

TREATMENT OF PRE-1978 PUBLICATION OF SOUND
 RECORDINGS

OCTOBER 21, 1997.—Committed to the Committee of the Whole House on the State
 of the Union and ordered to be printed

Mr. COBLE, from the Committee on the Judiciary,
 submitted the following

R E P O R T

[To accompany H.R. 1967]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill
 (H.R. 1967) to amend title 17, United States Code, to provide that
 the distribution before January 1, 1978, of a phonorecord shall not
 for any purpose constitute a publication of the musical work em-
 bodied therein, having considered the same, reports favorably
 thereon without amendment and recommends that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 1967 resolves problems created by recent judicial interpretations of provisions of the 1909 Copyright Act. It makes clear that the distribution of a musical record, disc or tape before 1978 did not constitute a publication of the musical composition(s) embodied in that disc or tape.

BACKGROUND AND NEED FOR THE LEGISLATION

Under the 1909 Copyright Act, a copyright owner had to secure her rights to her work once it was “published” by providing statutory notice to the public that the work was copyrighted. In *Rosette v. Rainbo Mfg. Corp.*, 546 F. 2d 461 (2d Cir. 1976), the United States Court of Appeals for the Second Circuit held that the sale of a phonorecord did not a “publication” of the work(s) contained within the phonorecord for purposes of the 1909 Copyright Act, because a record is not a “copy” of the works contained within it (citing the Supreme Court’s ruling in *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908), which held that a piano roll is not a “copy” of the underlying composition.) Based upon the Court’s holding that the distribution of a phonorecord did not constitute a copy of any work contained therein, and on the Copyright Office’s advice, songwriters and music publishers did not attempt to assure that the cover of a phonorecord which contained one of their works had printed upon it a statutory notice of ownership of the copyrighted work(s) contained within the phonorecord.

As a practical matter, industry practice would make it very difficult for songwriters and music publishers to ensure that a phonorecord cover contain a copyright notice regarding works contained within the recording, since these owners do not own the copyright in the phonorecord itself, and therefore do not control the production and publishing of the cover. Usually, a recording label company owns the copyright in the distribution (and digital performance) of the phonorecord itself, while a songwriter or music publisher owns the copyright to a work or works contained within any one recording.

The Copyright Office interpreted the 1909 Act, based upon the above practical considerations and legal interpretations, to mean that the release of a phonorecord was not a “copy” for purposes of the Act, and thus advised songwriters and music publishers that there was no need to comply with the 1909 notification requirements for phonorecord releases. This interpretation was affirmed in 1976 by *Rosette*.

The United States Court of Appeals for the Ninth Circuit, in *La Cienega Music Co. v. ZZ Top*, 44 F. 3d 813 (9th Cir. 1995), rejected the *Rosette* interpretation of the 1909 Act and held that the selling of a phonorecord does constitute a “publication” of any of the underlying works, requiring compliance with the notice requirements. This decision effectively places all pre-1978 works (the 1909 Act applies to pre-1978 works) under a cloud since, in reliance on the 1976 decision and Copyright Office advice, most recordings of musical works at that time were released without a copyright notice for works contained within.

H.R. 1967 reverses the *La Cienega* decision and affirms in the Copyright Act that a phonorecord released before 1978 did not constitute a “publication” under the 1909 Copyright Act.

HEARINGS

The Committee’s Subcommittee on Courts and Intellectual Property held a field hearing on H.R. 1967 in Nashville, Tennessee, on June 27, 1997. Testimony on this issue was received from Paul Williams, songwriter, on behalf of the American Society of Composers, Authors and Publishers; Ed Murphy, President, National Music Publishers Association; George David Weiss, Songwriter, Songwriters Guild of America; and Frances Preston, President and Chief Executive Officer, Broadcast Music Incorporated.

COMMITTEE CONSIDERATION

On September 30, 1997, the Subcommittee held a markup on H.R. 1967. No amendments were offered and the bill was favorably reported, by voice vote, a quorum being present, to the full Committee. On October 7, 1997, the Committee held a markup on H.R. 1967. No amendments were offered and the bill was favorably reported, by voice vote, a quorum being present, to the House.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(1)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(1)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1967, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
 CONGRESSIONAL BUDGET OFFICE,
 Washington, DC, May 16, 1997.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1967, a bill to amend title 17, United States Code, to provide that the distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Rachel Forward, who can be reached at 226-2860.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

H.R. 1967—Title 17, United States Code, to provide that the distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein

CBO estimates that enacting H.R. 1967 would have no significant impact on the federal budget. Because H.R. 1967 would not affect direct spending or receipts, pay-as-you-go procedures would not apply. In addition H.R. 1967 contains no private-sector or intergovernmental mandates as defined in the Unfunded Mandates Reform Act of 1995 and would not affect the budgets of state, local, or tribal governments.

H.R. 1967 would affirm the Copyright Office's current policy that the distribution of a phonorecord before 1978 does not constitute a publication of the underlying musical composition. That policy is consistent with a 1976 ruling from the Second U.S. Circuit Court of Appeals (*Rosette v. Rainbo Manufacturing Corporation*). In 1995 the Ninth U.S. Circuit Court of Appeals issued a contrary decision (*La Cienega Music Co. v. ZZ Top*), which held that pre-1978 musical compositions distributed on phonorecords constitute published works and must bear the required copyright notice to avoid becoming part of the public domain. Because the bill would confirm the Copyright Office's treatment of pre-1978 musical compositions, enacting H.R. 1967 would not significantly affect the workload or costs of the office.

The CBO staff contact for this estimate is Rachel Forward, who can be reach at 226-2860. The estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 1967 will have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS

SECTION 1.—TREATMENT OF PRE-1978 PUBLICATION OF SOUND RECORDINGS

This section affirms that the distribution of a phonorecord to the public before January 1, 1978 did not constitute publication of a musical composition embodied in that phonorecord under the 1909 Copyright Act. It is intended to restore the law to what it was before the decision of the Ninth Circuit Court of Appeals in *La Cienega Music Co. v. Z.Z. Top*.¹

Until that decision, it was the long-standing view of the Copyright Office and the understanding of the music industry, as reflected in their business practices, that the sale or distribution of a recording to the public before January 1, 1978, did not constitute publication of the musical composition(s) embodied in the recording. This view was confirmed by the Second Circuit Court of Appeals in *Rosette v. Rainbo Record Mfg. Corp.*²

The *La Cienega* decision has, therefore, placed a cloud over the legal status of a large number of musical works recorded and sold before January 1, 1978. Moreover, it has called into question the long established interpretation of the Copyright Office. It is the intent of this section to remove the cloud and bring the law into conformity with the Second Circuit opinion and Copyright Office practices.

SECTION 2.—EFFECTIVE DATES

All amendments to the Copyright Act included in this bill take effect on the date of enactment of the legislation.

AGENCY VIEWS

U.S. DEPARTMENT OF COMMERCE,
OFFICE OF THE GENERAL COUNSEL,
Washington, DC.

Hon. HENRY J. HYDE, *Chairman*,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: I am writing to express the Administration's support for H.R. 1967, copyright legislation scheduled for consideration by your Committee.

We strongly support legislation to remove a cloud over the copyright status of thousands of musical works embodied in phonorecords distributed before 1978. In the case of *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 331 (1995), the Ninth Circuit held that the publication of a phonorecord published the underlying musical work, thereby upsetting years of business practices based on what was believed to be settled law. Under pre-1978 copyright law, it was widely accepted that the publication of a phonorecord did not publish the music embodied in that phonorecord. By holding that this was a publication of a musical work, the *La Cienega* decision casts doubt over the

¹ 44 F.3d 813 (9th Cir.), *cert. denied*, 64 U.S.L.W. 3262 (Oct. 10, 1995).

² 354 F. Supp. 1183 (S.D.N.Y.), *aff'd per curiam*, 546 F.2d 461 (2d Cir. 1976).

copyright status of these works because the phonorecords in which they were embodied did not include the notice of copyright required under the 1909 Copyright Act to secure Federal copyright protection. Enactment of H.R. 1967 would reverse the Ninth Circuit's *La Cienega* decision, thereby ensuring the continued copyright protection of these valuable musical works, estimated by industry to generate \$1.2 billion in annual revenues.

We urge the Committee to move promptly to report this bill.

The Office of Management and Budget advises that from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

KATHRYN R. LUNNEY,
Deputy General Counsel

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

SECTION 303 OF TITLE 17, UNITED STATES CODE

§ 303. Duration of copyright: Works created but not published or copyrighted before January 1, 1978

(a) Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2027.

(b) *The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.*