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Union Calendar No. 143

104TH CONGRESS
1ST SESSION

H. R. 1506

[Report No. 104-274]

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.

IN THE HOUSE OF REPRESENTATIVES

APRIL 7, 1995

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

OCTOBER 11, 1995

Additional sponsors: Mr. BONO, Mr. FATTAH, Mr. PETERSON of Minnesota, Mr. LAHOOD, Mr. BARR, and Mr. BLILEY

OCTOBER 11, 1995

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in *italic*]

[For text of introduced bill, see copy of bill as introduced on April 7, 1995]

A BILL

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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 *This Act may be cited as the “Digital Performance*
5 *Right in Sound Recordings Act of 1995”.*

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

7 *Section 106 of title 17, United States Code, is amend-*
8 *ed—*

9 (1) *in paragraph (4) by striking “and” after the*
10 *semicolon;*

11 (2) *in paragraph (5) by striking the period and*
12 *inserting “; and”; and*

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

14 *“(6) in the case of sound recordings, to perform*
15 *the copyrighted work publicly by means of a digital*
16 *audio transmission.”.*

17 **SEC. 3. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORD-**
18 **INGS.**

19 *Section 114 of title 17, United States Code, is amend-*
20 *ed—*

21 (1) *in subsection (a) by striking “and (3)” and*
22 *inserting “(3) and (6)”;*

23 (2) *in subsection (b) in the first sentence by*
24 *striking “phonorecords, or of copies of motion pictures*

1 *and other audiovisual works,” and inserting*
2 *“phonorecords or copies”;*

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

4 *“(d) LIMITATIONS ON EXCLUSIVE RIGHT.—Notwith-*
5 *standing the provisions of section 106(6)—*

6 *“(1) EXEMPT TRANSMISSIONS AND*
7 *RETRANSMISSIONS.—The performance of a sound re-*
8 *ording publicly by means of a digital audio trans-*
9 *mission, other than as a part of an interactive serv-*
10 *ice, is not an infringement of section 106(6) if the*
11 *performance is part of—*

12 *“(A)(i) a nonsubscription transmission*
13 *other than a retransmission;*

14 *“(ii) an initial nonsubscription*
15 *retransmission made for direct reception by*
16 *members of the public of a prior or simultaneous*
17 *incidental transmission that is not made for di-*
18 *rect reception by members of the public; or*

19 *“(iii) a nonsubscription broadcast trans-*
20 *mission;*

21 *“(B) a retransmission of a nonsubscription*
22 *broadcast transmission: Provided, That, in the*
23 *case of a retransmission of a radio station’s*
24 *broadcast transmission—*

1 “(i) the radio station’s broadcast
2 transmission is not willfully or repeatedly
3 retransmitted more than a radius of 150
4 miles from the site of the radio broadcast
5 transmitter, however—

6 “(I) the 150 mile limitation under
7 this clause shall not apply when a
8 nonsubscription broadcast trans-
9 mission by a radio station licensed by
10 the Federal Communications Commis-
11 sion is retransmitted on a
12 nonsubscription basis by a terrestrial
13 broadcast station, terrestrial trans-
14 lator, or terrestrial repeater licensed by
15 the Federal Communications Commis-
16 sion; and

17 “(II) in the case of a subscription
18 retransmission of a nonsubscription
19 broadcast retransmission covered by
20 subclause (I), the 150 mile radius shall
21 be measured from the transmitter site
22 of such broadcast retransmitter;

23 “(ii) the retransmission is of radio sta-
24 tion broadcast transmissions that are—

1 “(I) obtained by the retransmitter
2 over the air;

3 “(II) not electronically processed
4 by the retransmitter to deliver separate
5 and discrete signals; and

6 “(III) retransmitted only within
7 the local communities served by the
8 retransmitter;

9 “(iii) the radio station’s broadcast
10 transmission was being retransmitted to
11 cable systems (as defined in section 111(f))
12 by a satellite carrier on January 1, 1995,
13 and that retransmission was being
14 retransmitted by cable systems as a separate
15 and discrete signal, and the satellite carrier
16 obtains the radio station’s broadcast trans-
17 mission in an analog format: Provided,
18 That the broadcast transmission being
19 retransmitted may embody the program-
20 ming of no more than one radio station; or

21 “(iv) the radio station’s broadcast
22 transmission is made by a noncommercial
23 educational broadcast station funded on or
24 after January 1, 1995, under section 396(k)
25 of the Communications Act of 1934 (47

1 *U.S.C. 396(k)), consists solely of non-*
2 *commercial educational and cultural radio*
3 *programs, and the retransmission, whether*
4 *or not simultaneous, is a nonsubscription*
5 *terrestrial broadcast retransmission; or*

6 *“(C) a transmission that comes within any*
7 *of the following categories:*

8 *“(i) a prior or simultaneous trans-*
9 *mission incidental to an exempt trans-*
10 *mission, such as a feed received by and then*
11 *retransmitted by an exempt transmitter:*
12 *Provided, That such incidental trans-*
13 *missions do not include any subscription*
14 *transmission directly for reception by mem-*
15 *bers of the public;*

16 *“(ii) a transmission within a business*
17 *establishment, confined to its premises or*
18 *the immediately surrounding vicinity;*

19 *“(iii) a retransmission by any*
20 *retransmitter, including a multichannel*
21 *video programming distributor as defined*
22 *in section 602(12) of the Communications*
23 *Act of 1934 (47 U.S.C. 522(12)), of a trans-*
24 *mission by a transmitter licensed to pub-*
25 *licly perform the sound recording as a part*

1 of that transmission, if the retransmission
2 is simultaneous with the licensed trans-
3 mission and authorized by the transmitter;
4 or

5 “(iv) a transmission to a business es-
6 tablishment for use in the ordinary course
7 of its business: Provided, That the business
8 recipient does not retransmit the trans-
9 mission outside of its premises or the imme-
10 diately surrounding vicinity, and that the
11 transmission does not exceed the sound re-
12 cording performance complement. Nothing
13 in this clause shall limit the scope of the ex-
14 emption in clause (ii).

15 “(2) *SUBSCRIPTION TRANSMISSIONS.*—In the
16 case of a subscription transmission not exempt under
17 subsection (d)(1), the performance of a sound record-
18 ing publicly by means of a digital audio transmission
19 shall be subject to statutory licensing, in accordance
20 with subsection (f) of this section, if—

21 “(A) the transmission is not part of an
22 interactive service;

23 “(B) the transmission does not exceed the
24 sound recording performance complement;

1 “(C) the transmitting entity does not cause
2 to be published by means of an advance program
3 schedule or prior announcement the titles of the
4 specific sound recordings or phonorecords em-
5 bodying such sound recordings to be transmitted;

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

11 “(E) except as provided in section 1002(e)
12 of this title, the transmission of the sound record-
13 ing is accompanied by the information encoded
14 in that sound recording, if any, by or under the
15 authority of the copyright owner of that sound
16 recording, that identifies the title of the sound re-
17 cording, the featured recording artist who per-
18 forms on the sound recording, and related infor-
19 mation, including information concerning the
20 underlying musical work and its writer.

21 “(3) LICENSES FOR TRANSMISSIONS BY INTER-
22 ACTIVE SERVICES.—

23 “(A) No interactive service shall be granted
24 an exclusive license under section 106(6) for the
25 performance of a sound recording publicly by

1 *means of digital audio transmission for a period*
2 *in excess of 12 months, except that with respect*
3 *to an exclusive license granted to an interactive*
4 *service by a licensor that holds the copyright to*
5 *1,000 or fewer sound recordings, the period of*
6 *such license shall not exceed 24 months: Pro-*
7 *vided, however, That the grantee of such exclusive*
8 *license shall be ineligible to receive another exclu-*
9 *sive license for the performance of that sound re-*
10 *ording for a period of 13 months from the expi-*
11 *ration of the prior exclusive license.*

12 “(B) *The limitation set forth in subpara-*
13 *graph (A) of this paragraph shall not apply if—*

14 “(i) *the licensor has granted and there*
15 *remain in effect licenses under section*
16 *106(6) for the public performance of sound*
17 *recordings by means of digital audio trans-*
18 *mission by at least 5 different interactive*
19 *services: Provided, however, That each such*
20 *license must be for a minimum of 10 per-*
21 *cent of the copyrighted sound recordings*
22 *owned by the licensor that have been li-*
23 *censed to interactive services, but in no*
24 *event less than 50 sound recordings; or*

1 “(ii) the exclusive license is granted to
2 perform publicly up to 45 seconds of a
3 sound recording and the sole purpose of the
4 performance is to promote the distribution
5 or performance of that sound recording.

6 “(C) Notwithstanding the grant of an exclu-
7 sive or nonexclusive license of the right of public
8 performance under section 106(6), an interactive
9 service may not publicly perform a sound record-
10 ing unless a license has been granted for the pub-
11 lic performance of any copyrighted musical work
12 contained in the sound recording: Provided, That
13 such license to publicly perform the copyrighted
14 musical work may be granted either by a per-
15 forming rights society representing the copyright
16 owner or by the copyright owner.

17 “(D) The performance of a sound recording
18 by means of a retransmission of a digital audio
19 transmission is not an infringement of section
20 106(6) if—

21 “(i) the retransmission is of a trans-
22 mission by an interactive service licensed to
23 publicly perform the sound recording to a
24 particular member of the public as part of
25 that transmission; and

1 “(ii) the retransmission is simulta-
2 neous with the licensed transmission, au-
3 thorized by the transmitter, and limited to
4 that particular member of the public in-
5 tended by the interactive service to be the
6 recipient of the transmission.

7 “(E) For the purposes of this paragraph—

8 “(i) a ‘licensor’ shall include the licens-
9 ing entity and any other entity under any
10 material degree of common ownership, man-
11 agement, or control that owns copyrights in
12 sound recordings; and

13 “(ii) a ‘performing rights society’ is an
14 association or corporation that licenses the
15 public performance of nondramatic musical
16 works on behalf of the copyright owner, such
17 as the American Society of Composers, Au-
18 thors and Publishers, Broadcast Music, Inc.,
19 and SESAC, Inc.

20 “(4) RIGHTS NOT OTHERWISE LIMITED.—

21 “(A) Except as expressly provided in this
22 section, this section does not limit or impair the
23 exclusive right to perform a sound recording
24 publicly by means of a digital audio trans-
25 mission under section 106(6).

1 “(B) *Nothing in this section annuls or lim-*
2 *its in any way—*

3 “(i) *the exclusive right to publicly per-*
4 *form a musical work, including by means of*
5 *a digital audio transmission, under section*
6 *106(4);*

7 “(ii) *the exclusive rights in a sound re-*
8 *ording or the musical work embodied there-*
9 *in under sections 106(1), 106(2) and*
10 *106(3); or*

11 “(iii) *any other rights under any other*
12 *clause of section 106, or remedies available*
13 *under this title, as such rights or remedies*
14 *exist either before or after the date of enact-*
15 *ment of the Digital Performance Right in*
16 *Sound Recordings Act of 1995.*

17 “(C) *Any limitations in this section on the*
18 *exclusive right under section 106(6) apply only*
19 *to the exclusive right under section 106(6) and*
20 *not to any other exclusive rights under section*
21 *106. Nothing in this section shall be construed to*
22 *annul, limit, impair or otherwise affect in any*
23 *way the ability of the owner of a copyright in*
24 *a sound recording to exercise the rights under*
25 *sections 106(1), 106(2) and 106(3), or to obtain*

1 *the remedies available under this title pursuant*
2 *to such rights, as such rights and remedies exist*
3 *either before or after the date of enactment of the*
4 *Digital Performance Right in Sound Recordings*
5 *Act of 1995.”; and*

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

7 “(e) *AUTHORITY FOR NEGOTIATIONS.—*

8 “(1) *Notwithstanding any provision of the anti-*
9 *trust laws, in negotiating statutory licenses in accord-*
10 *ance with subsection (f), any copyright owners of*
11 *sound recordings and any entities performing sound*
12 *recordings affected by this section may negotiate and*
13 *agree upon the royalty rates and license terms and*
14 *conditions for the performance of such sound record-*
15 *ings and the proportionate division of fees paid*
16 *among copyright owners, and may designate common*
17 *agents on a nonexclusive basis to negotiate, agree to,*
18 *pay, or receive payments.*

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

23 “(A) *copyright owners of sound recordings*
24 *affected by this section may designate common*
25 *agents to act on their behalf to grant licenses and*

1 *receive and remit royalty payments: Provided,*
2 *That each copyright owner shall establish the*
3 *royalty rates and material license terms and*
4 *conditions unilaterally, that is, not in agree-*
5 *ment, combination, or concert with other copy-*
6 *right owners of sound recordings; and*

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

16 “(f) *LICENSES FOR NONEXEMPT SUBSCRIPTION*
17 *TRANSMISSIONS.—*

18 “(1) *No later than 30 days after the enactment*
19 *of the Digital Performance Right in Sound Record-*
20 *ings Act of 1995, the Librarian of Congress shall*
21 *cause notice to be published in the Federal Register*
22 *of the initiation of voluntary negotiation proceedings*
23 *for the purpose of determining reasonable terms and*
24 *rates of royalty payments for the activities specified*
25 *by subsection (d)(2) of this section during the period*

1 *beginning on the effective date of such Act and ending*
2 *on December 31, 2000. Such terms and rates shall*
3 *distinguish among the different types of digital audio*
4 *transmission services then in operation. Any copy-*
5 *right owners of sound recordings or any entities per-*
6 *forming sound recordings affected by this section may*
7 *submit to the Librarian of Congress licenses covering*
8 *such activities with respect to such sound recordings.*
9 *The parties to each negotiation proceeding shall bear*
10 *their own costs.*

11 *“(2) In the absence of license agreements nego-*
12 *tiated under paragraph (1), during the 60-day period*
13 *commencing 6 months after publication of the notice*
14 *specified in paragraph (1), and upon the filing of a*
15 *petition in accordance with section 803(a)(1), the Li-*
16 *brarian of Congress shall, pursuant to chapter 8, con-*
17 *vene a copyright arbitration royalty panel to deter-*
18 *mine and publish in the Federal Register a schedule*
19 *of rates and terms which, subject to paragraph (3),*
20 *shall be binding on all copyright owners of sound re-*
21 *cordings and entities performing sound recordings. In*
22 *addition to the objectives set forth in section*
23 *801(b)(1), in establishing such rates and terms, the*
24 *copyright arbitration royalty panel may consider the*
25 *rates and terms for comparable types of digital audio*

1 *transmission services and comparable circumstances*
2 *under voluntary license agreements negotiated as pro-*
3 *vided in paragraph (1). The Librarian of Congress*
4 *shall also establish requirements by which copyright*
5 *owners may receive reasonable notice of the use of*
6 *their sound recordings under this section, and under*
7 *which records of such use shall be kept and made*
8 *available by entities performing sound recordings.*

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

15 *“(4)(A) Publication of a notice of the initiation*
16 *of voluntary negotiation proceedings as specified in*
17 *paragraph (1) shall be repeated, in accordance with*
18 *regulations that the Librarian of Congress shall pre-*
19 *scribe—*

20 *“(i) no later than 30 days after a petition*
21 *is filed by any copyright owners of sound record-*
22 *ings or any entities performing sound recordings*
23 *affected by this section indicating that a new*
24 *type of digital audio transmission service on*

1 *which sound recordings are performed is or is*
2 *about to become operational; and*

3 “(ii) *in the first week of January, 2000 and*
4 *at 5-year intervals thereafter.*

5 “(B)(i) *The procedures specified in paragraph*
6 *(2) shall be repeated, in accordance with regulations*
7 *that the Librarian of Congress shall prescribe, upon*
8 *the filing of a petition in accordance with section*
9 *803(a)(1) during a 60-day period commencing—*

10 “(I) *six months after publication of a notice*
11 *of the initiation of voluntary negotiation pro-*
12 *ceedings under paragraph (1) pursuant to a pe-*
13 *tion under paragraph (4)(A)(i); or*

14 “(II) *on July 1, 2000 and at 5-year inter-*
15 *vals thereafter.*

16 “(i) *The procedures specified in paragraph (2)*
17 *shall be concluded in accordance with section 802.*

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

23 “(i) *by complying with such notice require-*
24 *ments as the Librarian of Congress shall pre-*

1 *scribe by regulation and by paying royalty fees*
2 *in accordance with this subsection; or*

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

6 “(B) *Any royalty payments in arrears shall be*
7 *made on or before the twentieth day of the month next*
8 *succeeding the month in which the royalty fees are*
9 *set.*

10 “(g) *PROCEEDS FROM LICENSING OF SUBSCRIPTION*
11 *TRANSMISSIONS.—*

12 “(1) *Except in the case of a subscription trans-*
13 *mission licensed in accordance with subsection (f) of*
14 *this section—*

15 “(A) *a featured recording artist who per-*
16 *forms on a sound recording that has been li-*
17 *icensed for a subscription transmission shall be*
18 *entitled to receive payments from the copyright*
19 *owner of the sound recording in accordance with*
20 *the terms of the artist’s contract; and*

21 “(B) *a nonfeatured recording artist who*
22 *performs on a sound recording that has been li-*
23 *icensed for a subscription transmission shall be*
24 *entitled to receive payments from the copyright*
25 *owner of the sound recording in accordance with*

1 *the terms of the nonfeatured recording artist's*
2 *applicable contract or other applicable agree-*
3 *ment.*

4 “(2) *The copyright owner of the exclusive right*
5 *under section 106(6) of this title to publicly perform*
6 *a sound recording by means of a digital audio trans-*
7 *mission shall allocate to recording artists in the fol-*
8 *lowing manner its receipts from the statutory licens-*
9 *ing of subscription transmission performances of the*
10 *sound recording in accordance with subsection (f) of*
11 *this section:*

12 “(A) *2¹/₂ percent of the receipts shall be de-*
13 *posited in an escrow account managed by an*
14 *independent administrator jointly appointed by*
15 *copyright owners of sound recordings and the*
16 *American Federation of Musicians (or any suc-*
17 *cessor entity) to be distributed to nonfeatured*
18 *musicians (whether or not members of the Amer-*
19 *ican Federation of Musicians) who have per-*
20 *formed on sound recordings.*

21 “(B) *2¹/₂ percent of the receipts shall be de-*
22 *posited in an escrow account managed by an*
23 *independent administrator jointly appointed by*
24 *copyright owners of sound recordings and the*
25 *American Federation of Television and Radio*

1 *Artists (or any successor entity) to be distributed*
2 *to nonfeatured vocalists (whether or not members*
3 *of the American Federation of Television and*
4 *Radio Artists) who have performed on sound re-*
5 *cordings.*

6 “(C) 45 percent of the receipts shall be allo-
7 cated, on a per sound recording basis, to the re-
8 cording artist or artists featured on such sound
9 recording (or the persons conveying rights in the
10 artists’ performance in the sound recordings).

11 “(h) *LICENSING TO AFFILIATES.*—

12 “(1) *If the copyright owner of a sound recording*
13 *licenses an affiliated entity the right to publicly per-*
14 *form a sound recording by means of a digital audio*
15 *transmission under section 106(6), the copyright*
16 *owner shall make the licensed sound recording avail-*
17 *able under section 106(6) on no less favorable terms*
18 *and conditions to all bona fide entities that offer*
19 *similar services, except that, if there are material dif-*
20 *ferences in the scope of the requested license with re-*
21 *spect to the type of service, the particular sound re-*
22 *cordings licensed, the frequency of use, the number of*
23 *subscribers served, or the duration, then the copyright*
24 *owner may establish different terms and conditions*
25 *for such other services.*

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

4 “(A) *an interactive service; or*

5 “(B) *an entity to perform publicly up to 45*
6 *seconds of the sound recording and the sole pur-*
7 *pose of the performance is to promote the dis-*
8 *tribution or performance of that sound recording.*

9 “(i) *NO EFFECT ON ROYALTIES FOR UNDERLYING*
10 *WORKS.—License fees payable for the public performance*
11 *of sound recordings under section 106(6) shall not be taken*
12 *into account in any administrative, judicial, or other gov-*
13 *ernmental proceeding to set or adjust the royalties payable*
14 *to copyright owners of musical works for the public per-*
15 *formance of their works. It is the intent of Congress that*
16 *royalties payable to copyright owners of musical works for*
17 *the public performance of their works shall not be dimin-*
18 *ished in any respect as a result of the rights granted by*
19 *section 106(6).*

20 “(j) *DEFINITIONS.—As used in this section, the follow-*
21 *ing terms have the following meanings:*

22 “(1) *An ‘affiliated entity’ is an entity engaging*
23 *in digital audio transmissions covered by section*
24 *106(6), other than an interactive service, in which the*
25 *licensor has any direct or indirect partnership or any*

1 *ownership interest amounting to 5 percent or more of*
2 *the outstanding voting or non-voting stock.*

3 *“(2) A ‘broadcast’ transmission is a trans-*
4 *mission made by a terrestrial broadcast station li-*
5 *censed as such by the Federal Communications Com-*
6 *mission.*

7 *“(3) A ‘digital audio transmission’ is a digital*
8 *transmission as defined in section 101, that embodies*
9 *the transmission of a sound recording. This term does*
10 *not include the transmission of any audiovisual work.*

11 *“(4) An ‘interactive service’ is one that enables*
12 *a member of the public to receive, on request, a trans-*
13 *mission of a particular sound recording chosen by or*
14 *on behalf of the recipient. The ability of individuals*
15 *to request that particular sound recordings be per-*
16 *formed for reception by the public at large does not*
17 *make a service interactive. If an entity offers both*
18 *interactive and non-interactive services (either con-*
19 *currently or at different times), the non-interactive*
20 *component shall not be treated as part of an inter-*
21 *active service.*

22 *“(5) A ‘nonsubscription’ transmission is any*
23 *transmission that is not a subscription transmission.*

24 *“(6) A ‘retransmission’ is a further transmission*
25 *of an initial transmission, and includes any further*

1 *retransmission of the same transmission. Except as*
2 *provided in this section, a transmission qualifies as*
3 *a 'retransmission' only if it is simultaneous with the*
4 *initial transmission. Nothing in this definition shall*
5 *be construed to exempt a transmission that fails to*
6 *satisfy a separate element required to qualify for an*
7 *exemption under section 114(d)(1).*

8 *“(7) The 'sound recording performance com-*
9 *plement' is the transmission during any 3-hour pe-*
10 *riod, on a particular channel used by a transmitting*
11 *entity, of no more than—*

12 *“(A) 3 different selections of sound record-*
13 *ings from any one phonorecord lawfully distrib-*
14 *uted for public performance or sale in the United*
15 *States, if no more than 2 such selections are*
16 *transmitted consecutively; or*

17 *“(B) 4 different selections of sound record-*
18 *ings—*

19 *“(i) by the same featured recording*
20 *artist; or*

21 *“(ii) from any set or compilation of*
22 *phonorecords lawfully distributed together*
23 *as a unit for public performance or sale in*
24 *the United States,*

1 *if no more than three such selections are trans-*
2 *mitted consecutively:*

3 *Provided, That the transmission of selections in excess*
4 *of the numerical limits provided for in clauses (A)*
5 *and (B) from multiple phonorecords shall nonetheless*
6 *qualify as a sound recording performance complement*
7 *if the programming of the multiple phonorecords was*
8 *not willfully intended to avoid the numerical limita-*
9 *tions prescribed in such clauses.*

10 “(8) A ‘subscription’ transmission is a trans-
11 mission that is controlled and limited to particular
12 recipients, and for which consideration is required to
13 be paid or otherwise given by or on behalf of the re-
14 cipient to receive the transmission or a package of
15 transmissions including the transmission.

16 “(9) A ‘transmission’ includes both an initial
17 transmission and a retransmission.”.

18 **SEC. 4. MECHANICAL ROYALTIES IN DIGITAL PHONO-**
19 **RECORD DELIVERIES.**

20 Section 115 of title 17, United States Code, is amend-
21 *ed—*

22 (1) *in subsection (a)(1)—*

23 (A) *in the first sentence by striking out*
24 “any other person” *and inserting in lieu thereof*
25 “any other person, including those who make

1 *phonorecords or digital phonorecord deliveries,”;*

2 *and*

3 *(B) in the second sentence by inserting be-*
4 *fore the period “, including by means of a digi-*
5 *tal phonorecord delivery”;*

6 *(2) in subsection (c)(2) in the second sentence by*
7 *inserting “and other than as provided in paragraph*
8 *(3),” after “For this purpose,”;*

9 *(3) by redesignating paragraphs (3), (4), and (5)*
10 *of subsection (c) as paragraphs (4), (5), and (6), re-*
11 *spectively, and by inserting after paragraph (2) the*
12 *following new paragraph:*

13 *“(3)(A) A compulsory license under this section*
14 *includes the right of the compulsory licensee to dis-*
15 *tribute or authorize the distribution of a phonorecord*
16 *of a nondramatic musical work by means of a digital*
17 *transmission which constitutes a digital phonorecord*
18 *delivery, regardless of whether the digital trans-*
19 *mission is also a public performance of the sound re-*
20 *recording under section 106(6) of this title or of any*
21 *nondramatic musical work embodied therein under*
22 *section 106(4) of this title. For every digital phono-*
23 *record delivery by or under the authority of the com-*
24 *pulsory licensee—*

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

5 “(ii) on or after January 1, 1998, the roy-
6 alty payable by the compulsory licensee shall be
7 the royalty prescribed under subparagraphs (B)
8 through (F) and chapter 8 of this title.

9 “(B) Notwithstanding any provision of the anti-
10 trust laws, any copyright owners of nondramatic mu-
11 sical works and any persons entitled to obtain a com-
12 pulsory license under subsection (a)(1) may negotiate
13 and agree upon the terms and rates of royalty pay-
14 ments under this paragraph and the proportionate di-
15 vision of fees paid among copyright owners, and may
16 designate common agents to negotiate, agree to, pay
17 or receive such royalty payments. Such authority to
18 negotiate the terms and rates of royalty payments in-
19 cludes, but is not limited to, the authority to negotiate
20 the year during which the royalty rates prescribed
21 under subparagraphs (B) through (F) and chapter 8
22 of this title shall next be determined.

23 “(C) During the period of June 30, 1996,
24 through December 31, 1996, the Librarian of Congress
25 shall cause notice to be published in the Federal Reg-

1 *ister of the initiation of voluntary negotiation pro-*
2 *ceedings for the purpose of determining reasonable*
3 *terms and rates of royalty payments for the activities*
4 *specified by subparagraph (A) during the period be-*
5 *ginning January 1, 1998, and ending on the effective*
6 *date of any new terms and rates established pursuant*
7 *to subparagraph (C), (D) or (F), or such other date*
8 *(regarding digital phonorecord deliveries) as the par-*
9 *ties may agree. Such terms and rates shall distin-*
10 *guish between (i) digital phonorecord deliveries where*
11 *the reproduction or distribution of a phonorecord is*
12 *incidental to the transmission which constitutes the*
13 *digital phonorecord delivery, and (ii) digital phono-*
14 *record deliveries in general. Any copyright owners of*
15 *nondramatic musical works and any persons entitled*
16 *to obtain a compulsory license under subsection (a)(1)*
17 *may submit to the Librarian of Congress licenses cov-*
18 *ering such activities. The parties to each negotiation*
19 *proceeding shall bear their own costs.*

20 *“(D) In the absence of license agreements nego-*
21 *tiated under subparagraphs (B) and (C), upon the fil-*
22 *ing of a petition in accordance with section*
23 *803(a)(1), the Librarian of Congress shall, pursuant*
24 *to chapter 8, convene a copyright arbitration royalty*
25 *panel to determine and publish in the Federal Reg-*

1 *ister a schedule of rates and terms which, subject to*
2 *subparagraph (E), shall be binding on all copyright*
3 *owners of nondramatic musical works and persons*
4 *entitled to obtain a compulsory license under sub-*
5 *section (a)(1) during the period beginning January 1,*
6 *1998, and ending on the effective date of any new*
7 *terms and rates established pursuant to subparagraph*
8 *(C), (D) or (F), or such other date (regarding digital*
9 *phonorecord deliveries) as may be determined pursu-*
10 *ant to subparagraphs (B) and (C). Such terms and*
11 *rates shall distinguish between (i) digital phonorecord*
12 *deliveries where the reproduction or distribution of a*
13 *phonorecord is incidental to the transmission which*
14 *constitutes the digital phonorecord delivery, and (ii)*
15 *digital phonorecord deliveries in general. In addition*
16 *to the objectives set forth in section 801(b)(1), in es-*
17 *tablishing such rates and terms, the copyright arbi-*
18 *tration royalty panel may consider rates and terms*
19 *under voluntary license agreements negotiated as pro-*
20 *vided in subparagraphs (B) and (C). The royalty*
21 *rates payable for a compulsory license for a digital*
22 *phonorecord delivery under this section shall be estab-*
23 *lished de novo and no precedential effect shall be*
24 *given to the amount of the royalty payable by a com-*
25 *pulsory licensee for digital phonorecord deliveries on*

1 or before December 31, 1997. The Librarian of Con-
2 gress shall also establish requirements by which copy-
3 right owners may receive reasonable notice of the use
4 of their works under this section, and under which
5 records of such use shall be kept and made available
6 by persons making digital phonorecord deliveries.

7 “(E)(i) License agreements voluntarily nego-
8 tiated at any time between one or more copyright
9 owners of nondramatic musical works and one or
10 more persons entitled to obtain a compulsory license
11 under subsection (a)(1) shall be given effect in lieu of
12 any determination by the Librarian of Congress. Sub-
13 ject to clause (ii), the royalty rates determined pursu-
14 ant to subparagraph (C), (D) or (F) shall be given ef-
15 fect in lieu of any contrary royalty rates specified in
16 a contract pursuant to which a recording artist who
17 is the author of a nondramatic musical work grants
18 a license under that person’s exclusive rights in the
19 musical work under sections 106(1) and (3) or com-
20 mits another person to grant a license in that musical
21 work under sections 106(1) and (3), to a person desir-
22 ing to fix in a tangible medium of expression a sound
23 recording embodying the musical work.

24 “(ii) The second sentence of clause (i) shall not
25 apply to—

1 “(I) a contract entered into on or before
2 June 22, 1995, and not modified thereafter for
3 the purpose of reducing the royalty rates deter-
4 mined pursuant to subparagraph (C), (D) or (F)
5 or of increasing the number of musical works
6 within the scope of the contract covered by the
7 reduced rates, except if a contract entered into
8 on or before June 22, 1995, is modified thereafter
9 for the purpose of increasing the number of mu-
10 sical works within the scope of the contract, any
11 contrary royalty rates specified in the contract
12 shall be given effect in lieu of royalty rates deter-
13 mined pursuant to subparagraph (C), (D) or (F)
14 for the number of musical works within the scope
15 of the contract as of June 22, 1995; and

16 “(II) a contract entered into after the date
17 that the sound recording is fixed in a tangible
18 medium of expression substantially in a form in-
19 tended for commercial release, if at the time the
20 contract is entered into, the recording artist re-
21 tains the right to grant licenses as to the musical
22 work under sections 106(1) and 106(3).

23 “(F) The procedures specified in subparagraphs
24 (C) and (D) shall be repeated and concluded, in ac-
25 cordance with regulations that the Librarian of Con-

1 *gress shall prescribe, in each fifth calendar year after*
2 *1997, except to the extent that different years for the*
3 *repeating and concluding of such proceedings may be*
4 *determined in accordance with subparagraphs (B)*
5 *and (C).*

6 *“(G) Except as provided in section 1002(e) of*
7 *this title, a digital phonorecord delivery licensed*
8 *under this paragraph shall be accompanied by the in-*
9 *formation encoded in the sound recording, if any, by*
10 *or under the authority of the copyright owner of that*
11 *sound recording, that identifies the title of the sound*
12 *recording, the featured recording artist who performs*
13 *on the sound recording, and related information, in-*
14 *cluding information concerning the underlying musi-*
15 *cal work and its writer.*

16 *“(H)(i) A digital phonorecord delivery of a*
17 *sound recording is actionable as an act of infringe-*
18 *ment under section 501, and is fully subject to the*
19 *remedies provided by sections 502 through 506 and*
20 *section 509, unless—*

21 *“(I) the digital phonorecord delivery has*
22 *been authorized by the copyright owner of the*
23 *sound recording; and*

24 *“(II) the owner of the copyright in the*
25 *sound recording or the entity making the digital*

1 *phonorecord delivery has obtained a compulsory*
2 *license under this section or has otherwise been*
3 *authorized by the copyright owner of the musical*
4 *work to distribute or authorize the distribution,*
5 *by means of a digital phonorecord delivery, of*
6 *each musical work embodied in the sound record-*
7 *ing.*

8 “(ii) *Any cause of action under this subpara-*
9 *graph shall be in addition to those available to the*
10 *owner of the copyright in the nondramatic musical*
11 *work under subsection (c)(6) and section 106(4) and*
12 *the owner of the copyright in the sound recording*
13 *under section 106(6).*

14 “(I) *The liability of the copyright owner of a*
15 *sound recording for infringement of the copyright in*
16 *a nondramatic musical work embodied in the sound*
17 *recording shall be determined in accordance with ap-*
18 *plicable law, except that the owner of a copyright in*
19 *a sound recording shall not be liable for a digital*
20 *phonorecord delivery by a third party if the owner of*
21 *the copyright in the sound recording does not license*
22 *the distribution of a phonorecord of the nondramatic*
23 *musical work.*

24 “(J) *Nothing in section 1008 shall be construed*
25 *to prevent the exercise of the rights and remedies al-*

1 *lowed by this paragraph, paragraph (6), and chapter*
2 *5 in the event of a digital phonorecord delivery, ex-*
3 *cept that no action alleging infringement of copyright*
4 *may be brought under this title against a manufac-*
5 *turer, importer or distributor of a digital audio re-*
6 *recording device, a digital audio recording medium, an*
7 *analog recording device, or an analog recording me-*
8 *diuum, or against a consumer, based on the actions de-*
9 *scribed in such section.*

10 *“(K) Nothing in this section annuls or limits (i)*
11 *the exclusive right to publicly perform a sound record-*
12 *ing or the musical work embodied therein, including*
13 *by means of a digital transmission, under sections*
14 *106(4) and 106(6), (ii) except for compulsory licens-*
15 *ing under the conditions specified by this section, the*
16 *exclusive rights to reproduce and distribute the sound*
17 *recording and the musical work embodied therein*
18 *under sections 106(1) and 106(3), including by means*
19 *of a digital phonorecord delivery, or (iii) any other*
20 *rights under any other provision of section 106, or*
21 *remedies available under this title, as such rights or*
22 *remedies exist either before or after the date of enact-*
23 *ment of the Digital Performance Right in Sound Re-*
24 *cordings Act of 1995.*

1 “(L) *The provisions of this section concerning*
2 *digital phonorecord deliveries shall not apply to any*
3 *exempt transmissions or retransmissions under sec-*
4 *tion 114(d)(1). The exemptions created in section*
5 *114(d)(1) do not expand or reduce the rights of copy-*
6 *right owners under section 106(1) through (5) with*
7 *respect to such transmissions and retransmissions.”;*
8 *and*

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

10 “(d) *DEFINITION.—As used in this section, the follow-*
11 *ing term has the following meaning: A ‘digital phonorecord*
12 *delivery’ is each individual delivery of a phonorecord by*
13 *digital transmission of a sound recording which results in*
14 *a specifically identifiable reproduction by or for any trans-*
15 *mission recipient of a phonorecord of that sound recording,*
16 *regardless of whether the digital transmission is also a pub-*
17 *lic performance of the sound recording or any nondramatic*
18 *musical work embodied therein. A digital phonorecord de-*
19 *livery does not result from a real-time, noninteractive sub-*
20 *scription transmission of a sound recording where no repro-*
21 *duction of the sound recording or the musical work em-*
22 *bodied therein is made from the inception of the trans-*
23 *mission through to its receipt by the transmission recipient*
24 *in order to make the sound recording audible.”.*

1 **SEC. 5. CONFORMING AMENDMENTS.**

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

5 “A ‘digital transmission’ is a transmission in
6 whole or in part in a digital or other non-analog for-
7 mat.”.

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

12 (c) *LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY*
13 *TRANSMISSIONS OF SUPERSTATIONS AND NETWORK STA-*
14 *TIONS FOR PRIVATE HOME VIEWING.*—

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

18 (2) Section 119(a)(2)(A) of title 17, United
19 States Code, is amended in the first sentence by in-
20 serting “and section 114(d)” after “of this sub-
21 section”.

22 (d) *COPYRIGHT ARBITRATION ROYALTY PANELS.*—

23 (1) Section 801(b)(1) of title 17, United States
24 Code, is amended in the first and second sentences by
25 striking “115” each place it appears and inserting
26 “114, 115,”.

1 (2) *Section 802(c) of title 17, United States*
2 *Code, is amended in the third sentence by striking*
3 *“section 111, 116, or 119,” and inserting “section*
4 *111, 114, 116, or 119, any person entitled to a com-*
5 *pulsory license under section 114(d), any person enti-*
6 *tled to a compulsory license under section 115,”.*

7 (3) *Section 802(g) of title 17, United States*
8 *Code, is amended in the third sentence by inserting*
9 *“114,” after “111,”.*

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

12 (5) *Section 803(a)(1) of title 17, United States*
13 *Code, is amended in the first sentence by striking*
14 *“115” and inserting “114, 115” and by striking “and*
15 *(4)” and inserting “(4) and (5)”.*

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

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

22 *“(5) With respect to proceedings under section*
23 *801(b)(1) concerning the determination of reasonable*
24 *terms and rates of royalty payments as provided in*

1 *section 114, the Librarian of Congress shall proceed*
2 *when and as provided by that section.”.*

3 **SEC. 6. EFFECTIVE DATE.**

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

Union Calendar No. 143

104TH CONGRESS
1ST SESSION

H. R. 1506

[Report No. 104-274]

A BILL

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.

OCTOBER 11, 1995

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

