

104TH CONGRESS
1ST SESSION

S. 227

AN ACT

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”.

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

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

4 (1) in paragraph (4) by striking “and” after
5 the semicolon;

6 (2) in paragraph (5) by striking the period and
7 inserting “; and”; and

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

9 “(6) in the case of sound recordings, to perform
10 the copyrighted work publicly by means of a digital
11 audio transmission.”.

12 **SEC. 3. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORD-**
13 **INGS.**

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

16 (1) in subsection (a) by striking “and (3)” and
17 inserting “(3) and (6)”;

18 (2) in subsection (b) in the first sentence by
19 striking “phonorecords, or of copies of motion pic-
20 tures and other audiovisual works,” and inserting
21 “phonorecords or copies”;

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

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

25 “(1) EXEMPT TRANSMISSIONS AND
26 RETRANSMISSIONS.—The performance of a sound

1 recording publicly by means of a digital audio trans-
2 mission, other than as a part of an interactive serv-
3 ice, is not an infringement of section 106(6) if the
4 performance is part of—

5 “(A)(i) a nonsubscription transmission
6 other than a retransmission;

7 “(ii) an initial nonsubscription
8 retransmission made for direct reception by
9 members of the public of a prior or simulta-
10 neous incidental transmission that is not made
11 for direct reception by members of the public;
12 or

13 “(iii) a nonsubscription broadcast trans-
14 mission;

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

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

24 “(I) the 150 mile limitation
25 under this clause shall not apply when

1 a nonsubscription broadcast trans-
2 mission by a radio station licensed by
3 the Federal Communications Commis-
4 sion is retransmitted on a
5 nonsubscription basis by a terrestrial
6 broadcast station, terrestrial trans-
7 lator, or terrestrial repeater licensed
8 by the Federal Communications Com-
9 mission; and

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

17 “(ii) the retransmission is of radio
18 station broadcast transmissions that are—

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

21 “(II) not electronically processed
22 by the retransmitter to deliver sepa-
23 rate 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 sepa-
10 rate and discrete signal, and the satellite
11 carrier obtains the radio station’s broad-
12 cast transmission in an analog format:
13 *Provided*, That the broadcast transmission
14 being retransmitted may embody the pro-
15 gramming of no more than one radio sta-
16 tion; or

17 “(iv) the radio station’s broadcast
18 transmission is made by a noncommercial
19 educational broadcast station funded on or
20 after January 1, 1995, under section
21 396(k) of the Communications Act of 1934
22 (47 U.S.C. 396(k)), consists solely of non-
23 commercial educational and cultural radio
24 programs, and the retransmission, whether

1 or not simultaneous, is a nonsubscription
2 terrestrial broadcast retransmission; or

3 “(C) a transmission that comes within any
4 of the following categories:

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

13 “(ii) a transmission within a business
14 establishment, confined to its premises or
15 the immediately surrounding vicinity;

16 “(iii) a retransmission by any
17 retransmitter, including a multichannel
18 video programming distributor as defined
19 in section 602(12) of the Communications
20 Act of 1934 (47 U.S.C. 522(12)), of a
21 transmission by a transmitter licensed to
22 publicly perform the sound recording as a
23 part of that transmission, if the
24 retransmission is simultaneous with the li-

1 censed transmission and authorized by the
2 transmitter; or

3 “(iv) a transmission to a business es-
4 tablishment for use in the ordinary course
5 of its business: *Provided*, That the business
6 recipient does not retransmit the trans-
7 mission outside of its premises or the im-
8 mediately surrounding vicinity, and that
9 the transmission does not exceed the sound
10 recording performance complement. Noth-
11 ing in this clause shall limit the scope of
12 the exemption in clause (ii).

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

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

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

23 “(C) the transmitting entity does not cause
24 to be published by means of an advance pro-
25 gram schedule or prior announcement the titles

1 of the specific sound recordings or phonorecords
2 embodying such sound recordings to be trans-
3 mitted;

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

10 “(E) except as provided in section 1002(e)
11 of this title, the transmission of the sound re-
12 cording is accompanied by the information en-
13 coded in that sound recording, if any, by or
14 under the authority of the copyright owner of
15 that sound recording, that identifies the title of
16 the sound recording, the featured recording art-
17 ist who performs on the sound recording, and
18 related information, including information con-
19 cerning the underlying musical work and its
20 writer.

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

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

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

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

15 “(i) the licensor has granted and
16 there remain in effect licenses under sec-
17 tion 106(6) for the public performance of
18 sound recordings by means of digital audio
19 transmission by at least 5 different inter-
20 active services: *Provided, however,* That
21 each such license must be for a minimum
22 of 10 percent of the copyrighted sound re-
23 cordings owned by the licensor that have
24 been licensed to interactive services, but in
25 no 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
4 the performance is to promote the distribu-
5 tion or performance of that sound record-
6 ing.

7 “(C) Notwithstanding the grant of an ex-
8 clusive or nonexclusive license of the right of
9 public performance under section 106(6), an
10 interactive service may not publicly perform a
11 sound recording unless a license has been
12 granted for the public performance of any copy-
13 righted musical work contained in the sound re-
14 cording: *Provided*, That such license to publicly
15 perform the copyrighted musical work may be
16 granted either by a performing rights society
17 representing the copyright owner or by the
18 copyright owner.

19 “(D) The performance of a sound record-
20 ing by means of a retransmission of a digital
21 audio transmission is not an infringement of
22 section 106(6) if—

23 “(i) the retransmission is of a trans-
24 mission by an interactive service licensed
25 to publicly perform the sound recording to

1 a particular member of the public as part
2 of that transmission; and

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

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

10 “(i) a ‘licensor’ shall include the li-
11 censing entity and any other entity under
12 any material degree of common ownership,
13 management, or control that owns copy-
14 rights in sound recordings; and

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

22 “(4) RIGHTS NOT OTHERWISE LIMITED.—

23 “(A) Except as expressly provided in this
24 section, this section does not limit or impair the
25 exclusive right to perform a sound recording

1 publicly by means of a digital audio trans-
2 mission under section 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 audio transmission, under sec-
8 tion 106(4);

9 “(ii) the exclusive rights in a sound
10 recording or the musical work embodied
11 therein under sections 106(1), 106(2) and
12 106(3); or

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

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

1 in a sound recording to exercise the rights
2 under sections 106(1), 106(2) and 106(3), or to
3 obtain the remedies available under this title
4 pursuant to such rights, as such rights and
5 remedies exist either before or after the date of
6 enactment of the Digital Performance Right in
7 Sound Recordings Act of 1995.’; and

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

9 “(e) AUTHORITY FOR NEGOTIATIONS.—

10 “(1) Notwithstanding any provision of the anti-
11 trust laws, in negotiating statutory licenses in ac-
12 cordance with subsection (f), any copyright owners
13 of sound recordings and any entities performing
14 sound recordings affected by this section may nego-
15 tiate and agree upon the royalty rates and license
16 terms and conditions for the performance of such
17 sound recordings and the proportionate division of
18 fees paid among copyright owners, and may des-
19 ignate common agents on a nonexclusive basis to ne-
20 gotiate, agree to, pay, or receive payments.

21 “(2) For licenses granted under section 106(6),
22 other than statutory licenses, such as for perform-
23 ances by interactive services or performances that
24 exceed the sound recording performance com-
25 plement—

1 “(A) copyright owners of sound recordings
2 affected by this section may designate common
3 agents to act on their behalf to grant licenses
4 and receive and remit royalty payments: *Pro-*
5 *vided*, That each copyright owner shall establish
6 the royalty rates and material license terms and
7 conditions unilaterally, that is, not in agree-
8 ment, combination, or concert with other copy-
9 right owners of sound recordings; and

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

19 “(f) LICENSES FOR NONEXEMPT SUBSCRIPTION
20 TRANSMISSIONS.—

21 “(1) No later than 30 days after the enactment
22 of the Digital Performance Right in Sound Record-
23 ings Act of 1995, the Librarian of Congress shall
24 cause notice to be published in the Federal Register
25 of the initiation of voluntary negotiation proceedings

1 for the purpose of determining reasonable terms and
2 rates of royalty payments for the activities specified
3 by subsection (d)(2) of this section during the period
4 beginning on the effective date of such Act and end-
5 ing on December 31, 2000. Such terms and rates
6 shall distinguish among the different types of digital
7 audio transmission services then in operation. Any
8 copyright owners of sound recordings or any entities
9 performing sound recordings affected by this section
10 may submit to the Librarian of Congress licenses
11 covering such activities with respect to such sound
12 recordings. The parties to each negotiation proceed-
13 ing shall bear their own costs.

14 “(2) In the absence of license agreements nego-
15 tiated under paragraph (1), during the 60-day pe-
16 riod commencing 6 months after publication of the
17 notice specified in paragraph (1), and upon the filing
18 of a petition in accordance with section 803(a)(1),
19 the Librarian of Congress shall, pursuant to chapter
20 8, convene a copyright arbitration royalty panel to
21 determine and publish in the Federal Register a
22 schedule of rates and terms which, subject to para-
23 graph (3), shall be binding on all copyright owners
24 of sound recordings and entities performing sound
25 recordings. In addition to the objectives set forth in

1 section 801(b)(1), in establishing such rates and
2 terms, the copyright arbitration royalty panel may
3 consider the rates and terms for comparable types of
4 digital audio transmission services and comparable
5 circumstances under voluntary license agreements
6 negotiated as provided in paragraph (1). The Li-
7 brarian of Congress shall also establish requirements
8 by which copyright owners may receive reasonable
9 notice of the use of their sound recordings under
10 this section, and under which records of such use
11 shall be kept and made available by entities perform-
12 ing sound recordings.

13 “(3) License agreements voluntarily negotiated
14 at any time between one or more copyright owners
15 of sound recordings and one or more entities per-
16 forming sound recordings shall be given effect in lieu
17 of any determination by a copyright arbitration roy-
18 alty panel or decision by the Librarian of Congress.

19 “(4)(A) Publication of a notice of the initiation
20 of voluntary negotiation proceedings as specified in
21 paragraph (1) shall be repeated, in accordance with
22 regulations that the Librarian of Congress shall pre-
23 scribe—

24 “(i) no later than 30 days after a petition
25 is filed by any copyright owners of sound re-

1 cordings or any entities performing sound re-
2 cordings affected by this section indicating that
3 a new type of digital audio transmission service
4 on which sound recordings are performed is or
5 is about to become operational; and

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

8 “(B)(i) The procedures specified in paragraph
9 (2) shall be repeated, in accordance with regulations
10 that the Librarian of Congress shall prescribe, upon
11 the filing of a petition in accordance with section
12 803(a)(1) during a 60-day period commencing—

13 “(I) six months after publication of a no-
14 tice of the initiation of voluntary negotiation
15 proceedings under paragraph (1) pursuant to a
16 petition under paragraph (4)(A)(i); or

17 “(II) on July 1, 2000 and at 5-year inter-
18 vals thereafter.

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

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

1 “(i) by complying with such notice require-
2 ments as the Librarian of Congress shall pre-
3 scribe by regulation and by paying royalty fees
4 in accordance with this subsection; or

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

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

12 “(g) PROCEEDS FROM LICENSING OF SUBSCRIPTION
13 TRANSMISSIONS.—

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

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

23 “(B) a nonfeatured recording artist who
24 performs on a sound recording that has been li-
25 censed for a subscription transmission shall be

1 entitled to receive payments from the copyright
2 owner of the sound recording in accordance
3 with the terms of the nonfeatured recording
4 artist's applicable contract or other applicable
5 agreement.

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

14 “(A) 2½ percent of the receipts shall be
15 deposited in an escrow account managed by an
16 independent administrator jointly appointed by
17 copyright owners of sound recordings and the
18 American Federation of Musicians (or any suc-
19 cessor entity) to be distributed to nonfeatured
20 musicians (whether or not members of the
21 American Federation of Musicians) who have
22 performed on sound recordings.

23 “(B) 2½ percent of the receipts shall be
24 deposited in an escrow account managed by an
25 independent administrator jointly appointed by

1 copyright owners of sound recordings and the
2 American Federation of Television and Radio
3 Artists (or any successor entity) to be distrib-
4 uted to nonfeatured vocalists (whether or not
5 members of the American Federation of Tele-
6 vision and Radio Artists) who have performed
7 on sound recordings.

8 “(C) 45 percent of the receipts shall be al-
9 located, on a per sound recording basis, to the
10 recording artist or artists featured on such
11 sound recording (or the persons conveying
12 rights in the artists’ performance in the sound
13 recordings).

14 “(h) LICENSING TO AFFILIATES.—

15 “(1) If the copyright owner of a sound record-
16 ing licenses an affiliated entity the right to publicly
17 perform a sound recording by means of a digital
18 audio transmission under section 106(6), the copy-
19 right owner shall make the licensed sound recording
20 available under section 106(6) on no less favorable
21 terms and conditions to all bona fide entities that
22 offer similar services, except that, if there are mate-
23 rial differences in the scope of the requested license
24 with respect to the type of service, the particular
25 sound recordings licensed, the frequency of use, the

1 number of subscribers served, or the duration, then
2 the copyright owner may establish different terms
3 and conditions for such other services.

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

7 “(A) an interactive service; or

8 “(B) an entity to perform publicly up to
9 45 seconds of the sound recording and the sole
10 purpose of the performance is to promote the
11 distribution or performance of that sound re-
12 cording.

13 “(i) NO EFFECT ON ROYALTIES FOR UNDERLYING
14 WORKS.—License fees payable for the public performance
15 of sound recordings under section 106(6) shall not be
16 taken into account in any administrative, judicial, or other
17 governmental proceeding to set or adjust the royalties pay-
18 able to copyright owners of musical works for the public
19 performance of their works. It is the intent of Congress
20 that royalties payable to copyright owners of musical
21 works for the public performance of their works shall not
22 be diminished in any respect as a result of the rights
23 granted by section 106(6).

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

1 “(1) An ‘affiliated entity’ is an entity engaging
2 in digital audio transmissions covered by section
3 106(6), other than an interactive service, in which
4 the licensor has any direct or indirect partnership or
5 any ownership interest amounting to 5 percent or
6 more of the outstanding voting or non-voting stock.

7 “(2) A ‘broadcast’ transmission is a trans-
8 mission made by a terrestrial broadcast station li-
9 censed as such by the Federal Communications
10 Commission.

11 “(3) A ‘digital audio transmission’ is a digital
12 transmission as defined in section 101, that em-
13 bodies the transmission of a sound recording. This
14 term does not include the transmission of any audio-
15 visual work.

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

1 interactive component shall not be treated as part of
2 an interactive service.

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

5 “(6) A ‘retransmission’ is a further trans-
6 mission of an initial transmission, and includes any
7 further retransmission of the same transmission. Ex-
8 cept as provided in this section, a transmission
9 qualifies as a ‘retransmission’ only if it is simulta-
10 neous with the initial transmission. Nothing in this
11 definition shall be construed to exempt a trans-
12 mission that fails to satisfy a separate element re-
13 quired to qualify for an exemption under section
14 114(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 Unit-
22 ed 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 ex-
10 cess of the numerical limits provided for in clauses
11 (A) and (B) from multiple phonorecords shall none-
12 theless qualify as a sound recording performance
13 complement if the programming of the multiple
14 phonorecords was not willfully intended to avoid the
15 numerical limitations 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 “(9) A ‘transmission’ includes both an initial
23 transmission and a retransmission.”.

1 **SEC. 4. MECHANICAL ROYALTIES IN DIGITAL PHONO-**
2 **RECORD DELIVERIES.**

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

5 (1) in subsection (a)(1)—

6 (A) in the first sentence by striking out
7 “any other person” and inserting in lieu thereof
8 “any other person, including those who make
9 phonorecords or digital phonorecord deliv-
10 eries,”; and

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

14 (2) in subsection (c)(2) in the second sentence
15 by inserting “and other than as provided in para-
16 graph (3),” after “For this purpose,”;

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

21 “(3)(A) A compulsory license under this section
22 includes the right of the compulsory licensee to dis-
23 tribute or authorize the distribution of a phono-
24 record of a nondramatic musical work by means of
25 a digital transmission which constitutes a digital
26 phonorecord delivery, regardless of whether the digi-

1 tal transmission is also a public performance of the
2 sound recording under section 106(6) of this title or
3 of any nondramatic musical work embodied therein
4 under section 106(4) of this title. For every digital
5 phonorecord delivery by or under the authority of
6 the compulsory licensee—

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

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

15 “(B) Notwithstanding any provision of the anti-
16 trust laws, any copyright owners of nondramatic mu-
17 sical works and any persons entitled to obtain a
18 compulsory license under subsection (a)(1) may ne-
19 gotiate and agree upon the terms and rates of roy-
20 alty payments under this paragraph and the propor-
21 tionate division of fees paid among copyright owners,
22 and may designate common agents to negotiate,
23 agree to, pay or receive such royalty payments. Such
24 authority to negotiate the terms and rates of royalty
25 payments includes, but is not limited to, the author-

1 ity to negotiate the year during which the royalty
2 rates prescribed under subparagraphs (B) through
3 (F) and chapter 8 of this title shall next be deter-
4 mined.

5 “(C) During the period of June 30, 1996,
6 through December 31, 1996, the Librarian of Con-
7 gress shall cause notice to be published in the Fed-
8 eral Register of the initiation of voluntary negotia-
9 tion proceedings for the purpose of determining rea-
10 sonable terms and rates of royalty payments for the
11 activities specified by subparagraph (A) during the
12 period beginning January 1, 1998, and ending on
13 the effective date of any new terms and rates estab-
14 lished pursuant to subparagraph (C), (D) or (F), or
15 such other date (regarding digital phonorecord deliv-
16 eries) as the parties may agree. Such terms and
17 rates shall distinguish between (i) digital phono-
18 record deliveries where the reproduction or distribu-
19 tion of a phonorecord is incidental to the trans-
20 mission which constitutes the digital phonorecord de-
21 livery, and (ii) digital phonorecord deliveries in gen-
22 eral. Any copyright owners of nondramatic musical
23 works and any persons entitled to obtain a compul-
24 sory license under subsection (a)(1) may submit to
25 the Librarian of Congress licenses covering such ac-

1 tivities. The parties to each negotiation proceeding
2 shall bear their own costs.

3 “(D) In the absence of license agreements nego-
4 tiated under subparagraphs (B) and (C), upon the
5 filing of a petition in accordance with section
6 803(a)(1), the Librarian of Congress shall, pursuant
7 to chapter 8, convene a copyright arbitration royalty
8 panel to determine and publish in the Federal Reg-
9 ister a schedule of rates and terms which, subject to
10 subparagraph (E), shall be binding on all copyright
11 owners of nondramatic musical works and persons
12 entitled to obtain a compulsory license under sub-
13 section (a)(1) during the period beginning January
14 1, 1998, and ending on the effective date of any new
15 terms and rates established pursuant to subpara-
16 graph (C), (D) or (F), or such other date (regarding
17 digital phonorecord deliveries) as may be determined
18 pursuant to subparagraphs (B) and (C). Such terms
19 and rates shall distinguish between (i) digital phono-
20 record deliveries where the reproduction or distribu-
21 tion of a phonorecord is incidental to the trans-
22 mission which constitutes the digital phonorecord de-
23 livery, and (ii) digital phonorecord deliveries in gen-
24 eral. In addition to the objectives set forth in section
25 801(b)(1), in establishing such rates and terms, the

1 copyright arbitration royalty panel may consider
2 rates and terms under voluntary license agreements
3 negotiated as provided in subparagraphs (B) and
4 (C). The royalty rates payable for a compulsory li-
5 cense for a digital phonorecord delivery under this
6 section shall be established de novo and no
7 precedential effect shall be given to the amount of
8 the royalty payable by a compulsory licensee for dig-
9 ital phonorecord deliveries on or before December
10 31, 1997. The Librarian of Congress shall also es-
11 tablish requirements by which copyright owners may
12 receive reasonable notice of the use of their works
13 under this section, and under which records of such
14 use shall be kept and made available by persons
15 making digital phonorecord deliveries.

16 “(E)(i) License agreements voluntarily nego-
17 tiated at any time between one or more copyright
18 owners of nondramatic musical works and one or
19 more persons entitled to obtain a compulsory license
20 under subsection (a)(1) shall be given effect in lieu
21 of any determination by the Librarian of Congress.
22 Subject to clause (ii), the royalty rates determined
23 pursuant to subparagraph (C), (D) or (F) shall be
24 given effect in lieu of any contrary royalty rates
25 specified in a contract pursuant to which a recording

1 artist who is the author of a nondramatic musical
2 work grants a license under that person's exclusive
3 rights in the musical work under sections 106(1)
4 and (3) or commits another person to grant a license
5 in that musical work under sections 106(1) and (3),
6 to a person desiring to fix in a tangible medium of
7 expression a sound recording embodying the musical
8 work.

9 “(ii) The second sentence of clause (i) shall not
10 apply to—

11 “(I) a contract entered into on or before
12 June 22, 1995, and not modified thereafter for
13 the purpose of reducing the royalty rates deter-
14 mined pursuant to subparagraph (C), (D) or
15 (F) or of increasing the number of musical
16 works within the scope of the contract covered
17 by the reduced rates, except if a contract en-
18 tered into on or before June 22, 1995, is modi-
19 fied thereafter for the purpose of increasing the
20 number of musical works within the scope of
21 the contract, any contrary royalty rates speci-
22 fied in the contract shall be given effect in lieu
23 of royalty rates determined pursuant to sub-
24 paragraph (C), (D) or (F) for the number of

1 musical works within the scope of the contract
2 as of June 22, 1995; and

3 “(II) a contract entered into after the date
4 that the sound recording is fixed in a tangible
5 medium of expression substantially in a form
6 intended for commercial release, if at the time
7 the contract is entered into, the recording artist
8 retains the right to grant licenses as to the mu-
9 sical work under sections 106(1) and 106(3).

10 “(F) The procedures specified in subparagraphs
11 (C) and (D) shall be repeated and concluded, in ac-
12 cordance with regulations that the Librarian of Con-
13 gress shall prescribe, in each fifth calendar year
14 after 1997, except to the extent that different years
15 for the repeating and concluding of such proceedings
16 may be determined in accordance with subpara-
17 graphs (B) and (C).

18 “(G) Except as provided in section 1002(e) of
19 this title, a digital phonorecord delivery licensed
20 under this paragraph shall be accompanied by the
21 information encoded in the sound recording, if any,
22 by or under the authority of the copyright owner of
23 that sound recording, that identifies the title of the
24 sound recording, the featured recording artist who
25 performs on the sound recording, and related infor-

1 mation, including information concerning the under-
2 lying musical work and its writer.

3 “(H)(i) A digital phonorecord delivery of a
4 sound recording is actionable as an act of infringe-
5 ment under section 501, and is fully subject to the
6 remedies provided by sections 502 through 506 and
7 section 509, unless—

8 “(I) the digital phonorecord delivery has
9 been authorized by the copyright owner of the
10 sound recording; and

11 “(II) the owner of the copyright in the
12 sound recording or the entity making the digital
13 phonorecord delivery has obtained a compulsory
14 license under this section or has otherwise been
15 authorized by the copyright owner of the musi-
16 cal work to distribute or authorize the distribu-
17 tion, by means of a digital phonorecord delivery,
18 of each musical work embodied in the sound re-
19 cording.

20 “(ii) Any cause of action under this subpara-
21 graph shall be in addition to those available to the
22 owner of the copyright in the nondramatic musical
23 work under subsection (c)(6) and section 106(4) and
24 the owner of the copyright in the sound recording
25 under section 106(6).

1 “(I) The liability of the copyright owner of a
2 sound recording for infringement of the copyright in
3 a nondramatic musical work embodied in the sound
4 recording shall be determined in accordance with ap-
5 plicable law, except that the owner of a copyright in
6 a sound recording shall not be liable for a digital
7 phonorecord delivery by a third party if the owner
8 of the copyright in the sound recording does not li-
9 cense the distribution of a phonorecord of the
10 nondramatic musical work.

11 “(J) Nothing in section 1008 shall be construed
12 to prevent the exercise of the rights and remedies al-
13 lowed by this paragraph, paragraph (6), and chapter
14 5 in the event of a digital phonorecord delivery, ex-
15 cept that no action alleging infringement of copy-
16 right may be brought under this title against a man-
17 ufacturer, importer or distributor of a digital audio
18 recording device, a digital audio recording medium,
19 an analog recording device, or an analog recording
20 medium, or against a consumer, based on the ac-
21 tions described in such section.

22 “(K) Nothing in this section annuls or limits (i)
23 the exclusive right to publicly perform a sound re-
24 cording or the musical work embodied therein, in-
25 cluding by means of a digital transmission, under

1 sections 106(4) and 106(6), (ii) except for compul-
2 sory licensing under the conditions specified by this
3 section, the exclusive rights to reproduce and distrib-
4 ute the sound recording and the musical work em-
5 bodied therein under sections 106(1) and 106(3), in-
6 cluding by means of a digital phonorecord delivery,
7 or (iii) any other rights under any other provision of
8 section 106, or remedies available under this title, as
9 such rights or remedies exist either before or after
10 the date of enactment of the Digital Performance
11 Right in Sound Recordings Act of 1995.

12 “(L) The provisions of this section concerning
13 digital phonorecord deliveries shall not apply to any
14 exempt transmissions or retransmissions under sec-
15 tion 114(d)(1). The exemptions created in section
16 114(d)(1) do not expand or reduce the rights of
17 copyright owners under section 106(1) through (5)
18 with respect to such transmissions and
19 retransmissions.”; and

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

21 “(d) DEFINITION.—As used in this section, the fol-
22 lowing term has the following meaning: A ‘digital phono-
23 record delivery’ is each individual delivery of a phono-
24 record by digital transmission of a sound recording which
25 results in a specifically identifiable reproduction by or for

1 any transmission recipient of a phonorecord of that sound
 2 recording, regardless of whether the digital transmission
 3 is also a public performance of the sound recording or any
 4 nondramatic musical work embodied therein. A digital
 5 phonorecord delivery does not result from a real-time,
 6 noninteractive subscription transmission of a sound re-
 7 cording where no reproduction of the sound recording or
 8 the musical work embodied therein is made from the in-
 9 ception of the transmission through to its receipt by the
 10 transmission recipient in order to make the sound record-
 11 ing audible.”.

12 **SEC. 5. CONFORMING AMENDMENTS.**

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

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

19 (b) LIMITATIONS ON EXCLUSIVE RIGHTS: SECOND-
 20 ARY TRANSMISSIONS.—Section 111(c)(1) of title 17, Unit-
 21 ed States Code, is amended in the first sentence by insert-
 22 ing “and section 114(d)” after “of this subsection”.

23 (c) LIMITATIONS ON EXCLUSIVE RIGHTS: SECOND-
 24 ARY TRANSMISSIONS OF SUPERSTATIONS AND NETWORK
 25 STATIONS FOR PRIVATE HOME VIEWING.—

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

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

8 (d) COPYRIGHT ARBITRATION ROYALTY PANELS.—

9 (1) Section 801(b)(1) of title 17, United States
10 Code, is amended in the first and second sentences
11 by striking “115” each place it appears and insert-
12 ing “114, 115,”.

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

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

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

24 (5) Section 803(a)(1) of title 17, United States
25 Code, is amended in the first sentence by striking

1 “115” and inserting “114, 115” and by striking
2 “and (4)” and inserting “(4) and (5)”.

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

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

9 “(5) With respect to proceedings under section
10 801(b)(1) concerning the determination of reason-
11 able terms and rates of royalty payments as pro-
12 vided in section 114, the Librarian of Congress shall
13 proceed when and as provided by that section.”.

14 **SEC. 6. EFFECTIVE DATE.**

15 This Act and the amendments made by this Act shall
16 take effect 3 months after the date of enactment of this
17 Act, except that the provisions of sections 114(e) and
18 114(f) of title 17, United States Code (as added by section
19 3 of this Act) shall take effect immediately upon the date
20 of enactment of this Act.

Passed the Senate August 8 (legislative day, July
10), 1995.

Attest:

Secretary.

S 227 ES——2

S 227 ES——3

104TH CONGRESS
1ST SESSION

S. 227

AN ACT

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.