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## APPOINTMENTS BY THE MAJORITY LEADER

The PRESIDING OFFICER. The Chair on behalf of the majority leader, after consultation with the Democratic leader, pursuant to Public Law 93–415, as amended by Public Law 102–586 announces the appointment of James L. Burgess of Kansas to the Coordinating Council on Juvenile Justice and Delinquency Prevention, effective July 5, 1995.

The Chair on behalf of the majority leader, in consultation with the Democratic leader, pursuant to Public Law 102–246, appoints the following individual to the Library of Congress Trust Fund Board: Adele C. Hall of Kansas to a 5-year term.

## USE OF JEFFERSON DAVIS' DESK

Mr. GORTON. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Senate Resolution 161, submitted earlier today by Senators COCHRAN and LOTT.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

A resolution (S. Res. 161) to make available to the senior Senator from Mississippi, during his or her term of office, the use of the desk located in the Senate Chamber and used by Senator Jefferson Davis.

Mr. GORTON. Mr. President, I ask unanimous consent that the resolution be considered and agreed to; that the motion to reconsider be laid upon the table; and that any statements relating to the resolution appear at the appropriate place in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

So the resolution (S. Res. 161) was agreed to, as follows:

*Resolved*, That during the One hundred fourth Congress and each Congress thereafter, the desk located within the Senate Chamber and used by Senator Jefferson Davis shall, at the request of the senior Senator from the State of Mississippi, be assigned to such Senator, for use in carrying out his or her Senatorial duties during that Senator's term of office.

## REVISED EDITION OF STANDING RULES OF THE SENATE

Mr. GORTON. Mr. President, I ask unanimous consent that the Committee on Rules and Administration be directed to prepare a revised edition of the Standing Rules of the Senate, and that such standing rules be printed as a Senate document.

I further ask unanimous consent that 2,500 additional copies of this document be printed for the use of the Committee on Rules and Administration.

The PRESIDING OFFICER. Without objection, it is so ordered.

## DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS

Mr. GORTON. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of calendar No. 165, S. 227.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

A bill (S. 227) to amend title 17, United States Code, to provide an exclusive right to perform sound recordings publicly by means of digital transmissions, and for other purposes, which had been reported from the Committee on the Judiciary, with an amendment to strike all after the enacting clause and insert in lieu thereof the following:

*SECTION 1. SHORT TITLE.*

*This Act may be cited as the "Digital Performance Right in Sound Recordings Act of 1995".*

*SEC. 2. EXCLUSIVE RIGHTS IN COPYRIGHTED WORKS.*

*Section 106 of title 17, United States Code, is amended—*

*(1) in paragraph (4) by striking "and" after the semicolon;*

*(2) in paragraph (5) by striking the period and inserting "; and"; and*

*(3) by adding at the end the following:*

*"(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.".*

*SEC. 3. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS.*

*Section 114 of title 17, United States Code, is amended—*

*(1) in subsection (a) by striking "and (3)" and inserting "(3) and (6)";*

*(2) in subsection (b) in the first sentence by striking "phonorecords, or of copies of motion pictures and other audiovisual works," and inserting "phonorecords or copies";*

*(3) by striking subsection (d) and inserting:*

*"(d) LIMITATIONS ON EXCLUSIVE RIGHT.—Notwithstanding the provisions of section 106(6)—*

*"(1) EXEMPT TRANSMISSIONS AND RETRANSMISSIONS.—The performance of a sound recording publicly by means of a digital audio transmission or retransmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of—*

*"(A) a nonsubscription transmission, such as a nonsubscription broadcast transmission;*

*"(B) a retransmission of a nonsubscription broadcast transmission: Provided, That, in the case of a retransmission of a radio station's broadcast transmission—*

*"(i) the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter, however—*

*"(I) the 150 mile limitation under this clause shall not apply when a nonsubscription broadcast transmission by a radio station licensed by the Federal Communications Commission is retransmitted on a nonsubscription basis by a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the Federal Communications Commission; and*

*"(II) in the case of a subscription retransmission of a nonsubscription broadcast retransmission covered by subclause (I), the 150 mile radius shall be measured from the transmitter site of such broadcast retransmitter;*

*"(ii) the retransmission is of radio station broadcast transmissions that are—*

*"(I) obtained by the retransmitter over the air;*

*"(II) not electronically processed by the retransmitter to deliver separate and discrete signals; and*

*"(III) retransmitted only within the local communities served by the retransmitter;*

*"(iii) the radio station's broadcast transmission was being retransmitted to cable systems (as defined in section 111(f)) by a satellite carrier on January 1, 1995, and that retransmission was being retransmitted by cable systems as a separate and discrete signal, and the satellite carrier obtains the radio station's broadcast transmission in an analog format: Provided, That the broadcast transmission being retransmitted may embody the programming of no more than one radio station; or*

*"(iv) the radio station's broadcast transmission is made by a noncommercial educational broadcast station funded on or after January 1, 1995, under section 396(k) of the Communications Act of 1934 (47 U.S.C. 396(k)), consists solely of noncommercial educational and cultural radio programs, and the retransmission, whether or not simultaneous, is a nonsubscription terrestrial broadcast retransmission; or*

*"(C) a transmission or retransmission that comes within any of the following categories:*

*"(i) a prior or simultaneous transmission or retransmission incidental to an exempt transmission or retransmission, such as a feed received by and then retransmitted by an exempt transmitter: Provided, That such incidental transmissions or retransmissions do not include any subscription transmission or retransmission directly for reception by members of the public;*

*"(ii) a transmission or retransmission within a business establishment, confined to its premises or the immediately surrounding vicinity;*

*"(iii) a retransmission by any retransmitter, including a multichannel video programming distributor as defined in section 522(12) of the Communications Act of 1934 (47 U.S.C. 522(12)), of a transmission by a transmitter licensed to publicly perform the sound recording as a part of that transmission, if the retransmission is simultaneous with the licensed transmission and authorized by the transmitter; or*

*"(iv) a transmission or retransmission to a business establishment for use in the ordinary course of its business: Provided, That the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the sound recording performance complement. Nothing in this clause shall limit the scope of the exemption in clause (ii).*

*"(2) SUBSCRIPTION TRANSMISSIONS.—In the case of a subscription transmission not exempt under subsection (d)(1), the performance of a sound recording publicly by means of a digital audio transmission shall be subject to statutory licensing, in accordance with subsection (f) of this section, if—*

*"(A) the transmission is not part of an interactive service;*

*"(B) the transmission does not exceed the sound recording performance complement;*

*"(C) the transmitting entity does not cause to be published by means of an advance program schedule or prior announcement the titles of the specific sound recordings or phonorecords embodying such sound recordings to be transmitted;*

*"(D) except in the case of transmission to a business establishment, the transmitting entity does not automatically and intentionally cause any device receiving the transmission to switch from one program channel to another; and*

*"(E) except as provided in section 1002(e) of this title, the transmission of the sound recording is accompanied by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer.*

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"(3) LICENSES FOR TRANSMISSIONS BY INTERACTIVE SERVICES.—

"(A) No interactive service shall be granted an exclusive license under section 106(6) for the performance of a sound recording publicly by means of digital audio transmission for a period in excess of 12 months, except that with respect to an exclusive license granted to an interactive service by a licensor that holds the copyright to 1,000 or fewer sound recordings, the period of such license shall not exceed 24 months: Provided, however, That the grantee of such exclusive license shall be ineligible to receive another exclusive license for the performance of that sound recording for a period of 13 months from the expiration of the prior exclusive license.

"(B) The limitation set forth in subparagraph (A) of this paragraph shall not apply if—

"(i) the licensor has granted and there remain in effect licenses under section 106(6) for the public performance of sound recordings by means of digital audio transmission by at least 5 different interactive services: Provided, however, That each such license must be for a minimum of 10 percent of the copyrighted sound recordings owned by the licensor that have been licensed on an exclusive basis to interactive services, but in no event less than 50 sound recordings; or

"(ii) the exclusive license is granted to perform publicly up to 45 seconds of a sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

"(C) Notwithstanding the grant of an exclusive or nonexclusive license of the right of public performance under section 106(6), an interactive service may not publicly perform a sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording, Provided, That such license to publicly perform the copyrighted musical work may be granted either by a performing rights society representing the copyright owner or by the copyright owner.

"(D) The performance of a sound recording by means of a digital audio retransmission is not an infringement of section 106(6) if—

"(i) the retransmission is of a transmission by an interactive service licensed to publicly perform the sound recording to a particular member of the public as part of that transmission; and

"(ii) the retransmission is simultaneous with the licensed transmission, authorized by the transmitter, and limited to that particular member of the public intended by the interactive service to be the recipient of the transmission.

"(E) For the purposes of this paragraph—

"(i) a 'licensor' shall include the licensing entity and any other entity under any material degree of common ownership, management, or control that owns copyrights in sound recordings; and

"(ii) a 'performing rights society' is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owner, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

"(4) RIGHTS NOT OTHERWISE LIMITED.—

"(A) Except as expressly provided in this section, this section does not limit or impair the exclusive right to perform a sound recording publicly by means of a digital audio transmission under section 106(6).

"(B) Nothing in this section annuls or limits in any way—

"(i) the exclusive right to publicly perform a musical work, including by means of a digital audio transmission, under section 106(4);

"(ii) the exclusive rights to reproduce and distribute a sound recording or the musical work embodied therein under sections 106(1) and 106(3); or

"(iii) any other rights under any other clause of section 106, or remedies available under this title, as such rights or remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

"(C) Any limitations in this section on the exclusive right under section 106(6) apply only to the exclusive right under section 106(6) and not to any other exclusive rights under section 106. Nothing in this section shall be construed to annul, limit, impair or otherwise affect in any way the ability of the owner of a copyright in a sound recording to exercise the rights under sections 106(1), 106(2) and 106(3), or to obtain the remedies available under this title pursuant to such rights, as such rights and remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995."; and

(4) by adding after subsection (d) the following:

"(e) AUTHORITY FOR NEGOTIATIONS.—

"(1) Notwithstanding any provision of the antitrust laws, in negotiating statutory licenses in accordance with subsection (f), any copyright owners of sound recordings and any entities performing sound recordings affected by this section may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive payments.

"(2) For licenses granted under section 106(6), other than statutory licenses, such as for performances by interactive services or performances that exceed the sound recording performance complement—

"(A) copyright owners of sound recordings affected by this section may designate common agents to act on their behalf to grant licenses and receive and remit royalty payments, Provided, That each copyright owner shall establish the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other copyright owners of sound recordings; and

"(B) entities performing sound recordings affected by this section may designate common agents to act on their behalf to obtain licenses and collect and pay royalty fees, Provided, That each entity performing sound recordings shall determine the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other entities performing sound recordings.

"(f) LICENSES FOR NONEXEMPT SUBSCRIPTION TRANSMISSIONS.—

"(1) No later than 30 days after the enactment of the Digital Performance Right in Sound Recordings Act of 1995, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by subsection (d)(2) of this section during the period beginning on the effective date of such Act and ending on December 31, 2000. Such terms and rates shall distinguish among the different types of digital audio transmission services then in operation. Any copyright owners of sound recordings or any entities performing sound recordings affected by this section may submit to the Librarian of Congress licenses covering such activities with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

"(2) In the absence of license agreements negotiated under paragraph (1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings. In establishing such rates and terms the copyright arbitration royalty panel may consider the rates for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated as provided in paragraph (1). The parties to the proceeding shall bear the entire cost of the proceeding in such manner and proportion as the arbitration panels shall direct. The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept by entities performing sound recordings.

"(3) License agreements voluntarily negotiated at any time between one or more copyright owners of sound recordings and one or more entities performing sound recordings shall be given effect in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress.

"(4) The procedures specified in paragraphs (1) and (2) shall be repeated and concluded, in accordance with regulations that the Librarian of Congress shall prescribe—

"(A) within a 6-month period each time that a petition is filed by any copyright owners of sound recordings or any entities performing sound recordings affected by this section indicating that a new type of digital audio transmission service on which sound recordings are performed is or is about to become operational, and

"(B) between June 30 and December 31, 2000 and at 5-year intervals thereafter.

"(5)(A) Any person who wishes to perform a sound recording publicly by means of a nonexempt subscription transmission under this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording—

"(i) by complying with such notice requirements as the Register of Copyrights shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

"(ii) if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection.

"(B) Any royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set.

"(g) PROCEEDS FROM LICENSING OF SUBSCRIPTION TRANSMISSIONS.—

"(1) Except in the case of a subscription transmission licensed in accordance with subsection (f) of this section—

"(A) a featured recording artist who performs on a sound recording that has been licensed for a subscription transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the artist's contract; and

"(B) a nonfeatured recording artist who performs on a sound recording that has been licensed for a subscription transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the nonfeatured recording artist's applicable contract or other applicable agreement.

"(2) The copyright owner of the exclusive right under section 106(6) of this title to publicly perform a sound recording by means of a digital audio transmission shall allocate to recording artists in the following manner its receipts from the statutory licensing of subscription transmission performances of the sound recording in accordance with subsection (f) of this section:

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"(A) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians) who have performed on sound recordings.

"(B) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists) who have performed on sound recordings.

"(C) 45 percent of the receipts shall be allocated, on a per sound recording basis, to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings).

"(h) LICENSING TO AFFILIATES.—

"(1) If the copyright owner of a sound recording licenses an affiliated entity the right to publicly perform a sound recording by means of a digital audio transmission under section 106(6), the copyright owner shall make the licensed sound recording available under section 106(6) on no less favorable terms and conditions to all bona fide entities that offer similar services, except that, if there are material differences in the scope of the requested license with respect to the type of service, the particular sound recordings licensed, the frequency of use, the number of subscribers served, or the duration, then the copyright owner may establish different terms and conditions for such other services.

"(2) The limitation set forth in paragraph (1) of this subsection shall not apply in the case where the copyright owner of a sound recording licenses—

"(A) an interactive service; or

"(B) an entity to perform publicly up to 45 seconds of the sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

"(i) NO EFFECT ON ROYALTIES FOR UNDERLYING WORKS.—License fees payable for the public performance of sound recordings under clause (6) of section 106 shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).

"(j) DEFINITIONS.—As used in this section, the following terms have the following meanings:

"(1) An 'affiliated entity' is an entity engaging in digital audio transmissions covered by section 106(6), other than an interactive service, in which the licensor has any direct or indirect partnership or any ownership interest amounting to 5 percent or more of the outstanding voting or non-voting stock.

"(2) A 'broadcast transmission' is a transmission made by a broadcast station licensed as such by the Federal Communications Commission.

"(3) A 'digital audio transmission' is a digital transmission as defined in section 101, that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.

"(4) An 'interactive service' is one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large does not make a service interactive. If an entity offers both interactive and non-interactive services (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service.

"'(5) A 'nonsubscription transmission', 'nonsubscription retransmission', or a 'nonsubscription broadcast transmission' is any transmission or retransmission that is not a subscription transmission or retransmission.

"(6) A 'retransmission' includes any further simultaneous retransmission of the same transmission. Nothing in this definition shall be construed to exempt a transmission that fails to satisfy a separate element required to qualify for an exemption under section 114(d)(1).

"(7) The 'sound recording performance complement' is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than—

"(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or

"(B) 4 different selections of sound recordings

"(i) by the same featured recording artist; or

"(ii) from any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States,

if no more than three such selections are transmitted consecutively: Provided, That the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

"(8) A 'subscription transmission' is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission.".

**SEC. 4. MECHANICAL ROYALTIES IN DIGITAL PHONORECORD DELIVERIES.**

Section 115 of title 17, United States Code, is amended—

(1) in subsection (a)(1)—

(A) in the first sentence by striking out "any other person" and inserting in lieu thereof "any other person, including those who make phonorecords or digital phonorecord deliveries by means of a digital audio transmission,"; and

(B) in the second sentence by inserting before the period ", including by means of a digital phonorecord delivery";

(2) in subsection (c)(2) in the second sentence by inserting "and other than as provided in paragraph (3)," after "For this purpose,";

(3) by redesignating paragraphs (3), (4), and (5) of subsection (c) as paragraphs (4), (5), and (6), respectively, and by inserting after paragraph (2) the following new paragraph:

"(3)(A) A compulsory license under this section includes the right of the compulsory licensee to distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of a digital transmission which constitutes a digital phonorecord delivery, regardless of whether the digital transmission is also a public performance of the sound recording under section 106(6) of this title or of any nondramatic musical work embodied therein under section 106(4) of this title. For every digital phonorecord delivery by or under the authority of the compulsory licensee—

"(i) on or before December 31, 1997, the royalty payable by the compulsory licensee shall be the royalty prescribed under paragraph (2) and chapter 8 of this title; and

"(ii) on or after January 1, 1998, the royalty payable by the compulsory licensee shall be the royalty prescribed under subparagraphs (B) through (F) and chapter 8 of this title.

"(B) Notwithstanding any provision of the antitrust laws, for the purpose of this subparagraph, any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a)(1) may negotiate and agree upon the terms and rates of royalty payments under this paragraph and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay or receive such royalty payments. Such authority to negotiate the terms and rates of royalty payments includes, but is not limited to, the authority to negotiate the year during which the royalty rates prescribed under subparagraphs (B) through (F) and chapter 8 of this title shall next be determined.

"(C) During the period of June 30, 1996, through December 31, 1996, Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by subparagraph (A) during the period beginning January 1, 1998, and ending on December 31, 2007, or such earlier date (regarding digital transmissions) as the parties may agree. Such terms and rates shall distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general. Any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a)(1) may submit to the Librarian of Congress licenses covering such activities. The parties to each negotiation proceeding shall bear their own costs.

"(D) In the absence of license agreements negotiated under subparagraph (C), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to subparagraph (E), shall be binding on all copyright owners of nondramatic musical works and persons entitled to obtain a compulsory license under subsection (a)(1) during the period beginning January 1, 1998, and ending on December 31, 2007, or such earlier date (regarding digital transmissions) as may be determined pursuant to subparagraph (C) or chapter 8. Such terms and rates shall distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general. In addition to the objectives set forth in section 801(b)(1), in establishing such rates and terms, the copyright arbitration royalty panel may consider rates under voluntary license agreements negotiated as provided in subparagraph (C). The royalty rates payable for a compulsory license for a digital phonorecord delivery under this section shall be established de novo and no precedential effect shall be given to the amount of the royalty payable by a compulsory licensee for digital phonorecord deliveries on or before December 31, 1997. The parties to the proceeding shall bear the entire cost thereof in such manner and proportion as the arbitration panels shall direct. The Librarian of Congress shall also establish requirements by which copyright owners may receive

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*reasonable notice of the use of their works under this section, and under which records of such use shall be kept and made available by persons making digital phonorecord deliveries.*

*"(E)(i) License agreements voluntarily negotiated at any time between one or more copyright owners of nondramatic musical works and one or more persons entitled to obtain a compulsory license under subsection (a)(1) shall be given effect in lieu of any determination by the Librarian of Congress. Subject to clause (ii), the royalty rates determined pursuant to subparagraph (C) or (D) shall be given effect in lieu of any contrary royalty rates specified in a contract pursuant to which a recording artist who is the author of a nondramatic musical work grants a license under that person's exclusive rights in the musical work under section 106(1) or (3) to a person desiring to fix in a tangible medium of expression a sound recording embodying the musical work.*

*"(ii) Clause (i) shall not apply to—*

*"(I) a contract entered into on or before June 22, 1995, and not modified thereafter for the purpose of reducing such rates or of increasing the number of musical works within the scope of the contract covered by the reduced rates, except if a contract entered into on or before June 22, 1995, is modified thereafter for the purpose of increasing the number of musical works within the scope of the contract, any contrary royalty rates specified in the contract shall be given effect in lieu of royalty rates determined pursuant to subparagraph (C) or (D) for the number of musical works within the scope of the contract as of June 22, 1995; and*

*"(II) a contract entered into after the date that the sound recording is fixed in a tangible medium of expression substantially in a form intended for commercial release, if at the time the contract is entered into, the recording artist retains the right to grant licenses under sections 106(1) and 106(3).*

*"(F) The procedures specified in subparagraphs (C) and (D) shall be repeated and concluded, in accordance with regulations that the Librarian of Congress shall prescribe, as provided in section 803(a)(3), except to the extent that different times for the repeating and concluding of such proceedings may be determined in accordance with subparagraph (C) or (D).*

*"(G) Except as provided in section 1002(e) of this title, a digital phonorecord delivery licensed under this paragraph shall be accompanied by the information encoded in the sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer.*

*"(H)(i) A digital phonorecord delivery of a sound recording is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, unless—*

*"(I) the digital phonorecord delivery has been authorized by the copyright owner of the sound recording; and*

*"(II) the owner of the copyright in the sound recording or the entity making the digital phonorecord delivery has obtained a compulsory license under this section or has otherwise been authorized to distribute or authorize the distribution, by means of a digital phonorecord delivery, of each nondramatic musical work embodied in the sound recording.*

*"(ii) Any cause of action under this subparagraph shall be in addition to those available to the owner of the copyright in the nondramatic musical work under subsection (c)(5) and section 106(4) and the owner of the copyright in the sound recording under section 106(6).*

*"(I) The liability of the copyright owner of a sound recording for infringement of the copyright in a musical work embodied in the sound recording shall be determined in accordance with applicable law, except that the owner of a copyright in a sound recording shall not be liable for a digital phonorecord delivery by a third party if the owner of the copyright in the sound recording does not license the distribution of a phonorecord of the musical work.*

*"(J) Nothing in section 1008 shall be construed to prevent the exercise of the rights and remedies allowed by this paragraph, paragraph (7), and chapter 5 in the event of a digital phonorecord delivery, except that no action alleging infringement of copyright may be brought under this title against a manufacturer, importer or distributor of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or against a consumer, based on the actions described in such section.*

*"(K) Nothing in this section annuls or limits (i) the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of a digital transmission, under sections 106(4) and 106(6), (ii) except for compulsory licensing under the conditions specified by this section, the exclusive rights to reproduce and distribute the sound recording and the musical work embodied therein under sections 106(1) and 106(3), including by means of a digital phonorecord delivery, or (iii) any other rights under any other provision of section 106, or remedies available under this title, as such rights or remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.*

*"(L) The provisions of this section concerning digital phonorecord deliveries shall not apply to any exempt transmissions or retransmissions under section 114(d)(1). The exemptions created in section 114(d)(1) do not expand or reduce the rights of copyright owners under section 106 (1) through (5) with respect to such transmissions and retransmissions."; and*

*(5) by adding after subsection (c) the following:*

*"(d) DEFINITION.—As used in this section, the following term has the following meaning: A 'digital phonorecord delivery' is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, noninteractive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.".*

**SEC. 5. CONFORMING AMENDMENTS.**

*(a) DEFINITIONS.—Section 101 of title 17, United States Code, is amended by inserting after the definition of "device", "machine", or "process" the following:*

*"A 'digital transmission' is a transmission in whole or in part in a digital or other non-analog format.".*

*(b) LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY TRANSMISSIONS.—Section 111(c)(1) of title 17, United States Code, is amended in the first sentence by inserting "and section 114(d)" after "of this subsection".*

*(c) LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY TRANSMISSIONS OF SUPERSTATIONS AND NETWORK STATIONS FOR PRIVATE HOME VIEWING.—*

*(1) Section 119(a)(1) of title 17, United States Code, is amended in the first sentence by inserting "and section 114(d)" after "of this subsection".*

*(2) Section 119(a)(2)(A) of title 17, United States Code, is amended in the first sentence by inserting "and section 114(d)" after "of this subsection".*

*(d) COPYRIGHT ARBITRATION ROYALTY PANELS.—*

*(1) Section 801(b)(1) of title 17, United States Code, is amended in the first and second sentences by striking "115" each place it appears and inserting "114, 115,".*

*(2) Section 802(c) of title 17, United States Code, is amended in the third sentence by striking "section 111, 116, or 119," and inserting "section 111, 114, 116, or 119, any person entitled to a compulsory license under section 114(d), any person entitled to a compulsory license under section 115,".*

*(3) Section 802(g) of title 17, United States Code, is amended in the third sentence by inserting "114," after "111,".*

*(4) Section 802(h)(2) of title 17, United States Code, is amended by inserting "114," after "111,".*

**SEC. 6. EFFECTIVE DATE.**

*This Act and the amendments made by this Act shall take effect 3 months after the date of enactment of this Act, except that the provisions of sections 114(e) and 114(f) of title 17, United States Code (as added by section 3 of this Act) shall take effect immediately upon the date of enactment of this Act.*

AMENDMENT NO. 2302

(Purpose: To amend title 17, United States Code, to provide an exclusive right to perform sound recordings publicly by means of digital transmissions, and for other purposes)

Mr. GORTON. Mr. President, on behalf of Senators HATCH and FEINSTEIN, I send an amendment to the desk to the committee amendment and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Washington [Mr. GORTON] for Mr. HATCH, for himself and Mrs. FEINSTEIN, proposes an amendment numbered 2302.

Mr. GORTON. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The text of the amendment is printed in today's RECORD under "Amendments Submitted.")

Mr. GORTON. Mr. President, I ask unanimous consent that the amendment be agreed to.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment (No. 2302) was agreed to.

Mr. HATCH. Mr. President, I rise to request my colleagues' support for S. 227, the Digital Performance Right in Sound Recordings Act of 1995.

Mr. President, sound recordings—whether records, CD's, or tapes—are the only copyrighted works capable of performance that do not enjoy a performance right under our copyright law, even though they enjoy such a right in over 60 other nations. That

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simple fact, and the policies that underline it, is what S. 227 is all about. All other works, whether they be films, plays, operas, songs, or ballets are protected by the performance right which guarantees that when their works are heard or seen publicly, those who created and produced the work are compensated.

This legislation has been a long time in coming. From the very first moment that Federal copyright protection was extended to sound recordings in 1972, Congress has been concerned about whether this discrimination with regard to the performance right makes sense. In the Copyright Act of 1976, we ordered the Register of Copyrights to study this problem and to report to Congress "after consulting with representatives of owners of copyrighted materials, representatives of the broadcasting, recording, motion picture, entertainment industries, and arts organizations, representatives of organized labor and performers of copyrighted materials." 17 U.S.C. Section 114(d).

The report of the Copyright Office strongly recommended the adoption of a sweeping performance right for sound recordings. Over 10 years later, Congress requested a supplemental study of the issue, one that would take into account the many technological and legal changes in the intervening years. That report, filed in October of 1991, reaffirmed the view that sound recordings are illogically and unfairly discriminated against in our copyright law, with clearly identifiable adverse consequences for American artists individually and for our balance of trade in general.

Responding to these studies, Senator FEINSTEIN and I filed S. 1421 in the last Congress. That bill did not seek to create a performance right for all public performances of sound records, but instead addressed the most immediate threat to the owners of copyright in sound recordings—the ease of copying and greater fidelity that is achievable through the transmission of sound recordings by means of digital technologies.

We were unable to achieve passage of S. 1421 in the 103d Congress, but, because of the discussions and negotiations held throughout the past 2 years, we are able to present to this body a bill that accommodates the legitimate interests of everyone involved in the music licensing, distribution, and performance systems. The new digital performance right created by this bill applies to digital audio transmission of sound recordings which are part of an interactive service, or for which a subscriber pays a fee. The bill does not apply to traditional broadcasts and most other free transmissions, transmissions within business establishments, and transmissions made by commercial music services to businesses, among others. In drawing these lines, the Judiciary Committee, which I have the honor of chairing, attempted to balance the competing interests of the various copyright owners as well as users, and we think we have gotten it right.

S. 227 was unanimously approved by the Judiciary Committee on June 29, 1995. Indeed, I am pleased to note that, in addition to Senator FEINSTEIN and myself, the bill is now cosponsored by Senator DEWINE, Senator SIMPSON, Senator LOTT, Senator BAUCUS, Senator THURMOND, and Senator LEAHY. I believe it is ready for approval by the Senate today.

I should note that I am proposing today a substitute that contains a number of technical corrections to the bill as approved by the Judiciary Committee. The legislation is complex, and we have attempted to correct some inconsistent uses of defined terms and other technical errors. In addition, we have adopted a number of suggestions made by the Copyright Office to improve the procedures provided for in the legislation for negotiating and arbitrating royalty rates and terms. I am submitting a description of these changes and a section-by-section analysis for the RECORD along with this statement for the information of my colleagues.

Mr. President, today is an important day for creators of American music. Today we are correcting an anomalous inequity in our copyright law. Although American music has long been the world's most popular, we have strangely not given the creators of sound recordings a right to control and be remunerated for their works. Today we take a substantial step to ending that inequity.

This bill is forward looking. It largely leaves in place mature businesses that have grown up under the old copyright regime. It seeks to ensure that creators of sound recordings will have the rights they have been denied until now as the digital age dawns.

This bill also will help protect the creators of American music abroad by strengthening our international position in negotiating safeguards for the makers of American music performed in other countries, as it is all over the world.

Mr. President, it is important that the creators of America's music—whether they compose the score, write the lyrics, sing the songs, or produce the recordings—be fairly and equitably compensated for the public performances that result. For too long they have not been.

I therefore ask my colleagues to support and pass S. 227, so that this long overdue protection can be at last provided.

I also ask unanimous consent that a description of the changes from the committee-approved bill, and a new section-by-section analysis be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

DESCRIPTION OF TECHNICAL CORRECTIONS TO THE COMMITTEE-APPROVED BILL

SECTION 114(D)(1)—EXEMPT TRANSMISSIONS AND RETRANSMISSIONS

As originally approved by the Committee, the bill generally used to term "transmission" to refer to all transmissions, and the term "retransmission" to refer to the subset of transmissions that are further transmissions of initial transmissions. Thus, for example, new section 106(6) granted an exclusive right to perform a copyrighted sound recording publicly "by means of a digital audio transmission," and did not mention retransmissions, even though it was intended that the new performance right would cover all digital audio transmissions, including retransmissions.

Use of those terms in section 114(d)(1) was not always consistent with that general usage. The corrected bill uses these terms consistently. To clarify the original intention of the bill, the following changes were made:

In section 114(j), a new definition of the term "transmission" was added to clarify that that term includes retransmissions. The definitions of the terms "broadcast" transmission, "retransmission" and "nonsubscription" transmission were also revised to reflect this clarification.

In section 114(d)(1), the phrase "or retransmission" has been deleted in several places where it is not necessary in light of the new definitions.

Section 114(d)(1)(A) also was revised to reflect the clarified definitions. Subparagraph (A) originally was intended to exempt nonsubscription transmissions being initially delivered to the public, such as nonsubscription broadcast transmissions. With the clarification of the definitions, it became necessary to specify more precisely which transmissions are covered by this exemption. Thus, under the corrected bill, a transmission is exempt if it is either:

A nonsubscription transmission other than a retransmission (such as a nonbroadcast nonsubscription digital audio service that originates its transmissions rather than retransmitting a programming feed);

An initial nonsubscription retransmission made for direct reception by members of the public of a prior or simultaneous incidental transmission that is not made for direct reception by members of the public (such as an initial retransmission to the public of a network feed—whether the feed itself is exempt remains governed by section 114(d)(1)(C)(i)); or

A nonsubscription broadcast transmission. As defined in section 114(j)(2), this category includes all nonsubscription broadcast transmissions made by terrestrial broadcast stations licensed by the FCC, whether an initial transmission (such as a local newscast) or a retransmission (such as the retransmission of a feed supplied by a network or syndicator). This clause does not cover retransmissions by entities other than broadcast stations (such as cable systems) of transmissions made by broadcast stations; whether such retransmissions are themselves exempt remains governed by section 114(d)(1)(B) and, to some extent, section 114(d)(1)(C).

In light of the technical amendments to section 114(d)(1)(A), transmissions exempted

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by section 114(d)(1)(B)(i)(I) may already be exempt under section 114(d)(1)(A). For example, since section 114(d)(1)(A) exempts all nonsubscription broadcast tarnsmissions (including nonsubscription broadcast retransmissions), the retransmissions by terrestrial broadcast stations that are exempted by Section 114(d)(1)(B)(i)(I) are also exempt under section 114(d)(1)(A)(iii). To leave no doubt about the intention to exempt the retransmissions described in section 114(d)(1)(B)(i)(I) (without regard to the 150-mile limitation generally applicable under section 114(d)(1)(B)(i)), that section has been left intact.

In addition, section 114(d)(1)(C)(iii), an incorrect reference to section 522(12) of the Communications Act of 1934 was corrected.

SECTION 114(D)(3)— LICENSES FOR TRANSMISSIONS BY INTERACTIVE SERVICES

Subparagraph (A) limits the duration of exclusive performance licenses granted to interactive services, and subparagraph (B)(i) provides an exception to this limitation if a record company grants sufficient licenses to multiple interactive services. In describing this exception, the bill as originally approved referred to a percentage of the sound recordings licensed by a sound recording copyright owner "on an exclusive basis." However, to encourage diversity of licensing, the percentage should not be calculated based only on the number of sound recordings licensed "on an exclusive basis." Thus, the corrected bill deletes the phrase "on an exclusive basis" to make clear that the percentage should be calculated based on the number of sound recordings licensed by the copyright owner on an exclusive or nonexclusive basis.

Subparagraph (D) has been revised to use the phrase "retransmission of a digital audio transmission," which conforms to the terms defined and used throughout the bill.

SECTION 114(D)(4)—RIGHTS NOT OTHERWISE LIMITED

As the bill was originally approved, subparagraph (B)(ii) made clear that none of the changes made by the bill to section 114 of the Copyright Act is to affect the existing reproduction and distribution rights of sound recording and musical work copyright owners. Of course, the changes to section 114 are not intended to affect the adaptation rights of sound recording and musical work copyright owners either. The corrected bill adds a specific reference to section 106(2) of the Act to avoid any implication to the contrary.

SECTION 114(F)—LICENSES FOR NONEXEMPT SUBSCRIPTION TRANSMISSIONS

The Copyright Office provided thoughtful comments on various aspects of the bill as originally approved, including particularly those provisions concerning the mechanics of establishing statutory licensing royalty rates and terms. The corrected bill includes revised language to address a number of issues raised by those comments and related issues.

In paragraph (2):

New language makes clear that if an arbitration proceeding is necessary to establish the initial statutory licensing rates and terms, it will commence only upon the filing of a petition during a 60-day period which will commence 6 months after publication of notice of the initiation of the voluntary negotiation proceeding.

Language (already used in new section 115(c)(3)(D)) is added to clarify that the objectives set forth in existing section 801(b)(1) of the Copyright Act are to be considered by arbitration panels in setting statutory licensing rates and terms.

A reference to "terms" is added to clarify that arbitration panels may consider voluntarily negotiated license terms in determining the terms applicable to statutory licenses.

A sentence was deleted at the suggestion of the Copyright Office because substantially the same language already appears in existing section 802(c) of the Copyright Act.

The words "and made available" were added to be consistent with the provisions of new section 115(c)(3)(D).

Paragraph (4) of the bill was rewritten to clarify when voluntary negotiation or arbitration proceedings should commence. Under the revised paragraph, the Librarian of Congress is to publish notice of the initiation of voluntary negotiation proceedings:

(a) within 30 days after being petitioned to publish notice concerning a new type of digital audio transmission service; and

(b) in January 2000, and every five years thereafter.

If voluntary negotiations do not lead to an agreement among the interested parties, an arbitration may be commenced upon the filing of a petition in accordance with existing section 803(a)(1) of the Copyright Act during a specified 60-day period. That period commences:

(a) six months after publication of notice of the initiation of a voluntary negotiation proceeding concerning a new type of digital audio transmission service; and

(b) on July 1, 2000, and every five years thereafter.

Regardless of when an arbitration proceeding is commenced, it is to be concluded in accordance with the existing procedures in section 802 of the Copyright Act.

In paragraph (5)(A)(i), an erroneous reference to the "Register of Copyrights" has been corrected.

SECTION 114(I)—NO EFFECT ON ROYALTIES FOR UNDERLYING WORKS

The form of a reference to section 106(6) was conformed to other references in the bill.

SECTION 114(J)—DEFINITIONS

As explained in connection with section 114(d)(1), the corrected bill includes a new definition of the term "transmission" and several revised definitions intended to clarify the original intention of the bill concerning the use of those terms:

The revised definition of "transmission" clarifies the intention that that term covers both all initial transmissions and all retransmissions.

To reflect the use of the term "broadcast" transmission in section 114(d)(1)(A)(iii), as described above, the definition has been limited to transmissions by terrestrial broadcast stations. Whether nonbroadcast nonsubscription transmissions, for example by non-terrestrial services (such as satellite services), are exempt is governed by sections 114(d)(1)(A) (i) and (ii).

The definition of "nonsubscription" transmission was simplified in light of the other definitional changes.

The definition of "retransmission" previously set forth only an example of a retransmission. As modified, the provision defines the term as a further transmission of an initial transmission, as well as any further retransmission of the same transmission. Except as otherwise provided, a transmission is a "retransmission" only if it is simultaneous with the initial transmission.

SECTION 115(A)(1)

The phrase "by means of a digital audio transmission" was deleted because it is redundant.

SECTION 115(C)(3)(B)

The phrase "for the purpose of this subparagraph" was deleted because it is incorrect. The corrected provision conforms with the language of new section 114(e)(1).

SECTION 115(C)(3)(C)

This subparagraph was revised to provide that once statutory licensing rates and terms are established, they shall remain in effect until successor rates and terms are established, either by negotiation or, if necessary, arbitration. In addition, a reference to "digital transmissions" was replaced with the more precise term "digital phonorecord deliveries."

SECTION 115(C)(3)(D)

This subparagraph has been revised in several ways to clarify the mechanics of establishing compulsory licensing royalty rates and terms:

References to subparagraph (B) have been added because negotiations conducted under the procedures of subparagraph (C) are covered by the provisions of subparagraph (B).

An arbitration proceeding is to commence only upon the filing of a petition in accordance with existing section 803(a)(1). (Unlike arbitration under section 114, however, a petition of arbitration under section 115(c)(3)(D) may be filed at any time during the calendar year in which the mechanical royalty rates and terms for digital phonorecord deliveries are to be established.)

Once statutory licensing rates and terms are established, they shall remain in effect until successor rates and terms are established, either by negotiation or, if necessary, arbitration.

A reference to "digital transmissions" was replaced with the more precise term "digital phonorecord deliveries."

Arbitration panels may consider voluntarily negotiated license "terms" as well as "rates" in determining statutory licenses.

A sentence was deleted at the suggestion of the Copyright Office because substantially the same language already appears in existing section 802(c) of the Copyright Act.

SECTION 115(C)(3)(E)

Subparagraph (E)(i) was revised to make clear that the limitation on "controlled composition" clauses applies not only to contracts where a recording artist who is the author of a musical work grants a mechanical license in the work that, but also to contracts where the recording artist commits another person (such as the artist's music publisher) to grant a mechanical license in that work.

Several additional minor corrections were made to this subparagraph:

References to subparagraph (F) were added to recognize that subparagraphs (C), (D) and (F) all are relevant to determining compulsory licensing rates and terms.

The introduction to subparagraph (E)(ii) has been corrected to refer only to the second sentence of subparagraph (E)(i), because the exceptions contained in subparagraph (E)(ii) are not relevant to the first sentence of subparagraph (E)(i).

In subparagraph (E)(ii), ambiguous references to "such rates" and to "the right to grant licenses" have been replaced with more specific language.

SECTION 115(C)(3)(F)

As the bill was originally approved, this subparagraph provided that mechanical royalty rates and terms for digital phonorecord deliveries were to be reexamined every ten years, as provided in section 803(a)(3), except to the extent that different years for doing

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so were determined by agreement of the parties. If the parties did not agree on the shorter period for determining rates, the issue would have been subject to arbitration. It is preferable to provide a shorter period by statute, in the event the parties do not agree, to reexamine whether circumstances warrant a change in mechanical license rates and terms. Thus, the procedures specified in subparagraphs (C) and (D) shall next be repeated in five years if the parties do not choose another year.

SECTION 115(C)(3)(H)

Several corrections were made to this subparagraph:

In subparagraph (H)(i), an erroneous reference to section 510 was deleted.

New language in subparagraph (H)(i)(II) makes clear that, if no compulsory license is obtained, it is the musical work copyright owner (or someone acting under that person's authority) who must authorize the making of digital phonorecord deliveries of the musical work to digital phonorecord deliveries of the musical work to satisfy the requirements of subparagraph (H)(i)(II).

In subparagraph (H)(i)(II), the word "nondramatic" was deleted to confirm that the provisions of subparagraph (H) apply to digital phonorecord deliveries of sound recordings of both dramatic and nondramatic musical works.

In subparagraph (H)(ii), an erroneous reference to subsection (c)(5) was corrected.

SECTION 115(C)(3)(I)

Because section 115 generally applies only to nondramatic musical works, the word "nondramatic" was added to this subparagraph.

SECTION 115(C)(3)(J)

An erroneous reference to paragraph (7) was corrected.

CONFORMING AMENDMENTS

Additional conforming amendments have been added to the bill. These clarify the relationship between section 803 of the Copyright Act and the new arbitration provisions of sections 114 and 115.

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## DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995

### SECTION-BY-SECTION ANALYSIS

Section 1—Short Title.—This section sets forth the title of the Act, the "Digital Performance Right in Sound Recordings Act of 1995."

Section 2—Exclusive Rights in Copyrighted Works.—This section amends section 106 of title 17 to add a new paragraph (6) to provide an exclusive right to perform a copyrighted sound recording publicly by means of a digital audio transmission.

Section 3—Scope of Exclusive Rights in Sound Recordings.—This section amends section 114(a) by adding a reference to new section 106(6) in the list of exclusive rights granted to the owner of a copyright in a sound recording.

This section also amends the language of section 114(b) relating to the tangible medium of expression in which sound recordings can be duplicated. Instead of referring only to phonorecords or "copies of motion pictures and other audiovisual works," the new language recognizes that sound recordings can be reproduced in copies of any kind. As multimedia technologies begin to blur the lines between different categories of works capable of being embodied in copies, the Committee deemed it important to confirm that, subject to the specific limitations in section 114(b), sound recordings enjoy the full scope of protection afforded by the reproduction right under section 106(1).

This section also strikes section 114(d) of title 17, an obsolete provision that directed the Register of Copyrights to submit a report on performance rights to Congress on January 3, 1978, and replaces it with new subsections (d) through (i), as described below.

*Section 114(d). Limitations on Exclusive Right*

*Section 114(d)(1). Exempt Transmissions and Retransmissions*

Section 114(d)(1) is designed to ensure that the new right provided to owners of copyright in sound recordings with respect to certain digital public performances of those recordings will not affect nonsubscription transmissions being initially delivered to the public (such as radio or television broadcasts), certain retransmissions of those transmissions, and certain other transmissions (including retransmissions) that the Committee believes should not be subject to the new right.

To take advantage of the Section 114(d)(1) exemptions, a transmission must not be part of an "interactive service" as defined in Section 114(j)(4). The Committee anticipates that this requirement will not present any difficulty for the types of services covered by the Section 114(d)(1) exemption. The term "interactive service" is intended to cover only services in which an individual can arrange for the transmission of a specific sound recording to that person or another, individually.

Under Section 114(d)(1), a transmission will be exempt from the new right under Section 106(6) if it falls into at least one of the following categories:

*Section 114(d)(1)(A) (certain nonsubscription) transmissions)*

Under this provision, any transmission to members of the public that is not a part of an interactive service is exempt from the new digital performance right if it is either: a nonsubscription transmission other than a retransmission (such as a nonbroadcast nonsubscription digital audio service that originates its transmissions rather than retransmitting a programming feed); an initial nonsubscription retransmission made for direct reception by members of the public of a prior or simultaneous incidental transmission that is not made for direct reception by members of the public (such as an initial retransmission to the public of a network feed; whether the feed itself is exempt is governed by section 114(d)(1)(C)(i)); or a nonsubscription broadcast transmission. As defined in section 114(j)(2), this category includes all nonsubscription broadcast transmissions made by terrestrial broadcast stations licensed by the FCC, whether an initial transmission (such as a local newscast) or a retransmission (such as the retransmission of a feed supplied by a network or syndicator). This clause does not cover retransmissions by entities other than broadcast stations (such as cable systems) of transmissions made by broadcast stations; whether such retransmissions are themselves exempt is governed by section 114(d)(1)(B) and, to some extent, section 114(d)(1)(C).

The classic example of such an exempt transmission is a transmission to the general public by a free over-the-air broadcast station, such as a traditional radio or television station, and the Committee intends that such transmissions be exempt regardless of whether they are in a digital or non-digital format, in whole or in part.

*Section 114(d)(1)(B) (retransmissions of nonsubscription broadcast transmissions)*

In general, this provision exempts all retransmissions of nonsubscription broadcast transmissions, whether the retrans-missions are offered on a subscription or a nonsubscription basis. Retransmissions of radio station broadcast transmissions, however, are exempt only if they are not part of an interactive service and fall within certain specified categories, which are discussed in detail below.

The Committee has created the Section 114(d)(1)(B) exemption because it is aware that cable systems and other multichannel programming distributors often offer retransmissions of nonsubscription broadcast transmissions to their customers. At present, copyright liability for these retransmissions ordinarily is covered pur-suant to Sections 111 and 119 of the Act. The Committee intends, subject to the limitations discussed below concerning retransmissions of radio broadcasts, that all noninteractive retransmissions of noninteractive nonsubscription broadcast transmissions be exempt from the new digital sound recording performance right. These retransmissions will be exempt even if the cable system (or other retransmission service) limits the delivery of the retransmission to its customers and charges a fee to receive the retransmission. In other words, retransmissions of broadcast stations' signals will be exempt even if the retransmissions are themselves "subscription" transmissions under the Act. A cable system's delivery of a retransmitted radio broadcast signal within 150 miles of the transmitter, for example, will be exempt under Section 114(d)(1)(B)(i), even if the cable system charges a monthly fee to subscribers to receive the signal.

Retransmissions of the broadcast transmissions of radio stations are exempt pursuant to Section 114(d)(1)(B) only if they fall within one of the categories listed in paragraphs 114(d)(1)(B)(i) through (B)(iv):

Section 114(d)(1)(B)(i) (retransmission of radio signals within 150 mile radius of transmitter).—Under this provision, retransmissions of a radio station within a 150 mile radius of the site of that station's transmitter are exempt, whether retrans-mitted on a subscription or a nonsubscription basis, provided that they are not part of an interactive service.

This provision does not, however, exempt the willful or repeated retransmission of a radio station's broadcast transmission more than a 150 mile radius from the radio station's transmitter. The Committee recognizes that the 150 mile limit could serve as a dangerous trap for the uninitiated or inattentive. To ensure against that possibility, Section 114(d)(1)(B)(i) provides that a retransmission beyond the 150 mile radius will fall outside the exemption only if the retransmission is willful or repeated. The Committee intends the phrase "willful or repeated" to be understood in the same way that phrase was used in Section 111 of the Act, as explained in the House Report on the 1976 Act, H.R. Rep. No. 1476, 94th Cong., 2d Sess. 93 (1976).

Pursuant to Section 114(d)(1)(B)(i)(I), the 150-mile limitation does not apply when a nosubscription broadcast transmission by an FCC-licensed station is retransmitted on a nonsubscription basis by an FCC-licensed terrestrial broadcast station, terrestrial translator, or terrestrial repeater. In other words, a radio station's broadcast transmission may be retransmitted by another FCC-licensed basis without regard to the 150 mile restriction.

The Committee notes that transmissions exempted by section 114(d)(1)(B)(i)(I) may already be exempt under section 114(d)(1)(A).

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For example, since section 114(d)(1)(A) exempts all nonsubscription broadcast transmissions (including nonsubscription broadcast retransmissions), the retransmissions by terrestrial broadcast stations that are exempted by Section 114(d)(1)(B)(i)(I) are also exempt under section 114(d)(1)(A)(iii). To leave no doubt about the intention to exempt the retransmissions described in section 114(d)(1)(B)(i)(I) (without regard to the 150-mile limitation generally applicable under section 114(d)(1)(B)(i)), that section has been included in the bill in this form.

Under Section 114(d)(1)(B)(i)(II), when a retransmission covered by Section 114(d)(1)(B)(i)(I) is itself retransmitted on a subscription basis, the 150-mile radius is measured from the transmitter site of the broadcast retransmitter (whether a station, translator, or repeater). This means that a cable system (or other subscription retransmitter) can, without incurring liability under Section 106(6), retransmit a broadcast retransmission within 150 miles of the transmitter site of the station, translator, or repeater that is making the retransmission.

Section 106(6) is not intended to apply to the transmission of a local radio station's programming free of charge to local or long distance callers who are put "on hold" during a telephone call with a business, nor is the bill intended to change current law as it applies to such performances of copyrighted musical works under section 106(4).

Section 114(d)(1)(B)(ii) (all-band retransmissions of radio transmissions received over the air).—This provision is intended to permit retransmitters (such as cable systems) to offer retransmissions to their local subscribers of all radio stations that the retransmitter is able to pick up using an over-the-air antenna. (These are sometimes called "all-band" retransmissions.) There are three requirements for this exemption: (1) the retransmitter (such as a cable system) must obtain the radio broadcast transmission over the air; (2) the broadcast transmission must not be electronically processed by the retransmitter as separate and discrete signals (as that term is used in 37 C.F.R. §201.17(b)(4)), and (3) the transmissions must be retransmitted only within the local communities served by the retransmitter. Since some radio station broadcast transmissions can be picked up over the air beyond 150 miles, this provision is intended to ensure that the 150-mile limitation in Section 114(d)(1)(B)(i) will not create unintended liability for all-band retransmissions.

Section 114(d)(1)(B)(iii) (grandfathering).—This provision exempts certain other retransmissions of radio broadcast transmissions, again without regard to the 150 mile limit in Section 114(d)(1)(B)(i). The requirements for this exemption are as follows: (1) the radio station's transmission was being retransmitted by a satellite carrier on January 1, 1995 (as was, for example, Chicago radio station WFMT); (2) that retransmission was being retransmitted by cable systems (as defined in Section 111(f) of the Act) as a separate and discrete signal; (3) the satellite carrier receives the radio station's transmission in analog form; and (4) the broadcast transmission being retransmitted embodies the programming of no more than one radio station (i.e., the station must not the multiplexed).

Section 114(d)(1)(B)(iv) (nonsubscription broadcast retransmissions of public radio station broadcast transmissions)—The Committee recognizes that noncommercial educational radio stations rely on a variety of types of broadcast retransmissions to deliver their programming to the public. This provision establishes an exemption for such retransmissions. Specifically, this provision exempts both simultaneous and nonsimultaneous retransmissions of broadcast transmissions originally made by federally funded noncommercial educational radio stations, provided that the retransmissions are carried out through nonsubscription terrestrial broadcasts. To qualify, the noncommercial educational radio station's broadcasts must consist of news, informational, cultural, public affairs, or other "educational and cultural" programming to the public. The 150-mile limitation of Section 114(d)(1)(B)(i) does not apply to retransmissions that qualify for this exemption.

Many noncommercial educational stations also use intermediate nonbroadcast transmission links to broadcast their programming to the public, and those nonbroadcast transmissions or retransmissions may be exempt under other provisions of the bill.

*Section 114(d)(1)(C) (other exempt transmissions and retransmissions)*

This provision exempts certain other categories of transmissions, without regard to whether they are subscription transmissions or nonsubscription transmissions. The categories exempted under this provision are as follows:

Section 114(d)(1)(C)(i) (incidental transmissions).—In the course of arranging for the delivery of an exempt transmission, many incidental transmissions may take place. For example, a radio or television station may receive a satellite feed from a network or from another station that provides programming to the station; a station or network may receive a "backhaul" transmission from a sports or news event at a remote location; or a station may deliver a clean feed of its broadcast transmission to a cable system to ensure that the cable system's retransmission will be of the highest technical quality. Among other things, Section 114(d)(1)(C)(i) exempts transmissions of a broadcast station that both broadcasts its signal to the public and, either immediately or through intermediate terrestrial links, transmits that signal by satellite to other broadcast stations for their simultaneous or subsequent broadcast to the public. The Committee intends that all such incidental transmissions be exempt from the new digital performance right under Section 106(6) regardless of whether they are made on a subscription or a nonsubscription basis, and regardless of whether some or all portions of a transmission are in a digital format. Thus, section 114(d)(1)(C)(i) also exempts an incidental transmission, as described above, by a subscription digital transmission service to a cable system to the extent that the cable system is engaging in an exempt retransmission of that transmission to a business establishment pursuant to section 114(d)(1)(C)(iv). The Committee does not intend, however, for any subscription transmission intended for reception directly by members of the public to fall within the category of exempt incidental transmissions. To qualify for this "incidental" exemption, transmissions must be made for the purpose of facilitating an exempt transmission. Thus, a transmission that is available for general reception by the public (for example, through the Internet), which is not being used to facilitate an exempt transmission, would not qualify as an "incidental" transmission under this section.

Section 114(d)(1)(C)(ii) (transmissions by businesses on and around their premises).—Businesses often utilize transmissions on or around their premises that include prerecorded musical works. This activity is sometimes called "storecasting." The Committee is aware that there has been extensive litigation over the scope of Section 110(5) of the Act relating to the particular circumstances under which businesses are liable to the copyright owners of musical works when they utilize transmissions containing such works on and around their premises. To leave absolutely no doubt that the new Section 106(6) right is not intended to create any comparable right in the owners of copyright in sound recordings regarding "storecasts," Section 114(d)(1)(C)(ii) specifically provides that the new right does not reach transmissions on or around business premises. In particular, Section 114(d)(1)(C)(ii) would permit a business to engage in transmissions (including retransmissions of any transmission) on its premises or the immediately surrounding vicinity without incurring liability to the copyright owners of sound recordings under Section 106(6). This provision is not intended to change the rights of copyright owners of musical works regarding transmissions under existing law.

Section 114(d)(1)(C)(iii) (authorized retransmissions of licensed transmissions).—To simplify licensing practices, section 114(d)(1)(C)(iii) provides a "through to the listener" exemption intended to permit retransmitters, including cable systems, direct broadcast satellite ("DBS") service providers and other multichannel video programming distributors ("MVPDs") (as defined in the 1934 Communications Act, as amended), simultaneously to retransmit to the listener noninteractive music programming provided by a licensed source. To qualify for this exemption, the retransmission must be simultaneous with the original transmission and authorized by the original transmitter; and the original transmission must be licensed by the copyright owner of the sound recording. Retransmissions are deemed to be "simultaneous" even if there is some momentary time delay resulting from the technology used for transmission or retransmission.

Thus, Section 114(d)(1)(C)(iii) exempts retransmissions from liability for copyright infringement where a noninteractive music programmer transmitter has obtained a public performance copyright license from the copyright owner of the sound recording, and the retransmitter has not obtained such a license but is authorized by the licensed music programmer transmitter to retransmit the sound recording. Retransmissions of this type are exempt under the provisions of this Act, as the sound recordings retransmitted are covered by the licenses that the music programmer transmitter obtains from the sound recording copyright owners.

Section 114(d)(1)(C)(iv) (certain transmissions to business establishments).—This provision exempts from liability under new section 106(6) certain noninteractive transmissions made to business establishments for use in the ordinary course of their business, such as for background music played in offices, retail stores or restaurants.

To qualify, the transmission must meet all of the following conditions: (a) the transmission must be to a business establishment; (b) the transmission must be for use by the business establishment in the ordinary course of its business; (c) the business establishment must not retransmit the transmission outside its premises or the immediately surrounding vicinity; and (d) the transmission must not exceed the sound recording performance complement, as defined in Section 114(j)

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If a business establishment retransmits the transmission in a manner not otherwise exempted under subparagraph (C)(ii), without the authority or prior knowledge of or any inducement by any entity that transmitted the service to the business establishment, then only the retransmission by the business establishment is not exempt pursuant to subparagraph (C)(iv). Under such circumstances, the non-exempt status of such a retransmission would not affect the exempt status of the transmission to that business establishment.

If the same subscription transmission service programming is being transmitted to both business establishments and non-business consumers, then only the transmission of that service to the business establishments would qualify for an exemption pursuant to subparagraph (C)(iv). As the bill makes clear, nothing in this exemption is intended to limit the breadth of the general exemption in Section 114(d)(1)(C)(ii) for transmissions by business establishments on their premises, or any of the other exemptions in this Section 114(d)(1).

Section 106(6) is not intended to apply to the transmission of a commercial background music service free of charge to local or long distance callers who are put "on hold" during a telephone call with a business, nor is the bill intended to change current law as it applies to such performances of copyrighted musical works under section 106(4).

*Section 114(d)(2). Subscription Transmissions*

Subsection (d)(2) provides that certain subscription transmissions may be subject to statutory licensing if the transmissions conform to the criteria set forth in that section. "Subscription transmissions" are defined in subsection (j)(8) as transmissions limited to particular recipients for which consideration is required to be paid. Transmitters of noninteractive subscription transmissions that are not otherwise exempt under subsection (d)(1) may be eligible for a statutory license under subsection (f). A "statutory license" guarantees that every noninteractive subscription transmission service will receive a license to perform the sound recording by means of a digital transmission, provided that the transmission service pays the royalty and complies with the terms prescribed in accordance with subsection (f). The rates and terms will be set by industry or individual negotiation, or if necessary, by a copyright arbitration royalty panel convened pursuant to chapter 8 of the Copyright Act.

In order to qualify for a statutory license, a performance of a sound recording by digital audio transmission must meet five conditions, enumerated in subparagraphs (A) through (E):

First, as already noted, the transmission cannot be part of an "interactive service", as defined in subsection (j)(4). Interactive services, which allow listeners to receive sound recordings "on-demand", pose the greatest threat to traditional record sales, as to which sound recording copyright owners currently enjoy full exclusive rights. Thus, in order to provide a comparable ability to control distribution of their works, copyright owners of sound recordings must have the right to negotiate the terms of licenses granted to interactive services.

Second, subparagraph (B) requires that transmissions subject to the statutory license cannot exceed the sound recording performance complement defined in subsection (j)(7). The complement, more fully described below, contains limits on the number of selections a subscription transmission service can play from any one phonorecord or boxed set, or by the same featured recording artist pursuant to the statutory license. For purposes of this subparagraph, each channel of a multichannel service is a separate "transmission."

Third, subparagraph (C) states that the transmitting entity may not avail itself of the statutory license if it publishes an advance program schedule or makes prior announcements of the titles of specific sound recordings or phonorecords to be transmitted. This provision addresses the situation in which an entity informs its subscribers in advance as to when particular sound recordings will be performed. A preannouncement that does not use the title of the upcoming selection would still come within this limitation so long as it sufficiently identifies the selection through other information, such as the artist's name and the song's well-known current chart position. The limitation is not intended, however, to prevent a transmitting entity from advertising the names of illustrative sound recordings or phonorecords that may, at some time, be performed by that entity under the statutory license.

Fourth, the transmitting entity cannot automatically and intentionally cause the receiver's equipment to switch from one channel to another. This limitation does not apply to transmissions made to a business establishment. This subparagraph is intended to remedy the situation in which a service licensed under the statutory license might intentionally attempt to evade the sound recording performance complement by switching a non-business subscriber's receiver from one channel to another.

Finally, subparagraph (E) imposes as a condition of statutory licensing the obligation of a subscription entity to carry within its transmitted signal certain specified types of information, if that information has been encoded in the sound recording under the authority of the copyright owner of that sound recording. This provision does not obligate the copyright owner of the sound recording to encode such copyright management information in the work, nor does it limit the copyright owner's ability to select the types of information (e.g., artist, title) to be encoded. In addition, it is not intended to require a transmitting entity to generate or encode such information in its transmission if the information is not encoded in the sound recording. Moreover, the transmitting entity is not required to transmit information that may be encoded in the sound recording other than the information specified in this subparagraph and "related information" (i.e., information that is specifically related to the identification of the works being performed and upon which payments are to be made by the transmitting entity under this bill). Subparagraph (E) also makes clear that nothing in this section affects the provisions of section 1002(e).

*Section 114(d)(3). Licenses for transmissions by interactive services*

This provision places limits on the sound recording copyright owner's exclusive right to license interactive copyright owner's exclusive right to license interactive services. (No limitations are imposed where the sound recording copyright owner licenses an interactive service on a nonexclusive basis.) As described below, an "interactive service" includes on-line or other services that offer "pay-per-listen," "audio-on-demand," or "celestial jukebox" features, regardless of whether there is a charge to receive the service. The Committee is aware of concerns that the copyright owners of sound recordings might become "gatekeepers" and limit opportunities for public performances of the musical works embodied in the sound recordings. The Committee believes that the limits set forth in subsection (d)(3) appropriately resolve any such concerns.

Paragraph (3)(A) provides that the duration of an exclusive license granted to an interactive service for the public performance of a sound recording by means of digital audio transmission cannot exceed 12 months. In the case of a copyright owner that holds fewer than 1,000 copyrights in sound recordings, an exclusive license to an interactive service can last up to 24 months. In either case, after the license expires, that interactive service cannot receive another exclusive license for the same sound recording for a period of 13 months.

The sound recording copyright owner is not subject to these limitations in certain circumstances, as enumerated in paragraph (3)(B). Subparagraph (B)(i) provides that the limitations do not apply where the licensor has granted performance licenses to at least 5 different interactive services. Each license must be for a significant portion of that segment of the licensor's catalog of sound recordings that has been licensed to interactive services—specifically, at least 10% of the sound recordings that have been licensed to interactive services, but in no event less than 50 sound recordings. For example, a record company would not be subject to the limitations in paragraph (3)(A) if it has granted performance licenses for a total of 10,000 sound recordings to 5 different interactive services, and each service received a performance license for at least 1,000 sound recordings.

Subparagraph (B)(ii) provides that the limits on licenses to interactive services also do not apply where the performance license is granted for promotional purposes. The sole purpose of the license must be to promote the distribution or performance of the sound recording, and the license can only permit a public performance of up to 45 seconds. A qualifying public performance is merely exempted from the limitation on licensing found in paragraph (3)(A); subparagraph (B)(ii) does not provide an exemption from infringement liability for a transmission otherwise subject to liability.

Section 114(d)(3)(C) provides that, whether or not the owner of copyright in a sound recording has granted an exclusive or nonexclusive license to an interactive service, the service must nevertheless obtain a license from a performing rights society or from the copyright owner of the musical work contained in the sound recording. This provision does not affect any existing limitation under sections 107–113, section 116–120, or the unmended portions of sections 114 and 115.

To simplify licensing practices, a "through to the listener" exemption is provided in paragraph (3)(D) for those entities that retransmit digital audio transmissions from an interactive service. These retransmissions must be of transmissions by an interactive service licensed to publicly perform the sound recording; the retransmission must be authorized by the interactive service; the retransmission must be simultaneous with the transmission; and it must be limited to the customer intended by the interactive service to receive the transmission.

The definition of "licensor" in subparagraph (3)(E)(i) makes clear that this term includes certain affiliates of the copyright owner in sound recordings that own sound recording copyrights—namely, affiliates

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under a material degree of common ownership, management or control. Thus, the number of sound recording copyrights held by such affiliates of a record company must be included in a calculation to determine whether that company has fewer than 1,000 sound recordings for the purpose of paragraph (3)(A), and to determine whether the record company has licensed a sufficient number of sound recordings to satisfy the requirements found in paragraph (3)(B)(i) regarding the inapplicability of the exclusive licensing limitations.

*Section 114(d)(4). Rights not otherwise limited*

Under existing principles of copyright law, the transmission or other communication to the public of a musical work constitutes a public performance of that musical work. In addition, the digital transmission of a sound recording that results in the reproduction by or for the transmission recipient of a phonorecord of that sound recording implicates the exclusive rights to reproduce and distribute the sound recording and the musical work embodied therein. New technological uses of copyrighted sound recordings are arising which require an affirmation of existing copyright principles and application of those principles to the digital transmission of sound recordings, to encourage the creation of and protect rights in those sound recordings and the musical works they contain.

This subsection makes clear, in paragraph (4)(A), the Committee's intent that except as explicitly provided in section 114, nothing in that section limits the exclusive right to perform a sound recording publicly by means of a digital audio transmission. Paragraph (4)(B) also makes clear that section 114 does not in any way limit the exclusive right to publicly perform a musical work under section 106(4); the exclusive right in sound recordings and musical works under sections 106(1), 106(2), and 106(3); and any other rights and remedies available under title 17. Similarly, the bill does not affect any existing limitation under sections 107–113, sections 116–120, or the unamended portions of sections 114 and 115.

Paragraph (4)(C) ensures that where an activity implicates a sound recording copyright owner's rights under both section 106(6) and some other clause of section 106, the limitations contained in section 114 shall not be construed to limit or impair in any way any other rights the copyright owner may have, or any other exemptions to which users may be entitled, with respect to the particular activity. For example, where a digital audio transmission is a digital phonorecord delivery as well as a public performance of a sound recording, the fact that the public performance may be exempt from liability under section 114(d)(1) or subject to statutory licensing under section 114(f) does not in any way limit or impair the sound recording copyright owner's rights and remedies under section 106(3) against the transmitter for the distribution of a phonorecord of the sound recording. As another example, where an interactive digital audio transmission constitutes a distribution of a phonorecord as well as a public performance of a sound recording, the fact that the transmitting entity has obtained a license to perform the sound recording does not in any way limit or affect the entity's obligation to obtain a license to distribute phonorecords of the sound recording. Similarly, the bill does not affect any existing limitation under sections 107–113, sections 116–120, or the unamended portions of sections 114 and 115.

*Section 114(e). Authority for negotiations*

This subsection clarifies the applicability of the antitrust laws to the use of common agents in negotiations and agreements relating to statutory licenses and other licenses.

Under subsection (e)(1), copyright owners of sound recordings and operators of digital services (which perform sound recordings affected by section 114) may collectively negotiate statutory licenses for the performance of sound recordings "notwithstanding any provision of the antitrust laws." This exemption from the antitrust laws extends to negotiations and agreements on royalty rates and license terms and conditions, the proportionate division of the royalties among copyright owners, and the designation of common agents on a nonexclusive basis to negotiate, agree to, pay, or receive royalty payments.

Subsection (e)(1) closely follows the language of existing antitrust exemptions in copyright law relating to the negotiation of statutory licenses, including 17 U.S.C. §116(b)(1) (jukebox licenses) and 17 U.S.C. §118(b) (noncommercial broadcasting). Like those provisions, subsection (e)(1) is important to help effectuate the related statutory license provision. But unlike those provisions, subsection (e)(1) provides that use of a common agent must be nonexclusive.

The requirement of nonexclusivity is intended to preserve the possibility of direct licensing negotiations between individual copyright owners and operators of digital services, rather than merely between their common agents. For example, nonexclusivity should help prevent copyright owners from using a common agent to demand supracompetitive rates, because such demands might be avoided by direct negotiations with individual copyright owners. In such negotiations an individual copyright owner would exercise independent judgment on whether to contract on particular terms.

A more limited exemption to the antitrust laws is created by subsection (e)(2), relating to licenses granted under section 106(6), other than statutory licenses, such as performances by interactive services or performances that exceed the sound recording performance complement. Under subsection (e)(2)(A), copyright owners may designate common agents to "grant licenses and receive and remit royalty payments," while under subsection (e)(2)(B), operators of digital services may designate common agents to "obtain licenses and collect and pay royalty fees," without violating the antitrust laws. Importantly, however, subsection (e)(2) does not permit either copyright owners or operators to jointly establish royalty rates or competitively important license terms and conditions.

The antitrust protections provided for common agents in subsection (e)(2) are important to facilitate the licensing of digital sound recording performances (other than through statutory licenses) by reducing transaction costs. While this use of common agents might be found lawful under existing law, the statutory exemption in subsection (e)(2) will ensure that the formation of beneficial and procompetitive arrangements to facilitate licensing of performances will not be deterred by concerns over the possible application of the antitrust laws. This is particularly important given that other provisions in the copyright law contain antitrust exemptions.

The exemption in subsection (e)(2) is narrowly tailored to make clear that it would be permissible to use common agents, such as a clearinghouse, to handle the logistics of licensing, payment of royalties, and transmitting royalties to copyright owners. Establishment of royalty rates and material license terms and conditions do not receive any antitrust protection, however, so any common agents or clearinghouse must conform to the antitrust laws in these areas. To comply with this limitation, the common agent or clearinghouse could either relay information about rates and terms to and from the copyright owners and the operators of digital services, or simply put interested operators in touch with the appropriate copyright owners for direct negotiations.

*Section 114(f). Licenses for nonexempt subscription transmissions*

This provision requires the Librarian of Congress to cause notice to be published of voluntary negotiation proceedings. The purpose of these proceedings is to determine reasonable terms and royalty rates for transmissions that qualify for statutory licensing under section 114(d)(2). The subsection also contains other provisions concerning such proceedings.

The first such voluntary negotiation proceeding is to commence within 30 days after the enactment of this Act upon publication by the Librarian of Congress of a notice in the Federal Register. The purpose of that proceeding shall be to determine reasonable terms and royalty rates for public performances of sound recordings by means of nonexempt subscription transmissions that qualify, under section 114(d)(2), for a statutory license. The statutory license provided by this subsection covers only the performance of sound recordings under section 106(6), and not the reproduction or distribution of sound recordings under sections 106(1) or 106(3).

The terms and rates established will cover qualified transmissions made between the effective date of this Act and December 31, 2000. Paragraph (1) requires that terms and rates should be established separately for each different type of digital audio transmission service then in operation, but does not require or suggest that the terms and rates established must be different.

The voluntary negotiation proceeding may result in license agreements voluntarily negotiated among individual sound recording copyright owners and individual entities that perform or authorize the performance of sound recordings by means of digital transmissions. It is the Committee's intention that negotiations leading to any such agreements be covered by section 114(e) and that any such agreements shall be given effect in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress.

Beyond such individual license agreements, however, the Committee hopes that the voluntary negotiation proceeding will lead to an industry-wide agreement concerning royalty terms and rates. If an agreement as to rates and terms is reached and there is no controversy as to these matters, it would make no sense to subject the interested parties to the needless expense of an arbitration proceeding conducted under paragraph (2). Thus, it is the Committee's intention that in such a case, as under the Copyright Office's current regulations concerning rate adjustment proceedings, the Librarian of Congress should notify the public of the proposed agreement in a notice-and-comment proceeding and, if no opposing comment is received from a party with a substantial interest and an intent to participate in an arbitration proceeding, the Librarian of Congress should adopt the rates embodied in the agreement without convening an arbitration panel. See 37 C.F.R. §251.63(b); see also 59 Fed. Reg. 63,038 (1994).

Paragraph (2) provides that if a voluntary negotiation proceeding as described in paragraph (1) does not lead to the determination

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of the terms and royalty rates applicable to qualified digital performances of sound recordings, those terms and rates are to be determined by arbitration under this paragraph. However, if an arbitration proceeding is necessary to establish the initial statutory licensing rates and terms, it will commence only upon the filing of a petition during a 60-day period which will commence 6 months after publication of notice of the initiation of the voluntary negotiation proceeding. The Committee notes that the paragraph specifically refers to chapter 8 of title 17, which concerns copyright royalty arbitration in general. Accordingly, arbitration under this subparagraph should be conducted under the same type of procedures that apply in other copyright royalty arbitrations.

The parties are expected to negotiate, or if necessary arbitrate, "terms" as well as rates. By terms, the Committee means generally such details as how payments are to be made, when, and other accounting matters (such as are prescribed in section 115). In addition, the Librarian is to establish related terms under section 114(f)(2). Should additional terms be necessary to effectively implement the statutory license, the parties may negotiate such provisions or the CARPs may prescribe them.

Terms and rates determined under paragraph (2), like terms and rates determined under paragraph (1), are to be effective for a five year period or until the date of the next effective rate adjustment. In determining terms and rates under paragraph (2), a copyright arbitration royalty panel is to consider the objectives set forth in section 801(b)(1), and the arbitrators may consider rates and terms under voluntarily negotiated license agreements. Paragraph (2) specifically authorizes the Librarian of Congress to establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by persons performing sound recordings.

As provided in paragraph (4), the procedures for negotiation and, if necessary, arbitration set forth in paragraphs (1) and (2) of this subsection are to be repeated. The Librarian of Congress is to publish notice of the initiation of voluntary negotiation proceedings: (a) within 30 days after being petitioned to publish notice concerning a new type of digital audio transmission service; and (b) in January 2000, and every five years thereafter.

If voluntary negotiations do not lead to an agreement among the interested parties, an arbitration may be commenced upon the filing of a petition in accordance with existing section 803(a)(1) of the Copyright Act during a specified 60-day period. That period commences: (a) six months after publication of notice of the initiation of a voluntary negotiation proceeding concerning a new type of digital audio transmission service; and (b) on July 1, 2000, and every five years thereafter.

Regardless of when an arbitration proceeding is commenced, it is to be concluded in accordance with the existing procedures in section 802 of the Copyright Act.

Voluntary negotiation or arbitration proceedings concerning a new type of digital radio transmission service should apply only with respect to the new type of service or services described in the petition.

Paragraph (5) sets forth the requirements with which an entity must comply in order to obtain a statutory license. The performing entity must provide notice of the performance as required by regulations prescribed by the Librarian of Congress and pay the established royalty fees. If the royalty fees have not been set at the time of performance, the performing entity must agree to pay the royalty fee to be determined under this subsection by the twentieth day of the month following the month in which the rates are set. This limited license to perform the sound recording until the rate is set applies only to performances for which the entity seeks a statutory license. The failure to pay royalty rates in arrears makes the performing entity subject to full liability for infringement of section 106(6) from the inception of the transmissions of sound recordings by that transmitter after the effective date of the Act, and may disqualify the entity for a statutory license under paragraph (5)(A)(1).

*Section 114(g). Proceeds from licensing of subscription transmissions*

This subsection describes how royalties from the licensing of the digital performance right in a sound recording are distributed to the artists who performed on the sound recording.

Paragraph (1) of this subsection provides that payments to both featured and nonfeatured (or background) artists of royalties from the licensing of the digital performance of the sound recording will be determined by the applicable contract with, or collective bargaining agreement pertaining to, the artist, unless the performance of the sound recording is pursuant to a statutory license under subsection (f).

Where royalties are received from statutory licensing of a sound recording, then under paragraph (2), the sound recording copyright owner is required to allocate a total of 50% of the receipts as provided by subparagraphs (A), (B), and (C). Subparagraph (A) requires that 2½% of the receipts (as described more specifically below) are to be placed into an escrow account managed by an independent administrator appointed jointly by record companies and the American Federation of Musicians ("AFM") (or any successor entity) and distributed to nonfeatured musicians (regardless of whether they are members of AFM or any successor entity) who have performed on sound recordings. Similarly, subparagraph (B) requires that 2½% of the receipts are to be placed into an escrow account managed by an independent administrator appointed jointly by record companies and the American Federation of Television and Radio Artists ("AFTRA") (or any successor entity) and distributed to nonfeatured vocalists (regardless of whether they are members of AFTRA or any successor entity) who have performed on sound recordings. Subparagraph (C) requires that 45% of the receipts are to be paid to the featured artist or artists (or the person(s) conveying rights in the performance of the featured artist(s) in the sound recording). Although the Copyright Office currently administers several funds under the Copyright Act, the Committee does not expect that the Copyright Office would be asked to manage these escrow accounts.

"Receipts" means the licensing fees received by the copyright owner of the sound recording. Thus, if a collecting society or other organization acts on behalf of the copyright owner of the sound recording in licensing and/or collecting royalties, "receipts" shall constitute the monies the copyright owner receives from the collecting agency and, therefore, would exclude administrative fees either deducted by or paid to the collective.

*Section 114(h). Licensing to affiliates*

In addition to the protections available under antitrust law, subsection (h) specifically is intended to ensure competitive licensing practices by a licensor that owns an interest in an "affiliated entity" as defined in subsection (j)(1). Subsection (h) makes clear that terms no less favorable than those granted to the affiliated entity also must be made available to other bona fide entities that offer services similar to those covered by the affiliate's performance license.

For example, a licensor that grants to an affiliated entity a performance license for a fixed term with separate and distant rates for cable and satellite subscription transmission services would be required to offer no less favorable terms and conditions to an unrelated entity offering the same services. If, as another example, the license to the affiliated entity is limited only as to performances via cable, then an unrelated entity offering only satellite services cannot claim an entitlement to receive a performance license at the rate specified for cable services.

Nothing in this section is intended to prevent a licensor from establishing different rate structures, terms and conditions based on material differences in the license sought. But distinctions drawn among licensees should be applied rationally and consistently based on the nature, scope and duration of the requested license, and not based on arbitrary distinctions for monopolistic, discriminatory or other anticompetitive purposes. The factors identified in subsection (h), *i.e.*, different types of services, the particular sound recordings licensed, the frequency of use of the sound recordings, the duration of the requested license and the number of subscribers served, are all relevant bases upon which a copyright owner may draw rational distinctions.

The term "no less favorable" indicates that the same terms and conditions can be offered, but this is not to say that the licensor should not offer lower rates or more beneficial terms and conditions if it deems it appropriate. For example, a licensor might in its business judgment offer an unrelated start-up entity a more favorable rate for a shorter period of time. It is intended, however, that the potential licensee under such circumstances could reject the more favorable short-term license and instead request the terms and conditions granted to the affiliated licensed entity for similar services. In that event, the licensor must make a performance license available upon the same terms and conditions to the potential licensee, with respect to the same services proposed to be licensed, as described above.

The term "bona fide entities" is intended to make clear that the potential licensee must have a genuine intention and reasonable capability to provide the licensed services.

Paragraph (2) of this subsection makes clear that the obligations set forth in paragraph (1) are inapplicable where the affiliated entity is offering performances through an interactive service, or is granted a performance license for the sole purpose of promoting the sound recording. A public performance qualifying for the promotional exemption is merely exempted from the obligations of paragraph (1); paragraph (2)(B) does not provide an exemption for a transmission otherwise subject to liability where such a performance is unauthorized or unlicensed.

*Section 114(i). No effect on royalties for underlying works*

The Committee intends this provision to ensure that licensing fees paid under the new digital performance right shall not be taken into account in any administrative, judicial, or other governmental proceeding that sets

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or adjusts rates for the royalties to be paid for the public performance of musical works. The provision also makes clear Congress' intent that the new digital performance right shall not diminish in any respect the royalties payable to copyright owners of musical works for the public performance of their works.

*Section 114(j). Definitions*

*Section 114(j)(1)—"affiliated entity"*

A digital transmission service is considered affiliated with a licensor when the licensor has any direct or indirect partnership or any ownership interest of more than 5 percent of the outstanding voting or non-voting stock in the entity engaging in digital audio transmissions. An entity engaging in interactive services cannot be an affiliated entity under this definition, but to the extent that an entity is engaging in digital transmissions that are not interactive, it can qualify as an affiliated entity for that purpose alone.

*Section 114(j)(2)—"broadcast" transmission*

Transmissions made by terrestrial broadcast stations licensed as such by the Federal Communications Commission come within this definition.

*Section 114(j)(3)—"digital audio transmission"*

This phrase means a transmission is a digital format (or any other non-analog format that might currently exist or be developed in the future) that embodies the transmission of a sound recording. A transmission that is only partly in a digital or non-analog format satisfies this definition. (*See* section 101 definition of "digital transmission.") A transmission of an audiovisual work does not come within this definition.

The Committee has amended the bill as originally introduced to make clear that the performance right recognized herein applies only to digital transmissions of sound recordings and that nothing in the bill creates any new copyright liability with respect to the transmission of a motion picture or other audiovisual work, whether digital or analog, whether subscription or nonsubscription, and whether interactive or noninteractive.

*Section 114(j)(4)—"interactive service"*

The phrase "interactive service" is defined, in part, as a service that "enables a member of the public to receive, on request, a transmission of a particular sound recording . . . ." This term is intended to reach, for example, a service that enables an individual to make a request (by telephone, e-mail, or otherwise) to a service that will send a digital transmission to that individual or another individual of the specific sound recording that had been requested by or on behalf of the recipient. thus, it would include such services commonly referred to as "audio-on-demand," "pay-per-listen" or "celestial jukebox" services. The term also would apply to an on-line service that transmits recordings on demand, regardless of whether there is a charge for the service or for any transmission. But as the second sentence of the definition makes clear, the term "interactive service" is not intended to cover traditional practices engaged in by, for example, radio broadcast stations, through which individuals can ask the station to play a particular sound recording as part of the service's general programming available for reception by members of the public at large.

If an entity offering a nonsubscription service (such as a radio or television station) chooses to offer an interactive service as a separate business, or only during certain hours of the day, that decision does not affect the exempt status of any component of the entity's business that does not offer an interactive service. In other words, each transmission should be judged on its own merits with regard to whether it qualifies as part of an "interactive" service. The third sentence of the definition of "interactive service" is intended to make this clear.

*Section 114(j)(5)—"nonsubscription" transmission*

This term includes any transmission that does not come within the definition of "subscription" transmission.

*Section 114(j)(6)—"retransmission"*

As the definition of "retransmission" makes clear, that term includes any further transmission of an initial transmission, as well as any further retransmission of the same transmission. That is, the term "retransmission" is intended to cover both an initial retransmission of a transmission (such as by a satellite carrier) and any further transmissions of that transmission (such as by a cable system). Of course, the fact that a further simultaneous transmission qualifies as a "retransmission" does not by itself mean that it is exempt under any particular paragraph of Section 114(d)(1). To qualify for the 114(d)(1)(C)(ii) exemption, for example, a retransmission would need to be made by a business establishment on its premises or the immediately surrounding vicinity.

Except as otherwise provided, a transmission is a "retransmission" only if it is simultaneous with the initial transmission. The term "simultaneous" is used in this definition (and throughout this bill) to refer to retransmissions that are essentially simultaneous. Although there may be momentary time delays resulting from the technology used for retransmissions, such delays do not affect the status of the retransmissions as simultaneous.

*Section 114(j)(7)—"sound recording performance complement"*

The "sound recording performance complement" defines the metes and bounds of programming available to be transmitted under the statutory license grant in subsection (f). The definition is intended to encompass certain typical programming practices such as those used on broadcast radio. It does not extend to the performance of albums in their entirety, or the performance over a short period of time of a substantial number of different selections by a particular artist or from a particular phonorecord or compilation of phonorecords. Transmissions that exceed the limits of the complement are not eligible for a statutory license under subsection (f).

The definition provides that for a transmission to be within the complement, it must not include, on a particular channel in any rolling three-hour period, more than three selections from any one phonorecord, and no more than two of those selections can be transmitted consecutively. The transmission also must not include, on a particular channel in any rolling three-hour period, more than four selections by the same featured artist or from any boxed set or compilation of phonorecords, and no more than three of those selections can be transmitted consecutively. Whether selections are consecutive is determined by the sequence of the sound recordings transmitted, regardless of whether some tones or other brief interlude is transmitted between the sound recordings.

To avoid imposing liability for programming that unintentionally may exceed the complement, the complement is limited to the performance of sound recordings "from" a particular phonorecord. Many phonorecords include sound recordings that also appear on other phonorecords or compilations, such as the "greatest hits" of a particular artist, decade or genre of music. Similarly, the same sound recordings may appear on separate compilations under the names of different featured artists. It is not the intention of this legislation to impose liability where selections that are performed from separate phonorecords also may be incorporated on a different phonorecord or compilation, or also may appear on a different phonorecord under the name of another featured artist, in the absence of an intention by the performing entity to knowingly circumvent the numerical limits of the complement. An example of such a case is where the transmitting entity plays within a three-hour period one selection for each of four different phonorecord, which four selections also happen to be compiled on a soundtrack album. So long as the transmitting entity did not willfully intend to replicate selections from the soundtrack album, its transmission would be considered within the complement. However, where the transmitting entity willfully plays within a three-hour period five selections of a single featured recording artist, regardless of whether they were played from several different phonorecords, and regardless of whether the transmitting entity knew that the transmission included more than three songs from a single album, the transmission does not come within the complement. The fact that the transmitting entity did not willfully intend to violate the numerical limits for a single phonorecord under paragraph (A) does not excuse the willful violation of the limit of paragraph (B)(i).

The complement is to be evaluated as of the time of "the programming of the multiple phonorecords," rather than at the time of transmission. This avoids imposing liability for programming that occurs such as a week or two in advance of transmission that unintentionally exceeds the complement. An example is where, between the time of the programming and transmission, a phonorecord or set or compilation of phonorecords is released that embodies selections previously programmed by the transmitting entity from multiple phonorecords.

Certain transmitting entities covered by this legislation may provide multiple channels of service and musical formats. The bill applies the complement to each particular channel separately and not to all channels in the aggregate.

The requirement of "different selections" permits the performance of the same selection in excess of the numerical limits. This is intended to facilitate under the statutory license the programming of music formats that tend to repeat the same selections of music, such as "top 40" formats.

The term "featured recording artist" means the performing group or ensemble or, if not a group or ensemble, the individual performer, identified most prominently in print on, or otherwise in connection, with, the phonorecord actually being performed. Except in the case of a sound recording consisting of a compilation of sound recordings by more than one performer or group or ensemble, there will ordinarily be only one "featured recording artist" per phonorecord. A vocalist or soloist performing along with a group or ensemble is not a "featured recording artist" unless that person is identified in connection with the phonorecord as the primary performer. For example, the Eagles

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would be the "featured recording artist" on a track from an Eagles album that does not feature Don Henley by name with equal prominence; but if the same sound recording were performed from "Don Henley's Greatest Hits," then Don Henley and not the Eagles would be the "featured recording artist." Where both the vocalist or soloist and the group or ensemble are identified as a single entity and with equal prominence (such as "Diana Ross and the Supremes"), both the individual and the group qualify as the "featured recording artist."

*Section 114(j)(8)—"subscription" transmission*

A "subscription transmission" is defined as a transmission of a sound recording in a digital format that is "controlled and limited to particular recipients,' and for which consideration is required to be paid or given "by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission." It does not matter what the mechanism might be for the delivery of the transmission; thus, a digital transmission, whether delivered by cable, wire, satellite or terrestrial microwave, video dialtone, the Internet or any other digital transmission mechanism, could be a subscription transmission if the requirements cited above are satisfied. This definition obviously does not reach traditional over-the-air broadcast transmissions, which satisfy neither of these requirements. A typical transmission that would qualify as a "subscription transmission" under this definition is a cable system's transmission of a digital audio service, which is available only to the paying customers of the cable system. The payments required to satisfy the "consideration" requirement might consist, for example, of an "a la carte" fee for a specific audio service, or of a fee for an overall package of services that includes the digital audio service (e.g., a cable system's tier of services for a fee). The reference in the definition to payments "on behalf of" a recipient is intended to recognize that payments for a service may be made by one person on behalf of other people, such as a parent making payment for a child who lives away from home and receives the subscription service.

*Section 114(j)(9)—"transmission"*

This definition recognizes that the term "transmission" refers to any transmission, whether it is an initial transmission or a retransmission. Thus, for example, section 106(6) grants an exclusive right to perform a copyrighted sound recording publicly "by means of a digital audio transmission," and does not mention retransmissions, even though it is intended that the new performance right cover all digital audio transmissions, including retransmissions. Similarly, except where otherwise explicitedly indicated, the exemptions for certain "transmissions" created by section 114(d)(1) apply to both initial transmissions and retransmissions.

Section 4—Mechanical Royalties in Digital Phonorecord Deliveries.—This section amends section 115 of title 17 to clarify how the compulsory license for making and distributing phonorecords applies in the context of certain types of digital tranamisaions identified in the bill as "digital phonorecord deliveries."

Among other things, this section is intended to confirm and clarify the right of musical work and sound recording copyright owners to be protected against infringement when phonorecords embodying their works are delivered to consumers by means of transmissions rather than by means of phonorecord retail sales. The intention in extending the mechanical compulsory license to digital phonorecord deliveries is to maintain and reaffirm the mechanical rights of songwriters and music publishers as new technologies permit phonorecords to be delivered by wire or over the airwaves rather than by the traditional making and distribution of records, cassettes and CDs. The intention is not to substitute for or duplicate performance rights in musical works, but rather to maintain mechanical royalty income and performance rights income for writers and music publishers.

Changes to sections 115(a)(1) and 115(c)(2) make clear that the compulsory license for making and distributing phonorecords is not limited to the making and distribution of physical phonorecords, but that a compulsory license is also available for the making of digital phonorecord deliveries. The Committee intends that a compulsory license for digital phonorecord deliveries may be obtained, and the required mechanical royalties may be paid, either directly by a digital transmission service making a digital phonorecord delivery or by a record company authorizing a digital phonorecord delivery. Thus, the changes to section 115 are designed to minimize the burden on transmission services by placing record companies in a position to license not only their own rights, but also, if they choose to do so, the rights of writers and music publishers to authorize digital phonorecord deliveries; and by recognizing that transmission services themselves may obtain a compulsory license to make digital phonorecord deliveries.

As between a digital transmission service and a record company, allocation of the responsibility for paying mechanical royalties could be a subject of negotiation, but copyright owners of musical works would only be entitled to receive one mechanical royalty payment for each digital phonorecord delivery, not multiple payments. Of course, a digital transmission service would be liable for any infringing digital phonorecord delivery it made in the absence of a compulsory license or the authorization of the musical work copyright owner. (The liability of sound recording copyright owners in such a case is addressed in new section115(c)(3)(I).)

Section 4 also redesignates subsections (c)(3), (4) and (5) as subsections (c)(4), (5) and (6) and inserts new subsections (c)(3) and (d), which are descried in detail below.

*Section 115(c)(3)(A)*

This subparagraph specifically sets forth that a compulsory license includes the right of the compulsory licensee to make or authorize digital phonorecord deliveries and identifies the statutory rate of each digital phonorecord delivery made by or under the authority of the compulsory licensee. For all digital phonorecord deliveries made or authorized under a compulsory license on or before December 31, 1997, the royalty rate is to be the statutory rate than in effect under section 115(c)(2) for the making and distribution of a physical phonorecord. For digital phonorecord deliveries made authorized under a compulsory license on or after January 1, 1998, the statutory mechanical royalty rates for digital phonorecord deliveries shall be determined in accordance with subparagraphs (B) through (F); and the statutory mechanical royalty rate for making and distributing physical phonorecords shall be determined in accordance with chapter 8.

*Section 115(c)(3)(B)*

This subparagraph clarifies that collective negotiations and agreements relating to statutory licenses are not prohibited by the antitrust laws. This provision is nearly identical to new section 114(e)(1), and is patterned on existing antitrust exemptions relating to the negotiations of statutory licenses, including 17 U.S.C. §116(b)(1) (jukebox licenses) and 17 U.S.C. §118(b) (noncommercial broadcasting). Like those provisions, subsection (c)(3)(B) is important to help effectuate the related statutory license provision.

This subparagraph authorizes musical work copyright owners, record companies, digital transmission services, and any other persons entitled to obtain a compulsory license collectively to negotiate and agree upon the terms and statutory royalty rates under subsection 115(c)(3) "notwithstanding any provision of the antitrust laws." This exemption from the antitrust laws extends to negotiations and agreements on terms and rates of royalty payments, the proportionate division of royalties among copyright owners, the designation of common agents to negotiate, agree to, pay, or receive royalty payments, and the year during which the royalty rates prescribed under subparagraphs (B) through (F) and chapter 8 of title 17 are to next be determined.

The latter authorization allows the affected parties to agree when rates and terms should next be determined. If they do not do so voluntarily, then subparagraph (F) prescribes that the rates and terms will be reconsidered at five-year intervals. Given the rapid pace at which digital transmission technology is developing, and changes in the marketplace, the Committee recognizes that the statutory rate for digital phonorecord deliveries might need to be considered in different years, and that the interested parties are in the best position to determine how frequently and when this should be done.

*Section 115(c)(3)(C)*

This subparagraph requires the Librarian of Congress to cause notice to be published of voluntary negotiation proceedings to determine reasonable terms and statutory royalty rates for the making of digital phonorecord deliveries under a compulsory license. The subparagraph also contains other provisions concerning such proceedings.

The Librarian is to publish notice of commencement of the first such voluntary negotiation proceeding in the Federal Register between June 30, 1996 and December 31, 1996. The Committee expects that the Librarian will publish this notice relatively early in the prescribed period. However, the exact date of the notice is of limited importance because subparagraph (B) authorizes negotiations that can begin or end at any time, as determined by the parties. The purpose of the notice is simply to allow persons with a substantial interest who might not be represented by the parties engaged in negotiations to be aware that negotiations may be taking place that could lead to an industry-wide agreement concerning mechanical royalty rates.

The purpose of the first voluntary negotiation proceeding shall be to determine reasonable terms and statutory royalty rates for the making of digital phonorecord deliveries under a compulsory license during the period beginning January 1, 1998 and ending when successor rates and terms are established, either by negotiation or, if necessary, arbitration.

The subparagraph states that if any digital phonorecord delivery statutory mechanical royalty rates and terms are determined as a result of a voluntary negotiation proceeding, then such rates and terms shall distinguish

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between: (1) rates and terms for digital phonorecord deliveries where the reproduction or distribution of a phonorecord is "incidental" to the transmission which constitutes the digital phonorecord delivery, and (2) rates and terms for digital phonorecord deliveries in general. The Committee recognizes that there are likely to be different types of digital transmission systems that could result in the making of a digital phonorecord delivery. In the case of some of these transmission systems, delivering a phonorecord to a transmission recipient could be incidental to the purpose of a transmission. For example, if a transmission system was designed to allow transmission recipients to hear sound recordings substantially at the time of transmission, but the sound recording was transmitted to a high speed burst of data and stored in a computer memory for prompt playback (such storage being technically the making of a phonorecord), and the transmission recipient could not retain the phonorecord for playback on subsequent occasions (or for any other purpose), delivering the phonorecord to the transmission recipient would be incidental to the transmission. If such a system allowed transmission recipients to retain phonorecords for playback on subsequent occasions, but transmission recipients did not do so, delivering the phonorecords to the transmission recipients could be incidental to the transmissions. On and after January 1, 1998, statutory mechanical royalty rates shall distinguish between "incidental" digital phonorecord deliveries that take into account the different purpose and effect of these transmissions and digital phonorecord deliveries in general.

The voluntary negotiation proceeding may result in license agreements voluntarily negotiated among individual musical work copyright owners and individual entities that make or authorize digital phonorecord deliveries. It is the Committee's intention that negotiations leading to any such agreements be covered by section 115(c)(3)(B) and that any such agreements have the effect set forth in section 115(c)(3)(E).

Beyond such individual license agreements, however, the Committee anticipates that the voluntary negotiation proceeding will lead to an industry-wide agreement concerning mechanical royalty terms and rates and the year when terms and rates next will be determined.

The parties are expected to negotiate, or if necessary arbitrate, "terms" as well as rates. By "terms," the Committee means such details as how payments are to be made, when, and other accounting matters. While these details are for the most part already prescribed in section 115, and related details are to be established by the Librarian under section 115(c)(3)(D), the bill allows for additional such terms to be set by the parties or by CARPs in the event that the foregoing provisions or regulations are not readily applicable to the new digital transmission environment.

If an agreement as to rates and terms is reached and there is no controversy as to these matters, it would make no sense to subject the interested parties to the needless expense of an arbitration proceeding conducted under section 115(c)(3)(D). Thus, it is the Committee's intention that in such a case, as under the Copyright Office's current regulations concerning rate adjustment proceedings, the Librarian of Congress should notify the public of the proposed agreement in a notice-and-comment proceeding and, if no opposing comment is received from a party with a substantial interest and an intent to participate in an arbitration proceeding, the Librarian of Congress should adopt the rates embodied in the agreement, and any agreed-to year when the mechanical royalty rates for digital phonorecord deliveries next will be determined, without convening an arbitration panel. See 37 C.F.R. §251.63 (b); see also 59 Fed. Reg. 63,038 (1994).

As provided in section 115(c)(3)(F), the procedures for negotiation and, if necessary, arbitration set forth in this subparagraph and in section 115(c)(3)(D) are to be repeated every five years unless it is voluntarily determined by the parties pursuant to this subparagraph and subparagraph (B) that rates and terms should next be determined in a different year. The Committee recognizes that it may be unusual to allow the interested parties to negotiate and agree to a year when the statutory mechanical royalty rates for digital phonorecord deliveries next will be determined. However, the Committee was concerned that rapidly changing technology might justify redetermining the terms and royalty rates applicable to digital phonorecord deliveries made under a compulsory license on a different schedule than once every five years. Thus, the Committee chose to give the interested parties flexibility in this area.

The Committee wishes to make clear that nothing in section 115(c)(3) is intended to affect the schedule prescribed in section 803(a)(3) for determining the mechanical royalty rate for the making and distribution of physical phonorecords. Proceedings to establish mechanical royalty rates for the making and distribution of physical phonorecords are expected to be conducted in 1997 and every ten years thereafter, and are not subject to contrary agreement.

*Section 115(c)(3)(D)*

If a voluntary negotiation proceeding as described in section 115(c)(3)(C) does not lead to the determination of the terms and statutory royalty rates applicable to digital phonorecord deliveries made under a compulsory license, those terms and rates are to be determined by arbitration under this subparagraph. The Committee notes that the subparagraph specifically refers to chapter 8 of title 17, which concerns copyright royalty arbitration in general. Accordingly, arbitration under this subparagraph should be conducted under the same type of procedures that apply in other copyright royalty arbitrations. Thus, for example, an arbitration proceeding is to commence only upon the filing of a petition in accordance with existing section 803(a)(1).

Like terms and rates determined under section 115(c)(3)(C), terms and rates determined under this subparagraph are to distinguish between digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and digital phonorecord deliveries in general.

In determining terms and rates under this subparagraph, a copyright arbitration royalty panel is to consider the objectives set forth in section 801(b)(1), and the arbitrators may consider terms and rates under voluntarily negotiated license agreements. However, the statutory mechanical royalty payable for digital phonorecord deliveries made on or before December 31, 1997 shall be given no precedential effect in determining the statutory mechanical royalty payable for digital phonorecord deliveries made on or after January 1, 1998. The Committee specifically chooses to remain neutral on the question whether the mechanical royalty rates for any category of digital phonorecord delivery made on or after January 1, 1998 should be the same as, lower than, or higher than the mechanical royalty rate for the making and distribution of physical phonorecords.

The subparagraph specifically authorizes the Librarian of Congress to establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such use shall be kept and made available by persons making digital phonorecord deliveries.

*Section 115(c)(3)(E)*

This subparagraph provides that in general, the provisions of voluntarily negotiated agreements for the licensing of nondramatic musical works shall be given effect in lieu of any statutory rates and terms determined by the Librarian of Congress. For example, the Committee understands that individual record companies and music publishers have negotiated license agreements for specific albums prescribing a royalty rate less than the statutory mechanical royalty rate. The Committee does not intend to prevent negotiation of voluntary license agreements, for either physical phonorecords or digital phonorecord deliveries, prescribing royalties at less than the statutory rates, except in the situation described below.

There is a situation in which the provisions of voluntarily negotiated license agreements should not be given effect in lieu of any mechanical royalty rates determined by the Librarian of Congress. For some time, music publishers have expressed concerns about so-called "controlled composition" clauses in recording contracts. Generally speaking, controlled composition clauses are provisions whereby a recording artist who is the author of a nondramatic musical work agrees to reduce the mechanical royalty rate payable when a record company makes and distributes phonorecords which include recordings of such artist's compositions. Subject to the exceptions set forth in subparagraph (E)(ii), the second sentence of subparagraph (E)(i) is intended to make these controlled composition clauses inapplicable to digital phonorecord deliveries.

Specifically, unless the requirements of one or both of the exceptions of subparagraph (E)(ii) are satisfied, the royalty rates determined through negotiation or arbitration pursuant to subparagraph (C) or (D) are to be given effect in lieu of any contrary rates specified in a contract pursuant to which a recording artist who is the author of a nondramatic musical work grants a mechanical license in that work to a record company or commits another person (such as the artists music publisher) to grant such a mechanical license in that work.

Subparagraph (E)(ii) specifies two types of contracts where the negotiated royalty rates set forth in the contracts are to be given effect notwithstanding the second sentence of subparagraph (E)(i). The first of these is a "grandfather clause" giving effect to contracts and rates agreed to in a contract with a recording artist on or before June 22, 1995, except to the extent they are modified after that date for the purpose of reducing the royalty prescribed therein to less than the statutory rates or to add new compositions at less than the statutory rates. Thus, if a recording contract entered into on or before June 22, 1995 was modified after that date to cover a larger number of musical works, the royalty rates specified in the contract would apply to the number of works within the

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scope of the contract as of June 22, 1995, and the statutory rates would apply to the number of works added thereafter. The Committee also notes that recording artist contracts entered into on or before June 22, 1995 and not modified thereafter, or modified thereafter to extend the date by which an artist must complete a recording, are examples of contracts to be given effect notwithstanding the second sentence of subparagraph (E)(i).

The second of the exceptions provided in subparagraph (E)(ii) is intended to allow a recording artist-author who chooses to act as his or her own music publisher to agree to accept mechanical royalties at less than the statutory rates, provided that the contract containing such lower rates is entered into after the sound recording has been fixed in a tangible medium of expression substantially in a form intended for commercial release.

It should be emphasized that subparagraph (E) applies only to the making of digital phonorecord deliveries and not to the making and distribution of physical phonorecords. Nothing in the bill is intended to interfere with the application of controlled composition clauses to the making and distribution of physical phonorecords or to digital phonorecord deliveries where the agreements are not covered by the terms of subsection (c)(3)(E).

*Section 115(c)(3)(F)*

This subparagraph provides that the procedures specified in subparagraphs (C) and (D) for negotiation or arbitration of mechanical compulsory license rates and terms for digital phonorecord deliveries are to be repeated ever five years, unless different years for repeating such proceedings are determined in accordance with subparagraphs (B) or (C). Nothing in section 115(c)(3) is intended to affect the schedule prescribed for determining the mechanical royalty rate for the making and distribution of physical phonorecords. Proceedings to establish mechanical royalty rates for the making and distribution of physical phonorecords are to be conducted in 1997 and every ten years thereafter, and are not subject to contrary agreement.

The reference in subparagraph (F) to the procedures specified in subparagraphs (C) and (D) is to the publication of notice, initiation of voluntary negotiations, and convening of CARPs if necessary. The reference is not to the dates within the year as described in subparagraph (C). Indeed, the Committee encourages the Librarian to publish a notice of initiation of voluntary negotiation proceedings as early in the year as practicable, to allow the maximum amount of time for voluntary negotiations, or if necessary arbitration.

*Section 115(c)(3)(G)*

This subparagraph imposes as a condition of compulsory licensing the obligation that digital phonorecord deliveries be accompanied by certain specified types of information, if that information has been encoded in the sound recording being transmitted under the sound recording copyright owner's authority. This provision does not obligate the copyright owner of the sound recording to encode copyright management information in the work. In addition, it is not intended to require a transmitting entity to generate or encode such information in its transmission if the information is not encoded in the sound recording. Moreover, the transmitting entity is not required to transmit information that may be encoded in the sound recording other than the information specified in this subparagraph and "related information" (o.e., information that is specifically related to the identification of the works being performed and upon which payments are to be made by the transmitting entity under this bill). The subparagraph also makes clear that nothing in this section affects the provisions of section 1002(e).

*Section 115(c)(3)(H)*

This subparagraph confirms that musical work copyright owners and sound recording copyright owners both have the same rights to be protected against infringement with respect to digital phonorecord deliveries as they have with respect to distributions of physical phonorecords of their respective works. Thus, subject to the limitations contained in existing law, a digital phonorecord delivery infringes the rights of the sound recording copyright owner unless authorized by the sound recording copyright owner (or his or her agent), and a digital phonorecord delivery infringes the rights of the musical work copyright owner unless covered by a compulsory license or authorized by the musical work copyright owner (or his or her agent). The subparagraph makes clear that any cause of action under this subparagraph is in addition to other remedies available under title 17.

*Section 115(c)(3)(I)*

This subparagraph clarifies the circumstances under which a sound recording copyright owner may be held liable for digital phonorecord deliveries by third parties. The changes to section 115 made by S. 227 are intended to allow record companies to license not only their own rights, but also, if they choose to do so, the rights of writers and music publishers to authorize digital phonorecord deliveries. If a record company grants a digital transmission service a license under both the record company's rights in a sound recording and the musical work copyright owner's rights, the record company may be liable, to an extent determined in accordance with applicable law, for the applicable mechanical royalty for every digital phonorecord delivery made under the record company's authority. However, if a record company grants a license under its rights in a sound recording only, and does not grant a mechanical license under the copyright in the musical work embodied in the sound recording, it is the transmission service's responsibility to obtain a license under the musical work copyright, and the record company cannot be held liable for infringement of the copyright in the musical work by the record company's licensee.

*Section 115(c)(3)(J)*

This subparagraph makes clear that nothing in section 1008 shall be construed to prevent the exercise of the rights and remedies allowed by paragraphs (3) and (6) and chapter 5 in the event of a digital phonorecord delivery. However, no action alleging infringement of copyright may be brought under title 17 against a manufacturer, importer or distributor of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or against a consumer, based on the actions described in section 1008.

*Section 115(c)(3)(K)*

This subsection makes clear that section 115, as amended by the bill, is not intended to annul or limit any existing or future right or remedy of a sound recording copyright owner or musical work copyright owner, except to the extent that a musical work copyright owner's exclusive rights are limited by compulsory licensing under the conditions specified by section 115 as amended.

*Section 115(c)(3)(L)*

This subparagraph makes clear that the changes made to section 115 by the bill with regard to liability for digital phonorecord deliveries do not apply to transmissions or retransmissions that are exempt under section 114(d)(1). At the same time, the exemptions set forth in section 114(d)(1) are not intended either to enlarge or to diminish in any way the rights of copyright owners under existing law with respect to such transmissions or retransmissions.

*Section 115(d)*

This subsection defines the term "digital phonorecord delivery." A "digital phonorecord delivery" is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording. The Committee notes that the phrase "specifically identifiable reproduction," as used in the definition, should be understood to mean a reproduction specifically identifiable to the transmission service. Of course, a transmission recipient making a reproduction from a transmission is able to identify that reproduction, but the mere fact that a transmission recipient can make and identify a reproduction should not in itself cause a transmission to be considered a digital phonorecord delivery.

The final sentence of this definition provides that a digital phonorecord delivery does not result from a real-time, noninteractive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible. For example, a transmission by a noninteractive subscription transmission service that transmits in real time a continuous program of music selections chosen by the transmitting entity, for which a consumer pays a flat monthly fee, would not be a "digital phonorecord delivery" so long as there was no reproduction at any point in the transmission in order to make the sound recording audible. Moreover, such a transmission would not be a "digital phonorecord delivery" even if subscribers, through actions taken on their own part, may record all or part of the programming from that service. The final sentence of the definition of "digital phonorecord delivery" is not intended to change current law with respect to rights under section 106, or the limitations on those rights under sections 107–113, sections 116–120, and the unamended portions of sections 114 and 115.

Section 5—Conforming Amendments.—This section makes certain technical amendments to other sections of title 17.

Among other things, it adds to section 101 a definition of "digital transmission," which is any transmission in whole or in part in a digital or other non-analog format. Although the Committee is not presently aware of any non-analog formats that are not digital, the Committee wants to make clear that all non-analog formats now known or later developed are covered by the bill. For purposes of section 115, a transmission of a motion picture or other audiovisual work does not come within the definition of "digital transmission."

Section 6—Effective Date.—This section provides that new sections 114(e) and 114(f) of title 17, which concern negotiation of licenses under the new performance right,

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take effect immediately upon the date of enactment. The effective date of other provisions of the Act is three months after the date of enactment.

Mrs. FEINSTEIN. Mr. President, I rise today in support of S. 227, the Digital Performance Right in Sound Recordings Act of 1995. I am pleased to be a cosponsor of this legislation introduced by Senator HATCH, the distinguished chairman of the Judiciary Committee. This bill will allow the United States to finally join more than 60 nations in enacting this same copyright protection for sound recordings.

The bill before us, today, essentially closes a glaring loophole in the Copyright Act which had denied protection to recording artists and record companies ever since the copyright was first extended to sound recordings in 1972. This legislation would create a right to public performance in digital transmissions and give copyright owners the ability to negotiate the use of their works in new technologies.

Every other copyrighted work—motion pictures, books, plays, computer software and musical compositions—already has this protection. It is time to bring the law up to date for sound recordings.

Senator HATCH and I first introduced a version of this bill in the 103d Congress. Since that time, we have heard from literally hundreds of interested parties from all affected sides. We have had input from broadcasters, cable companies, consumers, songwriters, music publishers, artists, record companies, and more. Many of those affected by the legislation have had suggestions on how to make it better and more responsive to the marketplace.

I would like to commend Senator HATCH and his staff and thank them for working so hard with us to assure that all of the legitimate concerns with the original legislation were so thoughtfully addressed. Senators BIDEN, LEAHY, and THURMOND and their staffs deserve credit as well.

Every copyright expert who testified before the Judiciary Committee, including those from the nonpartisan U.S. Copyright Office, agreed that this legislation needs to be enacted.

The Digital Performance Right in Sound Recordings Act helps move our copyrighted industries closer to the Information Superhighway. A road where consumers will have access to new music and exciting artists delivered to the consumer in technology advanced ways beyond what we might have imagined when we first heard the Victrola, or even stereo sound. As these new technologies develop and as we enter this digital and computer age, the protection of America's intellectual property has taken on a tremendous urgency.

The inequities of the current law are best illustrated by a real-world example: when a digital music service, paid for with a subscription fee and available via a consumer's cable TV box, play a piece of recorded music from a compact disc, such as "White Christmas" performed by Bing Crosby, the songwriter and music publisher, in this case Irving Berlin, have rights and receive payment for the performance of that work. Yet while Irving Berlin is compensated, Bing Crosby, the recording artist who brought the song to life, and the record company which invested the moneys to record and distribute the album would receive nothing.

We have chosen to be forward thinking with this legislation, to enable Congress to close a loophole which threatens to grow immensely in the near future. With new digital technology, a transmission service, simply by acquiring a single copy of a compact disc, can deliver CD-quality sound electronically to millions of homes and cars, without any payment to the creators of that recorded music.

The hundreds of thousands of consumers who love new music could make perfect copies of the one CD. Potentially millions of perfect copies of this CD can be made electronically. Why would anyone go to a record store in the future if they were able to receive music this way? Why should the digital transmission businesses be making money by selling music when they are not paying the creators who have produced that music?

If this should occur without copyright protection, investment in recorded music will decline, as performers and record companies produce recordings which are widely distributed without compensation to them. This would result in the decline of what presently constitutes one of America's most important, productive and competitive industries.

America's copyright industries contributed a staggering 3.7 percent to the Nation's gross domestic product in 1993. That's a contribution of $238.6 billion, Mr. President. Between 1977 and 1993, the number of workers employed by those industries doubled to 3 million, 2.55 percent of our work force. Over the last 5 years, employment in this sector has grown at four times the rate of jobs in other sectors.

And, perhaps most significant of all in this context, these industries together achieved foreign sales of $45.8 billion in 1993. Amazingly, that was the second biggest single contribution to America's balance of trade in 1993 among all industries, second only to autos and their parts.

My home State of California has been a particular beneficiary of this growth. It is an important home to the music industry, the industry whose copyright protection we are specifically addressing today. California's music community is home to over 100,000 jobs, including recording, manufacturing, distribution and retail.

These are the jobs of the future, and I am pleased that this legislation will assure the continued viability of these important businesses and creative endeavors.

More than 60 nations, including 9 members of the European Community, provide their rightsholders with a performance right. $150 million is collected worldwide for the public performance of sound recordings.

The United States is the world's leading exporter of recorded music, with American artists accounting for 35 percent of all music sold worldwide. However, because the United States does not reciprocate in providing this performance right, the U.S. Patent and Trademark Office reports that U.S. performers and record companies are denied access to these substantial royalties. Rectifying this disparity will obviously benefit this very important export sector of our economy.

Moreover, I'm told that the lack of a performance right has been a major obstacle to the efforts of our trade negotiators to achieve higher levels of intellectual property protection in general. The Senate today can help eliminate this obstacle.

This legislation would provide equity, Mr. President. Equity for the digital transmitters who would be assured that new music was available for their services. Equity for consumers who would be assured that new and varied music continues to get recorded and produced. Equity for the creators and producers of music who invest their talent, effort and dollars in sound recordings.

In sum, as I detailed in my RECORD statement of January 13 when we introduced this bill, and at the hearing on this bill in March, passing this legislation is the right thing to do as a matter of copyright policy, it's the fair thing to do, and it is clearly in the best economic interests of the Nation. I urge its adoption.

Thank you, Mr. President. I yield the floor.

Mr. HELMS. Mr. President, it is regrettable that S. 227 fails to address the present concerns of countless small businesses in North Carolina, including many restaurants, that offer background music for the enjoyment of their customers.

Many restauranteurs, retailers, and radio broadcasters resent the continued heavy-handed practices by music-licensing organizations in imposing unreasonable copyright fees. I hope these concerns may be addressed soon in future legislation.

Mr. President, this is the problem: A restaurant has a radio or television set playing, and a representative of one of the music royalty organizations shows up threatening court action unless the restauranteur pays an exorbitant licensing fee, simply for having a radio or television set on.

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This double-dipping is both arrogant and unfair—the royalty organizations insist on collecting fees from both broadcasters and the small businesses that receive the public broadcasts.

Not only do these organizations double-dip, they also seek to intimidate small businesses into paying fees for listening to radio or TV stations.

Small businesses are entitled to fair protection against arbitrary pricing, discriminatory enforcement, and abusive collection practices by music-licensing organizations.

This is a problem that should be addressed soon, and, Mr. President, I ask unanimous consent that a relevant article be printed in the RECORD at the conclusion of my remarks—it being a Nation's Restaurant News article by Ron Ruggless entitled, "Operators to Lawmakers: Now You're Playing Our Song; Legislators Tackle Industry's Music-Licensing Gripe; Restaurateurs."

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From Nation's Restaurant News, Feb. 27, 1995]

OPERATORS TO LAWMAKERS: NOW YOU'RE PLAYING OUR SONG; LEGISLATORS TACKLE INDUSTRY'S MUSIC-LICENSING GRIPE; RESTAURATEURS

(By Ron Ruggless)

WASHINGTON.—At the urging of restaurateurs and other small-business owners, federal and state lawmakers are pumping up the volume on the way music-licensing agents do business and the fees they charge.

In Congress Rep. Jim Sensenbrenner, R-Wis., has introduced a bill to amend federal copyright law and exempt restaurateurs from paying licensing fees for background music from radios and televisions, for which they are now liable.

And in 10 states, from New Hampshire to Hawaii, Legislatures are considering proposals that would regulate the way the music-licensing agents conduct themselves in collecting royalties.

"Restaurant owners all over the country have been infuriated by the bullying tactics of the huge music-licensing agents," said Herman Cain, president of the National Restaurant Association. "Their outrage is palpable."

For years restaurateurs have been alarmed by what they consider random pricing and abusive collections and threats by the performing rights societies, such as Broadcast Music Inc., or BMI; the American Society of Composers, Authors and Publishers, or ASCAP; and the Society for European Songwriters and Composers, or SESAC.

I can't tell you the number of times small-business owners in my district have complained about the tactics used by these performing rights societies to collect fees for music played on radios or TVs," Sensenbrenner explained. "I believe artists should be compensated for their works, but I don't believe these societies should be able to intimidate a restaurant owner into paying fees for the incidental use of a broadcast over which he is she has no control."

More than 150 restaurateurs were scheduled to fly in to Washington on Feb. 23 to lobby the 104th Congress on Sensenbrenner's Fairness in Musical Licensing Act of 1995 (H.R. 789). Similar legislation was introduced in last year's Congress but was not acted upon before it adjourned.

The Sensenbrenner bill, which had 21 cosponsors by mid-February, also would establish an arbitration system to resolve rate disputes. Under current federal copyright law, only the federal court of the Southern District of New York is allowed to handle such disputes, which makes it expensive for business people elsewhere in the nation. The National Restaurant Association has long claimed that ASCAP, BMI, and SESAC rely on the threat of costly court battles to force restaurateurs to comply with their fees.

Meanwhile, restaurateurs were working at the local level in 10 states to regulate the way the music-copyright agents conduct their collections of royalties.

Most states were patterning their legislation after New Jersey's Collection Practices Reform Act, which has passed the state's General Assembly and is now under consideration by the Senate.

The New Jersey proposal would require music-licensing agents to provide list of songs they represent, provide comparisons of fees charged within a 25-mile radius of a business, force them to identify themselves upon entering a business establishment and set up a third-party arbitration group to mediate contract disputes.

States with similar bills wending their way through the legislatures include Colorado, Hawaii, Maryland, Missouri, New Hampshire, Oklahoma, Texas, Virginia, and Wyoming.

In Texas the proposed legislation includes the New Jersey provisions as well as a component that would require agents to be licensed by the state, according to Glen Garey, general counsel for the Texas Restaurant Association. "I don't think we'll be too easy to push over," Garey said, referring to lobbying by the performing-rights societies. "I don't buy into the argument that any of this is unconstitutional or conflicts with federal law."

Colorado's proposed legislation in mid-February had garnered the sponsorship of 20 of 65 House members and 10 of 35 senators, according to Pete Meersman, executive director of the Colorado Restaurant Association.

It doesn't deal with whether or not operators owe royalties to copyright owners, or whether those royalties are fair," Meersman said. What it does deal with is how royalties are collected in Colorado. It sets a standard of professional conduct for agents of these Performing-rights societies."

The legislation would require music-licensing agents to identify themselves upon entering establishments for the purposes of investigating the use of copyrighted music.

"A lot of times," Meersman explained, "they will come in unannounced. We've had members find them in their coat rooms, where their music equipment is kept. We've had them question employees who don't really know anything about the equipment, type of music or whether it's CDs, tapes or radio.

"We'd like them to identify themselves so someone who knows what they are talking about can get them the information they need."

Another provision would require the societies to provide lists of copyrighted songs they represent. "The reason we want to have lists available is that, say, you're an operator, and you don't want to pay royalties or a blanket licensing fee to all these groups," he said. "You want to know what is copyrighted or covered under your agreement. In other words, you want to know what you are paying for."

One other provision in the bill would require the performing-rights societies to let operators know what other similar establishments are paying in the same area, which was defined as a 25-mile radius. "That way you might be able to determine whether you are being asked to pay fees that are unreasonable compared to similar establishments," Meersman said.

A number of Colorado restaurant operators have been threatened if they didn't sign a music agreement, he said. "We think our members ought to be treated in a more professional manner. They don't like to be threatened, intimidated. It's a standard of professional conduct."

Meersman said the Colorado legislation has drawn opposition from lobbyists from the music-copyright companies, who, he said, "are pulling out all the stops to try to squash this legislation wherever it comes up."

One argument is that music-copyright legislation should be handled at the federal level, but Meersman disagrees: "Issues dealing with whether or not someone has to pay a fee, those are not things we can deal with at the state level. But how these people treat business owners in the state and how they go about collecting the fees is a state issue."

Katy McGregor, a legislative representative with the NRA in Washington, welcomes the state initiatives. If they can get some reforms at the state level, it certainly makes dealing with these music-licensing groups a little more agreeable until we can get some changes in copyright law at the federal level," she said. "What they are doing in the states is crucial."

Mr. LEAHY. Mr. President, the matter of a performance right for sound recordings is an issue that has been in dispute for over 20 years. I believe that Congress will finally enact a law establishing that right.

I believe that musicians, singers and featured performers on recordings ought to be compensated like other creative artists for the public performances of works that they create and that we all enjoy. I want companies that export American music not to be disadvantaged internationally by the lack of U.S. recognition of such a performance right. Most of all, I have wanted to be sure that the new law is fair to all parties—to performers, musicians, songwriters, music publishers, performing rights societies, emerging companies expanding new technologies, and, in particular, consumers and the public.

I am glad to have been able to play a role in redesigning the bill to meet these objectives. The substitute seeks to preserve existing rights, to encourage the development of new technologies, and to promote competition as the best protection for consumers. I was pleased to join as a cosponsor of the substitute and to urge support for S. 227 as amended when the Judiciary Committee considered the bill on June 29.

Working with Senator THURMOND, the Chairman of the Antitrust Subcommittee, and with the help of the Antitrust Division of the Department of Justice, we have been able to

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strengthen the bill in significant regard.

At our March hearing on S. 227, I raised antitrust concerns about certain provisions in the bill. In particular, I was concerned about subsections (h) and (e), which were proposed to be added to section 114 of the Copyright Act. The language of both subsections has been revised and strengthened to protect against anticompetitive activity.

As originally drafted, the bill might have created a virtually unlimited antitrust exemption for major record companies to combine to set prices for licensing music. While I want to work to find ways to keep transaction costs as low as possible for clearing rights in order to make music in the future more accessible to the public at lower prices, I do not support such an exemption to our antitrust laws.

On June 20, I received a letter from the Department of Justice responding to a letter I had sent following our hearing. The Department noted that subsection (e) of the original bill could be read to provide statutory authority to record companies to form a licensing cartel. In light of the concentration of the record industry in which 6 major companies account for 80 to 85 percent of the U.S. market, this could, in the words of the Justice Department "cause great mischief by allowing the formation of a cartel immune from antitrust scrutiny." I know that is not what the original sponsors of this legislation intended.

I was pleased to work with Senator THURMOND and others to resolve these problems. The Department provided technical assistance to us as we worked out another approach that authorizes only a clearinghouse to cut down transaction costs without authorizing price fixing by combinations of companies. This is an approach with which we are all more comfortable. In this regard, we received a follow-up letter from the Department of Justice on these provisions.

I commend the industry groups that took seriously our suggestion that they talk through their differences and see whether they could recommend a consensus solution to Congress. The cooperation and good faith contributed greatly to the process. My experience has been that in these areas of copyright law, legislation moves best and most easily by consensus. I think that is what we have strived to attain and what we have achieved.

I ask unanimous consent to have printed in the RECORD copies of the June 20 and July 21 letters from the Department of Justice on this measure.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
*Washington, DC, June 20, 1995.*

Hon. PATRICK LEAHY,
*Ranking Member, Subcommittee on Antitrust, Business Rights and Competition, Committee on the Judiciary, U.S. Senate, Washington, DC.*

DEAR SENATOR LEAHY: Thank you for your March 13, 1995, letter to Assistant Attorney General Anne Bingaman asking for views on S. 227, the "Digital Performance Right in Sound Recordings Act of 1995." The Administration supports the establishment of a performance right in digital recordings. However, based on our review of S. 227, we believe: (1) that proposed subsection (e) may inadvertently authorize cartel activity in the licensing of performance rights, and (2) that proposed subsection (h) does not fully address the potential competition issues associated with licensing to affiliated entities. Minor modifications to S. 227 would remedy these deficiencies without undermining the bill's underlying goals.

Performance rights in sound recordings, common in Europe and other regions, are not currently granted by the 1976 Copyright Act or any other federal statute. Thus, under current law, producers of sound recordings are not entitled to license or receive royalties for the public performance and broadcast of their recordings in the U.S. for example, digital subscription transmission services[1] currently may buy a compact disc on the retail market and simply play the music from it on their channels without obtaining the permission of or compensating the artists or record companies that produced the recording.

Senate Bill 227 would amend the Copyright Act to create a performance right in digital transmissions. Under the bill, right holders would have the authority to receive royalty fees from, and in some cases, negotiate the terms of, the performance of their sound recordings by digital delivery services such as pay-per-listen and subscription transmission services.

Generally, we believe that S. 227 would advance competition by allowing producers of sound recordings control over certain transmissions of their recordings by some digital transmission services, this potentially allowing them to limit the threat of uncompensated home copying by subscribers to those services. Nevertheless, given the concentrated nature of the affected industries, the danger exists that this remedial legislation could be subverted to monopolistic aims.

1. Licensing Cartel.—We are concerned that proposed subsection (e), by allowing license negotiations by a common agent, would authorize formation of a cartel by performance rights holders. Our understanding is that a "performance right" would, at least with respect to the major record companies and their affiliates (the "majors")[2] be held by the record company, either by virtue of its producer status or by contract with the artist.[3]

As part of its ongoing inquiry into licensing practices in U.S. and in foreign commerce, the Department is currently investigating whether certain record companies have unlawfully colluded on license fees by, inter alia, forming "performance rights societies" in Europe and elsewhere that operate as the exclusive negotiating agency for all of the record companies. Unlike licensing societies that act as nonexclusive agents for owners and composers of copyrighted compositions, the foreign performance rights societies are the exclusive assignees of performance rights and arguably are highly concentrated. Exploiting the combined market power associated with the pooling of intellectual property rights, these exclusive licensing societies typically charge a percentage-of-revenue fee in return for a blanket license. The European Commission has issued a Statement of Objections against these practices as they relate to music video licenses, and the Division is likewise seeking to determine whether the activities of these foreign rights societies have an adverse impact on U.S. exports of music video and digital radio programming. See *United States v. Time Warner Inc., et at.*, No. Misc. 94-338 HHG (filed Nov. 3, 1994) (Petition to enforce civil investigative demands).

Arguably, S. 227 would statutorily authorize performance right holders, and record companies in particular, to form the same kind of anticompetitive performance rights society here in the United States. According to proposed subsection (e):

"Any copyright owners of sound recordings and any entities performing sound recordings affected by this section may negotiate and agree upon the terms and rates of royalty payments for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and *may designate common agents to negotiate, agree to, pay, or receive such royalty payments.*"

(Emphasis added). This subsection could cause great mischief by allowing the formation of a cartel immune from antitrust scrutiny. Although the arbitration royalty panel created by the statute would set some limit on fees charged for compulsory licenses, this provision would authorize collective negotiations by right holders for unregulated voluntary licenses as well. Moreover, even in the compulsory license context, a small programmer would almost certainly pay hefty premium in order to avoid the costs of a challenge before the royalty panel against a cartel whose costs and legal fees are spread over a multi-billion dollar industry. Ultimately, U.S. consumers would pay this premium.

We therefore strongly recommend that proposed subsection (e) be deleted. To do so would in no way affect the salutary goals of the bill. Artists could transfer rights to the record companies. Record companies could unilaterally hire agents. They could even form a performance right society so long as it conformed to the antitrust laws. What they could not do is form a federally authorized cartel to set higher-than-competitive prices.

2. *Licensing to Affiliates.*—Proposed subsection (h) provides that, where a right holder licenses a sound recording to a digital programmer it directly or indirectly controls, the right holder must license to similarly situated programmers on similar terms and conditions. As written, this provision is unlikely to be an effective deterrent to discrimination in favor of affiliates and may have the unintended effect of mandating higher-than-competitive license fees.

In the first place, the trigger language of the bill is too narrow. As far as we know, no individual right holder, including the record companies, has a large enough individual stake in a digital programmer to have positive "control". Together, however, several majors potentially may exercise substantial *collective* influence. Taking the cable audio services industry as an example, Sony, Warner, and EMI each hold a 33% interest in

Footnotes at end of article.

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SWE Cable Radio Company (SWE), which in turn holds a 35% interest—enough for negative control over any major decision—in Digital Cable Radio Associates L.P. (DCR). Presumably, these partners could favor their collectively controlled programmer at the expense of Digital Music Express (DMX), the only other digital radio programmer. S. 227 would not prevent discrimination of this type.

Second, it is by no means clear that programmers such as DMX would be protected by subsection (h) even if it were triggered. As written, the subsection mandates "similar terms" as those provided to the affiliated programmer. This raises the possibility that right holder(s) could set a high price to the affiliated programmer and then claim a statutory requirement to apply the artificially high rate to the non-affiliated programmer.

Third, to be an effective deterrent to discrimination, subsection (h)(2), allowing the right holder to set different terms and conditions for essentially any reason, should be tightened.

We suggest, therefore, the following modifications to proposed subsection (h) (changes in italics):

"Where a copyright owner of sound recordings, *individually or collectively with other copyright owners of sound recordings*, owns a controlling interest in, or otherwise possesses the power directly or indirectly to *control or block important management decisions* of, an entity engaging in digital transmissions covered by section 106(6) and licenses to such entity the right to publicly perform a sound recording by means of digital transmission, the copyright owner shall make the licensed sound recording available under section 106(6) *on terms and conditions no less favorable* to all similarly-situated entities offering similar types of digital transmission services, except that the copyright owner may—

"(1) impose reasonable requirements for creditworthiness; and

"(2) *make reasonable adjustments to the* prices, terms, and conditions to take into account the types of services offered, the duration of the license, the geographic region, the numbers of subscribers served, and any other relevant factors."

We believe this modified language would address the concerns set forth above by (1) expanding the coverage of the subsection to include situations where right holders collectively control a programmer or have a stake in a programmer that does not rise to the level of positive control; (2) restricting the ability of a right holder to discriminate based on pretextual dissimilarities among affiliated and non-affiliated programmers; (3) preserving the ability of rights holders to take substantial differences among programmers into account; and (4) ensuring that a programmer is not bound by statute to accept an artificially high license fee.

Thank you for the opportunity to comment on S. 227. In our view, the bill would be measurably improved if Congress were to adopt the suggested modifications or take other steps to address the concerns we have raised. Please do not hesitate to contact me at any time for further elaboration of the views expressed.

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the submission of this report to the Congress.

Sincerely,

KENT MARKUS,
*Acting Assistant Attorney General.*

FOOTNOTES

[1] Digital subscription transmission services currently provide approximately 60 CD-quality channels of audio programming to cable and satellite television subscribers.

[2] Six major record companies and their affiliates (the "majors") collectively account for approximately eighty to eighty-five percent of the U.S. and worldwide markets for prerecorded records, tape, and compact discs.

[3] When a recording artist signs with a major record label, he or she typically transfers all copyrights, including any performance right, to the record company in perpetuity throughout the world.

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U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
*Washington, DC, July 21, 1995.*

Hon. PATRICK LEAHY,
*U.S. Senate,*
*Washington, DC.*

DEAR SENATOR LEAHY: This letter responds to your June 29, 1995, letter to Anne K. Bingaman in which you, joined by Senators Thurmand, Kyl and Brown, asked for the Department of Justice's views on whether the most recent changes made to S. 227 adequately address the antitrust concerns raised in the Department's June 20, 1995, letter to you on this subject.

S. 227 would amend the Copyright Act to create a performance right in digital transmissions. Under the bill, right holders would have the authority to receive royalty fees from, and, in some cases, negotiate the terms of the performance of their sound recordings by digital delivery services such as pay-per-listen and subscriptions transmission services.

The Administration supports the establishment of a performance right for sound recordings. Generally, we believe that S. 227 would advance competition by allowing producers of sound recordings control over certain transmissions of their recordings by some digital services, thus potentially allowing them to limit the threat of uncompensated home copying by subscribers of those services.

As set forth more fully in our earlier letter, the original language of S. 227 could have been read to statutorily authorize activities that might otherwise violate the antitrust laws. Specifically, proposed subsection (e) arguably would have authorized rights holders—typically record companies—to designate "common agents" without appropriate safeguards to ensure against cartel behavior. Similarly, proposed subsection (h) could have been read to require an unaffiliated programmer to pay the same artificially high license as paid by an affiliated programmer.

As we read the Chairman's Final Mark Substitute Draft of S. 227, the revised bill can no longer be read to exempt activity that would otherwise clearly violate the antitrust laws.

With respect to proposed subsection (e), "Authority for Negotiations," we were concerned that the original language of the bill would have the unintended effect of making cartel conduct immune from antitrust scrutiny. In the revised bill, the role of the common agent has been substantially curtailed, thus addressing our concern. Specifically, in the context of "voluntary negotiations" for a statutory license, the common agent is now "non-exclusive"—meaning that a programmer may not be required to negotiate through the common agent. In addition, any impasse on license fees, terms and conditions can be resolved by the rate panel, if necessary. Where a statutory license has not been created (e.g., for interactive transmissions or transmissions that exceed the performance complement), the common agent's role is limited to a "clearing house" function. In other words, under those circumstances a common agent may not be the instrument of collective negotiation of rates and material terms. These changes address our primary concerns with the original language of subsection (e).[1]

With respect to proposed subsection (h), "Licensing to Affiliates," our primary concerns were whether the language of the bill: (1) adequately defined situations in which right holders might individually or collectively control an affiliate, and (2) would have permitted right holders to impose artificially high license fees on non-affiliates. With the addition of a definition of an "affiliated entity" in (j)(1) and the replacement of "similar terms and conditions" in subsection (h) with "no less favorable terms and conditions," we believe that control of affiliates is adequately defined and that our competitive concern that the bill would create a likelihood of competitive disadvantage for non-affiliates has been addressed.

We believe that S. 227, as modified, adequately addresses the competition concerns of the Department of Justice.

The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ANDREW FOIS,
*Assistant Attorney General.*

Mr. GORTON. Mr. President, I ask unanimous consent that the committee amendment, as amended, be agreed to; that the bill be deemed read a third time and passed, as amended; that the motion to reconsider be laid upon the table; and that any statements relating to the bill be placed at the appropriate place in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

So the bill (S. 227), as amended, was deemed read the third time and passed, as follows:

S. 227

*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 "Digital Performance Right in Sound Recordings Act of 1995".

**SEC. 2. EXCLUSIVE RIGHTS IN COPYRIGHTED WORKS.**

Section 106 of title 17, United States Code, is amended—

(1) in paragraph (4) by striking "and" after the semicolon;

(2) in paragraph (5) by striking the period and inserting "; and"; and

(3) by adding at the end the following:

"(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.".

**SEC. 3. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS.**

Section 114 of title 17, United States Code, is amended—

[1] Proposed subsection (e)(1) contains the clause "[n]otwithstanding any provision of the antitrust laws * * *." We would prefer such language be deleted, although we understand that Congress has used that language in other parts of the Copyright Act dealing with statutory licenses. Even with that language, we note that the substance of proposed subsection (e)(1) does not appear to authorize conduct facially at odds with the antitrust laws.

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(1) in subsection (a) by striking "and (3)" and inserting "(3) and (6)";

(2) in subsection (b) in the first sentence by striking "phonorecords, or of copies of motion pictures and other audiovisual works," and inserting "phonorecords or copies";

(3) by striking subsection (d) and inserting:

"(d) LIMITATIONS ON EXCLUSIVE RIGHT.—Notwithstanding the provisions of section 106(6)—

"(1) EXEMPT TRANSMISSIONS AND RETRANSMISSIONS.—The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of—

"(A)(i) a nonsubscription transmission other than a retransmission;

"(ii) an initial nonsubscription retransmission made for direct reception by members of the public of a prior or simultaneous incidental transmission that is not made for direct reception by members of the public; or

"(iii) a nonsubscription broadcast transmission;

"(B) a retransmission of a nonsubscription broadcast transmission: *Provided*, That, in the case of a retransmission of a radio station's broadcast transmission—

"(i) the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter, however—

"(I) the 150 mile limitation under this clause shall not apply when a nonsubscription broadcast transmission by a radio station licensed by the Federal Communications Commission is retransmitted on a nonsubscription basis by a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the Federal Communications Commission; and

"(II) in the case of a subscription retransmission of a nonsubscription broadcast retransmission covered by subclause (I), the 150 mile radius shall be measured from the transmitter site of such broadcast retransmitter;

"(ii) the retransmission is of radio station broadcast transmissions that are—

"(I) obtained by the retransmitter over the air;

"(II) not electronically processed by the retransmitter to deliver separate and discrete signals; and

"(III) retransmitted only within the local communities served by the retransmitter;

"(iii) the radio station's broadcast transmission was being retransmitted to cable systems (as defined in section 111(f)) by a satellite carrier on January 1, 1995, and that retransmission was being retransmitted by cable systems as a separate and discrete signal, and the satellite carrier obtains the radio station's broadcast transmission in an analog format: *Provided*, That the broadcast transmission being retransmitted may embody the programming of no more than one radio station; or

"(iv) the radio station's broadcast transmission is made by a noncommercial educational broadcast station funded on or after January 1, 1995, under section 396(k) of the Communications Act of 1934 (47 U.S.C. 396(k)), consists solely of noncommercial educational and cultural radio programs, and the retransmission, whether or not simultaneous, is a nonsubscription terrestrial broadcast retransmission; or

"(C) a transmission that comes within any of the following categories:

"(i) a prior or simultaneous transmission incidental to an exempt transmission, such as a feed received by and then retransmitted by an exempt transmitter: *Provided*, That such incidental transmissions do not include any subscription transmission directly for reception by members of the public;

"(ii) a transmission within a business establishment, confined to its premises or the immediately surrounding vicinity;

"(iii) a retransmission by any retransmitter, including a multichannel video programming distributor as defined in section 602(12) of the Communications Act of 1934 (47 U.S.C. 522(12)), of a transmission by a transmitter licensed to publicly perform the sound recording as a part of that transmission, if the retransmission is simultaneous with the licensed transmission and authorized by the transmitter; or

"(iv) a transmission to a business establishment for use in the ordinary course of its business: *Provided*, That the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the sound recording performance complement. Nothing in this clause shall limit the scope of the exemption in clause (ii).

"(2) SUBSCRIPTION TRANSMISSIONS.—In the case of a subscription transmission not exempt under subsection (d)(1), the performance of a sound recording publicly by means of a digital audio transmission shall be subject to statutory licensing, in accordance with subsection (f) of this section, if—

"(A) the transmission is not part of an interactive service;

"(B) the transmission does not exceed the sound recording performance complement;

"(C) the transmitting entity does not cause to be published by means of an advance program schedule or prior announcement the titles of the specific sound recordings or phonorecords embodying such sound recordings to be transmitted;

"(D) except in the case of transmission to a business establishment, the transmitting entity does not automatically and intentionally cause any device receiving the transmission to switch from one program channel to another; and

"(E) except as provided in section 1002(e) of this title, the transmission of the sound recording is accompanied by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer.

"(3) LICENSES FOR TRANSMISSIONS BY INTERACTIVE SERVICES.—

"(A) No interactive service shall be granted an exclusive license under section 106(6) for the performance of a sound recording publicly by means of digital audio transmission for a period in excess of 12 months, except that with respect to an exclusive license granted to an interactive service by a licensor that holds the copyright to 1,000 or fewer sound recordings, the period of such license shall not exceed 24 months: *Provided, however*, That the grantee of such exclusive license shall be ineligible to receive another exclusive license for the performance of that sound recording for a period of 13 months from the expiration of the prior exclusive license.

"(B) The limitation set forth in subparagraph (A) of this paragraph shall not apply if—

"(i) the licensor has granted and there remain in effect licenses under section 106(6) for the public performance of sound recordings by means of digital audio transmission by at least 5 different interactive services: *Provided, however*, That each such license must be for a minimum of 10 percent of the copyrighted sound recordings owned by the licensor that have been licensed to interactive services, but in no event less than 40 sound recordings; or

"(ii) the exclusive license is granted to perform publicly up to 45 seconds of a sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

"(C) Notwithstanding the grant of an exclusive or nonexclusive license of the right of public performance under section 106(6), an interactive service may not publicly perform a sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording: *Provided*, That such license to publicly perform the copyrighted musical work may be granted either by a performing rights society representing the copyright owner or by the copyright owner.

"(D) The performance of a sound recording by means of a retransmission of a digital audio transmission is not an infringement of section 106(6) if—

"(i) the retransmission is of a transmission by an interactive service licensed to publicly perform the sound recording to a particular member of the public as part of that transmission; and

"(ii) the retransmission is simultaneous with the licensed transmission, authorized by the transmitter, and limited to that particular member of the public intended by the interactive service to be the recipient of the transmission.

"(E) For the purposes of this paragraph—

"(i) a 'licensor' shall include the licensing entity and any other entity under any material degree of common ownership, management, or control that owns copyrights in sound recordings; and

"(ii) a 'performing rights society' is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owner, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

"(4) RIGHTS NOT OTHERWISE LIMITED.—

"(A) Except as expressly provided in this section, this section does not limit or impair the exclusive right to perform a sound recording publicly by means of a digital audio transmission under section 106(6).

"(B) Nothing in this section annuls or limits in any way—

"(i) the exclusive right to publicly perform a musical work, including by means of a digital audio transmission, under section 106(4);

"(ii) the exclusive rights in a sound recording or the musical work embodied therein under sections 106(1), 106(2) and 106(3); or

"(iii) any other rights under any other clause of section 106, or remedies available under this title, as such rights or remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

"(C) Any limitations in this section on the exclusive right under section 106(6) apply only to the exclusive right under section 106(6) and not to any other exclusive rights under section 106. Nothing in this section shall be construed to annul, limit, impair or otherwise affect in any way the ability of the owner of a copyright in a sound recording to exercise the rights under sections 106(1), 106(2) and 106(3), or to obtain the remedies

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available under this title pursuant to such rights, as such rights and remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995."; and

(4) by adding after subsection (d) the following:

"(e) AUTHORITY FOR NEGOTIATIONS.—

"(1) Notwithstanding any provision of the antitrust laws, in negotiating statutory licenses in accordance with subsection (f), any copyright owners of sound recordings and any entities performing sound recordings affected by this section may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive payments.

"(2) For licenses granted under section 106(6), other than statutory licenses, such as for performances by interactive services or performances that exceed the sound recording performance complement—

"(A) copyright owners of sound recordings affected by this section may designate common agents to act on their behalf to grant licenses and receive and remit royalty payments: *Provided*, That each copyright owner shall establish the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other copyright owners of sound recordings; and

"(B) entities performing sound recordings affected by this section may designate common agents to act on their behalf to obtain licenses and collect and pay royalty fees: *Provided*, That each entity performing sound recordings shall determine the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other entities performing sound recordings.

"(f) LICENSES FOR NONEXEMPT SUBSCRIPTION TRANSMISSIONS.—

"(1) No later than 30 days after the enactment of the Digital Performance Right in Sound Recordings Act of 1995, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by subsection (d)(2) of this section during the period beginning on the effective date of such Act and ending on December 31, 2000. Such terms and rates shall distinguish among the different types of digital audio transmission services then in operation. Any copyright owners of sound recordings or any entities performing sound recordings affected by this section may submit to the Librarian of Congress licenses covering such activities with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

"(2) In the absence of license agreements negotiated under paragraph (1), during the 60-day period commencing 6 months after publication of the notice specified in paragraph (1), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings. In addition to the objectives set forth in section 801(b)(1), in establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated as provided in paragraph (1). The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings.

"(3) License agreements voluntarily negotiated at any time between one or more copyright owners of sound recordings and one or more entities performing sound recordings shall be given effect in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress.

"(4)(A) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in paragraph (1) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe—

"(i) no later than 30 days after a petition is filed by any copyright owners of sound recordings or any entities performing sound recordings affected by this section indicating that a new type of digital audio transmission service on which sound recordings are performed is or is about to become operational; and

"(ii) in the first week of January, 2000 and at 5-year intervals thereafter.

"(B)(i) The procedures specified in paragraph (2) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon the filing of a petition in accordance with section 803(a)(1) during a 60-day period commencing—

"(I) six months after publication of a notice of the initiation of voluntary negotiation proceedings under paragraph (1) pursuant to a petition under paragraph (4)(A)(i); or

"(II) on July 1, 2000 and at 5-year intervals thereafter.

"(ii) The procedures specified in paragraph (2) shall be concluded in accordance with section 802.

"(5)(A) Any person who wishes to perform a sound recording publicly by means of a nonexempt subscription transmission under this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording—

"(i) by complying with such notice requirements as the Librarian of Congress shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

"(ii) if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection.

"(B) Any royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set.

"(g) PROCEEDS FROM LICENSING OF SUBSCRIPTION TRANSMISSIONS.—

"(1) Except in the case of a subscription transmission licensed in accordance with subsection (f) of this section—

"(A) a featured recording artist who performs on a sound recording that has been licensed for a subscription transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the artist's contract; and

"(B) a nonfeatured recording artist who performs on a sound recording that has been licensed for a subscription transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the nonfeatured recording artist's applicable contract or other applicable agreement.

"(2) The copyright owner of the exclusive right under section 106(6) of this title to publicly perform a sound recording by means of a digital audio transmission shall allocate to recording artists in the following manner its receipts from the statutory licensing of subscription transmission performances of the sound recording in accordance with subsection (f) of this section:

"(A) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians) who have performed on sound recordings.

"(B) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists) who have performed on sound recordings.

"(C) 45 percent of the receipts shall be allocated, on a per sound recording basis, to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings).

"(h) LICENSING TO AFFILIATES.—

"(1) If the copyright owner of a sound recording licenses an affiliated entity the right to publicly perform a sound recording by means of a digital audio transmission under section 106(6), the copyright owner shall make the licensed sound recording available under section 106(6) on no less favorable terms and conditions to all bona fide entities that offer similar services, except that, if there are material differences in the scope of the requested license with respect to the type of service, the particular sound recordings licensed, the frequency of use, the number of subscribers served, or the duration, then the copyright owner may establish different terms and conditions for such other services.

"(2) The limitation set forth in paragraph (1) of this subsection shall not apply in the case where the copyright owner of a sound recording licenses—

"(A) an interactive service; or

"(B) an entity to perform publicly up to 45 seconds of the sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

"(i) NO EFFECT ON ROYALTIES FOR UNDERLYING WORKS.—License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).

"(j) DEFINITIONS.—As used in this section, the following terms have the following meanings:

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"(1) An 'affiliated entity' is an entity engaging in digital audio transmissions covered by section 106(6), other than an interactive service, in which the licensor has any direct or indirect partnership or any ownership interest amounting to 5 percent or more of the outstanding voting or non-voting stock.

"(2) A 'broadcast' transmission is a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.

"(3) A 'digital audio transmission' is a digital transmission as defined in section 101, that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.

"(4) An 'interactive service' is one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large does not make a service interactive. If an entity offers both interactive and non-interactive services (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service.

"(5) A 'nonsubscription' transmission is any transmission that is not a subscription transmission.

"(6) A 'retransmission' is a further transmission of an initial transmission, and includes any further retransmission of the same transmission. Except as provided in this section, a transmission qualifies as a 'retransmission' only if it is simultaneous with the initial transmission. Nothing in this definition shall be construed to exempt a transmission that fails to satisfy a separate element required to qualify for an exemption under section 114(d)(1).

"(7) The 'sound recording performance complement' is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than—

"(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or

"(B) 4 different selections of sound recordings

"(i) by the same featured recording artist; or

"(ii) from any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States,

if no more than three such selections are transmitted consecutively: *Provided*, That the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

"(8) A 'subscription' transmission is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission.

"(9) A 'transmission' includes both an initial transmission and a retransmission.".

**SEC. 4. MECHANICAL ROYALTIES IN DIGITAL PHONORECORD DELIVERIES.**

Section 115 of title 17, United States Code, is amended—

(1) in subsection (a)(1)—

(A) in the first sentence by striking out "any other person" and inserting in lieu thereof "any other person, including those who make phonorecords or digital phonorecord deliveries,"; and

(B) in the second sentence by inserting before the period ", including by means of a digital phonorecord delivery";

(2) in subsection (c)(2) in the second sentence by inserting "and other than as provided in paragraph (3)," after "For this purpose,";

(3) by redesignating paragraphs (3), (4), and (5) of subsection (c) as paragraphs (4), (5), and (6), respectively, and by inserting after paragraph (2) the following new paragraph:

"(3)(A) A compulsory license under this section includes the right of the compulsory licensee to distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of a digital transmission which constitutes a digital phonorecord delivery, regardless of whether the digital transmission is also a public performance of the sound recording under section 106(6) of this title or of any nondramatic musical work embodied therein under section 106(4) of this title. For every digital phonorecord delivery by or under the authority of the compulsory licensee—

"(i) on or before December 31, 1997, the royalty payable by the compulsory licensee shall be the royalty prescribed under paragraph (2) and chapter 8 of this title; and

"(ii) on or after January 1, 1998, the royalty payable by the compulsory licensee shall be the royalty prescribed under subparagraphs (B) through (F) and chapter 8 of this title.

"(B) Notwithstanding any provision of the antitrust laws, any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a)(1) may negotiate and agree upon the terms and rates of royalty payments under this paragraph and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay or receive such royalty payments. Such authority to negotiate the terms and rates of royalty payments includes, but is not limited to, the authority to negotiate the year during which the royalty rates prescribed under subparagraphs (B) through (F) and chapter 8 of this title shall next be determined.

"(C) During the period of June 30, 1996, through December 31, 1996, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by subparagraph (A) during the period beginning January 1, 1998, and ending on the effective date of any new terms and rates established pursuant to subparagraph (C), (D) or (F), or such other date (regarding digital phonorecord deliveries) as the parties may agree. Such terms and rates shall distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general. Any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a)(1) may submit to the Librarian of Congress licenses covering such activities. The parties to each negotiation proceeding shall bear their own costs.

"(D) In the absence of license agreements negotiated under subparagraphs (B) and (C), upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to subparagraph (E), shall be binding on all copyright owners of nondramatic musical works and persons entitled to obtain a compulsory license under subsection (a)(1) during the period beginning January 1, 1998, and ending on the effective date of any new terms and rates established pursuant to subparagraph (C), (D) or (F), or such other date (regarding digital phonorecord deliveries) as may be determined pursuant to subparagraphs (B) and (C). Such terms and rates shall distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general. In addition to the objectives set forth in section 801(b)(1), in establishing such rates and terms, the copyright arbitration royalty panel may consider rates and terms under voluntary license agreements negotiated as provided in subparagraphs (B) and (C). The royalty rates payable for a compulsory license for a digital phonorecord delivery under this section shall be established de novo and no precedential effect shall be given to the amount of the royalty payable by a compulsory licensee for digital phonorecord deliveries on or before December 31, 1997. The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such use shall be kept and made available by persons making digital phonorecord deliveries.

"(E)(i) License agreements voluntarily negotiated at any time between one or more copyright owners of nondramatic musical works and one or more persons entitled to obtain a compulsory license under subsection (a)(1) shall be given effect in lieu of any determination by the Librarian of Congress. Subject to clause (ii), the royalty rates determined pursuant to subparagraph (C), (D) or (F) shall be given effect in lieu of any contrary royalty rates specified in a contract pursuant to which a recording artist who is the author of a nondramatic musical work grants a license under that person's exclusive rights in the musical work under sections 106(1) and (3) or commits another person to grant a license in that musical work under sections 106(1) and (3), to a person desiring to fix in a tangible medium of expression a sound recording embodying the musical work.

"(ii) The second sentence of clause (i) shall not apply to—

"(I) a contract entered into on or before June 22, 1995, and not modified thereafter for the purpose of reducing the royalty rates determined pursuant to subparagraph (C), (D) or (F) or of increasing the number of musical works within the scope of the contract covered by the reduced rates, except if a contract entered into on or before June 22, 1995, is modified thereafter for the purpose of increasing the number of musical works within the scope of the contract, any contrary royalty rates specified in the contract shall be given effect in lieu of royalty rates determined pursuant to subparagraph (C), (D) or (F) for the number of musical works within the scope of the contract as of June 22, 1995; and

"(II) a contract entered into after the date that the sound recording is fixed in a tangible medium of expression substantially in

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a form intended for commercial release, if at the time the contract is entered into, the recording artist retains the right to grant licenses as to the musical work under sections 106(1) and 106(3).

"(F) The procedures specified in subparagraphs (C) and (D) shall be repeated and concluded, in accordance with regulations that the Librarian of Congress shall prescribe, in each fifth calendar year after 1997, except to the extent that different years for the repeating and concluding of such proceedings may be determined in accordance with subparagraphs (B) and (C).

"(G) Except as provided in section 1002(e) of this title, a digital phonorecord delivery licensed under this paragraph shall be accompanied by the information encoded in the sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer.

"(H)(i) A digital phonorecord delivery of a sound recording is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 509, unless—

"(I) the digital phonorecord delivery has been authorized by the copyright owner of the sound recording; and

"(II) the owner of the copyright in the sound recording or the entity making the digital phonorecord delivery has obtained a compulsory license under this section or has otherwise been authorized by the copyright owner of the musical work to distribute or authorize the distribution, by means of a digital phonorecord delivery, of each musical work embodied in the sound recording.

"(ii) Any cause of action under this subparagraph shall be in addition to those available to the owner of the copyright in the nondramatic musical work under subsection (c)(6) and section 106(4) and the owner of the copyright in the sound recording under section 106(6).

"(I) The liability of the copyright owner of a sound recording for infringement of the copyright in a nondramatic musical work embodied in the sound recording shall be determined in accordance with applicable law, except that the owner of a copyright in a sound recording shall not be liable for a digital phonorecord delivery by a third party if the owner of the copyright in the sound recording does not license the distribution of a phonorecord of the nondramatic musical work.

"(J) Nothing in section 1008 shall be construed to prevent the exercise of the rights and remedies allowed by this paragraph, paragraph (6), and chapter 5 in the event of a digital phonorecord delivery, except that no action alleging infringement of copyright may be brought under this title against a manufacturer, importer or distributor of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or against a consumer, based on the actions described in such section.

"(K) Nothing in this section annuls or limits (i) the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of a digital transmission, under sections 106(4) and 106(6), (ii) except for compulsory licensing under the conditions specified by this section, the exclusive rights to reproduce and distribute the sound recording and the musical work embodied therein under sections 106(1) and 106(3), including by means of a digital phonorecord delivery, or (iii) any other rights under any other provision of section 106, or remedies available under this title, as such rights or remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

"(L) The provisions of this section concerning digital phonorecord deliveries shall not apply to any exempt transmissions or retransmissions under section 114(d)(1). The exemptions created in section 114(d)(1) do not expand or reduce the rights of copyright owners under section 106(1) through (5) with respect to such transmissions and retransmissions."; and

(5) by adding after subsection (c) the following:

"(d) DEFINITION.—As used in this section, the following term has the following meaning: A 'digital phonorecord delivery' is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, noninteractive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.".

**SEC. 5. CONFORMING AMENDMENTS.**

(a) DEFINITIONS.—Section 101 of title 17, United States Code, is amended by inserting after the definition of "device", "machine", or "process" the following:

"A 'digital transmission' is a transmission in whole or in part in a digital or other nonanalog format.".

(b) LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY TRANSMISSIONS.—Section 111(c)(1) of title 17, United States Code, is amended in the first sentence by inserting "and section 114(d)" after "of this subsection".

(c) LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY TRANSMISSIONS OF SUPERSTATIONS AND NETWORK STATIONS FOR PRIVATE HOME VIEWING.—

(1) Section 119(a)(1) of title 17, United States Code, is amended in the first sentence by inserting "and section 114(d)" after "of this subsection".

(2) Section 119(a)(2)(A) of title 17, United States Code, is amended in the first sentence by inserting "and section 114(d)" after "of this subsection".

(d) COPYRIGHT ARBITRATION ROYALTY PANELS.—

(1) Section 801(b)(1) of title 17, United States Code, is amended in the first and second sentences by striking "115" each place it appears and inserting "114, 115,".

(2) Section 802(c) of title 17, United States Code, is amended in the third sentence by striking "section 111, 116, or 119," and inserting "section 111, 114, 116, or 119, any person entitled to a compulsory license under section 114(d), any person entitled to a compulsory license under section 115,".

(3) Section 802(g) of title 17, United States Code, is amended in the third sentence by inserting "114," after "111,".

(4) Section 802(h)(2) of title 17, United States Code, is amended by inserting "114," after "111,".

(5) Section 803(a)(1) of title 17, United States Code, is amended in the first sentence by striking "115" and inserting "114, 115" and by striking "and (4)" and inserting "(4) and (5)".

(6) Section 803(a)(3) of title 17, United States Code, is amended by inserting before the period "or as prescribed in section 115(c)(3)(D)".

(7) Section 803(a) of title 17, United States Code, is amended by inserting after paragraph (4) the following new paragraph:

"(5) With respect to proceedings under section 801(b)(1) concerning the determination of reasonable terms and rates of royalty payments as provided in section 114, the Librarian of Congress shall proceed when and as provided by that section.".

**SEC. 6. EFFECTIVE DATE.**

This Act and the amendments made by this Act shall take effect 3 months after the date of enactment of this Act, except that the provisions of sections 114(e) and 114(f) of title 17, United States Code (as added by section 3 of this Act) shall take effect immediately upon the date of enactment of this Act.

## ORDERS FOR WEDNESDAY, AUGUST 9, 1995

Mr. GORTON. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in recess until the hour of 9 a.m., Wednesday, August 9, 1995; that following the prayer, the Journal of proceedings be deemed approved to date, the time for the two leaders be reserved for their use later in the day; and that the Senate immediately resume consideration of the Interior appropriations bill, with 30 minutes for debate remaining on the Domenici amendment, with the vote occurring on or in relation to the Domenici amendment at the expiration or the yielding back of that time.

The PRESIDING OFFICER. Without objection, it is so ordered.

## PROGRAM

Mr. GORTON. Mr. President, for the information of all Senators, the Senate will resume consideration of the Interior bill at 9 a.m. tomorrow, with a rollcall vote occurring at 9:30 a.m. Additional rollcall votes can be expected to occur during Wednesday's session of the Senate in relation to the Interior bill, the DOD authorization bill, the DOD appropriations bill and/or the Transportation appropriations bill. All Members should expect a late night session on Wednesday in order to make progress on any or all of these bills.

## RECESS UNTIL 9 A.M. TOMORROW

Mr. GORTON. Mr. President, if there is no further business to come before the Senate, I now ask unanimous consent that the Senate stand in recess under the previous order.

There being no objection, the Senate, at 10:26 p.m., recessed until Wednesday, August 9, 1995, at 9 a.m.

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