The House Report on the Digital Performance Right in Sound Recordings Act of 1995

DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995

OCTOBER 11, 1995.--Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

MR. MOORHEAD, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 1506]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1506) 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, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

Purpose and Summary

The purpose of H.R. 1506 is to ensure that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used. H.R. 1506 does this by granting a limited right to copyright owners of sound recordings which are publicly performed by means of a digital transmission.

Background and Need for the Legislation

The historic lack of a performance right for sound recordings under U.S. copyright law has been a source of controversy for decades. The first efforts to amend the copyright laws to provide protection for sound recordings date from the 1920's. Through much of the 1960's and 1970's, both Houses of Congress studied and debated the arguments for and against establishing a performance right in sound recordings. In the 103d Congress, this issue was again considered without resolution.

Sound recordings were first granted Federal copyright protection by amendment to the Copyright Act in 1971. The purpose of the "Sound Recording Act of 1971"n1 (SRA) was to prevent phonorecord piracy due to advances in duplicating technology. Accordingly, to fulfill this specific objective, and to provide balance among the parties affected by the legislation, Congress did not grant sound recording copyright owners all of the rights usually afforded by a copyright. Specifically, they were granted only reproduction, distribution, and adaptation rights; they were not granted the rights of public performance,n2 on the presumption that the granted rights would suffice to protect against record piracy. The Federal courts quickly upheld the validity of the SRA against constitutional challenge,n3 and sound recording copyright owners began to enjoy limited copyright protection.

In the wake of the 1991 Copyright Office study on digital audio transmission services, the House of Representatives held an Oversight hearing during the first session of the 103d Congress regarding sound recording performance rights.n4 In the second session, Senators Orrin Hatch and Dianne Feinstein introduced S. 1421, which provided for an exclusive right to perform sound recordings publicly by means of digital transmissions.n5 A companion bill was introduced in the House of Representatives by Representative William Hughes.n6 Although the proposed right was limited, interested parties including representatives of broadcasters and of the recording industry proposed further amendments to these bills, and they were withdrawn at the end of the session. Prior to that, most parties did come to a compromise on May 11, 1994, but could not come to a final agreement.

Although no hearings were held on the bills in the Senate or in the House, introduction of these bills in the 103rd Congress revitalized the quest for a public performance right as interested parties met to discuss the issues that needed to be resolved. In fact, in his remarks on H.R. 2576, Congressman Moorhead recognized that H.R. 2576 would "undergo

some change as it works its way through the legislative process and * * * encouraged the affected parties to work with the subcommittee and each other to reach a solution."n7 Acting on that advice, the parties held a series of meetings. These meetings began under the auspices of "roundtable discussions" hosted by the House Subcommittee on Intellectual Property and Judicial Administration, and continued as interested parties met on their own to attempt to resolve their differences.

On January 13, 1995, Senators Hatch and Feinstein introduced S. 227, a new version of this legislation. That bill reflected some of the provisions in the compromise of May 11, 1994. On April 7, 1995 Congressmen Moorhead, Hyde, Conyers and Gekas introduced a bill very similar to the compromise, H.R. 1506. H.R. 1506 differed in a number of respects from S. 227 with the record industry supporting S. 227 and the songwriters and music publishers supporting H.R. 1506. At the two days of hearing on H.R. 1506 (June 21 and 28th, 1995) Subcommittee Chairman Moorhead strongly urged the parties to "work out their differences, otherwise legislation was not likely." On June 29th the parties announced that they had reached a compromise. The Senate Judiciary Committee, on June 29, 1995, gave unanimous approval to S. 227 which incorporated the compromise agreement. On July 27th the Subcommittee on Courts and Intellectual Property met and incorporated the compromise into H.R. 1506. On August 8th the Senate passed S. 227 by unanimous consent. On September 12, the House Judiciary Committee passed H.R. 1506 by recorded vote, 29 to 0 in favor of the bill.

Notwithstanding the views of the Copyright Office and the Patent and Trademark Office that it is appropriate to create a comprehensive performance right for sound recordings, H.R. 1506 addressed the concerns of record producers and performers regarding the effects that new digital technology and distribution systems might have on their core business without upsetting the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades. Accordingly, H.R. 1506 creates a carefully crafted and narrow performance right, applicable only to certain digital transmissions of sound recordings.

In a comparatively few years, compact discs (CD's), which embody digital recordings, have edged out analog recording media such as cassette tapes and vinyl records to become the dominant physical medium for the distribution of copyrighted sound recordings. Consumers have embraced digital recordings because of their superior sound quality.

Even more recently, a small number of services have begun to make digital transmissions of recordings available to subscribers. Trends within the music industry, as well as the telecommunications and information services industries, suggest that digital transmission of sound recordings is likely to become a very important outlet for the performance of recorded music in the near future. Some digital transmission services, such as so-called "celestial jukebox" "pay-per-listen" or "audio-on-demand" services, will be interactive services that enable a member of the public to receive, on request, a digital transmission of the particular recording that person wants to hear.

These new digital transmission technologies may permit consumers to enjoy performances of a broader range of higher-quality recordings than has ever before been possible. These new technologies also may lead to new systems for the electronic distribution of phonorecords with the authorization of the affected copyright owners. Such systems could increase the selection of recordings available to consumers, and make it more convenient for consumers to acquire authorized phonorecords.

However, in the absence of appropriate copyright protection in the digital environment, the creation of new sound recordings and musical works could be discouraged, ultimately denying the public some of the potential benefits of the new digital transmission technologies. Current copyright law is inadequate to address all of the issues raised by these new technologies dealing with the digital transmission of sound recordings and musical works and, thus, to protect the livelihoods of the recording artists, songwriters, record companies, music publishers and others who depend upon revenues derived from traditional record sales.

In particular, recording artists and record companies cannot be effectively protected unless copyright law recognizes at least a limited performance right in sound recordings. Thus, H.R. 1506 grants such a performance right, subject to various limitations intended to strike a balance among all of the interests affected thereby.

The relevant technologies will continue to advance. The bill has been carefully drafted to accommodate foreseeable technological changes. However, to the extent that the language of the bill does not precisely anticipate particular technological changes, it is the committee's intention that both the rights and the exemptions and limitations created by the bill be interpreted in order to achieve their intended purposes.

An important rationale for enactment of this legislation is to address the potential impact on the prerecorded music industry of digital subscription and interaction services. The sale of many sound recordings and the careers of many performers have benefitted considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The radio industry has grown and prospered with the availability and use of prerecorded music. H.R. 1506 does not change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.

This legislation is a narrowly crafted response to one of the concerns expressed by representatives of the recording community, namely that certain types of subscription and interaction audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for use of their work. Subscription and interactive audio services can provide multi-channel offerings of various music formats in CD-quality recordings, commercial free and 24 hours a day.

Copyright owners of sound recordings should enjoy protection with respect to interactive and certain digital subscription performances. By contrast, free over-the-air broadcasts are available without subscription, do not rely on interactive delivery, and provide a mix of entertainment and non-entertainment programming and other public interest activities to local communities to fulfill a condition of the broadcasters' license. The Committee has considered these factors in concluding not to include free over-the-air broadcast services in the legislation. Other media, such as cable television also undertake public interest activities, but they provide subscription or interactive service which establish the basis for subjecting them to the requirements of this legislation.

The limited right created by this legislation reflects changed circumstances -- that is, the commercial exploitation of new technologies in ways that may change the way prerecorded music is distributed to the consuming public. It is the intent of this legislation to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.

In deciding to grant a new exclusive right to perform copyrighted sound recordings publicly by means of digital audio transmission, it is important to strike a balance among all of the interests affected thereby. That balance is reflected in various limitations on the new performance rights that are set forth in the bill's amendments to section 114 of title 17 and described in detail later in this report. Two of the concerns that motivated certain of the limitations on exclusive rights are deserving of particular mention. First, concern was expressed that granting a performance right in sound recordings would make it economically infeasible for some transmitters to continue certain uses of sound recordings. This concern is addressed by various limitations on the exclusive right:

H.R. 1506 applies only to digital audio transmissions. Purely analog transmissions are not covered, and neither are digital transmissions of audiovisual works;

H.R. 1506 contains a number of exemptions from the exclusive right that are directed toward specific uses of sound recordings. Probably most important, nonsubscription transmissions (i.e., transmissions not controlled or limited to particular recipients or for which no consideration is required to be paid), such as nonsubscription broadcast transmissions by radio and television stations, are exempted unless they are part of an interactive service; and

Nonexempt, noninteractive subscription transmissions are eligible for statutory licensing.

Second, concern was expressed that granting sound recording copyright owners an exclusive performance right could limit opportunities for the performance of musical works. That concern is addressed by the limitations described above and also by the provisions of section 114(d)(3), which impose certain limitations on the granting of exclusive licenses under the new performance right in order not to hinder the growth of interactive services.

It is important to recognize that these limitations on the new performance right (other than the limitation on exclusive licensing of interactive services contained in section 114(d)(3)) do not apply to interactive digital transmission services. Of all the new forms of digital transmission services, interactive services are most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales. The Committee believes that sound recording copyright owners should have the exclusive right to control the performance of their works as part of an interactive service, and so has excluded interactive services from these limitations on the performance right.

The Committee was particularly concerned that this bill could be construed as affecting existing rights of the copyright owners of musical works embodied in sound recordings. The purpose of H.R. 1506 is to recognize a new limited performance right in sound recordings. As set forth in the various savings clauses of section 114(d)(4), H.R. 1506 does not limit any existing right of a sound recording or musical work of a copyright owner. To the extent, if any, that a limitation on the new right of public performance is inconsistent with the rights of a musical work or sound recording copyright owner under sections 106(1) through 106(5), the copyright owner may fully exercise its exclusive rights under section 106(1) through 106(5), and obtain the remedies provided by title 17 pursuant to such rights, notwithstanding any limitations on the new right of public performance. The limitations on exclusive rights contained in section 107 through 113, in sections 116 through 120, and in the unamended portions of sections 114 and 115 are likewise unchanged by this bill.

The Committee is aware of ongoing discussions and attempts at greater international harmonization of copyright and neighboring rights at the World Intellectual Property Organization (WIPO), in discussions within the G-7, and other forums. This legislation reflects a careful balancing of interests, reflecting the statutory and regulatory requirements imposed on U.S. broadcasters, recording interests, composers, and publishers, and the recognition of the potential impact of new technologies on the recording industry. The purpose and scope of this new right are clearly laid out in the bill and this report. The underlying rationale for creation of this limited right is grounded in the way the market for prerecorded music has developed, and the potential impact on that market posed by subscription and interactive services -- but not by broadcasting and related transmissions.

Hearings

The Committee's Subcommittee on Courts and Intellectual Property held two days of hearings on H.R. 1506 on June 21 and June 28, 1995. On June 21st testimony was received from the following six witnesses: Mr. Jason S. Berman, Chairman and Chief Executive Officer of the Recording Industry Association of America; Mr. Wayland D. Holyfield, Board Member of the American Society of Composers Authors and Publishers; Mr. Edward P. Murphy, President and Chief Executive Officer of the National Music Publishers Association; and Mr. Marvin Berenson, Senior Vice President and General Counsel of the Broadcast Music, Inc.; Mr. Edward O. Fritts, President of the National Association of Broadcasters; and Mr. Jerold H. Rubinstein, Chairman and Chief Executive Officer of the International Cablecasting Technologies, Inc.

On June 28th testimony was heard from the following four witnesses: The Honorable Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks of the Patent and Trademark Office of the United States Department of Commerce; and Ms. Marybeth Peters, Register of Copyrights of the Copyright Office of the United States Library of Congress; Mr. Dennis Dreith, President of the Recording Musicians' Association of the United States and Canada; and Mr. Barry Bergman, President of the International Managers Forum.

Committee Consideration

On July 27, 1995 the Subcommittee on Courts and Intellectual Property met in open session and ordered reported the bill H.R. 1506, as amended, by a voice vote, a quorum being present. On September 12, 1995, the Committee met in open session and ordered reported the bill H.R. 1506, amended, by a recorded vote of 29 in favor and 0 opposed, a quorum being present.

Vote of the Committee

Mr. Moorhead called up H.R. 1506 as amended by the Subcommittee on Courts and Intellectual Property, then offered an amendment in the nature of a substitute to the Subcommittee amendment which contained technical and clarifying changes in order to conform H.R. 1506 to the Senate-passed bill, S. 227. That amendment passed on voice vote. The Subcommittee amendment then passed on voice vote. Mr. Moorhead then moved adoption of H.R. 1506 as amended. The motion carried on a recorded vote of 29 in favor and 0 opposed, a quorum being present.

rollcall no. 1

Subject: H.R. 1506 Final Passage. Agreed to 29-0.

	Ayes	Nays	Present

Mr. Moorhead ..... X ....
Mr. Sensenbrenner.... X ....
Mr. McCollum..... X ....
Mr. Gekas..... X ....
Mr. Coble..... X ....
Mr. Smith (TX)..... X ....
Mr. Schiff..... X ....
Mr. Gallegly..... X ....
Mr. Canady..... X ....
Mr. Inglis..... X ....
Mr. Goodlatte..... X ....
Mr. Buyer..... ....
Mr. Hoke..... X ....
Mr. Bono..... X ....
Mr. Heineman..... X ....
Mr. Bryant (TN)..... ....
Mr. Chabot..... X ....
Mr. Flanagan..... X ....
Mr. Barr..... X ....
Mr. Conyers..... X ....
Mrs. Schroeder..... X ....
Mr. Frank..... X ....
Mr. Schumer..... ....
Mr. Berman..... X ....
Mr. Boucher..... X ....
Mr. Bryant (TX)..... X ....
Mr. Reed..... X ....
Mr. Nadler..... ....
Mr. Scott..... X ....
Mr. Watt..... X ....
Mr. Becerra..... ....
Mr. Serrano..... ....
Ms. Lofgren..... X ....
Ms. Jackson-Lee... X ....
Mr. Hyde, Chairman..... X ....
Total..... 29 0 .....

Committee Oversight Findings

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

Committee on Government Reform and Oversight Findings

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

New Budget Authority and Tax Expenditures

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

Congressional Budget Office Cost Estimate

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1506, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. Congress,
Congressional Budget Office,
Washington, DC,

September 19, 1995.

Hon. Henry J. Hyde,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

Dear Mr. Chairman:

The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1506, the Digital Performance Right in Sound Recordings Act of 1995.

Enacting H.R. 1506 would affect direct spending and receipts. Therefore, pay-as-you-go procedures would apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

James L. Blum
(For June E. O'Neill, Director).

Enclosure.

congressional budget office cost estimate

1. Bill number: H.R. 1506.

2. Bill title: Digital Performance Right in Sound Recordings Act of 1995.

3. Bill status: As ordered reported by the House Committee on the Judiciary on September 12, 1995.

4. Bill purpose: H.R. 1506 would create a system to ensure that recording artists and companies are compensated for public performances of their works by means of certain types of digital audio transmissions. The bill would require most subscription users of sound recordings to obtain a statutory license in order to broadcast these creative works, and would guarantee a license to subscription users so long as they pay royalties to copyright owners.

The bill would require the Library of Congress to announce the initiation of voluntary negotiations between copyright owners and users of digital sound recordings. If the parties could not agree on a rate, the Librarian of Congress would convene a copyright arbitration panel to establish rates. H.R. 1506 would require copyright owners to deposit a portion of their receipts from royalty payments into certain escrow accounts. An independent manager jointly appointed by the copyright owners and recording artists or their representatives would then distribute the proceeds to the designated recipients.

H.R. 1506 also would expand the scope of the mechanical royalty to include the duplication and distribution of digital phonographs. The mechanical royalty is the amount of royalty paid for the physical reproduction and distribution of recorded music. It ensures that copyright owners receive compensation when their non-dramatical musical works are duplicated and distributed. The bill would require the Librarian of Congress to announce the initiation of voluntary negotiations between copyright owners and distributors of nondramatical musical works and would convene an arbitration panel, if necessary, to establish the royalty rates.

5. Estimated cost to the Federal Government: The Copyright Office within the Library of Congress currently administers several funds similar to the escrow accounts that would be established under H.R. 1506. CBO expects that the Copyright Office would be asked to manage these escrow accounts as well. CBO estimates that the Copyright Office incur no significant additional cost to manage those funds. If the Copyright Office administers arbitration proceedings, CBO expects that no additional costs would be incurred because current law allows the Copyright Office to bill the parties to the dispute for the costs of arbitration.

Because H.R. 1506 would require certain parties to make payments to other parties as a result of the exercises of the sovereign power of the government, CBO believes that the payments into the escrow accounts should be included in the federal budget as governmental receipts, and the payments from the escrow accounts should be included as direct spending.

CBO expects a lag of several months between the receipt of the royalties and the distribution to the recipients. Because of this lag, CBO estimates that the net payments to the accounts will exceed the net distributions by an amount less than $ 500,000 in the first year. In the following years, CBO expects the net annual impact of such payments on the federal deficit to be close to zero because outlays from the escrow accounts would be roughly equal to the receipts.

The costs of this bill fall within budget function 370.

6. Comparison with spending under current law: There is no current system of royalty transfers for public performances covered by H.R. 1506; hence, all receipts and spending under the bill would be new.

7. Pay-as-you-go considerations: Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1998. Enacting H.R. 1506 would affect both direct spending and receipts; therefore the bill would be subject to pay-as-you-go procedures. However, CBO estimates that the impact on both outlays and receipts would be less than $ 500,000 in each year. The following table summarizes the estimated pay-as-you-go impact of this bill.

	1995	1996	1997	1998
Change in outlays	0	0	0	0
Change in receipts	0	0	0	0

8. Estimated cost to State and local governments: None.

9. Estimate comparison: None.

10. Previous CBO estimate: On July 21, 1995, CBO provided a cost estimate for S. 227, the Digital Performance Right in Sound Recordings Act of 1995 as ordered reported by the Senate Committee on the Judiciary. The two bills differ in that H.R. 1506 would require the Librarian of Congress to oversee negotiations and review rates for the expansion of the mechanical royalty. H.R. 1506 also would set more stringent requirements for subscription users to qualify for a statutory license. In all other regards the bills are very similar and CBO has estimated the same budgetary impact for both bills.

11. Estimate prepared by: Rachel Forward.

12. Estimate approved by: Robert A. Sunshine for Paul N. Van de Water, Assistant Director for Budget Analysis.

Inflationary Impact Statement

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 1506 will have no significant inflationary impact on prices and costs in the national economy.

Section-by-Section Analysis and Discussion

Section 1. Short title

Section one sets forth the title of the bill.

Section 2. Exclusive rights in copyright works

Section 2 amends *17 U.S.C. 106* by adding a new exclusive right giving copyright owners of sound recordings the right to perform their works publicly by means of a digital audio transmission. The precise language of the new right is intended to exclude from coverage digital transmissions of audiovisual works, analog transmissions, and performances that are not transmitted.

Section 3. Scope of exclusive rights in sound recordings

Section 3 deletes the existing subsection (d) in Sec. 114 and replaces it with six new subsections (d), (3), (f), (g), (h) and (i).

(d) Limitations on exclusive right

The new subsection (d) contains four paragraphs that define the scope of the new exclusive right created in Sec. 106(6). The first paragraph delineates exempt transmissions and retransmissions that create no liability; the second paragraph sets out a statutory license for certain subscription transmissions; and the third paragraph delineates the sound recording rightsholder's exclusive right to license transmissions for interactive services. The fourth paragraph, a savings clause, refers to rights that are not otherwise limited.

(1) Exempt Transmissions and Retransmissions. Paragraph 144(d)(1) exempts certain types of transmissions and retransmissions, provided they are not part of an interactive service. An "interactive service" is defined in Sec. 114(j)(4) as a service that enables a listener to receive a transmission of a particular sound recording on request (e.g., an "audio-on-demand service").

Subparagraph (A)(i) exempts: 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.

Subparagraph (B) exempts certain retransmissions of nonsubscription broadcast transmissions, including certain: (i) retransmissions of a radio station by multichannel program distributors within 150 miles of the station's transmission or, in the case of nonsubscription retransmission, by a terrestrial broadcaster, translator or repeater licensed by the FCC without regard to the 150 mile limitation; (ii) retransmissions by cable systems of radio station broadcasts on an "all-band" basis; (iii) existing retransmissions of a radio station by a satellite carrier under certain circumstances; and (iv) retransmissions of broadcasts by non-commercial educational radio stations.

Subparagraph (C) also exempts the following transmissions and retransmissions: (i) those that are solely incidental to exempt transmissions such as network feeds; (ii) those confined to a business establishment or its immediate surrounding vicinity, e.g., storecasts; (iii) those that are authorized simultaneous retransmissions of licensed transmissions, e.g., by the affiliates of a licensed transmitter (a "through the listener" exemption); and (iv) those by a commercial music service to a business establishment for use in the ordinary course of its business.

Section 114(d)(2). Subscription transmissions

Paragraph (2) establishes "statutory licensing" for certain subscription transmissions. "Subscription" transmissions are transmissions for which subscribers are charged a fee. Under paragraph (2) transmitters are guaranteed a license so long as they pay royalties (at rates to be negotiated, or if necessary, arbitrated) and comply with the other provisions of section 114.

The statutory license places four limitations on the licensees' activities. A statutory license is not available for transmissions by an interactive service. It is also not available for subscription transmission performances that exceed the "sound recording performance complement" (as defined in Sec. 114(j)(7)). The "sound recording complement" is the performance in any three-hour period of three selections from a single record album, with no more than two selections transmitted consecutively, or of four selections by a single featured artist or from a single boxed set, with no more than three transmitted consecutively. A service that selects from multiple sources and happens to exceed these limits will still be eligible for the license if it did not willfully intend to avoid the limits by so programming the selections.

In order to avoid solicitation of home taping under this license, a statutory license is unavailable for a transmission service that publishes a program guide, pre-announces selections, or causes a consumer's receiver to switch automatically from one channel to another. Finally, a statutory license is not available unless the transmission service includes the copyright management information encoded in the sound recording by the record producer.

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

Limits have been based on licenses granted to interactive services in response to concerns that sound recording copyright owners might become "gatekeepers" to the performances of musical works. To address these concerns, the bill limits the term of an exclusive license to a maximum of twelve months at a time (twenty-four months in the case of small licensors). For purposes of this paragraph (3), the term "licensors" includes the licensing entity and any other entity under common ownership, management or control that owns sound recording copyrights. After an initial exclusive license expires, the copyright owner may not issue an exclusive renewal to that same licensee until at least thirteen months have elapsed. A licensor can avoid these limits by licensing a sufficient number of recordings to at least five different interactive services. These limits on interactive licenses, also do not apply to licenses operated for promotional transmissions. The bill also addresses the gatekeeper concern by confirming that in addition to obtaining a license for the performance of sound recordings, the interactive services must obtain a license to perform the copyrighted musical works embodied in the sound recordings that they transmit. Such a license may be obtained from the copyright owners themselves or from a "performing rights society," (such as the American Society of Composers, Authors, and Publishers, Broadcast Music, Inc., or SESAC, Inc.), that licenses the public performance of nondramatic musical works on behalf of copyright owners. Finally, subparagraph (D) provides a "through to the listener" exemption for certain retransmissions.

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

These savings clauses make clear that existing exclusive rights, including specifically those of owners of copyrights in musical works and sound recordings, are not impaired in any way. The savings clause first specifies in subparagraph (A) that nothing other than what is specified in this section limits or impairs the exclusive right to perform a sound recording publicly by means of a digital audio transmission under the new section 106(6). It then goes on to clarify in subparagraph (B) that nothing in section 114 is meant to annul or limit in any way the right to publicly perform a musical work under Sec. 106(4) including by means of a digital transmission the right to reproduce, adapt and distribute a sound recording or the musical work embodied therein under Sec. 106(1), Sec. 106(2) or Sec. 106(3), or any other rights or remedies found either in other clauses of Sec. 106 or elsewhere in title 17 as such rights exist before or after the enactment of H.R. 1506. Subparagraph (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.

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. 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.

Section 114(e). Authority of negotiations

Under subsection (e)(1), owners of copyrights and operators of digital services may negotiate licensing agreements for statutory licenses "notwithstanding any provision of the antitrust laws." This exemption is patterned after those contained in existing copyright law (see, e.g., *17 U.S.C. Sec. 118*(b), noncommercial broadcasting), with the added provision that any common agents must be nonexclusive. In this context, this is a very limited antitrust exemption. It simply authorizes the copyright holders to take actions which are necessary to effectuate Congress's intent to enable the statutory goals to be met. It is important to emphasize that it encompasses only certain actions that are taken, and those actions must be taken in conjunction with the statutory license only, the level of which can be set by the copyright arbitration royalty panel convened by the Librarian of Congress if an agreement is not reached between the parties. Thus, unlike a broad antitrust exemption, this provision should not result in anticompetitive terms being imposed on consumers. If supracompetitive rates are attempted to be imposed on operators, the copyright arbitration royalty panel can be called on to set an acceptable rate.

The exemption also is only available if any common agents designated are nonexclusive, thus preserving the ability to negotiate directly with and seek to secure a statutory license from a copyright owner directly. This should prevent copyright owners from using any common agent to demand supracompetitive rates from operators.

Subsection (e)(2) addresses non-statutory licensing. For those types of licenses, there is no antitrust exemption. Each copyright owner and each entity performing sound recordings must establish the royalty rates and license terms on their own. They may use common agents only to perform a clearinghouse function and not for rate-setting.

Section 114(f). Licenses for nonexempt subscription transmissions

This provision describes the procedures by which royalty rates for statutory licenses of subscription transmissions will be determined. The rates will either be negotiated, or if necessary, the Librarian of Congress will convene a Copyright Arbitration Royalty Panel (CARP) to set the rates through arbitration, consistent with existing rate-setting procedures under the Copyright Act.

More specifically, the terms and rates for subscription transmissions that qualify for a compulsory license may be determined by voluntary negotiation in a proceeding initiated by the Librarian of Congress. The first negotiated licenses cover a period beginning with the effective date of the Act and ending on December 31, 2000, and must distinguish among the different types of digital audio transmission services in operation when the agreements were reached.

If no agreements are reached, or for those persons not included in the agreements that are reached and who file a petition for arbitration, the Librarian is to convene a CARP to set the terms and rates. The panel may take into account any agreements that have been reached in determining the rates. The Librarian is directed to establish requirements for recordkeeping and giving reasonable notice to copyright owners of the use of their sound recordings.

The same procedures -- voluntary negotiations and then perhaps the convening of a CARP will be initiated every five years beginning in the year 2000 and whenever a petition is filed informing the Librarian of Congress that a new type of digital audio transmission service is about to become operational.

Entities digitally transmitting sound recordings by means of a qualifying subscription transmission may avoid liability for infringement by paying the royalty fees and complying with the notice requirements, or if rates have not yet been set, agreeing to pay them as they are determined.

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

In the absence of the applications of the work made for hire doctrine of the copyright law, record companies, as authors of the sound engineering, and performers, as authors of their recorded interpretations, are joint authors of a sound recording. However, the work made for hire doctrine often applies to recorded performances. Under this doctrine, upon creation of the sound recording, record companies are authors of both the performance and the sound engineering portions of the sound recordings, and thus the sole rightsholders. Performers, in these cases, receive their compensation for the performance from the rightsholder on a contractual basis. The Committee intends the language of section 114(g) to ensure that a fair share of the digital sound recording performance royalties goes to performers according to the terms of their contracts. Subsection (g) then, refers to all royalties generated by the new digital performance right.

Paragraph (1) of subsection (g) directs payments to performers for nonstatutory sound recording performances. In such cases, the bill requires a rightsholder to make payments according to the terms of its contracts with performers, as follows: 45% to the featured artists allocated on a per sound recording basis; 2 1/2 % to the background musicians; and 2 1/2 % to the background vocalists.

Paragraph (2) of subsection (g) sets out a formula for receipts from statutory licensing to be divided equally between sound recording copyright owners and recording artists allocated on a per sound recording basis. In each case, nonfeatured artist funds are deposited in escrow accounts managed by independent administrators, jointly chosen by copyright owners of sound recordings and the musicians' or vocalists' unions -- the American Federation of Musicians and the American Federation of Television and Radio Artists, respectively. The Committee believes that it will be especially important for these independent administrators to identify and pay those vocalists and musicians who are not members of the union. They must establish procedures designed to enable all eligible parties to receive royalties, including nonunion members.

Section 114(h). Licensing to affiliates

Subsection (h) addresses the issue of vertical integration among companies involved in both the music and the subscription service business. This section is designed to assure that, if a record company grants a performance license to an affiliated entity, it must make performance licenses available to other similar services on no less favorable terms. An "affiliated entity" is defined as an entity 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 stock.

Although licenses must be made available to similarly situated entities, the license terms may differ according to material differences in their scope. The requested license may vary with respect to differences in price, duration and terms and to accommodate differences in geographic region, as well as numbers of subscribers or other relevant factors that may justify different terms and conditions.

This licensing to affiliate provision does not apply to promotional transmissions of up to 45 seconds. Nor does it apply to licenses to interactive services.

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

To dispel the fear that license fees for sound recording performance may adversely affect music performance royalties, subsection (i) makes an express statement of Congressional intent: license fees for music performance shall not be reduced by reason of obligations to pay royalties under this bill.

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 nonvoting 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 a terrestrial broadcast station licensed as such by the Federal Communications Commission come within this definition.

Section 114(j)(3) -- "digital audio transmission"

This phrase means a transmission in a digital format (or any other nonanalog 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 nonanalog format satisfies this definition. (See section 101 definition of "digital transmission.") A transmission of an audiovisual work does not come within this definition.

This definition makes 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 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 transmission 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 throughout this definition (and throughout the 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 3-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 3-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.

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.

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.

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 such as where, between the time of the programming and transmission, a phonorecord or set or compilation of phonorecords may be released that embodies selections previously programmed by the transmitting entity from multiple phonorecords.

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.

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.

Section 4. Mechanical royalties in digital phonorecord deliveries

Section 4 of the bill governs conditions under which mechanical royalties are to be paid when nondramatic music is reproduced and distributed via a "digital phonorecord delivery." It amends *17 U.S.C. Sec. 115,* to confirm that the existing "mechanical rights" of writers and publishers (i.e. the right to be paid when compact discs and cassettes embodying their music are distributed) apply to certain distributions of phonorecords by digital transmission (referred to in the bill as "digital phonorecord deliveries"). It does this by renumbering paragraphs (3), (4) and (5), and inserting a new paragraph (3), which contains twelve subsections.

Section 115(c). Royalty payable under compulsory license

Subparagraph (A) of paragraph (3) expands the scope of the mechanical license to include the right of the licensee to distribute or authorize others to distribute a phonorecord by means of a digital transmission which constitutes a digital phonorecord delivery. A digital phonorecord delivery is an individual delivery of a phonorecord by digital transmission or a sound recording that results in a specifically identifiable reproduction of a phonorecord of that sound recording, by or for a transmission recipient. Digital phonorecord delivery, as defined in Sec. 115(d), may also constitute a public performance but it does not include real-time non-interactive subscription transmission where the recorded performance and music are merely received in order to hear them.

Through 1997, the royalty rate payable for digital phonorecord delivery shall be the same as for physical phonorecords. After 1997, the rates for digital phonorecord delivery will be determined as provided by the amended provisions Sec. 115(c)(3), and need not be the same as for the making and distribution of physical phonorecords.

Subparagraph (B) allows copyright owners of nondramatic musical works and those seeking compulsory licenses for digital transmissions to negotiate the terms of compulsory licenses notwithstanding any provision of the antitrust laws. This exemption is similar to others in existing copyright law. This narrow exemption authorizes the parties to take only those actions necessary to effect the congressional intent embodied in the statute. The exemption applies only to the negotiation of compulsory licenses for digital transmissions. The royalty for these types of licenses may be set by a copyright arbitration panel convened by the Librarian of Congress if the parties do not reach an agreement. Thus, this narrow exemption should not result in anticompetitive terms for consumers. If the copyright owners attempt to impose supracompetitive rates, the copyright arbitration royalty panel can step in and set a competitive rate.

Subparagraph (C) provides that a voluntary negotiation proceeding will be convened by the Librarian of Congress during the period of June 30, 1996, to December 31, 1996, to specify the terms and rates of royalty payments of digital phonorecord delivery. This proceeding will cover the 5-year period beginning January 1, 1998, or any other period to which the parties agree. Voluntary agreements shall distinguish between digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the digital transmission, and digital phonorecord deliveries in general.

Subparagraph (D) provides that if no agreements are reached, or, for those persons not covered by the agreements that are reached, and who file a petition for arbitration, the Librarian of Congress shall convene a CARP to determine the terms and rates of royalty payments for the five-year period beginning January 1, 1998, or for such other period as the parties may agree.

The terms and rates shall be established according to the same criteria that apply to the license for making and distributing physical phonorecords, and, in addition, the panel may take into account the voluntary agreements that were reached for the 5-year period beginning January 1, 1998. However, the panel may not take into account the Sec. 115 royalty rates in effect on or before December 31, 1997.

The Librarian of Congress is directed to establish the requirements by which copyright owners receive notice of the use of their works and the records to be kept and made available by persons making digital phonorecords deliveries.

Subparagraph (E) direct that generally, voluntarily negotiated license agreements supersede any rates determined through industry-wide negotiation or arbitration. However, this subparagraph limits substantially the application in the digital transmission environment of so-called "controlled composition" clauses in recording contracts between singer-songwriters and record companies except in limited circumstances.

Subparagraph (F) specifies that negotiation and arbitration proceedings shall take place every five years, or in other years, if it is so determined by negotiation. Reasons for more frequent royalty determinations include, but are not limited to rapidly changing technological or market conditions.

Subparagraph (G) requires persons engaging in digital phonorecord delivery to include copyright management information encoded in the sound recording by the copyright owner in order to perfect the compulsory license.

Subparagraph (H) confirms that unauthorized digital phonorecord deliveries are infringing. However, a person or entity engaged in digital phonorecord delivery will not be liable for infringement if the delivery has been authorized by the copyright owner of the sound recordings, and a compulsory license has been perfected or an authorization from the copyright owner of the musical work has been obtained.

Subparagraph (I) clarifies the circumstances under which a sound recording copyright owner may be liable for contributory infringement as a result of unauthorized digital phonorecord deliveries by one of its licensees. The copyright owner of a sound recording will not be liable for infringement by a person or entity engaged in digital phonorecord delivery if the owner of the copyright in the sound recording did not license the distribution of a phonorecord of the musical work.

Subparagraph (J) clarifies the relationship between Sec. 115 as amended and the Audio Home Recording Act of 1992. It prohibits certain infringement actions 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 a consumer.

Subparagraph (K), a final savings clause, provides that section 115 does not annul or limit the exclusive rights to reproduce, distribute and publicly perform a sound recording; nor, except for compulsory licensing specified by this section, does it limit rights in the underlying musical work.

Subparagraph (L) excluded the compulsory license for digital phonorecord delivery from applicability to broadcast transmissions or retransmission that are exempt under amended section 114. Those broadcasts or retransmissions will, however, remain subject to the existing exclusive rights of copyright owners.

Section 115(d). Definition

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 phrase "specifically identifiable reproduction," as used in this definition, should be understood to mean a reproduction specifically identifiable to the transmission service. 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 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, section 116-120, and the unamended portions of sections 114 and 115.

Section 5. Conforming amendments

Section 5 makes necessary conforming amendments to various provisions of the Copyright Act. For example, conforming amendments have been made to the Copyright Act to provide a definition of "digital transmission" in Section 101, and to make the cable and satellite carrier compulsory licenses subject to compliance with new section 114(d). Pursuant to the Chapter 8 conforming amendment, this section clarifies that section 114 and 115 ratemaking proceedings are CARP proceedings, allows parties to section 114 and 115 ratemaking proceedings to submit all relevant evidence, and requires all parties to section 114 and 115 ratemaking proceedings to pay the determined rate during the pendency of any appeal.

Section 6. Effective date

This section is intended to permit negotiations for digital performance right licenses to begin immediately upon enactment of the bill. Otherwise, the bill is to become effective three months after enactment.

Agency Views

In testimony before the Subcommittee on Courts and Intellectual Property on June 28, 1995 the Department of Commerce (Patent and Trademark Office) and the Library of Congress (U.S. Copyright Office) testified in favor of H.R. 1506. In a letter to Subcommittee Chairman Moorhead dated July 28, 1995 the Department of Justice also supports H.R. 1506 as amended.

FOOTNOTES:

[n1] Footnote *. **Editor's Note:** Page numbers have been omitted in reprint.

[n2] Footnote 1. Sound Recording Act of 1971, Public Law 92-140, 85 Stat. 391 (1971). This Act was amended and made permanent by Public Law 93-573, 88 Stat. 1873 (1974) (codified in the Copyright Act of 1976, *17 U.S.C. 102* (1990).

[n3] Footnote 2. *17 U.S.C. 114*(a): "The exclusive rights of the owner of copyright in sound recordings are limited to the rights specified by clauses (1), (2), and (3) of section 106, and do not include any right of performance under Sec. 106(4)."

[n4] Footnote 3. *Shaab v. Kleindienst, 345 F. 589 (D.D.C. 1972).*

[n5] Footnote 4. Performers and Performance Rights in Sound Recordings: Hearing before the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary, 103d Congress., 1st sess. (1993).

[n6] Footnote 5. S. 1421, 103d Cong., 1st sess. (1993).

[n7] Footnote 6. H.R. 2576, 103d Cong., 1st sess. (1993).

[n8] Footnote 7. 139 Cong. Rec. E1731 (daily ed., July 1, 1993) (statement of Rep. Moorhead).