is amended to read as follows:

"(a) The following fees shall be paid to the Register of Copyrights:

"(1) on filing each application under section 408 for registration of a copyright claim or for a supplementary registration, including the issuance of a certificate of registration if registration is made, $20;

"(2) on filing each application for registration of a claim for renewal of a subsisting copyright in its first term under section 304(a), including the issuance of a certificate of registration if registration is made, $12;

"(3) for the issuance of a receipt for a deposit under section 407, $4;

"(4) for the recordation, as provided by section 205, of a transfer of copyright ownership or other document covering not more than one title, $20; for additional titles, $10 for each group of not more than 10 titles;

"(5) for the filing, under section 115(b), of a notice of intention to obtain a compulsory license, $12;

"(6) for the recordation, under section 302(c), of a statement revealing the identity of an author of an anonymous or pseudonymous work, or for the recordation, under section 302(d), of a statement relating to the death of an author, $20 for a document covering not more than one title; for each additional title, $2;

"(7) for the issuance, under section 706, of an additional certificate of registration, $8;

"(8) for the issuance of any other certification, $20 for each hour or fraction of an hour consumed with respect thereto;

"(9) for the making and reporting of a search as provided by section 705, and for any related services, $20 for each hour or fraction of an hour consumed with respect thereto; and

"(10) for any other special services requiring a substantial amount of time or expense, such fees as the Register of Copyrights may fix on the basis of the cost of providing the service.

The Register of Copyrights is authorized to fix the fees for preparing copies of Copyright Office records, whether or not such copies are certified, on the basis of the cost of such preparation.".

(b) ADJUSTMENT OF FEES.—Section 708 of title 17, United States Code, is amended—

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by inserting after subsection (a) the following:

"(b) In calendar year 1995 and in each subsequent fifth calendar year, the Register of Copyrights, by regulation, may increase the fees specified in subsection (a) by the percent change in the annual average, for the preceding calendar year, of the Consumer Price Index published by the Bureau

of Labor Statistics, over the annual average of the Consumer Price Index for the fifth calendar year preceding the calendar year in which such increase is authorized.".

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall take effect 6 months after the date of the enactment of this Act and shall apply to—

(A) claims to original, supplementary, and renewal copyright received for registration, and to items received for recordation in the Copyright Office, on or after such effective date, and

(B) other requests for services received on or after such effective date, or received before such effective date for services not yet rendered as of such date.

(2) PRIOR CLAIMS.—Claims to original, supplementary, and renewal copyright received for registration and items received for recordation in acceptable form in the Copyright Office before the effective date set forth in paragraph (1), and requests for services which are rendered before such effective date shall be governed by section 708 of title 17, United States Code, as in effect before such effective date.

SEC. 3. TECHNICAL AMENDMENTS.

(a) SECTION 111.—Section 111 of title 17, United States Code, is amended—

(1) in subsection (c)(2)(B) by striking out "recorded the notice specified by subsection (d) and"; and

(2) in subsection (d)—

(A) in paragraph (2) by striking out "paragraph (1)" and inserting in lieu thereof "clause (1)";

(B) in paragraph (3) by striking out "clause (5)" and inserting in lieu thereof "clause (4)"; and

(C) in paragraph (3)(B) by striking out "clause (2)(A)" and inserting in lieu thereof "clause (1)(A)".

(b) SECTION 801.—Section 801(b)(2)(D) of title 17, United States Code, is amended by striking out "111(d)(2) (C) and (D)" and inserting in lieu thereof "111(d)(1) (C) and (D)".

(c) SECTION 804.—Section 804(a)(2)(C)(i) of title 17, United States Code, is amended by striking out "115" and inserting in lieu thereof "116".

(d) SECTION 106.—Section 106 of title 17, United States Code, is amended by striking out "118" and inserting in lieu thereof "119".

(e) EFFECTIVE DATE.—(1) The amendments made by subsections (a) and (b) shall be effective as of August 27, 1986.

(2) The amendment made by subsection (c) shall be effective as of October 31, 1988.

(2) The amendment made by subsection (d) shall be effective as of November 16, 1988.

○

JASON S. BERMAN
President

RIAA

July 11, 1989

The Honorable Dennis DeConcini
United States Senate
SH-328 Hart Senate Office Building
Washington, D.C. 20510-0302

Dear Senator DeConcini:

On behalf of the Recording Industry Association of America, I would like to let you know of our support for S. 1271, the Copyright Fees and Technical Amendments Act of 1989. I understand that this legislation is the subject of a hearing in your Subcommittee.

The Copyright Office, under the leadership of Ralph Oman, performs an important public service to composers, authors and other creators of intellectual property. Although this legislation will result in slightly higher fees for the use of these services, it is clear that they are needed if the Copyright Office is to maintain efficiency and high standards in the protection of the rights of artists.

Please do not hesitate to call on the RIAA in the future should we be able to assist you in any way.

Sincerely,

Jason S. Berman

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.
1020 Nineteenth Street, N.W. ■ Suite 200 ■ Washington, D.C. 20036 ■ Phone: (202) 775-0101 ■ Fax: (202) 775-7253

THE LIBRARIAN OF CONGRESS

WASHINGTON, D.C. 20540

January 18, 1989

Dear Mr. Chairman:

As you know, the current fee schedule for Copyright Office services has been in effect for 10 years. Inflation has cut the real price of the fees by 50 percent.

Unlike some federal agencies, the Copyright Office has no discretion in processing copyright claims. The Office cannot simply decide to do less work; an increased number of applications are submitted as more creative works are produced. Since fiscal year 1979, the Copyright Office workload has increased 42 percent -- from 426,000 claims to 605,000 in fiscal year 1987. During this same period the staffing level has decreased 23 percent -- from 641 to 495. Because personnel costs account for 90 percent of the Copyright Office budget, the Office simply has no more room to maneuver.

On the recommendation of the Register of Copyrights, I request that you introduce a bill to amend section 708 of the Copyright Act to double the current fee schedule (for example, the basic registration fee would become $20.00). The proposed fees are almost exactly in accordance with the inflation correction using the Consumer Price Index. To cope with future inflationary pressure, I also recommend amendment of section 708 to give the Register of Copyrights regulatory authority to adjust the copyright fee schedule at five year intervals solely to reflect national increases in the cost of living as determined by the Consumer Price Index. Copyright registration gives copyright claimants substantial benefits. Periodic adjustment of the fee schedule in response to inflation ensures that the primary beneficiaries of registration pay their fair share of the costs of administering the system.

If the new fee schedule went into effect in January 1990, the proposed amendment would give the U.S. Treasury about $7 million in additional revenues.

I have attached language that would put this proposal into effect and respectfully request your assistance in introducing the bill, as well as your support in enacting these changes in the copyright law.

Sincerely,

James H. Billington
The Librarian of Congress

The Honorable
Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and the
Administration of Justice
U.S. House of Representatives
Washington, D.C. 20515

HARCOURT BRACE JOVANOVICH, INC.

1666 CONNECTICUT AVENUE, N.W., WASHINGTON, D.C. 20009 TELEPHONE 202-387-3900

MARSHA CAROW
VICE PRESIDENT

July 20, 1989

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Intellectual Property
and the Administration of Justice
Committee on the Judiciary
United States House of Representatives
2328 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

Harcourt Brace Jovanovich, Inc. is a significant customer of the Copyright Office, registering many thousands of works each year, as well as renewals, transfers, recordations, assignments and searches. We agree with the Register of Copyrights that an increase in the current fee schedule is warranted and support the fee schedule set forward in H.R. 1622. We do so not only in recognition of the value of the services we recieve for fees, but also in recognition of the valuable public services the Office performs.

We are appreciative of the Office's representation of U.S. copyright interests in international forums and of the Office's contributions toward public information. We acknowledge the importance of the Copyright Office's response to Congressional requests for special studies. Because the Copyright Office does fulfill functions of value to the general public, we believe that some share of the costs of the Office should be borne by the taxpayers.

We urge you, Mr. Chairman, to ensure that funds available to the Office through appropriations reflect an appropriate balance between credit for earned fees and general revenues. We would hope that the amount of general tax revenues appropriated to the Office would not be concomitantly reduced by the increased amounts contributed by users. In other words, we urge Congress to increase the Office's overall funding so that the Office may continue its important public functions while at the same time deliver more efficient services to users.

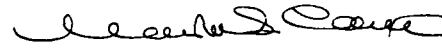
With respect to the Office's request for authority to adjust the fees for inflation at five year intervals, we cannot quarrel with the Copyright Office's anticipation of the need for

appropriate future increases, but we question whether these increases should occur automatically without an opportunity for Congressional oversight. We urge the Committee to continue its oversight function and suggest that requests to Congress for fee increases, as warranted, could provide ongoing opportunities for such oversight.

Finally, we read with interest the comments of the Register of Copyrights before your Subcommittee regarding possible modifications in the registration system to accommodate the special needs of individual authors and of periodical publishers. We look forward to the opportunity to cooperate with the staff of the Copyright Office to find mutually satisfactory solutions to these situations, and to others as changing conditions may suggest.

We appreciate this opportunity to present our views on H.R. 1622.

Sincerely yours,



Marsha S. Carow
Vice President

MSC/smv

cc: The Honorable Carlos J. Moorhead

AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION
SUITE 203 • 2001 JEFFERSON DAVIS HIGHWAY, ARLINGTON, VA 22202

Telephone (703) 521-1680
Facsimile (703) 892 2752

July 19, 1989

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Intellectual Property and the
Administration of Justice
Committee on the Judiciary
U.S. House of Representatives
2328 RHOB
Washington, D.C. 20515-4902

Re: H.R. 1622

Dear Mr. Chairman:

The Subcommittee on Courts, Intellectual Property, and the Administration of Justice has been referred H.R. 1622. The bill, which was introduced by you, would increase the fees charged by the Copyright Office for services provided to the public. The bill would also authorize the Register of Copyrights to increase these fees every five years to take into account the effects of inflation.

The American Intellectual Property Law Association supports the enactment of H.R. 1622. The proposed increase in these fees will not, in our view, discourage any person from enjoying the intended benefits of the copyright laws. On the other hand, the increase in revenue, if taken into account during the appropriation process, will allow the Copyright Office to maintain a high level of service to these who pay the fees.

Regards,

Sincerely,

Jack C. Goldstein

Jack C. Goldstein
President

JG/cc

Formerly AMERICAN PATENT LAW ASSOCIATION (APLA)

R.F.D. 144,
Vineyard Haven, Mass. 02568.
May 6, 1989.

The Honorable Robert W. Kastenmeier, Chairman,
Subcommittee on Courts, Intellectual Property,
and Administration of Justice
House of Representatives,
Washington, D.C. 20515.

Dear Bob Kastenmeier:

Once again, as so often in the past, I have occasion to appeal to you on a matter of real concern to members of the creative community in this country.

I write concerning H.R. 1622, which would cause various copyright fees to be doubled. This would, in effect, discriminate against authors, composers, photographers, and others who can least afford the only real protection of their intellectual property that is available to them. This would particularly hurt such creators who produce numerous works each year, and it would have the effect of depriving them of the possiblility of recovering statutory damages and attorneys' fees in cases of infringement of their work.

I would urge amendments that would enable the registration of single and/or group copyrights within 18 months of creation of the works, and that would allow the creator of the works to claim statutory damages and attorneys' fees whether or not the registration was made before the infringement. This would allow a creator to pay a single fee for all the works produced in the 18-month period. The only real value of copyright is to protect against infringement, and it is clear that as the bill is now worded, many creative people would be unable to afford this fundamental protection of their craft.

Sincerely yours,

John Hersey

John Hersey

ONE HUNDRED FIRST CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2137 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

July 5, 1989

The Honorable Steny H. Hoyer
Member of Congress
1513 Longworth Bldg.
Washington, D.C. 20515

Dear Steny:

Thank you for your letter of May 18, 1989, regarding a proposed amendment to H.R. 1621 to provide a salary increase for the Chairman and Commissioners on the United States Parole Commission.

I agree with your proposition that a salary increase for the Parole Commission -- to an Executive Level III for the Chairman and to an Executive Level IV of the Commissioners -- is consistent with other agencies of government and is sound public policy. In other words, I will incorporate the amendment into the text of H.R. 1621.

Thanks for conveying your views and thanks also for the informative background materials about salary levels on Federal boards and commissions.

Sincerely,

ROBERT W. KASTENMEIER
Chairman
Subcommittee on Courts,
Intellectual Property and the
Administration of Justice

RWK:mr

STENY H HOYER
5TH DISTRICT MARYLAND

VICE CHAIR
DEMOCRATIC CAUCUS

DEPUTY WHIP

DEMOCRATIC STEERING
AND POLICY COMMITTEE

CO-CHAIR
COMMISSION ON SECURITY AND
COOPERATION IN EUROPE

Congress of the United States
House of Representatives
Washington, DC 20515

APPROPRIATIONS COMMITTEE

TREASURY POSTAL SERVICE
GENERAL GOVERNMENT

LABOR,
HEALTH AND HUMAN SERVICES
EDUCATION

DISTRICT OF COLUMBIA

May 18, 1989

The Honorable Robert W. Kastenmeier, Chairman
Subcommittee on Courts, Intellectual Property, and
The Administration of Justice
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman,

I am writing to request your consideration for an amendment to HR 1621 to provide the U.S. Parole Commission the same salary increase proposed for the Copyright Royalty Tribunal.

Currently, according to the attached report by the Library of Congress, only two collegial bodies are paid at the GS-18 level. I believe it only just that both the Copyright Royalty Tribunal and the U.S. Parole Commission be upgraded to have the Chairmen paid at the Executive Level III and the members at Executive Level IV, which is consistent with other boards and commissions of similar responsibility listed in the attached memo.

I would be happy to provide you with any additional information that may be helpful in this regard, and would hope that we could move to speedily redress what is an inequitable situation.

Thanking you for your attention to this request and with warmest personal regards, I am

Sincerely yours,

STENY H. HOYER

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

March 10, 1989

TO : Honorable Steny H. Hoyer
Attention: John Berry

FROM : Rogelio Garcia
Analyst in American National Government
Government Operations and Management Section
Government Division

SUBJECT : Executive Levels and GS Grade of Chairmen and Members Serving in Full-Time Positions on Federal Boards and Commissions

This memorandum is sent in response to your inquiry and our subsequent telephone conversation regarding the executive levels and GS grade of the chairmen and members of Federal collegial bodies.

Of 31 collegial bodies whose members serve full-time and are confirmed by the Senate, 29 classify their chairmen and members in an Executive Level category. The remaining two, the Copyright Royalty Tribunal and the United States Parole Commission, classify their chairmen and members in a GS-18 or equivalent category. (Under P.L. 98-473, as amended by P.L. 99-217, the Parole Commission will terminate on November 1, 1992, and the term of the present members of the Commission has been extended to that time.)

Of the 29 chairman in the Executive Level category, two are at Level II, 25 at Level III, one at Level IV, and one at Level V. The members in each of these agencies, with one exception, are one level below the chairmen.

Presented below are (1) a table which indicates the number of collegial bodies with chairmen and members at specified grade levels and (2) a listing of the collegial bodies grouped according to the Executive Level and the GS Grade or equivalent of their chairmen and members.

If I can be of further assistance, please call me at 707-8687.

Number of Collegial Bodies with Chairmen and Members at Specified Executive Levels and GS Grade

	Executive Level				
	II	III	IV	V	GS-18[1]
Chairmen	2	25	1	1	2
Members	0	2	25	2	2

Executive Level of Chairmen and Members of Collegial Bodies

Chairman at Executive Level II; Members at Executive Level III

Federal Reserve System, Board of Governors
Nuclear Regulatory Commission

Chairman at Executive Level III; Members at Executive Level IV

Commodity Futures Trading Commission
Consumer Product Safety Commission
Equal Employment Opportunity Commission
Export-Import Bank
Farm Credit Administration
Federal Communications Commission
Federal Deposit Insurance Corporation, Board of Directors
Federal Election Commission[2]
Federal Energy Regulatory Commission
Federal Home Loan Bank Board, Board of Directors
Federal Maritime Commission
Federal Mine Safety and Health Review Commission
Federal Trade Commission
Interstate Commerce Commission
Merit Systems Protection Board

[1] The grade is GS-18 or equivalent.

[2] The FEC has six members, but no chairman. The members are at Executive Level IV.

Chairman at Executive Level III; Members at Executive Level IV

National Credit Union Administration, board of directors
National Labor Relations Board
National Mediation Board
National Transportation Safety Board
Occupational Safety and Health Review Commission
Postal Rate Commission
Railroad Retirement Board
Securities and Exchange Commission
Tennessee Valley Authority
United States International Trade Commission

Chairman at Executive Level IV; Members at Executive Level V

Federal Labor Relations Authority

Chairman at Executive Level V[a]

Foreign Claims Settlement Commission

Chairmen and Members at GS-18 Level or Equivalent

Copyright Royalty Tribunal
United States Parole Commission

RG:rda

[a] The other members of the Commission work part-time and are therefore not included in this list.

U.S. Department of Justice
United States Parole Commission

Office of the Chairman

5550 Friendship Blvd.
Chevy Chase, Maryland 20815

August 2, 1988

Mr. John Berry
Legislative Assistant
for Appropriations
U.S. House of Representatives
Longworth House Office Building
Room 1513
Washington, D.C. 20515

Dear Mr. Berry:

Pursuant to your conversation with Commissioner Clay this date enclosed is justification for conversion of pay schedules for U.S. Parole Commissioners from the General Schedule Pay Rate to the Executive Schedule Pay Rate.

Thank you for your assistance.

Sincerely,

for Benjamin F. Baer
Chairman
U.S. Parole Commission

BFB:jle
Enclosures

Justification for Conversion
of U.S. Parole Commission
Chairman and Members
from General Schedule Pay Rate
to Executive Schedule Pay Rate

The U.S. Parole Commission is an independent agency in the U.S. Department of Justice which is composed of nine full time members appointed by the President, by and with the advice and consent of the Senate. One of the members is designated by the President to serve as the Chairman. The Commission determines national paroling policy. The Commission promulgates rules and regulations establishing guidelines to carry out their duties. The Commission members grant or deny parole to eligible prisoners; impose reasonable conditions on orders granting parole; modify and revoke an order paroling any eligible prisoner and request probation officers and other individuals, organizations and public or private agencies to perform such duties with respect to any parolee as the Commission deems necessary for maintaining proper supervision and assistance to such parolee.

Of the hundreds of Presidential Appointees all but fifteen are compensated based on the Executive Schedule Pay rate.

The positions not paid based on the Executive Schedule are compensated on the General Schedule, fourteen at the GS-18 Level and one at the GS-17 Level. The U.S. Parole Commissioners comprise nine of this group. The other six positions are the following:

Department of Health and Human Services
- Commissioner, Administration for Children, Youth and Family (1);

Department of Commerce
- Assistant Secretary and Commissioner of Patents & Trademarks (1);

- Assistant Commissioner for Patents (1), Assistant Commissioner for Trademarks (1);

Department of the Treasury
- Director of U.S. Mint (1), Treasurer of the United States (1).

The following is a listing of ten other independent agencies, nine of which have Chairmen paid at the rate of Executive Schedule Level III and whose members are paid at the rate of Executive Schedule Level IV and the 10th, a part-time Board paid at Executive Level V.

1. Chairman, Consumer Product Safety Commission / Level III
   Members, Consumer Product Safety Commission / Level IV

2. Chairman, Equal Employment Opportunity Commission / Level III
   Members, Equal Employment Opportunity Commission / Level IV

3. Chairman, Federal Communications Commission / Level III
   Members, Federal Communications Commission / Level IV

4. Chairman, Commodities Future Trading Commission / Level III
   Members, Commodities Future Trading Commission / Level IV

5. Chairman, Federal Maritime Commission / Level III
   Members, Federal Maritime Commission / Level IV

6. Chairman, Federal Mines Safety and Health Review Commission / Level III
   Members, Federal Mines Safety and Health Review Commission / Level IV

7. Chairman, National Credit Union Administration Board / Level III
   Members, National Credit Union Administration Board / Level IV

8. Chairman, National Mediation Board / Level III
   Members, National Mediation Board / Level IV

9. Chairman, Postal Rate Commission / Level III
   Members, Postal Rate Commission / Level IV

10. Chairman, Commission on Civil Rights / Level V
    Members, Commission on Civil Rights / Level V
    (This is a part-time Board.)

Presently no distinction is made between the pay of the Chairman, U.S. Parole Commission and the Members. The Chairman has administrative responsibility for the U.S. Parole Commission and should be paid at a higher rate than the Members.

The level of responsibility and duties of the Chairman and Commissioners, U.S. Parole Commission, i.e. setting national paroling policy and the releasing and retaking of federal offenders is certainly equivalent if not greater than the responsibilities assigned to any of the other Chairman or Members of the respective Commissions listed above.

For example the Chairman and members of the Federal Maritime Commission are responsible for all functions with respect to regulation and control of rates, services, practices, tariffs and control of rates, and agreements of common carriers by water. They are full-time members. The Chairman of this board is paid at the Level III and the members are paid at the Level IV of the Executive Pay Schedule.

The members of the U.S. Parole Commission are responsible for the release of federal prisoners from institutions. Their jobs involve decisions which effect the protection of the public. In addition they take the liberty of individuals who are under federal supervision in the community if they violate certain conditions of release.

Therefore the duties and responsibilities of the U.S. Parole Commissioners have a more far reaching effect on the general public.

The members of the U.S. Parole Commission also have a more far reaching responsibility than a Chairman and Members of the Postal Rate Commission, who are paid at the Level III and Level IV of the Executive Pay Schedule, respectively.

The Chairman and the members of the Commission on Civil Rights are only part-time positions and are paid at the Executive Level V.

The other members of the other Commissions listed do not have as broad a spectrum of responsibility as the U.S. Parole Commissioners. The other Commissions listed focus on a particular aspect of the general public which does not effect the safety or protection of the general public or focus in on the safety of a specific group. The U.S. Parole Commission has duties so far reaching that it involves responsibility for the protection of the general public from dangerous persons.

Therefore it is believed the nine U.S. Parole Commissioners should be paid on the Executive Schedule and that the Chairman be compensated at the rate of the Level III and the Commissioners at the Level IV.

Section 1. Section 4202 of Title 18, United States Code, is amended by deleting the last sentence.

Section 2. Section 5314 of Title 5, United States Code, is amended by adding at the end, the following:

"Chairman, United States Parole Commission."

Section 3. Section 5315 of Title 5, United States Code, is amended by adding at the end the following:

"Members, United States Parole Commission (8)."

ONE HUNDRED FIRST CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY
2137 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6216

May 1, 1989

Mr. Irwin Karp
40 Woodland Drive
Port Chester, N.Y. 10573

Dear Irwin:

Thank you for your letter of April 24, 1989, regarding my bill, H.R. 1622, to increase various copyright fees.

I have not yet decided whether to hold further hearings on the measure, which developed from an oversight hearing on the Copyright Office. I will keep you apprised of my decision in this regard.

I would inquire whether you and the authors and publishers organizations that received a copy of your letter have intervened with the House Appropriations Committee, Legislative Branch Subcommittee, to ensure that the Copyright Office receives an appropriation level adequate to satisfy its statutory obligations.

As you know, the Berne Convention Implementation Act of 1988 doubled statutory damages in the Copyright Act. It is my understanding from sources in the Senate that copyright registration fees should also have been doubled. Neither of these changes, of course, were mandated by the Berne Convention itself. But, with one set of changes (relating to authors rights) in place we certainly should continue with the other (relating to the public interest and good government). I hope that you will continue to participate in this balancing process.

Thanks again for your views.

Sincerely,

ROBERT W. KASTENMEIER
Chairman
Subcommittee on Courts,
Intellectual Property and the
Administration of Justice

IRWIN KARP

April 24, 1989

The Honorable Robert W. Kastenmeier, Chairman
Subcommittee on Courts, Intellectual Property and
the Administration of Justice
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Re: H.R. 1622: A Bill to Increase
Registration and Other Copyright Fees

Dear Chairman Kastenmeier:

H.R. 1622 would amend Sec. 708 (Title 17) to double various copyright fees. Most significantly, the fee for registering a copyright claim would be raised from $10 to $20. This will deny effective copyright protection to innumerable authors, photographers, composers, illustrators and other individuals, each of whom yearly creates several copyrighted works; most cannot afford the several $10 fees now required annually to assure that protection for each work as it is created. The fee rise also will deny effective protection to many journal and newsletter publishers.

I write to summarize the problem they face; to suggest simple amendments of Secs. 412 and 408 to ameliorate it; and to urge that hearings be held so that interested organizations can present their views.

1. How Authors of Multiple Works, and Journal Publishers, are Precluded from Effective Copyright Protection.

Obviously, if a poem, photograph, song, magazine article or similar short work is infringed and its author elects to sue for infringement, he/she can afford the $10 (or $20) fee for the copyright registration which Sec. 411(a) requires as a condition for commencing the action.

The catch is that if the work was not registered before the infringement, Sec. 412 prohibits the author from recovering statutory damages or attorneys fees. But these two remedies provide the only effective copyright protection for poets, photographers, composers, authors of articles, illustrators and creators of other short works. Actual damages usually are modest or difficult to prove. The only redress is statutory damages fixed by the Court. And without the possibility of recovering attorney's fees, many creators usually cannot afford to sue the infringer.

An author who creates several diffsrent works each year -- 20 or 30 songs or poems or paintings, 10 or 15 short stories or articles, several hundred or more photographs -- cannot foresee which, if any, of these works will be infringed in the future. Most will not; none may be. Consequently, to assure that effective protection is preserved in case one of his works is infringed in the future, the author must, under Sec. 412, pay a fee and register every work as it is created, to avoid losing statutory damages and attorneys fees. The price is already too high for many authors to afford —

40 WOODLAND DRIVE PORT CHESTER, N.Y. 10573 914/939-5386

$200 to register 20 works in a year; $300 for 30 works.

Many of these authors, artists, and composers, along with journal publishers, create or disseminate works of cultural, scientific, educational and other social value, which yield modest or little profit. Yet, under H.R. 1622, a poet or artist or composer who creates 30 works in 1990 would have to pay the Copyright Office $600 to for the right to claim statutory damages and attorneys fees should one of those works be infringed in the future; a motion picture company would have to pay $20 for a $20 million film produced in 1990 that grosses upwards of $100 million.

The effect of Sec. 412 is to exact a price for remedies. Those who can afford to pay may claim statutory damages and attorney's fees; those who cannot afford to pay are barred from obtaining these remedies. And Sec. 412 puts the heaviest burden on authors and artists who can least afford it. Its requirements, and that discrimination, violate the spirit, if not the letter, of Constitutional due process and equal protection.

The burdens Sec. 412 imposes and its denial of remedies to those who cannot afford to pay its price can be ameliorated by simple amendments.

2. Suggested Amendments to Secs. 412 and 408

(a) I suggest Sec. 412 be amended to provide that if an unpublished work is registered within 18 months after it is created, or a published work is registered within 18 months after it is first published -- the author or publisher is entitled to claim statutory damages whether the registration was made before or after the infringement. This comports with the 1909-1977 Copyright Act.

This amendment would enable authors, artists, composers and photographers to make a single registration -- for one $10 (or $20) fee -- of all the works they created, or published, during the previous 18 month period, without losing the right to claim statutory damages or attorneys fees. Presently, authors can make that type of group registration for unpublished works; but if they wait for several months or until year-end -- the only way to avoid multiple fees -- their works created during that period are ineligible for effective protection if an infringer strikes before the group registration is filed.

(b) Sec. 408 (c) should be amended to specifically permit these group registrations of unpublished works, rather than leave this to the Register's discretion. The section also should be amended to permit group registrations of works published as contributions in periodicals (as now allowed) or in other collective works such as anthologies. It should not require separate deposit of the entire issue , only a copy of the pages containing the work.

(c) I suggest that a clause be added to Sec. 408 permitting group registrations of issues of the same periodical or newsletter published during the prior 18 month period - in one application and for a single $10 or $20 fee. Also, the deposit requirement for journals, newsletters and newspapers should be revised to relieve publishers, particularly those with modest income and small circulations, of unnecessary and extremely burdensome obligations that by and large do not benefit the Library of Congress and probably increase its administrative workload and expenses.

Sincerely yours,

Irwin Karp

Irwin Karp

cc: Members of the Subcommittee
Michael Remington, Esq.
Thomas Mooney, Esq.

Ralph Oman, Register of Copyrights

Various Authors and Publishers
Organizations

IRWIN KARP

April 26, 1989

The Honorable Robert W. Kastenmeier, Chairman
Subcommittee on Courts, Intellectual Property and
the Administration of Justice
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Re: H.R. 1622: A Bill to Increase
Registration and Other Copyright Fees

Dear Chairman Kastenmeier:

I find that my April 24th letter omitted the crucial phrase "and attorney's fees" from the first sentence of 2(a) on page 2. I would like to correct that omission. The phrase should be inserted (as indicated by underlining) so that the sentence reads:

" (a) I suggest Sec. 412 be amended to provide that if an unpublished work is registered within 18 months after it is created, or a published work is registered within 18 months after it is first published -- the author or publisher is entitled to claim statutory damages and attorney's fees whether the registration was made before or after the infringement."

As I point out in my April 24th letter, Sec. 412 denies statutory damages and attorney's fees to authors who cannot afford to pay several registration fees for the multiple works they create each year. The purpose of the amendment suggested in 2(a) above is to preserve for them the right to claim both both of those remedies - as noted in the next paragraph of the April 24th letter.

I earnestly hope that the Subcommittee will conduct hearings on H.R. 1622 so that organizations representing authors, artists, and publishers will have an opportunity to express their views.

Sincerely yours,

Irwin Karp

cc: Members of the Committee
Michael Remington, Esq.
Thomas Mooney, Esq.
Ralph Oman, Register of Coprights

Various Authors and Publishers Organizations

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Curtis Brown Ltd. Ten Astor Place, New York, N.Y. 10003 (212) 473-5400

Cable Browncurt · Telex: 422745

Perry H. Knowlton
Chairman
Chief Executive Officer

May 2, 1989

The Honorable Robert W. Kastenmeier, Chairman
Subcommittee on Courts, Intellectual Property and
the Administration of Justice
Committee on the Judiciary
House of Representatives
Washington, DC 20515

RE: H.R. 1622: A Bill to Increase
Registration and Other Copyright Fees

Dear Chairman Kastenmeier:

Irwin Karp sent me a copy of his letter of 4/24/89 in regard to H.R. 1622: A Bill to Increase Registration and Other Copyright Fees.

I am a literary agent, CEO and Chairman of Curtis Brown, Ltd., an agency which represents many authors, mainly American and British. I am writing on behalf of the Society of Authors Representatives, a group of fifty-odd agents like Curtis Brown, Ltd. who represent in aggregate several thousand authors of widely varying status from struggling beginners to major best sellers.

The SAR fully supports the principles and suggestions put to you by Irwin Karp. His solution would correct many of the problems with which H.R. 1622 would burden all authors, artists and everyone else protected by our copyright law, while at the same time it would provide a means of reducing the workload and expense that would be incurred by the Library of Congress under the current version of H.R. 1622.

Sincerely,

President, Society of Authors' Representatives

PK:jh

cc: Members of the Subcommittee
Michael Remington, Esq.
Thomas Mooney, Esq.
Ralph Oman, Register of Copyrights

LAW OFFICES OF
BRYLAWSKI, CLEARY & LEEDS

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June 21, 1989

The Honorable Robert W. Kastenmeier
2328 Rayburn Building
House of Representatives
Washington, D.C. 20515

Re: Copyright Fees and Technical Amendments Act of 1989 -- H.R. 1622

Dear Rep. Kastenmeier:

I am writing to express my strong support for the Copyright Office fee bill which you recently introduced on March 23, 1989.

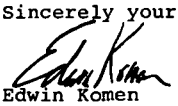
I have practiced before the United States Copyright Office on virtually a daily basis since 1976 conducting and supervising copyright searches, preparing and filing registrations and documents and corresponding with various officials of the Copyright Office on matters affecting my clients. I have always been greeted with friendly, prompt and professional service whether from a Copyright Examiner or from the Register of Copyrights. It would be no understatement to say that the Copyright Office is one of the best managed federal agencies. Not only do members of the United States copyright community rely upon it but many of my foreign clients find the U.S. records more informative than those maintained in their own countries.

This excellent public resource is, however, being threatened by an insidious but growing problem which cannot be solved by any action taken by the Copyright Office alone. Virtually all of the copyright fees are set by statute. These fees have not been increased since they became effective on January 1, 1978. Inflation has, however, sharply eroded by half the value of the $10 filing fee as well as the other correspondingly modest fees. At the same time, the Copyright Office staff of over 600 in 1976, which then administered approximately 400,000 claims per year, has dwindled to under 500 while now processing over 600,000 claims per year. Something, somewhere has to give way in the form of declining service to the public and erosion of personnel morale through overwork and burnout.

Measured against these facts, the fee increase proposed by the Register of Copyrights Ralph Oman on March 16, 1989 before the House Judiciary Subcommittee on Courts, Intellectual Property and the Administration of Justice seems eminently reasonable. Although the Register requested a doubling of current fees, the filing fee would still only be $20 per application even though a $30 fee might be justified. Perhaps more importantly, the pending fee bill gives the Register much needed flexibility to raise fees at certain stated intervals based upon inflation. It would, in fact, not be unreasonable to give the Register more flexibility to base future fee increases, following proper public hearing and opportunity to comment, on additional factors which would reward the Copyright Office for providing even better, more efficient service to the public.

The Copyright Office provides a service unique in its scope and quality. We should take all steps necessary to preserve and improve this valuable resource. The current fee bill is both an appropriate and necessary step in this direction.

Sincerely yours,



Edwin Komen

EK:jbs
cc: The Hon. Ralph Oman,
Register of Copyrights

PATENT, TRADEMARK AND
COPYRIGHT LAW SECTION
THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA
1819 H STREET, N.W — 12TH FLOOR
WASHINGTON, D C 20006-3690
(202) 223-6600

July 20, 1989

The Honorable Robert W. Kastenmeier
2328 Rayburn Building
House of Representatives
Washington, D.C. 20515

Re: Copyright Fees and Technical Amendments
Act of 1989 -- H.R. 1622

Dear Rep. Kastenmeier:

I am writing this letter on behalf of the Patent, Trademark and Copyright Law Section of the Bar Association of the District of Columbia expressing our strong support for the bill which you recently introduced on March 23, 1989.

Members of the private bar are generally not enthusiastic in recommending fee increases directly affecting the pocketbooks of their clients. We are, however, acutely aware of the fine job that the Copyright Office is doing with an ever dwindling staff and a perpetually increasing caseload. Unfortunately and inevitably, without additional support from the public in the form of increased fees, the quality and promptness of this service must necessarily decline to the benefit of no one and at great expense both to copyright owners who rely on the public records for protecting their copyright claims and to the general public which both requires and deserves access to an accurate record of these claims.

In light of the potential benefits of the pending bill and the obvious risks of failing to act, the modest fee increase from $10 to $20 per application, with correspondingly modest fee increases for other services, seems well justified.

We therefore urge prompt and favorable action on this bill.

Sincerely yours,

Joseph R. Magnone
Chairman, PTC Section
The Bar Association of
the District of Columbia

The Register of Copyrights
of the
United States of America

Library of Congress
Department 100
Washington, D.C. 20540

(202) 287-8350

July 20, 1989

The Honorable
Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Intellectual Property, and the
Administration of Justice
U.S. House of Representatives
Washington, D. C. 20515

Dear Chairman Kastenmeier:

I would like to share with you some information about the efforts I have made to build a consensus in favor of the proposed increase in copyright service fees, including our consultations with the magazine publishers about group registration of their publications. I would also like to review alternative fee structure ideas that I have considered and the reasons why I would not recommend their adoption. Finally, I want to respond to Irwin Karp's proposal for a two-year grace period during which unregistered works would be entitled to statutory damages and attorney's fees.

In my efforts to build a consensus in support of the copyright fee increase, I have written to, and talked with, a long list of authors, users, educators, and copyright owners, to explain the need for the increase. And I think I have succeeded in building a consensus, even though there may be a few holdouts. I have received many letters of support from many different people -- from individuals and corporations, including a most sympathetic letter from Garson Kanin, Robert Massie, and Peter Stone, representing the Authors League of America and its constituent guilds. The American Intellectual Property Law Association, representing the patent, trademark, and copyright bar, supports the fee increase, as do the RIAA, the MPAA, and CBEMA.

I have also tried to adjust Copyright Office regulations wherever possible to reduce any burden on small publishers and individual authors. I have great sympathy for the men and women who struggle to make a living by writing or composing. Let me mention some of the positive things Congress or the Copyright Office has done to ease the plight of authors, starting back in 1978.

- Congress made the biggest change back in 1978 when it made registration voluntary. So a struggling artist does not have to register at all to get copyright protection. Of course, the artist gets very valuable benefits for registering, and many of them do register.

- The Copyright Office also allows individual authors to make a single registration for an unlimited number of their unpublished works by grouping them into a "collective" work. So a writer of poems or short stories, or a photographer, can register a year's production for only one fee. This greatly eases the hardship on the struggling author.

- Congress allowed individual authors to make group registrations for their published contributions to magazines within a calendar year or less. This option has become even more important since you eliminated the notice requirement in the Berne Implementation Act of 1988. These authors of poems, essays, and short stories can make group registrations for a calendar year or less, at their option.

I am also actively considering another change in our regulations that would allow group registration of magazines and newsletters. The publishers have asked for this privilege in the past, and I have been working with the acquisitions people in the Library of Congress and with the publishers to develop the outline of a proposal that gives benefits to the Library and the Copyright Office as well as the publishers. Based on these consultations, if you would encourage me to do so; I would recommend to the Librarian the issuance of a group registration regulation for serial publications -- magazines, journals, and newspapers. Daily publications could be registered weekly on one application for one fee; weekly and monthly publications could be registered quarterly on one application for one fee. I have the authority to set a fee for a special service like group registration, and I may recommend a fee to the Librarian. You may be assured that the fee will still be substantially less than the fee if the group of works were registered individually.

As a condition of allowing this kind of group registration of serials, we would ask the publishers, as they have suggested, to add the Library of Congress to their subscription list so the Library will receive two copies immediately upon publication. When group registration is applied for on a quarterly basis, the publisher would submit one application and fee for all of the issues published weekly or monthly during the quarter.

By reducing paperwork headaches and compliance costs, this proposal would benefit small periodical publishers and publishers of

newsletters, and, indirectly, their authors. It would benefit the Library of Congress, by getting publications to the Library faster than it gets them under the current arrangement. In that way, it would also benefit Congress.

I understand that if you would sanction this compromise proposal, the publishers would accept it and support H.R. 1622 in full. The publishers have acknowledged that doubling of the fee schedule is justified simply to adjust for the inflation since the last fee increase. I know of no publishers who object to the fee increase. However, the compromise I have described removes any concerns they may have about adoption of the five-year inflation adjustment authority.

Consideration of alternative proposals

As you know, Mr. Chairman, H.R. 1622 doubles the fee schedule because inflation has cut its value in half since you set the fees in the 1976 Copyright Act. Even though the fee increase merely responds to inflation, I have given careful thought to possible alternatives. We have considered the possibility of a variable fee structure -- that is, a different fee for different works. The first question of course is what is the policy basis for the fee differential. If it is the potential or assumed value of the work, when and how is that value determined? If a cost-recovery basis is used, the higher fee may in fact fall on the individual authors.

The major problem is that variable fees for different works would be administratively unmanageable. In a volume operation like ours--now 650,000 items a year--determining different levels of fees would consume a significant amount of time all along the production line, often requiring correspondence, and thus increase rather than decrease costs. Variable fees might also result in time and effort spent by applicants trying artificially to avoid the higher priced categories. Also, I believe the policy of nondiscrimination is best. Often applications completed by individual remitters take much longer to examine--like pro se litigants before the court--since we often have to write to them to correct mistakes. (The Copyright Office deals with more non-expert remitters than does the Patent Office, for example, which recommends that applicants first seek the help of a patent attorney before filing.) On the other hand, large corporations who repeatedly do business with the Office have experienced personnel to handle filing. On a cost-recovery basis, therefore, the "ordinary citizen" remitters would pay higher registration fees.

My bottom line is that even at $20 a work, the copyright registration filing fee remains one of the biggest bargains in Washington. Our neighbor, Canada, charges $35 (Canadian) for copyright registration, and authors and copyright owners, in some ways, get less for their money.

Under our system, registration entitles authors and copyright owners to a legal presumption of copyright validity which has seldom been rebutted in court. The authors can get statutory damages and attorney's fees if they register and their works are infringed. Registration also greatly facilitates business transactions in copyrighted works. And all of these benefits will cost only $20 a work or even less if the author opts for group registration. The authors get real value for their money.

This brings me to Irwin Karp's proposal for a two-year grace period (after creation for unpublished works and after publication for published works -- which could mean four years for some works) within which an unregistered work remains entitled to attorney's fees and statutory damages. I have considered this proposal, and must oppose it because it would weaken the registration system. A strong registration system serves the public interest because it builds the collections of the Library of Congress, it facilitates commercial transactions relating to copyrighted works, and it assists the court in narrowing the issues that are litigated.

Statutory damages and attorney's fees are extraordinary remedies. No other country in the Berne Union allows statutory damages as a remedy for copyright infringement. Authors must prove actual damages. Statutory damages and attorney's fees constitute the primary incentive to make early registration of works. Since most works are infringed within a year or two of publication, a two-year grace period for published works largely destroys the incentive to make registration; if the work is not infringed during the two-year period, the author probably will not register. Also, timeliness is an essential feature of any good registration system to ensure that the facts alleged are correctly stated, rather than reconstructed two (or four) years later in connection with a lawsuit. Above all, early registration is essential so that the Library of Congress can rely on the copyright deposits to build current, high quality collections for the benefit of the Congress and the public.

Even so, authors who delay in making registration are entitled to significant remedies: an injunction, actual damages and lost profits, and seizure of infringing articles. These are the remedies available in other Berne member countries. But I know that this answer won't convince Mr. Karp. He fought this same battle back in 1976 during copyright revision, and he lost then. And he's trying again.

Finally, I understand that the concept of a copyright fund has been suggested. Some portion of the additional revenue flowing into the Copyright Office, as a result of the fee increase, would be set aside in a fund for special projects. The benefit of this proposal would be that the fees earned by the registration system would definitely be used to accomplish specific improvements to the system that benefit authors.

One of the problems with the fund concept is the Copyright Office needs additional revenues to make up for inflation. We need these revenues simply to restore service cut because of insufficient funds and to improve service in the application processing system. While I will be seeking a one-shot injection of funds from the appropriations committees for automation of the Copyright Office card catalog, the greater need is an injection of funds to improve basic services. I also see a danger in creating a stand-alone fund; it could be the first step in the direction of an entirely self-financing system based on user fees. I would counsel against this trend as unfair to the authors. The public benefits from the system, and the taxpapers should be willing to pay their fair share to support the system.

Moreover, the appropriations committees would have to agree with any fund proposal, and I am reluctant to delay the fee increase pending an agreement on establishment of a special fund. I am confident that the authors would be happy to rely on your assurances that you will use your good offices to make certain that a sizable portion of the increased revenues will be used to benefit the copyright system. Your track record in the Appropriations Committee should reassure them on that score.

I am at your disposal, of course, but I hope that the information in this letter will enable you to mark up H.R. 1622 and report it favorably to the Judiciary Committee without amendment. I really think the copyright community supports us on this modest bill.

As always, I greatly appreciate your help and direction.

Sincerely,

Ralph Oman
Register of Copyrights

RO:mg

The Register

April 1, 1986

The Honorable
Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties and the Administration of Justice
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

As you know, the Copyright Office's workload has increased substantially during recent years, with the number of registrations escalating from 429,000 in 1979 to 540,000 last year. Although we have markedly improved productivity during this period, recent staff cutbacks, coupled with restrictions on hiring following the Gramm-Rudman-Hollings Act, have severely strained our operations.

LIBRARY
OF
CONGRESS

Department
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Washington
D C.
20540

Recently, I appointed an internal study group to make recommendations to me on the pros and cons of a fee increase in the Copyright Office. The group has just made its report, and it recommends an adjustment of statutory fees based on the cost of providing the service. If the registration fee were recalculated solely on the basis of cost of living increases since 1978, it would rise from the present $10.00 to almost $20.00. However, the actual cost of registering a claim, calculated on the basis of staff salary and benefits, and administrative costs (not including capital costs asssumed by the Government) is $27.00. On this basis, the committee suggested a registration fee of $25.00, with proportional across-the-board increases in other fees enumerated in §708 of the copyright act.

I have not yet decided whether or not to ask the Librarian of Congress to submit a fee increase proposal to Congress for consideration. However, since we will be discussing our deliberations with members of the copyright bar, I wanted to apprise you of these developments. A copy of the internal committee's working document calculations is enclosed for your information.

Sincerely yours,

Ralph Oman
Register of Copyrights

Enclosure:
Proposed Copyright Fee Schedule

February, 7 1986

Proposed Copyright Fee Schedule

The basic formula for determining the amount to be charged for an individul service is:

$$\frac{\text{The total cost of performing the service for one year}}{\text{The total number of times the service is performed in one year}}$$

Where,

The Total Cost = salary of the units involved + 11.8% personel benefits + 10% overhead + non-personal support

Fiscal year 1985 is the most recent year for which there exist actual workload statistics. The calculations that follow are based on the statistics for that year. The total salary for the Copyright Office (excluding Licensing) was about $14 million, and the total non-personal appropriation was about $1,810,000.

1. Registration Fee

The registration fee is based on the cost of issuing a certificate, recording the registration, maintaining a public record, providing information to the public, and providing legal and automation support. The calculation is made as follows:

$$\frac{\text{Total Cost}}{555{,}000} \quad \text{(555,000 claims were received in FY 1985)}$$

Salary = R & P + Examining + Rec. Maint. + CPU/Reg Num + Catalog + % of Information Office + % of Register's Office

= $2,080,000 + $4,238,000 + $267,000 + $170,000 + $2,744,000 + $474,000 + $848,000

= $10,821,000

Therefore,

Total Cost = $10,821,000 + $1,277,000 + $1,210,000 + $1,742,000

= $15,050,000

The cost per claim is:

$$\frac{\$15{,}050{,}000}{555{,}000} = \textbf{\$27 per claim}$$

2. Renewals

Same Basic calculation as for registrations:

$$\frac{\text{Total Cost}}{43{,}000} \quad \text{(there were 43,000 Renewals in FY 1985)}$$

Salary = Exam (R & D only) + 2 mail clerks + 2 Data Prep Clerks + 1 Reg Num Clerk + 1 CPU Clerk + 2 Catalogers + % of Register's Office

= \$366,000 + \$30,000 + \$30,000 + \$15,000 + \$15,000 + \$50,000 + \$33,000

= \$539,000

Therefore,

Total Cost = \$539,000 + \$64,000 + \$60,000 + \$87,000

= \$750,000

The cost of processing a renewal is:

$$\frac{\$750{,}000}{43{,}000} = \textbf{\$17.50 per renewal}$$

3. Receipt for a Deposit

The cost of issuing a receipt for a deposit under Section 407 will be **increased to \$4.** (See Laila Mulgaokar's memo dated 2/5/86.)

4. Documents

Same basic calculation as for registrations:

$$\frac{\text{Total cost}}{15{,}000} \quad \text{(there were 15,000 documents recorded in FY 1985)}$$

Salary = Cataloging (Docs only) + 1 Mail Clerk + 1 Data Prep Clerk + 2 Preservation Clerks + % of Register's Office

= \$173,000 + \$15,000 + \$15,000 + \$30,000 + \$21,000

= \$254,000

Therefore,

Total Cost = \$254,000 + \$30,000 + \$28,000 + \$41,000

= \$353,000

The basic cost cost of processing a document is:

$$\frac{\$353,000}{15,000} = \$24 \text{ per document}$$

5. Notice of Intention to make a Phonorecord

Due to inflation, the cost of processing a Notice of intention to make a Phonorecord will be **increased to $10.**

6. Statement of Identy of an Author... [Section 302(d)]

Due to inflation the cost of processing a Statement of Identity of an Author... will be **increased to $20.**

7. Import statements

Processing required is approximately 30% of that for processing a registration. If the registration fee were $25, the **cost of processing an Import Statement would be $8.**

8. Additional certificate

The cost of issuing an additional certificate of registration is approximately 40% of the cost of issuing an original certificate. If the registration fee were $25, the **fee for issuing an additional certificate would be $10.**

9. Issuance of other Certifications

This is actually a variable fee service because searching for material is involved; therefore, the fee will be based on the actual time taken to process requests. This will be **$10 per hour.**

10. Official searches of the records

$$\text{Cost per hour} = \frac{\text{Total cost of operating the searching activity}}{\text{Total number of searching hours per year}}$$

Total cost of operating the searching activity =

[R & B (Bibliographers only) + % of Register's Office] + 11.8% + 10% + non-personal support

= [$259,000 + $23,000] + $31,000 + $33,000 + $35,000

= **$381,000**

Total number of searching hours per year =

Number of Bibliographers x hours per year per Bibliographer

= 10 x (8 x 230)

= **18,400 hours**

Therefore,

Cost per hour is:

$$\frac{\$381,000}{18,400} = \$21$$

NOTE:

If the proposed fee schedule had been in effect in FY 1985, our income from fees would have been approximately **$14 million,** rather than **$6,518,000.**

McGraw-Hill, Inc.

1221 Avenue of the Americas
New York, New York 10020
Telephone 212/512-4605

Kurt D Steele
Vice President and Associate General Counsel

July 7, 1986

The Hon. Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and
Administration of Justice
House of Representatives
Washington, D.C. 20510

Dear Mr. Kastenmeier:

As one of the world's largest publishers of a variety of information in many media, we are writing to express concern that the application of the Gramm-Rudman-Hollings Act to the fees collected by the Copyright Office may significantly diminish their ability to register on a timely basis the copyrights to material we publish. Given the fact that a large portion of the Copyright Office's budget is derived from copyright registration and related fees, we are seriously concerned that the level of service we have come to expect from the Copyright Office may be in jeopardy.

We understand that you have expressed concern to the Office of Management and Budget about their interpretation of Section 255(e) of the Act which we believe should automatically exempt offsetting fees paid to the Copyright Office. We hope OMB's position will not prevail that offsetting fees are not exempt from the Act since they are in lieu of appropriated funds.

Your efforts to preserve the operations of the Copyright Office are very much appreciated.

Sincerely yours,

Kurt Steele