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Testimony
June 15, 2000

House of Representatives
Ways and Means
Trade

Waiver of Jackson-Vanick

June 15, 2000
HONORABLE MARYBETH PETERS
STATEMENT OF THE REGISTER OF COPYRIGHTS
before the SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY
of the HOUSE COMMITTEE ON THE JUDICIARY
Thank you, Mr. Chairman and members of the Subcommittee, for this opportunity to appear and present the views of the Copyright Office with respect to copyrighted broadcast programming on the Internet. Because of the nature of the issue and because of the Copyright Office's role in administering the compulsory licenses created by the copyright law, most of my testimony will focus on the advisability of compulsory licensing of Internet retransmissions of television broadcast signals. I will also discuss the existing compulsory license for sound recordings on the Internet.
I will not be addressing other related issues that have received a lot of attention over the past months, such as piracy and other unlawful copying and distribution of motion pictures, sound recordings, and music on the Internet. I understand that those subjects are beyond the scope of this hearing, which focuses on the streaming of broadcast transmissions.
I. INTERNET RETRANSMISSIONS OF TELEVISION BROADCAST STATIONS
Background
Section 106 of the Copyright Act grants certain exclusive rights to the owner of a copyrighted work. 17 U.S.C. 106. Among these exclusive rights are the right to make or authorize the making of copies of the work, to distribute or authorize the distribution of the work and, in the case of television broadcast programming and other audiovisual works, the right to publicly perform or authorize the performance of the copyrighted work. As a result, unless a compulsory license is available, anybody who wishes to

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retransmit copyrighted broadcast programming--whether over the Internet or by more established means of transmission such as cable or satellite--may do so only by obtaining the consent of the copyright owners.

Compulsory licenses are abrogations of one or more of these exclusive rights and permit certain parties to use the copyrighted work without the consent of the copyright owner provided that the terms of the compulsory license are satisfied. Most of the compulsory licenses in the Copyright Act affect only the performance right. This is true of the cable (111) and satellite (119 and 122) compulsory licenses, which allow cable operators and satellite carriers to retransmit (and consequently perform) the programming contained on television broadcast stations. Cable operators and satellite carriers are guaranteed access to broadcast programming; the copyright owners of these television programs cannot say no, nor can they bargain the price and terms of a license agreement.

The Copyright Office has written extensively on the enactment and operation of the cable and satellite licenses, and I will not go into the details here. See The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis (1992); A Review of Copyright Licensing Regimes Covering Retransmission of Broadcast Signals (1997). The reasons offered for enactment of the cable and satellite licenses, and compulsory licenses in general, are essentially economic ones. For the cable license, Congress believed that the transaction costs associated with a cable operator and copyright owners bargaining for separate licenses to all television broadcast programs retransmitted by the cable operator were too high to make the operation of the cable system practical. Unlike a broadcast station which negotiates directly with the copyright owners for the programs it transmits over-the-air, cable systems carry multiple broadcast stations, raising substantially the number of copyright owners the cable operator would have to bargain with for retransmission rights. The transaction cost problem was exacerbated by the cable industry's lack of market power in 1976.

Congress also determined that cable operators must have guaranteed access to broadcast programming, which might not occur under a negotiation scenario. A cable operator might successfully bargain with the copyright owners of most of the programs contained on a broadcast signal, but be forced to pay exorbitant fees (or denied access to the programming) by copyright owners of certain categories of programming, or those copyright owners who realized that a cable operator's retransmission of an entire broadcast signal hinged on its ability to obtain a license from

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that program owner. A compulsory license for the cable operator eliminates any holdouts among copyright owners by guaranteeing access to the programming.

The concern over transaction costs that led to enactment of the cable compulsory license in 1976 also led to the enactment of the satellite license in 1988. Again, because the satellite business was a fledgling industry without market power, it was believed unlikely that satellite carriers could negotiate retransmission licenses with broadcast programming copyright owners. In addition, it was believed that the satellite industry needed a compulsory license in order to compete with the entrenched cable industry, which already enjoyed the benefits of a compulsory license. Consequently, Congress passed the Satellite Home Viewer Act of 1988 and created a compulsory license for satellite carriers' retransmission of distant television stations. This license was expanded in the Satellite Home Viewer Improvement Act of 1999 to include retransmissions of local television stations by satellite carriers.

Although the cable and satellite licenses operate differently in terms of their royalty calculation mechanisms, their purpose is the same: a limitation on copyright owners' performance right by guaranteeing cable operators and satellite carriers access to over-the-air television broadcast programming at fixed terms and prices.

A Compulsory License for Internet Retransmissions of Broadcast Signals: Our 1997 Report

In 1997, at the request of Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, the Copyright Office prepared an extensive report analyzing compulsory licensing of television broadcast programming. See, A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals (1997). Although the report focused principally on cable and satellite retransmissions, we did consider the advisability of a statutory licensing regime for Internet retransmissions of both radio and television broadcast stations. We solicited comment from the public on the issue, including public hearings at which copyright owners, broadcasters, and certain webcasting pioneers testified. We concluded, for several reasons, that a compulsory license specifically designed for the Internet was not appropriate. First, we were concerned about the Internet's ability to disseminate programming "instantaneously worldwide" without any territorial restrictions, and the intention of certain webcasters to retransmit to the widest audience possible. Unrestricted retransmission of copyrighted works could seriously compromise both the value and integrity of those works. 1997 Report at 99.

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Second, the Office questioned whether retransmission of a broadcast signal over the Internet involved solely the performance right, and in fact did not implicate the reproduction right as well. Id. Unlike real-time cable or satellite retransmissions, Internet retransmissions require the making of temporary copies within the computer systems delivering the retransmissions, which allow the audio or video programming to appear to be played in real time to the end user. A compulsory license for Internet retransmissions would, consequently, require abrogation of not one but two exclusive rights granted under section 106 of the Copyright Act: the performance right and the reproduction right.

Finally, because Internet retransmissions were still in their infancy, the Office determined that it was premature to consider a statutory licensing regime for broadcast retransmissions. The Office cited the President's Information Infrastructure Task Force's Working Group on Intellectual Property Rights, which concluded that licensing of copyrighted works on the Internet should be decided by the marketplace, rather than a government-imposed scheme. Id. The Office also cited a Federal Communications Commission paper advocating the same wait-and-see, anti-regulatory approach. See FCC Office of Plans and Policy, OPP Working Paper No. 29: Digital Tornado: The Internet and Communications Policy (March 1997).

Developments Since the 1997 Report

Following our 1997 Report, and as Congress worked on legislation to reauthorize the satellite compulsory license, compulsory licensing for Internet retransmissions received little attention. This changed dramatically, however, during the Senate and House conference on the Satellite Home Viewer Improvement Act of 1999. Toward the end of the conference, an amendment was made to the satellite license reauthorization bill to clarify that the section 111 cable compulsory license did not apply to broadcast retransmissions via the Internet.(1) The amendment appeared to us to be of little consequence, since we believed that the cable compulsory license could not reasonably be interpreted to include Internet retransmissions. Nonetheless, several Internet companies challenged the amendment as taking away their ability to use the cable compulsory license for new Internet retransmission activities they might soon commence. When it became clear that these objections might halt passage of the Satellite Home Viewer Improvement Act, I wrote a letter to you, Mr. Chairman, and to Mr. Berman, expressing our view that the proposed amendment was indeed a clarification, and not a change, of existing law. I stated:

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It is my understanding that some services that wish to retransmit television programming over the Internet have asserted that they are entitled to do so pursuant to the compulsory license of section 111 of Title 17. I find this assertion to be without merit. The section 111 license, created 23 years ago in the Copyright Act of 1976, was tailored to a heavily-regulated industry subject to requirements such as must-carry, programming exclusivity, and signal quota rules--issues that have also arisen in the context of the satellite compulsory license. Congress has properly concluded that the Internet should be largely free of regulation, but the lack of such regulation makes the Internet a poor candidate for a compulsory license that depends so heavily on such restrictions. I believe that the section 111 license does not and should not apply to Internet transmissions.

Letter of Marybeth Peters, Register of Copyrights, to the Honorable Howard Coble, November 10, 1999.

Because of the inability to resolve this issue in the remaining days of the last session of Congress, the amendment was removed before the legislation was enacted. Our view on this matter has not changed: if there is to be a compulsory license covering such retransmissions, it will have to come from newly enacted legislation and not existing law.

Is There a Need for a Compulsory License for Internet Retransmissions of Broadcast Signals?

The Copyright Office has long been a critic of compulsory licensing for broadcast retransmissions. A compulsory license is not only a derogation of a copyright owner's exclusive rights, but it also prevents the marketplace from deciding the fair value of copyrighted works through government-set price controls. In addition, we believe that a compulsory license for Internet retransmissions of television broadcast signals is not warranted, and such activity is not comparable to retransmissions via cable and satellite.

Opposition to the cable compulsory license, and calls for its repeal, began not long after its enactment. In 1981, the Office recommended to this Subcommittee that the cable license be abolished, stating:

The general principle of the copyright law is that copyright owners are entitled to receive fair compensation for the public performance of their works, especially in the case of performances for profit. Cable systems perform copyrighted works for profit when they make secondary transmissions of such works. Copyright owners will be more confidently assured of rightful compensation if that compensation is determined by contract and the market rather than by compulsory license.

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In the last five years, the cable industry has progressed from an infant industry to a vigorous, economically stable industry. Cable no longer needs the protective support of the compulsory license.
A compulsory license mechanism is in derogation of the rights of authors and copyright owners. It should be utilized only if compelling reasons support its existence. Those reasons may have existed in 1976. They no longer do.
Copyright/Cable Television: Hearings on H.R. 1805, H.R. 2007, H.R. 2108, H.R. 3528, H.R. 3530, H.R. 3560, H.R. 3940, H.R. 5870,
and H.R. 5949 Before the Subcomm. On Courts, Civil Liberties, and the Administration of Justice, 97th Cong., 959-960 (1981)(statement of David Ladd, Register of Copyrights, Copyright Office).
In 1989, the Federal Communications Commission issued a report arguing that the cable license undervalued broadcast programs and should be repealed in favor of marketplace negotiations. Report and Order in Docket No. 87-25, 4 FCC Rcd. 6711 (1989).
Nevertheless, shortly before issuance of that report, Congress added to the stable of compulsory licenses by passing the Satellite Home Viewer Act of 1988, creating the section 119 license for satellite retransmission of broadcast signals.
With each renewal of the satellite license, in 1994 and 1999, the Office has been asked by Congress to analyze the cable and satellite licenses, and each time the Office has questioned whether they should continue to exist. The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis at 81, (1992); A Review of Compulsory Licensing Regimes Covering Retransmission of Broadcast Signals at 32-33 (1997). At the same time, we recognized the economic and political considerations surrounding the retention of the cable license and the extension of the satellite license. Although the economic reasons for enacting the cable compulsory license have largely disappeared, as the Register recognized in 1981, the permanence of that license, and the expectations that it has created both for copyright owners and users, makes elimination of the cable license difficult. The permanence of the cable license directly affects the continued reauthorization of the satellite license. Congressional concern for competition in the video programming marketplace raises the likelihood that the satellite license will continue to be renewed. Moreover, we recommended in our 1997 compulsory license Report that the satellite license remain in existence for as long as the cable license continues. 1997 Report at 33.

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Although we still firmly believe that the cable and satellite licenses ultimately should yield to a regime of exclusive rights and the free marketplace, we see a fundamental difference between Internet retransmissions and retransmissions via cable and satellite, a difference that I believe makes compulsory licensing for the Internet inadvisable. That difference is in the nature of the delivery platform for the retransmissions. Both cable and satellite provide a means of delivering broadcast signals that copyright owners cannot practicably do themselves. Copyright owners license broadcasters to perform their works via over-the-air broadcasting, which has certain important limitations. There are topographical limitations to over-the-air broadcasting which limit certain viewers' ability to receive a signal. There are also distance limitations to over-the-air broadcast signals that restrict how far a signal will travel. Cable eliminates these limitations by being a closed path transmission service--a wire--that not only allows clear receipt of nearby broadcast stations, but also allows receipt of stations far beyond the reach of any over-the-air signal. The same is true with satellite, which can deliver broadcast programming to subscribers who are not capable of receiving over-the-air broadcasting, and cannot receive a quality picture by other means.

By building multi-billion dollar delivery systems, cable and satellite deliver broadcast programming in ways that the copyright owners of those programs and the broadcasters cannot. This is not true, however, for the Internet. Parties that wish to make use of the Internet to retransmit broadcast programming do not have to build the delivery platform; it already exists. The technology is readily available and is not particularly expensive. Copyright owners of broadcast programming do not need to turn to someone else to place their content on the Internet; they can do it themselves. In fact, certain television broadcasters have already begun to place portions of their signals on the Internet, demonstrating that there is no need for a third-party packager to do it for them. See, Hearings Before the Subcomm. on Telecommunications, Trade & Consumer Protection of the House Commerce Committee, 106th Cong. (2000)(statement of Paul Karpowicz). OR, copyright owners can freely decide to license others to transmit their programming over the Internet. But it should be their choice.

Additionally, although Internet transmissions of television broadcast signals presumably would be "streamed" using technology intended to prevent the making of copies of broadcast programs, apparently it is all too easy for recipients of such transmissions to find ways to circumvent those measures and

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download perfect digital copies, which then could be redisseminated without limit online. The resulting harm to copyright owners in a global market could be irreparable. Although this risk also exists when copyright owners stream their own programming on the Internet, in such cases they are voluntarily assuming that risk. Compulsory licensing permitting third parties to stream television programming gives the copyright owner no choice in the matter.

Because the Internet is available to copyright owners, unlike the delivery platforms for cable and satellite, and because of the potential of a devastating effect, we see no reason to create a compulsory license giving third parties permission to retransmit broadcast signals. Copyright owners should be allowed to determine when and under what circumstances they wish to make broadcast programming available over the Internet without concern that a third-party packager will make these decisions for them under the auspices of a government-mandated compulsory license.

In sum, retransmission of broadcast signals over the Internet is very different from retransmission by cable operators and satellite providers. The free marketplace must be allowed to develop and operate. Copyright owners must be able to decide when, and under what circumstances, broadcast programming will be retransmitted via the Internet.

Should There Be a Compulsory License for Retransmission of Local Signals on the Internet?

Last year, during the House and Senate conference on the Satellite Home Viewer Improvement Act, the matter of delivery of local broadcast stations in smaller, rural markets across the country received great attention. The issue was raised when certain satellite carriers indicated that they would only provide local-into-local retransmissions of broadcast stations for approximately the top 70 television markets in the United States. This year, both the House and the Senate passed loan guarantee legislation to enable construction of delivery platforms to bring local retransmissions of broadcast stations to all 210 television markets.

Some have suggested that rather than encourage the construction of new delivery platforms for local broadcast signals, the government should authorize retransmission of local signals on the Internet. We think that this is not a good idea, for the following reasons.

Our principal concern is the extent to which Internet retransmissions of broadcast signals can be controlled geographically. The Internet is a worldwide system with the capability of transmitting, or retransmitting, copyrighted works

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to hundreds of millions of viewers within seconds. If a compulsory license were created for retransmission of local broadcast signals, it is unclear how the retransmission of those signals could be limited to their local markets. iCraveTV's feeble attempts to limit the retransmission of Buffalo television stations to Canadian viewers by requiring entry into a computer of a Canadian telephone area code and requiring the user to certify that he is receiving the transmission from a computer terminal or display device located within Canada, were ineffective. In response, copyright owners brought a successful copyright infringement suit that blocked iCraveTV retransmissions in the U.S. and, effectively, shut it down altogether. Some firms are working on software and hardware that would restrict the distribution of information, which could include broadcast retransmissions, to specific Internet customers or to customers located in a specific geographic area. But no one has yet rolled out a fail-proof system, and if experience has taught anything with technological controls to copying, it is that it is not long before they are hacked or circumvented.

Because of the ease with which copyrighted materials can move around the world on the Internet, the defeat of a keylock system can spell instant disaster for these works. Broadcast programming intended for limited television markets within the U.S. could become available worldwide with no control or compensation for the copyright owner. Further, even if protection devices are in place to limit receipt of a broadcast signal from a source to a specific geographic location, there may be no control over the receiver of that signal that prevents him from further retransmitting the signal to others. Again, technological solutions may be developed to address these concerns, but until they are, and unless we can be confident of their reliability and security, enactment of a compulsory license for local signals would place broadcast programming in jeopardy.

Some have asserted that signal theft is signal theft, and that such activities on the Internet would be no different than signal theft of cable or satellite service. We disagree. Cable is a closed path retransmission service with little customer interactivity. While a consumer can obtain an illegal "black box" for cable, that consumer cannot use his or her equipment to defeat the encryption system for cable signals, nor can that consumer further retransmit the cable signals around the world. The same is true for satellite. One can obtain an illegal smart card to make a digital satellite box operate, but that equipment cannot make a satellite signal suddenly available to anyone with a television set. These activities can occur, however, on the

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Internet, which makes comparisons between retransmissions via cable or satellite and the Internet inapposite.

International Considerations

In addition to the domestic policy implications raised by broadcasting on the Internet, there are important international considerations as well. The U.S. has obligations under the Berne Convention for the Protection of Literary and Artistic Works (Berne), the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), and the recently ratified WIPO Copyright Treaty (WCT) that relate to broadcasting and Internet transmissions. In particular, to the extent that Congress considers the option of compulsory licensing of broadcast television signals for retransmission on the Internet, Berne imposes specific limitations on member countries' ability to impose such licenses

The Berne Convention

Among the obligations to which the U.S. is subject as a member of Berne is the requirement that authors be granted the exclusive right of authorizing "communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one."(2) Under Berne, the retransmission of television programming, whether by terrestrial rebroadcasting, by cable, by satellite, or over the Internet, must be subject to the author's exclusive rights.

These exclusive rights are not absolute. Berne permits countries to "determine the conditions under which the rights . . . may be exercised" by national legislation. This includes the imposition of compulsory licensing in appropriate circumstances. The cable and satellite licenses under sections 111, 119, and 122 of the Copyright Act are examples of national laws that "determine the conditions under which the rights" of copyright owners in the content of broadcast television signals "may be exercised."

Berne establishes three express limitations on the conditions that a country may impose by national legislation: the conditions "shall apply only in the country where they have been prescribed; [t]hey shall not in any circumstances be prejudicial to the moral rights of the author;" and they must not prejudice the author's right to obtain equitable remuneration. The first of these limitations is directly relevant to any compulsory license in the Internet context.

This Berne limitation on compulsory licensing flows from the territorial nature of copyright laws. National copyright laws govern conduct within their respective territories. Authors and other copyright owners must look to the national laws of the

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country in which protection is claimed to determine their rights. A necessary corollary to this principle of territoriality is that the national copyright law of one country cannot authorize the exercise of exclusive rights in another country.

The limitation can be interpreted to be either a mere restatement of this territorial principle or as a positive limitation on "conditions" on the exercise of an author's retransmission right that a Berne member may impose. Under the first interpretation, it would be permissible for a Berne country to allow retransmission of works under a compulsory license in a fashion that permits their receipt in another country, although that conduct may violate the copyright laws of the recipient country and subject the retransmitting entity to infringement liability. Under the second interpretation, a Berne country may not, consistent with its Berne obligations, permit retransmissions outside of its borders under a compulsory license.

The view of the Copyright Office is that Berne requires member countries to impose territorial limitations on retransmissions that are carried out under a compulsory license. The alternative interpretation would require us to read the limitation as surplus verbiage, since it would merely restate what the principle of territoriality makes clear: the copyright law of one country does not govern conduct in another. In addition, the territorial limitation is one of three limitations on compulsory licensing, the other two of which--that a compulsory licensing regime not prejudice an author's moral rights and right of remuneration--are clearly positive limitations on the law of member countries.

In order to comply with Berne's territorial limitation on compulsory licenses, a compulsory license for retransmission of broadcast television signals on the Internet could only permit such transmissions for reception within the United States. With cable television, confining the application of the compulsory license provisions of the Copyright Act to the territory of the United States does not pose a major technical challenge: the wire must stop at the water's edge. Direct broadcast satellite poses a greater challenge, since the "footprint" on the ground where the satellite signal can be received often crosses national boundaries. However, since these signals are encrypted and require a special decoder for viewing, territorial limitations can be enforced by controlling the availability of the decoders.

Given the global reach of the Internet, the technical issue of whether a signal can be confined to the United States becomes critical to determining whether a Berne-compatible compulsory licensing regime is possible. It appears that the answer depends

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largely on the business model adopted by an entity that wishes to retransmit television signals on the Internet.

It is possible that certain signals transmitted on the Internet could be treated like signals emanating from a satellite that has a footprint covering the entire planet. In order to enforce territorial restrictions, this approach would require that the signals be encrypted and that the decoders be made available only within the United States. This approach requires, however, that those engaged in Internet retransmissions adopt a subscription model. In addition, extreme caution should be exercised not to overextend the analogy to satellite transmissions. Certain implementations of this approach may not be as technologically sound as existing systems for preventing unauthorized reception of satellite signals and, unlike satellite decoders, personal computers connected to the Internet are capable of retransmitting a signal once decoded.

As the iCraveTV controversy demonstrated, limiting territorial distribution of signals in an open model, where signals are not encrypted, presents a much greater technical challenge. As far as we have been able to ascertain through our discussions with the industry, there is no technology at the present time that is one hundred percent effective at preventing reception of signals outside the boundaries of a particular country.

Given the present state of the technology, it appears unlikely that we could implement a Berne-compatible compulsory licensing regime that permits unencrypted retransmissions of television signals over the Internet. A compulsory licensing regime that required retransmissions to be encrypted, and prohibited foreign distribution of the decoding technology, could satisfy the territorial limitations of Berne, provided the technology was effective in preventing reception of the retransmitted signals outside the United States.

The WTO TRIPs Agreement

All of the substantive obligations of Berne (apart from the provision relating to moral rights) are incorporated by reference in the WTO TRIPs agreement. If a compulsory license does not pass muster under Berne, it does not pass muster under TRIPs either. In addition, TRIPs includes a number of obligations that are independent of Berne. None of these, however, appear to be applicable to transmission of television broadcasts on the Internet.(3)

Although TRIPs does not add any relevant substantive obligations, it does make the Berne obligations that are incorporated by reference subject to WTO dispute resolution. Consequently, a WTO member that concludes that a provision of our law is incompatible

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with Berne can request that a dispute resolution panel be convened to hear a case against the United States.

WIPO Copyright Treaty (WCT)

The WCT supplements the Berne Convention in several important respects. As this Subcommittee is well aware, several aspects of this agreement required changes to U.S. law--notably those aspects of the agreement relating to circumvention of technological protection measures and tampering with copyright management information.(4) Another provision of the WCT, which did not require any change in U.S. law, requires parties to grant copyright owners an exclusive right of communication to the public, including making a work available to the public on demand.(5)

The right of communication to the public under the WCT is general in nature and not limited to a particular technology. It covers over-the-air broadcasts as well as digital transmissions and retransmissions of works through cable systems and over the Internet. The WCT communication right, however, is "without prejudice" to the broadcasting and communication rights under Berne. This indicates that those aspects of the broader communication right in the WCT that are covered under the more specific rights in Berne are covered by the provisions of the latter treaty. Since the retransmission of television signals on the Internet is already covered under Berne, the broadcast and communication rights under Berne, and not the communication right under the WCT, would govern. The WCT, therefore, does not appear to add any substantive obligation relevant to retransmissions of broadcast signals on the Internet.

II. INTERNET TRANSMISSIONS OF COPYRIGHTED SOUND RECORDINGS

Unlike the retransmission of television broadcast signals, audio transmission of sound recordings via the Internet has been taking place for some time and continues to grow. Recent figures show an increase in the number of radio webcasters from a low of 56 stations in 1996 to well over 3,500 stations today. See www.brsradio.com/press000410.html (April 10, 2000). The Digital Millennium Copyright Act of 1998 amended portions of section 112 and section 114 of the Copyright Act to address transmissions of sound recordings over the Internet made by noninteractive, nonsubscription services and transmissions made by preexisting satellite digital audio radio services. The Copyright Office is currently engaged in several proceedings concerning these provisions, which are addressed below.

Most audio transmissions over the Internet involve the performance of music. Recorded music involves two distinct copyrights. First, there is a copyright for the underlying music

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itself. This copyright typically belongs to the songwriter. There is no compulsory license scheme in the Copyright Act for the performance of a copyrighted song; the licensing of these performances is typically done through one of the performing rights societies, ASCAP, BMI, or SESAC.

Second, there is a copyright for the sound recording itself, separate from the underlying music. As we discussed at another hearing three weeks ago, this copyright typically belongs to a record company. The performance right granted a copyright owner of a sound recording is more limited than that for the underlying music, and certain performances of sound recordings are exempt from copyright, while others are subject to compulsory licensing. For a long time in American copyright law, sound recordings enjoyed all of the exclusive rights granted by copyright, except for the performance right. A variety of reasons existed for this exclusion, including the fact that sound recordings did not even receive any copyright protection until 1972, and radio broadcasters' unwillingness to pay two copyright fees each time a music recording was played over-the-air. However, in 1995, Congress passed the Digital Performance Right in Sound Recordings Act, which created a limited performance right for sound recordings. Digital broadcasts of recorded music remained exempt, but interactive services providing subscribers with digital transmission of recorded music were subject to the performance right. In addition, certain noninteractive digital subscription services (typically music services delivered over cable and satellite television systems) were subject to the performance right, but were granted a compulsory license for their performances of sound recordings. To take advantage of this compulsory license, found in section 114 of the Copyright Act, one must comply with a number of limitations on the frequency and identification of the music performed by the service. These limitations are designed to discourage subscribers from engaging in home taping of the music performed in digital format. See 17 U.S.C. 114(d)(2)(C) (1995).

With the proliferation of music on the Internet in the latter half of the 1990's, Congress reconsidered and adjusted the status of the performance right in sound recordings. For reasons that I have already discussed, transmissions of sound recordings over the Internet are technologically different from similar transmissions via cable or satellite. In order to perform a copyrighted song over a computer, copies of that work must be made along the transmission path to deliver the work. These copies are typically ephemeral in nature, but are necessary to enable the work to travel from the computer server to the desktop

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computer. Use of a copyrighted sound recording in this context consequently may require a license for both the performance right and the reproduction right.

After comprehensive negotiations between representatives of webcasters on the Internet and sound recording interests, Congress enacted the Digital Millennium Copyright Act of 1998. The DMCA created a compulsory licensing scheme for certain digital transmissions of sound recordings, again subject to conditions designed to discourage and prevent home copying of recorded music. Section 114 of the Copyright Act was amended by expanding the compulsory license for the performance right to a sound recording to include "eligible nonsubscription services" (i.e., webcasters), and section 112 was amended to address the reproduction right. The statutory royalty fees and terms of payment were not prescribed in either of these licenses, but, as with the more limited section 114 compulsory license established in 1995, instead were subject to the Copyright Arbitration Royalty Panel (CARP) process at the Copyright Office.

The setting of rates and terms for the new section 112 and 114 licenses is still pending at the Copyright Office. Procedural matters have delayed the start of the CARP proceedings. In addition to procedural delays, both the Recording Industry of America (RIAA) and the Digital Media Association (DiMA) have asked the Office to conduct rulemakings addressing the meaning of certain terms contained in section 114 of the Copyright Act. The RIAA petition seeks a ruling from the Office as to whether a broadcaster's transmission of its over-the-air signal on the Internet is exempt from copyright liability under section 114, or is subject to the licensing provisions of that section. A substantial number of the webcasters who have filed initial notices of digital transmission of sound recordings under the compulsory license are radio broadcasters or licensees of radio broadcasters who transmit radio broadcasts not only on the air, but also on the Internet. The Office recently published a Notice of Proposed Rulemaking (NPRM), seeking comment on the RIAA's proposal that the Office amend its rules governing this compulsory license to clarify that Internet transmissions of broadcasts are not exempt. 65 FR 14227 (March 16, 2000). We have received public comment on this NPRM and expect to issue a decision in the near future.

There is another development related to our rulemaking proceeding on this matter. The National Association of Broadcasters (NAB) have filed a lawsuit against the RIAA in the federal district court for the Southern District of New York, seeking a declaratory ruling that broadcaster transmissions of over-the-air

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signals are exempt under section 114. RIAA has moved to dismiss the suit on a jurisdictional basis. The motion was argued a couple of weeks ago; and as of the date this testimony was submitted, it is our understanding that the court has not yet ruled. NAB has suggested that we should defer to the court rather than proceed with our rulemaking.

Additionally, DiMA seeks a ruling from the Office as to the meaning of the term "interactive service" under section 114(j)(7) of the Copyright Act. As noted above, an interactive service transmitting sound recordings over the Internet is not subject to compulsory licensing, and is governed by copyright owners' exclusive rights. DiMA asserts that webcasters who seek some information from subscribers as to their musical preferences are not interactive services and wants the Office to amend its rules to reflect this interpretation. The Copyright Office has published a Federal Register notice seeking public comment on DiMA's petition. 65 FR 33266 (May 23, 2000). The deadline for the first round of comments is a week from today.

It appears that the most pressing issues relating to this compulsory license are currently before the Office in pending rulemakings and CARP proceedings, so it would be inappropriate for me to express any views on them at this time. However, I am certain that many of the witnesses in the third panel today will have something to say about those issues.

International Considerations

By contrast with transmissions of television programming, transmissions of sound recordings are not governed by the Berne Convention. The treaties to which the United States is a party that govern the treatment of sound recordings are the Geneva Phonograms Convention, the TRIPs Agreement and, once it becomes effective, the WIPO Performances and Phonograms Treaty (WPPT). The Geneva Phonograms Convention addresses only duplication and dissemination of sound recordings, and contains no obligations with respect to transmissions. Similarly, the TRIPs Agreement grants no rights to performers or producers of phonograms with respect to transmissions of fixed performances. Consequently, the compulsory licensing regime for webcasting of sound recordings under U.S. law is unaffected by our Geneva and TRIPs obligations. The WPPT grants performers and producers of phonograms what is called a "right of remuneration" for broadcasting or communication to the public of sound recordings. Unlike an exclusive right, a right of remuneration contemplates that the right holder may not have the right to prevent a given activity, but will be entitled to a payment.

The provision of the WPPT concerning the right of remuneration

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for broadcasting and communication to the public permits parties to make a declaration that they will not grant the right, or that they will limit its application. In its instrument of ratification of the WPPT, the U.S. made the following declaration:

Pursuant to Article 15(3), the United States declares that it will apply the provisions of Article 15(1) only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under United States law.

As a result of this declaration, the U.S. obligations concerning broadcasting and communication to the public of sound recordings do not extend to free transmissions of sound recordings on the Internet. Even if they did, however, the compulsory licensing regime adopted for webcasting in the DMCA, which provides for royalty payments to right holders, would qualify as a right of remuneration under the WPPT.

CONCLUSION

Once again, we thank you for the opportunity to address the Subcommittee on important issues relating to copyright law and policy. As always, we are pleased to offer our assistance to the Subcommittee in any way that you find to be helpful.

MARYBETH PETERS

Representative

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