

104TH CONGRESS
1ST SESSION

S. 1137

To amend title 17, United States Code, with respect to the licensing of music, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 9 (legislative day, JULY 10), 1995

Mr. THOMAS (for himself and Mr. BROWN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 17, United States Code, with respect to the licensing of music, 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 “Fairness in Musical
5 Licensing Act of 1995”.

6 **SEC. 2. BUSINESS EXEMPTION.**

7 Section 110(5) of title 17, United States Code, is
8 amended to read as follows:

9 “(5) communication by electronic device of a
10 transmission embodying a performance or display of

1 a work by the reception of a broadcast, cable, sat-
 2 ellite, or other transmission, unless—

3 “(A) an admission fee is charged specifi-
 4 cally to see or hear the transmission, or

5 “(B) the transmission is not properly
 6 licensed,

7 except that this paragraph shall apply in the case of
 8 a performance or display in a commercial establish-
 9 ment only if the performance or display is incidental
 10 to the main purpose of the establishment;”.

11 **SEC. 3. BINDING ARBITRATION OF RATE DISPUTES INVOLV-**
 12 **ING PERFORMING RIGHTS SOCIETIES.**

13 (a) IN GENERAL.—Section 504 of title 17, United
 14 States Code, is amended by adding at the end the follow-
 15 ing new subsection:

16 “(d) PERFORMING RIGHTS SOCIETIES; BINDING AR-
 17 BITRATION.—

18 “(1) ARBITRATION OF DISPUTES PRIOR TO
 19 COURT ACTION.—

20 “(A) ARBITRATION.—(i) If a general music
 21 user and a performing rights society are unable
 22 to agree on the appropriate fee to be paid for
 23 the user’s past or future performance of musi-
 24 cal works in the repertoire of the performing
 25 rights society, the general music user shall, in

1 lieu of any other dispute-resolution mechanism
2 established by any judgment or decree govern-
3 ing the operation of the performing rights soci-
4 ety, be entitled to binding arbitration of such
5 disagreement pursuant to the rules of the
6 American Arbitration Association. The music
7 user may initiate such arbitration.

8 “(ii) The arbitrator in such binding arbi-
9 tration shall determine a fair and reasonable fee
10 for the general music user’s past and future
11 performance of musical works in such society’s
12 repertoire and shall determine whether the
13 user’s past performances of such musical works,
14 if any, infringed the copyrights of works in the
15 society’s repertoire. If the arbitrator determines
16 that the general music user’s past performances
17 of such musical works infringed the copyrights
18 of works in the society’s repertoire, the arbitra-
19 tor shall impose a penalty for such infringe-
20 ment. Such penalty shall not exceed the arbitra-
21 tor’s determination of the fair and reasonable
22 license fee for the performances at issue.

23 “(B) DEFINITION.—For purposes of this
24 paragraph, a ‘general music user’ is any person
25 who performs musical works publicly but is not

1 engaged in the transmission of musical works to
2 the general public or to subscribers through
3 broadcast, cable, satellite, or other trans-
4 mission. For purposes of this paragraph, trans-
5 missions within a single commercial establish-
6 ment or within establishments under common
7 ownership or control are not transmissions to
8 the general public.

9 “(C) ENFORCEMENT OF ARBITRATOR’S
10 DETERMINATIONS.—An arbitrator’s determina-
11 tion under this paragraph is binding on the
12 parties and may be enforced pursuant to sec-
13 tions 9 through 13 of title 9.

14 “(2) COURT-ANNEXED ARBITRATION.—In any
15 civil action for infringement of the right granted in
16 section 106(4) involving a musical work that is in
17 the repertoire of a performing rights society, if the
18 defendant admits the prior public performance of
19 one or more works in the repertoire of the perform-
20 ing rights society but contests the amount of the li-
21 cense fee demanded by such society for such per-
22 formance, the dispute shall, if requested by the de-
23 fendant, be submitted to arbitration under section
24 652(e) of title 28. In such arbitration proceeding,
25 the arbitrator shall determine the amount owed by

1 the defendant to the performing rights society for all
2 past public performances of musical works in the so-
3 ciety's repertoire. Such amount shall not exceed two
4 times the amount of the blanket license fee that
5 would be applied by the society to the defendant for
6 the year or years in which the performances oc-
7 curred. In addition, the arbitrator shall, if requested
8 by the defendant, determine a fair and reasonable li-
9 cense fee for the defendant's future public perform-
10 ances of the musical works in such society's rep-
11 ertoire.

12 “(3) TERM OF LICENSE FEE DETERMINA-
13 TION.—In any arbitration proceeding initiated under
14 this subsection, the arbitrator's determination of a
15 fair and reasonable license fee for the performance
16 of the music in the repertoire of the performing
17 rights society concerned shall apply for a period of
18 not less than 3 years nor more than 5 years after
19 the date of the arbitrator's determination.”.

20 (b) ACTIONS THAT SHALL BE REFERRED TO ARBI-
21 TRATION.—Section 652 of title 28, United States Code,
22 is amended by adding at the end the following:

23 “(e) ACTIONS THAT SHALL BE REFERRED TO ARBI-
24 TRATION.—In any civil action for infringement of the
25 right granted in section 106(4) of title 17 involving a mu-

1 sical work that is in the repertoire of a performing rights
2 society, if the defendant admits the public performance of
3 any musical work in the repertoire of the performing
4 rights society but contests the amount of the license fee
5 demanded for such performance by the society, the district
6 court shall, if requested by the defendant, refer the dispute
7 to arbitration, which shall be conducted in accordance with
8 section 504(d)(2) of title 17. Each district court shall es-
9 tablish procedures by local rule authorizing the use of ar-
10 bitration under this subsection. The definitions set forth
11 in title 17 apply to the terms used in this subsection.”.

12 **SEC. 4. RADIO PER PROGRAMMING PERIOD LICENSE.**

13 Section 504 of title 17, United States Code, as
14 amended by section 3 of this Act, is further amended by
15 adding at the end thereof the following new subsection:

16 “(e) RADIO PER PROGRAMMING PERIOD LI-
17 CENSES.—

18 “(1) IN GENERAL.—Each performing rights so-
19 ciety shall offer, to any radio broadcaster that so re-
20 quests, a per programming period license to perform
21 nondramatic musical works in the repertoire of the
22 performing rights society. Such license shall be of-
23 fered on reasonable terms and conditions that pro-
24 vide an economically and administratively viable al-
25 ternative to all other licenses offered by the Society

1 to Radio Broadcasters (including the society's blan-
2 ket license) for all such broadcasters.

3 “(2) PRICE OF PER PROGRAMMING PERIOD LI-
4 CENSES.—(A) The total price of a per programming
5 period license described in paragraph (1)—

6 “(i) shall include separate components for
7 incidental and feature performances, with the
8 identical performance component to be inde-
9 pendent of the quantity of such performances
10 by the broadcaster and not exceeding the rel-
11 ative value the performing rights society assigns
12 to such performances in its distribution of roy-
13 alties; and

14 “(ii) shall not exceed the fee that would be
15 payable by the broadcaster under the lowest
16 price blanket license offered to radio broad-
17 casters, and shall be in direct proportion to the
18 percentage of the broadcaster's revenue attrib-
19 utable to programming periods containing
20 feature performances of musical works in the
21 society's repertoire compared to the industry
22 average percentage of revenue attributable to
23 programming periods containing feature per-
24 formances of musical works in the society's rep-
25 ertoire.

1 “(B) A nondramatic musical work shall not be
2 considered in calculating any per programming pe-
3 riod license fee under this subsection, if the perform-
4 ance of such work—

5 “(i) has been licensed directly or at the
6 source; or

7 “(ii) constitutes fair use or is otherwise ex-
8 empt from liability under this title.

9 “(3) ADMINISTRATION OF LICENSE.—Begin-
10 ning January 1, 1998, the performance of
11 nondramatic musical works by a broadcaster under
12 any per programming period license shall be deter-
13 mined on the basis of statistically reliable sampling
14 or monitoring by the performing rights society, and
15 the society may not require the broadcaster to report
16 such performance to the society. The society shall
17 provide the broadcaster with a report detailing the
18 results of such sampling or monitoring, identifying
19 each programming period containing the perform-
20 ance of nondramatic musical works in the society’s
21 repertoire and the nondramatic musical works
22 performed.

23 “(4) IMPLEMENTATION.—Any radio broad-
24 caster entitled to a per programming period license
25 under this subsection may bring an action to require

1 compliance with this subsection in an appropriate
2 United States district court, including any district
3 court established by court order or statute as a
4 court that resolves disputes, with respect to license
5 rates, that may arise between performing rights soci-
6 eties and persons who perform musical works in the
7 society's repertoire.

8 “(5) DEFINITIONS.—As used in this sub-
9 section—

10 “(A) the term ‘blanket license’ means a li-
11 cense provided by a performing rights society
12 that authorizes the unlimited performance of
13 musical works in the society's repertoire, for a
14 fee that does not vary with the quantity or type
15 of performances of musical works in the soci-
16 ety's repertoire, or any other license with com-
17 parable economic effect;

18 “(B) the term ‘incidental’ means commer-
19 cial jingles not exceeding 60 seconds in dura-
20 tion, bridges, themes or signatures, arrange-
21 ments of works in the public domain, and back-
22 ground music, including music used in conjunc-
23 tion with sporting events; and

24 “(C) the term ‘programming period’ means
25 any 15-minute period of radio broadcasting

1 commencing on the hour, or at 15, 30, or 45
2 minutes past the hour.”.

3 **SEC. 5. ACCESS TO REPERTOIRE AND LICENSING INFORMA-**
4 **TION.**

5 Section 504 of title 17, United States Code, as
6 amended by sections 3 and 4 of this Act, is further amend-
7 ed by adding at the end the following:

8 “(f) ACCESS TO MUSICAL REPERTOIRE.—

9 “(1) ONLINE COMPUTER ACCESS.—

10 “(A) IN GENERAL.—Each performing
11 rights society shall make available, free of
12 charge, to all interested persons, online com-
13 puter access to copyright and licensing informa-
14 tion for each work in its repertoire.

15 “(B) CONTENT.—Such information shall,
16 for each such musical work, identify—

17 “(i) the work by—

18 “(I) the title of the work;

19 “(II) the name, address, and
20 telephone number of any writer who
21 does not object to such disclosure; and

22 “(III) the name, address, and
23 telephone number of the publisher;

24 “(ii) when the work will enter the
25 public domain, if determinable; and

1 “(iii) the names of any artists known
2 by the society to have recorded the work,
3 to the extent such artist information is
4 tracked by the society for any purpose
5 other than this section.

6 “(C) REVIEW OF WORKS.—Such online
7 computer access shall permit the efficient re-
8 view of multiple musical works consistent with
9 reasonably available technology.

10 “(2) DIRECTORY OF TITLES.—Each performing
11 rights society shall make available at no charge, not
12 less frequently than semiannually, a printed direc-
13 tory of each title in its repertoire, as of the date
14 which is not more than 30 days before the date on
15 which the directory is published, containing the in-
16 formation set forth in paragraph (1).

17 “(3) DOCUMENTATION OF RIGHT TO LI-
18 CENSE.—A performing rights society shall, upon the
19 request of any licensee or prospective licensee, pro-
20 vide to that person copies of the documentation es-
21 tablishing the society’s right to license the public
22 performance of such musical works.

23 “(4) RESTRICTIONS ON INFRINGEMENT AC-
24 TIONS.—

1 “(A) RESTRICTIONS.—A performing rights
2 society may not institute or be a party to, or
3 pay the costs of another party in, any action al-
4 leging the infringement of the copyright in, or
5 charge a fee under any per programming period
6 license for, any work in that society’s repertoire
7 that is not identified and documented as re-
8 quired by paragraphs (1), (2), and (3).

9 “(B) EXCEPTION.—Subparagraph (A)
10 shall not apply on the basis of a failure to com-
11 ply with paragraph (2) with respect to a musi-
12 cal work first entering the society’s repertoire
13 within the 6-month period beginning 30 days
14 before the date on which the society’s last direc-
15 tory was published under paragraph (2), if the
16 society establishes that such musical work was
17 included in the online database required by
18 paragraph (1) not less than 10 days before the
19 performance giving rise to the alleged infringe-
20 ment or charge.

21 “(g) ACCESS TO LICENSING INFORMATION.—

22 “(1) TERMS OF LICENSES.—Each performing
23 rights society shall provide, within 5 business days
24 after it receives a written request from a licensee of
25 any musical work in the society’s repertoire, or from

1 any person that is negotiating to become such a
2 licensee—

3 “(A) a schedule of the society’s license
4 rates for those licensees in the same locality as
5 the licensee or person making the request, that
6 have characteristics similar to such licensee or
7 person, except that the society shall provide in-
8 formation with respect to at least 5 but not
9 more than 10 such licensees;

10 “(B) the formulas by which the rates are
11 derived; and

12 “(C) license terms under agreements exe-
13 cuted by the performing rights society and li-
14 censees described in subparagraph (A).

15 “(2) COPIES OF LICENSES.—Each performing
16 rights society shall provide, within 5 business days
17 after receiving a written request from an entity au-
18 thorized to negotiate license fees and terms on be-
19 half of any group of persons who perform or may
20 perform musical works within that society’s rep-
21 ertoire, copies of all forms of licenses negotiated be-
22 tween that society and other entities authorized to
23 negotiate license fees and terms on behalf of any
24 group of persons who perform musical works in that
25 society’s repertoire, except that the society shall not

1 disclose individual licensee's names, addresses, or
2 business confidential information.".

3 **SEC. 6. ANNUAL REPORTS.**

4 Not later than March 1 of each year, the Attorney
5 General of the United States shall submit a written report
6 to the Congress on the activities of the Department of
7 Justice during the preceding calendar year relating to the
8 continuing supervision and enforcement by the Depart-
9 ment of the consent decree of the American Society of
10 Composers, Authors, and Publishers of March 14, 1950,
11 and the consent decree of Broadcast Music, Inc. of Decem-
12 ber 29, 1966. Such report shall include a description of
13 all issues raised or complaints filed with the Department
14 of Justice relating to the operations of those performing
15 rights societies, and a summary of the Department's ac-
16 tions or investigations undertaken by the Department in
17 response to such issues and complaints.

18 **SEC. 7. VICARIOUS LIABILITY PROHIBITED.**

19 A landlord, an organizer or sponsor of a convention,
20 exposition, or meeting, a facility owner, or any other per-
21 son making space available to another party by contract,
22 shall not be liable under any theory of vicarious or con-
23 tributory infringement with respect to an infringing public
24 performance of a copyrighted work by a tenant, lessee,

1 subtenant, sublessee, licensee, exhibitor, or other user of
2 such space on the ground that—

3 (1) a contract for such space provides the land-
4 lord, organizer or sponsor, facility owner, or other
5 person a right or ability to control such space and
6 compensation for the use of such space; or

7 (2) the landlord, organizer or sponsor, facility
8 owner, or other person has or had at the time of the
9 infringing performance actual control over some as-
10 pects of the use of such space,

11 if the contract for the use of such space prohibits infring-
12 ing public performances and the landlord, organizer or
13 sponsor, facility owner, or other person does not exercise
14 control over the selection of works performed.

15 **SEC. 8. RELIGIOUS SERVICE EXEMPTION.**

16 Section 110(3) of title 17, United States Code, is
17 amended by inserting after “religious assembly” the fol-
18 lowing: “, the transmission of such services, whether live
19 or recorded, or the recording of copies or phonorecords
20 of a transmission program embodying such services in
21 their entirety”.

22 **SEC. 9. CONFORMING AMENDMENTS.**

23 Section 101 of title 17, United States Code, is
24 amended by inserting after the undesignated paragraph
25 relating to the definition of “perform” the following:

1 “A ‘performing rights society’ is an association,
2 corporation, or other entity that licenses the public
3 performance of nondramatical musical works on be-
4 half of copyright owners of such works, such as the
5 American Society of Composers, Authors, and Pub-
6 lishers, Broadcast Music, Inc., and SESAC, Inc. The
7 ‘repertoire’ of a performing rights society consists of
8 those works for which the society provides licenses
9 on behalf of the owners of copyright in the works.”.

10 **SEC. 10. CONSTRUCTION OF ACT.**

11 Except as provided in section 504(d)(1) of title 17,
12 United States Code, as added by section 3(a) of this Act,
13 nothing in this Act shall be construed to relieve any per-
14 forming rights society (as defined in section 101 of title
15 17, United States Code) of any obligation under any con-
16 sent decree or other court order governing its operation,
17 as such decree or order is in effect on the date of the
18 enactment of this Act, as it may be amended after such
19 date, or as it may be issued or agreed to after such date.

○

S 1137 IS—2