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Calendar No. 165

104TH CONGRESS
1ST SESSION**S. 227****[Report No. 104-128]**

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 SENATE OF THE UNITED STATES

JANUARY 13 (legislative day, JANUARY 10), 1995

Mr. HATCH (for himself, Mrs. FEINSTEIN, Mr. SIMPSON, Mr. DEWINE, Mr. LOTT, and Mr. BAUCUS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

AUGUST 4 (legislative day, JULY 10), 1995

Reported by Mr. HATCH, with an amendment

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

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,*

1 **SECTION 1. SHORT TITLE.**

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

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

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

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

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

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

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

15 **SEC. 3. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORD-**
16 **INGS.**

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

19 (1) in subsection (a) by striking "and (3)" and
20 replacing it with "(3) and (6)";

21 (2) in subsection (b) by deleting from the first
22 sentence "phonorecords, or of copies of motion pic-
23 tures and other audiovisual works," and inserting
24 "phonorecords or copies";

25 (3) by striking subsection (d) and replacing it
26 with the following new subsection (d):

1 “(d) LIMITATIONS ON EXCLUSIVE RIGHT.—Notwith-
2 standing the provisions of section 106(6)—

3 “(1) EXEMPT TRANSMISSIONS.—The perform-
4 ance of a sound recording publicly by means of a
5 digital transmission, other than as part of an inter-
6 active service, is not an infringement of section
7 106(6) if the performance is part of—

8 “(A) a nonsubscription transmission, such
9 as a nonsubscription broadcast transmission;

10 “(B) a prior or simultaneous transmission
11 incidental to a nonsubscription transmission,
12 such as a feed received by and then
13 retransmitted by the nonsubscription transmit-
14 ter: *Provided*, That such incidental trans-
15 missions do not include any subscription trans-
16 mission directly for reception by members of
17 the public;

18 “(C) a retransmission of a nonsubscription
19 broadcast transmission: *Provided*, That, in the
20 case of a retransmission of a radio station’s
21 broadcast transmission, the transmission is not
22 willfully or repeatedly retransmitted more than
23 a radius of one hundred and fifty miles from
24 the site of the radio broadcast transmitter;

1 “(D) a further transmission by a business,
 2 confined to its premises or the immediately sur-
 3 rounding vicinity, of a transmission described in
 4 paragraphs (A) or (B) of this subsection (d)(1);
 5 or

6 “(E) a retransmission otherwise subject to
 7 liability, if such transmission is simultaneous
 8 with the primary transmission and authorized
 9 by the primary transmitter, and the primary
 10 transmitter has been licensed to publicly per-
 11 form the sound recording.

12 “(2) SUBSCRIPTION TRANSMISSIONS.—In the
 13 ease of a subscription transmission, the performance
 14 of a sound recording publicly by means of a digital
 15 transmission shall be subject to statutory licensing,
 16 in accordance with subsection (f) of this section, if—

17 “(A) the transmission is not part of an
 18 interactive service; and

19 “(B) the transmission does not exceed the
 20 sound recording performance complement.

21 “(3) RIGHTS NOT OTHERWISE LIMITED.—

22 “(A) Except as expressly provided herein,
 23 this section does not limit or impair the exclu-
 24 sive right to perform a sound recording publicly

1 by means of a digital transmission under sec-
2 tion 106(6).

3 “(B) Nothing in this section annuls or lim-
4 its in any way—

5 “(i) the exclusive right to publicly per-
6 form a musical work, including by means
7 of a digital transmission, under section
8 106(4),

9 “(ii) the exclusive rights to reproduce
10 and distribute a sound recording or the
11 musical work embodied therein under sec-
12 tions 106(1) and 106(3), including by
13 means of a digital phonorecord delivery as
14 defined in section 115, or

15 “(iii) any other rights under any other
16 clause of section 106, or remedies available
17 under this title, as such rights or remedies
18 exist either before or after the date of en-
19 actment of this Act.”; and

20 “(4) by adding after subsection (d) the follow-
21 ing:

22 “(e) AUTHORITY FOR NEGOTIATIONS.—Any copy-
23 right owners of sound recordings and any entities perform-
24 ing sound recordings affected by this section may nego-
25 tiate and agree upon the terms and rates of royalty pay-

1 ments for the performance of such sound recordings and
2 the proportionate division of fees paid among copyright
3 owners, and may designate common agents to negotiate,
4 agree to, pay, or receive such royalty payments.

5 “(f) LICENSES FOR SUBSCRIPTION TRANS-
6 MISSIONS.—

7 “(1) No later than thirty days after the enact-
8 ment of this legislation, the Librarian of Congress
9 shall cause notice to be published in the Federal
10 Register of the initiation of voluntary negotiation
11 proceedings for the purpose of determining reason-
12 able terms and rates of royalty payments for the ac-
13 tivities specified by subsection (d)(2) of this section
14 during the period beginning on the effective date of
15 this legislation and ending on December 31, 2000.
16 Such terms and rates shall distinguish among the
17 different types of digital transmission services then
18 in operation. Any copyright owners of sound record-
19 ings or any entities performing sound recordings af-
20 fected by this section may submit to the Librarian
21 of Congress licenses covering such activities with re-
22 spect to such sound recordings. The parties to each
23 negotiation proceeding shall bear their own costs.

24 “(2) In the absence of license agreements nego-
25 tiated under paragraph (1), the Librarian of Con-

1 gress shall, pursuant to chapter 8, convene a copy-
2 right arbitration royalty panel to determine and pub-
3 lish in the Federal Register a schedule of rates and
4 terms which, subject to paragraph (3), shall be bind-
5 ing on all copyright owners of sound recordings and
6 entities performing sound recordings. In establishing
7 such rates and terms the copyright arbitration roy-
8 alty panel may consider the rates for comparable
9 types of digital transmission services and comparable
10 circumstances under voluntary license agreements
11 negotiated as provided in paragraph (1). The parties
12 to the proceeding shall bear the entire cost thereof
13 in such manner and proportion as the arbitration
14 panels shall direct. The Librarian of Congress shall
15 also establish requirements by which copyright own-
16 ers may receive reasonable notice of the use of their
17 sound recordings under this section, and under
18 which records of such use shall be kept by entities
19 performing sound recordings.

20 ~~“(3) License agreements voluntarily negotiated~~
21 at any time between one or more copyright owners
22 of sound recordings and one or more entities per-
23 forming sound recordings shall be given effect in lieu
24 of any determination by the Librarian of Congress.

1 “(4) the procedures specified in paragraphs (1)
2 and (2) shall be repeated and concluded, in accord-
3 ance with regulations that the Librarian of Congress
4 shall prescribe—

5 “(A) within a six-month period each time
6 that a petition is filed by any copyright owners
7 of sound recordings or any entities performing
8 sound recordings affected by this section indi-
9 cating that a new type of digital transmission
10 service on which sound recordings are per-
11 formed is or is about to become operational;
12 and

13 “(B) between June 30 and December 31,
14 2000 and at five-year intervals thereafter.

15 “(5) Any person who wishes to perform a sound
16 recording publicly by means of a subscription trans-
17 mission under this subsection (f) may do so without
18 infringing the exclusive right of the copyright owner
19 of the sound recording by complying with such no-
20 tice requirements as the Register of Copyrights shall
21 prescribe by regulation and by paying royalty fees in
22 accordance with this subsection, or, if such royalty
23 fees have not been set, by agreeing to pay such roy-
24 alty fees as shall be determined in accordance with
25 this subsection, and any royalty payments in arrears

1 shall be made on or before the twentieth day of the
2 month next succeeding the month in which the roy-
3 alty fees are set.

4 ~~“(g) PROCEEDS FROM LICENSING OF SUBSCRIPTION~~
5 ~~TRANSMISSIONS.~~—In the case of a subscription trans-
6 mission performance of a sound recording licensed under
7 subsection (f) of this section, the copyright owner of the
8 exclusive right under section 106(6) of this title to publicly
9 perform a sound recording by means of a digital trans-
10 mission shall allocate to recording artists in the following
11 manner its receipts from the licensing of subscription
12 transmission performances of the sound recording in ac-
13 cordance with subsection (f) of this section:

14 ~~“(1) 2½ percent of the receipts shall be depos-~~
15 ~~ited in an escrow account managed by an independ-~~
16 ~~ent administrator jointly appointed by copyright~~
17 ~~owners of sound recordings and the American Fed-~~
18 ~~eration of Musicians (or any successor entity) to be~~
19 ~~distributed to nonfeatured musicians (whether or not~~
20 ~~members of the American Federation of Musicians)~~
21 ~~who have performed on sound recordings.~~

22 ~~“(2) 2½ percent of the receipts shall be depos-~~
23 ~~ited in an escrow account managed by an independ-~~
24 ~~ent administrator jointly appointed by copyright~~
25 ~~owners of sound recordings and the American Fed-~~

1 eration of Television and Radio Artists (or any suc-
2 cessor entity) to be distributed to nonfeatured vocal-
3 ists (whether or not members of the American Fed-
4 eration of Television and Radio Artists) who have
5 performed on sound recordings.

6 “(3) 45 percent of the receipts shall be allo-
7 cated, on a per sound recording basis, to the record-
8 ing artist or artists featured on such sound record-
9 ing (or the persons conveying rights in the artists’
10 performance in the sound recordings).

11 “(h) LICENSING TO AFFILIATES.—Where the copy-
12 right owner of a sound recording owns a controlling inter-
13 est in, or otherwise possesses the power directly or indi-
14 rectly to exercise a controlling influence over the manage-
15 ment or policies of, an entity engaging in digital trans-
16 missions covered by section 106(6) and licenses to such
17 entity the right to publicly perform a sound recording by
18 means of a digital transmission, the copyright owner shall
19 make the licensed sound recording available under section
20 106(6) on similar terms and conditions to all other simi-
21 larly-situated entities offering similar types of digital
22 transmission services, except that such copyright owner
23 may—

24 “(1) impose reasonable requirements for credit-
25 worthiness; and

1 “(2) establish different prices, terms, and con-
 2 ditions to take into account the types of services of-
 3 fered, the duration of the license, the geographic re-
 4 gion, the numbers of subscribers served, and any
 5 other relevant factors.

6 “(i) NO EFFECT ON ROYALTIES FOR UNDERLYING
 7 WORKS.—License fees payable for the public performance
 8 of sound recordings under clause (6) of section 106 shall
 9 not be taken into account in any administrative, judicial
 10 or other governmental proceeding to set or adjust the roy-
 11 alties payable to copyright owners of musical works for
 12 the public performance of their works.

13 “(j) DEFINITIONS.—As used in this section, the fol-
 14 lowing terms have the following meanings:

15 “(1) A ‘broadcast transmission’ is a trans-
 16 mission made by a broadcast station licensed as such
 17 by the Federal Communications Commission.

18 “(2) An ‘interactive service’ is one that enables
 19 a member of the public to receive, on request, a
 20 transmission of a particular sound recording chosen
 21 by or on behalf of the recipient. The ability of indi-
 22 viduals to request that particular sound recordings
 23 be performed for reception by the public at large
 24 does not make a service interactive. If an entity of-
 25 fers both interactive and non-interactive services (ei-

1 ther concurrently or at different times); the non-
2 interactive component shall not be treated as part of
3 an interactive service.

4 “(3) A ‘nonsubscription transmission’ is any
5 transmission that is not a subscription transmission.

6 “(4) The ‘sound recording performance com-
7 plement’ is the transmission of no more than—

8 “(A) two selections each day of sound re-
9 cordings embodied in any one phonorecord dis-
10 tributed in the United States for ultimate sale
11 to consumers; or

12 “(B) three selections each day of sound re-
13 cordings of performances—

14 “(i) by the same featured recording
15 artist; or

16 “(ii) embodied in any set of
17 phonorecords or compilation of sound re-
18 cordings marketed together as a unit for
19 ultimate sale to consumers.

20 “(5) A ‘subscription transmission’ is a trans-
21 mission that is controlled and limited to particular
22 recipients, and for which consideration is required to
23 be paid or otherwise given by or on behalf of the re-
24 cipient to receive the transmission or a package of
25 transmissions including the transmission.”.

1 **SEC. 4. SCOPE OF EXCLUSIVE RIGHTS IN NONDRAMATIC**
 2 **MUSICAL WORKS: COMPULSORY LICENSE**
 3 **FOR MAKING AND DISTRIBUTING**
 4 **PHONORECORDS.**

5 Section 115 of title 17, United State Code, is amend-
 6 ed—

7 (1) by inserting before the period at the end of
 8 the second sentence in subsection (a)(1) the words
 9 “including by means of a digital phonorecord deliv-
 10 ery”;

11 (2) by inserting in the second sentence of sub-
 12 section (e)(2), after the words “For this purpose,”
 13 the words “and other than as provided in clause
 14 (3)”;

15 (3) by redesignating clauses (3), (4) and (5) of
 16 subsection (e) as clauses (4), (5) and (6), respec-
 17 tively, and by inserting the following new clause:

18 “(3)(A) A compulsory license under this section
 19 includes the right of the maker of a phonorecord of
 20 a nondramatic musical work under subsection (a)(1)
 21 to distribute or authorize distribution of the sound
 22 recording of such phonorecord by means of a digital
 23 transmission which constitutes a digital phonorecord
 24 delivery, regardless of whether the digital trans-
 25 mission is also a public performance of the sound re-
 26 cording under section 106(6) of this title or of any

1 nondramatic musical work embodied therein under
2 section 106(4) of this title. For every digital phono-
3 record delivery by or under the authority of the com-
4 pulsory licensee, the royalty payable by the compu-
5 sory licensee shall be the royalty prescribed under
6 clause (2) and chapter 8 of this title.

7 “(B) Independent of any right of public per-
8 formance under section 106(4), the copyright owner
9 of a nondramatic musical work embodied in a sound
10 recording has the right to receive royalty payments
11 at the rates prescribed under this subsection when
12 the digital transmission of that sound recording con-
13 stitutes a digital phonorecord delivery. Unless au-
14 thorized by said copyright owner of the nondramatic
15 musical work or by any person who has obtained a
16 compulsory license under this section, such a digital
17 transmission, by whomever made, shall be actionable
18 by the copyright owner in the nondramatic musical
19 work as an act of infringement. *Provided, however,*
20 That no such cause of action may be brought
21 against a copyright owner of a sound recording un-
22 less it authorized the digital phonorecord delivery.
23 Any such cause of action shall be in addition to
24 those available to the copyright owner of the musical
25 work under section 106(4) and the copyright owner

1 of the sound recording with respect to digital phono-
2 record deliveries and under section 106(6).

3 “(C) Nothing in section 1008 shall be construed
4 to prevent the exercise of the rights and remedies al-
5 lowed by clauses (3) and (7) and chapter 5 in the
6 event of a digital phonorecord delivery, except that
7 no action alleging infringement of copyright may be
8 brought under this title against a manufacturer, im-
9 porter or distributor of a digital audio recording de-
10 vice, a digital audio recording medium, an analog re-
11 cording device, or an analog recording medium, or
12 against a consumer, based on the actions described
13 in such section.

14 “(D) Nothing in this section annuls or limits in
15 any way (i) the exclusive right to publicly perform
16 a sound recording or the musical work embodied
17 therein, including by means of a digital trans-
18 mission, under sections 106(4) and 106(6), (ii) ex-
19 cept for the compulsory licensing under the condi-
20 tions specified by this section, the exclusive rights to
21 reproduce and distribute the sound recording and
22 the musical work embodied therein under sections
23 106(1) and 106(3), including by means of a digital
24 phonorecord delivery, or (iii) any other rights under
25 any other clause of section 106, or remedies avail-

1 able under this title, as such rights or remedies exist
 2 either before or after the date of enactment of this
 3 Act.”; and

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

5 “(d) DEFINITIONS.—As used in this section, the fol-
 6 lowing term has the following meaning: A ‘digital phono-
 7 record delivery’ is each individual digital transmission of
 8 a sound recording which results in a specifically identified
 9 reproduction by or for any transmission recipient of a pho-
 10 norecord of that sound recording, regardless of whether
 11 the digital transmission is also a public performance of
 12 the sound recording or any nondramatic musical work em-
 13 bodied therein.”.

14 **SEC. 5. CONFORMING AMENDMENTS.**

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

18 “A ‘digital transmission’ is a transmission in
 19 whole or in part in a digital or other non-analog for-
 20 mat.”.

21 (b) LIMITATIONS ON EXCLUSIVE RIGHTS: SECOND-
 22 ARY TRANSMISSIONS.—Section 111(e)(1) of title 17,
 23 United States Code, is amended in the first sentence by
 24 striking “The” and inserting “Except in the case of a per-

1 performance of a sound recording in the course of a digital
2 transmission; the”.

3 (c) LIMITATIONS ON EXCLUSIVE RIGHTS: SECOND-
4 ARY TRANSMISSIONS OF SUPERSTATIONS AND NETWORK
5 STATIONS FOR PRIVATE HOME VIEWING.—Section
6 119(a)(1) of title 17, United States Code, is amended by
7 striking “Subject to” and inserting “Except in the case
8 of a performance of a sound recording in the course of
9 a digital transmission; and subject to”.

10 (d) COPYRIGHT ARBITRATION ROYALTY PANELS.—

11 (1) Section 801(b)(1) of title 17, United States
12 Code, is amended in the first and second sentences
13 by inserting “114” before “115”.

14 (2) Section 802(e) of title 17, United States
15 Code, is amended in the third sentence by deleting
16 “section 111, 116, or 119,” and inserting “section
17 111, 114, 116, or 119, any person entitled to a com-
18 pulsory license under section 114(d), any person en-
19 titled to a compulsory license under section 115,”.

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

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

1 **SEC. 6. EFFECTIVE DATE.**

2 This Act shall become effective three months after
3 the date of enactment, except that the provisions of sec-
4 tions 114(e) and 114(f) shall take effect immediately upon
5 enactment.

6 **SECTION 1. SHORT TITLE.**

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

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

10 *Section 106 of title 17, United States Code, is amend-*
11 *ed—*

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

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

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

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

20 **SEC. 3. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORD-**
21 **INGS.**

22 *Section 114 of title 17, United States Code, is amend-*
23 *ed—*

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

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

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

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

8 “(1) *EXEMPT TRANSMISSIONS AND*
9 *RETRANSMISSIONS.—The performance of a sound re-*
10 *ording publicly by means of a digital audio trans-*
11 *mission or retransmission, other than as a part of an*
12 *interactive service, is not an infringement of section*
13 *106(6) if the performance is part of—*

14 “(A) *a nonsubscription transmission, such*
15 *as a nonsubscription broadcast transmission;*

16 “(B) *a retransmission of a nonsubscription*
17 *broadcast transmission: Provided, That, in the*
18 *case of a retransmission of a radio station’s*
19 *broadcast transmission—*

20 “(i) *the radio station’s broadcast*
21 *transmission is not willfully or repeatedly*
22 *retransmitted more than a radius of 150*
23 *miles from the site of the radio broadcast*
24 *transmitter, however—*

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

12 “(II) in the case of a subscription
13 retransmission of a nonsubscription
14 broadcast retransmission covered by
15 subclause (I), the 150 mile radius shall
16 be measured from the transmitter site
17 of such broadcast retransmitter;

18 “(i) the retransmission is of radio sta-
19 tion broadcast transmissions that are—

20 “(I) obtained by the retransmitter
21 over the air;

22 “(II) not electronically processed
23 by the retransmitter to deliver separate
24 and discrete signals; and

1 “(III) retransmitted only within
2 the local communities served by the
3 retransmitter;

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

16 “(iv) the radio station’s broadcast
17 transmission is made by a noncommercial
18 educational broadcast station funded on or
19 after January 1, 1995, under section 396(k)
20 of the Communications Act of 1934 (47
21 U.S.C. 396(k)), consists solely of non-
22 commercial educational and cultural radio
23 programs, and the retransmission, whether
24 or not simultaneous, is a nonsubscription
25 terrestrial broadcast retransmission; or

1 “(C) a transmission or retransmission that
2 comes within any of the following categories:

3 “(i) a prior or simultaneous trans-
4 mission or retransmission incidental to an
5 exempt transmission or retransmission,
6 such as a feed received by and then
7 retransmitted by an exempt transmitter:
8 Provided, That such incidental trans-
9 missions or retransmissions do not include
10 any subscription transmission or
11 retransmission directly for reception by
12 members of the public;

13 “(ii) a transmission or retransmission
14 within a business establishment, confined to
15 its premises or the immediately surround-
16 ing vicinity;

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

1 *mission and authorized by the transmitter;*

2 *or*

3 “(iv) *a transmission or retransmission*
4 *to a business establishment for use in the*
5 *ordinary course of its business: Provided,*
6 *That the business recipient does not*
7 *retransmit the transmission outside of its*
8 *premises or the immediately surrounding*
9 *vicinity, and that the transmission does not*
10 *exceed the sound recording performance*
11 *complement. Nothing in this clause shall*
12 *limit the scope of the exemption in clause*
13 *(ii).*

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

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

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

24 “(C) *the transmitting entity does not cause*
25 *to be published by means of an advance program*

1 *schedule or prior announcement the titles of the*
2 *specific sound recordings or phonorecords em-*
3 *bodying such sound recordings to be transmitted;*

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

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

19 “(3) *LICENSES FOR TRANSMISSIONS BY INTER-*
20 *ACTIVE SERVICES.—*

21 “(A) *No interactive service shall be granted*
22 *an exclusive license under section 106(6) for the*
23 *performance of a sound recording publicly by*
24 *means of digital audio transmission for a period*
25 *in excess of 12 months, except that with respect*

1 to an exclusive license granted to an interactive
2 service by a licensor that holds the copyright to
3 1,000 or fewer sound recordings, the period of
4 such license shall not exceed 24 months: Pro-
5 vided, however, That the grantee of such exclusive
6 license shall be ineligible to receive another exclu-
7 sive license for the performance of that sound re-
8 cording for a period of 13 months from the expi-
9 ration of the prior exclusive license.

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

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

24 “(ii) the exclusive license is granted to
25 perform publicly up to 45 seconds of a

1 *sound recording and the sole purpose of the*
2 *performance is to promote the distribution*
3 *or performance of that sound recording.*

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

15 “(D) *The performance of a sound recording*
16 *by means of a digital audio retransmission is*
17 *not an infringement of section 106(6) if—*

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

23 “(ii) *the retransmission is simulta-*
24 *neous with the licensed transmission, au-*
25 *thorized by the transmitter, and limited to*

1 that particular member of the public in-
2 tended by the interactive service to be the
3 recipient of the transmission.

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

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

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

17 “(4) RIGHTS NOT OTHERWISE LIMITED.—

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

23 “(B) Nothing in this section annuls or lim-
24 its in any way—

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

5 “(ii) the exclusive rights to reproduce
6 and distribute a sound recording or the mu-
7 sical work embodied therein under sections
8 106(1) and 106(3); or

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

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

1 *either before or after the date of enactment of the*
2 *Digital Performance Right in Sound Recordings*
3 *Act of 1995.”; and*

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

5 “(e) *AUTHORITY FOR NEGOTIATIONS.—*

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

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

21 *“(A) copyright owners of sound recordings*
22 *affected by this section may designate common*
23 *agents to act on their behalf to grant licenses and*
24 *receive and remit royalty payments, Provided,*
25 *That each copyright owner shall establish the*

1 *royalty rates and material license terms and*
2 *conditions unilaterally, that is, not in agree-*
3 *ment, combination, or concert with other copy-*
4 *right owners of sound recordings; and*

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

14 “(f) *LICENSES FOR NONEXEMPT SUBSCRIPTION*
15 *TRANSMISSIONS.—*

16 “(1) *No later than 30 days after the enactment*
17 *of the Digital Performance Right in Sound Record-*
18 *ings Act of 1995, the Librarian of Congress shall*
19 *cause notice to be published in the Federal Register*
20 *of the initiation of voluntary negotiation proceedings*
21 *for the purpose of determining reasonable terms and*
22 *rates of royalty payments for the activities specified*
23 *by subsection (d)(2) of this section during the period*
24 *beginning on the effective date of such Act and ending*
25 *on December 31, 2000. Such terms and rates shall*

1 *distinguish among the different types of digital audio*
2 *transmission services then in operation. Any copy-*
3 *right owners of sound recordings or any entities per-*
4 *forming sound recordings affected by this section may*
5 *submit to the Librarian of Congress licenses covering*
6 *such activities with respect to such sound recordings.*
7 *The parties to each negotiation proceeding shall bear*
8 *their own costs.*

9 “(2) *In the absence of license agreements nego-*
10 *tiated under paragraph (1), the Librarian of Congress*
11 *shall, pursuant to chapter 8, convene a copyright ar-*
12 *bitration royalty panel to determine and publish in*
13 *the Federal Register a schedule of rates and terms*
14 *which, subject to paragraph (3), shall be binding on*
15 *all copyright owners of sound recordings and entities*
16 *performing sound recordings. In establishing such*
17 *rates and terms the copyright arbitration royalty*
18 *panel may consider the rates for comparable types of*
19 *digital audio transmission services and comparable*
20 *circumstances under voluntary license agreements ne-*
21 *gotiated as provided in paragraph (1). The parties to*
22 *the proceeding shall bear the entire cost of the pro-*
23 *ceeding in such manner and proportion as the arbi-*
24 *tration panels shall direct. The Librarian of Congress*
25 *shall also establish requirements by which copyright*

1 *owners may receive reasonable notice of the use of*
2 *their sound recordings under this section, and under*
3 *which records of such use shall be kept by entities per-*
4 *forming sound recordings.*

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

11 *“(4) The procedures specified in paragraphs (1)*
12 *and (2) shall be repeated and concluded, in accord-*
13 *ance with regulations that the Librarian of Congress*
14 *shall prescribe—*

15 *“(A) within a 6-month period each time*
16 *that a petition is filed by any copyright owners*
17 *of sound recordings or any entities performing*
18 *sound recordings affected by this section indicat-*
19 *ing that a new type of digital audio trans-*
20 *mission service on which sound recordings are*
21 *performed is or is about to become operational,*
22 *and*

23 *“(B) between June 30 and December 31,*
24 *2000 and at 5-year intervals thereafter.*

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

6 “(i) by complying with such notice require-
7 ments as the Register of Copyrights shall pre-
8 scribe by regulation and by paying royalty fees
9 in accordance with this subsection; or

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

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

17 “(g) PROCEEDS FROM LICENSING OF SUBSCRIPTION
18 TRANSMISSIONS.—

19 “(1) Except in the case of a subscription trans-
20 mission licensed in accordance with subsection (f) of
21 this section—

22 “(A) a featured recording artist who per-
23 forms on a sound recording that has been li-
24 censed for a subscription transmission shall be
25 entitled to receive payments from the copyright

1 owner of the sound recording in accordance with
2 the terms of the artist's contract; and

3 “(B) a nonfeatured recording artist who
4 performs on a sound recording that has been li-
5 censed for a subscription transmission shall be
6 entitled to receive payments from the copyright
7 owner of the sound recording in accordance with
8 the terms of the nonfeatured recording artist's
9 applicable contract or other applicable agree-
10 ment.

11 “(2) The copyright owner of the exclusive right
12 under section 106(6) of this title to publicly perform
13 a sound recording by means of a digital audio trans-
14 mission shall allocate to recording artists in the fol-
15 lowing manner its receipts from the statutory licens-
16 ing of subscription transmission performances of the
17 sound recording in accordance with subsection (f) of
18 this section:

19 “(A) 2¹/₂ percent of the receipts shall be de-
20 posited in an escrow account managed by an
21 independent administrator jointly appointed by
22 copyright owners of sound recordings and the
23 American Federation of Musicians (or any suc-
24 cessor entity) to be distributed to nonfeatured
25 musicians (whether or not members of the Amer-

1 *ican Federation of Musicians) who have per-*
2 *formed on sound recordings.*

3 *“(B) 2½ percent of the receipts shall be de-*
4 *posited in an escrow account managed by an*
5 *independent administrator jointly appointed by*
6 *copyright owners of sound recordings and the*
7 *American Federation of Television and Radio*
8 *Artists (or any successor entity) to be distributed*
9 *to nonfeatured vocalists (whether or not members*
10 *of the American Federation of Television and*
11 *Radio Artists) who have performed on sound re-*
12 *cordings.*

13 *“(C) 45 percent of the receipts shall be allo-*
14 *cated, on a per sound recording basis, to the re-*
15 *recording artist or artists featured on such sound*
16 *recording (or the persons conveying rights in the*
17 *artists’ performance in the sound recordings).*

18 *“(h) LICENSING TO AFFILIATES.—*

19 *“(1) If the copyright owner of a sound recording*
20 *licenses an affiliated entity the right to publicly per-*
21 *form a sound recording by means of a digital audio*
22 *transmission under section 106(6), the copyright*
23 *owner shall make the licensed sound recording avail-*
24 *able under section 106(6) on no less favorable terms*
25 *and conditions to all bona fide entities that offer*

1 *similar services, except that, if there are material dif-*
 2 *ferences in the scope of the requested license with re-*
 3 *spect to the type of service, the particular sound re-*
 4 *cordings licensed, the frequency of use, the number of*
 5 *subscribers served, or the duration, then the copyright*
 6 *owner may establish different terms and conditions*
 7 *for such other services.*

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

11 *“(A) an interactive service; or*

12 *“(B) an entity to perform publicly up to 45*
 13 *seconds of the sound recording and the sole pur-*
 14 *pose of the performance is to promote the dis-*
 15 *tribution or performance of that sound recording.*

16 *“(i) NO EFFECT ON ROYALTIES FOR UNDERLYING*
 17 *WORKS.—License fees payable for the public performance*
 18 *of sound recordings under clause (6) of section 106 shall*
 19 *not be taken into account in any administrative, judicial,*
 20 *or other governmental proceeding to set or adjust the royal-*
 21 *ties payable to copyright owners of musical works for the*
 22 *public performance of their works. It is the intent of Con-*
 23 *gress that royalties payable to copyright owners of musical*
 24 *works for the public performance of their works shall not*

1 *be diminished in any respect as a result of the rights grant-*
2 *ed by section 106(6).*

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

5 “(1) *An ‘affiliated entity’ is an entity engaging*
6 *in digital audio transmissions covered by section*
7 *106(6), other than an interactive service, in which the*
8 *licensor has any direct or indirect partnership or any*
9 *ownership interest amounting to 5 percent or more of*
10 *the outstanding voting or non-voting stock.*

11 “(2) *A ‘broadcast transmission’ is a trans-*
12 *mission made by a broadcast station licensed as such*
13 *by the Federal Communications Commission.*

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

18 “(4) *An ‘interactive service’ is one that enables*
19 *a member of the public to receive, on request, a trans-*
20 *mission of a particular sound recording chosen by or*
21 *on behalf of the recipient. The ability of individuals*
22 *to request that particular sound recordings be per-*
23 *formed for reception by the public at large does not*
24 *make a service interactive. If an entity offers both*
25 *interactive and non-interactive services (either con-*

1 *currently or at different times), the non-interactive*
2 *component shall not be treated as part of an inter-*
3 *active service.*

4 “(5) A ‘nonsubscription transmission’,
5 ‘nonsubscription retransmission’, or a
6 ‘nonsubscription broadcast transmission’ is any
7 transmission or retransmission that is not a subscrip-
8 tion transmission or retransmission.

9 “(6) A ‘retransmission’ includes any further si-
10 multaneous retransmission of the same transmission.
11 Nothing in this definition shall be construed to ex-
12 empt a transmission that fails to satisfy a separate
13 element required to qualify for an exemption under
14 section 114(d)(1).

15 “(7) The ‘sound recording performance com-
16 plement’ is the transmission during any 3-hour pe-
17 riod, on a particular channel used by a transmitting
18 entity, of no more than—

19 “(A) 3 different selections of sound record-
20 ings from any one phonorecord lawfully distrib-
21 uted for public performance or sale in the United
22 States, if no more than 2 such selections are
23 transmitted consecutively; or

24 “(B) 4 different selections of sound record-
25 ings

1 “(i) by the same featured recording
2 artist; or

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

7 if no more than three such selections are trans-
8 mitted consecutively:

9 *Provided, That the transmission of selections in excess*
10 *of the numerical limits provided for in clauses (A)*
11 *and (B) from multiple phonorecords shall nonetheless*
12 *qualify as a sound recording performance complement*
13 *if the programming of the multiple phonorecords was*
14 *not willfully intended to avoid the numerical limita-*
15 *tions prescribed in such clauses.*

16 “(8) A ‘subscription transmission’ is a trans-
17 mission that is controlled and limited to particular
18 recipients, and for which consideration is required to
19 be paid or otherwise given by or on behalf of the re-
20 cipient to receive the transmission or a package of
21 transmissions including the transmission.”.

22 **SEC. 4. MECHANICAL ROYALTIES IN DIGITAL PHONO-**
23 **RECORD DELIVERIES.**

24 Section 115 of title 17, United States Code, is amend-
25 ed—

1 (1) in subsection (a)(1)—

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

7 (B) in the second sentence by inserting be-
8 fore the period “, including by means of a digi-
9 tal phonorecord delivery”;

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

13 (3) by redesignating paragraphs (3), (4), and (5)
14 of subsection (c) as paragraphs (4), (5), and (6), re-
15 spectively, and by inserting after paragraph (2) the
16 following new paragraph:

17 “(3)(A) A compulsory license under this section
18 includes the right of the compulsory licensee to dis-
19 tribute or authorize the distribution of a phonorecord
20 of a nondramatic musical work by means of a digital
21 transmission which constitutes a digital phonorecord
22 delivery, regardless of whether the digital trans-
23 mission is also a public performance of the sound re-
24 cording under section 106(6) of this title or of any
25 nondramatic musical work embodied therein under

1 *section 106(4) of this title. For every digital phono-*
2 *record delivery by or under the authority of the com-*
3 *pulsory licensee—*

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

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

12 *“(B) Notwithstanding any provision of the anti-*
13 *trust laws, for the purpose of this subparagraph, any*
14 *copyright owners of nondramatic musical works and*
15 *any persons entitled to obtain a compulsory license*
16 *under subsection (a)(1) may negotiate and agree upon*
17 *the terms and rates of royalty payments under this*
18 *paragraph and the proportionate division of fees paid*
19 *among copyright owners, and may designate common*
20 *agents to negotiate, agree to, pay or receive such roy-*
21 *alty payments. Such authority to negotiate the terms*
22 *and rates of royalty payments includes, but is not*
23 *limited to, the authority to negotiate the year during*
24 *which the royalty rates prescribed under subpara-*

1 *graphs (B) through (F) and chapter 8 of this title*
2 *shall next be determined.*

3 “(C) *During the period of June 30, 1996,*
4 *through December 31, 1996, Librarian of Congress*
5 *shall cause notice to be published in the Federal Reg-*
6 *ister of the initiation of voluntary negotiation pro-*
7 *ceedings for the purpose of determining reasonable*
8 *terms and rates of royalty payments for the activities*
9 *specified by subparagraph (A) during the period be-*
10 *ginning January 1, 1998, and ending on December*
11 *31, 2007, or such earlier date (regarding digital*
12 *transmissions) as the parties may agree. Such terms*
13 *and rates shall distinguish between (i) digital phono-*
14 *record deliveries where the reproduction or distribu-*
15 *tion of a phonorecord is incidental to the trans-*
16 *mission which constitutes the digital phonorecord de-*
17 *livery, and (ii) digital phonorecord deliveries in gen-*
18 *eral. Any copyright owners of nondramatic musical*
19 *works and any persons entitled to obtain a compul-*
20 *sory license under subsection (a)(1) may submit to*
21 *the Librarian of Congress licenses covering such ac-*
22 *tivities. The parties to each negotiation proceeding*
23 *shall bear their own costs.*

24 “(D) *In the absence of license agreements nego-*
25 *tiated under subparagraph (C), the Librarian of Con-*

1 *gress shall, pursuant to chapter 8, convene a copy-*
2 *right arbitration royalty panel to determine and pub-*
3 *lish in the Federal Register a schedule of rates and*
4 *terms which, subject to subparagraph (E), shall be*
5 *binding on all copyright owners of nondramatic mu-*
6 *sical works and persons entitled to obtain a compul-*
7 *sory license under subsection (a)(1) during the period*
8 *beginning January 1, 1998, and ending on December*
9 *31, 2007, or such earlier date (regarding digital*
10 *transmissions) as may be determined pursuant to*
11 *subparagraph (C) or chapter 8. Such terms and rates*
12 *shall distinguish between (i) digital phonorecord de-*
13 *liveries where the reproduction or distribution of a*
14 *phonorecord is incidental to the transmission which*
15 *constitutes the digital phonorecord delivery, and (ii)*
16 *digital phonorecord deliveries in general. In addition*
17 *to the objectives set forth in section 801(b)(1), in es-*
18 *tablishing such rates and terms, the copyright arbi-*
19 *tration royalty panel may consider rates under vol-*
20 *untary license agreements negotiated as provided in*
21 *subparagraph (C). The royalty rates payable for a*
22 *compulsory license for a digital phonorecord delivery*
23 *under this section shall be established de novo and no*
24 *precedential effect shall be given to the amount of the*
25 *royalty payable by a compulsory licensee for digital*

1 *phonorecord deliveries on or before December 31,*
2 *1997. The parties to the proceeding shall bear the en-*
3 *tire cost thereof in such manner and proportion as*
4 *the arbitration panels shall direct. The Librarian of*
5 *Congress shall also establish requirements by which*
6 *copyright owners may receive reasonable notice of the*
7 *use of their works under this section, and under*
8 *which records of such use shall be kept and made*
9 *available by persons making digital phonorecord de-*
10 *liveries.*

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

1 “(ii) Clause (i) shall not apply to—

2 “(I) a contract entered into on or before
3 June 22, 1995, and not modified thereafter for
4 the purpose of reducing such rates or of increas-
5 ing the number of musical works within the
6 scope of the contract covered by the reduced rates,
7 except if a contract entered into on or before
8 June 22, 1995, is modified thereafter for the pur-
9 pose of increasing the number of musical works
10 within the scope of the contract, any contrary
11 royalty rates specified in the contract shall be
12 given effect in lieu of royalty rates determined
13 pursuant to subparagraph (C) or (D) for the
14 number of musical works within the scope of the
15 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 under sections
22 106(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, as provided in section 803(a)(3),*
2 *except to the extent that different times for the repeat-*
3 *ing and concluding of such proceedings may be deter-*
4 *mined in accordance with subparagraph (C) or (D).*

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

15 *“(H)(i) A digital phonorecord delivery of a*
16 *sound recording is actionable as an act of infringe-*
17 *ment under section 501, and is fully subject to the*
18 *remedies provided by sections 502 through 506 and*
19 *sections 509 and 510, unless—*

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

23 *“(II) the owner of the copyright in the*
24 *sound recording or the entity making the digital*
25 *phonorecord delivery has obtained a compulsory*

1 *license under this section or has otherwise been*
2 *authorized to distribute or authorize the distribu-*
3 *tion, by means of a digital phonorecord delivery,*
4 *of each nondramatic musical work embodied in*
5 *the sound recording.*

6 “(ii) *Any cause of action under this subpara-*
7 *graph shall be in addition to those available to the*
8 *owner of the copyright in the nondramatic musical*
9 *work under subsection (c)(5) and section 106(4) and*
10 *the owner of the copyright in the sound recording*
11 *under section 106(6).*

12 “(I) *The liability of the copyright owner of a*
13 *sound recording for infringement of the copyright in*
14 *a musical work embodied in the sound recording shall*
15 *be determined in accordance with applicable law, ex-*
16 *cept that the owner of a copyright in a sound record-*
17 *ing shall not be liable for a digital phonorecord deliv-*
18 *ery by a third party if the owner of the copyright in*
19 *the sound recording does not license the distribution*
20 *of a phonorecord of the musical work.*

21 “(J) *Nothing in section 1008 shall be construed*
22 *to prevent the exercise of the rights and remedies al-*
23 *lowed by this paragraph, paragraph (7), and chapter*
24 *5 in the event of a digital phonorecord delivery, ex-*
25 *cept that no action alleging infringement of copyright*

1 *may be brought under this title against a manufac-*
2 *turer, importer or distributor of a digital audio re-*
3 *recording device, a digital audio recording medium, an*
4 *analog recording device, or an analog recording me-*
5 *di-um, or against a consumer, based on the actions de-*
6 *scribed in such section.*

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

22 *“(L) The provisions of this section concerning*
23 *digital phonorecord deliveries shall not apply to any*
24 *exempt transmissions or retransmissions under sec-*
25 *tion 114(d)(1). The exemptions created in section*

1 114(d)(1) do not expand or reduce the rights of copy-
2 right owners under section 106 (1) through (5) with
3 respect to such transmissions and retransmissions.”;
4 and

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

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

21 **SEC. 5. CONFORMING AMENDMENTS.**

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

1 “A ‘digital transmission’ is a transmission in
2 whole or in part in a digital or other non-analog for-
3 mat.”.

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

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

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

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

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

19 (1) Section 801(b)(1) of title 17, United States
20 Code, is amended in the first and second sentences by
21 striking “115” each place it appears and inserting
22 “114, 115,”.

23 (2) Section 802(c) of title 17, United States
24 Code, is amended in the third sentence by striking
25 “section 111, 116, or 119,” and inserting “section

1 111, 114, 116, or 119, any person entitled to a com-
2 pulsory license under section 114(d), any person enti-
3 tled to a compulsory license under section 115,”.

4 (3) Section 802(g) of title 17, United States
5 Code, is amended in the third sentence by inserting
6 “114,” after “111,”.

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

9 **SEC. 6. EFFECTIVE DATE.**

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

Calendar No. 165

104TH CONGRESS
1ST SESSION

S. 227

[Report No. 104-128]

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.

AUGUST 4 (legislative day, July 10), 1995

Reported with an amendment

