

105TH CONGRESS  
1ST SESSION

# S. 28

To amend title 17, United States Code, with respect to certain exemptions from copyright, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

JANUARY 21, 1997

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

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## A BILL

To amend title 17, United States Code, with respect to certain exemptions from copyright, 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 1997”.

6 **SEC. 2. EXEMPTION OF CERTAIN MUSIC USES FROM COPY-**  
7 **RIGHT PROTECTION.**

8       (a) BUSINESS EXEMPTION.—Section 110(5) of title  
9 17, United States Code, is amended to read as follows:

1           “(5) communication by electronic device of a  
2 transmission embodying a performance or display of  
3 a nondramatic musical work by the reception of a  
4 broadcast, cable, satellite, or other transmission, un-  
5 less—

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

8                   “(B) the transmission is not properly li-  
9 censed;”.

10           (b) AGRICULTURAL EVENTS.—Section 110(6) of title  
11 17, United States Code, is amended to read as follows:

12           “(6) performance of a nondramatic musical  
13 work by a governmental body or a nonprofit agricul-  
14 tural or horticultural organization, in the course of  
15 an agricultural or horticultural fair, convention,  
16 meeting, event, or exhibition conducted by such body  
17 or organization; the exception provided by this para-  
18 graph shall extend to any liability for copyright in-  
19 fringement that would otherwise be imposed on such  
20 body or organization, including under the doctrines  
21 of vicarious liability, contributory infringement, or  
22 related infringement, for a performance by a conces-  
23 sionaire, business establishment, or other person at  
24 such fair, convention, meeting, event, or exhibition,

1 but shall not excuse any such person from liability  
2 for the performance;”.

3 (c) EXEMPTION RELATING TO PROMOTION.—Section  
4 110(7) of title 17, United States Code, is amended—

5 (1) by striking “vending”;

6 (2) by striking “sole”;

7 (3) by inserting “or of the audio, video or other  
8 devices utilized in the performance,” after  
9 “phonorecords of the work,”; and

10 (4) by striking “and is within the immediate  
11 area where the sale is occurring”.

12 (d) PERFORMANCES AT CHILDREN’S CAMPS.—Sec-  
13 tion 110 of title 17, United States Code, is amended—

14 (1) by striking the periods at the end of para-  
15 graphs (8) and (9) and inserting semicolons;

16 (2) in paragraph (10) by striking the period at  
17 the end and inserting “; and”; and

18 (3) by adding at the end thereof the following:

19 “(11) performance of a nondramatic musical  
20 work at an organized children’s camp, if children in  
21 attendance sing all or a portion of the work, children  
22 in attendance engage in games or dance to the ac-  
23 companiment of all or a portion of the work, or the  
24 performance is of an instructional nature.”.

1 **SEC. 3. BINDING ARBITRATION OF RATE DISPUTES INVOLV-**  
 2 **ING PERFORMING RIGHTS SOCIETIES.**

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

6 “(d) PERFORMING RIGHTS SOCIETIES; BINDING AR-  
 7 BITRATION.—

8 “(1) ARBITRATION OF DISPUTES PRIOR TO  
 9 COURT ACTION.—

10 “(A) ARBITRATION.—(i) If a general music  
 11 user and a performing rights society are unable  
 12 to agree on the appropriate fee to be paid for  
 13 the user’s past or future performance of musi-  
 14 cal works in the repertoire of the performing  
 15 rights society, the general music user shall, in  
 16 lieu of any other dispute-resolution mechanism  
 17 established by any judgment or decree govern-  
 18 ing the operation of the performing rights soci-  
 19 ety, be entitled to binding arbitration of such  
 20 disagreement pursuant to the rules of the  
 21 American Arbitration Association. The music  
 22 user may initiate such arbitration.

23 “(ii) The arbitrator in such binding arbi-  
 24 tration shall determine a fair and reasonable fee  
 25 for the general music user’s past and future  
 26 performance of musical works in such society’s

1 repertoire and shall determine whether the  
2 user's past performances of such musical works,  
3 if any, infringed the copyrights of works in the  
4 society's repertoire. If the arbitrator determines  
5 that the general music user's past performances  
6 of such musical works infringed the copyrights  
7 of works in the society's repertoire, the arbitra-  
8 tor shall impose a penalty for such infringe-  
9 ment. Such penalty shall not exceed the arbitra-  
10 tor's determination of the fair and reasonable  
11 license fee for the performances at issue.

12 “(B) DEFINITIONS.—(i) For purposes of  
13 this paragraph, a ‘general music user’ is any  
14 person who performs musical works publicly but  
15 is not engaged in the transmission of musical  
16 works to the general public or to subscribers  
17 through broadcast, cable, satellite, or other  
18 transmission.

19 “(ii) For purposes of this paragraph,  
20 transmissions within a single commercial estab-  
21 lishment or within establishments under com-  
22 mon ownership or control are not transmissions  
23 to the general public.

24 “(iii) For purposes of clause (ii), an ‘estab-  
25 lishment’ is a retail business, restaurant, bar,

1 inn, tavern, or any other place of business in  
2 which the public may assemble.

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

8 “(2) COURT-ANNEXED ARBITRATION.—In any  
9 civil action for infringement of the right granted in  
10 section 106(4) involving a musical work that is in  
11 the repertoire of a performing rights society, if the  
12 defendant admits the prior public performance of  
13 one or more works in the repertoire of the perform-  
14 ing rights society but contests the amount of the li-  
15 cense fee demanded by such society for such per-  
16 formance, the dispute shall, if requested by the de-  
17 fendant, be submitted to arbitration under section  
18 652(e) of title 28. In such arbitration proceeding,  
19 the arbitrator shall determine the amount owed by  
20 the defendant to the performing rights society for all  
21 past public performances of musical works in the so-  
22 ciety’s repertoire. Such amount shall not exceed two  
23 times the amount of the blanket license fee that  
24 would be applied by the society to the defendant for

1 the year or years in which the performances oc-  
2 curred. In addition, the arbitrator shall, if requested  
3 by the defendant, determine a fair and reasonable li-  
4 cense fee for the defendant's future public perform-  
5 ances of the musical works in such society's rep-  
6 ertoire.

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

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

18 “(e) ACTIONS THAT SHALL BE REFERRED TO ARBI-  
19 TRATION.—In any civil action for infringement of the  
20 right granted in section 106(4) of title 17 involving a mu-  
21 sical work that is in the repertoire of a performing rights  
22 society, if the defendant admits the public performance of  
23 any musical work in the repertoire of the performing  
24 rights society but contests the amount of the license fee  
25 demanded for such performance by the society, the district

1 court shall, if requested by the defendant, refer the dispute  
 2 to arbitration, which shall be conducted in accordance with  
 3 section 504(d)(2) of title 17. Each district court shall es-  
 4 tablish procedures by local rule authorizing the use of ar-  
 5 bitration under this subsection. The definitions set forth  
 6 in title 17 apply to the terms used in this subsection.”.

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

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

11 “(e) RADIO PER PROGRAMMING PERIOD LI-  
 12 CENSES.—

13 “(1) IN GENERAL.—Each performing rights so-  
 14 ciety shall offer, to any radio broadcaster that so re-  
 15 quests, a per programming period license to perform  
 16 nondramatic musical works in the repertoire of the  
 17 performing rights society. Such license shall be of-  
 18 fered on reasonable terms and conditions that pro-  
 19 vide an economically and administratively viable al-  
 20 ternative to the society’s blanket license for all such  
 21 broadcasters.

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

1           “(i) shall include separate components for  
2 incidental and feature performances, with the  
3 incidental performance component to be inde-  
4 pendent of the quantity of such performances  
5 by the broadcaster and not to exceed the rel-  
6 ative value that the performing rights society  
7 assigns to such performances in its distribution  
8 of royalties; and

9           “(ii) shall not exceed the fee that would be  
10 payable by the broadcaster under the lowest  
11 price blanket license offered to radio broad-  
12 casters, and shall vary between the incidental  
13 performance component, for a broadcaster that  
14 makes only incidental performances of music in  
15 the society’s repertoire, and such blanket license  
16 fee, in direct proportion to the percentage of  
17 the broadcaster’s revenue attributable to pro-  
18 gramming periods containing feature perform-  
19 ances of musical works in the society’s rep-  
20 ertoire compared to the industry average per-  
21 centage of revenue attributable to programming  
22 periods containing feature performances of such  
23 musical works.

1           “(B) Nondramatic musical works that have  
2           been licensed directly or at the source, or whose per-  
3           formance constitutes fair use or is otherwise exempt  
4           from liability under this title, shall not be considered  
5           in calculating any per programming period license  
6           fee under this subsection.

7           “(3) IMPLEMENTATION.—Any radio broad-  
8           caster entitled to a per programming period license  
9           under this subsection may bring an action to require  
10          compliance with this subsection in an appropriate  
11          United States district court, including any district  
12          court established by court order or statute as a  
13          court that resolves disputes, with respect to license  
14          rates, that may arise between performing rights soci-  
15          eties and persons who perform musical works in the  
16          society’s repertoire.

17          “(4) DEFINITIONS.—As used in this sub-  
18          section—

19                 “(A) the term ‘blanket license’ means a li-  
20                 cense provided by a performing rights society  
21                 that authorizes the unlimited performance of  
22                 musical works in the society’s repertoire, for a  
23                 fee that does not vary with the quantity or type  
24                 of performances of musical works in the soci-  
25                 ety’s repertoire;

1           “(B) the term ‘incidental’ means commer-  
 2           cial jingles not exceeding 60 seconds in dura-  
 3           tion, bridges, themes or signatures, arrange-  
 4           ments of works in the public domain, and back-  
 5           ground music, including music used in conjunc-  
 6           tion with sporting events; and

7           “(C) the term ‘programming period’ means  
 8           any 15-minute period of radio broadcasting  
 9           commencing on the hour, or at 15, 30, or 45  
 10          minutes past the hour.”.

11 **SEC. 5. ACCESS TO REPERTOIRE AND LICENSING INFORMA-**  
 12 **TION.**

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

16          “(f) ACCESS TO MUSICAL REPERTOIRE.—

17                 “(1) ONLINE COMPUTER ACCESS.—Each per-  
 18                 forming rights society shall make available, free of  
 19                 charge, to all interested persons, online computer ac-  
 20                 cess to copyright and licensing information for each  
 21                 work in its repertoire. Such access shall, for each  
 22                 such musical work, identify the work by title of the  
 23                 work, the name of the author and the copyright  
 24                 owner, and the names of any artists known to have  
 25                 performed the work. Such online computer access

1 shall permit the efficient review of multiple musical  
2 works consistent with reasonably available tech-  
3 nology.

4 “(2) DIRECTORY OF TITLES.—Each performing  
5 rights society shall make available at cost, not less  
6 frequently than semiannually, a printed directory of  
7 each title in its repertoire, as of the date which is  
8 not more than 30 days before the date on which the  
9 directory is published, containing the information set  
10 forth in paragraph (1).

11 “(3) DOCUMENTATION OF RIGHT TO LI-  
12 CENSE.—A performing rights society shall, upon the  
13 request of any person who performs or may perform  
14 musical works in the society’s repertoire, provide to  
15 that person copies of the documentation establishing  
16 the society’s right to license the public performance  
17 of such musical works.

18 “(4) RESTRICTIONS ON INFRINGEMENT AC-  
19 TIONS.—

20 “(A) RESTRICTIONS.—A performing rights  
21 society may not institute or be a party to, or  
22 pay the costs of another party in, any action al-  
23 leging the infringement of the copyright in, or  
24 charge a fee under any per programming period  
25 license for, any work in that society’s repertoire

1 that is not identified and documented as re-  
2 quired by paragraphs (1), (2), and (3).

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

15 “(g) ACCESS TO LICENSING INFORMATION.—

16 “(1) TERMS OF LICENSES.—Each performing  
17 rights society shall provide, within 5 business days  
18 after it receives a written request from a licensee of  
19 any musical work in the society’s repertoire, or from  
20 any person that is negotiating to become such a  
21 licensee—

22 “(A) the schedule of the society’s license  
23 rates and terms of the license fees to be paid

1 under the license agreement, including any slid-  
2 ing scale or schedule for any increase or de-  
3 crease in rates for the duration of the license  
4 agreement;

5 “(B) the formulas by which the rates are  
6 derived; and

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

10 “(2) COPIES OF LICENSES.—Any performing  
11 rights society that receives a written request from an  
12 entity that has been requested to enter into a license  
13 agreement with the performing rights society on be-  
14 half of persons who perform or may perform musical  
15 works within that society’s repertoire, shall provide  
16 to that entity, within 5 business days after receiving  
17 that request, a schedule of fees for such perform-  
18 ances by similar persons.”.

19 **SEC. 6. ANNUAL REPORTS.**

20 Not later than March 1 of each year, the Attorney  
21 General of the United States shall submit a written report  
22 to the Congress on the activities of the Department of  
23 Justice during the preceding calendar year relating to the  
24 continuing supervision and enforcement by the Depart-  
25 ment of the consent decree of the American Society of

1 Composers, Authors, and Publishers of March 14, 1950,  
2 and the consent decree of Broadcast Music, Inc. of Decem-  
3 ber 29, 1966. Such report shall include a description of  
4 all issues raised or complaints filed with the Department  
5 of Justice relating to the operations of those performing  
6 rights societies, and a summary of the Department's ac-  
7 tions or investigations undertaken by the Department in  
8 response to such issues and complaints.

9 **SEC. 7. VICARIOUS LIABILITY PROHIBITED.**

10 A landlord, an organizer or sponsor of a convention,  
11 exposition, or meeting, a facility owner, or any other per-  
12 son making space available to another party by contract,  
13 shall not be liable under any theory of vicarious or con-  
14 tributary infringement with respect to an infringing public  
15 performance of a copyrighted work by a tenant, lessee,  
16 subtenant, sublessee, licensee, exhibitor, or other user of  
17 such space on the ground that—

18 (1) a contract for such space provides the land-  
19 lord, organizer or sponsor, facility owner, or other  
20 person a right or ability to control such space and  
21 compensation for the use of such space; or

22 (2) the landlord, organizer or sponsor, facility  
23 owner, or other person has or had at the time of the  
24 infringing performance actual control over some as-  
25 pects of the use of such space,

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

5 **SEC. 8. CONFORMING AMENDMENTS.**

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

9 “A ‘performing rights society’ is an association,  
10 corporation, or other entity that licenses the public  
11 performance of nondramatic musical works on behalf  
12 of copyright owners of such works, such as the  
13 American Society of Composers, Authors, and Pub-  
14 lishers, Broadcast Music, Inc., and SESAC, Inc. The  
15 ‘repertoire’ of a performing rights society consists of  
16 those works for which the society provides licenses  
17 on behalf of the owners of copyright in the works.”.

18 **SEC. 9. CONSTRUCTION OF ACT.**

19 Except as provided in section 504(d)(1) of title 17,  
20 United States Code, as added by section 3(a) of this Act,  
21 nothing in this Act shall be construed to relieve any per-  
22 forming rights society (as defined in section 101 of title  
23 17, United States Code) of any obligation under any con-  
24 sent decree, State statute, or other court order governing  
25 its operation, as such decree or order is in effect on the

- 1 date of the enactment of this Act, as it may be amended
- 2 after such date, or as it may be issued or agreed to after
- 3 such date.

