

TABLE II

This Table lists the sections of former Title 17, Copyrights, and indicates the sections of Title 17, as revised in 1976, which cover similar and related subject matter.

<i>Title 17 1947 Revision Sections</i>	<i>Title 17 New Sections</i>
1	106, 116
2	301
3	102, 103
4	102
5	102
6	102
7	103
8	104, 105, 303
9	104
10	401
11	410
12	408
13	407, 411
14	407
15	407
16	601
17	407
18	407, 506
19	401
20	401, 402
21	405
22	601
23	601
24	203, 301 et seq.
25	301 et seq.
26	101
27	109, 202
28	201, 204
29	204
30	205
31	205
32	201
101	412, 501-504
102	Rep. See T. 28 § 1338
103	Rep. See F.R. Civ. Proc.
104	110, 506
105	506
106	602
107	602
108	603
109	603
110	Rep. See T. 28 § 1338
111	Rep. See T. 28 § 1400
112	502
113	502
114	502
115	507
116	505
201	701(a)
202	701(a)
203	708(c)
204	Rep.
205	701(c)
206	701(b)
207	702
208	705
209	407, 410
210	707
211	707
212	705
213	704
214	704
215	708(a), (b)
216	703

PRIOR PROVISIONS

Title 17, as enacted by act July 30, 1947, ch. 391, 61 Stat. 652, consisting of sections 1 to 32, 101 to 116, and 201 to 216, as amended through 1976, and section 203, as amended by Pub. L. 95-94, title IV, § 406(a), Aug. 5, 1977, 91 Stat. 682, terminated Jan. 1, 1978.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE

Pub. L. 94-553, title I, § 102, Oct. 19, 1976, 90 Stat. 2598, provided that: "This Act [enacting this title and section 170 of Title 2, The Congress, amending section 131 of Title 2, section 290e of Title 15, Commerce and Trade, section 2318 of Title 18, Crimes and Criminal Procedure, section 543 of Title 26, Internal Revenue Code, section 1498 of Title 28, Judiciary and Judicial Procedure, sections 3203 and 3206 of Title 39, Postal Service, and sections 505 and 2117 of Title 44, Public Printing and Documents, and enacting provisions set out as notes below and under sections 104, 115, 304, 401, 407, 410, and 501 of

this title] becomes effective on January 1, 1978, except as otherwise expressly provided by this Act, including provisions of the first section of this Act. The provisions of sections 118, 304(b), and chapter 8 of title 17, as amended by the first section of this Act, take effect upon enactment of this Act [Oct. 19, 1976]."

SEPARABILITY

Pub. L. 94-553, title I, § 115, Oct. 19, 1976, 90 Stat. 2602, provided that: "If any provision of title 17 [this title], as amended by the first section of this Act, is declared unconstitutional, the validity of the remainder of this title is not affected."

AUTHORIZATION OF APPROPRIATIONS

Pub. L. 94-553, title I, § 114, Oct. 19, 1976, 90 Stat. 2602, provided that: "There are hereby authorized to be appropriated such funds as may be necessary to carry out the purposes of this Act [this title]."

LOST AND EXPIRED COPYRIGHTS; RECORDING RIGHTS

Pub. L. 94-553, title I, § 103, Oct. 19, 1976, 90 Stat. 2599, provided that: "This Act [enacting this title] does not provide copyright protection for any work that goes into the public domain before January 1, 1978. The exclusive rights, as provided by section 106 of title 17 as amended by the first section of this Act, to reproduce a work in phonorecords and to distribute phonorecords of the work, do not extend to any nondramatic musical work copyrighted before July 1, 1909."

CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

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|-------|--|
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| 101. | Definitions. |
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| 103. | Subject matter of copyright: Compilations and derivative works. |
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| 118. | Scope of exclusive rights: Use of certain works in connection with noncommercial broadcasting. |
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| 120. | Scope of exclusive rights in architectural works. |
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- Sec.
 121A. Limitations on exclusive rights: reproduction for blind or other people with disabilities in Marrakesh Treaty countries.
 122. Limitations on exclusive rights: Secondary transmissions of local television programming by satellite.

Editorial Notes**AMENDMENTS**

2018—Pub. L. 115–261, §2(b), Oct. 9, 2018, 132 Stat. 3669, added item 121A.

2010—Pub. L. 111–175, title I, §§102(a)(2), 103(a)(2), 104(a)(2), May 27, 2010, 124 Stat. 1219, 1227, 1231, added items 111, 119, and 122 and struck out former items 111 “Limitations on exclusive rights: Secondary transmissions”, 119 “Limitations on exclusive rights: Secondary transmissions of superstations and network stations for private home viewing”, and 122 “Limitations on exclusive rights: Secondary transmissions by satellite carriers within local markets”.

2002—Pub. L. 107–273, div. C, title III, §13210(2)(B), (3)(B), Nov. 2, 2002, 116 Stat. 1909, substituted “Reproduction” for “reproduction” in item 121 and “Limitations on exclusive rights: Secondary transmissions by satellite carriers within local markets” for “Limitations on exclusive rights: secondary transmissions by satellite carriers within local market” in item 122.

1999—Pub. L. 106–113, div. B, §1000(a)(9) [title I, §1002(c)], Nov. 29, 1999, 113 Stat. 1536, 1501A–527, added item 122.

1997—Pub. L. 105–80, §12(a)(2), Nov. 13, 1997, 111 Stat. 1534, substituted “Limitations on exclusive rights: Computer programs” for “Scope of exclusive rights: Use in conjunction with computers and similar information systems” in item 117.

1996—Pub. L. 104–197, title III, §316(b), Sept. 16, 1996, 110 Stat. 2417, added item 121.

1994—Pub. L. 103–465, title V, §514(c), Dec. 8, 1994, 108 Stat. 4981, substituted “Copyright in restored works” for “Copyright in certain motion pictures” in item 104A.

1993—Pub. L. 103–198, §3(a), (b)(2), Dec. 17, 1993, 107 Stat. 2309, renumbered item 116A as 116 and struck out former item 116 “Scope of exclusive rights in nondramatic musical works: Compulsory licenses for public performances by means of coin-operated phonorecord players.”

Pub. L. 103–182, title III, §334(b), Dec. 8, 1993, 107 Stat. 2115, added item 104A.

1990—Pub. L. 101–650, title VI, §603(b), title VII, §704(b)(1), Dec. 1, 1990, 104 Stat. 5130, 5134, added items 106A and 120.

1988—Pub. L. 100–667, title II, §202(6), Nov. 16, 1988, 102 Stat. 3958, added item 119.

Pub. L. 100–568, §4(b)(2), Oct. 31, 1988, 102 Stat. 2857, substituted “Compulsory licenses for public performances” for “Public performances” in item 116 and added item 116A.

§ 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

An “anonymous work” is a work on the copies or phonorecords of which no natural person is identified as author.

An “architectural work” is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

“Audiovisual works” are works that consist of a series of related images which are intrin-

sically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The “Berne Convention” is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.

The “best edition” of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person’s “children” are that person’s immediate offspring, whether legitimate or not, and any children legally adopted by that person.

A “collective work” is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A “compilation” is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term “compilation” includes collective works.

A “computer program” is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

“Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed.

“Copyright owner”, with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A “Copyright Royalty Judge” is a Copyright Royalty Judge appointed under section 802 of this title, and includes any individual serving as an interim Copyright Royalty Judge under such section.

A work is “created” when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other

modifications which, as a whole, represent an original work of authorship, is a "derivative work".

A "device", "machine", or "process" is one now known or later developed.

A "digital transmission" is a transmission in whole or in part in a digital or other non-analog format.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

An "establishment" is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

The term "financial gain" includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

A "food service or drinking establishment" is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

The "Geneva Phonograms Convention" is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, concluded at Geneva, Switzerland, on October 29, 1971.

The "gross square feet of space" of an establishment means the entire interior space of that establishment, and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise.

The terms "including" and "such as" are illustrative and not limitative.

An "international agreement" is—

- (1) the Universal Copyright Convention;
- (2) the Geneva Phonograms Convention;
- (3) the Berne Convention;
- (4) the WTO Agreement;
- (5) the WIPO Copyright Treaty;
- (6) the WIPO Performances and Phonograms Treaty; and
- (7) any other copyright treaty to which the United States is a party.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

The term "motion picture exhibition facility" means a movie theater, screening room, or other venue that is being used primarily for the exhibition of a copyrighted motion picture, if such exhibition is open to the public or is made to an assembled group of viewers outside of a normal circle of a family and its social acquaintances.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

A "performing rights society" is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

For purposes of section 513, a "proprietor" is an individual, corporation, partnership, or other entity, as the case may be, that owns an establishment or a food service or drinking establishment, except that no owner or operator of a radio or television station licensed by the Federal Communications Commission, cable system or satellite carrier, cable or satellite carrier service or programmer, provider of online services or network access or the operator of facilities therefor, telecommunications

company, or any other such audio or audiovisual service or programmer now known or as may be developed in the future, commercial subscription music service, or owner or operator of any other transmission service, shall under any circumstances be deemed to be a proprietor.

A “pseudonymous work” is a work on the copies or phonorecords of which the author is identified under a fictitious name.

“Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work “publicly” means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

“Registration”, for purposes of sections 205(c)(2), 405, 406, 410(d), 411, 412, and 506(e), means a registration of a claim in the original or the renewed and extended term of copyright.

“Sound recordings” are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

“State” includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

A “transfer of copyright ownership” is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A “transmission program” is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To “transmit” a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

A “treaty party” is a country or intergovernmental organization other than the United States that is a party to an international agreement.

The “United States”, when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

For purposes of section 411, a work is a “United States work” only if—

(1) in the case of a published work, the work is first published—

(A) in the United States;

(B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;

(C) simultaneously in the United States and a foreign nation that is not a treaty party; or

(D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;

(2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or

(3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

A “useful article” is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a “useful article”.

The author’s “widow” or “widower” is the author’s surviving spouse under the law of the author’s domicile at the time of his or her death, whether or not the spouse has later remarried.

The “WIPO Copyright Treaty” is the WIPO Copyright Treaty concluded at Geneva, Switzerland, on December 20, 1996.

The “WIPO Performances and Phonograms Treaty” is the WIPO Performances and Phonograms Treaty concluded at Geneva, Switzerland, on December 20, 1996.

A “work of visual art” is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

A “work of the United States Government” is a work prepared by an officer or employee of the United States Government as part of that person’s official duties.

A “work made for hire” is—

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

In determining whether any work is eligible to be considered a work made for hire under paragraph (2), neither the amendment contained in section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106–113, nor the deletion of the words added by that amendment—

(A) shall be considered or otherwise given any legal significance, or

(B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination,

by the courts or the Copyright Office. Paragraph (2) shall be interpreted as if both section 2(a)(1) of the Work Made For Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106–113, were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.

The terms “WTO Agreement” and “WTO member country” have the meanings given those terms in paragraphs (9) and (10), respectively, of section 2 of the Uruguay Round Agreements Act.

(Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2541; Pub. L. 96–517, § 10(a), Dec. 12, 1980, 94 Stat. 3028; Pub. L. 100–568, § 4(a)(1), Oct. 31, 1988, 102 Stat. 2854; Pub. L. 101–650, title VI, § 602, title VII, § 702, Dec. 1, 1990, 104 Stat. 5128, 5133; Pub. L. 102–307, title I, § 102(b)(2), June 26, 1992, 106 Stat. 266; Pub. L. 102–563, § 3(b), Oct. 28, 1992, 106 Stat. 4248; Pub. L. 104–39, § 5(a), Nov. 1, 1995, 109 Stat. 348; Pub. L. 105–80, § 12(a)(3), Nov. 13, 1997, 111 Stat. 1534; Pub. L. 105–147, § 2(a), Dec. 16, 1997, 111 Stat. 2678; Pub. L. 105–298, title II, § 205, Oct. 27, 1998, 112 Stat. 2833; Pub. L. 105–304, title I, § 102(a), Oct. 28, 1998, 112 Stat. 2861; Pub. L. 106–44, § 1(g)(1), Aug. 5, 1999, 113 Stat. 222; Pub. L. 106–113, div. B, § 1000(a)(9) [title I, § 1011(d)], Nov. 29, 1999, 113 Stat. 1536, 1501A–544; Pub. L. 106–379, § 2(a), Oct. 27, 2000, 114 Stat. 1444; Pub. L. 107–273, div. C, title III, § 13210(5), Nov. 2, 2002, 116 Stat. 1909; Pub. L. 108–419, § 4, Nov. 30, 2004, 118 Stat. 2361; Pub. L. 109–9, title I, § 102(c), Apr. 27, 2005, 119 Stat. 220; Pub. L. 111–295, § 6(a), Dec. 9, 2010, 124 Stat. 3181.)

HISTORICAL AND REVISION NOTES

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The significant definitions in this section will be mentioned or summarized in connection with the provisions to which they are most relevant.

Editorial Notes

REFERENCES IN TEXT

Section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, referred to in definition of “work made for hire”, is section 1000(a)(9) [title I, § 1011(d)] of Pub. L. 106–113, which amended par. (2) of that definition. See 1999 Amendment note below.

Section 2(a)(1) of the Work Made For Hire and Copyright Corrections Act of 2000, referred to in definition of “work made for hire”, is section 2(a)(1) of Pub. L. 106–379, which amended par. (2) of that definition. See 2000 Amendment note below.

Section 2 of the Uruguay Round Agreements Act, referred to in definitions of “WTO Agreement” and “WTO member country”, is classified to section 3501 of Title 19, Customs Duties.

AMENDMENTS

2010—Pub. L. 111–295, § 6(a)(3), transferred the definition of “food service or drinking establishment” to appear after the definition of “fixed”.

Pub. L. 111–295, § 6(a)(2), transferred the definition of “motion picture exhibition facility” to appear after the definition of “Literary works”.

Pub. L. 111–295, § 6(a)(1), which directed transfer of the definition of “Copyright Royalty Judges” to appear after the definition of “Copyright owner”, was executed by so transferring the definition of “Copyright Royalty Judge”, to reflect the probable intent of Congress.

2005—Pub. L. 109–9 inserted definition of “motion picture exhibition facility” after definition of “Motion pictures”.

2004—Pub. L. 108–419 inserted definition of “Copyright Royalty Judge” after definition of “Copies”.

2002—Pub. L. 107–273, § 13210(5)(B), transferred definition of “Registration” to appear after definition of “publicly”.

Pub. L. 107–273, § 13210(5)(A), transferred definition of “computer program” to appear after definition of “compilation”.

2000—Pub. L. 106-379, §2(a)(2), in definition of “work made for hire”, inserted after par. (2) provisions relating to considerations and interpretations to be used in determining whether any work is eligible to be considered a work made for hire under par. (2).

Pub. L. 106-379, §2(a)(1), in definition of “work made for hire”, struck out “as a sound recording,” after “motion picture or other audiovisual work,” in par. (2).

1999—Pub. L. 106-113, which directed the insertion of “as a sound recording,” after “audiovisual work” in par. (2) of definition relating to work made for hire, was executed by making the insertion after “audiovisual work,” to reflect the probable intent of Congress.

Pub. L. 106-44, §1(g)(1)(B), in definition of “proprietor”, substituted “For purposes of section 513, a ‘proprietor’” for “A ‘proprietor’”.

Pub. L. 106-44, §1(g)(1)(A), transferred definition of “United States work” to appear after definition of “United States”.

1998—Pub. L. 105-304, §102(a)(1), struck out definition of “Berne Convention work”.

Pub. L. 105-304, §102(a)(2), in definition of “country of origin”, substituted “For purposes of section 411, a work is a ‘United States work’ only if” for “The ‘country of origin’ of a Berne Convention work, for purposes of section 411, is the United States if” in introductory provisions, substituted “treaty party or parties” for “nation or nations adhering to the Berne Convention” in par. (1)(B) and “is not a treaty party” for “does not adhere to the Berne Convention” in par. (1)(C), (D), and struck out at end “For the purposes of section 411, the ‘country of origin’ of any other Berne Convention work is not the United States.”

Pub. L. 105-298, §205(1), inserted definitions of “establishment” and “food service or drinking establishment”.

Pub. L. 105-304, §102(a)(3), inserted definition of “Geneva Phonograms Convention”.

Pub. L. 105-298, §205(2), inserted definition of “gross square feet of space”.

Pub. L. 105-304, §102(a)(4), inserted definition of “international agreement”.

Pub. L. 105-298, §205(3), (4), inserted definitions of “performing rights society” and “proprietor”.

Pub. L. 105-304, §102(a)(5), inserted definition of term “treaty party”.

Pub. L. 105-304, §102(a)(6), inserted definition of term “WIPO Copyright Treaty”.

Pub. L. 105-304, §102(a)(7), inserted definition of term “WIPO Performances and Phonograms Treaty”.

Pub. L. 105-304, §102(a)(8), inserted definitions of terms “WTO Agreement” and “WTO member country”.

1997—Pub. L. 105-147 inserted definition of “financial gain”.

Pub. L. 105-80, in definition of to perform or to display a work “publicly”, substituted “process” for “processes” in par. (2).

1995—Pub. L. 104-39 inserted definition of “digital transmission”.

1992—Pub. L. 102-563 substituted “Except as otherwise provided in this title, as used” for “As used” in introductory provisions.

Pub. L. 102-307 inserted definition of “registration”.

1990—Pub. L. 101-650, §702(a), inserted definition of “architectural work”.

Pub. L. 101-650, §702(b), in definition of “Berne Convention work” added par. (5).

Pub. L. 101-650, §602, inserted definition of “work of visual art”.

1988—Pub. L. 100-568, §4(a)(1)(B), inserted definitions of “The Berne Convention” and “Berne Convention work”.

Pub. L. 100-568, §4(a)(1)(C), inserted definition of “country of origin”.

Pub. L. 100-568, §4(a)(1)(A), in definition of “Pictorial, graphic, and sculptural works” substituted “diagrams, models, and technical drawings, including architectural plans” for “technical drawings, diagrams, and models”.

1980—Pub. L. 96-517 inserted definition of “computer program”.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2004 AMENDMENT

Amendment by Pub. L. 108-419 effective 6 months after Nov. 30, 2004, subject to transition provisions, see section 6 of Pub. L. 108-419, set out as an Effective Date; Transition Provisions note under section 801 of this title.

EFFECTIVE DATE OF 2000 AMENDMENT

Pub. L. 106-379, §2(b)(1), Oct. 27, 2000, 114 Stat. 1444, provided that: “The amendments made by this section [amending this section] shall be effective as of November 29, 1999.”

EFFECTIVE DATE OF 1999 AMENDMENT

Pub. L. 106-113, div. B, §1000(a)(9) [title I, §1012], Nov. 29, 1999, 113 Stat. 1536, 1501A-544, provided that: “Sections 1001, 1003, 1005, 1007, 1008, 1009, 1010, and 1011 [enacting sections 338 and 339 of Title 47, Telecommunications, amending this section, sections 111, 119, 501, and 510 of this title, and section 325 of Title 47, enacting provisions set out as a note under this section and section 325 of Title 47, and amending provisions set out as a note under section 119 of this title] (and the amendments made by such sections) shall take effect on the date of the enactment of this Act [Nov. 29, 1999]. The amendments made by sections 1002, 1004, and 1006 [enacting section 122 of this title and amending sections 119 and 501 of this title] shall be effective as of July 1, 1999.”

EFFECTIVE DATE OF 1998 AMENDMENT

Pub. L. 105-304, title I, §105, Oct. 28, 1998, 112 Stat. 2877, provided that:

“(a) IN GENERAL.—Except as otherwise provided in this title [see section 101 of Pub. L. 105-304, set out as a Short Title of 1998 Amendment note below], this title and the amendments made by this title shall take effect on the date of the enactment of this Act [Oct. 28, 1998].

“(b) AMENDMENTS RELATING TO CERTAIN INTERNATIONAL AGREEMENTS.—(1) The following shall take effect upon the entry into force of the WIPO Copyright Treaty with respect to the United States [Mar. 6, 2002]:

“(A) Paragraph (5) of the definition of ‘international agreement’ contained in section 101 of title 17, United States Code, as amended by section 102(a)(4) of this Act.

“(B) The amendment made by section 102(a)(6) of this Act [amending this section].

“(C) Subparagraph (C) of section 104A(h)(1) of title 17, United States Code, as amended by section 102(c)(1) of this Act.

“(D) Subparagraph (C) of section 104A(h)(3) of title 17, United States Code, as amended by section 102(c)(2) of this Act.

“(2) The following shall take effect upon the entry into force of the WIPO Performances and Phonograms Treaty with respect to the United States [May 20, 2002]:

“(A) Paragraph (6) of the definition of ‘international agreement’ contained in section 101 of title 17, United States Code, as amended by section 102(a)(4) of this Act.

“(B) The amendment made by section 102(a)(7) of this Act [amending this section].

“(C) The amendment made by section 102(b)(2) of this Act [amending section 104 of this title].

“(D) Subparagraph (D) of section 104A(h)(1) of title 17, United States Code, as amended by section 102(c)(1) of this Act.

“(E) Subparagraph (D) of section 104A(h)(3) of title 17, United States Code, as amended by section 102(c)(2) of this Act.

“(F) The amendments made by section 102(c)(3) of this Act [amending section 104A of this title].”

Pub. L. 105-298, title II, §207, Oct. 27, 1998, 112 Stat. 2834, provided that: “This title [enacting section 512 of this title, amending this section and sections 110 and 504 of this title, and enacting provisions set out as notes under this section] and the amendments made by this title shall take effect 90 days after the date of the enactment of this Act [Oct. 27, 1998].”

EFFECTIVE DATE OF 1995 AMENDMENT

Pub. L. 104-39, §6, Nov. 1, 1995, 109 Stat. 349, provided that: “This Act [see Short Title of 1995 Amendment note below] and the amendments made by this Act shall take effect 3 months after the date of enactment of this Act [Nov. 1, 1995], except that the provisions of sections 114(e) and 114(f) of title 17, United States Code (as added by section 3 of this Act) shall take effect immediately upon the date of enactment of this Act.”

EFFECTIVE DATE OF 1992 AMENDMENT

Pub. L. 102-307, title I, §102(g), June 26, 1992, 106 Stat. 266, as amended by Pub. L. 105-298, title I, §102(d)(2)(B), Oct. 27, 1998, 112 Stat. 2828, provided that:

“(1) Subject to paragraphs (2) and (3), this section [amending this section and sections 304, 408, 409, and 708 of this title and enacting provisions set out as a note under section 304 of this title] and the amendments made by this section shall take effect on the date of the enactment of this Act [June 26, 1992].

“(2) The amendments made by this section shall apply only to those copyrights secured between January 1, 1964, and December 31, 1977. Copyrights secured before January 1, 1964, shall be governed by the provisions of section 304(a) of title 17, United States Code, as in effect on the day before the effective date of this section [June 26, 1992], except each reference to forty-seven years in such provisions shall be deemed to be 67 years.

“(3) This section and the amendments made by this section shall not affect any court proceedings pending on the effective date of this section.”

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by section 602 of Pub. L. 101-650 effective 6 months after Dec. 1, 1990, see section 610 of Pub. L. 101-650, set out as an Effective Date note under section 106A of this title.

Pub. L. 101-650, title VII, §706, Dec. 1, 1990, 104 Stat. 5134, provided that: “The amendments made by this title [enacting section 120 of this title and amending this section and sections 102, 106, and 301 of this title], apply to—

“(1) any architectural work created on or after the date of the enactment of this Act [Dec. 1, 1990]; and

“(2) any architectural work that, on the date of the enactment of this Act, is unconstructed and embodied in unpublished plans or drawings, except that protection for such architectural work under title 17, United States Code, by virtue of the amendments made by this title, shall terminate on December 31, 2002, unless the work is constructed by that date.”

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100-568, §13, Oct. 31, 1988, 102 Stat. 2861, provided that:

“(a) EFFECTIVE DATE.—This Act and the amendments made by this Act [enacting section 116A of this title, amending this section and sections 104, 116, 205, 301, 401 to 408, 411, 501, 504, 801, and 804 of this title, and enacting provisions set out as notes under this section] take effect on the date on which the Berne Convention (as defined in section 101 of title 17, United States Code) enters into force with respect to the United States [Mar. 1, 1989]. [The Berne Convention entered into force with respect to the United States on Mar. 1, 1989.]

“(b) EFFECT ON PENDING CASES.—Any cause of action arising under title 17, United States Code, before the effective date of this Act shall be governed by the provisions of such title as in effect when the cause of action arose.”

SHORT TITLE OF 2022 AMENDMENT

Pub. L. 117-201, §1, Oct. 17, 2022, 136 Stat. 2222, provided that: “This Act [amending section 708 of this title] may be cited as the ‘Artistic Recognition for Talented Students Act’ or the ‘ARTS Act’.”

SHORT TITLE OF 2020 AMENDMENT

Pub. L. 116-260, div. Q, title II, §212(a), Dec. 27, 2020, 134 Stat. 2176, provided that: “This section [enacting chapter 15 of this title and enacting provisions set out as notes under sections 1501 and 1502 of this title] may be cited as the ‘Copyright Alternative in Small-Claims Enforcement Act of 2020’ or the ‘CASE Act of 2020’.”

SHORT TITLE OF 2019 AMENDMENT

Pub. L. 116-94, div. P, title XI, §1101, Dec. 20, 2019, 133 Stat. 3201, provided that: “This title [amending sections 119 and 501 of this title and enacting provisions set out as a note under section 119 of this title] may be cited as the ‘Satellite Television Community Protection and Promotion Act of 2019’.”

SHORT TITLE OF 2018 AMENDMENT

Pub. L. 115-264, §1(a), Oct. 11, 2018, 132 Stat. 3676, provided that: “This Act [enacting chapter 14 of this title, amending sections 114, 115, 301, 801, 803, and 804 of this title, section 58c of Title 19, Customs Duties, and section 137 of Title 28, Judiciary and Judicial Procedure, and enacting provisions set out as notes under this section and sections 106, 114, and 115 of this title] may be cited as the ‘Orrin G. Hatch-Bob Goodlatte Music Modernization Act’.”

Pub. L. 115-264, title I, §101, Oct. 11, 2018, 132 Stat. 3676, provided that: “This title [amending sections 114, 115, 801, 803, and 804 of this title and section 137 of Title 28, Judiciary and Judicial Procedure, and enacting provisions set out as notes under sections 106, 114, and 115 of this title] may be cited as the ‘Musical Works Modernization Act’.”

Pub. L. 115-264, title II, §201, Oct. 11, 2018, 132 Stat. 3728, provided that: “This title [enacting chapter 14 of this title and amending section 301 of this title] may be cited as the ‘Classics Protection and Access Act’.”

Pub. L. 115-264, title III, §301, Oct. 11, 2018, 132 Stat. 3737, provided that: “This title [amending section 114 of this title and enacting provisions set out as a note under section 114 of this title] may be cited as the ‘Allocation for Music Producers Act’ or the ‘AMP Act’.”

Pub. L. 115-261, §1, Oct. 9, 2018, 132 Stat. 3667, provided that: “This Act [enacting section 121A of this title and amending section 121 of this title] may be cited as the ‘Marrakesh Treaty Implementation Act’.”

SHORT TITLE OF 2010 AMENDMENT

Pub. L. 111-295, §1, Dec. 9, 2010, 124 Stat. 3180, provided that: “This Act [amending this section and sections 114, 115, 119, 205, 303, 409, 503, 504, 512, 602, 704, 803, 1203, and 1204 of this title and section 2318 of Title 18, Crimes and Criminal Procedure, and repealing section 601 of this title] may be cited as the ‘Copyright Cleanup, Clarification, and Corrections Act of 2010’.”

Pub. L. 111-175, §1(a), May 27, 2010, 124 Stat. 1218, provided that: “This Act [enacting section 342 of Title 47, Telecommunications, amending sections 111, 119, 122, 708, and 804 of this title and sections 325, 335, and 338 to 340 of Title 47, enacting provisions set out as notes under sections 111 and 119 of this title and sections 325, 338, and 340 of Title 47, and repealing provisions set out as a note under section 119 of this title] may be cited as the ‘Satellite Television Extension and Localism Act of 2010’.”

Pub. L. 111-151, §1, Mar. 26, 2010, 124 Stat. 1027, provided that: “This Act [amending section 119 of this title and section 325 of Title 47, Telecommunications, and amending provisions set out as a note under section 119 of this title] may be cited as the ‘Satellite Television [sic] Extension Act of 2010’.”

SHORT TITLE OF 2009 AMENDMENT

Pub. L. 111-36, §1, June 30, 2009, 123 Stat. 1926, provided that: “This Act [amending section 114 of this

title] may be cited as the ‘Webcaster Settlement Act of 2009’.”

SHORT TITLE OF 2008 AMENDMENT

Pub. L. 110–435, §1, Oct. 16, 2008, 122 Stat. 4974, provided that: “This Act [amending section 114 of this title] may be cited as the ‘Webcaster Settlement Act of 2008’.”

Pub. L. 110–434, §1(a), Oct. 16, 2008, 122 Stat. 4972, provided that: “This Act [amending section 1301 of this title] may be cited as the ‘Vessel Hull Design Protection Amendments of 2008’.”

SHORT TITLE OF 2006 AMENDMENT

Pub. L. 109–303, §1, Oct. 6, 2006, 120 Stat. 1478, provided that: “This Act [amending sections 111, 114, 115, 118, 119, 801 to 804, and 1007 of this title, enacting provisions set out as notes under sections 111 and 119 of this title, and amending provisions set out as a note under section 801 of this title] may be cited as the ‘Copyright Royalty Judges Program Technical Corrections Act’.”

SHORT TITLE OF 2005 AMENDMENT

Pub. L. 109–9, §1, Apr. 27, 2005, 119 Stat. 218, provided that: “This Act [enacting section 2319B of Title 18, Crimes and Criminal Procedure, amending this section and sections 108, 110, 408, 411, 412, and 506 of this title, sections 179m, 179n, 179p, 179q, and 179w of Title 2, The Congress, section 1114 of Title 15, Commerce and Trade, section 2319 of Title 18, and sections 151703, 151705, 151706, and 151711 of Title 36, Patriotic and National Observances, Ceremonies, and Organizations, enacting provisions set out as notes under this section, section 179j of Title 2, and section 101 of Title 36, and provisions listed in a table relating to sentencing guidelines set out as a note under section 994 of Title 28, Judiciary and Judicial Procedure] may be cited as the ‘Family Entertainment and Copyright Act of 2005’.”

Pub. L. 109–9, title I, §101, Apr. 27, 2005, 119 Stat. 218, provided that: “This title [enacting section 2319B of Title 18, Crimes and Criminal Procedure, amending this section, sections 408, 411, 412, and 506 of this title, and section 2319 of Title 18, and enacting provisions listed in a table relating to sentencing guidelines set out as a note under section 994 of Title 28, Judiciary and Judicial Procedure] may be cited as the ‘Artists’ Rights and Theft Prevention Act of 2005’ or the ‘ART Act’.”

Pub. L. 109–9, title II, §201, Apr. 27, 2005, 119 Stat. 223, provided that: “This title [amending section 110 of this title and section 1114 of Title 15, Commerce and Trade] may be cited as the ‘Family Movie Act of 2005’.”

Pub. L. 109–9, title IV, §401, Apr. 27, 2005, 119 Stat. 226, provided that: “This title [amending section 108 of this title] may be cited as the ‘Preservation of Orphan Works Act’.”

SHORT TITLE OF 2004 AMENDMENT

Pub. L. 108–447, div. J, title IX, §1(a), Dec. 8, 2004, 118 Stat. 3393, provided that: “This title [enacting sections 340 and 341 of Title 47, Telecommunications, amending sections 111, 119, 122, and 803 of this title and sections 307, 312, 325, 338, and 339 of Title 47, enacting provisions set out as notes under section 119 of this title and sections 325 and 338 of Title 47, and amending provisions set out as a note under section 119 of this title] may be cited as the ‘Satellite Home Viewer Extension and Reauthorization Act of 2004’ or the ‘W. J. (Billy) Tauzin Satellite Television Act of 2004’.”

Pub. L. 108–419, §1, Nov. 30, 2004, 118 Stat. 2341, provided that: “This Act [enacting chapter 8 of this title, amending this section and sections 111, 112, 114 to 116, 118, 119, 1004, 1006, 1007, and 1010 of this title, and enacting provisions set out as a note under section 801 of this title] may be cited as the ‘Copyright Royalty and Distribution Reform Act of 2004’.”

SHORT TITLE OF 2002 AMENDMENT

Pub. L. 107–321, §1, Dec. 4, 2002, 116 Stat. 2780, provided that: “This Act [amending section 114 of this title and

enacting provisions set out as notes under section 114 of this title] may be cited as the ‘Small Webcaster Settlement Act of 2002’.”

Pub. L. 107–273, div. C, title III, §13301(a), Nov. 2, 2002, 116 Stat. 1910, provided that: “This subtitle [subtitle C (§13301) of title III of div. C of Pub. L. 107–273, amending sections 110, 112, and 802 of this title] may be cited as the ‘Technology, Education, and Copyright Harmonization Act of 2002’.”

SHORT TITLE OF 2000 AMENDMENT

Pub. L. 106–379, §1, Oct. 27, 2000, 114 Stat. 1444, provided that: “This Act [amending this section and sections 121, 705, and 708 of this title, repealing section 710 of this title, and enacting provisions set out as notes under this section and section 708 of this title] may be cited as the ‘Work Made For Hire and Copyright Corrections Act of 2000’.”

SHORT TITLE OF 1999 AMENDMENT

Pub. L. 106–160, §1, Dec. 9, 1999, 113 Stat. 1774, provided that: “This Act [amending section 504 of this title and enacting provisions set out as notes under section 504 of this title and section 994 of Title 28, Judiciary and Judicial Procedure] may be cited as the ‘Digital Theft Deterrence and Copyright Damages Improvement Act of 1999’.”

Pub. L. 106–113, div. B, §1000(a)(9) [title I, §1001], Nov. 29, 1999, 113 Stat. 1536, 1501A–523, provided that: “This title [enacting section 122 of this title and sections 338 and 339 of Title 47, Telecommunications, amending this section, sections 111, 119, 501, and 510 of this title, and section 325 of Title 47, enacting provisions set out as notes under this section and section 325 of Title 47, and amending provisions set out as a note under section 119 of this title] may be cited as the ‘Satellite Home Viewer Improvement Act of 1999’.”

SHORT TITLE OF 1998 AMENDMENT

Pub. L. 105–304, §1, Oct. 28, 1998, 112 Stat. 2860, provided that: “This Act [enacting section 512 and chapters 12 and 13 of this title and section 4001 of Title 28, Judiciary and Judicial Procedure, amending this section, sections 104, 104A, 108, 112, 114, 117, 411, 507, 701, and 801 to 803 of this title, section 5314 of Title 5, Government Organization and Employees, sections 1338, 1400, and 1498 of Title 28, and section 3 of Title 35, Patents, and enacting provisions set out as notes under this section and sections 108, 109, 112, 114, 512, and 1301 of this title] may be cited as the ‘Digital Millennium Copyright Act’.”

Pub. L. 105–304, title I, §101, Oct. 28, 1998, 112 Stat. 2861, provided that: “This title [enacting chapter 12 of this title, amending this section and sections 104, 104A, 411, and 507 of this title, and enacting provisions set out as notes under this section and section 109 of this title] may be cited as the ‘WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998’.”

Pub. L. 105–304, title II, §201, Oct. 28, 1998, 112 Stat. 2877, provided that: “This title [enacting section 512 of this title and provisions set out as a note under section 512 of this title] may be cited as the ‘Online Copyright Infringement Liability Limitation Act’.”

Pub. L. 105–304, title III, §301, Oct. 28, 1998, 112 Stat. 2886, provided that: “This title [amending section 117 of this title] may be cited as the ‘Computer Maintenance Competition Assurance Act’.”

Pub. L. 105–304, title V, §501, Oct. 28, 1998, 112 Stat. 2905, provided that: “This Act [probably means ‘this title’, enacting chapter 13 of this title and amending sections 1338, 1400, and 1498 of Title 28, Judiciary and Judicial Procedure] may be referred to as the ‘Vessel Hull Design Protection Act’.”

Pub. L. 105–298, title I, §101, Oct. 27, 1998, 112 Stat. 2827, provided that: “This title [amending sections 108, 203, and 301 to 304 of this title, enacting provisions set out as a note under section 108 of this title, and amending provisions set out as notes under this section and

section 304 of this title] may be referred to as the ‘Sonny Bono Copyright Term Extension Act’.”

Pub. L. 105-298, title II, §201, Oct. 27, 1998, 112 Stat. 2830, provided that: “This title [enacting section 512 of this title, amending this section and sections 110 and 504 of this title, and enacting provisions set out as notes under this section] may be cited as the ‘Fairness In Music Licensing Act of 1998’.”

SHORT TITLE OF 1995 AMENDMENT

Pub. L. 104-39, §1, Nov. 1, 1995, 109 Stat. 336, provided that: “This Act [amending this section and sections 106, 111, 114, 115, 119, and 801 to 803 of this title and enacting provisions set out as a note above] may be cited as the ‘Digital Performance Right in Sound Recordings Act of 1995’.”

SHORT TITLE OF 1994 AMENDMENT

Pub. L. 103-369, §1, Oct. 18, 1994, 108 Stat. 3477, provided that: “This Act [amending sections 111 and 119 of this title and enacting and repealing provisions set out as notes under section 119 of this title] may be cited as the ‘Satellite Home Viewer Act of 1994’.”

SHORT TITLE OF 1993 AMENDMENT

Pub. L. 103-198, §1, Dec. 17, 1993, 107 Stat. 2304, provided that: “This Act [amending sections 111, 116, 118, 119, 801 to 803, 1004 to 1007, and 1010 of this title and section 1288 of Title 8, Aliens and Nationality, renumbering sections 116A and 804 of this title as sections 116 and 803, respectively, of this title, repealing sections 116, 803, and 805 to 810 of this title, and enacting provisions set out as notes under section 801 of this title and section 1288 of Title 8] may be cited as the ‘Copyright Royalty Tribunal Reform Act of 1993’.”

SHORT TITLE OF 1992 AMENDMENT

Pub. L. 102-563, §1, Oct. 28, 1992, 106 Stat. 4237, provided that: “This Act [enacting chapter 10 of this title, amending this section, sections 801, 804, and 912 of this title, and section 1337 of Title 19, Customs Duties, and enacting provisions set out as a note under section 1001 of this title] may be cited as the ‘Audio Home Recording Act of 1992’.”

Pub. L. 102-307, §1, June 26, 1992, 106 Stat. 264, provided that: “This Act [enacting sections 179 to 179k of Title 2, The Congress, amending this section and sections 108, 304, 408, 409, and 708 of this title, repealing sections 178 to 178l of Title 2, enacting provisions set out as notes under this section, section 304 of this title, and section 179 of Title 2, and repealing provisions set out as a note under section 178 of Title 2] may be cited as the ‘Copyright Amendments Act of 1992’.”

Pub. L. 102-307, title I, §101, June 26, 1992, 106 Stat. 264, provided that: “This title [amending this section and sections 304, 408, 409, and 708 of this title and enacting provisions set out as notes under this section and section 304 of this title] may be referred to as the ‘Copyright Renewal Act of 1992’.”

SHORT TITLE OF 1991 AMENDMENT

Pub. L. 102-64, §1, June 28, 1991, 105 Stat. 320, provided that: “This Act [amending section 914 of this title and enacting provisions set out as a note under section 914 of this title] may be cited as the ‘Semiconductor International Protection Extension Act of 1991’.”

SHORT TITLE OF 1990 AMENDMENT

Pub. L. 101-650, title VI, §601, Dec. 1, 1990, 104 Stat. 5128, provided that: “This title [enacting section 106A of this title, amending this section and sections 107, 113, 301, 411, 412, 501, and 506 of this title, and enacting provisions set out as notes under this section and section 106A of this title] may be cited as the ‘Visual Artists Rights Act of 1990’.”

Pub. L. 101-650, title VII, §701, Dec. 1, 1990, 104 Stat. 5133, provided that: “This title [enacting section 120 of this title, amending this section and sections 102, 106,

and 301 of this title, and enacting provisions set out as a note above] may be cited as the ‘Architectural Works Copyright Protection Act’.”

Pub. L. 101-650, title VIII, §801, Dec. 1, 1990, 104 Stat. 5134, provided that: “This title [amending section 109 of this title and enacting provisions set out as notes under sections 109 and 205 of this title] may be cited as the ‘Computer Software Rental Amendments Act of 1990’.”

Pub. L. 101-553, §1, Nov. 15, 1990, 104 Stat. 2749, provided that: “This Act [enacting section 511 of this title, amending sections 501, 910, and 911 of this title, and enacting provisions set out as a note under section 501 of this title] may be cited as the ‘Copyright Remedy Clarification Act’.”

Pub. L. 101-319, §1, July 3, 1990, 104 Stat. 290, provided that: “This Act [amending sections 701 and 802 of this title and sections 5315 and 5316 of Title 5, Government Organization and Employees, and enacting provisions set out as a note under section 701 of this title] may be cited as the ‘Copyright Royalty Tribunal Reform and Miscellaneous Pay Act of 1989’.”

Pub. L. 101-318, §1, July 3, 1990, 104 Stat. 287, provided that: “This Act [amending sections 106, 111, 704, 708, 801, and 804 of this title and enacting provisions set out as notes under sections 106, 111, 708, and 804 of this title] may be cited as the ‘Copyright Fees and Technical Amendments Act of 1989’.”

SHORT TITLE OF 1988 AMENDMENT

Pub. L. 100-667, title II, §201, Nov. 16, 1988, 102 Stat. 3949, provided that: “This title [enacting section 119 of this title and sections 612 and 613 of Title 47, Telecommunications, amending sections 111, 501, 801, and 804 of this title and section 605 of Title 47, and enacting provisions set out as notes under section 119 of this title] may be cited as the ‘Satellite Home Viewer Act of 1988’.” [Section ceases to be effective Dec. 31, 1994, see section 207 of Pub. L. 100-667, set out as an Effective and Termination Dates note under section 119 of this title.]

Pub. L. 100-568, §1(a), Oct. 31, 1988, 102 Stat. 2853, provided that: “This Act [enacting section 116A of this title, amending this section and sections 104, 116, 205, 301, 401 to 408, 411, 501, 504, 801, and 804 of this title, and enacting provisions set out as notes under this section] may be cited as the ‘Berne Convention Implementation Act of 1988’.”

SHORT TITLE OF 1984 AMENDMENT

Pub. L. 98-620, title III, §301, Nov. 8, 1984, 98 Stat. 3347, provided that: “This title [enacting chapter 9 of this title] may be cited as the ‘Semiconductor Chip Protection Act of 1984’.”

Pub. L. 98-450, §1, Oct. 4, 1984, 98 Stat. 1727, provided that: “This Act [amending sections 109 and 115 of this title and enacting provisions set out as a note under section 109 of this title] may be cited as the ‘Record Rental Amendment of 1984’.”

SHORT TITLE OF 1976 ACT

Pub. L. 94-553, Oct. 19, 1976, 90 Stat. 2541, which enacted this title and section 170 of Title 2, The Congress, amended section 131 of Title 2, section 290e of Title 15, Commerce and Trade, section 2318 of Title 18, Crimes and Criminal Procedure, section 543 of Title 26, Internal Revenue Code, section 1498 of Title 28, Judiciary and Judicial Procedure, sections 3202 and 3206 of Title 39, Postal Service, and sections 505 and 2117 of Title 44, Public Printing and Documents, and enacted provisions set out as notes preceding this section and under sections 104, 115, 304, 401, 407, 410, and 501 of this title, is popularly known as the “Copyright Act of 1976”.

SEVERABILITY

Pub. L. 106-379, §2(b)(2), Oct. 27, 2000, 114 Stat. 1444, provided that: “If the provisions of paragraph (1) [see Effective Date of 2000 Amendment note above], or any application of such provisions to any person or cir-

cumstance, is held to be invalid, the remainder of this section [amending this section and enacting provisions set out as a note above], the amendments made by this section, and the application of this section to any other person or circumstance shall not be affected by such invalidation.”

CONSTRUCTION OF 1998 AMENDMENT

Pub. L. 105-298, title II, §206, Oct. 27, 1998, 112 Stat. 2834, provided that: “Except as otherwise provided in this title [enacting section 512 of this title, amending this section and sections 110 and 504 of this title, and enacting provisions set out as notes under this section], nothing in this title shall be construed to relieve any performing rights society of any obligation under any State or local statute, ordinance, or law, or consent decree or other court order governing its operation, as such statute, ordinance, law, decree, or order is in effect on the date of the enactment of this Act [Oct. 27, 1998], as it may be amended after such date, or as it may be issued or agreed to after such date.”

FIRST AMENDMENT APPLICATION

Pub. L. 101-650, title VI, §609, Dec. 1, 1990, 104 Stat. 5132, provided that: “This title [see Short Title of 1990 Amendment note above] does not authorize any governmental entity to take any action or enforce restrictions prohibited by the First Amendment to the United States Constitution.”

BERNE CONVENTION; CONGRESSIONAL DECLARATIONS

Pub. L. 100-568, §2, Oct. 31, 1988, 102 Stat. 2853, provided that: “The Congress makes the following declarations:

“(1) The Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto (hereafter in this Act [see Short Title of 1988 Amendment note above] referred to as the ‘Berne Convention’) are not self-executing under the Constitution and laws of the United States.

“(2) The obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.

“(3) The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act [Oct. 31, 1988], satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.”

BERNE CONVENTION; CONSTRUCTION

Pub. L. 100-568, §3, Oct. 31, 1988, 102 Stat. 2853, provided that:

“(a) RELATIONSHIP WITH DOMESTIC LAW.—The provisions of the Berne Convention—

“(1) shall be given effect under title 17, as amended by this Act [see Short Title of 1988 Amendment note above], and any other relevant provision of Federal or State law, including the common law; and

“(2) shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself.

“(b) CERTAIN RIGHTS NOT AFFECTED.—The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law—

“(1) to claim authorship of the work; or

“(2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author’s honor or reputation.”

WORKS IN PUBLIC DOMAIN WITHOUT COPYRIGHT PROTECTION

Pub. L. 100-568, §12, Oct. 31, 1988, 102 Stat. 2860, provided that: “Title 17, United States Code, as amended

by this Act [see Short Title of 1988 Amendment note above], does not provide copyright protection for any work that is in the public domain in the United States.”

DEFINITIONS

Pub. L. 103-465, title V, §501, Dec. 8, 1994, 108 Stat. 4973, provided that: “For purposes of this title [enacting section 1101 of this title and section 2319A of Title 18, Crimes and Criminal Procedure, amending sections 104A and 109 of this title, sections 1052 and 1127 of Title 15, Commerce and Trade, and sections 41, 104, 111, 119, 154, 156, 172, 173, 252, 262, 271, 272, 287, 292, 295, 307, 365, and 373 of Title 35, Patents, enacting provisions set out as notes under section 1052 of Title 15 and sections 104 and 154 of Title 35, and amending provisions set out as a note under section 109 of this title]—

“(1) the term ‘WTO Agreement’ has the meaning given that term in section 2(9) of the Uruguay Round Agreements Act [19 U.S.C. 3501(9)]; and

“(2) the term ‘WTO member country’ has the meaning given that term in section 2(10) of the Uruguay Round Agreements Act.”

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

(Pub. L. 94-553, title I, §101, Oct. 19, 1976, 90 Stat. 2544; Pub. L. 101-650, title VII, §703, Dec. 1, 1990, 104 Stat. 5133.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Original Works of Authorship. The two fundamental criteria of copyright protection—originality and fixation in tangible form are restated in the first sentence of this cornerstone provision. The phrase “original works or authorship,” which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute. This standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.

In using the phrase “original works of authorship,” rather than “all the writings of an author” now in section 4 of the statute [section 4 of former title 17], the committee’s purpose is to avoid exhausting the constitutional power of Congress to legislate in this field, and to eliminate the uncertainties arising from the lat-

ter phrase. Since the present statutory language is substantially the same as the empowering language of the Constitution [Const. Art. I, §8, cl. 8], a recurring question has been whether the statutory and the constitutional provisions are coextensive. If so, the courts would be faced with the alternative of holding copyrightable something that Congress clearly did not intend to protect, or of holding constitutionally incapable of copyright something that Congress might one day want to protect. To avoid these equally undesirable results, the courts have indicated that "all the writings of an author" under the present statute is narrower in scope than the "writings" of "authors" referred to in the Constitution. The bill avoids this dilemma by using a different phrase—"original works of authorship"—in characterizing the general subject matter of statutory copyright protection.

The history of copyright law has been one of gradual expansion in the types of works accorded protection, and the subject matter affected by this expansion has fallen into two general categories. In the first, scientific discoveries and technological developments have made possible new forms of creative expression that never existed before. In some of these cases the new expressive forms—electronic music, filmstrips, and computer programs, for example—could be regarded as an extension of copyrightable subject matter Congress had already intended to protect, and were thus considered copyrightable from the outset without the need of new legislation. In other cases, such as photographs, sound recordings, and motion pictures, statutory enactment was deemed necessary to give them full recognition as copyrightable works.

Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. The bill does not intend either to freeze the scope of copyrightable subject matter at the present stage of communications technology or to allow unlimited expansion into areas completely outside the present congressional intent. Section 102 implies neither that that subject matter is unlimited nor that new forms of expression within that general area of subject matter would necessarily be unprotected.

The historic expansion of copyright has also applied to forms of expression which, although in existence for generations or centuries, have only gradually come to be recognized as creative and worthy of protection. The first copyright statute in this country, enacted in 1790, designated only "maps, charts, and books"; major forms of expression such as music, drama, and works of art achieved specific statutory recognition only in later enactments. Although the coverage of the present statute is very broad, and would be broadened further by the explicit recognition of all forms of choreography, there are unquestionably other areas of existing subject matter that this bill does not propose to protect but that future Congresses may want to.

Fixation in Tangible Form. As a basic condition of copyright protection, the bill perpetuates the existing requirement that a work be fixed in a "tangible medium of expression," and adds that this medium may be one "now known or later developed," and that the fixation is sufficient if the work "can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." This broad language is intended to avoid the artificial and largely unjustifiable distinctions, derived from cases such as *White-Smith Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908) [28 S.Ct. 319, 52 L.Ed. 655], under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed. Under the bill it makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device "now known or later developed."

Under the bill, the concept of fixation is important since it not only determines whether the provisions of the statute apply to a work, but it also represents the dividing line between common law and statutory protection. As will be noted in more detail in connection with section 301, an unfixed work of authorship, such as an improvisation or an unrecorded choreographic work, performance, or broadcast, would continue to be subject to protection under State common law or statute, but would not be eligible for Federal statutory protection under section 102.

The bill seeks to resolve, through the definition of "fixation" in section 101, the status of live broadcasts—sports, news coverage, live performances of music, etc.—that are reaching the public in unfixed form but that are simultaneously being recorded. When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes "authorship." The further question to be considered is whether there has been a fixation. If the images and sounds to be broadcast are first recorded (on a video tape, film, etc.) and then transmitted, the recorded work would be considered a "motion picture" subject to statutory protection against unauthorized reproduction or retransmission of the broadcast. If the program content is transmitted live to the public while being recorded at the same time, the case would be treated the same; the copyright owner would not be forced to rely on common law rather than statutory rights in proceeding against an infringing user of the live broadcast.

Thus, assuming it is copyrightable—as a "motion picture" or "sound recording," for example—the content of a live transmission should be regarded as fixed and should be accorded statutory protection if it is being recorded simultaneously with its transmission. On the other hand, the definition of "fixation" would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the "memory" of a computer.

Under the first sentence of the definition of "fixed" in section 101, a work would be considered "fixed in a tangible medium of expression" if there has been an authorized embodiment in a copy or phonorecord and if that embodiment "is sufficiently permanent or stable" to permit the work "to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." The second sentence makes clear that, in the case of "a work consisting of sounds, images, or both, that are being transmitted," the work is regarded as "fixed" if a fixation is being made at the same time as the transmission.

Under this definition "copies" and "phonorecords" together will comprise all of the material objects in which copyrightable works are capable of being fixed. The definitions of these terms in section 101, together with their usage in section 102 and throughout the bill, reflect a fundamental distinction between the "original work" which is the product of "authorship" and the multitude of material objects in which it can be embodied. Thus, in the sense of the bill, a "book" is not a work of authorship, but is a particular kind of "copy." Instead, the author may write a "literary work," which in turn can be embodied in a wide range of "copies" and "phonorecords," including books, periodicals, computer punch cards, microfilm, tape recordings, and so forth. It is possible to have an "original work of authorship" without having a "copy" or "phonorecord" embodying it, and it is also possible to have a "copy" or "phonorecord" embodying something that does not qualify as an "original work of authorship." The two essential elements—original work and tangible object—must merge through fixation in order to produce subject matter copyrightable under the statute.

Categories of Copyrightable Works. The second sentence of section 102 lists seven broad categories which the concept of "works of authorship" is said to "include". The use of the word "include," as defined in section 101, makes clear that the listing is "illustrative and not limitative," and that the seven categories do not necessarily exhaust the scope of "original works of authorship" that the bill is intended to protect. Rather, the list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories. The items are also overlapping in the sense that a work falling within one class may encompass works coming within some or all of the other categories. In the aggregate, the list covers all classes of works now specified in section 5 of title 17 [section 5 of former title 17]; in addition, it specifically enumerates "pantomimes and choreographic works".

Of the seven items listed, four are defined in section 101. The three undefined categories—"musical works," "dramatic works," and "pantomimes and choreographic works"—have fairly settled meanings. There is no need, for example, to specify the copyrightability of electronic or concrete music in the statute since the form of a work would no longer be of any importance, nor is it necessary to specify that "choreographic works" do not include social dance steps and simple routines.

The four items defined in section 101 are "literary works," "pictorial, graphic, and sculptural works," "motion pictures and audiovisual works", and "sound recordings". In each of these cases, definitions are needed not only because the meaning of the term itself is unsettled but also because the distinction between "work" and "material object" requires clarification. The term "literary works" does not connote any criterion of literary merit or qualitative value: it includes catalogs, directories, and similar factual, reference, or instructional works and compilations of data. It also includes computer data bases, and computer programs to the extent that they incorporate authorship in the programmer's expression of original ideas, as distinguished from the ideas themselves.

Correspondingly, the definition of "pictorial, graphic, and sculptural works" carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality. The term is intended to comprise not only "works of art" in the traditional sense but also works of graphic art and illustration, art reproductions, plans and drawings, photographs and reproductions of them, maps, charts, globes, and other cartographic works, works of these kinds intended for use in advertising and commerce, and works of "applied art." There is no intention whatever to narrow the scope of the subject matter now characterized in section 5(k) [section 5(k) of former title 17] as "prints or labels used for articles of merchandise." However, since this terminology suggests the material object in which a work is embodied rather than the work itself, the bill does not mention this category separately.

In accordance with the Supreme Court's decision in *Mazer v. Stein*, 347 U.S. 201 (1954) [74 S.Ct. 460, 98 L.Ed. 630, rehearing denied 74 S.Ct. 637, 347 U.S. 949, 98 L.Ed. 1096], works of "applied art" encompass all original pictorial, graphic, and sculptural works that are intended to be or have been embodied in useful articles, regardless of factors such as mass production, commercial exploitation, and the potential availability of design patent protection. The scope of exclusive rights in these works is given special treatment in section 113, to be discussed below.

The Committee has added language to the definition of "pictorial, graphic, and sculptural works" in an effort to make clearer the distinction between works of applied art protectable under the bill and industrial designs not subject to copyright protection. The declaration that "pictorial, graphic, and sculptural works" include "works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned" is classic language; it is drawn from

Copyright Office regulations promulgated in the 1940's and expressly endorsed by the Supreme Court in the *Mazer* case.

The second part of the amendment states that "the design of a useful article * * * shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." A "useful article" is defined as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." This part of the amendment is an adaptation of language added to the Copyright Office Regulations in the mid-1950's in an effort to implement the Supreme Court's decision in the *Mazer* case.

In adopting this amendatory language, the Committee is seeking to draw as clear a line as possible between copyrightable works of applied art and uncopied works of industrial design. A two-dimensional painting, drawing, or graphic work is still capable of being identified as such when it is printed on or applied to utilitarian articles such as textile fabrics, wallpaper, containers, and the like. The same is true when a statue or carving is used to embellish an industrial product or, as in the *Mazer* case, is incorporated into a product without losing its ability to exist independently as a work of art. On the other hand, although the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill. The test of separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design—that is, even if the appearance of an article is determined by aesthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable. And, even if the three-dimensional design contains some such element (for example, a carving on the back of a chair or a floral relief design on silver flatware), copyright protection would extend only to that element, and would not cover the over-all configuration of the utilitarian article as such.

A special situation is presented by architectural works. An architect's plans and drawings would, of course, be protected by copyright, but the extent to which that protection would extend to the structure depicted would depend on the circumstances. Purely nonfunctional or monumental structures would be subject to full copyright protection under the bill, and the same would be true of artistic sculpture or decorative ornamentation or embellishment added to a structure. On the other hand, where the only elements of shape in an architectural design are conceptually inseparable from the utilitarian aspects of the structure, copyright protection for the design would not be available.

The Committee has considered, but chosen to defer, the possibility of protecting the design of typefaces. A "typeface" can be defined as a set of letters, numbers, or other symbolic characters, whose forms are related by repeating design elements consistently applied in a notational system and are intended to be embodied in articles whose intrinsic utilitarian function is for use in composing text or other cognizable combinations of characters. The Committee does not regard the design of typeface, as thus defined, to be a copyrightable "pictorial, graphic, or sculptural work" within the meaning of this bill and the application of the dividing line in section 101.

Enactment of Public Law 92-140 in 1971 [Pub. L. 92-140, Oct. 15, 1971, 85 Stat. 391, which amended sections 1, 5, 19, 20, 26, and 101 of former title 17, and enacted provisions set out as a note under section 1 of

former title 17] marked the first recognition in American copyright law of sound recordings as copyrightable works. As defined in section 101, copyrightable "sound recordings" are original works of authorship comprising an aggregate of musical, spoken, or other sounds that have been fixed in tangible form. The copyrightable work comprises the aggregation of sounds and not the tangible medium of fixation. Thus, "sound recordings" as copyrightable subject matter are distinguished from "phonorecords," the latter being physical objects in which sounds are fixed. They are also distinguished from any copyrighted literary, dramatic, or musical works that may be reproduced on a "phonorecord."

As a class of subject matter, sound recordings are clearly within the scope of the "writings of an author" capable of protection under the Constitution [Const. Art. I, §8, cl. 8], and the extension of limited statutory protection to them was too long delayed. Aside from cases in which sounds are fixed by some purely mechanical means without originality of any kind, the copyright protection that would prevent the reproduction and distribution of unauthorized phonorecords of sound recordings is clearly justified.

The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may, however, be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable.

Sound tracks of motion pictures, long a nebulous area in American copyright law, are specifically included in the definition of "motion pictures," and excluded in the definition of "sound recordings." To be a "motion picture," as defined, requires three elements: (1) a series of images, (2) the capability of showing the images in certain successive order, and (3) an impression of motion when the images are thus shown. Coupled with the basic requirements of original authorship and fixation in tangible form, this definition encompasses a wide range of cinematographic works embodied in films, tapes, video disks, and other media. However, it would not include: (1) unauthorized fixations of live performances or telecasts, (2) live telecasts that are not fixed simultaneously with their transmission, or (3) filmstrips and slide sets which, although consisting of a series of images intended to be shown in succession, are not capable of conveying an impression of motion.

On the other hand, the bill equates audiovisual materials such as filmstrips, slide sets, and sets of transparencies with "motion pictures" rather than with "pictorial, graphic, and sculptural works." Their sequential showing is closer to a "performance" than to a "display," and the definition of "audiovisual works," which applies also to "motion pictures," embraces works consisting of a series of related images that are by their nature, intended for showing by means of projectors or other devices.

Nature of Copyright. Copyright does not preclude others from using the ideas or information revealed by the author's work. It pertains to the literary, musical, graphic, or artistic form in which the author expressed intellectual concepts. Section 102(b) makes clear that copyright protection does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Some concern has been expressed lest copyright in computer programs should extend protection to the methodology or processes adopted by the programmer, rather than merely to the "writing" expressing his

ideas. Section 102(b) is intended, among other things, to make clear that the expression adopted by the programmer is the copyrightable element in a computer program, and that the actual processes or methods embodied in the program are not within the scope of the copyright law.

Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law. Its purpose is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged.

Editorial Notes

AMENDMENTS

1990—Subsec. (a)(8). Pub. L. 101-650 added par. (8).

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101-650 applicable to any architectural work created on or after Dec. 1, 1990, and any architectural work, that, on Dec. 1, 1990, is unconstructed and embodied in unpublished plans or drawings, except that protection for such architectural work under this title terminates on Dec. 31, 2002, unless the work is constructed by that date, see section 706 of Pub. L. 101-650, set out as a note under section 101 of this title.

§ 103. Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

(Pub. L. 94-553, title I, §101, Oct. 19, 1976, 90 Stat. 2545.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Section 103 complements section 102: A compilation or derivative work is copyrightable if it represents an "original work of authorship" and falls within one or more of the categories listed in section 102. Read together, the two sections make plain that the criteria of copyrightable subject matter stated in section 102 apply with full force to works that are entirely original and to those containing preexisting material. Section 103(b) is also intended to define, more sharply and clearly than does section 7 of the present law [section 7 of former title 17], the important interrelationship and correlation between protection of preexisting and of "new" material in a particular work. The most important point here is one that is commonly misunderstood today: copyright in a "new version" covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material.

Between them the terms "compilations" and "derivative works" which are defined in section 101 com-

prehend every copyrightable work that employs pre-existing material or data of any kind. There is necessarily some overlapping between the two, but they basically represent different concepts. A “compilation” results from a process of selecting, bringing together, organizing, and arranging previously existing material of all kinds, regardless of whether the individual items in the material have been or ever could have been subject to copyright. A “derivative work,” on the other hand, requires a process of recasting, transforming, or adapting “one or more preexisting works”; the “preexisting work” must come within the general subject matter of copyright set forth in section 102, regardless of whether it is or was ever copyrighted.

The second part of the sentence that makes up section 103(a) deals with the status of a compilation or derivative work unlawfully employing preexisting copyrighted material. In providing that protection does not extend to “any part of the work in which such material has been used unlawfully,” the bill prevents an infringer from benefiting, through copyright protection, from committing an unlawful act, but preserves protection for those parts of the work that do not employ the preexisting work. Thus, an unauthorized translation of a novel could not be copyrighted at all, but the owner of copyright in an anthology of poetry could sue someone who infringed the whole anthology, even though the infringer proves that publication of one of the poems was unauthorized. Under this provision, copyright could be obtained as long as the use of the preexisting work was not “unlawful,” even though the consent of the copyright owner had not been obtained. For instance, the unauthorized reproduction of a work might be “lawful” under the doctrine of fair use or an applicable foreign law, and if so the work incorporating it could be copyrighted.

§ 104. Subject matter of copyright: National origin

(a) UNPUBLISHED WORKS.—The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

(b) PUBLISHED WORKS.—The works specified by sections 102 and 103, when published, are subject to protection under this title if—

(1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a treaty party, or is a stateless person, wherever that person may be domiciled; or

(2) the work is first published in the United States or in a foreign nation that, on the date of first publication, is a treaty party; or

(3) the work is a sound recording that was first fixed in a treaty party; or

(4) the work is a pictorial, graphic, or sculptural work that is incorporated in a building or other structure, or an architectural work that is embodied in a building and the building or structure is located in the United States or a treaty party; or

(5) the work is first published by the United Nations or any of its specialized agencies, or by the Organization of American States; or

(6) the work comes within the scope of a Presidential proclamation. Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States or to works that are first published in the United States, copyright protection on substantially the same basis as that on which the

foreign nation extends protection to works of its own nationals and domiciliaries and works first published in that nation, the President may by proclamation extend protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation, or which was first published in that nation. The President may revise, suspend, or revoke any such proclamation or impose any conditions or limitations on protection under a proclamation.

For purposes of paragraph (2), a work that is published in the United States or a treaty party within 30 days after publication in a foreign nation that is not a treaty party shall be considered to be first published in the United States or such treaty party, as the case may be.

(c) EFFECT OF BERNE CONVENTION.—No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.

(d) EFFECT OF PHONOGRAMS TREATIES.—Notwithstanding the provisions of subsection (b), no works other than sound recordings shall be eligible for protection under this title solely by virtue of the adherence of the United States to the Geneva Phonograms Convention or the WIPO Performances and Phonograms Treaty.

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2545; Pub. L. 100-568, § 4(a)(2), (3), Oct. 31, 1988, 102 Stat. 2855; Pub. L. 105-304, title I, § 102(b), Oct. 28, 1998, 112 Stat. 2862.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Section 104 of the bill [this section], which sets forth the basic criteria under which works of foreign origin can be protected under the U.S. copyright law, divides all works coming within the scope of sections 102 and 103 into two categories: unpublished and published. Subsection (a) imposes no qualifications of nationality and domicile with respect to unpublished works. Subsection (b) would make published works subject to protection under any one of four conditions:

(1) The author is a national or domiciliary of the United States or of a country with which the United States has copyright relations under a treaty, or is a stateless person;

(2) The work is first published in the United States or in a country that is a party to the Universal Copyright Convention;

(3) The work is first published by the United Nations, by any of its specialized agencies, or by the Organization of American States; or

(4) The work is covered by a Presidential proclamation extending protection to works originating in a specified country which extends protection to U.S. works “on substantially the same basis” as to its own works.

The third of these conditions represents a treaty obligation of the United States. Under the Second Protocol of the Universal Copyright Convention, protection under U.S. Copyright law is expressly required for works published by the United Nations, by U.N. special-

ized agencies and by the Organization of American States.

Editorial Notes**AMENDMENTS**

1998—Subsec. (b). Pub. L. 105-304, §102(b)(1)(G), inserted concluding provisions.

Subsec. (b)(1). Pub. L. 105-304, §102(b)(1)(A), substituted “treaty party” for “foreign nation that is a party to a copyright treaty to which the United States is also a party”.

Subsec. (b)(2). Pub. L. 105-304, §102(b)(1)(B), substituted “treaty party” for “party to the Universal Copyright Convention”.

Subsec. (b)(3). Pub. L. 105-304, §102(b)(1)(E), added par. (3). Former par. (3) redesignated (5).

Subsec. (b)(4). Pub. L. 105-304, §102(b)(1)(F), substituted “pictorial, graphic, or sculptural work that is incorporated in a building or other structure, or an architectural work that is embodied in a building and the building or structure is located in the United States or a treaty party” for “Berne Convention work”.

Subsec. (b)(5), (6). Pub. L. 105-304, §102(b)(1)(C), (D), redesignated par. (3) as (5) and transferred it to appear after par. (4) and redesignated former par. (5) as (6).

Subsec. (d). Pub. L. 105-304, §102(b)(2), added subsec. (d).

1988—Subsec. (b)(4), (5). Pub. L. 100-568, §4(a)(2), added par. (4) and redesignated former par. (4) as (5).

Subsec. (c). Pub. L. 100-568, §4(a)(3), added subsec. (c).

Statutory Notes and Related Subsidiaries**EFFECTIVE DATE OF 1998 AMENDMENT**

Amendment by section 102(b)(1) of Pub. L. 105-304 effective Oct. 28, 1998, except as otherwise provided, and amendment by section 102(b)(2) of Pub. L. 105-304 effective May 20, 2002, see section 105(a), (b)(2)(C) of Pub. L. 105-304, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-568 effective Mar. 1, 1989, with any cause of action arising under this title before such date being governed by provisions in effect when cause of action arose, see section 13 of Pub. L. 100-568, set out as a note under section 101 of this title.

Executive Documents**PROC. NO. 3792. COPYRIGHT EXTENSION: GERMANY**

Proc. No. 3792, July 12, 1967, 32 F.R. 10341, provided:

WHEREAS the President is authorized, in accordance with the conditions prescribed in Section 9 of Title 17 of the United States Code which includes the provisions of the act of Congress approved March 4, 1909, 35 Stat. 1075, as amended by the act of September 25, 1941, 55 Stat. 732, to grant an extension of time for fulfillment of the conditions and formalities prescribed by the copyright laws of the United States of America, with respect to works first produced or published outside the United States of America and subject to copyright or to renewal of copyright under the laws of the United States of America, by nationals of countries which accord substantially equal treatment to citizens of the United States of America; and

WHEREAS satisfactory official assurances have been received that, since April 15, 1892, citizens of the United States have been entitled to obtain copyright in Germany for their works on substantially the same basis as German citizens without the need of complying with any formalities, provided such works secured protection in the United States; and

WHEREAS, pursuant to Article 2 of the Law No. 8, Industrial, Literary and Artistic Property Rights of Foreign Nations and Nationals, promulgated by the Allied High Commission for Germany on October 20, 1949, literary or artistic property rights in Germany owned

by United States nationals at the commencement of or during the state of war between Germany and the United States of America which were transferred, seized, requisitioned, revoked or otherwise impaired by war measures, whether legislative, judicial or administrative, were, upon request made prior to October 3, 1950, restored to such United States nationals or their legal successors; and

WHEREAS, pursuant to Article 5 of the aforesaid law, any literary or artistic property right in Germany owned by a United States national at the commencement of or during the state of war between Germany and the United States of America was, upon request made prior to October 3, 1950, extended in term for a period corresponding to the inclusive time from the date of the commencement of the state of war, or such later date on which such right came in existence, to September 30, 1949; and

WHEREAS, by virtue of a proclamation by the President of the United States of America dated May 25, 1922, 42 Stat. 2271, German citizens are and have been entitled to the benefits of the act of Congress approved March 4, 1909, 35 Stat. 1075, as amended, including the benefits of Section 1(e) of the aforementioned Title 17 of the United States Code [section 1(e) of former Title 17]; and

WHEREAS, a letter of February 6, 1950, from the Chancellor of the Federal Republic of Germany to the Chairman of the Allied High Commission for Germany established the mutual understanding that reciprocal copyright relations continued in effect between the Federal Republic of Germany and the United States of America:

NOW, THEREFORE, I, LYNDON B. JOHNSON, President of the United States of America, by virtue of the authority vested in me by Section 9 of Title 17 of the United States Code [section 9 of former Title 17], do declare and proclaim:

(1) That, with respect to works first produced or published outside the United States of America: (a) where the work was subject to copyright under the laws of the United States of America on or after September 3, 1939, and on or before May 5, 1956, by an author or other owner who was then a German citizen; or (b) where the work was subject to renewal of copyright under the laws of the United States of America on or after September 3, 1939, and on or before May 5, 1956, by an author or other person specified in Sections 24 and 25 of the aforesaid Title 17 [sections 24 and 25 of former Title 17], who was then a German citizen, there has existed during several years of the aforementioned period such disruption and suspension of facilities essential to compliance with conditions and formalities prescribed with respect to such works by the copyright law of the United States of America as to bring such works within the terms of Section 9(b) of the aforesaid Title 17 [section 9(b) of former Title 17]; and

(2) That, in view of the reciprocal treatment accorded to citizens of the United States by the Federal Republic of Germany, the time within which persons who are presently German citizens may comply with such conditions and formalities with respect to such works is hereby extended for one year after the date of this proclamation.

It shall be understood that the term of copyright in any case is not and cannot be altered or affected by this proclamation. It shall also be understood that, as provided by Section 9(b) of Title 17, United States Code [section 9(b) of former Title 17], no liability shall attach under that title for lawful uses made or acts done prior to the effective date of this proclamation in connection with the above-described works, or with respect to the continuance for one year subsequent to such date of any business undertaking or enterprise lawfully undertaken prior to such date involving expenditure or contractual obligation in connection with the exploitation, production, reproduction, circulation or performance of any such works.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of July in the year of our Lord

nineteen hundred and sixty-seven, and of the Independence of the United States of America the one hundred and ninety-second.

LYNDON B. JOHNSON.

PRESIDENTIAL PROCLAMATIONS ISSUED UNDER
PREDECESSOR PROVISIONS

Pub. L. 94-553, title I, § 104, Oct. 19, 1976, 90 Stat. 2599, provided that: "All proclamations issued by the President under section 1(e) or 9(b) of title 17 as it existed on December 31, 1977, or under previous copyright statutes of the United States, shall continue in force until terminated, suspended, or revised by the President."

§ 104A. Copyright in restored works

(a) AUTOMATIC PROTECTION AND TERM.—

(1) TERM.—

(A) Copyright subsists, in accordance with this section, in restored works, and vests automatically on the date of restoration.

(B) Any work in which copyright is restored under this section shall subsist for the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States.

(2) EXCEPTION.—Any work in which the copyright was ever owned or administered by the Alien Property Custodian and in which the restored copyright would be owned by a government or instrumentality thereof, is not a restored work.

(b) OWNERSHIP OF RESTORED COPYRIGHT.—A restored work vests initially in the author or initial rightholder of the work as determined by the law of the source country of the work.

(c) FILING OF NOTICE OF INTENT TO ENFORCE RESTORED COPYRIGHT AGAINST RELIANCE PARTIES.—On or after the date of restoration, any person who owns a copyright in a restored work or an exclusive right therein may file with the Copyright Office a notice of intent to enforce that person's copyright or exclusive right or may serve such a notice directly on a reliance party. Acceptance of a notice by the Copyright Office is effective as to any reliance parties but shall not create a presumption of the validity of any of the facts stated therein. Service on a reliance party is effective as to that reliance party and any other reliance parties with actual knowledge of such service and of the contents of that notice.

(d) REMEDIES FOR INFRINGEMENT OF RESTORED COPYRIGHTS.—

(1) ENFORCEMENT OF COPYRIGHT IN RESTORED WORKS IN THE ABSENCE OF A RELIANCE PARTY.—As against any party who is not a reliance party, the remedies provided in chapter 5 of this title shall be available on or after the date of restoration of a restored copyright with respect to an act of infringement of the restored copyright that is commenced on or after the date of restoration.

(2) ENFORCEMENT OF COPYRIGHT IN RESTORED WORKS AS AGAINST RELIANCE PARTIES.—As against a reliance party, except to the extent provided in paragraphs (3) and (4), the remedies provided in chapter 5 of this title shall be available, with respect to an act of infringement of a restored copyright, on or after the

date of restoration of the restored copyright if the requirements of either of the following subparagraphs are met:

(A)(i) The owner of the restored copyright (or such owner's agent) or the owner of an exclusive right therein (or such owner's agent) files with the Copyright Office, during the 24-month period beginning on the date of restoration, a notice of intent to enforce the restored copyright; and

(ii)(I) the act of infringement commenced after the end of the 12-month period beginning on the date of publication of the notice in the Federal Register;

(II) the act of infringement commenced before the end of the 12-month period described in subclause (I) and continued after the end of that 12-month period, in which case remedies shall be available only for infringement occurring after the end of that 12-month period; or

(III) copies or phonorecords of a work in which copyright has been restored under this section are made after publication of the notice of intent in the Federal Register.

(B)(i) The owner of the restored copyright (or such owner's agent) or the owner of an exclusive right therein (or such owner's agent) serves upon a reliance party a notice of intent to enforce a restored copyright; and

(ii)(I) the act of infringement commenced after the end of the 12-month period beginning on the date the notice of intent is received;

(II) the act of infringement commenced before the end of the 12-month period described in subclause (I) and continued after the end of that 12-month period, in which case remedies shall be available only for the infringement occurring after the end of that 12-month period; or

(III) copies or phonorecords of a work in which copyright has been restored under this section are made after receipt of the notice of intent.

In the event that notice is provided under both subparagraphs (A) and (B), the 12-month period referred to in such subparagraphs shall run from the earlier of publication or service of notice.

(3) EXISTING DERIVATIVE WORKS.—(A) In the case of a derivative work that is based upon a restored work and is created—

(i) before the date of the enactment of the Uruguay Round Agreements Act, if the source country of the restored work is an eligible country on such date, or

(ii) before the date on which the source country of the restored work becomes an eligible country, if that country is not an eligible country on such date of enactment,

a reliance party may continue to exploit that derivative work for the duration of the restored copyright if the reliance party pays to the owner of the restored copyright reasonable compensation for conduct which would be subject to a remedy for infringement but for the provisions of this paragraph.

(B) In the absence of an agreement between the parties, the amount of such compensation

shall be determined by an action in United States district court, and shall reflect any harm to the actual or potential market for or value of the restored work from the reliance party's continued exploitation of the work, as well as compensation for the relative contributions of expression of the author of the restored work and the reliance party to the derivative work.

(4) COMMENCEMENT OF INFRINGEMENT FOR RELIANCE PARTIES.—For purposes of section 412, in the case of reliance parties, infringement shall be deemed to have commenced before registration when acts which would have constituted infringement had the restored work been subject to copyright were commenced before the date of restoration.

(e) NOTICES OF INTENT TO ENFORCE A RESTORED COPYRIGHT.—

(1) NOTICES OF INTENT FILED WITH THE COPYRIGHT OFFICE.—(A)(i) A notice of intent filed with the Copyright Office to enforce a restored copyright shall be signed by the owner of the restored copyright or the owner of an exclusive right therein, who files the notice under subsection (d)(2)(A)(i) (hereafter in this paragraph referred to as the "owner"), or by the owner's agent, shall identify the title of the restored work, and shall include an English translation of the title and any other alternative titles known to the owner by which the restored work may be identified, and an address and telephone number at which the owner may be contacted. If the notice is signed by an agent, the agency relationship must have been constituted in a writing signed by the owner before the filing of the notice. The Copyright Office may specifically require in regulations other information to be included in the notice, but failure to provide such other information shall not invalidate the notice or be a basis for refusal to list the restored work in the Federal Register.

(ii) If a work in which copyright is restored has no formal title, it shall be described in the notice of intent in detail sufficient to identify it.

(iii) Minor errors or omissions may be corrected by further notice at any time after the notice of intent is filed. Notices of corrections for such minor errors or omissions shall be accepted after the period established in subsection (d)(2)(A)(i). Notices shall be published in the Federal Register pursuant to subparagraph (B).

(B)(i) The Register of Copyrights shall publish in the Federal Register, commencing not later than 4 months after the date of restoration for a particular nation and every 4 months thereafter for a period of 2 years, lists identifying restored works and the ownership thereof if a notice of intent to enforce a restored copyright has been filed.

(ii) Not less than 1 list containing all notices of intent to enforce shall be maintained in the Public Information Office of the Copyright Office and shall be available for public inspection and copying during regular business hours pursuant to sections 705 and 708.

(C) The Register of Copyrights is authorized to fix reasonable fees based on the costs of re-

ceipt, processing, recording, and publication of notices of intent to enforce a restored copyright and corrections thereto.

(D)(i) Not later than 90 days before the date the Agreement on Trade-Related Aspects of Intellectual Property referred to in section 101(d)(15) of the Uruguay Round Agreements Act enters into force with respect to the United States, the Copyright Office shall issue and publish in the Federal Register regulations governing the filing under this subsection of notices of intent to enforce a restored copyright.

(ii) Such regulations shall permit owners of restored copyrights to file simultaneously for registration of the restored copyright.

(2) NOTICES OF INTENT SERVED ON A RELIANCE PARTY.—(A) Notices of intent to enforce a restored copyright may be served on a reliance party at any time after the date of restoration of the restored copyright.

(B) Notices of intent to enforce a restored copyright served on a reliance party shall be signed by the owner or the owner's agent, shall identify the restored work and the work in which the restored work is used, if any, in detail sufficient to identify them, and shall include an English translation of the title, any other alternative titles known to the owner by which the work may be identified, the use or uses to which the owner objects, and an address and telephone number at which the reliance party may contact the owner. If the notice is signed by an agent, the agency relationship must have been constituted in writing and signed by the owner before service of the notice.

(3) EFFECT OF MATERIAL FALSE STATEMENTS.—Any material false statement knowingly made with respect to any restored copyright identified in any notice of intent shall make void all claims and assertions made with respect to such restored copyright.

(f) IMMUNITY FROM WARRANTY AND RELATED LIABILITY.—

(1) IN GENERAL.—Any person who warrants, promises, or guarantees that a work does not violate an exclusive right granted in section 106 shall not be liable for legal, equitable, arbitral, or administrative relief if the warranty, promise, or guarantee is breached by virtue of the restoration of copyright under this section, if such warranty, promise, or guarantee is made before January 1, 1995.

(2) PERFORMANCES.—No person shall be required to perform any act if such performance is made infringing by virtue of the restoration of copyright under the provisions of this section, if the obligation to perform was undertaken before January 1, 1995.

(g) PROCLAMATION OF COPYRIGHT RESTORATION.—Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States, restored copyright protection on substantially the same basis as provided under this section, the President may by proclamation extend restored protection provided under this section to any work—

(1) of which one or more of the authors is, on the date of first publication, a national, domi-

ciliary, or sovereign authority of that nation; or

(2) which was first published in that nation.

The President may revise, suspend, or revoke any such proclamation or impose any conditions or limitations on protection under such a proclamation.

(h) DEFINITIONS.—For purposes of this section and section 109(a):

(1) The term “date of adherence or proclamation” means the earlier of the date on which a foreign nation which, as of the date the WTO Agreement enters into force with respect to the United States, is not a nation adhering to the Berne Convention or a WTO member country, becomes—

(A) a nation adhering to the Berne Convention;

(B) a WTO member country;

(C) a nation adhering to the WIPO Copyright Treaty;

(D) a nation adhering to the WIPO Performances and Phonograms Treaty; or

(E) subject to a Presidential proclamation under subsection (g).

(2) The “date of restoration” of a restored copyright is—

(A) January 1, 1996, if the source country of the restored work is a nation adhering to the Berne Convention or a WTO member country on such date, or

(B) the date of adherence or proclamation, in the case of any other source country of the restored work.

(3) The term “eligible country” means a nation, other than the United States, that—

(A) becomes a WTO member country after the date of the enactment of the Uruguay Round Agreements Act;

(B) on such date of enactment is, or after such date of enactment becomes, a nation adhering to the Berne Convention;

(C) adheres to the WIPO Copyright Treaty;

(D) adheres to the WIPO Performances and Phonograms Treaty; or

(E) after such date of enactment becomes subject to a proclamation under subsection (g).

(4) The term “reliance party” means any person who—

(A) with respect to a particular work, engages in acts, before the source country of that work becomes an eligible country, which would have violated section 106 if the restored work had been subject to copyright protection, and who, after the source country becomes an eligible country, continues to engage in such acts;

(B) before the source country of a particular work becomes an eligible country, makes or acquires 1 or more copies or phonorecords of that work; or

(C) as the result of the sale or other disposition of a derivative work covered under subsection (d)(3), or significant assets of a person described in subparagraph (A) or (B), is a successor, assignee, or licensee of that person.

(5) The term “restored copyright” means copyright in a restored work under this section.

(6) The term “restored work” means an original work of authorship that—

(A) is protected under subsection (a);

(B) is not in the public domain in its source country through expiration of term of protection;

(C) is in the public domain in the United States due to—

(i) noncompliance with formalities imposed at any time by United States copyright law, including failure of renewal, lack of proper notice, or failure to comply with any manufacturing requirements;

(ii) lack of subject matter protection in the case of sound recordings fixed before February 15, 1972; or

(iii) lack of national eligibility;

(D) has at least one author or rightholder who was, at the time the work was created, a national or domiciliary of an eligible country, and if published, was first published in an eligible country and not published in the United States during the 30-day period following publication in such eligible country; and

(E) if the source country for the work is an eligible country solely by virtue of its adherence to the WIPO Performances and Phonograms Treaty, is a sound recording.

(7) The term “rightholder” means the person—

(A) who, with respect to a sound recording, first fixes a sound recording with authorization, or

(B) who has acquired rights from the person described in subparagraph (A) by means of any conveyance or by operation of law.

(8) The “source country” of a restored work is—

(A) a nation other than the United States;

(B) in the case of an unpublished work—

(i) the eligible country in which the author or rightholder is a national or domiciliary, or, if a restored work has more than 1 author or rightholder, of which the majority of foreign authors or rightholders are nationals or domiciliaries; or

(ii) if the majority of authors or rightholders are not foreign, the nation other than the United States which has the most significant contacts with the work; and

(C) in the case of a published work—

(i) the eligible country in which the work is first published, or

(ii) if the restored work is published on the same day in 2 or more eligible countries, the eligible country which has the most significant contacts with the work.

(Added Pub. L. 103-182, title III, §334(a), Dec. 8, 1993, 107 Stat. 2115; amended Pub. L. 103-465, title V, §514(a), Dec. 8, 1994, 108 Stat. 4976; Pub. L. 104-295, §20(e)(2), Oct. 11, 1996, 110 Stat. 3529; Pub. L. 105-80, §2, Nov. 13, 1997, 111 Stat. 1530; Pub. L. 105-304, title I, §102(c), Oct. 28, 1998, 112 Stat. 2862.)

Editorial Notes

REFERENCES IN TEXT

The date of the enactment of the Uruguay Round Agreements Act, referred to in subsecs. (d)(3)(A) and (h)(3), is the date of enactment of Pub. L. 103–465, which was approved Dec. 8, 1994.

Section 101(d)(15) of the Uruguay Round Agreements Act, referred to in subsec. (e)(1)(D)(i), is classified to section 3511(d)(15) of Title 19, Customs Duties.

AMENDMENTS

1998—Subsec. (h)(1)(A) to (E). Pub. L. 105–304, §102(c)(1), added subpars. (A) to (E) and struck out former subpars. (A) and (B) which read as follows:

“(A) a nation adhering to the Berne Convention or a WTO member country; or

“(B) subject to a Presidential proclamation under subsection (g).”

Subsec. (h)(3). Pub. L. 105–304, §102(c)(2), amended par. (3) generally. Prior to amendment, par. (3) read as follows: “The term ‘eligible country’ means a nation, other than the United States, that—

“(A) becomes a WTO member country after the date of the enactment of the Uruguay Round Agreements Act;

“(B) on such date of enactment is, or after such date of enactment becomes, a member of the Berne Convention; or

“(C) after such date of enactment becomes subject to a proclamation under subsection (g).

For purposes of this section, a nation that is a member of the Berne Convention on the date of the enactment of the Uruguay Round Agreements Act shall be construed to become an eligible country on such date of enactment.”

Subsec. (h)(6)(E). Pub. L. 105–304, §102(c)(3), added subpar. (E).

Subsec. (h)(8)(B)(i). Pub. L. 105–304, §102(c)(4), inserted “of which” before “the majority” and struck out “of eligible countries” after “domiciliaries”.

Subsec. (h)(9). Pub. L. 105–304, §102(c)(5), struck out par. (9) which read as follows: “The terms ‘WTO Agreement’ and ‘WTO member country’ have the meanings given those terms in paragraphs (9) and (10), respectively, of section 2 of the Uruguay Round Agreements Act.”

1997—Subsec. (d)(3)(A). Pub. L. 105–80, §2(1), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: “In the case of a derivative work that is based upon a restored work and is created—

“(i) before the date of the enactment of the Uruguay Round Agreements Act, if the source country of the derivative work is an eligible country on such date, or

“(ii) before the date of adherence or proclamation, if the source country of the derivative work is not an eligible country on such date of enactment, a reliance party may continue to exploit that work for the duration of the restored copyright if the reliance party pays to the owner of the restored copyright reasonable compensation for conduct which would be subject to a remedy for infringement but for the provisions of this paragraph.”

Subsec. (e)(1)(B)(ii). Pub. L. 105–80, §2(2), struck out at end “Such list shall also be published in the Federal Register on an annual basis for the first 2 years after the applicable date of restoration.”

Subsec. (h)(2), (3). Pub. L. 105–80, §2(3), (4), amended pars. (2) and (3) generally. Prior to amendment, pars. (2) and (3) read as follows:

“(2) The ‘date of restoration’ of a restored copyright is the later of—

“(A) the date on which the Agreement on Trade-Related Aspects of Intellectual Property referred to in section 101(d)(15) of the Uruguay Round Agreements Act enters into force with respect to the United States, if the source country of the restored work is a nation adhering to the Berne Convention or a WTO member country on such date; or

“(B) the date of adherence or proclamation, in the case of any other source country of the restored work.

“(3) The term ‘eligible country’ means a nation, other than the United States, that is a WTO member country, adheres to the Berne Convention, or is subject to a proclamation under subsection (g).”

1996—Subsec. (h)(3). Pub. L. 104–295 substituted “subsection (g)” for “section 104A(g)”.

1994—Pub. L. 103–465 substituted “Copyright in restored works” for “Copyright in certain motion pictures” as section catchline and amended text generally, substituting present provisions for provisions restoring copyright in certain motion pictures and providing for effective date of protection as well as use of previously owned copies.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 1998 AMENDMENT

Subsec. (h)(1)(A), (B), (E), (3)(A), (B), (E) of this section and amendment by section 102(c)(4), (5) of Pub. L. 105–304 effective Oct. 28, 1998, except as otherwise provided, subsec. (h)(1)(C), (3)(C) of this section effective Mar. 6, 2002, and subsec. (h)(1)(D), (3)(D) of this section and amendment by section 102(c)(3) of Pub. L. 105–304 effective May 20, 2002, see section 105(a), (b)(1)(C), (D), (2)(D)–(F) of Pub. L. 105–304, set out as a note under section 101 of this title.

EFFECTIVE DATE

Section effective on the date the North American Free Trade Agreement enters into force with respect to the United States (Jan. 1, 1994), see section 335(a) of Pub. L. 103–182, formerly set out in an Effective Date of 1993 Amendment note under section 1052 of Title 15, Commerce and Trade.

Executive Documents

URUGUAY ROUND AGREEMENTS: ENTRY INTO FORCE

The Uruguay Round Agreements, including the World Trade Organization Agreement and agreements annexed to that Agreement, as referred to in section 3511(d) of Title 19, Customs Duties, entered into force with respect to the United States on Jan. 1, 1995. See note set out under section 3511 of Title 19.

§ 105. Subject matter of copyright: United States Government works

(a) **IN GENERAL.**—Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

(b) **COPYRIGHT PROTECTION OF CERTAIN WORKS.**—Subject to subsection (c), the covered author of a covered work owns the copyright to that covered work.

(c) **USE BY FEDERAL GOVERNMENT.**—

(1) **SECRETARY OF DEFENSE AUTHORITY.**—With respect to a covered author who produces a covered work in the course of employment at a covered institution described in subparagraphs (A) through (L) of subsection (d)(2), the Secretary of Defense may direct the covered author to provide the Federal Government with an irrevocable, royalty-free, worldwide, nonexclusive license to reproduce, distribute, perform, or display such covered work for purposes of the United States Government.

(2) **DIRECTOR OF NATIONAL INTELLIGENCE AUTHORITY.**—With respect to a covered author who produces a covered work in the course of

employment at the covered institution described in subsection (d)(2)(M),¹ the Director of National Intelligence may direct the covered author to provide the Federal Government with an irrevocable, royalty-free, world-wide, nonexclusive license to reproduce, distribute, perform, or display such covered work for purposes of the United States Government.

(d) DEFINITIONS.—In this section:

(1) The term “covered author” means a civilian member of the faculty of a covered institution.

(2) The term “covered institution” means the following:

- (A) National Defense University.
- (B) United States Military Academy.
- (C) Army War College.
- (D) United States Army Command and General Staff College.
- (E) United States Naval Academy.
- (F) Naval War College.
- (G) Naval Post Graduate School.
- (H) Marine Corps University.
- (I) United States Air Force Academy.
- (J) Air University.
- (K) Defense Language Institute.
- (L) United States Coast Guard Academy.
- (M)² United States Merchant Marine Academy.
- (M)² National Intelligence University.

(3) The term “covered Secretary”³ means—

(A) the Secretary of Transportation, with respect to the United States Merchant Marine Academy;

(B) the Secretary of Homeland Security, with respect to the United States Coast Guard Academy; or

(C) the Secretary of Defense, with respect to any other covered institution under paragraph (2).

(4) The term “covered work” means a literary work produced by a covered author in the course of employment at a covered institution for publication by a scholarly press or journal.

(Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2546; Pub. L. 116–92, div. A, title V, § 544, Dec. 20, 2019, 133 Stat. 1376; Pub. L. 117–263, div. C, title XXXV, § 3514, div. F, title LXIII, § 6306, Dec. 23, 2022, 136 Stat. 3068, 3504.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94–1476

Scope of the Prohibition. The basic premise of section 105 of the bill is the same as that of section 8 of the present law [section 8 of former title 17]—that works produced for the U.S. Government by its officers and employees should not be subject to copyright. The provision applies the principle equally to unpublished and published works.

The general prohibition against copyright in section 105 applies to “any work of the United States Government,” which is defined in section 101 as “a work prepared by an officer or employee of the United States

Government as part of that person’s official duties.” Under this definition a Government official or employee would not be prevented from securing copyright in a work written at that person’s own volition and outside his or her duties, even though the subject matter involves the Government work or professional field of the official or employee. Although the wording of the definition of “work of the United States Government” differs somewhat from that of the definition of “work made for hire,” the concepts are intended to be construed in the same way.

A more difficult and far-reaching problem is whether the definition should be broadened to prohibit copyright in works prepared under U.S. Government contract or grant. As the bill is written, the Government agency concerned could determine in each case whether to allow an independent contractor or grantee, to secure copyright in works prepared in whole or in part with the use of Government funds. The argument that has been made against allowing copyright in this situation is that the public should not be required to pay a “double subsidy,” and that it is inconsistent to prohibit copyright in works by Government employees while permitting private copyrights in a growing body of works created by persons who are paid with Government funds. Those arguing in favor of potential copyright protection have stressed the importance of copyright as an incentive to creation and dissemination in this situation, and the basically different policy considerations, applicable to works written by Government employees and those applicable to works prepared by private organizations with the use of Federal funds.

The bill deliberately avoids making any sort of outright, unqualified prohibition against copyright in works prepared under Government contract or grant. There may well be cases where it would be in the public interest to deny copyright in the writings generated by Government research contracts and the like; it can be assumed that, where a Government agency commissions a work for its own use merely as an alternative to having one of its own employees prepare the work, the right to secure a private copyright would be withheld. However, there are almost certainly many other cases where the denial of copyright protection would be unfair or would hamper the production and publication of important works. Where, under the particular circumstances, Congress or the agency involved finds that the need to have a work freely available outweighs the need of the private author to secure copyright, the problem can be dealt with by specific legislation, agency regulations, or contractual restrictions.

The prohibition on copyright protection for United States Government works is not intended to have any effect on protection of these works abroad. Works of the governments of most other countries are copyrighted. There are no valid policy reasons for denying such protection to United States Government works in foreign countries, or for precluding the Government from making licenses for the use of its works abroad.

The effect of section 105 is intended to place all works of the United States Government, published or unpublished, in the public domain. This means that the individual Government official or employee who wrote the work could not secure copyright in it or restrain its dissemination by the Government or anyone else, but it also means that, as far as the copyright law is concerned, the Government could not restrain the employee or official from disseminating the work if he or she chooses to do so. The use of the term “work of the United States Government” does not mean that a work falling within the definition of that term is the property of the U.S. Government.

LIMITED EXCEPTION FOR NATIONAL TECHNICAL INFORMATION SERVICE

At the House hearings in 1975 the U.S. Department of Commerce called attention to its National Technical Information Service (NTIS), which has a statutory mandate, under Chapter 23 [§1151 et seq.] of Title 15 of the U.S. Code, to operate a clearinghouse for the collec-

¹ So in original. There are two subpars. designated (M) in subsec. (d)(2).

² So in original. There are two subpars. (M).

³ Term does not appear in section after amendment by section 6306(2) of Pub. L. 117–263. See 2022 Amendment notes for subsec. (c) below.

tion and dissemination of scientific, technical and engineering information. Under its statute, NTIS is required to be as self-sustaining as possible, and not to force the general public to bear publishing costs that are for private benefit. The Department urged an amendment to section 105 that would allow it to secure copyright in NTIS publications both in the United States and abroad, noting that a precedent exists in the Standard Reference Data Act (15 U.S.C. § 290(e) [§ 290e]).

In response to this request the Committee adopted a limited exception to the general prohibition in section 105, permitting the Secretary of Commerce to "secure copyright for a limited term not to exceed five years, on behalf of the United States as author or copyright owner" in any NTIS publication disseminated pursuant to 15 U.S.C. Chapter 23 [§ 1151 et seq.]. In order to "secure copyright" in a work under this amendment the Secretary would be required to publish the work with a copyright notice, and the five-year term would begin upon the date of first publication.

Proposed Saving Clause. Section 8 of the statute now in effect [section 8 of former title 17] includes a saving clause intended to make clear that the copyright protection of a private work is not affected if the work is published by the Government. This provision serves a real purpose in the present law because of the ambiguity of the undefined term "any publication of the United States Government." Section 105 of the bill, however, uses the operative term "work of the United States Government" and defines it in such a way that privately written works are clearly excluded from the prohibition; accordingly, a saving clause becomes superfluous.

Retention of a saving clause has been urged on the ground that the present statutory provision is frequently cited, and that having the provision expressly stated in the law would avoid questions and explanations. The committee here observes: (1) there is nothing in section 105 that would relieve the Government of its obligation to secure permission in order to publish a copyrighted work; and (2) publication or other use by the Government of a private work would not affect its copyright protection in any way. The question of use of copyrighted material in documents published by the Congress and its Committees is discussed below in connection with section 107.

Works of the United States Postal Service. The intent of section 105 [this section] is to restrict the prohibition against Government copyright to works written by employees of the United States Government within the scope of their official duties. In accordance with the objectives of the Postal Reorganization Act of 1970 [Pub. L. 91-375, which enacted title 39, Postal Service], this section does not apply to works created by employees of the United States Postal Service. In addition to enforcing the criminal statutes proscribing the forgery or counterfeiting of postage stamps, the Postal Service could, if it chooses, use the copyright law to prevent the reproduction of postage stamp designs for private or commercial non-postal services (for example, in philatelic publications and catalogs, in general advertising, in art reproductions, in textile designs, and so forth). However, any copyright claimed by the Postal Service in its works, including postage stamp designs, would be subject to the same conditions, formalities, and time limits as other copyrightable works.

Editorial Notes

AMENDMENTS

2022—Subsec. (b). Pub. L. 117-263, § 3514(1), substituted "Certain Works" for "Certain of Works" in heading.

Subsec. (c). Pub. L. 117-263, § 6306(2), added subsec. (c) and struck out former subsec. (c). Text read as follows: "A covered Secretary may direct the covered author of a covered work to provide the Federal Government with an irrevocable, royalty-free, world-wide, nonexclusive license to reproduce, distribute, perform, or display such covered work for purposes of the United States Government."

Pub. L. 117-263, § 3514(2), substituted "A covered Secretary" for "The Secretary of Defense".

Subsec. (d). Pub. L. 117-263, §§ 3514(3), 6306(1), made identical amendments, redesignating subsec. (c) relating to definitions as (d).

Subsec. (d)(2)(M). Pub. L. 117-263, § 6306(3), added subparagraph (M) relating to National Intelligence University.

Pub. L. 117-263, § 3514(4)(A), added subparagraph (M) relating to United States Merchant Marine Academy.

Subsec. (d)(3), (4). Pub. L. 117-263, § 3514(4)(B), (C), added par. (3) and redesignated former par. (3) as (4).

2019—Pub. L. 116-92 designated existing provisions as subsec. (a), inserted heading, and added subsec. (b) and two subsecs. (c). Heading of subsec. (a) was conformed to the style used in this title.

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

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

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2546; Pub. L. 101-318, § 3(d), July 3, 1990, 104 Stat. 288; Pub. L. 101-650, title VII, § 704(b)(2), Dec. 1, 1990, 104 Stat. 5134; Pub. L. 104-39, § 2, Nov. 1, 1995, 109 Stat. 336; Pub. L. 106-44, § 1(g)(2), Aug. 5, 1999, 113 Stat. 222; Pub. L. 107-273, div. C, title III, § 13210(4)(A), Nov. 2, 2002, 116 Stat. 1909.)

HISTORICAL AND REVISION NOTES

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General Scope of Copyright. The five fundamental rights that the bill gives to copyright owners—the exclusive rights of reproduction, adaptation, publication, performance, and display—are stated generally in section 106. These exclusive rights, which comprise the so-called "bundle of rights" that is a copyright, are cumulative and may overlap in some cases. Each of the five enumerated rights may be subdivided indefinitely and, as discussed below in connection with section 201, each subdivision of an exclusive right may be owned and enforced separately.

The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 is made "subject to sections 107 through 118", and must be read in conjunction with those provisions.

The exclusive rights accorded to a copyright owner under section 106 are "to do and to authorize" any of the activities specified in the five numbered clauses. Use of the phrase "to authorize" is intended to avoid

any questions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance.

Rights of Reproduction, Adaptation, and Publication. The first three clauses of section 106, which cover all rights under a copyright except those of performance and display, extend to every kind of copyrighted work. The exclusive rights encompassed by these clauses, though closely related, are independent; they can generally be characterized as rights of copying, recording, adaptation, and publishing. A single act of infringement may violate all of these rights at once, as where a publisher reproduces, adapts, and sells copies of a person's copyrighted work as part of a publishing venture. Infringement takes place when any one of the rights is violated: where, for example, a printer reproduces copies without selling them or a retailer sells copies without having anything to do with their reproduction. The references to "copies or phonorecords," although in the plural, are intended here and throughout the bill to include the singular (1 U.S.C. §1).

Reproduction.—Read together with the relevant definitions in section 101, the right "to reproduce the copyrighted work in copies or phonorecords" means the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." As under the present law, a copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation. Wide departures or variations from the copyrighted work would still be an infringement as long as the author's "expression" rather than merely the author's "ideas" are taken. An exception to this general principle, applicable to the reproduction of copyrighted sound recordings, is specified in section 114.

"Reproduction" under clause (1) of section 106 is to be distinguished from "display" under clause (5). For a work to be "reproduced," its fixation in tangible form must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Thus, the showing of images on a screen or tube would not be a violation of clause (1), although it might come within the scope of clause (5).

Preparation of Derivative Works.—The exclusive right to prepare derivative works, specified separately in clause (2) of section 106, overlaps the exclusive right of reproduction to some extent. It is broader than that right, however, in the sense that reproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form.

To be an infringement the "derivative work" must be "based upon the copyrighted work," and the definition in section 101 refers to "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." Thus, to constitute a violation of section 106(2), the infringing work must incorporate a portion of the copyrighted work in some form; for example, a detailed commentary on a work or a programmatic musical composition inspired by a novel would not normally constitute infringements under this clause.

Use in Information Storage and Retrieval Systems.—As section 117 declares explicitly, the bill is not intended to alter the present law with respect to the use of copyrighted works in computer systems.

Public Distribution.—Clause (3) of section 106 establishes the exclusive right of publication: The right "to distribute copies or phonorecords of the copyrighted

work to the public by sale or other transfer of ownership, or by rental, lease, or lending." Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy or phonorecord of his work, whether by sale, gift, loan, or some rental or lease arrangement. Likewise, any unauthorized public distribution of copies or phonorecords that were unlawfully made would be an infringement. As section 109 makes clear, however, the copyright owner's rights under section 106(3) cease with respect to a particular copy or phonorecord once he has parted with ownership of it.

Rights of Public Performance and Display. Performing Rights and the "For Profit" Limitation.—The right of public performance under section 106(4) extends to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works and sound recordings" and, unlike the equivalent provisions now in effect, is not limited by any "for profit" requirement. The approach of the bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses.

This approach is more reasonable than the outright exemption of the 1909 statute. The line between commercial and "nonprofit" organizations is increasingly difficult to draw. Many "non-profit" organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad "not for profit" exemption could not only hurt authors but could dry up their incentive to write.

The exclusive right of public performance is expanded to include not only motion pictures, including works recorded on film, video tape, and video disks, but also audiovisual works such as filmstrips and sets of slides. This provision of section 106(4), which is consistent with the assimilation of motion pictures to audiovisual works throughout the bill, is also related to amendments of the definitions of "display" and "perform" discussed below. The important issue of performing rights in sound recordings is discussed in connection with section 114.

Right of Public Display.—Clause (5) of section 106 represents the first explicit statutory recognition in American copyright law of an exclusive right to show a copyrighted work, or an image of it, to the public. The existence or extent of this right under the present statute is uncertain and subject to challenge. The bill would give the owners of copyright in "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works", including the individual images of a motion picture or other audiovisual work, the exclusive right "to display the copyrighted work publicly."

Definitions. Under the definitions of "perform," "display," "publicly," and "transmit" in section 101, the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set. Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a "performance" or "display" under the bill, it would not be actionable as an infringement unless it were

done “publicly,” as defined in section 101. Certain other performances and displays, in addition to those that are “private,” are exempted or given qualified copyright control under sections 107 through 118.

To “perform” a work, under the definition in section 101, includes reading a literary work aloud, singing or playing music, dancing a ballet or other choreographic work, and acting out a dramatic work or pantomime. A performance may be accomplished “either directly or by means of any device or process,” including all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented.

The definition of “perform” in relation to “a motion picture or other audiovisual work” is “to show its images in any sequence or to make the sounds accompanying it audible.” The showing of portions of a motion picture, filmstrip, or slide set must therefore be sequential to constitute a “performance” rather than a “display”, but no particular order need be maintained. The purely aural performance of a motion picture sound track, or of the sound portions of an audiovisual work, would constitute a performance of the “motion picture or other audiovisual work”; but, where some of the sounds have been reproduced separately on phonorecords, a performance from the phonorecord would not constitute performance of the motion picture or audiovisual work.

The corresponding definition of “display” covers any showing of a “copy” of the work, “either directly or by means of a film, slide, television image, or any other device or process.” Since “copies” are defined as including the material object “in which the work is first fixed,” the right of public display applies to original works of art as well as to reproductions of them. With respect to motion pictures and other audiovisual works, it is a “display” (rather than a “performance”) to show their “individual images nonsequentially.” In addition to the direct showings of a copy of a work, “display” would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system.

Under clause (1) of the definition of “publicly” in section 101, a performance or display is “public” if it takes place “at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.” One of the principal purposes of the definition was to make clear that, contrary to the decision in *Metro-Goldwyn-Mayer Distributing Corp. v. Wyatt*, 21 C.O.Bull. 203 (D.Md.1932), performances in “semipublic” places such as clubs, lodges, factories, summer camps, and schools are “public performances” subject to copyright control. The term “a family” in this context would include an individual living alone, so that a gathering confined to the individual’s social acquaintances would normally be regarded as private. Routine meetings of businesses and governmental personnel would be excluded because they do not represent the gathering of a “substantial number of persons.”

Clause (2) of the definition of “publicly” in section 101 makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process. The definition of “transmit”—to communicate a performance or display “by any device or process whereby images or sound are received beyond the place from which they are sent”—is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and con-

veyed is a “transmission,” and if the transmission reaches the public in my [any] form, the case comes within the scope of clauses (4) or (5) of section 106.

Under the bill, as under the present law, a performance made available by transmission to the public at large is “public” even though the recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television service. Clause (2) of the definition of “publicly” is applicable “whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”

Editorial Notes

AMENDMENTS

2002—Pub. L. 107-273 substituted “122” for “121” in introductory provisions.

1999—Pub. L. 106-44 substituted “121” for “120” in introductory provisions.

1995—Par. (6). Pub. L. 104-39 added par. (6).

1990—Pub. L. 101-650 substituted “120” for “119” in introductory provisions.

Pub. L. 101-318 substituted “119” for “118” in introductory provisions.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104-39 effective 3 months after Nov. 1, 1995, see section 6 of Pub. L. 104-39, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101-650 applicable to any architectural work created on or after Dec. 1, 1990, and any architectural work, that, on Dec. 1, 1990, is unconstructed and embodied in unpublished plans or drawings, except that protection for such architectural work under this title terminates on Dec. 31, 2002, unless the work is constructed by that date, see section 706 of Pub. L. 101-650, set out as a note under section 101 of this title.

Pub. L. 101-318, §3(e)(3), July 3, 1990, 104 Stat. 289, provided that: “The amendment made by subsection (d) [amending this section] shall be effective as of November 16, 1988.”

PERFORMING RIGHTS SOCIETY CONSENT DECREES

Pub. L. 115-264, title I, §105, Oct. 11, 2018, 132 Stat. 3726, provided that:

“(a) DEFINITION.—In this section, the term ‘performing rights society’ has the meaning given the term in section 101 of title 17, United States Code.

“(b) NOTIFICATION OF REVIEW.—

“(1) IN GENERAL.—The Department of Justice shall provide timely briefings upon request of any Member of the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives regarding the status of a review in progress of a consent decree between the United States and a performing rights society.

“(2) CONFIDENTIALITY AND DELIBERATIVE PROCESS.—In accordance with applicable rules relating to confidentiality and agency deliberative process, the Department of Justice shall share with such Members of Congress detailed and timely information and pertinent documents related to the consent decree review.

“(c) ACTION BEFORE MOTION TO TERMINATE.—

“(1) IN GENERAL.—Before filing with the appropriate district court of the United States a motion to terminate a consent decree between the United States and

a performing rights society, including a motion to terminate a consent decree after the passage of a specified period of time, the Department of Justice shall—

“(A) notify Members of Congress and committees of Congress described in subsection (b); and

“(B) provide to such Members of Congress and committees information regarding the impact of the proposed termination on the market for licensing the public performance of musical works should the motion be granted.

(2) NOTIFICATION.—

“(A) IN GENERAL.—During the notification described in paragraph (1), and not later than a reasonable time before the date on which the Department of Justice files with the appropriate district court of the United States a motion to terminate a consent decree between the United States and a performing rights society, the Department of Justice should submit to the chairmen and ranking members of the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a written notification of the intent of the Department of Justice to file the motion.

“(B) CONTENTS.—The notification provided in subparagraph (A) shall include a written report to the chairmen and ranking members of the Committee on the Judiciary of [the] Senate and the Committee on the Judiciary of the House of Representatives setting forth—

“(i) an explanation of the process used by the Department of Justice to review the consent decree;

“(ii) a summary of the public comments received by the Department of Justice during the review by the Department; and

“(iii) other information provided to Congress under paragraph (1)(B).

“(d) SCOPE.—This section applies only to a consent decree between the United States and a performing rights society.”

§ 106A. Rights of certain authors to attribution and integrity

(a) **RIGHTS OF ATTRIBUTION AND INTEGRITY.**—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

(1) shall have the right—

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right—

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

(b) **SCOPE AND EXERCISE OF RIGHTS.**—Only the author of a work of visual art has the rights

conferred by subsection (a) in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are co-owners of the rights conferred by subsection (a) in that work.

(c) **EXCEPTIONS.**—(1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).

(2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.

(3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of “work of visual art” in section 101, and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).

(d) **DURATION OF RIGHTS.**—(1) With respect to works of visual art created on or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.

(2) With respect to works of visual art created before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, but title to which has not, as of such effective date, been transferred from the author, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.

(3) In the case of a joint work prepared by two or more authors, the rights conferred by subsection (a) shall endure for a term consisting of the life of the last surviving author.

(4) All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire.

(e) **TRANSFER AND WAIVER.**—(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.

(2) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a). Except as may otherwise be agreed by the author in a written instrument signed by the author, a waiver of the

rights conferred by subsection (a) with respect to a work of visual art shall not constitute a transfer of ownership of any copy of that work, or of ownership of a copyright or of any exclusive right under a copyright in that work.

(Added Pub. L. 101-650, title VI, § 603(a), Dec. 1, 1990, 104 Stat. 5128.)

Editorial Notes

REFERENCES IN TEXT

Section 610(a) of the Visual Artists Rights Act of 1990 [Pub. L. 101-650], referred to in subsec. (d), is set out as an Effective Date note below.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE

Pub. L. 101-650, title VI, §610, Dec. 1, 1990, 104 Stat. 5132, provided that:

“(a) IN GENERAL.—Subject to subsection (b) and except as provided in subsection (c), this title [enacting this section, amending sections 101, 107, 113, 301, 411, 412, 501, and 506 of this title, and enacting provisions set out as notes under this section and section 101 of this title] and the amendments made by this title take effect 6 months after the date of the enactment of this Act [Dec. 1, 1990].

“(b) APPLICABILITY.—The rights created by section 106A of title 17, United States Code, shall apply to—

“(1) works created before the effective date set forth in subsection (a) but title to which has not, as of such effective date, been transferred from the author, and

“(2) works created on or after such effective date, but shall not apply to any destruction, distortion, mutilation, or other modification (as described in section 106A(a)(3) of such title) of any work which occurred before such effective date.

“(c) SECTION 608.—Section 608 [set out below] takes effect on the date of the enactment of this Act.”

STUDIES BY COPYRIGHT OFFICE

Pub. L. 101-650, title VI, §608, Dec. 1, 1990, 104 Stat. 5132, directed the Register of Copyrights to study the extent to which authorship rights have been waived by visual artists under this section and to submit a final report to Congress not later than 5 years after Dec. 1, 1990, and also directed the Register of Copyrights to study the feasibility of implementing a requirement that, after the first sale of a work of art, would enable authors of visual art to share monetarily in the resale and enhanced value of that work, with a report to Congress due not later than 18 months after Dec. 1, 1990.

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2546; Pub. L. 101-650, title VI, § 607, Dec. 1, 1990, 104 Stat. 5132; Pub. L. 102-492, Oct. 24, 1992, 106 Stat. 3145.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

General Background of the Problem. The judicial doctrine of fair use, one of the most important and well-established limitations on the exclusive right of copyright owners, would be given express statutory recognition for the first time in section 107. The claim that a defendant's acts constituted a fair use rather than an infringement has been raised as a defense in innumerable copyright actions over the years, and there is ample case law recognizing the existence of the doctrine and applying it. The examples enumerated at page 24 of the Register's 1961 Report, while by no means exhaustive, give some idea of the sort of activities the courts might regard as fair use under the circumstances: “quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.”

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though in no case definitive or determinative, provide some gauge for balancing the equities. These criteria have been stated in various ways, but essentially they can all be reduced to the four standards which have been adopted in section 107: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”

These criteria are relevant in determining whether the basic doctrine of fair use, as stated in the first sentence of section 107, applies in a particular case: “Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”

The specific wording of section 107 as it now stands is the result of a process of accretion, resulting from the long controversy over the related problems of fair use and the reproduction (mostly by photocopying) of copyrighted material for educational and scholarly purposes. For example, the reference to fair use “by reproduction in copies or phonorecords or by any other means” is mainly intended to make clear that the doc-

trine has as much application to photocopying and taping as to older forms of use; it is not intended to give these kinds of reproduction any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use. Similarly, the newly-added reference to "multiple copies for classroom use" is a recognition that, under the proper circumstances of fairness, the doctrine can be applied to reproductions of multiple copies for the members of a class.

The Committee has amended the first of the criteria to be considered—"the purpose and character of the use"—to state explicitly that this factor includes a consideration of "whether such use is of a commercial nature or is for non-profit educational purposes." This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.

General Intention Behind the Provision. The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

Intention as to Classroom Reproduction. Although the works and uses to which the doctrine of fair use is applicable are as broad as the copyright law itself, most of the discussion of section 107 has centered around questions of classroom reproduction, particularly photocopying. The arguments on the question are summarized at pp. 30-31 of this Committee's 1967 report (H.R. Rep. No. 83, 90th Cong., 1st Sess.), and have not changed materially in the intervening years.

The Committee also adheres to its earlier conclusion, that "a specific exemption freeing certain reproductions of copyrighted works for educational and scholarly purposes from copyright control is not justified.. At the same time the Committee recognizes, as it did in 1967, that there is a "need for greater certainty and protection for teachers." In an effort to meet this need the Committee has not only adopted further amendments to section 107, but has also amended section 504(c) to provide innocent teachers and other non-profit users of copyrighted material with broad insulation against unwarranted liability for infringement. The latter amendments are discussed below in connection with Chapter 5 of the bill [§ 501 et seq. of this title].

In 1967 the Committee also sought to approach this problem by including, in its report, a very thorough discussion of "the considerations lying behind the four criteria listed in the amended section 107, in the context of typical classroom situations arising today." This discussion appeared on pp. 32-35 of the 1967 report, and with some changes has been retained in the Senate report on S. 22 (S. Rep. No. 94-473, pp. 63-65). The Committee has reviewed this discussion, and considers that it still has value as an analysis of various aspects of the problem.

At the Judiciary Subcommittee hearings in June 1975, Chairman Kastenmeier and other members urged the parties to meet together independently in an effort to achieve a meeting of the minds as to permissible educational uses of copyrighted material. The response to these suggestions was positive, and a number of meetings of three groups, dealing respectively with

classroom reproduction of printed material, music, and audio-visual material, were held beginning in September 1975.

In a joint letter to Chairman Kastenmeier, dated March 19, 1976, the representatives of the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, and of the Authors League of America, Inc., and the Association of American Publishers, Inc., stated:

You may remember that in our letter of March 8, 1976 we told you that the negotiating teams representing authors and publishers and the Ad Hoc Group had reached tentative agreement on guidelines to insert in the Committee Report covering educational copying from books and periodicals under Section 107 of H.R. 2223 and S. 22 [this section], and that as part of that tentative agreement each side would accept the amendments to Sections 107 and 504 [this section and section 504 of this title] which were adopted by your Subcommittee on March 3, 1976.

We are now happy to tell you that the agreement has been approved by the principals and we enclose a copy herewith. We had originally intended to translate the agreement into language suitable for inclusion in the legislative report dealing with Section 107 [this section], but we have since been advised by committee staff that this will not be necessary.

As stated above, the agreement refers only to copying from books and periodicals, and it is not intended to apply to musical or audiovisual works.

The full text of the agreement is as follows:

**AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING
IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS**

WITH RESPECT TO BOOKS AND PERIODICALS

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of H.R. 2223 [this section]. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill [this section]. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

GUIDELINES

I. Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A. A chapter from a book;
- B. An article from a periodical or newspaper;
- C. A short story, short essay or short poem, whether or not from a collective work;
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper;

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; *provided that*:

- A. The copying meets the tests of brevity and spontaneity as defined below; *and*,
- B. Meets the cumulative effect test as defined below; *and*
- C. Each copy includes a notice of copyright.

*Definitions**Brevity*

(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Spontaneity

(i) The copying is at the instance and inspiration of the individual teacher, and

(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

III. Prohibitions as to I and II Above

Notwithstanding any of the above, the following shall be prohibited:

(A) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.

(B) There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

(C) Copying shall not:

(a) substitute for the purchase of books, publishers' reprints or periodicals;

(b) be directed by higher authority;

(c) be repeated with respect to the same item by the same teacher from term to term.

(D) No charge shall be made to the student beyond the actual cost of the photocopying.

Agreed March 19, 1976.

Ad Hoc Committee on Copyright Law Revision:

By SHELDON ELLIOTT STEINBACH.

Author-Publisher Group:

Authors League of America:

By IRWIN KARP, Counsel.

Association of American Publishers, Inc.:

By ALEXANDER C. HOFFMAN.

Chairman, Copyright Committee.

In a joint letter dated April 30, 1976, representatives of the Music Publishers' Association of the United States, Inc., the National Music Publishers' Association, Inc., the Music Teachers National Association, the Music Educators National Conference, the National Association of Schools of Music, and the Ad Hoc Committee on Copyright Law Revision, wrote to Chairman Kastenmeier as follows:

During the hearings on H.R. 2223 in June 1975, you and several of your subcommittee members suggested that concerned groups should work together in developing guidelines which would be helpful to clarify Section 107 of the bill [this section].

Representatives of music educators and music publishers delayed their meetings until guidelines had been developed relative to books and periodicals. Shortly after that work was completed and those guidelines were forwarded to your subcommittee, representatives of the undersigned music organizations met together with representatives of the Ad Hoc Committee on Copyright Law Revision to draft guidelines relative to music.

We are very pleased to inform you that the discussions thus have been fruitful on the guidelines which have been developed. Since private music teachers are an important factor in music education, due consideration has been given to the concerns of that group.

We trust that this will be helpful in the report on the bill to clarify Fair Use as it applies to music.

The text of the guidelines accompanying this letter is as follows:

GUIDELINES FOR EDUCATIONAL USES OF MUSIC

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of H.R. 2223 [this section]. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future, and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill [this section]. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

A. Permissible Uses

1. Emergency copying to replace purchased copies which for any reason are not available for an imminent performance provided purchased replacement copies shall be substituted in due course.

2. (a) For academic purposes other than performance, multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a section, movement or aria, but in no case more than 10% of the whole work. The number of copies shall not exceed one copy per pupil.

(b) For academic purposes other than performance, a single copy of an entire performable unit (section, movement, aria, etc.) that is, (1) confirmed by the copyright proprietor to be out of print or (2) unavailable except in a larger work, may be made by or for a teacher solely for the purpose of his or her scholarly research or in preparation to teach a class.

3. Printed copies which have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if none exist.

4. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.

5. A single copy of a sound recording (such as a tape, disc or cassette) of copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

B. Prohibitions

1. Copying to create or replace or substitute for anthologies, compilations or collective works.

2. Copying of or from works intended to be "consumable" in the course of study or of teaching such as workbooks, exercises, standardized tests and answer sheets and like material.

3. Copying for the purpose of performance, except as in A(1) above.

4. Copying for the purpose of substituting for the purchase of music, except as in A(1) and A(2) above.

5. Copying without inclusion of the copyright notice which appears on the printed copy.

The problem of off-the-air taping for nonprofit classroom use of copyrighted audiovisual works incorporated in radio and television broadcasts has proved to be difficult to resolve. The Committee believes that the fair use doctrine has some limited application in this area, but it appears that the development of detailed guidelines will require a more thorough exploration than has so far been possible of the needs and problems of a number of different interests affected, and of the various legal problems presented. Nothing in section 107 or elsewhere in the bill is intended to change or prejudge the law on the point. On the other hand, the Committee is sensitive to the importance of the problem, and urges the representatives of the various interests, if possible under the leadership of the Register of Copyrights, to continue their discussions actively and in a constructive spirit. If it would be helpful to a solution, the Committee is receptive to undertaking further consideration of the problem in a future Congress.

The Committee appreciates and commends the efforts and the cooperative and reasonable spirit of the parties who achieved the agreed guidelines on books and periodicals and on music. Representatives of the American Association of University Professors and of the Association of American Law Schools have written to the Committee strongly criticizing the guidelines, particularly with respect to multiple copying, as being too restrictive with respect to classroom situations at the university and graduate level. However, the Committee notes that the Ad Hoc group did include representatives of higher education, that the stated "purpose of the * * * guidelines is to state the minimum and not the maximum standards of educational fair use" and that the agreement acknowledges "there may be instances in which copying which does not fall within the guidelines * * * may nonetheless be permitted under the criteria of fair use."

The Committee believes the guidelines are a reasonable interpretation of the minimum standards of fair use. Teachers will know that copying within the guidelines is fair use. Thus, the guidelines serve the purpose of fulfilling the need for greater certainty and protection for teachers. The Committee expresses the hope that if there are areas where standards other than these guidelines may be appropriate, the parties will continue their efforts to provide additional specific guidelines in the same spirit of good will and give and take that has marked the discussion of this subject in recent months.

Reproduction and Uses for Other Purposes. The concentrated attention given the fair use provision in the context of classroom teaching activities should not ob-

sure its application in other areas. It must be emphasized again that the same general standards of fair use are applicable to all kinds of uses of copyrighted material, although the relative weight to be given them will differ from case to case.

The fair use doctrine would be relevant to the use of excerpts from copyrighted works in educational broadcasting activities not exempted under section 110(2) or 112, and not covered by the licensing provisions of section 118. In these cases the factors to be weighed in applying the criteria of this section would include whether the performers, producers, directors, and others responsible for the broadcast were paid, the size and nature of the audience, the size and number of excerpts taken and, in the case of recordings made for broadcast, the number of copies reproduced and the extent of their reuse or exchange. The availability of the fair use doctrine to educational broadcasters would be narrowly circumscribed in the case of motion pictures and other audiovisual works, but under appropriate circumstances it could apply to the nonsequential showing of an individual still or slide, or to the performance of a short excerpt from a motion picture for criticism or comment.

Another special instance illustrating the application of the fair use doctrine pertains to the making of copies or phonorecords of works in the special forms needed for the use of blind persons. These special forms, such as copies in Braille and phonorecords of oral readings (talking books), are not usually made by the publishers for commercial distribution. For the most part, such copies and phonorecords are made by the Library of Congress' Division for the Blind and Physically Handicapped with permission obtained from the copyright owners, and are circulated to blind persons through regional libraries covering the nation. In addition, such copies and phonorecords are made locally by individual volunteers for the use of blind persons in their communities, and the Library of Congress conducts a program for training such volunteers. While the making of multiple copies or phonorecords of a work for general circulation requires the permission of the copyright owner, a problem addressed in section 710 of the bill, the making of a single copy or phonorecord by an individual as a free service for blind persons would properly be considered a fair use under section 107.

A problem of particular urgency is that of preserving for posterity prints of motion pictures made before 1942. Aside from the deplorable fact that in a great many cases the only existing copy of a film has been deliberately destroyed, those that remain are in immediate danger of disintegration; they were printed on film stock with a nitrate base that will inevitably decompose in time. The efforts of the Library of Congress, the American Film Institute, and other organizations to rescue and preserve this irreplaceable contribution to our cultural life are to be applauded, and the making of duplicate copies for purposes of archival preservation certainly falls within the scope of "fair use."

When a copyrighted work contains unfair, inaccurate, or derogatory information concerning an individual or institution, the individual or institution may copy and reproduce such parts of the work as are necessary to permit understandable comment on the statements made in the work.

The Committee has considered the question of publication, in Congressional hearings and documents, of copyrighted material. Where the length of the work or excerpt published and the number of copies authorized are reasonable under the circumstances, and the work itself is directly relevant to a matter of legitimate legislative concern, the Committee believes that the publication would constitute fair use.

During the consideration of the revision bill in the 94th Congress it was proposed that independent newsletters, as distinguished from house organs and publicity or advertising publications, be given separate treatment. It is argued that newsletters are particularly vulnerable to mass photocopying, and that most

newsletters have fairly modest circulations. Whether the copying of portions of a newsletter is an act of infringement or a fair use will necessarily turn on the facts of the individual case. However, as a general principle, it seems clear that the scope of the fair use doctrine should be considerably narrower in the case of newsletters than in that of either mass-circulation periodicals or scientific journals. The commercial nature of the user is a significant factor in such cases: Copying by a profit-making user of even a small portion of a newsletter may have a significant impact on the commercial market for the work.

The Committee has examined the use of excerpts from copyrighted works in the art work of calligraphers. The committee believes that a single copy reproduction of an excerpt from a copyrighted work by a calligrapher for a single client does not represent an infringement of copyright. Likewise, a single reproduction of excerpts from a copyrighted work by a student calligrapher or teacher in a learning situation would be a fair use of the copyrighted work.

The Register of Copyrights has recommended that the committee report describe the relationship between this section and the provisions of section 108 relating to reproduction by libraries and archives. The doctrine of fair use applies to library photocopying, and nothing contained in section 108 "in any way affects the right of fair use." No provision of section 108 is intended to take away any rights existing under the fair use doctrine. To the contrary, section 108 authorizes certain photocopying practices which may not qualify as a fair use.

The criteria of fair use are necessarily set forth in general terms. In the application of the criteria of fair use to specific photocopying practices of libraries, it is the intent of this legislation to provide an appropriate balancing of the rights of creators, and the needs of users.

Editorial Notes

AMENDMENTS

1992—Pub. L. 102-492 inserted at end "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

1990—Pub. L. 101-650 substituted "sections 106 and 106A" for "section 106" in introductory provisions.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101-650 effective 6 months after Dec. 1, 1990, see section 610 of Pub. L. 101-650, set out as an Effective Date note under section 106A of this title.

§ 108. Limitations on exclusive rights: Reproduction by libraries and archives

(a) Except as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this section, if—

(1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;

(2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it

is a part, but also to other persons doing research in a specialized field; and

(3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.

(b) The rights of reproduction and distribution under this section apply to three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if—

(1) the copy or phonorecord reproduced is currently in the collections of the library or archives; and

(2) any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.

(c) The right of reproduction under this section applies to three copies or phonorecords of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if—

(1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and

(2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.

For purposes of this subsection, a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

(d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if—

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(e) The rights of reproduction and distribution under this section apply to the entire work, or

to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if—

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(f) Nothing in this section—

(1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises: *Provided*, That such equipment displays a notice that the making of a copy may be subject to the copyright law;

(2) excuses a person who uses such reproducing equipment or who requests a copy or phonorecord under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107;

(3) shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program, subject to clauses (1), (2), and (3) of subsection (a); or

(4) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.

(g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee—

(1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): *Provided*, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

(h)(1) For purposes of this section, during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.

(2) No reproduction, distribution, display, or performance is authorized under this subsection if—

(A) the work is subject to normal commercial exploitation;

(B) a copy or phonorecord of the work can be obtained at a reasonable price; or

(C) the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.

(3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives.

(i) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsections (b), (c), and (h), or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2546; Pub. L. 102-307, title III, § 301, June 26, 1992, 106 Stat. 272; Pub. L. 105-80, § 12(a)(4), Nov. 13, 1997, 111 Stat. 1534; Pub. L. 105-298, title I, § 104, Oct. 27, 1998, 112 Stat. 2829; Pub. L. 105-304, title IV, § 404, Oct. 28, 1998, 112 Stat. 2889; Pub. L. 109-9, title IV, § 402, Apr. 27, 2005, 119 Stat. 227.)

HISTORICAL AND REVISION NOTES

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Notwithstanding the exclusive rights of the owners of copyright, section 108 provides that under certain conditions it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce or distribute not more than one copy or phonorecord of a work, provided (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage and (2) the collections of the library or archives are open to the public or available not only to researchers affiliated with the library or archives, but also to other persons doing research in a specialized field, and (3) the reproduction or distribution of the work includes a notice of copyright.

Under this provision, a purely commercial enterprise could not establish a collection of copyrighted works, call itself a library or archive, and engage in for-profit reproduction and distribution of photocopies. Similarly, it would not be possible for a non-profit institution, by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to carry out copying and distribution functions

that would be exempt if conducted by the non-profit institution itself.

The reference to "indirect commercial advantage" has raised questions as to the status of photocopying done by or for libraries or archival collections within industrial, profit-making, or proprietary institutions (such as the research and development departments of chemical, pharmaceutical, automobile, and oil corporations, the library of a proprietary hospital, the collections owned by a law or medical partnership, etc.).

There is a direct interrelationship between this problem and the prohibitions against "multiple" and "systematic" photocopying in section 108(g)(1) and (2). Under section 108, a library in a profitmaking organization would not be authorized to:

- (a) use a single subscription or copy to supply its employees with multiple copies of material relevant to their work; or
- (b) use a single subscription or copy to supply its employees, on request, with single copies of material relevant to their work, where the arrangement is "systematic" in the sense of deliberately substituting photocopying for subscription or purchase; or
- (c) use "interlibrary loan" arrangements for obtaining photocopies in such aggregate quantities as to substitute for subscriptions or purchase of material needed by employees in their work.

Moreover, a library in a profit-making organization could not evade these obligations by installing reproducing equipment on its premises for unsupervised use by the organization's staff.

Isolated, spontaneous making of single photocopies by a library in a for-profit organization, without any systematic effort to substitute photocopying for subscriptions or purchases, would be covered by section 108, even though the copies are furnished to the employees of the organization for use in their work. Similarly, for-profit libraries could participate in interlibrary arrangements for exchange of photocopies, as long as the reproduction or distribution was not "systematic." These activities, by themselves, would ordinarily not be considered "for direct or indirect commercial advantage," since the "advantage" referred to in this clause must attach to the immediate commercial motivation behind the reproduction or distribution itself, rather than to the ultimate profit-making motivation behind the enterprise in which the library is located. On the other hand, section 108 would not excuse reproduction or distribution if there were a commercial motive behind the actual making or distributing of the copies, if multiple copies were made or distributed, or if the photocopying activities were "systematic" in the sense that their aim was to substitute for subscriptions or purchases.

The rights of reproduction and distribution under section 108 apply in the following circumstances:

Archival Reproduction. Subsection (b) authorizes the reproduction and distribution of a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security, or for deposit for research use in another library or archives, if the copy or phonorecord reproduced is currently in the collections of the first library or archives. Only unpublished works could be reproduced under this exemption, but the right would extend to any type of work, including photographs, motion pictures and sound recordings. Under this exemption, for example, a repository could make photocopies of manuscripts by microfilm or electrostatic process, but could not reproduce the work in "machine-readable" language for storage in an information system.

Replacement of Damaged Copy. Subsection (c) authorizes the reproduction of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price. The scope and nature of a reasonable investigation to

determine that an unused replacement cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration), or an authorized reproducing service.

Articles and Small Excerpts. Subsection (d) authorizes the reproduction and distribution of a copy of not more than one article or other contribution to a copyrighted collection or periodical issue, or of a copy or phonorecord of a small part of any other copyrighted work. The copy or phonorecord may be made by the library where the user makes his request or by another library pursuant to an interlibrary loan. It is further required that the copy become the property of the user, that the library or archives have no notice that the copy would be used for any purposes other than private study, scholarship or research, and that the library or archives display prominently at the place where reproduction requests are accepted, and includes in its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

Out-of-Print Works. Subsection (e) authorizes the reproduction and distribution of a copy or phonorecord of an entire work under certain circumstances, if it has been established that a copy cannot be obtained at a fair price. The copy may be made by the library where the user makes his request or by another library pursuant to an interlibrary loan. The scope and nature of a reasonable investigation to determine that an unused copy cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if the owner can be located at the address listed in the copyright registration), or an authorized reproducing service. It is further required that the copy become the property of the user, that the library or archives have no notice that the copy would be used for any purpose other than private study, scholarship, or research, and that the library or archives display prominently at the place where reproduction requests are accepted, and include on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

General Exemptions. Clause (1) of subsection (f) specifically exempts a library or archives or its employees from liability for the unsupervised use of reproducing equipment located on its premises, provided that the reproducing equipment displays a notice that the making of a copy may be subject to the copyright law. Clause (2) of subsection (f) makes clear that this exemption of the library or archives does not extend to the person using such equipment or requesting such copy if the use exceeds fair use. Insofar as such person is concerned the copy or phonorecord made is not considered "lawfully" made for purposes of sections 109, 110 or other provisions of the title.

Clause (3) provides that nothing in section 108 is intended to limit the reproduction and distribution by lending of a limited number of copies and excerpts of an audiovisual news program. This exemption is intended to apply to the daily newscasts of the national television networks, which report the major events of the day. It does not apply to documentary (except documentary programs involving news reporting as that term is used in section 107), magazine-format or other public affairs broadcasts dealing with subjects of general interest to the viewing public.

The clause was first added to the revision bill in 1974 by the adoption of an amendment proposed by Senator Baker. It is intended to permit libraries and archives, subject to the general conditions of this section, to make off-the-air videotape recordings of daily network news casts for limited distribution to scholars and researchers for use in research purposes. As such, it is an

adjunct to the American Television and Radio Archive established in Section 113 of the Act [2 U.S.C. 170] which will be the principal repository for television broadcast material, including news broadcasts, the inclusion of language indicating that such material may only be distributed by lending by the library or archive is intended to preclude performance, copying, or sale, whether or not for profit, by the recipient of a copy of a television broadcast taped off-the-air pursuant to this clause.

Clause (4), in addition to asserting that nothing contained in section 108 "affects the right of fair use as provided by section 107", also provides that the right of reproduction granted by this section does not override any contractual arrangements assumed by a library or archives when it obtained a work for its collections: For example, if there is an express contractual prohibition against reproduction for any purpose, this legislation shall not be construed as justifying a violation of the contract. This clause is intended to encompass the situation where an individual makes papers, manuscripts or other works available to a library with the understanding that they will not be reproduced.

It is the intent of this legislation that a subsequent unlawful use by a user of a copy or phonorecord of a work lawfully made by a library, shall not make the library liable for such improper use.

Multiple Copies and Systematic Reproduction. Subsection (g) provides that the rights granted by this section extend only to the "isolated and unrelated reproduction of a single copy or phonorecord of the same material on separate occasions." However, this section does not authorize the related or concerted reproduction of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group.

With respect to material described in subsection (d)—articles or other contributions to periodicals or collections, and small parts of other copyrighted works—subsection (g)(2) provides that the exemptions of section 108 do not apply if the library or archive engages in "systematic reproduction or distribution of single or multiple copies or phonorecords." This provision in S. 22 provoked a storm of controversy, centering around the extent to which the restrictions on "systematic" activities would prevent the continuation and development of interlibrary networks and other arrangements involving the exchange of photocopies. After thorough consideration, the Committee amended section 108(g)(2) to add the following proviso:

Provided, that nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

In addition, the Committee added a new subsection (i) to section 108 [this section], requiring the Register of Copyrights, five years from the effective date of the new Act and at five-year intervals thereafter, to report to Congress upon "the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users," and to make appropriate legislative or other recommendations. As noted in connection with section 107, the Committee also amended section 504(c) in a way that would insulate librarians from unwarranted liability for copyright infringement; this amendment is discussed below.

The key phrases in the Committee's amendment of section 108(g)(2) are "aggregate quantities" and "substitute for a subscription to or purchase of" a work. To be implemented effectively in practice, these provisions will require the development and implementation of more-or-less specific guidelines establishing criteria to govern various situations.

The National Commission on New Technological Uses of Copyrighted Works (CONTU) offered to provide good

offices in helping to develop these guidelines. This offer was accepted and, although the final text of guidelines has not yet been achieved, the Committee has reason to hope that, within the next month, some agreement can be reached on an initial set of guidelines covering practices under section 108(g)(2).

Works Excluded. Subsection (h) provides that the rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than "an audiovisual work dealing with news." The latter term is intended as the equivalent in meaning of the phrase "audiovisual news program" in section 108(f)(3). The exclusions under subsection (h) do not apply to archival reproduction under subsection (b), to replacement of damaged or lost copies or phonorecords under subsection (c), or to "pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e)."

Although subsection (h) generally removes musical, graphic, and audiovisual works from the specific exemptions of section 108, it is important to recognize that the doctrine of fair use under section 107 remains fully applicable to the photocopying or other reproduction of such works. In the case of music, for example, it would be fair use for a scholar doing musicological research to have a library supply a copy of a portion of a score or to reproduce portions of a phonorecord of a work. Nothing in section 108 impairs the applicability of the fair use doctrine to a wide variety of situations involving photocopying or other reproduction by a library of copyrighted material in its collections, where the user requests the reproduction for legitimate scholarly or research purposes.

Editorial Notes

AMENDMENTS

2005—Subsec. (i). Pub. L. 109-9 substituted "(b), (c), and (h)" for "(b) and (c)".

1998—Subsec. (a). Pub. L. 105-304, § 404(1)(A), (B), in introductory provisions, substituted "Except as otherwise provided in this title and notwithstanding" for "Notwithstanding" and inserted ", except as provided in subsections (b) and (c)" after "of a work".

Subsec. (a)(3). Pub. L. 105-304, § 404(1)(C), inserted before period at end "that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section".

Subsec. (b). Pub. L. 105-304, § 404(2), substituted "three copies or phonorecords" for "a copy or phonorecord", struck out "in facsimile form" after "duplicated", and substituted "if—

"(1) the copy or phonorecord reproduced is currently in the collections of the library or archives; and

"(2) any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives."

for "if the copy or phonorecord reproduced is currently in the collections of the library or archives."

Subsec. (c). Pub. L. 105-304, § 404(3), substituted "three copies or phonorecords" for "a copy or phonorecord", struck out "in facsimile form" after "duplicated", inserted "or if the existing format in which the work is stored has become obsolete," after "stolen,", substituted "if—

"(1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and

"(2) any such copy or phonorecord that is reproduced in digital format is not made available to the

public in that format outside the premises of the library or archives in lawful possession of such copy.” for “if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.”, and inserted concluding provisions.

Subsecs. (h), (i). Pub. L. 105-298 added subsec. (h) and redesignated former subsec. (h) as (i).

1997—Subsec. (e). Pub. L. 105-80 substituted “fair price” for “pair price” in introductory provisions.

1992—Subsec. (i). Pub. L. 102-307 struck out subsec. (i), which read as follows: “Five years from the effective date of this Act, and at five-year intervals thereafter, the Register of Copyrights, after consulting with representatives of authors, book and periodical publishers, and other owners of copyrighted materials, and with representatives of library users and librarians, shall submit to the Congress a report setting forth the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users. The report should also describe any problems that may have arisen, and present legislative or other recommendations, if warranted.”

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 1998 AMENDMENTS

Pub. L. 105-304, title IV, §407, Oct. 28, 1998, 112 Stat. 2905, provided that: “Except as otherwise provided in this title [enacting section 4001 of Title 28, Judiciary and Judicial Procedure, amending this section, sections 112, 114, 701, and 801 to 803 of this title, section 5314 of Title 5, Government Organization and Employees, and section 3 of Title 35, Patents, and enacting provisions set out as notes under sections 112 and 114 of this title], this title and the amendments made by this title shall take effect on the date of the enactment of this Act [Oct. 28, 1998].”

Pub. L. 105-298, title I, §106, Oct. 27, 1998, 112 Stat. 2829, provided that: “This title [amending this section and sections 203 and 301 to 304 of this title, enacting provisions set out as a note under section 101 of this title, and amending provisions set out as notes under sections 101 and 304 of this title] and the amendments made by this title shall take effect on the date of the enactment of this Act [Oct. 27, 1998].”

§ 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord

(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord. Notwithstanding the preceding sentence, copies or phonorecords of works subject to restored copyright under section 104A that are manufactured before the date of restoration of copyright or, with respect to reliance parties, before publication or service of notice under section 104A(e), may be sold or otherwise disposed of without the authorization of the owner of the restored copyright for purposes of direct or indirect commercial advantage only during the 12-month period beginning on—

(1) the date of the publication in the Federal Register of the notice of intent filed with the Copyright Office under section 104A(d)(2)(A), or

(2) the date of the receipt of actual notice served under section 104A(d)(2)(B),

whichever occurs first.

(b)(1)(A) Notwithstanding the provisions of subsection (a), unless authorized by the owners

of copyright in the sound recording or the owner of copyright in a computer program (including any tape, disk, or other medium embodying such program), and in the case of a sound recording in the musical works embodied therein, neither the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program (including any tape, disk, or other medium embodying such program), may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord or computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending. Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution. The transfer of possession of a lawfully made copy of a computer program by a nonprofit educational institution to another nonprofit educational institution or to faculty, staff, and students does not constitute rental, lease, or lending for direct or indirect commercial purposes under this subsection.

(B) This subsection does not apply to—

(i) a computer program which is embodied in a machine or product and which cannot be copied during the ordinary operation or use of the machine or product; or

(ii) a computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes.

(C) Nothing in this subsection affects any provision of chapter 9 of this title.

(2)(A) Nothing in this subsection shall apply to the lending of a computer program for nonprofit purposes by a nonprofit library, if each copy of a computer program which is lent by such library has affixed to the packaging containing the program a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(B) Not later than three years after the date of the enactment of the Computer Software Rental Amendments Act of 1990, and at such times thereafter as the Register of Copyrights considers appropriate, the Register of Copyrights, after consultation with representatives of copyright owners and librarians, shall submit to the Congress a report stating whether this paragraph has achieved its intended purpose of maintaining the integrity of the copyright system while providing nonprofit libraries the capability to fulfill their function. Such report shall advise the Congress as to any information or recommendations that the Register of Copyrights considers necessary to carry out the purposes of this subsection.

(3) Nothing in this subsection shall affect any provision of the antitrust laws. For purposes of the preceding sentence, “antitrust laws” has the meaning given that term in the first section of the Clayton Act and includes section 5 of the Federal Trade Commission Act to the extent that section relates to unfair methods of competition.

(4) Any person who distributes a phonorecord or a copy of a computer program (including any

tape, disk, or other medium embodying such program) in violation of paragraph (1) is an infringer of copyright under section 501 of this title and is subject to the remedies set forth in sections 502, 503, 504, and 505. Such violation shall not be a criminal offense under section 506 or cause such person to be subject to the criminal penalties set forth in section 2319 of title 18.

(c) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

(d) The privileges prescribed by subsections (a) and (c) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

(e) Notwithstanding the provisions of sections 106(4) and 106(5), in the case of an electronic audiovisual game intended for use in coin-operated equipment, the owner of a particular copy of such a game lawfully made under this title, is entitled, without the authority of the copyright owner of the game, to publicly perform or display that game in coin-operated equipment, except that this subsection shall not apply to any work of authorship embodied in the audiovisual game if the copyright owner of the electronic audiovisual game is not also the copyright owner of the work of authorship.

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2548; Pub. L. 98-450, § 2, Oct. 4, 1984, 98 Stat. 1727; Pub. L. 100-617, § 2, Nov. 5, 1988, 102 Stat. 3194; Pub. L. 101-650, title VIII, §§ 802, 803, Dec. 1, 1990, 104 Stat. 5134, 5135; Pub. L. 103-465, title V, § 514(b), Dec. 8, 1994, 108 Stat. 4981; Pub. L. 105-80, § 12(a)(5), Nov. 13, 1997, 111 Stat. 1534; Pub. L. 110-403, title II, § 209(a)(1), Oct. 13, 2008, 122 Stat. 4264.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Effect on Further Disposition of Copy or Phonorecord. Section 109(a) restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of a work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means. Under this principle, which has been established by the court decisions and section 27 of the present law [section 27 of former title 17], the copyright owner's exclusive right of public distribution would have no effect upon anyone who owns "a particular copy or phonorecord lawfully made under this title" and who wishes to transfer it to someone else or to destroy it.

Thus, for example, the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose. This does not mean that conditions on future disposition of copies or phonorecords, imposed by a contract between their buyer and seller, would be unenforceable between the parties as a breach of contract, but it does mean that they could not be enforced by an action for infringement of copyright. Under section 202 however, the owner of the physical copy or phonorecord

cannot reproduce or perform the copyrighted work publicly without the copyright owner's consent.

To come within the scope of section 109(a), a copy or phonorecord must have been "lawfully made under this title," though not necessarily with the copyright owner's authorization. For example, any resale of an illegally "pirated" phonorecord would be an infringement, but the disposition of a phonorecord legally made under the compulsory licensing provisions of section 115 would not.

Effect on Display of Copy. Subsection (b) of section 109 deals with the scope of the copyright owner's exclusive right to control the public display of a particular "copy" of a work (including the original or prototype copy in which the work was first fixed). Assuming, for example, that a painter has sold the only copy of an original work of art without restrictions, would it be possible for him to restrain the new owner from displaying it publicly in galleries, shop windows, on a projector, or on television?

Section 109(b) adopts the general principle that the lawful owner of a copy of a work should be able to put his copy on public display without the consent of the copyright owner. As in cases arising under section 109(a), this does not mean that contractual restrictions on display between a buyer and seller would be unenforceable as a matter of contract law.

The exclusive right of public display granted by section 106(5) would not apply where the owner of a copy wishes to show it directly to the public, as in a gallery or display case, or indirectly, as through an opaque projector. Where the copy itself is intended for projection, as in the case of a photographic slide, negative, or transparency, the public projection of a single image would be permitted as long as the viewers are "present at the place where the copy is located."

On the other hand, section 109(b) takes account of the potentialities of the new communications media, notably television, cable and optical transmission devices, and information storage and retrieval devices, for replacing printed copies with visual images. First of all, the public display of an image of a copyrighted work would not be exempted from copyright control if the copy from which the image was derived were outside the presence of the viewers. In other words, the display of a visual image of a copyrighted work would be an infringement if the image were transmitted by any method (by closed or open circuit television, for example, or by a computer system) from one place to members of the public located elsewhere.

Moreover, the exemption would extend only to public displays that are made "either directly or by the projection of no more than one image at a time." Thus, even where the copy and the viewers are located at the same place, the simultaneous projection of multiple images of the work would not be exempted. For example, where each person in a lecture hall is supplied with a separate viewing apparatus, the copyright owner's permission would generally be required in order to project an image of a work on each individual screen at the same time.

The committee's intention is to preserve the traditional privilege of the owner of a copy to display it directly, but to place reasonable restrictions on the ability to display it indirectly in such a way that the copyright owner's market for reproduction and distribution of copies would be affected. Unless it constitutes a fair use under section 107, or unless one of the special provisions of section 110 or 111 is applicable, projection of more than one image at a time, or transmission of an image to the public over television or other communication channels, would be an infringement for the same reasons that reproduction in copies would be. The concept of "the place where the copy is located" is generally intended to refer to a situation in which the viewers are present in the same physical surroundings as the copy, even though they cannot see the copy directly.

Effect of Mere Possession of Copy or Phonorecord. Subsection (c) of section 109 qualifies the privileges

specified in subsections (a) and (b) by making clear that they do not apply to someone who merely possesses a copy or phonorecord without having acquired ownership of it. Acquisition of an object embodying a copyrighted work by rental, lease, loan, or bailment carries with it no privilege to dispose of the copy under section 109(a) or to display it publicly under section 109(b). To cite a familiar example, a person who has rented a print of a motion picture from the copyright owner would have no right to rent it to someone else without the owner's permission.

Burden of Proof in Infringement Actions. During the course of its deliberations on this section, the Committee's attention was directed to a recent court decision holding that the plaintiff in an infringement action had the burden of establishing that the allegedly infringing copies in the defendant's possession were not lawfully made or acquired under section 27 of the present law [section 27 of former title 17]. *American International Pictures, Inc. v. Foreman*, 400 F.Supp. 928 (S.D.Alabama 1975). The Committee believes that the court's decision, if followed, would place a virtually impossible burden on copyright owners. The decision is also inconsistent with the established legal principle that the burden of proof should not be placed upon a litigant to establish facts particularly within the knowledge of his adversary. The defendant in such actions clearly has the particular knowledge of how possession of the particular copy was acquired, and should have the burden of providing this evidence to the court. It is the intent of the Committee, therefore, that in an action to determine whether a defendant is entitled to the privilege established by section 109(a) and (b), the burden of proving whether a particular copy was lawfully made or acquired should rest on the defendant.

Editorial Notes

REFERENCES IN TEXT

The date of the enactment of the Computer Software Rental Amendments Act of 1990, referred to in subsec. (b)(2)(B), is the date of enactment of Pub. L. 101-650, which was approved Dec. 1, 1990.

The first section of the Clayton Act, referred to in subsec. (b)(3), is classified to section 12 of Title 15, Commerce and Trade, and section 53 of Title 29, Labor. The term "antitrust laws" is defined in section 12 of Title 15.

Section 5 of the Federal Trade Commission Act, referred to in subsec. (b)(3), is classified to section 45 of Title 15.

AMENDMENTS

2008—Subsec. (b)(4). Pub. L. 110-403 substituted “and 505” for “505, and 509”.

1997—Subsec. (b)(2)(B). Pub. L. 105-80 substituted “Register of Copyrights considers appropriate” for “Register of Copyright considers appropriate”.

1994—Subsec. (a). Pub. L. 103-465 inserted at end “Notwithstanding the preceding sentence, copies or phonorecords of works subject to restored copyright under section 104A that are manufactured before the date of restoration of copyright or, with respect to reliance parties, before publication or service of notice under section 104A(e), may be sold or otherwise disposed of without the authorization of the owner of the restored copyright for purposes of direct or indirect commercial advantage only during the 12-month period beginning on—

“(1) the date of the publication in the Federal Register of the notice of intent filed with the Copyright Office under section 104A(d)(2)(A), or

“(2) the date of the receipt of actual notice served under section 104A(d)(2)(B), whichever occurs first.”

1990—Subsec. (b)(1). Pub. L. 101-650, §802(2), added par. (1) and struck out former par. (1) which read as follows: “Notwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound

recording and in the musical works embodied therein, the owner of a particular phonorecord may not, for purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending. Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution.”

Subsec. (b)(2), (3). Pub. L. 101-650, §802(1), (2), added par. (2) and redesignated former pars. (2) and (3) as (3) and (4), respectively.

Subsec. (b)(4). Pub. L. 101-650, §802(3), added par. (4) and struck out former par. (4) which read as follows: “Any person who distributes a phonorecord in violation of clause (1) is an infringer of copyright under section 501 of this title and is subject to the remedies set forth in sections 502, 503, 504, 505, and 509. Such violation shall not be a criminal offense under section 506 or cause such person to be subject to the criminal penalties set forth in section 2319 of title 18.”

Pub. L. 101-650, §802(1), redesignated par. (3) as (4).

Subsec. (e). Pub. L. 101-650, §803, added subsec. (e).

1988—Subsec. (d). Pub. L. 100-617 substituted “(a) and (c)” for “(a) and (b)” and “copyright” for “coyright”.

1984—Subsecs. (b) to (d). Pub. L. 98-450 added subsec. (b) and redesignated existing subsecs. (b) and (c) as (c) and (d), respectively.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 1990 AMENDMENT

Pub. L. 101-650, title VIII, §804, Dec. 1, 1990, 104 Stat. 5136, as amended by Pub. L. 103-465, title V, §511, Dec. 8, 1994, 108 Stat. 4974, provided that:

“(a) IN GENERAL.—Subject to subsection (b), this title [amending this section and enacting provisions set out as notes under sections 101 and 205 of this title] and the amendments made in section 802 [amending this section] shall take effect on the date of the enactment of this Act [Dec. 1, 1990]. The amendment made by section 803 [amending this section] shall take effect one year after such date of enactment.

“(b) PROSPECTIVE APPLICATION.—Section 109(b) of title 17, United States Code, as amended by section 802 of this Act, shall not affect the right of a person in possession of a particular copy of a computer program, who acquired such copy before the date of the enactment of this Act [Dec. 1, 1990], to dispose of the possession of that copy on or after such date of enactment in any manner permitted by section 109 of title 17, United States Code, as in effect on the day before such date of enactment.

“(c) TERMINATION.—The amendments made by section 803 shall not apply to public performances or displays that occur on or after October 1, 1995.”

EFFECTIVE DATE OF 1984 AMENDMENT

Pub. L. 98-450, §4, Oct. 4, 1984, 98 Stat. 1728, as amended by Pub. L. 100-617, §1, Nov. 5, 1988, 102 Stat. 3194; Pub. L. 103-182, title III, §332, Dec. 8, 1993, 107 Stat. 2114, provided that:

“(a) The amendments made by this Act [amending this section and section 115 of this title and enacting provisions set out as a note under section 101 of this title] shall take effect on the date of the enactment of this Act [Oct. 4, 1984].

“(b) The provisions of section 109(b) of title 17, United States Code, as added by section 2 of this Act, shall not affect the right of an owner of a particular phonorecord of a sound recording, who acquired such ownership before the date of the enactment of this Act [Oct. 4, 1984], to dispose of the possession of that particular phonorecord on or after such date of enactment in any manner permitted by section 109 of title 17, United States Code, as in effect on the day before the date of the enactment of this Act.”

[Amendment by Pub. L. 103-182 to section 4 of Pub. L. 98-450, set out above, effective on the date the North

American Free Trade Agreement enters into force with respect to the United States (Jan. 1, 1994), see section 335 of Pub. L. 103-182, formerly set out as an Effective Date of 1993 Amendment note under section 1052 of Title 15, Commerce and Trade.]

EVALUATION OF IMPACT OF COPYRIGHT LAW AND AMENDMENTS ON ELECTRONIC COMMERCE AND TECHNOLOGICAL DEVELOPMENT

Pub. L. 105-304, title I, §104, Oct. 28, 1998, 112 Stat. 2876, provided that:

“(a) EVALUATION BY THE REGISTER OF COPYRIGHTS AND THE ASSISTANT SECRETARY FOR COMMUNICATIONS AND INFORMATION.—The Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce shall jointly evaluate—

“(1) the effects of the amendments made by this title [enacting chapter 12 of this title and amending sections 101, 104, 104A, 411, and 507 of this title] and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, United States Code; and

“(2) the relationship between existing and emergent technology and the operation of sections 109 and 117 of title 17, United States Code.

“(b) REPORT TO CONGRESS.—The Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce shall, not later than 24 months after the date of the enactment of this Act [Oct. 28, 1998], submit to the Congress a joint report on the evaluation conducted under subsection (a), including any legislative recommendations the Register and the Assistant Secretary may have.”

§ 110. Limitations on exclusive rights: Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks, or a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired, the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission, if—

(A) the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution;

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission;

(C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to—

(i) students officially enrolled in the course for which the transmission is made; or

(ii) officers or employees of governmental bodies as a part of their official duties or employment; and

(D) the transmitting body or institution—

(i) institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and provides notice to students that materials used in connection with the course may be subject to copyright protection; and

(ii) in the case of digital transmissions—

(I) applies technological measures that reasonably prevent—

(aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and

(bb) unauthorized further dissemination of the work in accessible form by such recipients to others; and

(II) does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination;

(3) performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly;

(4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if—

(A) there is no direct or indirect admission charge; or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of objection to the performance under the following conditions:

(i) the notice shall be in writing and signed by the copyright owner or such owner's duly authorized agent; and

(ii) the notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for the objection; and

(iii) the notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation;

(5)(A) except as provided in subparagraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—

(i) a direct charge is made to see or hear the transmission; or

(ii) the transmission thus received is further transmitted to the public;

(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if—

(i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and—

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and—

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(iii) no direct charge is made to see or hear the transmission or retransmission;

(iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and

(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed;

(6) performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organization; the exemption provided by this clause shall extend to any liability for copyright infringement that would otherwise be imposed on such body or organization, under doctrines of vicarious liability or related infringement, for a performance by a concessionnaire,¹ business establishment, or other person at such fair or exhibition, but shall not excuse any such person from liability for the performance;

(7) performance of a nondramatic musical work by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, or of the audiovisual or other devices utilized in such performance, and the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring;

(8) performance of a nondramatic literary work, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, or deaf or other handicapped persons who are unable to hear the aural signals accompanying a transmission of visual signals, if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of: (i) a governmental body; or (ii) a noncommercial educational broadcast station (as defined in section 397 of title 47); or (iii) a radio subcarrier authorization (as defined in 47 CFR 73.293–73.295 and 73.593–73.595); or (iv) a cable system (as defined in section 111(f));

(9) performance on a single occasion of a dramatic literary work published at least ten

¹ So in original. Probably should be "concessionnaire".

years before the date of the performance, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of a radio subcarrier authorization referred to in clause (8)(iii), *Provided*, That the provisions of this clause shall not be applicable to more than one performance of the same work by the same performers or under the auspices of the same organization;

(10) notwithstanding paragraph (4), the following is not an infringement of copyright: performance of a nondramatic literary or musical work in the course of a social function which is organized and promoted by a non-profit veterans' organization or a nonprofit fraternal organization to which the general public is not invited, but not including the invitees of the organizations, if the proceeds from the performance, after deducting the reasonable costs of producing the performance, are used exclusively for charitable purposes and not for financial gain. For purposes of this section the social functions of any college or university fraternity or sorority shall not be included unless the social function is held solely to raise funds for a specific charitable purpose; and

(11) the making imperceptible, by or at the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during a performance in or transmitted to that household for private home viewing, from an authorized copy of the motion picture, or the creation or provision of a computer program or other technology that enables such making imperceptible and that is designed and marketed to be used, at the direction of a member of a private household, for such making imperceptible, if no fixed copy of the altered version of the motion picture is created by such computer program or other technology.

The exemptions provided under paragraph (5) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners for the public performance or display of their works. Royalties payable to copyright owners for any public performance or display of their works other than such performances or displays as are exempted under paragraph (5) shall not be diminished in any respect as a result of such exemption.

In paragraph (2), the term "mediated instructional activities" with respect to the performance or display of a work by digital transmission under this section refers to activities that use such work as an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting. The term does not refer to activities that use, in 1 or more class sessions of a single course, such works as textbooks, course packs,

or other material in any media, copies or phonorecords of which are typically purchased or acquired by the students in higher education for their independent use and retention or are typically purchased or acquired for elementary and secondary students for their possession and independent use.

For purposes of paragraph (2), accreditation—

(A) with respect to an institution providing post-secondary education, shall be as determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education; and

(B) with respect to an institution providing elementary or secondary education, shall be as recognized by the applicable state certification or licensing procedures.

For purposes of paragraph (2), no governmental body or accredited nonprofit educational institution shall be liable for infringement by reason of the transient or temporary storage of material carried out through the automatic technical process of a digital transmission of the performance or display of that material as authorized under paragraph (2). No such material stored on the system or network controlled or operated by the transmitting body or institution under this paragraph shall be maintained on such system or network in a manner ordinarily accessible to anyone other than anticipated recipients. No such copy shall be maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary to facilitate the transmissions for which it was made.

For purposes of paragraph (11), the term "making imperceptible" does not include the addition of audio or video content that is performed or displayed over or in place of existing content in a motion picture.

Nothing in paragraph (11) shall be construed to imply further rights under section 106 of this title, or to have any effect on defenses or limitations on rights granted under any other section of this title or under any other paragraph of this section.

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2549; Pub. L. 97-366, § 3, Oct. 25, 1982, 96 Stat. 1759; Pub. L. 105-80, § 12(a)(6), Nov. 13, 1997, 111 Stat. 1534; Pub. L. 105-298, title II, § 202, Oct. 27, 1998, 112 Stat. 2830; Pub. L. 106-44, § 1(a), Aug. 5, 1999, 113 Stat. 221; Pub. L. 107-273, div. C, title III, §§ 13210(6), 13301(b), Nov. 2, 2002, 116 Stat. 1909, 1910; Pub. L. 109-9, title II, § 202(a), Apr. 27, 2005, 119 Stat. 223.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Clauses (1) through (4) of section 110 deal with performances and exhibitions that are now generally exempt under the "for profit" limitation or other provisions of the copyright law, and that are specifically exempted from copyright liability under this legislation. Clauses (1) and (2) between them are intended to cover all of the various methods by which performances or displays in the course of systematic instruction take place.

Face-to-Face Teaching Activities. Clause (1) of section 110 is generally intended to set out the conditions

under which performances or displays, in the course of instructional activities other than educational broadcasting, are to be exempted from copyright control. The clause covers all types of copyrighted works, and exempts their performance or display "by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution," where the activities take place "in a classroom or similar place devoted to instruction."

There appears to be no need for a statutory definition of "face-to-face" teaching activities to clarify the scope of the provision. "Face-to-face teaching activities" under clause (1) embrace instructional performances and displays that are not "transmitted." The concept does not require that the teacher and students be able to see each other, although it does require their simultaneous presence in the same general place. Use of the phrase "in the course of face-to-face teaching activities" is intended to exclude broadcasting or other transmissions from an outside location into classrooms, whether radio or television and whether open or closed circuit. However, as long as the instructor and pupils are in the same building or general area, the exemption would extend to the use of devices for amplifying or reproducing sound and for projecting visual images. The "teaching activities" exempted by the clause encompass systematic instruction of a very wide variety of subjects, but they do not include performances or displays, whatever their cultural value or intellectual appeal, that are given for the recreation or entertainment of any part of their audience.

Works Affected.—Since there is no limitation on the types of works covered by the exemption, teachers or students would be free to perform or display anything in class as long as the other conditions of the clause are met. They could read aloud from copyrighted text material, act out a drama, play or sing a musical work, perform a motion picture or filmstrip, or display text or pictorial material to the class by means of a projector. However, nothing in this provision is intended to sanction the unauthorized reproduction of copies or phonorecords for the purpose of classroom performance or display, and the clause contains a special exception dealing with performances from unlawfully made copies of motion pictures and other audiovisual works, to be discussed below.

Instructors or Pupils.—To come within clause (1), the performance or display must be "by instructors or pupils," thus ruling out performances by actors, singers, or instrumentalists brought in from outside the school to put on a program. However, the term "instructors" would be broad enough to include guest lecturers if their instructional activities remain confined to classroom situations. In general, the term "pupils" refers to the enrolled members of a class.

Nonprofit Educational Institution.—Clause (1) makes clear that it applies only to the teaching activities "of a nonprofit educational institution," thus excluding from the exemption performances or displays in profit-making institutions such as dance studios and language schools.

Classroom or Similar Place.—The teaching activities exempted by the clause must take place "in a classroom or similar place devoted to instruction." For example, performances in an auditorium or stadium during a school assembly, graduation ceremony, class play, or sporting event, where the audience is not confined to the members of a particular class, would fall outside the scope of clause (1), although in some cases they might be exempted by clause (4) of section 110. The "similar place" referred to in clause (1) is a place which is "devoted to instruction" in the same way a classroom is; common examples would include a studio, a workshop, a gymnasium, a training field, a library, the stage of an auditorium, or the auditorium itself, if it is actually used as a classroom for systematic instructional activities.

Motion Pictures and Other Audiovisual Works.—The final provision of clause (1) deals with the special problem of performances from unlawfully-made copies of

motion pictures and other audiovisual works. The exemption is lost where the copy being used for a classroom performance was "not lawfully made under this title" and the person responsible for the performance knew or had reason to suspect as much. This special exception to the exemption would not apply to performances from lawfully-made copies, even if the copies were acquired from someone who had stolen or converted them, or if the performances were in violation of an agreement. However, though the performance would be exempt under section 110(1) in such cases, the copyright owner might have a cause of action against the unauthorized distributor under section 106(3), or against the person responsible for the performance, for breach of contract.

Projection Devices.—As long as there is no transmission beyond the place where the copy is located, both section 109(b) and section 110(1) would permit the classroom display of a work by means of any sort of projection device or process.

Instructional Broadcasting. Works Affected.—The exemption for instructional broadcasting provided by section 110(2) would apply only to "performance of a nondramatic literary or musical work or display of a work." Thus, the copyright owner's permission would be required for the performance on educational television or radio of a dramatic work, of a dramatico-musical work such as an opera or musical comedy, or of a motion picture. Since, as already explained, audiovisual works such as filmstrips are equated with motion pictures, their sequential showing would be regarded as a performance rather than a display and would not be exempt under section 110(2). The clause is not intended to limit in any way the copyright owner's exclusive right to make dramatizations, adaptations, or other derivative works under section 106(2). Thus, for example, a performer could read a nondramatic literary work aloud under section 110(2), but the copyright owner's permission would be required for him to act it out in dramatic form.

Systematic Instructional Activities.—Under section 110(2) a transmission must meet three specified conditions in order to be exempted from copyright liability. The first of these, as provided by subparagraph (A), is that the performance or display must be "a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution." The concept of "systematic instructional activities" is intended as the general equivalent of "curriculums," but it could be broader in a case such as that of an institution using systematic teaching methods not related to specific course work. A transmission would be a regular part of these activities if it is in accordance with the pattern of teaching established by the governmental body or institution. The use of commercial facilities, such as those of a cable service, to transmit the performance or display, would not affect the exemption as long as the actual performance or display was for nonprofit purposes.

Content of Transmission.—Subclause (B) requires that the performance or display be directly related and of material assistance to the teaching content of the transmission.

Intended Recipients.—Subclause (C) requires that the transmission is made primarily for:

(i) Reception in classrooms or similar places normally devoted to instruction, or

(ii) Reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) Reception by officers or employees of governmental bodies as a part of their official duties or employment.

In all three cases, the instructional transmission need only be made "primarily" rather than "solely" to the specified recipients to be exempt. Thus, the transmission could still be exempt even though it is capable of reception by the public at large. Conversely, it would

not be regarded as made “primarily” for one of the required groups of recipients if the principal purpose behind the transmission is reception by the public at large, even if it is cast in the form of instruction and is also received in classrooms. Factors to consider in determining the “primary” purpose of a program would include its subject matter, content, and the time of its transmission.

Paragraph (i) of subclause (C) generally covers what are known as “in-school” broadcasts, whether open- or closed-circuit. The reference to “classrooms or similar places” here is intended to have the same meaning as that of the phrase as used in section 110(1). The exemption in paragraph (ii) is intended to exempt transmissions providing systematic instruction to individuals who cannot be reached in classrooms because of “their disabilities or other special circumstances.” Accordingly, the exemption is confined to instructional broadcasting that is an adjunct to the actual classwork of nonprofit schools or is primarily for people who cannot be brought together in classrooms such as preschool children, displaced workers, illiterates, and shut-ins.

There has been some question as to whether or not the language in this section of the bill is intended to include instructional television college credit courses. These telecourses are aimed at undergraduate and graduate students in earnest pursuit of higher educational degrees who are unable to attend daytime classes because of daytime employment, distance from campus, or some other intervening reason. So long as these broadcasts are aimed at regularly enrolled students and conducted by recognized higher educational institutions, the committee believes that they are clearly within the language of section 110(2)(C)(ii). Like night school and correspondence courses before them, these telecourses are fast becoming a valuable adjunct of the normal college curriculum.

The third exemption in subclause (C) is intended to permit the use of copyrighted material, in accordance with the other conditions of section 110(2), in the course of instructional transmissions for Government personnel who are receiving training “as a part of their official duties or employment.”

Religious Services. The exemption in clause (3) of section 110 covers performances of a nondramatic literary or musical work, and also performances “of dramatico-musical works of a religious nature”; in addition, it extends to displays of works of all kinds. The exemption applies where the performance or display is “in the course of services at a place of worship or other religious assembly.” The scope of the clause does not cover the sequential showing of motion pictures and other audiovisual works.

The exemption, which to some extent has its counterpart in sections 1 and 104 of the present law [sections 1 and 104 of former title 17], applies to dramatico-musical works “of a religious nature.” The purpose here is to exempt certain performances of sacred music that might be regarded as “dramatic” in nature, such as oratorios, cantatas, musical settings of the mass, choral services, and the like. The exemption is not intended to cover performances of secular operas, musical plays, motion pictures, and the like, even if they have an underlying religious or philosophical theme and take place “in the course of [religious] services.”

To be exempted under section 110(3) a performance or display must be “in the course of services,” thus excluding activities at a place of worship that are for social, educational, fund raising, or entertainment purposes. Some performances of these kinds could be covered by the exemption in section 110(4), discussed next. Since the performance or display must also occur “at a place of worship or other religious assembly,” the exemption would not extend to religious broadcasts or other transmissions to the public at large, even where the transmissions were sent from the place of worship. On the other hand, as long as services are being conducted before a religious gathering, the exemption would apply if they were conducted in places such as auditoriums, outdoor theaters, and the like.

Certain Other Nonprofit Performances. In addition to the educational and religious exemptions provided by clauses (1) through (3) of section 110, clause (4) contains a general exception to the exclusive right of public performance that would cover some, though not all, of the same ground as the present “for profit” limitation.

Scope of Exemption.—The exemption in clause (4) applies to the same general activities and subject matter as those covered by the “for profit” limitation today: public performances of nondramatic literary and musical works. However, the exemption would be limited to public performances given directly in the presence of an audience whether by means of living performers, the playing of phonorecords, or the operation of a receiving apparatus, and would not include a “transmission to the public.” Unlike the clauses (1) through (3) and (5) of section 110, but like clauses (6) through (8), clause (4) applies only to performing rights in certain works, and does not affect the exclusive right to display a work in public.

No Profit Motive.—In addition to the other conditions specified by the clause, the performance must be “without any purpose of direct or indirect commercial advantage.” This provision expressly adopts the principle established by the court decisions construing the “for profit” limitation: that public performances given or sponsored in connection with any commercial or profit-making enterprises are subject to the exclusive rights of the copyright owner even though the public is not charged for seeing or hearing the performance.

No Payment for Performance.—An important condition for this exemption is that the performance be given “without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers.” The basic purpose of this requirement is to prevent the free use of copyrighted material under the guise of charity where fees or percentages are paid to performers, promoters, producers, and the like. However, the exemption would not be lost if the performers, directors, or producers of the performance, instead of being paid directly “for the performance,” are paid a salary for duties encompassing the performance. Examples are performances by a school orchestra conducted by a music teacher who receives an annual salary, or by a service band whose members and conductors perform as part of their assigned duties and who receive military pay. The committee believes that performances of this type should be exempt, assuming the other conditions in clause (4) are met, and has not adopted the suggestion that the word “salary” be added to the phrase referring to the “payment of any fee or other compensation.”

Admission Charge.—Assuming that the performance involves no profit motive and no one responsible for it gets paid a fee, it must still meet one of two alternative conditions to be exempt. As specified in subclauses (A) and (B) of section 110(4), these conditions are: (1) that no direct or indirect admission charge is made, or (2) that the net proceeds are “used exclusively for educational, religious, or charitable purposes and not for private financial gain.”

Under the second of these conditions, a performance meeting the other conditions of clause (4) would be exempt even if an admission fee is charged, provided any amounts left “after deducting the reasonable costs of producing the performance” are used solely for bona fide educational, religious, or charitable purposes. In cases arising under this second condition and as provided in subclause (B), where there is an admission charge, the copyright owner is given an opportunity to decide whether and under what conditions the copyrighted work should be performed; otherwise, owners could be compelled to make involuntary donations to the fund-raising activities of causes to which they are opposed. The subclause would thus permit copyright owners to prevent public performances of their works under section 110(4)(B) by serving notice of objection, with the reasons therefor, at least seven days in advance.

Mere Reception in Public. Unlike the first four clauses of section 110, clause (5) is not to any extent a

counterpart of the "for profit" limitation of the present statute. It applies to performances and displays of all types of works, and its purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use.

The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. In the vast majority of these cases no royalties are collected today, and the exemption should be made explicit in the statute. This clause has nothing to do with cable television systems and the exemptions would be denied in any case where the audience is charged directly to see or hear the transmission.

With respect to section 110(5), the conference substitute conforms to the language in the Senate bill. It is the intent of the conferees that a small commercial establishment of the type involved in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), [95 S.Ct. 2040, 45 L.Ed.2d 84], which merely augmented a home-type receiver and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt. However, where the public communication was by means of something other than a home-type receiving apparatus, or where the establishment actually makes a further transmission to the public, the exemption would not apply.

On June 17, 1975, the Supreme Court handed down a decision in *Twentieth Century Music Corp. v. Aiken*, 95 S.Ct. 2040 [422 U.S. 151, 45 L.Ed.2d 84], that raised fundamental questions about the proper interpretation of section 110(5). The defendant, owner and operator of a fast-service food shop in downtown Pittsburgh, had "a radio with outlets to four speakers in the ceiling," which he apparently turned on and left on throughout the business day. Lacking any performing license, he was sued for copyright infringement by two ASCAP members. He lost in the District Court, won a reversal in the Third Circuit Court of Appeals, and finally prevailed, by a margin of 7-2, in the Supreme Court.

The *Aiken* decision is based squarely on the two Supreme Court decisions dealing with cable television. In *Fortnightly Corp. v. United Artists*, 392 U.S. 390 [88 S.Ct. 2084, 20 L.Ed.2d 1176, rehearing denied 89 S.Ct. 65, 393 U.S. 902, 21 L.Ed.2d 190], and again in *Teleprompter Corp. v. CBS*, 415 U.S. 394 [94 S.Ct. 1129, 39 L.Ed.2d 415], the Supreme Court has held that a CATV operator was not "performing" within the meaning of the 1909 statute, when it picked up broadcast signals off the air and retransmitted them to subscribers by cable. The *Aiken* decision extends this interpretation of the scope of the 1909 statute's right of "public performance for profit" to a situation outside the CATV context and, without expressly overruling the decision in *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) [51 S.Ct. 410, 75 L.Ed. 971], effectively deprives it of much meaning under the present law. For more than forty years the *Jewell-LaSalle* rule was thought to require a business establishment to obtain copyright licenses before it could legally pick up any broadcasts off the air and retransmit them to its guests and patrons. As reinterpreted by the *Aiken* decision, the rule of *Jewell-LaSalle* applies only if the broadcast being retransmitted was itself unlicensed.

The majority of the Supreme Court in the *Aiken* case based its decision on a narrow construction of the word "perform" in the 1909 statute. This basis for the decision is completely overturned by the present bill and its broad definition of "perform" in section 101. The Committee has adopted the language of section 110(5) with an amendment expressly denying the exemption in situations where "the performance or display is further transmitted beyond the place where the receiving apparatus is located"; in doing so, it accepts the traditional, pre-*Aiken*, interpretation of the *Jewell-LaSalle* decision, under which public communication by means

other than a home receiving set, or further transmission of a broadcast to the public, is considered an infringing act.

Under the particular fact situation in the *Aiken* case, assuming a small commercial establishment and the use of a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set, it is intended that the performances would be exempt under clause (5). However, the Committee considers this fact situation to represent the outer limit of the exemption, and believes that the line should be drawn at that point. Thus, the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial "sound system" installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system. Factors to consider in particular cases would include the size, physical arrangement, and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the aural or visual quality of the performance for individual members of the public using those areas.

Agricultural Fairs. The Committee also amended clause (6) of section 110 of S. 22 as adopted by the Senate. As amended, the provision would exempt "performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organization." The exemption extends only to the governmental body or nonprofit organization sponsoring the fair; the amendment makes clear that, while such a body or organization cannot itself be held vicariously liable for infringements by concessionaires at the fair, the concessionaires themselves enjoy no exemption under the clause.

Retail Sale of Phonorecords. Clause (7) provides that the performance of a nondramatic musical work or of a sound recording by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, is not an infringement of copyright. This exemption applies only if the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring.

Transmission to Handicapped Audiences. The new clause (8) of subsection 110, which had been added to S. 22 by the Senate Judiciary Committee when it reported the bill on November 20, 1975, and had been adopted by the Senate on February 19, 1976, was substantially amended by the Committee. Under the amendment, the exemption would apply only to performances of "nondramatic literary works" by means of "a transmission specifically designed for and primarily directed to" one or the other of two defined classes of handicapped persons: (1) "blind or other handicapped persons who are unable to read normal printed material as a result of their handicap" or (2) "deaf or other handicapped persons who are unable to hear the aural signals accompanying a transmission." Moreover, the exemption would be applicable only if the performance is "without any purpose of direct or indirect commercial advantage," and if the transmission takes place through government facilities or through the facilities of a non-commercial educational broadcast station, a radio subcarrier authorization (SCA), or a cable system.

Editorial Notes

AMENDMENTS

2005—Pub. L. 109-9, §202(a)(4), inserted two pars. relating to par. (11) at end of concluding provisions.

Par. (11). Pub. L. 109-9, § 202(a)(1)-(3), added par. (11). 2002—Pub. L. 107-273, § 13301(b)(2), inserted concluding provisions relating to par. (2).

Par. (2). Pub. L. 107-273, § 13301(b)(1), added par. (2) and struck out former par. (2) which read as follows: “performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission, if—

“(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

“(B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and

“(C) the transmission is made primarily for—

“(i) reception in classrooms or similar places normally devoted to instruction, or

“(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

“(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment;”.

Par. (4)(B). Pub. L. 107-273, § 13210(6), substituted colon for semicolon at end of introductory provisions.

1999—Par. (5)(A). Pub. L. 106-44 redesignated clss. (A) and (B) as (i) and (ii), respectively.

1998—Pub. L. 105-298, § 202(a)(2), inserted concluding provisions relating to par. (5).

Par. (5). Pub. L. 105-298, § 202(a)(1), designated existing provisions as subpar. (A), inserted “except as provided in subparagraph (B),” after “(A)”, and added subpar. (B).

Par. (7). Pub. L. 105-298, § 202(b), inserted “or of the audiovisual or other devices utilized in such performance,” after “phonorecords of the work.”.

1997—Par. (8). Pub. L. 105-80, § 12(a)(6)(A), substituted semicolon for period at end.

Par. (9). Pub. L. 105-80, § 12(a)(6)(B), substituted “; and” for period at end.

Par. (10). Pub. L. 105-80, § 12(a)(6)(C), substituted “paragraph (4)” for “paragraph 4 above”.

1982—Par. (10). Pub. L. 97-366 added par. (10).

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105-298 effective 90 days after Oct. 27, 1998, see section 207 of Pub. L. 105-298, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-366 effective 30 days after Oct. 25, 1982, see section 2 of Pub. L. 97-366, set out as a note under section 708 of this title.

§ 111. Limitations on exclusive rights: Secondary transmissions of broadcast programming by cable

(a) CERTAIN SECONDARY TRANSMISSIONS EXEMPTED.—The secondary transmission of a performance or display of a work embodied in a primary transmission is not an infringement of copyright if—

(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct

charge is made to see or hear the secondary transmission; or

(2) the secondary transmission is made solely for the purpose and under the conditions specified by paragraph (2) of section 110; or

(3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided*, That the provisions of this paragraph extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions;

(4) the secondary transmission is made by a satellite carrier pursuant to a statutory license under section 119 or section 122;

(5) the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

(b) SECONDARY TRANSMISSION OF PRIMARY TRANSMISSION TO CONTROLLED GROUP.—Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a performance or display of a work embodied in a primary transmission is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public: *Provided, however*, That such secondary transmission is not actionable as an act of infringement if—

(1) the primary transmission is made by a broadcast station licensed by the Federal Communications Commission; and

(2) the carriage of the signals comprising the secondary transmission is required under the rules, regulations, or authorizations of the Federal Communications Commission; and

(3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.

(c) SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

(1) Subject to the provisions of paragraphs (2), (3), and (4) of this subsection and section 114(d), secondary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico shall be subject to statutory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or

authorizations of the Federal Communications Commission.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, in the following cases:

(A) where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations, or authorizations of the Federal Communications Commission; or

(B) where the cable system has not deposited the statement of account and royalty fee required by subsection (d).

(3) Notwithstanding the provisions of paragraph (1) of this subsection and subject to the provisions of subsection (e) of this section, the secondary transmission to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television commercial advertising market research: *Provided*, That the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmission: *And provided further*, That such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial time.

(4) Notwithstanding the provisions of paragraph (1) of this subsection, the secondary transmission to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by an appropriate governmental authority of Canada or Mexico is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, if

(A) with respect to Canadian signals, the community of the cable system is located more than 150 miles from the United States-Canadian border and is also located south of the

forty-second parallel of latitude, or (B) with respect to Mexican signals, the secondary transmission is made by a cable system which received the primary transmission by means other than direct interception of a free space radio wave emitted by such broadcast television station, unless prior to April 15, 1976, such cable system was actually carrying, or was specifically authorized to carry, the signal of such foreign station on the system pursuant to the rules, regulations, or authorizations of the Federal Communications Commission.

(d) STATUTORY LICENSE FOR SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

(1) STATEMENT OF ACCOUNT AND ROYALTY FEES.—Subject to paragraph (5), a cable system whose secondary transmissions have been subject to statutory licensing under subsection (c) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation the following:

(A) A statement of account, covering the six months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, and such other data as the Register of Copyrights may from time to time prescribe by regulation. In determining the total number of subscribers and the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, the system shall not include subscribers and amounts collected from subscribers receiving secondary transmissions pursuant to section 119. Such statement shall also include a special statement of account covering any non-network television programming that was carried by the cable system in whole or in part beyond the local service area of the primary transmitter, under rules, regulations, or authorizations of the Federal Communications Commission permitting the substitution or addition of signals under certain circumstances, together with logs showing the times, dates, stations, and programs involved in such substituted or added carriage.

(B) Except in the case of a cable system whose royalty fee is specified in subparagraph (E) or (F), a total royalty fee payable to copyright owners pursuant to paragraph (3) for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during such period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

(i) 1.064 percent of such gross receipts for the privilege of further transmitting, beyond the local service area of such primary transmitter, any non-network pro-

gramming of a primary transmitter in whole or in part, such amount to be applied against the fee, if any, payable pursuant to clauses (ii) through (iv);

(ii) 1.064 percent of such gross receipts for the first distant signal equivalent;

(iii) 0.701 percent of such gross receipts for each of the second, third, and fourth distant signal equivalents; and

(iv) 0.330 percent of such gross receipts for the fifth distant signal equivalent and each distant signal equivalent thereafter.

(C) In computing amounts under clauses (ii) through (iv) of subparagraph (B)—

(i) any fraction of a distant signal equivalent shall be computed at its fractional value;

(ii) in the case of any cable system located partly within and partly outside of the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located outside of the local service area of such primary transmitter; and

(iii) if a cable system provides a secondary transmission of a primary transmitter to some but not all communities served by that cable system—

(I) the gross receipts and the distant signal equivalent values for such secondary transmission shall be derived solely on the basis of the subscribers in those communities where the cable system provides such secondary transmission; and

(II) the total royalty fee for the period paid by such system shall not be less than the royalty fee calculated under subparagraph (B)(i) multiplied by the gross receipts from all subscribers to the system.

(D) A cable system that, on a statement submitted before the date of the enactment of the Satellite Television Extension and Localism Act of 2010, computed its royalty fee consistent with the methodology under subparagraph (C)(iii), or that amends a statement filed before such date of enactment to compute the royalty fee due using such methodology, shall not be subject to an action for infringement, or eligible for any royalty refund or offset, arising out of its use of such methodology on such statement.

(E) If the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters are \$263,800 or less—

(i) gross receipts of the cable system for the purpose of this paragraph shall be computed by subtracting from such actual gross receipts the amount by which \$263,800 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than \$10,400; and

(ii) the royalty fee payable under this paragraph to copyright owners pursuant to paragraph (3) shall be 0.5 percent, regard-

less of the number of distant signal equivalents, if any.

(F) If the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters are more than \$263,800 but less than \$527,600, the royalty fee payable under this paragraph to copyright owners pursuant to paragraph (3) shall be—

(i) 0.5 percent of any gross receipts up to \$263,800, regardless of the number of distant signal equivalents, if any; and

(ii) 1 percent of any gross receipts in excess of \$263,800, but less than \$527,600, regardless of the number of distant signal equivalents, if any.

(G) A filing fee, as determined by the Register of Copyrights pursuant to section 708(a).

(2) HANDLING OF FEES.—The Register of Copyrights shall receive all fees (including the filing fee specified in paragraph (1)(G)) deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Librarian of Congress upon authorization by the Copyright Royalty Judges.

(3) DISTRIBUTION OF ROYALTY FEES TO COPYRIGHT OWNERS.—The royalty fees thus deposited shall, in accordance with the procedures provided by paragraph (4), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

(A) Any such owner whose work was included in a secondary transmission made by a cable system of a non-network television program in whole or in part beyond the local service area of the primary transmitter.

(B) Any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under paragraph (1)(A).

(C) Any such owner whose work was included in non-network programming consisting exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs.

(4) PROCEDURES FOR ROYALTY FEE DISTRIBUTION.—The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to statutory license fees for secondary transmissions shall file a claim with the Copyright Royalty Judges, in accordance with requirements that the Copyright Royalty Judges shall prescribe by regulation. Notwithstanding any provisions of the antitrust

laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of statutory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Copyright Royalty Judges shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Copyright Royalty Judges determine that no such controversy exists, the Copyright Royalty Judges shall authorize the Librarian of Congress to proceed to distribute such fees to the copyright owners entitled to receive them, or to their designated agents, subject to the deduction of reasonable administrative costs under this section. If the Copyright Royalty Judges find the existence of a controversy, the Copyright Royalty Judges shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(C) During the pendency of any proceeding under this subsection, the Copyright Royalty Judges shall have the discretion to authorize the Librarian of Congress to proceed to distribute any amounts that are not in controversy.

(5) **3.75 PERCENT RATE AND SYNDICATED EXCLUSIVITY SURCHARGE NOT APPLICABLE TO MULTICAST STREAMS.**—The royalty rates specified in sections 256.2(c) and 256.2(d) of title 37, Code of Federal Regulations (commonly referred to as the “3.75 percent rate” and the “syndicated exclusivity surcharge”, respectively), as in effect on the date of the enactment of the Satellite Television Extension and Localism Act of 2010, as such rates may be adjusted, or such sections redesignated, thereafter by the Copyright Royalty Judges, shall not apply to the secondary transmission of a multicast stream.

(6) **VERIFICATION OF ACCOUNTS AND FEE PAYMENTS.**—The Register of Copyrights shall issue regulations to provide for the confidential verification by copyright owners whose works were embodied in the secondary transmissions of primary transmissions pursuant to this section of the information reported on the semi-annual statements of account filed under this subsection for accounting periods beginning on or after January 1, 2010, in order that the auditor designated under subparagraph (A) is able to confirm the correctness of the calculations and royalty payments reported therein. The regulations shall—

(A) establish procedures for the designation of a qualified independent auditor—

(i) with exclusive authority to request verification of such a statement of account on behalf of all copyright owners whose works were the subject of secondary transmissions of primary transmissions by the cable system (that deposited the statement) during the accounting period covered by the statement; and

(ii) who is not an officer, employee, or agent of any such copyright owner for any purpose other than such audit;

(B) establish procedures for safeguarding all non-public financial and business information provided under this paragraph;

(C)(i) require a consultation period for the independent auditor to review its conclusions with a designee of the cable system;

(ii) establish a mechanism for the cable system to remedy any errors identified in the auditor’s report and to cure any underpayment identified; and

(iii) provide an opportunity to remedy any disputed facts or conclusions;

(D) limit the frequency of requests for verification for a particular cable system and the number of audits that a multiple system operator can be required to undergo in a single year; and

(E) permit requests for verification of a statement of account to be made only within 3 years after the last day of the year in which the statement of account is filed.

(7) **ACCEPTANCE OF ADDITIONAL DEPOSITS.**—Any royalty fee payments received by the Copyright Office from cable systems for the secondary transmission of primary transmissions that are in addition to the payments calculated and deposited in accordance with this subsection shall be deemed to have been deposited for the particular accounting period for which they are received and shall be distributed as specified under this subsection.

(e) **NONSIMULTANEOUS SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.**—

(1) Notwithstanding those provisions of the¹ subsection (f)(2) relating to nonsimultaneous secondary transmissions by a cable system, any such transmissions are actionable as an act of infringement under section 501, and are fully subject to the remedies provided by sections 502 through 506 and section 510, unless—

(A) the program on the videotape is transmitted no more than one time to the cable system’s subscribers;

(B) the copyrighted program, episode, or motion picture videotape, including the commercials contained within such program, episode, or picture, is transmitted without deletion or editing;

(C) an owner or officer of the cable system (i) prevents the duplication of the videotape while in the possession of the system, (ii) prevents unauthorized duplication while in the possession of the facility making the videotape for the system if the system owns or controls the facility, or takes reasonable precautions to prevent such duplication if it does not own or control the facility, (iii) takes adequate precautions to prevent duplication while the tape is being transported, and (iv) subject to paragraph (2), erases or destroys, or causes the erasure or destruction of, the videotape;

(D) within forty-five days after the end of each calendar quarter, an owner or officer of the cable system executes an affidavit attesting (i) to the steps and precautions taken to prevent duplication of the videotape, and (ii) subject to paragraph (2), to the

¹ So in original. The word “the” probably should not appear.

erasure or destruction of all videotapes made or used during such quarter;

(E) such owner or officer places or causes each such affidavit, and affidavits received pursuant to paragraph (2)(C), to be placed in a file, open to public inspection, at such system's main office in the community where the transmission is made or in the nearest community where such system maintains an office; and

(F) the nonsimultaneous transmission is one that the cable system would be authorized to transmit under the rules, regulations, and authorizations of the Federal Communications Commission in effect at the time of the nonsimultaneous transmission if the transmission had been made simultaneously, except that this subparagraph shall not apply to inadvertent or accidental transmissions.

(2) If a cable system transfers to any person a videotape of a program nonsimultaneously transmitted by it, such transfer is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, except that, pursuant to a written, nonprofit contract providing for the equitable sharing of the costs of such videotape and its transfer, a videotape nonsimultaneously transmitted by it, in accordance with paragraph (1), may be transferred by one cable system in Alaska to another system in Alaska, by one cable system in Hawaii permitted to make such nonsimultaneous transmissions to another such cable system in Hawaii, or by one cable system in Guam, the Northern Mariana Islands, the Federated States of Micronesia, the Republic of Palau, or the Republic of the Marshall Islands, to another cable system in any of those five entities, if—

(A) each such contract is available for public inspection in the offices of the cable systems involved, and a copy of such contract is filed, within thirty days after such contract is entered into, with the Copyright Office (which Office shall make each such contract available for public inspection);

(B) the cable system to which the videotape is transferred complies with paragraph (1)(A), (B), (C)(i), (iii), and (iv), and (D) through (F); and

(C) such system provides a copy of the affidavit required to be made in accordance with paragraph (1)(D) to each cable system making a previous nonsimultaneous transmission of the same videotape.

(3) This subsection shall not be construed to supersede the exclusivity protection provisions of any existing agreement, or any such agreement hereafter entered into, between a cable system and a television broadcast station in the area in which the cable system is located, or a network with which such station is affiliated.

(4) As used in this subsection, the term "videotape" means the reproduction of the images and sounds of a program or programs broadcast by a television broadcast station licensed by the Federal Communications Commission,

regardless of the nature of the material objects, such as tapes or films, in which the reproduction is embodied.

(f) DEFINITIONS.—As used in this section, the following terms mean the following:

(1) PRIMARY TRANSMISSION.—A "primary transmission" is a transmission made to the public by a transmitting facility whose signals are being received and further transmitted by a secondary transmission service, regardless of where or when the performance or display was first transmitted. In the case of a television broadcast station, the primary stream and any multicast streams transmitted by the station constitute primary transmissions.

(2) SECONDARY TRANSMISSION.—A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission if by a cable system not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico: *Provided, however,* That a nonsimultaneous further transmission by a cable system located in Hawaii of a primary transmission shall be deemed to be a secondary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

(3) CABLE SYSTEM.—A "cable system" is a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

(4) LOCAL SERVICE AREA OF A PRIMARY TRANSMITTER.—The "local service area of a primary transmitter", in the case of both the primary stream and any multicast streams transmitted by a primary transmitter that is a television broadcast station, comprises the area where such primary transmitter could have insisted upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, or such station's television market as defined in section 76.55(e) of title 47, Code of Federal Regulations (as in effect on September 18, 1993, or any modifications to such television market made, on or after September 18, 1993, pursuant to section 76.55(e) or 76.59 of title 47, Code of Federal Regulations, or within the noise-limited contour as defined in 73.622(e)(1) of title 47, Code of Federal Regulations, or in the case of a television broadcast station licensed by an appropriate governmental authority of Canada or Mexico, the area in which

it would be entitled to insist upon its signal being retransmitted if it were a television broadcast station subject to such rules, regulations, and authorizations. In the case of a low power television station, as defined by the rules and regulations of the Federal Communications Commission, the “local service area of a primary transmitter” comprises the designated market area, as defined in section 122(j)(2)(C), that encompasses the community of license of such station and any community that is located outside such designated market area that is either wholly or partially within 35 miles of the transmitter site or, in the case of such a station located in a standard metropolitan statistical area which has one of the 50 largest populations of all standard metropolitan statistical areas (based on the 1980 decennial census of population taken by the Secretary of Commerce), wholly or partially within 20 miles of such transmitter site. The “local service area of a primary transmitter”, in the case of a radio broadcast station, comprises the primary service area of such station, pursuant to the rules and regulations of the Federal Communications Commission.

(5) DISTANT SIGNAL EQUIVALENT.—

(A) IN GENERAL.—Except as provided under subparagraph (B), a “distant signal equivalent”—

(i) is the value assigned to the secondary transmission of any non-network television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming; and

(ii) is computed by assigning a value of one to each primary stream and to each multicast stream (other than a simulcast) that is an independent station, and by assigning a value of one-quarter to each primary stream and to each multicast stream (other than a simulcast) that is a network station or a noncommercial educational station.

(B) EXCEPTIONS.—The values for independent, network, and noncommercial educational stations specified in subparagraph (A) are subject to the following:

(i) Where the rules and regulations of the Federal Communications Commission require a cable system to omit the further transmission of a particular program and such rules and regulations also permit the substitution of another program embodying a performance or display of a work in place of the omitted transmission, or where such rules and regulations in effect on the date of the enactment of the Copyright Act of 1976² permit a cable system, at its election, to effect such omission and substitution of a nonlive program or to carry additional programs not transmitted by primary transmitters within whose local service area the cable system is located, no value shall be assigned for the substituted or additional program.

(ii) Where the rules, regulations, or authorizations of the Federal Communica-

tions Commission in effect on the date of the enactment of the Copyright Act of 1976² permit a cable system, at its election, to omit the further transmission of a particular program and such rules, regulations, or authorizations also permit the substitution of another program embodying a performance or display of a work in place of the omitted transmission, the value assigned for the substituted or additional program shall be, in the case of a live program, the value of one full distant signal equivalent multiplied by a fraction that has as its numerator the number of days in the year in which such substitution occurs and as its denominator the number of days in the year.

(iii) In the case of the secondary transmission of a primary transmitter that is a television broadcast station pursuant to the late-night or specialty programming rules of the Federal Communications Commission, or the secondary transmission of a primary transmitter that is a television broadcast station on a part-time basis where full-time carriage is not possible because the cable system lacks the activated channel capacity to retransmit on a full-time basis all signals that it is authorized to carry, the values for independent, network, and noncommercial educational stations set forth in subparagraph (A), as the case may be, shall be multiplied by a fraction that is equal to the ratio of the broadcast hours of such primary transmitter retransmitted by the cable system to the total broadcast hours of the primary transmitter.

(iv) No value shall be assigned for the secondary transmission of the primary stream or any multicast streams of a primary transmitter that is a television broadcast station in any community that is within the local service area of the primary transmitter.

(6) NETWORK STATION.—

(A) TREATMENT OF PRIMARY STREAM.—The term “network station” shall be applied to a primary stream of a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programming supplied by such networks for a substantial part of the primary stream’s typical broadcast day.

(B) TREATMENT OF MULTICAST STREAMS.—The term “network station” shall be applied to a multicast stream on which a television broadcast station transmits all or substantially all of the programming of an interconnected program service that—

(i) is owned or operated by, or affiliated with, one or more of the television networks described in subparagraph (A); and

(ii) offers programming on a regular basis for 15 or more hours per week to at least 25 of the affiliated television licensees of the interconnected program service in 10 or more States.

²See References in Text note below.

(7) INDEPENDENT STATION.—The term “independent station” shall be applied to the primary stream or a multicast stream of a television broadcast station that is not a network station or a noncommercial educational station.

(8) NONCOMMERCIAL EDUCATIONAL STATION.—The term “noncommercial educational station” shall be applied to the primary stream or a multicast stream of a television broadcast station that is a noncommercial educational broadcast station as defined in section 397 of the Communications Act of 1934, as in effect on the date of the enactment of the Satellite Television Extension and Localism Act of 2010.

(9) PRIMARY STREAM.—A “primary stream” is—

(A) the single digital stream of programming that, before June 12, 2009, was substantially duplicating the programming transmitted by the television broadcast station as an analog signal; or

(B) if there is no stream described in subparagraph (A), then the single digital stream of programming transmitted by the television broadcast station for the longest period of time.

(10) PRIMARY TRANSMITTER.—A “primary transmitter” is a television or radio broadcast station licensed by the Federal Communications Commission, or by an appropriate governmental authority of Canada or Mexico, that makes primary transmissions to the public.

(11) MULTICAST STREAM.—A “multicast stream” is a digital stream of programming that is transmitted by a television broadcast station and is not the station’s primary stream.

(12) SIMULCAST.—A “simulcast” is a multicast stream of a television broadcast station that duplicates the programming transmitted by the primary stream or another multicast stream of such station.

(13) SUBSCRIBER; SUBSCRIBE.—

(A) SUBSCRIBER.—The term “subscriber” means a person or entity that receives a secondary transmission service from a cable system and pays a fee for the service, directly or indirectly, to the cable system.

(B) SUBSCRIBE.—The term “subscribe” means to elect to become a subscriber.

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2550; Pub. L. 99-397, §§ 1, 2(a), (b), Aug. 27, 1986, 100 Stat. 848; Pub. L. 100-667, title II, § 202(1), Nov. 16, 1988, 102 Stat. 3949; Pub. L. 101-318, § 3(a), July 3, 1990, 104 Stat. 288; Pub. L. 103-198, § 6(a), Dec. 17, 1993, 107 Stat. 2311; Pub. L. 103-369, § 3, Oct. 18, 1994, 108 Stat. 3480; Pub. L. 104-39, § 5(b), Nov. 1, 1995, 109 Stat. 348; Pub. L. 106-113, div. B, § 1000(a)(9) [title I, § 1011(a)(1), (2), (b)(1)], Nov. 29, 1999, 113 Stat. 1536, 1501A-543; Pub. L. 108-419, § 5(a), Nov. 30, 2004, 118 Stat. 2361; Pub. L. 108-447, div. J, title IX [title I, § 107(b)], Dec. 8, 2004, 118 Stat. 3406; Pub. L. 109-303, § 4(a), Oct. 6, 2006, 120 Stat. 1481; Pub. L. 110-229, title VIII, § 807, May 8, 2008, 122 Stat. 874; Pub. L. 110-403, title II, § 209(a)(2), Oct. 13, 2008, 122 Stat. 4264; Pub. L. 111-175, title I, § 104(a)(1), (b), (c), (e), (g), May 27, 2010, 124 Stat. 1231, 1235, 1238; Pub. L. 113-200,

title II, §§ 201(1), 203, Dec. 4, 2014, 128 Stat. 2066, 2067.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Introduction and General Summary. The complex and economically important problem of “secondary transmissions” is considered in section 111. For the most part, the section is directed at the operation of cable television systems and the terms and conditions of their liability for the retransmission of copyrighted works. However, other forms of secondary transmissions are also considered, including apartment house and hotel systems, wired instructional systems, common carriers, nonprofit “boosters” and translators, and secondary transmissions of primary transmissions to controlled groups.

Cable television systems are commercial subscription services that pick up broadcasts of programs originated by others and retransmit them to paying subscribers. A typical system consists of a central antenna which receives and amplifies television signals and a network of cables through which the signals are transmitted to the receiving sets of individual subscribers. In addition to an installation charge, the subscribers pay a monthly charge for the basic service averaging about six dollars. A large number of these systems provide automated programming. A growing number of CATV systems also originate programs, such as movies and sports, and charge additional fees for this service (pay-cable).

The number of cable systems has grown very rapidly since their introduction in 1950, and now total about 3,450 operating systems, servicing 7,700 communities. Systems currently in operation reach about 10.8 million homes. It is reported that the 1975 total subscriber revenues of the cable industry were approximately \$770 million.

Pursuant to two decisions of the Supreme Court (*Fortnightly Corp. v. United Artist Television, Inc.*, 392 U.S. 390 (1968) [88 S.Ct. 2084, 20 L.Ed.2d 1176, rehearing denied 89 S.Ct. 65, 393 U.S. 902, 21 L.Ed.2d 190], and *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974)) [94 S.Ct. 1129, 39 L.Ed.2d 415], under the 1909 copyright law, the cable television industry has not been paying copyright royalties for its retransmission of over-the-air broadcast signals. Both decisions urged the Congress, however, to consider and determine the scope and extent of such liability in the pending revision bill.

The difficult problem of determining the copyright liability of cable television systems has been before the Congress since 1965. In 1967, this Committee sought to address and resolve the issues in H.R. 2512, an early version of the general revision bill (see H.R. Rep. No. 83, 90th Cong., 1st Sess.). However, largely because of the cable-copyright impasse, the bill died in the Senate.

The history of the attempts to find a solution to the problem since 1967 has been explored thoroughly in the voluminous hearings and testimony on the general revision bill, and has also been succinctly summarized by the Register of Copyrights in her Second Supplementary Report, Chapter V.

The Committee now has before it the Senate bill which contains a series of detailed and complex provisions which attempt to resolve the question of the copyright liability of cable television systems. After extensive consideration of the Senate bill, the arguments made during and after the hearings, and of the issues involved, this Committee has also concluded that there is no simple answer to the cable-copyright controversy. In particular, any statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry. While the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC’s rules or which might be characterized as affecting “communications policy”, the Committee

has been cognizant of the interplay between the copyright and the communications elements of the legislation.

We would, therefore, caution the Federal Communications Commission, and others who make determinations concerning communications policy, not to rely upon any action of this Committee as a basis for any significant changes in the delicate balance of regulation in areas where the Congress has not resolved the issue. Specifically, we would urge the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as pay cable regulation or increased use of imported distant signals. These matters are ones of communications policy and should be left to the appropriate committees in the Congress for resolution.

In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to maintain the basic principle of the Senate bill to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC.

The compulsory license is conditioned, however, on certain requirements and limitations. These include compliance with reporting requirements, payment of the royalty fees established in the bill, a ban on the substitution or deletion of commercial advertising, and geographic limits on the compulsory license for copyrighted programs broadcast by Canadian or Mexican stations. Failure to comply with these requirements and limitations subjects a cable system to a suit for copyright infringement and the remedies provided under the bill for such actions.

In setting a royalty fee schedule for the compulsory license, the Committee determined that the initial schedule should be established in the bill. It recognized, however, that adjustments to the schedule would be required from time to time. Accordingly, the Copyright Royalty Commission, established in chapter 8 [§801 et seq. of this title], is empowered to make the adjustments in the initial rates, at specified times, based on standards and conditions set forth in the bill.

In setting an initial fee schedule, the Senate bill based the royalty fee on a sliding scale related to the gross receipts of a cable system for providing the basic retransmission service and rejected a statutory scheme that would distinguish between "local" and "distant" signals. The Committee determined, however, that there was no evidence that the retransmission of "local" broadcast signals by a cable operator threatens the existing market for copyright program owners. Similarly, the retransmission of network programming, including network programming which is broadcast in "distant" markets, does not injure the copyright owner. The copyright owner contracts with the network on the basis of his programming reaching all markets served by the network and is compensated accordingly.

By contrast, their retransmission of distant non-network programming by cable systems causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market. It is also of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues. For these reasons, the Committee has concluded that the copyright liability of cable television systems under the compulsory license should be limited to the retransmission of distant non-network programming.

In implementing this conclusion, the Committee generally followed a proposal submitted by the cable and

motion picture industries, the two industries most directly affected by the establishment of copyright royalties for cable television systems. Under the proposal, the royalty fee is determined by a two step computation. First, a value called a "distant signal equivalent" is assigned to all "distant" signals. Distant signals are defined as signals retransmitted by a cable system, in whole or in part, outside the local service area of the primary transmitter. Different values are assigned to independent, network, and educational stations because of the different amounts of viewing of non-network programming carried by such stations. For example, the viewing of non-network programs on network stations is considered to approximate 25 percent. These values are then combined and a scale of percentages is applied to the cumulative total.

The Committee also considered various proposals to exempt certain categories of cable systems from royalty payments altogether. The Committee determined that the approach of the Senate bill to require some payment by every cable system is sound, but established separate fee schedules for cable systems whose gross receipts for the basic retransmission service do not exceed either \$80,000 or \$160,000 semiannually. It is the Committee's view that the fee schedules adopted for these systems are now appropriate, based on their relative size and the services performed.

All the royalty payments required under the bill are paid on a semiannual basis to the Register of Copyrights. Each year they are distributed by the Copyright Royalty Commission to those copyright owners who may validly claim that their works were the subject of distant non-network retransmissions by cable systems.

Based on current estimates supplied to the Committee, the total royalty fees paid under the initial schedule established in the bill should approximate \$8.7 million. Compared with the present number of cable television subscribers, calculated at 10.8 million, copyright payments under the bill would therefore approximate 81 cents per subscriber per year. The Committee believes that such payments are modest and will not retard the orderly development of the cable television industry or the service it provides to its subscribers.

Analysis of Provisions. Throughout section 111, the operative terms are "primary transmission" and "secondary transmission." These terms are defined in subsection (f) entirely in relation to each other. In any particular case, the "primary" transmitter is the one whose signals are being picked up and further transmitted by a "secondary" transmitter which in turn, is someone engaged in "the further transmitting of a primary transmission simultaneously with the primary transmission." With one exception provided in subsection (f) and limited by subsection (e), the section does not cover or permit a cable system, or indeed any person, to tape or otherwise record a program off-the-air and later to transmit the program from the tape or record to the public. The one exception involves cable systems located outside the continental United States, but not including cable systems in Puerto Rico, or, with limited exceptions, Hawaii. These systems are permitted to record and retransmit programs under the compulsory license, subject to the restrictive conditions of subsection (e), because off-the-air signals are generally not available in the offshore areas.

General Exemptions. Certain secondary transmissions are given a general exemption under clause (1) of section 111(a). The first of these applies to secondary transmissions consisting "entirely of the relaying, by the management of a hotel, apartment house, or similar establishment" of a transmission to the private lodgings of guests or residents and provided "no direct charge is made to see or hear the secondary transmission."

The exemption would not apply if the secondary transmission consists of anything other than the mere relay of ordinary broadcasts. The cutting out of advertising, the running in of new commercials, or any other change in the signal relayed would subject the secondary transmitter to full liability. Moreover, the term

"private lodgings" is limited to rooms used as living quarters or for private parties, and does not include dining rooms, meeting halls, theatres, ballrooms, or similar places that are outside of a normal circle of a family and its social acquaintances. No special exception is needed to make clear that the mere placing of an ordinary radio or television set in a private hotel room does not constitute an infringement.

Secondary Transmissions of Instructional Broadcasts. Clause (2) of section 111(a) is intended to make clear that an instructional transmission within the scope of section 110(2) is exempt whether it is a "primary transmission" or a "secondary transmission."

Carriers. The general exemption under section 111 extends to secondary transmitters that act solely as passive carriers. Under clause (3), a carrier is exempt if it "has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission." For this purpose its activities must "consist solely of providing wires, cables, or other communications channels for the use of others."

Clause (4) would exempt the activities of secondary transmitters that operate on a completely nonprofit basis. The operations of nonprofit "translators" or "boosters," which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception, would be exempt if there is no "purpose of direct or indirect commercial advantage," and if there is no charge to the recipients "other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service." This exemption does not apply to a cable television system.

Secondary Transmissions of Primary Transmissions to Controlled Group. Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display is actionable as an act of infringement if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public. Examples of transmissions not intended for the general public are background music services such as MUZAK, closed circuit broadcasts to theatres, pay television (STV) or pay-cable.

The Senate bill contains a provision, however, stating that the secondary transmission does not constitute an act of infringement if the carriage of the signals comprising the secondary transmission is required under the rules and regulations of the FCC. The exclusive purpose of this provision is to exempt a cable system from copyright liability if the FCC should require cable systems to carry to their subscribers a "scrambled" pay signal of a subscription television station.

The Committee is concerned, however, that the Senate bill is not clearly limited to the situation where a cable system is required by the FCC to carry a "scrambled" pay television signal. The Committee believes that the provision should not include any authority or permission to "unscramble" the signal. Further, the Senate bill does not make clear that the exception would not apply if the primary transmission is made by a cable system or cable system network transmitting its own originated program, *e.g.*, pay-cable. For these reasons, the subsection was amended to provide that the exception would only apply if (1) the primary transmission to a controlled group is made by a broadcast station licensed by the FCC; (2) the carriage of the signal is required by FCC rules and regulations; and (3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.

Compulsory License. Section 111(c) establishes the compulsory license for cable systems generally. It provides that, subject to the provisions of clauses (2), (3) and (4), the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the FCC or by an appropriate governmental authority of Canada or Mexico is subject to compulsory licensing upon compliance with

the provisions of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules and regulations of the FCC. The compulsory license applies, therefore, to the carriage of over-the-air broadcast signals and is inapplicable to the secondary transmission of any nonbroadcast primary transmission such as a program originated by a cable system or a cable network. The latter would be subject to full copyright liability under other sections of the legislation.

Limitations on the Compulsory License. Sections 111(c)(2), (3) and (4) establish limitations on the scope of the compulsory license, and provide that failure to comply with these limitations subjects a cable system to a suit for infringement and all the remedies provided in the legislation for such actions.

Section 111(c)(2) provides that the "willful or repeated" carriage of signals not permissible under the rules and regulations of the FCC subjects a cable system to full copyright liability. The words "willful or repeated" are used to prevent a cable system from being subjected to severe penalties for innocent or casual acts ("Repeated" does not mean merely "more than once," of course; rather, it denotes a degree of aggravated negligence which borders on willfulness. Such a condition would not exist in the case of an innocent mistake as to what signals or programs may properly be carried under the FCC's complicated rules). Section 111(c)(2) also provides that a cable system is subject to full copyright liability where the cable system has not recorded the notice, deposited the statement of account, or paid the royalty fee required by subsection (d). The Committee does not intend, however, that a good faith error by the cable system in computing the amount due would subject it to full liability as an infringer. The Committee expects that in most instances of this type the parties would be able to work out the problem without resort to the courts.

Commercial Substitution. Section 111(c)(3) provides that a cable system is fully subject to the remedies provided in this legislation for copyright infringement if the cable system willfully alters, through changes, deletions, or additions, the content of a particular program or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of the program. In the Committee's view, any willful deletion, substitution, or insertion of commercial advertisements of any nature by a cable system or changes in the program content of the primary transmission, significantly alters the basic nature of the cable retransmission service, and makes its function similar to that of a broadcaster. Further, the placement of substitute advertising in a program by a cable system on a "local" signal harms the advertiser and, in turn, the copyright owner, whose compensation for the work is directly related to the size of the audience that the advertiser's message is calculated to reach. On a "distant" signal, the placement of substitute advertising harms the local broadcaster in the distant market because the cable system is then competing for local advertising dollars without having comparable program costs. The Committee has therefore attempted broadly to proscribe the availability of the compulsory license if a cable system substitutes commercial messages. Included in the prohibition are commercial messages and station announcements not only during, but also immediately before or after the program, so as to insure a continuous ban on commercial substitution from one program to another. In one situation, however, the Committee has permitted such substitution when the commercials are inserted by those engaged in television commercial advertising market research. This exception is limited to those situations where the research company has obtained the consent of the advertiser who purchased the original commercial advertisement, the television station whose signal is retransmitted, and the cable system, and provided further that no income is derived from the sale of such commercial time.

Canadian and Mexican Signals. Section 111(c)(4) provides limitations on the compulsory license with respect to foreign signals carried by cable systems from Canada or Mexico. Under the Senate bill, the carriage of any foreign signals by a cable system would have been subject to full copyright liability, because the compulsory license was limited to the retransmission of broadcast stations licensed by the FCC. The Committee recognized, however, that cable systems primarily along the northern and southern border have received authorization from the FCC to carry broadcast signals of certain Canadian and Mexican stations.

In the Committee's view, the authorization by the FCC to a cable system to carry a foreign signal does not resolve the copyright question of the royalty payment that should be made for copyrighted programs originating in the foreign country. The latter raises important international questions of the protection to be accorded foreign copyrighted works in the United States. While the Committee has established a general compulsory licensing scheme for the retransmission of copyrighted works of U.S. nationals, a broad compulsory license scheme for all foreign works does not appear warranted or justified. Thus, for example, if in the future the signal of a British, French, or Japanese station were retransmitted in the United States by a cable system, full copyright liability would apply.

With respect to Canadian and Mexican signals, the Committee found that a special situation exists regarding the carriage of these signals by U.S. cable systems on the northern and southern borders, respectively. The Committee determined, therefore, that with respect to Canadian signals the compulsory license would apply in an area located 150 miles from the U.S.-Canadian border, or south from the border to the 42nd parallel of latitude, whichever distance is greater. Thus the cities of Detroit, Pittsburgh, Cleveland, Green Bay and Seattle would be included within the compulsory license area, while cities such as New York, Philadelphia, Chicago, and San Francisco would be located outside the area.

With respect to Mexican signals, the Commission determined that the compulsory license would apply only in the area in which such signals may be received by a U.S. cable system by means of direct interception of a free space radio wave. Thus, full copyright liability would apply if a cable system were required to use any equipment or device other than a receiving antenna to bring the signal to the community of the cable system.

Further, to take account of those cable systems that are presently carrying or are specifically authorized to carry Canadian or Mexican signals, pursuant to FCC rules and regulations, and whether or not within the zones established, the Committee determined to grant a compulsory license for the carriage of those specific signals on those cable systems as in effect on April 15, 1976.

The Committee wishes to stress that cable systems operating within these zones are fully subject to the payment of royalty fees under the compulsory license for those foreign signals retransmitted. The copyright owners of the works transmitted may appear before the Copyright Royalty Commission and, pursuant to the provisions of this legislation, file claims to their fair share of the royalties collected. Outside the zones, however, full copyright liability would apply as would all the remedies of the legislation for any act of infringement.

Requirements for a Compulsory License. The compulsory license provided for in section 111(c) is contingent upon fulfillment of the requirements set forth in section 111(d). Subsection (d)(1) directs that at least one month before the commencement of operations, or within 180 days after the enactment of this act [Oct. 19, 1976], whichever is later, a cable system must record in the Copyright Office a notice, including a statement giving the identity and address of the person who owns or operates the secondary transmission service or who has power to exercise primary control over it, together with the name and location of the primary transmitter

whose signals are regularly carried by the cable system. Signals "regularly carried" by the system mean those signals which the Federal Communications Commission has specifically authorized the cable system to carry, and which are actually carried by the system on a regular basis. It is also required that whenever the ownership or control or regular signal carriage complement of the system changes, the cable system must within 30 days record any such changes in the Copyright Office. Cable systems must also record such further information as the Register of Copyrights shall prescribe by regulation.

Subsection (d)(2) directs cable systems whose secondary transmissions have been subject to compulsory licensing under subsection (c) to deposit with the Register of Copyrights a semi-annual statement of account. The dates for filing such statements of account and the six-month period which they are to cover are to be determined by the Register of Copyrights after consultation with the Copyright Royalty Commission. In addition to other such information that the Register may prescribe by regulation, the statements of account are to specify the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were carried by the system, the total number of subscribers to the system, and the gross amounts paid to the system for the basic service of providing secondary transmissions. If any non-network television programming was retransmitted by the cable system beyond the local service area of the primary transmitter, pursuant to the rules of the Federal Communications Commission, which under certain circumstances permit the substitution or addition of television signals not regularly carried, the cable system must deposit a special statement of account listing the times, dates, stations and programs involved in such substituted or added carriage.

Copyright Royalty Payments. Subsection (d)(2)(B), (C) and (D) require cable systems to deposit royalty fee payments for the period covered by the statements of account. These payments are to be computed on the basis of specified percentages of the gross receipts from cable subscribers during the period covered by the statement. For purposes of computing royalty payments, only receipts for the basic service of providing secondary transmissions of primary broadcast transmitters are to be considered. Other receipts from subscribers, such as those for pay-cable services or installation charges, are not included in gross receipts.

Subsection (d)(2)(B) provides that, except in the case of a cable system that comes within the gross receipts limitations of subclauses (C) and (D), the royalty fee is computed in the following manner:

Every cable system pays .675 of 1 percent of its gross receipts for the privilege of retransmitting distant non-network programming, such amount to be applied against the fee, if any, payable under the computation for "distant signal equivalents." The latter are determined by adding together the values assigned to the actual number of distant television stations carried by a cable system. The purpose of this initial rate, applicable to all cable systems in this class, is to establish a basic payment, whether or not a particular cable system elects to transmit distant non-network programming. It is not a payment for the retransmission of purely "local" signals, as is evident from the provision that it applies to and is deductible from the fee payable for any "distant signal equivalents."

The remaining provisions of subclause (B) establish the following rates for "distant signal equivalents":

The rate from zero to one distant signal equivalent is .675 of 1 percent of gross subscriber revenues. An additional .425 of 1 percent of gross subscriber revenues is to be paid for each of the second, third and fourth distant signal equivalents that are carried. A further payment of .2 of 1 percent of gross subscriber revenues is to be made for each distant signal equivalent after the fourth. Any fraction of a distant signal equivalent is to be computed at its fractional value and where a cable

system is located partly within and partly without the local service area of a primary transmitter, the gross receipts subject to the percentage payment are limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter.

Pursuant to the foregoing formula, copyright payments as a percentage of gross receipts increase as the number of distant television signals carried by a cable system increases. Because many smaller cable systems carry a large number of distant signals, especially those located in areas where over-the-air television service is sparse, and because smaller cable systems may be less able to shoulder the burden of copyright payments than larger systems, the Committee decided to give special consideration to cable systems with semi-annual gross subscriber receipts of less than \$160,000 (\$320,000 annually). The royalty fee schedules for cable systems in this category are specified in subclauses (C) and (D).

In lieu of the payments required in subclause (B), systems earning less than \$80,000, semi-annually, are to pay a royalty fee of .5 of 1 percent of gross receipts. Gross receipts under this provision are computed, however, by subtracting from actual gross receipts collected during the payment period the amount by which \$80,000 exceeds such actual gross receipts. Thus, if the actual gross receipts of the cable system for the period covered are \$60,000, the fee is determined by subtracting \$20,000 (the amount by which \$80,000 exceeds actual gross receipts) from \$60,000 and applying .5 of 1 percent to the \$40,000 result. However, gross receipts in no case are to be reduced to less than \$3,000.

Under subclause (D), cable systems with semi-annual gross subscriber receipts of between \$80,000 and \$160,000 are to pay royalty fees of .5 of 1 percent of such actual gross receipts up to \$80,000, and 1 percent of any actual gross receipts in excess of \$80,000. The royalty fee payments under both subclauses (C) and (D) are to be determined without regard to the number of distant signal equivalents, if any, carried by the subject cable systems.

Copyright Royalty Distribution. Section 111(d)(3) provides that the royalty fees paid by cable systems under the compulsory license shall be received by the Register of Copyrights and, after deducting the reasonable costs incurred by the Copyright Office, deposited in the Treasury of the United States. The fees are distributed subsequently, pursuant to the determination of the Copyright Royalty Commission under chapter 8 [§ 801 et seq. of this title].

The copyright owners entitled to participate in the distribution of the royalty fees paid by cable systems under the compulsory license are specified in section 111(d)(4). Consistent with the Committee's view that copyright royalty fees should be made only for the retransmission of distant non-network programming, the claimants are limited to (1) copyright owners whose works were included in a secondary transmission made by a cable system of a distant non-network television program; (2) any copyright owner whose work is included in a secondary transmission identified in a special statement of account deposited under section 111(d)(2)(A); and (3) any copyright owner whose work was included in distant non-network programming consisting exclusively of aural signals. Thus, no royalty fees may be claimed or distributed to copyright owners for the retransmission of either "local" or "network" programs.

The Committee recognizes that the bill does not include specific provisions to guide the Copyright Royalty Commission in determining the appropriate division among competing copyright owners of the royalty fees collected from cable systems under Section 111. The Committee concluded that it would not be appropriate to specify particular, limiting standards for distribution. Rather, the Committee believes that the Copyright Royalty Commission should consider all pertinent data and considerations presented by the claimants.

Should disputes arise, however, between the different classes of copyright claimants, the Committee believes that the Copyright Royalty Commission should consider that with respect to the copyright owners of "live" programs identified by the special statement of account deposited under Section 111(d)(2)(A), a special payment is provided in Section 111(f).

Section 111(d)(5) sets forth the procedure for the distribution of the royalty fees paid by cable systems. During the month of July of each year, every person claiming to be entitled to compulsory license fees must file a claim with the Copyright Royalty Commission, in accordance with such provisions as the Commission shall establish. In particular, the Commission may establish the relevant period covered by such claims after giving adequate time for copyright owners to review and consider the statements of account filed by cable systems. Notwithstanding any provisions of the anti-trust laws, the claimants may agree among themselves as to the division and distribution of such fees. After the first day of August of each year, the Copyright Royalty Commission shall determine whether a controversy exists concerning the distribution of royalty fees. If no controversy exists, the Commission, after deducting its reasonable administrative costs, shall distribute the fees to the copyright owners entitled or their agents. If the Commission finds the existence of a controversy, it shall, pursuant to the provisions of chapter 8 [§ 801 et seq. of this title], conduct a proceeding to determine the distribution of royalty fees.

Off-Shore Taping by Cable Systems. Section 111(e) establishes the conditions and limitation upon which certain cable systems located outside the continental United States, and specified in subsection (f), may make tapes of copyrighted programs and retransmit the taped programs to their subscribers upon payment of the compulsory license fee. These conditions and limitations include compliance with detailed transmission, record keeping, and other requirements. Their purpose is to control carefully the use of any tapes made pursuant to the limited recording and retransmission authority established in subsection (f), and to insure that the limited objective of assimilating off-shore cable systems to systems within the United States for purposes of the compulsory license is not exceeded. Any secondary transmission by a cable system entitled to the benefits of the taping authorization that does not comply with the requirements of section 111(e) is an act of infringement and is fully subject to all the remedies provided in the legislation for such actions.

Definitions. Section 111(f) contains a series of definitions. These definitions are found in subsection (f) rather than in section 101 because of their particular application to secondary transmissions by cable systems.

Primary and Secondary Transmissions. The definitions of "primary transmission" and "secondary transmission" have been discussed above. The definition of "secondary transmission" also contains a provision permitting the nonsimultaneous retransmission of a primary transmission if by a cable system "not located in whole or in part within the boundary of the forty-eight contiguous states, Hawaii or Puerto Rico." Under a proviso, however, a cable system in Hawaii may make a nonsimultaneous retransmission of a primary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations or authorizations of the FCC.

The effect of this definition is to permit certain cable systems in offshore areas, but not including cable systems in the offshore area of Puerto Rico and to a limited extent only in Hawaii, to tape programs and retransmit them to subscribers under the compulsory license. Puerto Rico was excluded based upon a communication the Committee received from the Governor of Puerto Rico stating that the particular television broadcasting problems which the definition seeks to solve for cable systems in other noncontiguous areas do not exist in Puerto Rico. He therefore requested that Puerto Rico be excluded from the scope of the defini-

tion. All cable systems covered by the definition are subject to the conditions and limitations for non-simultaneous transmissions established in section 111(e).

Cable System. The definition of a "cable system" establishes that it is a facility that in whole or in part receives signals of one or more television broadcast stations licensed by the FCC and makes secondary transmissions of such signals to subscribing members of the public who pay for such service. A closed circuit wire system that only originates programs and does not carry television broadcast signals would not come within the definition. Further, the definition provides that, in determining the applicable royalty fee and system classification under subsection (d)(2)(B), (C), or (D) cable systems in contiguous communities under common ownership or control or operating from one headend are considered as one system.

Local Service Area of a Primary Transmitter. The definition of "local service area of a primary transmitter" establishes the difference between "local" and "distant" signals and therefore the line between signals which are subject to payment under the compulsory license and those that are not. It provides that the local service area of a television broadcast station is the area in which the station is entitled to insist upon its signal being retransmitted by a cable system pursuant to FCC rules and regulations. Under FCC rules and regulations this so-called "must carry" area is defined based on the market size and position of cable systems in 47 C.F.R. §§ 76.57, 76.59, 76.61 and 76.63. The definition is limited, however, to the FCC rules in effect on April 15, 1976. The purpose of this limitation is to insure that any subsequent rule amendments by the FCC that either increase or decrease the size of the local service area for its purposes do not change the definition for copyright purposes. The Committee believes that any such change for copyright purposes, which would materially affect the royalty fee payments provided in the legislation, should only be made by an amendment to the statute.

The "local service area of a primary transmitter" of a Canadian or Mexican television station is defined as the area in which such station would be entitled to insist upon its signals being retransmitted if it were a television broadcast station subject to FCC rules and regulations. Since the FCC does not permit a television station licensed in a foreign country to assert a claim to carriage by a U.S. cable system, the local service area of such foreign station is considered to be the same area as if it were a U.S. station.

The local service area for a radio broadcast station is defined to mean "the primary service area of such station pursuant to the rules and regulations of the Federal Communications Commission." The term "primary service area" is defined precisely by the FCC with regard to AM stations in Section 73.11(a) of the FCC's rules. In the case of FM stations, "primary service area" is regarded by the FCC as the area included within the field strength contours specified in Section 73.31 of its rules.

Distant Signal Equivalent. The definition of a "distant signal equivalent" is central to the computation of the royalty fees payable under the compulsory license. It is the value assigned to the secondary transmission of any non-network television programming carried by a cable system, in whole or in part, beyond the local service area of the primary transmitter of such programming. It is computed by assigning a value of one (1) to each distant independent station and a value of one-quarter ($\frac{1}{4}$) to each distant network station and distant noncommercial educational station carried by a cable system, pursuant to the rules and regulations of the FCC. Thus, a cable system carrying two distant independent stations, two distant network stations and one distant noncommercial educational station would have a total of 2.75 distant signal equivalents.

The values assigned to independent, network and noncommercial educational stations are subject, however, to certain exceptions and limitations. Two of

these relate to the mandatory and discretionary program deletion and substitution rules of the FCC. Where the FCC rules require a cable system to omit certain programs (e.g., the syndicated program exclusivity rules) and also permit the substitution of another program in place of the omitted program, no additional value is assigned for the substituted or additional program. Further, where the FCC rules on the date of enactment of this legislation permit a cable system, at its discretion, to make such deletions or substitutions or to carry additional programs not transmitted by primary transmitters within whose local service area the cable system is located, no additional value is assigned for the substituted or additional programs. However, the latter discretionary exception is subject to a condition that if the substituted or additional program is a "live" program (e.g., a sports event), then an additional value is assigned to the carriage of the distant signal computed as a fraction of one distant signal equivalent. The fraction is determined by assigning to the numerator the number of days in the year on which the "live" substitution occurs, and by assigning to the denominator the number of days in the year. Further, the discretionary exception is limited to those FCC rules in effect on the date of enactment of this legislation [Oct. 19, 1976]. If subsequent FCC rule amendments or individual authorizations enlarge the discretionary ability of cable systems to delete and substitute programs, such deletions and substitutions would be counted at the full value assigned the particular type of station provided above.

Two further exceptions pertain to the late-night or specialty programming rules of the FCC or to a station carried on a part-time basis where full-time carriage is not possible because the cable system lacks the activated channel capacity to retransmit on a full-time basis all signals which it is authorized to carry. In this event, the values for independent, network and non-commercial, educational stations set forth above, as the case may be, are determined by multiplying each by a fraction which is equal to the ratio of the broadcast hours of such station carried by the cable system to the total broadcast hours of the station.

Network Station. A "network station" is defined as a television broadcast station that is owned or operated by, or affiliated with, one or more of the U.S. television networks providing nationwide transmissions and that transmits a substantial part of the programming supplied by such networks for a substantial part of that station's typical broadcast day. To qualify as a network station, all the conditions of the definition must be met. Thus, the retransmission of a Canadian station affiliated with a Canadian network would not qualify under the definition. Further, a station affiliated with a regional network would not qualify, since a regional network would not provide nationwide transmissions. However, a station affiliated with a network providing nationwide transmissions that also occasionally carries regional programs would qualify as a "network station," if the station transmits a substantial part of the programming supplied by the network for a substantial part of the station's typical broadcast day.

Independent Station. An "independent station" is defined as a commercial television broadcast station other than a network station. Any commercial station that does not fall within the definition of "network station" is classified as an "independent station."

Noncommercial Educational Station. A "noncommercial educational station" is defined as a television station that is a noncommercial educational broadcast station within the meaning of section 397 of title 47 [47 U.S.C. 397].

Editorial Notes

REFERENCES IN TEXT

The date of the enactment of the Satellite Television Extension and Localism Act of 2010, referred to in subsecs. (d)(1)(D), (5) and (f)(8), is the date of the enact-

ment of Pub. L. 111–175, which shall be deemed to refer to Feb. 27, 2010, see section 307(a) of Pub. L. 111–175, set out as an Effective Date of 2010 Amendment note below.

The date of the enactment of the Copyright Act of 1976, referred to in subsec. (f)(5)(B)(i), (ii), probably means the date of the enactment of Pub. L. 94–553, which was approved Oct. 19, 1976.

Section 397 of the Communications Act of 1934, referred to in subsec. (f)(8), is classified to section 397 of Title 47, Telecommunications.

AMENDMENTS

2014—Subsec. (d)(3). Pub. L. 113–200, § 201(1), substituted “paragraph” for “clause” in introductory provisions and in subpar. (B).

Subsec. (f)(4). Pub. L. 113–200, § 203, in second sentence, inserted “as defined by the rules and regulations of the Federal Communications Commission,” after “television station,” and substituted “comprises the designated market area, as defined in section 122(j)(2)(C), that encompasses the community of license of such station and any community that is located outside such designated market area that is either wholly or partially within 35 miles of the transmitter site or,” for “comprises the area within 35 miles of the transmitter site, except that” and “wholly or partially within 20 miles of such transmitter site” for “the number of miles shall be 20 miles”.

2010—Pub. L. 111–175, § 104(a)(1), inserted “of broadcast programming by cable” after “transmissions” in section catchline.

Subsec. (a)(2), (3). Pub. L. 111–175, § 104(g)(1)(A), substituted “paragraph” for “clause”.

Subsec. (a)(4). Pub. L. 111–175, § 104(b), substituted “or section 122;” for “; or”.

Subsec. (c)(1). Pub. L. 111–175, § 104(g)(1)(B), substituted “paragraphs” for “clauses”.

Subsec. (c)(2) to (4). Pub. L. 111–175, § 104(g)(1)(A), substituted “paragraph” for “clause”.

Subsec. (d)(1). Pub. L. 111–175, § 104(c)(1)(A), inserted heading and, in introductory provisions, substituted “Subject to paragraph (5), a cable system whose secondary” for “A cable system whose secondary” and “by regulation the following:” for “by regulation—”.

Subsec. (d)(1)(A). Pub. L. 111–175, § 104(c)(1)(B), (g)(2), substituted “A statement of account” for “a statement of account”, “non-network” for “nonnetwork”, and “carriage.” for “carriage; and” at end.

Subsec. (d)(1)(B) to (G). Pub. L. 111–175, § 104(c)(1)(C), added subpars. (B) to (G) and struck out former subpars. (B) to (D) which established fee schedules for certain royalty fees to be paid by cable systems based upon the gross receipts received from subscribers.

Subsec. (d)(2). Pub. L. 111–175, § 104(c)(2), inserted heading and inserted “(including the filing fee specified in paragraph (1)(G))” after “shall receive all fees”.

Subsec. (d)(3). Pub. L. 111–175, § 104(c)(3)(A), inserted heading.

Subsec. (d)(3)(A). Pub. L. 111–175, § 104(c)(3)(B), (g)(2), substituted “Any such” for “any such”, “non-network” for “nonnetwork”, and a period for “; and”.

Subsec. (d)(3)(B). Pub. L. 111–175, § 104(c)(3)(C), substituted “Any such” for “any such” and a period for the semicolon at end.

Subsec. (d)(3)(C). Pub. L. 111–175, § 104(c)(3)(D), (g)(2), substituted “Any such” for “any such” and “non-network” for “nonnetwork”.

Subsec. (d)(4). Pub. L. 111–175, § 104(c)(4), inserted heading.

Subsec. (d)(5) to (7). Pub. L. 111–175, § 104(c)(5), added pars. (5) to (7).

Subsec. (e)(1). Pub. L. 111–175, § 104(g)(3), substituted “subsection (f)(2)” for “second paragraph of subsection (f)” in introductory provisions.

Subsec. (e)(1)(A) to (C). Pub. L. 111–175, § 104(g)(4)(A)–(C), struck out “and” at end.

Subsec. (e)(1)(C)(iv). Pub. L. 111–175, § 104(g)(1)(A), substituted “paragraph” for “clause”.

Subsec. (e)(1)(D). Pub. L. 111–175, § 104(g)(4)(D), struck out “and” at end.

Subsec. (e)(1)(D)(ii), (E). Pub. L. 111–175, § 104(g)(1)(A), substituted “paragraph” for “clause”.

Subsec. (e)(1)(F). Pub. L. 111–175, § 104(g)(1)(C), substituted “subparagraph” for “subclause”.

Subsec. (e)(2). Pub. L. 111–175, § 104(g)(1)(A), (6), in introductory provisions, substituted “paragraph” for “clause” and “five entities” for “three territories”.

Subsec. (e)(2)(A). Pub. L. 111–175, § 104(g)(4)(E), struck out “and” at end.

Subsec. (e)(2)(B), (C). Pub. L. 111–175, § 104(g)(1)(A), substituted “paragraph” for “clause”.

Subsec. (e)(4). Pub. L. 111–175, § 104(g)(5)(A), struck out “, and each of its variant forms,” before “means the reproduction”.

Subsec. (f). Pub. L. 111–175, § 104(g)(5)(B), struck out “and their variant forms” after “terms” in introductory provisions.

Pub. L. 111–175, § 104(e)(5) to (8), designated undesignated par. which defined “distant signal equivalent” as par. (5), inserted par. (5) heading, and amended text generally, added pars. (6) to (8), and struck out last three undesignated pars. which defined “network station”, “independent station”, and “noncommercial educational station”, respectively.

Pub. L. 111–175, § 104(e)(4)(C), which directed amendment of “the fourth undesignated paragraph, in the first sentence” by striking out “as defined by the rules and regulations of the Federal Communications Commission,”, was executed by striking out such phrase after “television station,” in the second sentence of par. (4), to reflect the probable intent of Congress.

Pub. L. 111–175, § 104(e)(1) to (4)(B), added par. (1) and struck out first undesignated par. which defined “primary transmission”, designated second undesignated par. as par. (2), inserted par. (2) heading, and substituted “a cable system” for “a ‘cable system’”, designated third undesignated par. as par. (3), inserted par. (3) heading, and substituted “territory, trust territory, or possession of the United States” for “Territory, Trust Territory, or Possession”, and designated fourth undesignated par. as par. (4), inserted par. (4) heading, and substituted “The local service area of a primary transmitter”, in the case of both the primary stream and any multicast streams transmitted by a primary transmitter that is a television broadcast station, comprises the area where such primary transmitter could have insisted” for “The local service area of a primary transmitter’, in the case of a television broadcast station, comprises the area in which such station is entitled to insist” and “76.59 of title 47, Code of Federal Regulations, or within the noise-limited contour as defined in 73.622(e)(1) of title 47, Code of Federal Regulations” for “76.59 of title 47 of the Code of Federal Regulations”.

Subsec. (f)(9) to (13). Pub. L. 111–175, § 104(e)(9), added pars. (9) to (13).

2008—Subsec. (b). Pub. L. 110–403, § 209(a)(2)(A), struck out “and 509” after “506” in introductory provisions.

Subsec. (c)(2). Pub. L. 110–403, § 209(a)(2)(B)(i), struck out “and 509” after “506” in introductory provisions.

Subsec. (c)(3). Pub. L. 110–403, § 209(a)(2)(B)(ii), substituted “section 510” for “sections 509 and 510”.

Subsec. (c)(4). Pub. L. 110–403, § 209(a)(2)(B)(iii), struck out “and section 509” after “506”.

Subsec. (e)(1). Pub. L. 110–403, § 209(a)(2)(C)(i), substituted “section 510” for “sections 509 and 510” in introductory provisions.

Subsec. (e)(2). Pub. L. 110–403, § 209(a)(2)(C)(ii), struck out “and 509” after “506” in introductory provisions.

Pub. L. 110–229 substituted “the Federated States of Micronesia, the Republic of Palau, or the Republic of the Marshall Islands” for “or the Trust Territory of the Pacific Islands” in introductory provisions.

2006—Subsec. (d)(2). Pub. L. 109–303, § 4(a)(1), substituted “upon authorization by the Copyright Royalty Judges.” for “in the event no controversy over distribution exists, or by the Copyright Royalty Judges. in the event a controversy over such distribution exists.”

Subsec. (d)(4)(B). Pub. L. 109–303, § 4(a)(2)(A), substituted second sentence for former second sentence

which read as follows: “If the Copyright Royalty Judges determine that no such controversy exists, the Librarian shall, after deducting reasonable administrative costs under this section, distribute such fees to the copyright owners entitled to such fees, or to their designated agents.” and “find” for “finds” in last sentence.

Subsec. (d)(4)(C). Pub. L. 109-303, §4(a)(2)(B), added subparagraph. (C) and struck out former subparagraph. (C) which read as follows: “During the pendency of any proceeding under this subsection, the Copyright Royalty Judges shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.”

2004—Subsec. (a)(4). Pub. L. 108-447 struck out “for private home viewing” after “satellite carrier”.

Subsec. (d)(1)(A). Pub. L. 108-447 struck out “for private home viewing” after “secondary transmissions”.

Subsec. (d)(2). Pub. L. 108-419, §5(a)(1), substituted “the Copyright Royalty Judges.” for “a copyright arbitration royalty panel”.

Subsec. (d)(4)(A). Pub. L. 108-419, §5(a)(2)(A), substituted “Copyright Royalty Judges” for “Librarian of Congress” in two places.

Subsec. (d)(4)(B). Pub. L. 108-419, §5(a)(2)(B), substituted, in first sentence, “Copyright Royalty Judges shall” for “Librarian of Congress shall, upon the recommendation of the Register of Copyrights,”, in second sentence, “Copyright Royalty Judges determine” for “Librarian determines”, and, in third sentence, “Copyright Royalty Judges” for “Librarian” in two places and “conduct a proceeding” for “convene a copyright arbitration royalty panel”.

Subsec. (d)(4)(C). Pub. L. 108-419, §5(a)(2)(C), substituted “Copyright Royalty Judges” for “Librarian of Congress”.

1999—Subsecs. (a), (b). Pub. L. 106-113, §1000(a)(9) [title I, §1011(b)(1)(A), (B)], substituted “performance or display of a work embodied in a primary transmission” for “primary transmission embodying a performance or display of a work” in introductory provisions.

Subsec. (c)(1). Pub. L. 106-113, §1000(a)(9) [title I, §1011(a)(2), (b)(1)(C)(i)], inserted “a performance or display of a work embodied in” after “by a cable system of”, struck out “and embodying a performance or display of a work” after “governmental authority of Canada or Mexico”, and substituted “statutory” for “compulsory”.

Subsec. (c)(3), (4). Pub. L. 106-113, §1000(a)(9) [title I, §1011(b)(1)(C)(ii)], substituted “a performance or display of a work embodied in a primary transmission” for “a primary transmission” and struck out “and embodying a performance or display of a work” after “governmental authority of Canada or Mexico”.

Subsec. (d). Pub. L. 106-113, §1000(a)(9) [title I, §1011(a)(2)], which directed substitution of “statutory” for “compulsory”, was executed by substituting “Statutory” for “Compulsory” in heading to reflect probable intent of Congress.

Subsec. (d)(1). Pub. L. 106-113, §1000(a)(9) [title I, §1011(a)(2)], substituted “statutory” for “compulsory” in introductory provisions.

Subsec. (d)(1)(B)(i), (3)(C). Pub. L. 106-113, §1000(a)(9) [title I, §1011(a)(1)], substituted “programming” for “programing”.

Subsec. (d)(4)(A). Pub. L. 106-113, §1000(a)(9) [title I, §1011(a)(2)], substituted “statutory” for “compulsory” in two places.

Subsec. (f). Pub. L. 106-113, §1000(a)(9) [title I, §1011(a)(1)], substituted “programming” for “programing” wherever appearing.

1995—Subsec. (c)(1). Pub. L. 104-39 inserted “and section 114(d)” after “of this subsection”.

1994—Subsec. (f). Pub. L. 103-369, §3(b), in fourth undesignated par. defining local service area of a primary transmitter, inserted “or such station’s television market as defined in section 76.55(e) of title 47, Code of Federal Regulations (as in effect on September 18, 1993), or

any modifications to such television market made, on or after September 18, 1993, pursuant to section 76.55(e) or 76.59 of title 47 of the Code of Federal Regulations,” after “April 15, 1976.”

Pub. L. 103-369, §3(a), inserted “microwave,” after “wires, cables,” in third undesignated par., defining cable system.

1993—Subsec. (d)(1). Pub. L. 103-198, §6(a)(1), struck out “, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted),” after “Register shall” in introductory provisions.

Subsec. (d)(1)(A). Pub. L. 103-198, §6(a)(2), struck out “, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted),” after “Register of Copyrights may”.

Subsec. (d)(2). Pub. L. 103-198, §6(a)(3), substituted “All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Librarian of Congress in the event no controversy over distribution exists, or by a copyright arbitration royalty panel in the event a controversy over such distribution exists.” for “All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on a semiannual basis, a compilation of all statements of account covering the relevant six-month period provided by clause (1) of this subsection.”

Subsec. (d)(4)(A). Pub. L. 103-198, §6(a)(4), substituted “Librarian of Congress” for “Copyright Royalty Tribunal” before “claim with the” and for “Tribunal” before “requirements that the”.

Subsec. (d)(4)(B). Pub. L. 103-198, §6(a)(5), amended subparagraph. (B) generally. Prior to amendment, subparagraph. (B) read as follows: “After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds the existence of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.”

Subsec. (d)(4)(C). Pub. L. 103-198, §6(a)(6), substituted “Librarian of Congress” for “Copyright Royalty Tribunal”.

1990—Subsec. (c)(2)(B). Pub. L. 101-318, §3(a)(1), struck out “recorded the notice specified by subsection (d) and” after “where the cable system has not”.

Subsec. (d)(2). Pub. L. 101-318, §3(a)(2)(A), substituted “clause (1)” for “paragraph (1)”.

Subsec. (d)(3). Pub. L. 101-318, §3(a)(2)(B), substituted “clause (4)” for “clause (5)” in introductory provisions.

Subsec. (d)(3)(B). Pub. L. 101-318, §3(a)(2)(C), substituted “clause (1)(A)” for “clause (2)(A)”.

1988—Subsec. (a)(4), (5). Pub. L. 100-667, §202(1)(A), added par. (4) and redesignated former par. (4) as (5).

Subsec. (d)(1)(A). Pub. L. 100-667, §202(1)(B), inserted provision that determination of total number of subscribers and gross amounts paid to cable system for basic service of providing secondary transmissions of primary broadcast transmitters not include subscribers and amounts collected from subscribers receiving secondary transmissions for private home viewing under section 119.

1986—Subsec. (d). Pub. L. 99-397, §2(a)(1), (4), (5), substituted “paragraph (1)” for “clause (2)” in par. (3), struck out par. (1) which related to recordation of notice with Copyright Office by cable systems in order for secondary transmissions to be subject to compulsory licensing, and redesignated pars. (2) to (5) as (1) to (4), respectively.

Pub. L. 99-397, §2(a)(2), (3), which directed the amendment of subsec. (d) by substituting “paragraph (4)” for “clause (5)” in pars. (2) and (2)(B) could not be executed

because pars. (2) and (2)(B) did not contain references to “clause (5)”. See 1990 Amendment note above.

Subsec. (f). Pub. L. 99-397, §2(b), substituted “subsection (d)(1)” for “subsection (d)(2)” in third undesignated par., defining a cable system.

Pub. L. 99-397, §1, inserted provision in fourth undesignated par., defining “local service area of a primary transmitter”, to cover that term in relation to low power television stations.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2010 AMENDMENT

Pub. L. 111-175, title I, §104(d), May 27, 2010, 124 Stat. 1235, provided that: “The royalty fee rates established in section 111(d)(1)(B) of title 17, United States Code, as amended by subsection (c)(1)(C) of this section, shall take effect commencing with the first accounting period occurring in 2010.”

Pub. L. 111-175, title I, §104(h), May 27, 2010, 124 Stat. 1238, provided that:

“(1) IN GENERAL.—Subject to paragraphs (2) and (3), the amendments made by this section [amending this section and section 804 of this title], to the extent such amendments assign a distant signal equivalent value to the secondary transmission of the multicast stream of a primary transmitter, shall take effect on the date of the enactment of this Act [deemed to refer to Feb. 27, 2010, see section 307(a) of Pub. L. 111-175, set out as a note below].

“(2) DELAYED APPLICABILITY.—

“(A) SECONDARY TRANSMISSIONS OF A MULTICAST STREAM BEYOND THE LOCAL SERVICE AREA OF ITS PRIMARY TRANSMITTER BEFORE 2010 ACT.—In any case in which a cable system was making secondary transmissions of a multicast stream beyond the local service area of its primary transmitter before the date of the enactment of this Act, a distant signal equivalent value (referred to in paragraph (1)) shall not be assigned to secondary transmissions of such multicast stream that are made on or before June 30, 2010.

“(B) MULTICAST STREAMS SUBJECT TO PREEXISTING WRITTEN AGREEMENTS FOR THE SECONDARY TRANSMISSION OF SUCH STREAMS.—In any case in which the secondary transmission of a multicast stream of a primary transmitter is the subject of a written agreement entered into on or before June 30, 2009, between a cable system or an association representing the cable system and a primary transmitter or an association representing the primary transmitter, a distant signal equivalent value (referred to in paragraph (1)) shall not be assigned to secondary transmissions of such multicast stream beyond the local service area of its primary transmitter that are made on or before the date on which such written agreement expires.

“(C) NO REFUNDS OR OFFSETS FOR PRIOR STATEMENTS OF ACCOUNT.—A cable system that has reported secondary transmissions of a multicast stream beyond the local service area of its primary transmitter on a statement of account deposited under section 111 of title 17, United States Code, before the date of the enactment of this Act shall not be entitled to any refund, or offset, of royalty fees paid on account of such secondary transmissions of such multicast stream.

“(3) DEFINITIONS.—In this subsection, the terms ‘cable system’, ‘secondary transmission’, ‘multicast stream’, and ‘local service area of a primary transmitter’ have the meanings given those terms in section 111(f) of title 17, United States Code, as amended by this section.”

Pub. L. 111-175, title III, §307, May 27, 2010, 124 Stat. 1257, provided that:

“(a) EFFECTIVE DATE.—Unless specifically provided otherwise, this Act [see Short Title of 2010 Amendment note set out under section 101 of this title], and the amendments made by this Act, shall take effect on February 27, 2010, and with the exception of the reference in subsection (b), all references to the date of enactment of this Act shall be deemed to refer to February 27, 2010, unless otherwise specified.

“(b) NONINFRINGEMENT OF COPYRIGHT.—The secondary transmission of a performance or display of a work embodied in a primary transmission is not an infringement of copyright if it was made by a satellite carrier on or after February 27, 2010, and prior to enactment of this Act [May 27, 2010], and was in compliance with the law as in existence on February 27, 2010.”

EFFECTIVE DATE OF 2006 AMENDMENT

Pub. L. 109-303, §6, Oct. 6, 2006, 120 Stat. 1483, provided that:

“(a) IN GENERAL.—Except as provided under subsection (b), this Act [see Short Title of 2006 Amendment note set out under section 101 of this title] and the amendments made by this Act shall be effective as if included in the Copyright Royalty and Distribution Reform Act of 2004 [Pub. L. 108-419].

“(b) PARTIAL DISTRIBUTION OF ROYALTY FEES.—Section 5 [amending section 801 of this title] shall take effect on the date of enactment of this Act [Oct. 6, 2006].”

EFFECTIVE DATE OF 2004 AMENDMENT

Amendment by Pub. L. 108-419 effective 6 months after Nov. 30, 2004, subject to transition provisions, see section 6 of Pub. L. 108-419, set out as an Effective Date; Transition Provisions note under section 801 of this title.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104-39 effective 3 months after Nov. 1, 1995, see section 6 of Pub. L. 104-39, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by section 3(b) of Pub. L. 103-369 effective July 1, 1994, see section 6(d) of Pub. L. 103-369, set out as an Effective and Termination Dates of 1994 Amendment note under section 119 of this title.

EFFECTIVE DATE OF 1993 AMENDMENT

Pub. L. 103-198, §7, Dec. 17, 1993, 107 Stat. 2313, provided that:

“(a) IN GENERAL.—This Act [see Short Title of 1993 Amendment note set out under section 101 of this title] and the amendments made by this Act shall take effect on the date of the enactment of this Act [Dec. 17, 1993].

“(b) EFFECTIVENESS OF EXISTING RATES AND DISTRIBUTIONS.—All royalty rates and all determinations with respect to the proportionate division of compulsory license fees among copyright claimants, whether made by the Copyright Royalty Tribunal, or by voluntary agreement, before the effective date set forth in subsection (a) shall remain in effect until modified by voluntary agreement or pursuant to the amendments made by this Act.

“(c) TRANSFER OF APPROPRIATIONS.—All unexpended balances of appropriations made to the Copyright Royalty Tribunal, as of the effective date of this Act, are transferred on such effective date to the Copyright Office for use by the Copyright Office for the purposes for which such appropriations were made.”

EFFECTIVE DATE OF 1990 AMENDMENT

Pub. L. 101-318, §3(e)(1), July 3, 1990, 104 Stat. 289, provided that: “The amendments made by subsections (a) and (b) [amending this section and section 801 of this title] shall be effective as of August 27, 1986.”

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-667 effective Jan. 1, 1989, see section 206 of Pub. L. 100-667, set out as an Effective Date note under section 119 of this title.

SAVINGS PROVISION

Pub. L. 111-175, title III, §306, May 27, 2010, 124 Stat. 1257, provided that:

“(a) IN GENERAL.—Nothing in this Act [see Short Title of 2010 Amendment note set out under section 101

of this title], title 17, United States Code, the Communications Act of 1934 [47 U.S.C. 151 et seq.], regulations promulgated by the Register of Copyrights under this title or title 17, United States Code, or regulations promulgated by the Federal Communications Commission under this Act or the Communications Act of 1934 shall be construed to prevent a multichannel video programming distributor from retransmitting a performance or display of a work pursuant to an authorization granted by the copyright owner or, if within the scope of its authorization, its licensee.

“(b) LIMITATION.—Nothing in subsection (a) shall be construed to affect any obligation of a multichannel video programming distributor under section 325(b) of the Communications Act of 1934 [47 U.S.C. 325(b)] to obtain the authority of a television broadcast station before retransmitting that station's signal.”

SEVERABILITY

Pub. L. 113-200, title III, § 301, Dec. 4, 2014, 128 Stat. 2067, provided that: “If any provision of this Act [see Short Title of 2014 Amendment note set out under section 609 of Title 47, Telecommunications], an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of such provision or amendment to any person or circumstance shall not be affected thereby.”

Pub. L. 111-175, title IV, § 401, May 27, 2010, 124 Stat. 1258, provided that: “If any provision of this Act [see Short Title of 2010 Amendment note set out under section 101 of this title], an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of such provision or amendment to any person or circumstance shall not be affected thereby.”

CONSTRUCTION

Pub. L. 111-175, title I, § 108, May 27, 2010, 124 Stat. 1245, provided that: “Nothing in section 111, 119, or 122 of title 17, United States Code, including the amendments made to such sections by this title, shall be construed to affect the meaning of any terms under the Communications Act of 1934 [47 U.S.C. 151 et seq.], except to the extent that such sections are specifically cross-referenced in such Act or the regulations issued thereunder.”

§ 112. Limitations on exclusive rights: Ephemeral recordings

(a)(1) Notwithstanding the provisions of section 106, and except in the case of a motion picture or other audiovisual work, it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work, under a license, including a statutory license under section 114(f), or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114(a), or for a transmitting organization that is a broadcast radio or television station licensed as such by the Federal Communications Commission and that makes a broadcast transmission of a performance of a sound recording in a digital format on a nonsubscription basis, to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display, if—

(A) the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and

(B) the copy or phonorecord is used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security; and

(C) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public.

(2) In a case in which a transmitting organization entitled to make a copy or phonorecord under paragraph (1) in connection with the transmission to the public of a performance or display of a work is prevented from making such copy or phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the work, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such copy or phonorecord as permitted under that paragraph, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization's reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such copies or phonorecords as permitted under paragraph (1) of this subsection.

(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display, if—

(1) no further copies or phonorecords are reproduced from the copies or phonorecords made under this clause; and

(2) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are destroyed within seven years from the date the transmission program was first transmitted to the public.

(c) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization to make for distribution no more than one copy or phonorecord, for each transmitting organization specified in clause (2) of this subsection, of a particular transmission program embodying a performance of a nondramatic musical work of a religious nature, or of a sound recording of such a musical work, if—

(1) there is no direct or indirect charge for making or distributing any such copies or phonorecords; and

(2) none of such copies or phonorecords is used for any performance other than a single transmission to the public by a transmitting organization entitled to transmit to the public a performance of the work under a license or transfer of the copyright; and

(3) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are all destroyed within one year from the date the transmission program was first transmitted to the public.

(d) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance of a work under section 110(8) to make no more than ten copies or phonorecords embodying the performance, or to permit the use of any such copy or phonorecord by any governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), if—

(1) any such copy or phonorecord is retained and used solely by the organization that made it, or by a governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), and no further copies or phonorecords are reproduced from it; and

(2) any such copy or phonorecord is used solely for transmissions authorized under section 110(8), or for purposes of archival preservation or security; and

(3) the governmental body or nonprofit organization permitting any use of any such copy or phonorecord by any governmental body or nonprofit organization under this subsection does not make any charge for such use.

(e) STATUTORY LICENSE.—(1) A transmitting organization entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by section 114(d)(1)(C)(iv) or under a statutory license in accordance with section 114(f) is entitled to a statutory license, under the conditions specified by this subsection, to make no more than 1 phonorecord of the sound recording (unless the terms and conditions of the statutory license allow for more), if the following conditions are satisfied:

(A) The phonorecord is retained and used solely by the transmitting organization that made it, and no further phonorecords are reproduced from it.

(B) The phonorecord is used solely for the transmitting organization's own transmissions originating in the United States under a statutory license in accordance with section 114(f) or the limitation on exclusive rights specified by section 114(d)(1)(C)(iv).

(C) Unless preserved exclusively for purposes of archival preservation, the phonorecord is destroyed within 6 months from the date the sound recording was first transmitted to the public using the phonorecord.

(D) Phonorecords of the sound recording have been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording, and the transmitting entity makes the phonorecord under this subsection from a phonorecord lawfully made and acquired under the authority of the copyright owner.

(2) Notwithstanding any provision of the antitrust laws, any copyright owners of sound re-

cordings and any transmitting organizations entitled to a statutory license under this subsection may negotiate and agree upon royalty rates and license terms and conditions for making phonorecords of such sound recordings under this section and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

(3) Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for the activities specified by paragraph (1) during the 5-year period beginning on January 1 of the second year following the year in which the proceedings are to be commenced, or such other period as the parties may agree. Such rates shall include a minimum fee for each type of service offered by transmitting organizations. Any copyright owners of sound recordings or any transmitting organizations entitled to a statutory license under this subsection may submit to the Copyright Royalty Judges licenses covering such activities with respect to such sound recordings. The parties to each proceeding shall bear their own costs.

(4) The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (5), be binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under this subsection during the 5-year period specified in paragraph (3), or such other period as the parties may agree. Such rates shall include a minimum fee for each type of service offered by transmitting organizations. The Copyright Royalty Judges shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base their decision on economic, competitive, and programming information presented by the parties, including—

(A) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner's traditional streams of revenue; and

(B) the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms under voluntary license agreements described in paragraphs (2) and (3). The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by transmitting organizations entitled to obtain a statutory license under this subsection.

(5) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more transmitting organizations entitled to obtain a statutory license under this subsection shall be given effect in lieu of any decision by the Librarian of Con-

gress or determination by the Copyright Royalty Judges.

(6)(A) Any person who wishes to make a phonorecord of a sound recording under a statutory license in accordance with this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording under section 106(1)—

(i) by complying with such notice requirements as the Copyright Royalty Judges shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

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

(B) Any royalty payments in arrears shall be made on or before the 20th day of the month next succeeding the month in which the royalty fees are set.

(7) If a transmitting organization entitled to make a phonorecord under this subsection is prevented from making such phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the sound recording, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such phonorecord as permitted under this subsection, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization's reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such phonorecords as permitted under this subsection.

(8) Nothing in this subsection annuls, limits, impairs, or otherwise affects in any way the existence or value of any of the exclusive rights of the copyright owners in a sound recording, except as otherwise provided in this subsection, or in a musical work, including the exclusive rights to reproduce and distribute a sound recording or musical work, including by means of a digital phonorecord delivery, under sections 106(1), 106(3), and 115, and the right to perform publicly a sound recording or musical work, including by means of a digital audio transmission, under sections 106(4) and 106(6).

(f)(1) Notwithstanding the provisions of section 106, and without limiting the application of subsection (b), it is not an infringement of copyright for a governmental body or other non-profit educational institution entitled under section 110(2) to transmit a performance or display to make copies or phonorecords of a work that is in digital form and, solely to the extent permitted in paragraph (2), of a work that is in analog form, embodying the performance or display to be used for making transmissions authorized under section 110(2), if—

(A) such copies or phonorecords are retained and used solely by the body or institution that made them, and no further copies or phonorecords are reproduced from them, except as authorized under section 110(2); and

(B) such copies or phonorecords are used solely for transmissions authorized under section 110(2).

(2) This subsection does not authorize the conversion of print or other analog versions of works into digital formats, except that such conversion is permitted hereunder, only with respect to the amount of such works authorized to be performed or displayed under section 110(2), if—

(A) no digital version of the work is available to the institution; or

(B) the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use for section 110(2).

(g) The transmission program embodied in a copy or phonorecord made under this section is not subject to protection as a derivative work under this title except with the express consent of the owners of copyright in the preexisting works employed in the program.

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2558; Pub. L. 105-304, title IV, §§ 402, 405(b), Oct. 28, 1998, 112 Stat. 2888, 2899; Pub. L. 106-44, § 1(b), Aug. 5, 1999, 113 Stat. 221; Pub. L. 107-273, div. C, title III, § 13301(c)(1), Nov. 2, 2002, 116 Stat. 1912; Pub. L. 108-419, § 5(b), Nov. 30, 2004, 118 Stat. 2361.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Section 112 of the bill concerns itself with a special problem that is not dealt with in the present statutes but is the subject of provisions in a number of foreign statutes and in the revisions of the Berne Convention since 1948. This is the problem of what are commonly called "ephemeral recordings": copies or phonorecords of a work made for purposes of later transmission by a broadcasting organization legally entitled to transmit the work. In other words, where a broadcaster has the privilege of performing or displaying a work either because he is licensed or because the performance or display is exempted under the statute, the question is whether he should be given the additional privilege of recording the performance or display to facilitate its transmission. The need for a limited exemption in these cases because of the practical exigencies of broadcasting has been generally recognized, but the scope of the exemption has been a controversial issue.

Recordings for Licensed Transmissions. Under subsection (a) of section 112, an organization that has acquired the right to transmit any work (other than a motion picture or other audiovisual work), or that is free to transmit a sound recording under section 114, may make a single copy or phonorecord of a particular program embodying the work, if the copy or phonorecord is used solely for the organization's own transmissions within its own area; after 6 months it must be destroyed or preserved solely for archival purposes.

Organizations Covered.—The ephemeral recording privilege is given by subsection (a) to "a transmitting organization entitled to transmit to the public a performance or display of a work." Assuming that the transmission meets the other conditions of the provision, it makes no difference what type of public transmission the organization is making: commercial radio and television broadcasts, public radio and television broadcasts not exempted by section 110(2), pay-TV, closed circuit, background music, and so forth. However, to come within the scope of subsection (a), the organization must have the right to make the transmission "under a license or transfer of the copyright or under the limitations on exclusive rights in sound re-

cordings specified by section 114(a).” Thus, except in the case of copyrighted sound recordings (which have no exclusive performing rights under the bill), the organization must be a transferee or licensee (including compulsory licensee) of performing rights in the work in order to make an ephemeral recording of it.

Some concern has been expressed by authors and publishers lest the term “organization” be construed to include a number of affiliated broadcasters who could exchange the recording without restrictions. The term is intended to cover a broadcasting network, or a local broadcaster or individual transmitter; but, under clauses (1) and (2) of the subsection, the ephemeral recording must be “retained and used solely by the transmitting organization that made it,” and must be used solely for that organization’s own transmissions within its own area. Thus, an ephemeral recording made by one transmitter, whether it be a network or local broadcaster, could not be made available for use by another transmitter. Likewise, this subsection does not apply to those nonsimultaneous transmissions by cable systems not located within a boundary of the forty-eight contiguous States that are granted a compulsory license under section 111.

Scope of the Privilege.—Subsection (a) permits the transmitting organization to make “no more than one copy or phonorecord of a particular transmission program embodying the performance or display.” A “transmission program” is defined in section 101 as a body of material produced for the sole purpose of transmission as a unit. Thus, under section 112(a), a transmitter could make only one copy or phonorecord of a particular “transmission program” containing a copyrighted work, but would not be limited as to the number of times the work itself could be duplicated as part of other “transmission programs.”

Three specific limitations on the scope of the ephemeral recording privilege are set out in subsection (a), and unless all are met the making of an “ephemeral recording” becomes fully actionable as an infringement. The first requires that the copy or phonorecord be “retained and used solely by the transmitting organization that made it,” and that “no further copies or phonorecords are reproduced from it.” This means that a transmitting organization would have no privilege of exchanging ephemeral recordings with other transmitters or of allowing them to duplicate their own ephemeral recordings from the copy or phonorecord it has made. There is nothing in the provision to prevent a transmitting organization from having an ephemeral recording made by means of facilities other than its own, although it would not be permissible for a person or organization other than a transmitting organization to make a recording on its own initiative for possible sale or lease to a broadcaster. The ephemeral recording privilege would extend to copies or phonorecords made in advance for later broadcast, as well as recordings of a program that are made while it is being transmitted and are intended for deferred transmission or preservation.

Clause (2) of section 112(a) provides that, to be exempt from copyright, the copy or phonorecord must be “used solely for the transmitting organization’s own transmissions within its local service area, or for purposes of archival preservation or security”. The term “local service area” is defined in section 111(f).

Clause (3) of section 112(a) provides that, unless preserved exclusively for archival purposes, the copy or phonorecord of a transmission program must be destroyed within six months from the date the transmission program was first transmitted to the public.

Recordings for Instructional Transmissions. Section 112(b) represents a response to the arguments of instructional broadcasters and other educational groups for special recording privileges, although it does not go as far as these groups requested. In general, it permits a nonprofit organization that is free to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make not more

than thirty copies or phonorecords and to use the ephemeral recordings for transmitting purposes for not more than seven years after the initial transmission.

Organizations Covered.—The privilege of making ephemeral recordings under section 112(b) extends to a “governmental body or other nonprofit organization entitled to transmit a performance or display of a work under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a).” Aside from phonorecords of copyrighted sound recordings, the ephemeral recordings made by an instructional broadcaster under subsection (b) must embody a performance or display that meets all of the qualifications for exemption under section 110(2). Copies or phonorecords made for educational broadcasts of a general cultural nature, or for transmission as part of an information storage and retrieval system, would not be exempted from copyright protection under section 112(b).

Motion Pictures and Other Audiovisual Works.—Since the performance exemption provided by section 110(2) applies only to nondramatic literary and musical works, there was no need to exclude motion pictures and other audiovisual works explicitly from the scope of section 112(b). Another point stressed by the producers of educational films in this connection, however, was that ephemeral recordings made by instructional broadcasters are in fact audiovisual works that often compete for exactly the same market. They argued that it is unfair to allow instructional broadcasters to reproduce multiple copies of films and tapes, and to exchange them with other broadcasters, without paying any copyright royalties, thereby directly injuring the market of producers of audiovisual works who now pay substantial fees to authors for the same uses. These arguments are persuasive and justify the placing of reasonable limits on the recording privilege.

Scope of the Privilege.—Under subsection (b) an instructional broadcaster may make “no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display.” No further copies or phonorecords can be reproduced from those made under section 112(b), either by the nonprofit organization that made them or by anyone else.

On the other hand, if the nonprofit organization does nothing directly or indirectly to authorize, induce, or encourage others to duplicate additional copies or phonorecords of an ephemeral recording in excess of the limit of thirty, it would not be held responsible as participating in the infringement in such a case, and the unauthorized copies would not be counted against the organization’s total of thirty.

Unlike ephemeral recordings made under subsection (a), exchanges of recordings among instructional broadcasters are permitted. An organization that has made copies or phonorecords under subsection (b) may use one of them for purposes of its own transmissions that are exempted by section 110(2), and it may also transfer the other 29 copies to other instructional broadcasters for use in the same way.

As in the case of ephemeral recordings made under section 112(a), a copy or phonorecord made for instructional broadcasting could be reused in any number of transmissions within the time limits specified in the provision. Because of the special problems of instructional broadcasters resulting from the scheduling of courses and the need to prerecord well in advance of transmission, the period of use has been extended to seven years from the date the transmission program was first transmitted to the public.

Religious Broadcasts.—Section 112(c) provides that it is not an infringement of copyright for certain nonprofit organizations to make no more than one copy for each transmitting organization of a broadcast program embodying a performance of a nondramatic musical work of a religious nature or of a sound recording of such a musical work. In order for this exception to be applicable there must be no charge for the distribution of the copies, none of the copies may be used for any performance other than a single transmission by an or-

ganization possessing a license to transmit a copyrighted work, and, other than for one copy that may be preserved for archival purposes, the remaining copies must be destroyed within one year from the date the program was first transmitted to the public.

Despite objections by music copyright owners, the Committee found this exemption to be justified by the special circumstances under which many religious programs are broadcast. These programs are produced on tape or disk for distribution by mail of one copy only to each broadcast station carrying the program. None of the programs are prepared for profit, and the program producer either pays the station to carry the program or furnishes it free of charge. The stations have performing licenses, so the copyright owners receive compensation. Following the performance, the tape is returned or the disk destroyed. It seems likely that, as has been alleged, to require a second payment for the mechanical reproduction under these circumstances would simply have the effect of driving some of the copyrighted music off the air.

Ephemeral Recordings for Transmissions to Handicapped Audiences. As a counterpart to its amendment of section 110(8), the Committee adopted a new provision, subsection (d) of section 112, to provide an ephemeral recording exemption in the case of transmissions to the blind and deaf. New subsection would permit the making of one recording of a performance exempted under section 110(8), and its retention for an unlimited period. It would not permit the making of further reproductions or their exchange with other organizations.

Copyright Status of Ephemeral Recordings. A program reproduced in an ephemeral recording made under section 112 in many cases will constitute a motion picture, a sound recording, or some other kind of derivative work, and will thus be potentially copyrightable under section 103. In section 112(e) it is provided that ephemeral recordings are not to be copyrightable as derivative works except with the consent of the owners of the copyrighted material employed in them.

Editorial Notes

AMENDMENTS

2004—Subsec. (e)(3). Pub. L. 108-419, §5(b)(1), substituted first sentence for former first sentence which read: “No later than 30 days after the date of the enactment of the Digital Millennium Copyright Act, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by paragraph (1) of this subsection during the period beginning on the date of the enactment of such Act and ending on December 31, 2000, or such other date as the parties may agree.”, substituted “Copyright Royalty Judges licenses” for “Librarian of Congress licenses” in third sentence, and struck out “negotiation” before “proceeding” in last sentence.

Subsec. (e)(4). Pub. L. 108-419, §5(b)(2), substituted first sentence for former first sentence which read: “In the absence of license agreements negotiated under paragraph (2), during the 60-day period commencing 6 months after publication of the notice specified in paragraph (3), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of reasonable rates and terms which, subject to paragraph (5), shall be binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under this subsection during the period beginning on the date of the enactment of the Digital Millennium Copyright Act and ending on December 31, 2000, or such other date as the parties may agree.”, and substituted “Copyright Royalty Judges” for “copyright arbitration royalty panel” in third and fourth sentences and in

concluding provisions, “their decision” for “its decision”, “described” for “negotiated as provided”, and “Copyright Royalty Judges shall also establish” for “Librarian of Congress shall also establish”.

Subsec. (e)(5). Pub. L. 108-419, §5(b)(3), substituted “decision by the Librarian of Congress or determination by the Copyright Royalty Judges” for “determination by a copyright arbitration royalty panel or decision by the Librarian of Congress”.

Subsec. (e)(6). Pub. L. 108-419, §5(b)(4), redesignated par. (7) as (6) and struck out former par. (6) which related to publication of notice of the initiation of voluntary negotiation proceedings as specified in par. (3).

Subsec. (e)(6)(A)(i). Pub. L. 108-419, §5(b)(5), substituted “Copyright Royalty Judges” for “Librarian of Congress”.

Subsec. (e)(7) to (9). Pub. L. 108-419, §5(b)(4), redesignated pars. (8) and (9) as (7) and (8), respectively. Former par. (7) redesignated (6).

2002—Subsecs. (f), (g). Pub. L. 107-273 added subsec. (f) and redesignated former subsec. (f) as (g).

1999—Subsec. (e)(2). Pub. L. 106-44, §1(b)(1), redesignated par. (3) as (2).

Subsec. (e)(3). Pub. L. 106-44, §1(b)(1), (2), redesignated par. (4) as (3) and substituted “(1)” for “(2)” in first sentence. Former par. (3) redesignated (2).

Subsec. (e)(4). Pub. L. 106-44, §1(b)(1), (3), redesigned par. (5) as (4), substituted “(2)” for “(3)”, “(3)” for “(4)”, and “(5)” for “(6)” in first sentence, and substituted “(2) and (3)” for “(3) and (4)” in penultimate sentence of concluding provisions. Former par. (4) redesignated (3).

Subsec. (e)(5). Pub. L. 106-44, §1(b)(1), redesigned par. (6) as (5). Former par. (5) redesignated (4).

Subsec. (e)(6). Pub. L. 106-44, §1(b)(1), (4), redesigned par. (7) as (6), substituted “(3)” for “(4)” wherever appearing, and substituted “(4)” for “(5)” in two places. Former par. (6) redesignated (5).

Subsec. (e)(7) to (10). Pub. L. 106-44, §1(b)(1), redesigned pars. (8) to (10) as (7) to (9), respectively. Former par. (7) redesignated (6).

1998—Subsec. (a). Pub. L. 105-304, §402, designated existing provisions as par. (1), in introductory provisions inserted “, including a statutory license under section 114(f),” after “under a license” and “or for a transmitting organization that is a broadcast radio or television station licensed as such by the Federal Communications Commission and that makes a broadcast transmission of a performance of a sound recording in a digital format on a nonsubscription basis,” after “114(a)”, redesignated former pars. (1) to (3) as subpars. (A) to (C), respectively, and added par. (2).

Subsecs. (e), (f). Pub. L. 105-304, §405(b), added subsec. (e) and redesignated former subsec. (e) as (f).

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2004 AMENDMENT

Amendment by Pub. L. 108-419 effective 6 months after Nov. 30, 2004, subject to transition provisions, see section 6 of Pub. L. 108-419, set out as an Effective Date; Transition Provisions note under section 801 of this title.

CONSTRUCTION OF 1998 AMENDMENT

Pub. L. 105-304, title IV, §405(c), Oct. 28, 1998, 112 Stat. 2902, provided that: “Nothing in this section [amending this section and sections 114 and 801 to 803 of this title and enacting provisions set out as notes under section 114 of this title] or the amendments made by this section shall affect the scope of section 112(a) of title 17, United States Code, or the entitlement of any person to an exemption thereunder.”

§ 113. Scope of exclusive rights in pictorial, graphic, and sculptural works

(a) Subject to the provisions of subsections (b) and (c) of this section, the exclusive right to re-

produce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.

(b) This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.

(c) In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to prevent the making, distribution, or display of pictures or photographs of such articles in connection with advertisements or commentaries related to the distribution or display of such articles, or in connection with news reports.

(d)(1) In a case in which—

(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and

(B) the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal,

then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.

(2) If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), the author's rights under paragraphs (2) and (3) of section 106A(a) shall apply unless—

(A) the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art, or

(B) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

For purposes of subparagraph (A), an owner shall be presumed to have made a diligent, good faith attempt to send notice if the owner sent such notice by registered mail to the author at the most recent address of the author that was recorded with the Register of Copyrights pursuant to paragraph (3). If the work is removed at the expense of the author, title to that copy of the work shall be deemed to be in the author.

(3) The Register of Copyrights shall establish a system of records whereby any author of a work of visual art that has been incorporated in or

made part of a building, may record his or her identity and address with the Copyright Office. The Register shall also establish procedures under which any such author may update the information so recorded, and procedures under which owners of buildings may record with the Copyright Office evidence of their efforts to comply with this subsection.

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2560; Pub. L. 101-650, title VI, § 604, Dec. 1, 1990, 104 Stat. 5130.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Section 113 deals with the extent of copyright protection in "works of applied art." The section takes as its starting point the Supreme Court's decision in *Mazer v. Stein*, 347 U.S. 201 (1954) [74 S.Ct. 460, 98 L.Ed. 630, rehearing denied 74 S.Ct. 637, 347 U.S. 949, 98 L.Ed. 1096], and the first sentence of subsection (a) restates the basic principle established by that decision. The rule of *Mazer*, as affirmed by the bill, is that copyright in a pictorial, graphic, or sculptural work will not be affected if the work is employed as the design of a useful article, and will afford protection to the copyright owner against the unauthorized reproduction of his work in useful as well as nonuseful articles. The terms "pictorial, graphic, and sculptural works" and "useful article" are defined in section 101, and these definitions are discussed above in connection with section 102.

The broad language of section 106(1) and of subsection (a) of section 113 raises questions as to the extent of copyright protection for a pictorial, graphic, or sculptural work that portrays, depicts, or represents an image of a useful article in such a way that the utilitarian nature of the article can be seen. To take the example usually cited, would copyright in a drawing or model of an automobile give the artist the exclusive right to make automobiles of the same design?

The 1961 Report of the Register of Copyrights stated, on the basis of judicial precedent, that "copyright in a pictorial, graphic, or sculptural work, portraying a useful article as such, does not extend to the manufacture of the useful article itself," and recommended specifically that "the distinctions drawn in this area by existing court decisions" not be altered by the statute. The Register's Supplementary Report, at page 48, cited a number of these decisions, and explained the insuperable difficulty of finding "any statutory formulation that would express the distinction satisfactorily." Section 113(b) reflects the Register's conclusion that "the real need is to make clear that there is no intention to change the present law with respect to the scope of protection in a work portraying a useful article as such."

Section 113(c) provides that it would not be an infringement of copyright, where a copyright work has been lawfully published as the design of useful articles, to make, distribute or display pictures of the articles in advertising, in feature stories about the articles, or in the news reports.

In conformity with its deletion from the bill of Title II, relating to the protection of ornamental designs of useful articles, the Committee has deleted subsections (b), (c), and (d) of section 113 of S. 22 as adopted by the Senate, since they are no longer relevant.

Editorial Notes

REFERENCES IN TEXT

Section 610(a) of the Visual Artists Rights Act of 1990 [Pub. L. 101-650], referred to in subsec. (d)(1)(B), is set out as an Effective Date note under section 106A of this title.

AMENDMENTS

1990—Subsec. (d). Pub. L. 101-650 added subsec. (d).

Statutory Notes and Related Subsidiaries**EFFECTIVE DATE OF 1990 AMENDMENT**

Amendment by Pub. L. 101-650 effective 6 months after Dec. 1, 1990, see section 610 of Pub. L. 101-650, set out as an Effective Date note under section 106A of this title.

§ 114. Scope of exclusive rights in sound recordings

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).

(b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(f)): *Provided*, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

(c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4).

(d) **LIMITATIONS ON EXCLUSIVE RIGHT.**—Notwithstanding the provisions of section 106(6)—

(1) **EXEMPT TRANSMISSIONS AND RETRANSMISSIONS.**—The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of—

(A) a nonsubscription broadcast transmission;

(B) a retransmission of a nonsubscription broadcast transmission: *Provided*, That, in the case of a retransmission of a radio station's broadcast transmission—

(i) the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter, however—

(I) the 150 mile limitation under this clause shall not apply when a nonsubscription broadcast transmission by a

radio station licensed by the Federal Communications Commission is retransmitted on a nonsubscription basis by a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the Federal Communications Commission; and

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

(iii) the retransmission is of radio station broadcast transmissions that are—

(I) obtained by the retransmitter over the air;

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

(III) retransmitted only within the local communities served by the retransmitter;

(iv) the radio station's broadcast transmission was being retransmitted to cable systems (as defined in section 111(f)) by a satellite carrier on January 1, 1995, and that retransmission was being retransmitted by cable systems as a separate and discrete signal, and the satellite carrier obtains the radio station's broadcast transmission in an analog format: *Provided*, That the broadcast transmission being retransmitted may embody the programming of no more than one radio station; or

(v) the radio station's broadcast transmission is made by a noncommercial educational broadcast station funded on or after January 1, 1995, under section 396(k) of the Communications Act of 1934 (47 U.S.C. 396(k)), consists solely of noncommercial educational and cultural radio programs, and the retransmission, whether or not simultaneous, is a nonsubscription terrestrial broadcast retransmission; or

(C) a transmission that comes within any of the following categories—

(i) a prior or simultaneous transmission incidental to an exempt transmission, such as a feed received by and then retransmitted by an exempt transmitter: *Provided*, That such incidental transmissions do not include any subscription transmission directly for reception by members of the public;

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

(iii) a retransmission by any retransmitter, including a multichannel video programming distributor as defined in section 602(12)¹ of the Communications Act of 1934 (47 U.S.C. 522(12)), of a transmission by a transmitter licensed to publicly perform the sound recording as a part of that transmission, if the retransmission is si-

¹ See References in Text note below.

multaneous with the licensed transmission and authorized by the transmitter; or

(iv) a transmission to a business establishment for use in the ordinary course of its business: *Provided*, That the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the sound recording performance complement. Nothing in this clause shall limit the scope of the exemption in clause (ii).

(2) STATUTORY LICENSING OF CERTAIN TRANSMISSIONS.—The performance of a sound recording publicly by means of a subscription digital audio transmission not exempt under paragraph (1), an eligible nonsubscription transmission, or a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service shall be subject to statutory licensing, in accordance with subsection (f) if—

(A)(i) the transmission is not part of an interactive service;

(ii) except in the case of a transmission to a business establishment, the transmitting entity does not automatically and intentionally cause any device receiving the transmission to switch from one program channel to another; and

(iii) except as provided in section 1002(e), the transmission of the sound recording is accompanied, if technically feasible, by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer;

(B) in the case of a subscription transmission not exempt under paragraph (1) that is made by a preexisting subscription service in the same transmission medium used by such service on July 31, 1998, or in the case of a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service—

(i) the transmission does not exceed the sound recording performance complement; and

(ii) the transmitting entity does not cause to be published by means of an advance program schedule or prior announcement the titles of the specific sound recordings or phonorecords embodying such sound recordings to be transmitted; and

(C) in the case of an eligible nonsubscription transmission or a subscription transmission not exempt under paragraph (1) that is made by a new subscription service or by a preexisting subscription service other than in the same transmission medium used by such service on July 31, 1998—

(i) the transmission does not exceed the sound recording performance complement, except that this requirement shall not apply in the case of a retransmission of a broadcast transmission if the retrans-

mission is made by a transmitting entity that does not have the right or ability to control the programming of the broadcast station making the broadcast transmission, unless—

(I) the broadcast station makes broadcast transmissions—

(aa) in digital format that regularly exceed the sound recording performance complement; or

(bb) in analog format, a substantial portion of which, on a weekly basis, exceed the sound recording performance complement; and

(II) the sound recording copyright owner or its representative has notified the transmitting entity in writing that broadcast transmissions of the copyright owner's sound recordings exceed the sound recording performance complement as provided in this clause;

(ii) the transmitting entity does not cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement, the titles of the specific sound recordings to be transmitted, the phonorecords embodying such sound recordings, or, other than for illustrative purposes, the names of the featured recording artists, except that this clause does not disqualify a transmitting entity that makes a prior announcement that a particular artist will be featured within an unspecified future time period, and in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, the requirement of this clause shall not apply to a prior oral announcement by the broadcast station, or to an advance program schedule published, induced, or facilitated by the broadcast station, if the transmitting entity does not have actual knowledge and has not received written notice from the copyright owner or its representative that the broadcast station publishes or induces or facilitates the publication of such advance program schedule, or if such advance program schedule is a schedule of classical music programming published by the broadcast station in the same manner as published by that broadcast station on or before September 30, 1998;

(iii) the transmission—

(I) is not part of an archived program of less than 5 hours duration;

(II) is not part of an archived program of 5 hours or greater in duration that is made available for a period exceeding 2 weeks;

(III) is not part of a continuous program which is of less than 3 hours duration; or

(IV) is not part of an identifiable program in which performances of sound recordings are rendered in a predetermined order, other than an archived or continuous program, that is transmitted at—

(aa) more than 3 times in any 2-week period that have been publicly announced in advance, in the case of a program of less than 1 hour in duration, or

(bb) more than 4 times in any 2-week period that have been publicly announced in advance, in the case of a program of 1 hour or more in duration,

except that the requirement of this subparagraph shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

(iv) the transmitting entity does not knowingly perform the sound recording, as part of a service that offers transmissions of visual images contemporaneously with transmissions of sound recordings, in a manner that is likely to cause confusion, to cause mistake, or to deceive, as to the affiliation, connection, or association of the copyright owner or featured recording artist with the transmitting entity or a particular product or service advertised by the transmitting entity, or as to the origin, sponsorship, or approval by the copyright owner or featured recording artist of the activities of the transmitting entity other than the performance of the sound recording itself;

(v) the transmitting entity cooperates to prevent, to the extent feasible without imposing substantial costs or burdens, a transmission recipient or any other person or entity from automatically scanning the transmitting entity's transmissions alone or together with transmissions by other transmitting entities in order to select a particular sound recording to be transmitted to the transmission recipient, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed by the Federal Communications Commission, on or before July 31, 1998;

(vi) the transmitting entity takes no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient, and if the technology used by the transmitting entity enables the transmitting entity to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format, the transmitting entity sets such technology to limit such making of phonorecords to the extent permitted by such technology;

(vii) phonorecords of the sound recording have been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound re-

cording, and the transmitting entity makes the transmission from a phonorecord lawfully made under the authority of the copyright owner, except that the requirement of this clause shall not apply to a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

(viii) the transmitting entity accommodates and does not interfere with the transmission of technical measures that are widely used by sound recording copyright owners to identify or protect copyrighted works, and that are technically feasible of being transmitted by the transmitting entity without imposing substantial costs on the transmitting entity or resulting in perceptible aural or visual degradation of the digital signal, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed under the authority of the Federal Communications Commission, on or before July 31, 1998, to the extent that such service has designed, developed, or made commitments to procure equipment or technology that is not compatible with such technical measures before such technical measures are widely adopted by sound recording copyright owners; and

(ix) the transmitting entity identifies in textual data the sound recording during, but not before, the time it is performed, including the title of the sound recording, the title of the phonorecord embodying such sound recording, if any, and the featured recording artist, in a manner to permit it to be displayed to the transmission recipient by the device or technology intended for receiving the service provided by the transmitting entity, except that the obligation in this clause shall not take effect until 1 year after the date of the enactment of the Digital Millennium Copyright Act and shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, or in the case in which devices or technology intended for receiving the service provided by the transmitting entity that have the capability to display such textual data are not common in the marketplace.

(3) LICENSES FOR TRANSMISSIONS BY INTERACTIVE SERVICES.—

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

granted to an interactive service by a licensor that holds the copyright to 1,000 or fewer sound recordings, the period of such license shall not exceed 24 months: *Provided, however,* That the grantee of such exclusive license shall be ineligible to receive another exclusive license for the performance of that sound recording for a period of 13 months from the expiration of the prior exclusive license.

(B) The limitation set forth in subparagraph (A) of this paragraph shall not apply if—

(i) the licensor has granted and there remain in effect licenses under section 106(6) for the public performance of sound recordings by means of digital audio transmission by at least 5 different interactive services: *Provided, however,* That each such license must be for a minimum of 10 percent of the copyrighted sound recordings owned by the licensor that have been licensed to interactive services, but in no event less than 50 sound recordings; or

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

(C) Notwithstanding the grant of an exclusive or nonexclusive license of the right of public performance under section 106(6), an interactive service may not publicly perform a sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording: *Provided, That* such license to publicly perform the copyrighted musical work may be granted either by a performing rights society representing the copyright owner or by the copyright owner.

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

(i) the retransmission is of a transmission by an interactive service licensed to publicly perform the sound recording to a particular member of the public as part of that transmission; and

(ii) the retransmission is simultaneous with the licensed transmission, authorized by the transmitter, and limited to that particular member of the public intended by the interactive service to be the recipient of the transmission.

(E) For the purposes of this paragraph—

(i) a “licensor” shall include the licensing entity and any other entity under any material degree of common ownership, management, or control that owns copyrights in sound recordings; and

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

(4) RIGHTS NOT OTHERWISE LIMITED.—

(A) Except as expressly provided in this section, this section does not limit or impair the exclusive right to perform a sound recording publicly by means of a digital audio transmission under section 106(6).

(B) Nothing in this section annuls or limits in any way—

(i) the exclusive right to publicly perform a musical work, including by means of a digital audio transmission, under section 106(4);

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

(iii) any other rights under any other clause of section 106, or remedies available under this title, as such rights or remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

(C) Any limitations in this section on the exclusive right under section 106(6) apply only to the exclusive right under section 106(6) and not to any other exclusive rights under section 106. Nothing in this section shall be construed to annul, limit, impair or otherwise affect in any way the ability of the owner of a copyright in a sound recording to exercise the rights under sections 106(1), 106(2) and 106(3), or to obtain the remedies available under this title pursuant to such rights, as such rights and remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

(e) AUTHORITY FOR NEGOTIATIONS.—

(1) Notwithstanding any provision of the antitrust laws, in negotiating statutory licenses in accordance with subsection (f), any copyright owners of sound recordings and any entities performing sound recordings affected by this section may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive payments.

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

(A) copyright owners of sound recordings affected by this section may designate common agents to act on their behalf to grant licenses and receive and remit royalty payments: *Provided, That* each copyright owner shall establish the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other copyright owners of sound recordings; and

(B) entities performing sound recordings affected by this section may designate common agents to act on their behalf to obtain licenses and collect and pay royalty fees:

Provided, That each entity performing sound recordings shall determine the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other entities performing sound recordings.

(f) LICENSES FOR CERTAIN NONEXEMPT TRANSMISSIONS.—

(1)(A) Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for transmissions subject to statutory licensing under subsection (d)(2) during the 5-year period beginning on January 1 of the second year following the year in which the proceedings are to be commenced pursuant to subparagraph (A) or (B) of section 804(b)(3), as the case may be, or such other period as the parties may agree. The parties to each proceeding shall bear their own costs.

(B) The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (2), be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the 5-year period specified in subparagraph (A), or such other period as the parties may agree. Such rates and terms shall distinguish among the different types of services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers. The Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges—

(i) shall base their decision on economic, competitive, and programming information presented by the parties, including—

(I) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from the copyright owner's sound recordings; and

(II) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk; and

(ii) may consider the rates and terms for comparable types of audio transmission services and comparable circumstances under voluntary license agreements.

(C) The procedures under subparagraphs (A) and (B) shall also be initiated pursuant to a petition filed by any sound recording copyright owner or any transmitting entity indicating that a new type of service on which sound recordings are performed is or is about to become operational, for the purpose of de-

termining reasonable terms and rates of royalty payments with respect to such new type of service for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for eligible nonsubscription services and new subscription services, or preexisting subscription services and preexisting satellite digital audio radio services, as the case may be, most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.

(2) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more entities performing sound recordings shall be given effect in lieu of any decision by the Librarian of Congress or determination by the Copyright Royalty Judges.

(3)(A) The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings. The notice and recordkeeping rules in effect on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2004 shall remain in effect unless and until new regulations are promulgated by the Copyright Royalty Judges. If new regulations are promulgated under this subparagraph, the Copyright Royalty Judges shall take into account the substance and effect of the rules in effect on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2004 and shall, to the extent practicable, avoid significant disruption of the functions of any designated agent authorized to collect and distribute royalty fees.

(B) Any person who wishes to perform a sound recording publicly by means of a transmission eligible for statutory licensing under this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording—

(i) by complying with such notice requirements as the Copyright Royalty Judges shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

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

(C) Any royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set.

(4)(A) Notwithstanding section 112(e) and the other provisions of this subsection, the receiving agent may enter into agreements for the reproduction and performance of sound recordings under section 112(e) and this section by any 1 or more commercial webcasters or non-commercial webcasters for a period of not more than 11 years beginning on January 1, 2005, that, once published in the Federal Register pursuant to subparagraph (B), shall be binding on all copyright owners of sound re-

cordings and other persons entitled to payment under this section, in lieu of any determination by the Copyright Royalty Judges. Any such agreement for commercial webcasters may include provisions for payment of royalties on the basis of a percentage of revenue or expenses, or both, and include a minimum fee. Any such agreement may include other terms and conditions, including requirements by which copyright owners may receive notice of the use of their sound recordings and under which records of such use shall be kept and made available by commercial webcasters or noncommercial webcasters. The receiving agent shall be under no obligation to negotiate any such agreement. The receiving agent shall have no obligation to any copyright owner of sound recordings or any other person entitled to payment under this section in negotiating any such agreement, and no liability to any copyright owner of sound recordings or any other person entitled to payment under this section for having entered into such agreement.

(B) The Copyright Office shall cause to be published in the Federal Register any agreement entered into pursuant to subparagraph (A). Such publication shall include a statement containing the substance of subparagraph (C). Such agreements shall not be included in the Code of Federal Regulations. Thereafter, the terms of such agreement shall be available, as an option, to any commercial webcaster or noncommercial webcaster meeting the eligibility conditions of such agreement.

(C) Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges under paragraph (3) or section 112(e)(4). It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b). This subparagraph shall not apply to the extent that the receiving agent and a webcaster that is party to an agreement entered into pursuant to subparagraph (A) expressly authorize the submission of the agreement in a proceeding under this subsection.

(D) Nothing in the Webcaster Settlement Act of 2008, the Webcaster Settlement Act of

2009, or any agreement entered into pursuant to subparagraph (A) shall be taken into account by the United States Court of Appeals for the District of Columbia Circuit in its review of the determination by the Copyright Royalty Judges of May 1, 2007, of rates and terms for the digital performance of sound recordings and ephemeral recordings, pursuant to sections 112 and 114.

(E) As used in this paragraph—

(i) the term “noncommercial webcaster” means a webcaster that—

(I) is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501);

(II) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or

(III) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes;

(ii) the term “receiving agent” shall have the meaning given that term in section 261.2 of title 37, Code of Federal Regulations, as published in the Federal Register on July 8, 2002; and

(iii) the term “webcaster” means a person or entity that has obtained a compulsory license under section 112 or 114 and the implementing regulations therefor.

(F) The authority to make settlements pursuant to subparagraph (A) shall expire at 11:59 p.m. Eastern time on the 30th day after the date of the enactment of the Webcaster Settlement Act of 2009.

(g) PROCEEDS FROM LICENSING OF TRANSMISSIONS.—

(1) Except in the case of a transmission licensed under a statutory license in accordance with subsection (f) of this section—

(A) a featured recording artist who performs on a sound recording that has been licensed for a transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the artist's contract; and

(B) a nonfeatured recording artist who performs on a sound recording that has been licensed for a transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the nonfeatured recording artist's applicable contract or other applicable agreement.

(2) Except as provided for in paragraph (6), a nonprofit collective designated by the Copyright Royalty Judges to distribute receipts from the licensing of transmissions in accordance with subsection (f) shall distribute such receipts as follows:

(A) 50 percent of the receipts shall be paid to the copyright owner of the exclusive right under section 106(6) of this title to publicly perform a sound recording by means of a digital audio transmission.

(B) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians) who have performed on sound recordings.

(C) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists) who have performed on sound recordings.

(D) 45 percent of the receipts shall be paid, on a per sound recording basis, to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings).

(3) A nonprofit collective designated by the Copyright Royalty Judges to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts to any person or entity entitled thereto other than copyright owners and performers who have elected to receive royalties from another designated nonprofit collective and have notified such nonprofit collective in writing of such election, the reasonable costs of such collective incurred after November 1, 1995, in—

(A) the administration of the collection, distribution, and calculation of the royalties;

(B) the settlement of disputes relating to the collection and calculation of the royalties; and

(C) the licensing and enforcement of rights with respect to the making of ephemeral recordings and performances subject to licensing under section 112 and this section, including those incurred in participating in negotiations or arbitration proceedings under section 112 and this section, except that all costs incurred relating to the section 112 ephemeral recordings right may only be deducted from the royalties received pursuant to section 112.

(4) Notwithstanding paragraph (3), any nonprofit collective designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts, the reasonable costs identified in paragraph (3) of such collective incurred after November 1, 1995, with respect to such copyright owners and performers who have entered with such collective a contractual relationship that specifies that such costs may be deducted from such royalty receipts.

(5) LETTER OF DIRECTION.—

(A) IN GENERAL.—A nonprofit collective designated by the Copyright Royalty Judges

to distribute receipts from the licensing of transmissions in accordance with subsection (f) shall adopt and reasonably implement a policy that provides, in circumstances determined by the collective to be appropriate, for acceptance of instructions from a payee identified under subparagraph (A) or (D) of paragraph (2) to distribute, to a producer, mixer, or sound engineer who was part of the creative process that created a sound recording, a portion of the payments to which the payee would otherwise be entitled from the licensing of transmissions of the sound recording. In this section, such instructions shall be referred to as a "letter of direction".

(B) ACCEPTANCE OF LETTER.—To the extent that a collective described in subparagraph (A) accepts a letter of direction under that subparagraph, the person entitled to payment pursuant to the letter of direction shall, during the period in which the letter of direction is in effect and carried out by the collective, be treated for all purposes as the owner of the right to receive such payment, and the payee providing the letter of direction to the collective shall be treated as having no interest in such payment.

(C) AUTHORITY OF COLLECTIVE.—This paragraph shall not be construed in such a manner so that the collective is not authorized to accept or act upon payment instructions in circumstances other than those to which this paragraph applies.

(6) SOUND RECORDINGS FIXED BEFORE NOVEMBER 1, 1995.—

(A) PAYMENT ABSENT LETTER OF DIRECTION.—A nonprofit collective designated by the Copyright Royalty Judges to distribute receipts from the licensing of transmissions in accordance with subsection (f) (in this paragraph referred to as the "collective") shall adopt and reasonably implement a policy that provides, in circumstances determined by the collective to be appropriate, for the deduction of 2 percent of all the receipts that are collected from the licensing of transmissions of a sound recording fixed before November 1, 1995, but which is withdrawn from the amount otherwise payable under paragraph (2)(D) to the recording artist or artists featured on the sound recording (or the persons conveying rights in the artists' performance in the sound recording), and the distribution of such amount to 1 or more persons described in subparagraph (B) of this paragraph, after deduction of costs described in paragraph (3) or (4), as applicable, if each of the following requirements is met:

(i) CERTIFICATION OF ATTEMPT TO OBTAIN A LETTER OF DIRECTION.—The person described in subparagraph (B) who is to receive the distribution has certified to the collective, under penalty of perjury, that—

(I) for a period of not less than 120 days, that person made reasonable efforts to contact the artist payee for such sound recording to request and obtain a letter of direction instructing the collective to pay to that person a portion of

the royalties payable to the featured recording artist or artists; and

(II) during the period beginning on the date on which that person began the reasonable efforts described in subparagraph (I) and ending on the date of that person's certification to the collective, the artist payee did not affirm or deny in writing the request for a letter of direction.

(ii) COLLECTIVE ATTEMPT TO CONTACT ARTIST.—After receipt of the certification described in clause (i) and for a period of not less than 120 days before the first distribution by the collective to the person described in subparagraph (B), the collective attempts, in a reasonable manner as determined by the collective, to notify the artist payee of the certification made by the person described in subparagraph (B).

(iii) NO OBJECTION RECEIVED.—The artist payee does not, as of the date that was 10 business days before the date on which the first distribution is made, submit to the collective in writing an objection to the distribution.

(B) ELIGIBILITY FOR PAYMENT.—A person shall be eligible for payment under subparagraph (A) if the person—

(i) is a producer, mixer, or sound engineer of the sound recording;

(ii) has entered into a written contract with a record company involved in the creation or lawful exploitation of the sound recording, or with the recording artist or artists featured on the sound recording (or the persons conveying rights in the artists' performance in the sound recording), under which the person seeking payment is entitled to participate in royalty payments that are based on the exploitation of the sound recording and are payable from royalties otherwise payable to the recording artist or artists featured on the sound recording (or the persons conveying rights in the artists' performance in the sound recording);

(iii) made a creative contribution to the creation of the sound recording; and

(iv) submits to the collective—

(I) a written certification stating, under penalty of perjury, that the person meets the requirements in clauses (i) through (iii); and

(II) a true copy of the contract described in clause (ii).

(C) MULTIPLE CERTIFICATIONS.—Subject to subparagraph (D), in a case in which more than 1 person described in subparagraph (B) has met the requirements for a distribution under subparagraph (A) with respect to a sound recording as of the date that is 10 business days before the date on which the distribution is made, the collective shall divide the 2 percent distribution equally among all such persons.

(D) OBJECTION TO PAYMENT.—Not later than 10 business days after the date on which the collective receives from the artist payee a written objection to a distribution made pursuant to subparagraph (A), the col-

lective shall cease making any further payment relating to such distribution. In any case in which the collective has made 1 or more distributions pursuant to subparagraph (A) to a person described in subparagraph (B) before the date that is 10 business days after the date on which the collective receives from the artist payee an objection to such distribution, the objection shall not affect that person's entitlement to any distribution made before the collective ceases such distribution under this subparagraph.

(E) OWNERSHIP OF THE RIGHT TO RECEIVE PAYMENTS.—To the extent that the collective determines that a distribution will be made under subparagraph (A) to a person described in subparagraph (B), such person shall, during the period covered by such distribution, be treated for all purposes as the owner of the right to receive such payments, and the artist payee to whom such payments would otherwise be payable shall be treated as having no interest in such payments.

(F) ARTIST PAYEE DEFINED.—In this paragraph, the term "artist payee" means a person, other than a person described in subparagraph (B), who owns the right to receive all or part of the receipts payable under paragraph (2)(D) with respect to a sound recording. In a case in which there are multiple artist payees with respect to a sound recording, an objection by 1 such payee shall apply only to that payee's share of the receipts payable under paragraph (2)(D), and shall not preclude payment under subparagraph (A) from the share of an artist payee that does not so object.

(7) PREEMPTION OF STATE PROPERTY LAWS.—The holding and distribution of receipts under section 112 and this section by a nonprofit collective designated by the Copyright Royalty Judges in accordance with this subsection and regulations adopted by the Copyright Royalty Judges, or by an independent administrator pursuant to subparagraphs (B) and (C) of section 114(g)(2), shall supersede and preempt any State law (including common law) concerning escheatment or abandoned property, or any analogous provision, that might otherwise apply.

(h) LICENSING TO AFFILIATES.—

(1) If the copyright owner of a sound recording licenses an affiliated entity the right to publicly perform a sound recording by means of a digital audio transmission under section 106(6), the copyright owner shall make the licensed sound recording available under section 106(6) on no less favorable terms and conditions to all bona fide entities that offer similar services, except that, if there are material differences in the scope of the requested license with respect to the type of service, the particular sound recordings licensed, the frequency of use, the number of subscribers served, or the duration, then the copyright owner may establish different terms and conditions for such other services.

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

(A) an interactive service; or

(B) an entity to perform publicly up to 45 seconds of the sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

[(i) Repealed. Pub. L. 115–264, title I, §103(b), Oct. 11, 2018, 132 Stat. 3724.]

(j) DEFINITIONS.—As used in this section, the following terms have the following meanings:

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

(2) An “archived program” is a predetermined program that is available repeatedly on the demand of the transmission recipient and that is performed in the same order from the beginning, except that an archived program shall not include a recorded event or broadcast transmission that makes no more than an incidental use of sound recordings, as long as such recorded event or broadcast transmission does not contain an entire sound recording or feature a particular sound recording.

(3) A “broadcast” transmission is a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.

(4) A “continuous program” is a predetermined program that is continuously performed in the same order and that is accessed at a point in the program that is beyond the control of the transmission recipient.

(5) A “digital audio transmission” is a digital transmission as defined in section 101, that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.

(6) An “eligible nonsubscription transmission” is a noninteractive nonsubscription digital audio transmission not exempt under subsection (d)(1) that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

(7) An “interactive service” is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings

that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.

(8) A “new subscription service” is a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service.

(9) A “nonsubscription” transmission is any transmission that is not a subscription transmission.

(10) A “preexisting satellite digital audio radio service” is a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(11) A “preexisting subscription service” is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(12) A “retransmission” is a further transmission of an initial transmission, and includes any further retransmission of the same transmission. Except as provided in this section, a transmission qualifies as a “retransmission” only if it is simultaneous with the initial transmission. Nothing in this definition shall be construed to exempt a transmission that fails to satisfy a separate element required to qualify for an exemption under section 114(d)(1).

(13) The “sound recording performance complement” is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than—

(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or

(B) 4 different selections of sound recordings—

(i) by the same featured recording artist; or

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

if no more than three such selections are transmitted consecutively:

Provided, That the transmission of selections in excess of the numerical limits provided for

in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

(14) A “subscription” transmission is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission.

(15) A “transmission” is either an initial transmission or a retransmission.

(Pub. L. 94–553, title I, §101, Oct. 19, 1976, 90 Stat. 2560; Pub. L. 104–39, §3, Nov. 1, 1995, 109 Stat. 336; Pub. L. 105–80, §3, Nov. 13, 1997, 111 Stat. 1531; Pub. L. 105–304, title IV, §405(a)(1)–(4), Oct. 28, 1998, 112 Stat. 2890–2897; Pub. L. 107–321, §§4, 5(b), (c), Dec. 4, 2002, 116 Stat. 2781, 2784; Pub. L. 108–419, §5(c), Nov. 30, 2004, 118 Stat. 2362; Pub. L. 109–303, §4(b), Oct. 6, 2006, 120 Stat. 1481; Pub. L. 110–435, §2, Oct. 16, 2008, 122 Stat. 4974; Pub. L. 111–36, §2, June 30, 2009, 123 Stat. 1926; Pub. L. 111–295, §§5(c), 6(b), (f)(1), Dec. 9, 2010, 124 Stat. 3181; Pub. L. 115–264, title I, §103(a), (b), (g)(1), title III, §302, Oct. 11, 2018, 132 Stat. 3723–3725, 3737.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94–1476

Subsection (a) of Section 114 specified that the exclusive rights of the owner of copyright in a sound recording are limited to the rights to reproduce the sound recording in copies or phonorecords, to prepare derivative works based on the copyrighted sound recording, and to distribute copies or phonorecords of the sound recording to the public. Subsection (a) states explicitly that the owner's rights “do not include any right of performance under section 106(4).” The Committee considered at length the arguments in favor of establishing a limited performance right, in the form of a compulsory license, for copyrighted sound recordings, but concluded that the problem requires further study. It therefore added a new subsection (d) to the bill requiring the Register of Copyrights to submit to Congress, on January 3, 1978, “a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners * * * any performance rights” in copyrighted sound recordings. Under the new subsection, the report “should describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations, if any.”

Subsection (b) of section 114 makes clear that statutory protection for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated. Thus, infringement takes place whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method, or by reproducing them in the soundtrack or audio portion of a motion picture or other audiovisual work. Mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible.

Under section 114, the exclusive right of owner of copyright in a sound recording to prepare derivative works based on the copyrighted sound recording is recognized. However, in view of the expressed intention

not to give exclusive rights against imitative or simulated performances and recordings, the Committee adopted an amendment to make clear the scope of rights under section 106(2) in this context. Section 114(b) provides that the “exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.”

Another amendment deals with the use of copyrighted sound recordings “included in educational television and radio programs * * * distributed or transmitted by or through public broadcasting entities.” This use of recordings is permissible without authorization from the owner of copyright in the sound recording, as long as “copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.”

During the 1975 hearings, the Register of Copyrights expressed some concern that an invaluable segment of this country's musical heritage—in the form of sound recordings—had become inaccessible to musicologists and to others for scholarly purposes. Several of the major recording companies have responded to the Register's concern by granting blanket licenses to the Library of Congress to permit it to make single copy duplications of sound recordings maintained in the Library's archives for research purposes. Moreover, steps are being taken to determine the feasibility of additional licensing arrangements as a means of satisfying the needs of key regional music libraries across the country. The Register has agreed to report to Congress if further legislative consideration should be undertaken.

Section 114(c) states explicitly that nothing in the provisions of section 114 should be construed to “limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4).” This principle is already implicit in the bill, but it is restated to avoid the danger of confusion between rights in a sound recording and rights in the musical composition or other work embodied in the recording.

Editorial Notes

REFERENCES IN TEXT

Section 602(12) of the Communications Act of 1934, referred to in subsec. (d)(1)(C)(iii), was subsequently amended, and section 602(12) no longer defines “multi-channel video programming distributor”. However, such term is defined elsewhere in that section.

The date of the enactment of the Digital Millennium Copyright Act, referred to in subsec. (d)(2)(C)(ix), is the date of enactment of Pub. L. 105–304, which was approved Oct. 28, 1998.

The date of enactment of the Digital Performance Right in Sound Recordings Act of 1995, referred to in subsec. (d)(4)(B)(iii), (C), is the date of enactment of Pub. L. 104–39, which was approved Nov. 1, 1995.

The effective date of the Copyright Royalty and Distribution Reform Act of 2004, referred to in subsec. (f)(3)(A), is the effective date of Pub. L. 108–419, which is 6 months after Nov. 30, 2004, subject to transition provisions, see section 6 of Pub. L. 108–419, set out as an Effective Date; Transition Provisions note under section 801 of this title.

The Webcaster Settlement Act of 2008, referred to in subsec. (f)(4)(D), is Pub. L. 110–435, Oct. 16, 2008, 122 Stat. 4974, which amended this section and enacted provisions set out as a note under section 101 of this title. For complete classification of this Act to the Code, see Short Title of 2008 Amendment note set out under section 101 of this title and Tables.

The Webcaster Settlement Act of 2009, referred to in subsec. (f)(4)(D), is Pub. L. 111–36, June 30, 2009, 123 Stat. 1926, which amended this section and enacted provisions set out as a note under section 101 of this title.

For complete classification of this Act to the Code, see Short Title of 2009 Amendment note set out under section 101 of this title and Tables.

The date of the enactment of the Webcaster Settlement Act of 2009, referred to in subsec. (f)(4)(F), is the date of the enactment of Pub. L. 111-36, which was approved June 30, 2009.

AMENDMENTS

2018—Subsec. (f)(1). Pub. L. 115-264, §103(a)(1), added par. (1) and struck out former par. (1) which related to the determination of reasonable rates and terms of royalty payments for certain subscription and satellite digital audio transmissions.

Subsec. (f)(2) to (5). Pub. L. 115-264, §103(a), redesignated pars. (3) to (5) as (2) to (4), respectively, and struck out former par. (2) which related to the determination of reasonable rates and terms of royalty payments for certain types of public performances of sound recordings.

Subsec. (f)(4)(C). Pub. L. 115-264, §103(g)(1), substituted “under paragraph (3)” for “under paragraph (4)”.

Subsec. (g)(2). Pub. L. 115-264, §302(c)(1), substituted “Except as provided for in paragraph (6), a nonprofit collective designated by the Copyright Royalty Judges” for “An agent designated” in introductory provisions.

Subsec. (g)(3). Pub. L. 115-264, §302(c)(2), in introductory provisions, substituted “nonprofit collective designated by the Copyright Royalty Judges” for “nonprofit agent designated”, “another designated nonprofit collective” for “another designated agent”, “such nonprofit collective” for “such nonprofit agent”, and “of such collective” for “of such agent”.

Subsec. (g)(4). Pub. L. 115-264, §302(c)(3), substituted “nonprofit collective” for “designated agent” and substituted “such collective” for “such agent” in two places.

Subsec. (g)(5). Pub. L. 115-264, §302(a), added par. (5).

Subsec. (g)(6). Pub. L. 115-264, §302(b), added par. (6).

Subsec. (g)(7). Pub. L. 115-264, §302(c)(4), added par. (7).

Subsec. (i). Pub. L. 115-264, §103(b), struck out subsec. (i). Text read as follows: “License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).”

2010—Subsec. (b). Pub. L. 111-295, §6(f)(1), substituted “118(f)” for “118(g)”.

Subsec. (f)(2)(B). Pub. L. 111-295, §6(b), substituted “Judges shall base their decision” for “Judges shall base its decision” in introductory provisions.

Subsec. (f)(2)(C). Pub. L. 111-295, §5(c), substituted “eligible nonsubscription services and new subscription services” for “preexisting subscription digital audio transmission services or preexisting satellite digital radio audio services”.

2009—Subsec. (f)(5)(D). Pub. L. 111-36, §2(1), substituted “2008, the Webcaster Settlement Act of 2009,” for “2008”.

Subsec. (f)(5)(E)(iii). Pub. L. 111-36, §2(2), struck out “to make eligible nonsubscription transmissions and ephemeral recordings” after “therefor”.

Subsec. (f)(5)(F). Pub. L. 111-36, §2(3), substituted “at 11:59 p.m. Eastern time on the 30th day after the date of the enactment of the Webcaster Settlement Act of 2009” for “February 15, 2009”.

2008—Subsec. (f)(5)(A). Pub. L. 110-435, §2(1), substituted “commercial” for “small commercial” whenever appearing, in first sentence substituted “for a period of not more than 11 years beginning on January 1, 2005” for “during the period beginning on October 28,

1998, and ending on December 31, 2004” and “the Copyright Royalty Judges” for “a copyright arbitration royalty panel or decision by the Librarian of Congress”, and in second sentence substituted “webcasters may include” for “webcasters shall include”.

Subsec. (f)(5)(B). Pub. L. 110-435, §2(2), substituted “commercial” for “small commercial”.

Subsec. (f)(5)(C). Pub. L. 110-435, §2(3), substituted “Copyright Royalty Judges” for “Librarian of Congress” and “webcasters” for “small webcasters” and inserted at end “This subparagraph shall not apply to the extent that the receiving agent and a webcaster that is party to an agreement entered into pursuant to subparagraph (A) expressly authorize the submission of the agreement in a proceeding under this subsection.”

Subsec. (f)(5)(D). Pub. L. 110-435, §2(4)(B), substituted “Copyright Royalty Judges of May 1, 2007” for “Librarian of Congress of July 8, 2002”.

Pub. L. 110-435, §2(4)(A), which directed substitution of “the Webcaster Settlement Act of 2008” for “the Small Webcasters Settlement Act of 2002”, was executed by making the substitution for “the Small Webcaster Settlement Act of 2002”, to reflect the probable intent of Congress.

Subsec. (f)(5)(F). Pub. L. 110-435, §2(5), substituted “February 15, 2009” for “December 15, 2002, except with respect to noncommercial webcasters for whom the authority shall expire May 31, 2003”.

2006—Subsec. (f)(1)(A). Pub. L. 109-303, §4(b)(1), substituted “except in the case of a different transitional period provided under section 6(b)(3) of the Copyright Royalty and Distribution Reform Act of 2004, or such other period as the parties may agree.” for “except where a different transitional period is provided under section 6(b)(3) of the Copyright Royalty and Distribution Reform Act of 2004 or such other period.”

Subsec. (f)(2)(A). Pub. L. 109-303, §4(b)(2), amended subparagraph (A) generally. Prior to amendment, subparagraph (A) related to rates and terms of royalty payments for subscription transmissions by eligible nonsubscription transmission services and new subscription services.

Subsec. (f)(2)(B). Pub. L. 109-303, §4(b)(3), substituted “described in” for “negotiated under” in concluding provisions.

2004—Subsec. (f)(1)(A). Pub. L. 108-419, §5(c)(1)(A), substituted first sentence for former first sentence which read: “No later than 30 days after the enactment of the Digital Performance Right in Sound Recordings Act of 1995, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services specified by subsection (d)(2) of this section during the period beginning on the effective date of such Act and ending on December 31, 2001, or, if a copyright arbitration royalty panel is convened, ending 30 days after the Librarian issues and publishes in the Federal Register an order adopting the determination of the copyright arbitration royalty panel or an order setting the terms and rates (if the Librarian rejects the panel’s determination).”, substituted “Copyright Royalty Judges” for “Librarian of Congress” in third sentence, and struck out “negotiation” before “proceeding” in fourth sentence.

Subsec. (f)(1)(B). Pub. L. 108-419, §5(c)(1)(B), substituted first sentence for former first sentence which read: “In the absence of license agreements negotiated under subparagraph (A), during the 60-day period commencing 6 months after publication of the notice specified in subparagraph (A), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this para-

graph.” and, in second sentence, substituted “Copyright Royalty Judges may consider” for “copyright arbitration royalty panel may consider” and “described” for “negotiated as provided”.

Subsec. (f)(1)(C). Pub. L. 108-419, §5(c)(1)(C), amended subparagraph (C) generally. Prior to amendment, subparagraph (C) related to repetition of publication of notices of the initiation of voluntary negotiation proceedings as specified in subparagraph (A) and repetition of the procedures specified in subparagraph (B).

Subsec. (f)(2)(A). Pub. L. 108-419, §5(c)(2)(A)(ii), (iii), substituted “Copyright Royalty Judges” for “Librarian of Congress” in third sentence and struck out “negotiation” after “parties to each” in fourth sentence.

Pub. L. 108-419, §5(c)(2)(A)(i), which directed the general amendment of the first paragraph, was executed by making the amendment to first sentence of subparagraph (A) to reflect the probable intent of Congress. Prior to amendment, first sentence read as follows: “No later than 30 days after the date of the enactment of the Digital Millennium Copyright Act, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for public performances of sound recordings by means of eligible nonsubscription transmissions and transmissions by new subscription services specified by subsection (d)(2) during the period beginning on the date of the enactment of such Act and ending on December 31, 2000, or such other date as the parties may agree.”

Subsec. (f)(2)(B). Pub. L. 108-419, §5(c)(2)(B)(iii), which directed substitution of “described in” for “negotiated as provided” in last sentence, could not be executed because “negotiated as provided” does not appear in text.

Pub. L. 108-419, §5(c)(2)(B)(ii), substituted “Copyright Royalty Judges” for “copyright arbitration royalty panel” wherever appearing after first sentence.

Pub. L. 108-419, §5(c)(2)(B)(i), substituted first sentence for former first sentence which read: “In the absence of license agreements negotiated under subparagraph (A), during the 60-day period commencing 6 months after publication of the notice specified in subparagraph (A), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the period beginning on the date of the enactment of the Digital Millennium Copyright Act and ending on December 31, 2000, or such other date as the parties may agree.”

Subsec. (f)(2)(C). Pub. L. 108-419, §5(c)(2)(C), amended subparagraph (C) generally. Prior to amendment, subparagraph (C) related to repetition of publication of notices of the initiation of voluntary negotiation proceedings as specified in subparagraph (A) and repetition of the procedures specified in subparagraph (B).

Subsec. (f)(3). Pub. L. 108-419, §5(c)(3), substituted “decision by the Librarian of Congress or determination by the Copyright Royalty Judges” for “determination by a copyright arbitration royalty panel or decision by the Librarian of Congress”.

Subsec. (f)(4). Pub. L. 108-419, §5(c)(4), substituted “Copyright Royalty Judges” for “Librarian of Congress” in two places and inserted after first sentence in subparagraph (A) “The notice and recordkeeping rules in effect on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2004 shall remain in effect unless and until new regulations are promulgated by the Copyright Royalty Judges. If new regulations are promulgated under this subparagraph, the Copyright Royalty Judges shall take into account the substance and effect of the rules in effect on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2004 and shall, to the extent practicable, avoid significant disruption of the

functions of any designated agent authorized to collect and distribute royalty fees.”

2002—Subsec. (f)(5). Pub. L. 107-321, §4, added par. (5).

Subsec. (g)(2). Pub. L. 107-321, §5(c), amended par. (2) generally. Prior to amendment, par. (2) read as follows: “The copyright owner of the exclusive right under section 106(6) of this title to publicly perform a sound recording by means of a digital audio transmission shall allocate to recording artists in the following manner its receipts from the statutory licensing of transmission performances of the sound recording in accordance with subsection (f) of this section:

“(A) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians) who have performed on sound recordings.

“(B) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists) who have performed on sound recordings.

“(C) 45 percent of the receipts shall be allocated, on a per sound recording basis, to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists’ performance in the sound recordings).”

Subsec. (g)(3), (4). Pub. L. 107-321, §5(b), added pars. (3) and (4).

1998—Subsec. (d)(1)(A). Pub. L. 105-304, §405(a)(1)(A), added subparagraph (A) and struck out former subparagraph (A) which read as follows:

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

“(ii) an initial nonsubscription retransmission made for direct reception by members of the public of a prior or simultaneous incidental transmission that is not made for direct reception by members of the public; or

“(iii) a nonsubscription broadcast transmission.”

Subsec. (d)(2). Pub. L. 105-304, §405(a)(1)(B), amended heading and text of par. (2) generally. Prior to amendment, text read as follows: “In the case of a subscription transmission not exempt under subsection (d)(1), the performance of a sound recording publicly by means of a digital audio transmission shall be subject to statutory licensing, in accordance with subsection (f) of this section, if—

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

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

“(C) the transmitting entity does not cause to be published by means of an advance program schedule or prior announcement the titles of the specific sound recordings or phonorecords embodying such sound recordings to be transmitted;

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

“(E) except as provided in section 1002(e) of this title, the transmission of the sound recording is accompanied by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer.”

Subsec. (f). Pub. L. 105-304, §405(a)(2)(A), substituted “Certain Nonexempt” for “Nonexempt Subscription” in heading.

Subsec. (f)(1)(A). Pub. L. 105–304, §405(a)(2)(B), designated existing provisions as subparagraph (A), in first sentence, substituted “subscription transmissions by pre-existing subscription services and transmissions by pre-existing satellite digital audio radio services” for “the activities” and “2001” for “2000”, and amended third sentence generally. Prior to amendment, third sentence read as follows: “Any copyright owners of sound recordings or any entities performing sound recordings affected by this section may submit to the Librarian of Congress licenses covering such activities with respect to such sound recordings.”

Subsec. (f)(1)(B), (C). Pub. L. 105–304, §405(a)(2)(C), added subpars. (B) and (C).

Subsec. (f)(2) to (5). Pub. L. 105–304, §405(a)(2)(C), added pars. (2) to (4) and struck out former pars. (2) to (5), which provided: in par. (2) that Librarian of Congress would convene a copyright arbitration royalty panel to determine schedule of rates and terms, that panel could consider rates and terms for comparable types of services under voluntary license agreements, and that requirements would be established by which copyright owners would receive notice of use of their recordings; in par. (3) that voluntarily negotiated license agreements would be given effect in lieu of determination by panel or decision by Librarian; in par. (4) that publication of notice of negotiations would be repeated no later than 30 days after petition was filed, in the first week of January, 2000, and at 5-year intervals thereafter, and that par. (2) procedures would be repeated upon filing of petition during a 60-day period commencing six months after publication of notice or on July 1, 2000 and at 5-year intervals thereafter; and in par. (5) that performance by non-exempt subscription transmission without infringing copyright was permissible by compliance with notice requirements and payment of royalty fees or agreement to pay such fees.

Subsec. (g). Pub. L. 105–304, §405(a)(3)(A), struck out “Subscription” before “Transmissions” in heading.

Subsec. (g)(1). Pub. L. 105–304, §405(a)(3)(B), substituted “transmission licensed under a statutory license” for “subscription transmission licensed” in introductory provisions.

Subsec. (g)(1)(A), (B). Pub. L. 105–304, §405(a)(3)(C), struck out “subscription” before “transmission”.

Subsec. (g)(2). Pub. L. 105–304, §405(a)(3)(D), struck out “subscription” before “transmission performances” in introductory provisions.

Subsec. (j)(2), (3). Pub. L. 105–304, §405(a)(4)(A), (B), added par. (2) and redesignated former par. (2) as (3). Former par. (3) redesignated (5).

Subsec. (j)(4). Pub. L. 105–304, §405(a)(4)(A), (C), added par. (4) and struck out former par. (4) which read as follows: “An ‘interactive service’ is one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large does not make a service interactive. If an entity offers both interactive and non-interactive services (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service.”

Subsec. (j)(5). Pub. L. 105–304, §405(a)(4)(A), redesignated par. (3) as (5). Former par. (5) redesignated (9).

Subsec. (j)(6) to (8). Pub. L. 105–304, §405(a)(4)(A), (D), added pars. (6) to (8). Former pars. (6) to (8) redesignated (12) to (14), respectively.

Subsec. (j)(9). Pub. L. 105–304, §405(a)(4)(A), redesignated par. (5) as (9) and struck out former par. (9) which read as follows: “A ‘transmission’ includes both an initial transmission and a retransmission.”

Subsec. (j)(10), (11). Pub. L. 105–304, §405(a)(4)(E), added pars. (10) and (11).

Subsec. (j)(12) to (14). Pub. L. 105–304, §405(a)(4)(A), redesignated pars. (6) to (8) as (12) to (14), respectively.

Subsec. (j)(15). Pub. L. 105–304, §405(a)(4)(F), added par. (15).

1997—Subsec. (f)(1). Pub. L. 105–80, §3(1), inserted “, or, if a copyright arbitration royalty panel is con-

vened, ending 30 days after the Librarian issues and publishes in the Federal Register an order adopting the determination of the copyright arbitration royalty panel or an order setting the terms and rates (if the Librarian rejects the panel’s determination)” after “December 31, 2000”.

Subsec. (f)(2). Pub. L. 105–80, §3(2), struck out “and publish in the Federal Register” before “a schedule of rates and terms”.

1995—Subsec. (a). Pub. L. 104–39, §3(1), substituted “(3) and (6) of section 106” for “and (3) of section 106”.

Subsec. (b). Pub. L. 104–39, §3(2), substituted “phonorecords or copies” for “phonorecords, or of copies of motion pictures and other audiovisual works,” in first sentence.

Subsec. (d). Pub. L. 104–39, §3(3), added subsec. (d) and struck out former subsec. (d), which read as follows: “On January 3, 1978, the Register of Copyrights, after consulting with representatives of owners of copyrighted materials, representatives of the broadcasting, recording, motion picture, entertainment industries, and arts organizations, representatives of organized labor and performers of copyrighted materials, shall submit to the Congress a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners of copyrighted material any performance rights in such material. The report should describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations, if any.”

Subsecs. (e) to (j). Pub. L. 104–39, §3(4), added subsecs. (e) to (j).

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2018 AMENDMENT

Pub. L. 115–264, title I, §103(h), Oct. 11, 2018, 132 Stat. 3725, provided that: “The amendments made by subsection (a)(1) [amending this section] shall apply to any proceeding before the Copyright Royalty Judges that is commenced on or after the date of the enactment of this Act [Oct. 11, 2018].”

Pub. L. 115–264, title I, §106, Oct. 11, 2018, 132 Stat. 3727, provided that: “This title [amending this section and sections 115, 801, 803, and 804 of this title and section 137 of Title 28, Judiciary and Judicial Procedure, and enacting provisions set out as notes under this section and sections 101, 106, and 115 of this title], and the amendments made by this title, shall take effect on the date of enactment of this Act [Oct. 11, 2018].”

Pub. L. 115–264, title III, §303, Oct. 11, 2018, 132 Stat. 3741, provided that:

“(a) IN GENERAL.—Except as provided in subsection (b), this title [amending this section and enacting provisions set out as a note under section 101 of this title] and the amendments made by this title shall take effect on the date of enactment of this Act [Oct. 11, 2018].

“(b) DELAYED EFFECTIVE DATE.—Paragraphs (5)(B) and (6)(E) of section 114(g) of title 17, United States Code, as added by section 302, shall take effect on January 1, 2020.”

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109–303 effective as if included in the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. 108–419, see section 6 of Pub. L. 109–303, set out as a note under section 111 of this title.

EFFECTIVE DATE OF 2004 AMENDMENT

Amendment by Pub. L. 108–419 effective 6 months after Nov. 30, 2004, subject to transition provisions, see section 6 of Pub. L. 108–419, set out as an Effective Date; Transition Provisions note under section 801 of this title.

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by section 405(a)(1), (2)(A), (B)(i)(I), (II), (ii), (3), (4) of Pub. L. 105–304 effective Oct. 28, 1998, ex-

cept as otherwise provided, see section 407 of Pub. L. 105-304, set out as a note under section 108 of this title.

Pub. L. 105-304, title IV, §405(a)(5), Oct. 28, 1998, 112 Stat. 2899, provided that: “The amendment made by paragraph (2)(B)(i)(III) of this subsection [amending this section] shall be deemed to have been enacted as part of the Digital Performance Right in Sound Recordings Act of 1995 [Pub. L. 104-39], and the publication of notice of proceedings under [former] section 114(f)(1) of title 17, United States Code, as in effect upon the effective date of that Act [see Effective Date of 1995 Amendment note set out under section 101 of this title], for the determination of royalty payments shall be deemed to have been made for the period beginning on the effective date of that Act and ending on December 1, 2001.”

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104-39 effective 3 months after Nov. 1, 1995, except that provisions of subsecs. (e) and (f) of this section effective Nov. 1, 1995, see section 6 of Pub. L. 104-39, set out as a note under section 101 of this title.

SEVERABILITY

Pub. L. 115-264, title IV, §401, Oct. 11, 2018, 132 Stat. 3741, provided that: “If any provision of this Act [see Short Title of 2018 Amendment note set out under section 101 of this title] or any amendment made by this Act, or any application of such provision or amendment to any person or circumstance, is held to be unconstitutional, the remainder of the provisions of this Act and the amendments made by this Act, and the application of the provision or amendment to any other person or circumstance, shall not be affected.”

CONSTRUCTION OF 2018 AMENDMENT

Pub. L. 115-264, title I, §103(e), Oct. 11, 2018, 132 Stat. 3724, provided that: “The repeal of section 114(i) of title 17, United States Code, by subsection (b) shall not be taken into account in any proceeding to set or adjust the rates and fees payable for the use of sound recordings under section 112(e) or 114(f) of such title that is pending on, or commenced on or after, the date of enactment of this Act [Oct. 11, 2018].”

Pub. L. 115-264, title I, §103(f), Oct. 11, 2018, 132 Stat. 3725, provided that: “The repeal of section 114(i) of title 17, United States Code, by subsection (b) shall not have any effect upon the decisions, or the precedents established or relied upon, in any proceeding to set or adjust the rates and fees payable for the use of sound recordings under section 112(e) or 114(f) of such title before the date of enactment of this Act [Oct. 11, 2018].”

CONSTRUCTION OF 1998 AMENDMENT

Pub. L. 105-304, title IV, §405(a)(6), Oct. 28, 1998, 112 Stat. 2899, provided that: “The amendments made by this subsection [amending this section] do not annul, limit, or otherwise impair the rights that are preserved by section 114 of title 17, United States Code, including the rights preserved by subsections (c), (d)(4), and (i) of such section.”

USE IN MUSICAL WORK PROCEEDINGS; NO EFFECT ON INTERPRETATION

Pub. L. 115-264, title I, §103(c), (d), Oct. 11, 2018, 132 Stat. 3724, provided that:

“(C) USE IN MUSICAL WORK PROCEEDINGS.—

“(1) IN GENERAL.—License fees payable for the public performance of sound recordings under section 106(6) of title 17, United States Code, shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to musical work copyright owners for the public performance of their works except in such a proceeding to set or adjust royalties for the public performance of musical works by means of a digital audio transmission other than a transmission by a broadcaster, and may be taken into account only with respect to such digital audio transmission.

“(2) DEFINITIONS.—In this subsection:

“(A) TRANSMISSION BY A BROADCASTER.—The term ‘transmission by a broadcaster’ means a non-subscription digital transmission made by a terrestrial broadcast station on its own behalf, or on the behalf of a terrestrial broadcast station under common ownership or control, that is not part of an interactive service or a music-intensive service comprising the transmission of sound recordings customized for or customizable by recipients or service users.

“(B) TERRESTRIAL BROADCAST STATION.—The term ‘terrestrial broadcast station’ means a terrestrial, over-the-air radio or television broadcast station, including an FM translator (as defined in section 74.1201 of title 47, Code of Federal Regulations, and licensed as such by the Federal Communications Commission) whose primary business activities are comprised of, and whose revenues are generated through, terrestrial, over-the-air broadcast transmissions, or the simultaneous or substantially-simultaneous digital retransmission by the terrestrial, over-the-air broadcast station of its over-the-air broadcast transmissions.

“(d) RULE OF CONSTRUCTION.—Subsection (c)(2) shall not be given effect in interpreting provisions of title 17, United States Code.”

FINDINGS RELATING TO PUB. L. 107-321

Pub. L. 107-321, §2, Dec. 4, 2002, 116 Stat. 2780, provided that: “Congress finds the following:

“(1) Some small webcasters who did not participate in the copyright arbitration royalty panel proceeding leading to the July 8, 2002 order of the Librarian of Congress establishing rates and terms for certain digital performances and ephemeral reproductions of sound recordings, as provided in part 261 of the Code of Federal Regulations (published in the Federal Register on July 8, 2002) (referred to in this section as ‘small webcasters’), have expressed reservations about the fee structure set forth in such order, and have expressed their desire for a fee based on a percentage of revenue.

“(2) Congress has strongly encouraged representatives of copyright owners of sound recordings and representatives of the small webcasters to engage in negotiations to arrive at an agreement that would include a fee based on a percentage of revenue.

“(3) The representatives have arrived at an agreement that they can accept in the extraordinary and unique circumstances here presented, specifically as to the small webcasters, their belief in their inability to pay the fees due pursuant to the July 8 order, and as to the copyright owners of sound recordings and performers, the strong encouragement of Congress to reach an accommodation with the small webcasters on an expedited basis.

“(4) The representatives have indicated that they do not believe the agreement provides for or in any way approximates fair or reasonable royalty rates and terms, or rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.

“(5) Congress has made no determination as to whether the agreement provides for or in any way approximates fair or reasonable fees and terms, or rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.

“(6) Congress likewise has made no determination as to whether the July 8 order is reasonable or arbitrary, and nothing in this Act [amending this section and enacting provisions set out as notes under this section and section 101 of this title] shall be taken into account by the United States Court of Appeals for the District of Columbia Circuit in its review of such order.

“(7) It is, nevertheless, in the public interest for the parties to be able to enter into such an agreement without fear of liability for deviating from the fees

and terms of the July 8 order, if it is clear that the agreement will not be admissible as evidence or otherwise taken into account in any government proceeding involving the setting or adjustment of the royalties payable to copyright owners of sound recordings for the public performance or reproduction in ephemeral phonorecords or copies of such works, the determination of terms or conditions related thereto, or the establishment of notice or record-keeping requirements.”

Pub. L. 107-321, § 5(a), Dec. 4, 2002, 116 Stat. 2783, provided that: “Congress finds that—

“(1) in the case of royalty payments from the licensing of digital transmissions of sound recordings under subsection (f) of section 114 of title 17, United States Code, the parties have voluntarily negotiated arrangements under which payments shall be made directly to featured recording artists and the administrators of the accounts provided in subsection (g)(2) of that section;

“(2) such voluntarily negotiated payment arrangements have been codified in regulations issued by the Librarian of Congress, currently found in section 261.4 of title 37, Code of Federal Regulations, as published in the Federal Register on July 8, 2002;

“(3) other regulations issued by the Librarian of Congress were inconsistent with the voluntarily negotiated arrangements by such parties concerning the deductibility of certain costs incurred for licensing and arbitration, and Congress is therefore restoring those terms as originally negotiated among the parties; and

“(4) in light of the special circumstances described in this subsection, the uncertainty created by the regulations issued by the Librarian of Congress, and the fact that all of the interested parties have reached agreement, the voluntarily negotiated arrangements agreed to among the parties are being codified.”

SUSPENSION OF CERTAIN PAYMENTS

Pub. L. 107-321, § 3, Dec. 4, 2002, 116 Stat. 2781, provided that:

“(a) NONCOMMERCIAL WEBCASTERS.—

“(1) IN GENERAL.—The payments to be made by non-commercial webcasters for the digital performance of sound recordings under section 114 of title 17, United States Code, and the making of ephemeral phonorecords under section 112 of title 17, United States Code, during the period beginning on October 28, 1998, and ending on May 31, 2003, which have not already been paid, shall not be due until June 20, 2003.

“(2) DEFINITION.—In this subsection, the term ‘non-commercial webcaster’ has the meaning given that term in section 114(f)(5)(E)(i) [now 114(f)(4)(E)(i)] of title 17, United States Code, as added by section 4 of this Act.

“(b) SMALL COMMERCIAL WEBCASTERS.—

“(1) IN GENERAL.—The receiving agent may, in a writing signed by an authorized representative thereof, delay the obligation of any 1 or more small commercial webcasters to make payments pursuant to sections 112 and 114 of title 17, United States Code, for a period determined by such entity to allow negotiations as permitted in section 4 of this Act [amending this section], except that any such period shall end no later than December 15, 2002. The duration and terms of any such delay shall be as set forth in such writing.

“(2) DEFINITIONS.—In this subsection—

“(A) the term ‘webcaster’ has the meaning given that term in section 114(f)(5)(E)(iii) [now 114(f)(4)(E)(iii)] of title 17, United States Code, as added by section 4 of this Act; and

“(B) the term ‘receiving agent’ shall have the meaning given that term in section 261.2 of title 37, Code of Federal Regulations, as published in the Federal Register on July 8, 2002.”

REPORT TO CONGRESS

Pub. L. 107-321, § 6, Dec. 4, 2002, 116 Stat. 2785, required that, by not later than June 1, 2004, the Comptroller

General, in consultation with the Register of Copyrights, was to conduct and submit to Congress a study concerning the economic arrangements among small commercial webcasters covered by agreements entered into pursuant to subsec. (f) of this section and third parties, and the effect of those arrangements on royalty fees payable on a percentage of revenue or expense basis.

§ 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) AVAILABILITY AND SCOPE OF COMPULSORY LICENSE IN GENERAL.—

(1) ELIGIBILITY FOR COMPULSORY LICENSE.—

(A) CONDITIONS FOR COMPULSORY LICENSE.—A person may by complying with the provisions of this section obtain a compulsory license to make and distribute phonorecords of a nondramatic musical work, including by means of digital phonorecord delivery. A person may obtain a compulsory license only if the primary purpose in making phonorecords of the musical work is to distribute them to the public for private use, including by means of digital phonorecord delivery, and—

(i) phonorecords of such musical work have previously been distributed to the public in the United States under the authority of the copyright owner of the work, including by means of digital phonorecord delivery; or

(ii) in the case of a digital music provider seeking to make and distribute digital phonorecord deliveries of a sound recording embodying a musical work under a compulsory license for which clause (i) does not apply—

(I) the first fixation of such sound recording was made under the authority of the musical work copyright owner, and the sound recording copyright owner has the authority of the musical work copyright owner to make and distribute digital phonorecord deliveries embodying such work to the public in the United States; and

(II) the sound recording copyright owner, or the authorized distributor of the sound recording copyright owner, has authorized the digital music provider to make and distribute digital phonorecord deliveries of the sound recording to the public in the United States.

(B) DUPLICATION OF SOUND RECORDING.—A person may not obtain a compulsory license for the use of the work in the making of phonorecords duplicating a sound recording fixed by another, including by means of digital phonorecord delivery, unless—

(i) such sound recording was fixed lawfully; and

(ii) the making of the phonorecords was authorized by the owner of the copyright

in the sound recording or, if the sound recording was fixed before February 15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the copyright in the musical work or pursuant to a valid compulsory license for use of such work in a sound recording.

(2) MUSICAL ARRANGEMENT.—A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

(b) PROCEDURES TO OBTAIN A COMPULSORY LICENSE.—

(1) PHONORECORDS OTHER THAN DIGITAL PHONORECORD DELIVERIES.—A person who seeks to obtain a compulsory license under subsection (a) to make and distribute phonorecords of a musical work other than by means of digital phonorecord delivery shall, before, or not later than 30 calendar days after, making, and before distributing, any phonorecord of the work, serve notice of intention to do so on the copyright owner. If the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served, it shall be sufficient to file the notice of intention with the Copyright Office. The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(2) DIGITAL PHONORECORD DELIVERIES.—A person who seeks to obtain a compulsory license under subsection (a) to make and distribute phonorecords of a musical work by means of digital phonorecord delivery—

(A) prior to the license availability date, shall, before, or not later than 30 calendar days after, first making any such digital phonorecord delivery, serve a notice of intention to do so on the copyright owner (but may not file the notice with the Copyright Office, even if the public records of the Office do not identify the owner or the owner's address), and such notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation; or

(B) on or after the license availability date, shall, before making any such digital phonorecord delivery, follow the procedure described in subsection (d)(2), except as provided in paragraph (3).

(3) RECORD COMPANY INDIVIDUAL DOWNLOAD LICENSES.—Notwithstanding paragraph (2)(B), a record company may, on or after the license availability date, obtain an individual download license in accordance with the notice requirements described in paragraph (2)(A) (except for the requirement that notice occur prior to the license availability date). A record company that obtains an individual download license as permitted under this para-

graph shall provide statements of account and pay royalties as provided in subsection (c)(2)(I).

(4) FAILURE TO OBTAIN LICENSE.—

(A) PHONORECORDS OTHER THAN DIGITAL PHONORECORD DELIVERIES.—In the case of phonorecords made and distributed other than by means of digital phonorecord delivery, the failure to serve or file the notice of intention required by paragraph (1) forecloses the possibility of a compulsory license under paragraph (1). In the absence of a voluntary license, the failure to obtain a compulsory license renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and subject to the remedies provided by sections 502 through 506.

(B) DIGITAL PHONORECORD DELIVERIES.—

(i) IN GENERAL.—In the case of phonorecords made and distributed by means of digital phonorecord delivery:

(I) The failure to serve the notice of intention required by paragraph (2)(A) or paragraph (3), as applicable, forecloses the possibility of a compulsory license under such paragraph.

(II) The failure to comply with paragraph (2)(B) forecloses the possibility of a blanket license for a period of 3 years after the last calendar day on which the notice of license was required to be submitted to the mechanical licensing collective under such paragraph.

(ii) EFFECT OF FAILURE.—In either case described in subclause (I) or (II) of clause (i), in the absence of a voluntary license, the failure to obtain a compulsory license renders the making and distribution of phonorecords by means of digital phonorecord delivery actionable as acts of infringement under section 501 and subject to the remedies provided by sections 502 through 506.

(c) GENERAL CONDITIONS APPLICABLE TO COMPULSORY LICENSE.—

(1) ROYALTY PAYABLE UNDER COMPULSORY LICENSE.—

(A) IDENTIFICATION REQUIREMENT.—To be entitled to receive royalties under a compulsory license obtained under subsection (b)(1) the copyright owner must be identified in the registration or other public records of the Copyright Office. The owner is entitled to royalties for phonorecords made and distributed after being so identified, but is not entitled to recover for any phonorecords previously made and distributed.

(B) ROYALTY FOR PHONORECORDS OTHER THAN DIGITAL PHONORECORD DELIVERIES.—Except as provided by subparagraph (A), for every phonorecord made and distributed under a compulsory license under subsection (a) other than by means of digital phonorecord delivery, with respect to each work embodied in the phonorecord, the royalty shall be the royalty prescribed under subparagraphs (D) through (F), paragraph (2)(A), and chapter 8. For purposes of this subparagraph, a phonorecord is considered “distrib-

uted" if the person exercising the compulsory license has voluntarily and permanently parted with its possession.

(C) ROYALTY FOR DIGITAL PHONORECORD DELIVERIES.—For every digital phonorecord delivery of a musical work made under a compulsory license under this section, the royalty payable shall be the royalty prescribed under subparagraphs (D) through (F), paragraph (2)(A), and chapter 8.

(D) AUTHORITY TO NEGOTIATE.—Notwithstanding any provision of the antitrust laws, any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a) may negotiate and agree upon the terms and rates of royalty payments under this section and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay or receive such royalty payments. Such authority to negotiate the terms and rates of royalty payments includes, but is not limited to, the authority to negotiate the year during which the royalty rates prescribed under this subparagraph, subparagraphs (E) and (F), paragraph (2)(A), and chapter 8 shall next be determined.

(E) DETERMINATION OF REASONABLE RATES AND TERMS.—Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for the activities specified by this section during the period beginning with the effective date of such rates and terms, but not earlier than January 1 of the second year following the year in which the petition requesting the proceeding is filed, and ending on the effective date of successor rates and terms, or such other period as the parties may agree. Any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a) may submit to the Copyright Royalty Judges licenses covering such activities. The parties to each proceeding shall bear their own costs.

(F) SCHEDULE OF REASONABLE RATES.—The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (2)(A), be binding on all copyright owners of nondramatic musical works and persons entitled to obtain a compulsory license under subsection (a) during the period specified in subparagraph (E), such other period as may be determined pursuant to subparagraphs (D) and (E), or such other period as the parties may agree. The Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms for digital phonorecord deliveries, the Copyright Royalty Judges shall base their decision on economic, competitive, and programming information presented by the parties, including—

(i) whether use of the compulsory licensee's service may substitute for or may promote the sales of phonorecords or other-

wise may interfere with or may enhance the musical work copyright owner's other streams of revenue from its musical works; and

(ii) the relative roles of the copyright owner and the compulsory licensee in the copyrighted work and the service made available to the public with respect to the relative creative contribution, technological contribution, capital investment, cost, and risk.

(2) ADDITIONAL TERMS AND CONDITIONS.—

(A) VOLUNTARY LICENSES AND CONTRACTUAL ROYALTY RATES.—

(i) IN GENERAL.—License agreements voluntarily negotiated at any time between one or more copyright owners of nondramatic musical works and one or more persons entitled to obtain a compulsory license under subsection (a) shall be given effect in lieu of any determination by the Copyright Royalty Judges. Subject to clause (ii), the royalty rates determined pursuant to subparagraphs (E) and (F) of paragraph (1) shall be given effect as to digital phonorecord deliveries in lieu of any contrary royalty rates specified in a contract pursuant to which a recording artist who is the author of a nondramatic musical work grants a license under that person's exclusive rights in the musical work under paragraphs (1) and (3) of section 106 or commits another person to grant a license in that musical work under paragraphs (1) and (3) of section 106, to a person desiring to fix in a tangible medium of expression a sound recording embodying the musical work.

(ii) APPLICABILITY.—The second sentence of clause (i) shall not apply to—

(I) a contract entered into on or before June 22, 1995, and not modified thereafter for the purpose of reducing the royalty rates determined pursuant to subparagraphs (E) and (F) of paragraph (1) or of increasing the number of musical works within the scope of the contract covered by the reduced rates, except if a contract entered into on or before June 22, 1995, is modified thereafter for the purpose of increasing the number of musical works within the scope of the contract, any contrary royalty rates specified in the contract shall be given effect in lieu of royalty rates determined pursuant to subparagraphs (E) and (F) of paragraph (1) for the number of musical works within the scope of the contract as of June 22, 1995; and

(II) a contract entered into after the date that the sound recording is fixed in a tangible medium of expression substantially in a form intended for commercial release, if at the time the contract is entered into, the recording artist retains the right to grant licenses as to the musical work under paragraphs (1) and (3) of section 106.

(B) SOUND RECORDING INFORMATION.—Except as provided in section 1002(e), a digital

phonorecord delivery licensed under this paragraph shall be accompanied by the information encoded in the sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer.

(C) INFRINGEMENT REMEDIES.—

(i) IN GENERAL.—A digital phonorecord delivery of a sound recording is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, unless—

(I) the digital phonorecord delivery has been authorized by the sound recording copyright owner; and

(II) the entity making the digital phonorecord delivery has obtained a compulsory license under subsection (a) or has otherwise been authorized by the musical work copyright owner, or by a record company pursuant to an individual download license, to make and distribute phonorecords of each musical work embodied in the sound recording by means of digital phonorecord delivery.

(ii) OTHER REMEDIES.—Any cause of action under this subparagraph shall be in addition to those available to the owner of the copyright in the nondramatic musical work under subparagraph (J) and section 106(4) and the owner of the copyright in the sound recording under section 106(6).

(D) LIABILITY OF SOUND RECORDING OWNERS.—The liability of the copyright owner of a sound recording for infringement of the copyright in a nondramatic musical work embodied in the sound recording shall be determined in accordance with applicable law, except that the owner of a copyright in a sound recording shall not be liable for a digital phonorecord delivery by a third party if the owner of the copyright in the sound recording does not license the distribution of a phonorecord of the nondramatic musical work.

(E) RECORDING DEVICES AND MEDIA.—Nothing in section 1008 shall be construed to prevent the exercise of the rights and remedies allowed by this paragraph, subparagraph (J), and chapter 5 in the event of a digital phonorecord delivery, except that no action alleging infringement of copyright may be brought under this title against a manufacturer, importer or distributor of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or against a consumer, based on the actions described in such section.

(F) PRESERVATION OF RIGHTS.—Nothing in this section annuls or limits—

(i) the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of a digital transmission, under paragraphs (4) and (6) of section 106;

(ii) except for compulsory licensing under the conditions specified by this section, the exclusive rights to reproduce and distribute the sound recording and the musical work embodied therein under paragraphs (1) and (3) of section 106, including by means of a digital phonorecord delivery; or

(iii) any other rights under any other provision of section 106, or remedies available under this title, as such rights or remedies exist before, on, or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

(G) EXEMPT TRANSMISSIONS AND RETRANSMISSIONS.—The provisions of this section concerning digital phonorecord deliveries shall not apply to any exempt transmissions or retransmissions under section 114(d)(1). The exemptions created in section 114(d)(1) do not expand or reduce the rights of copyright owners under paragraphs (1) through (5) of section 106 with respect to such transmissions and retransmissions.

(H) DISTRIBUTION BY RENTAL, LEASE, OR LENDING.—A compulsory license obtained under subsection (b)(1) to make and distribute phonorecords includes the right of the maker of such a phonorecord to distribute or authorize distribution of such phonorecord, other than by means of a digital phonorecord delivery, by rental, lease, or lending (or by acts or practices in the nature of rental, lease, or lending). With respect to each nondramatic musical work embodied in the phonorecord, the royalty shall be a proportion of the revenue received by the compulsory licensee from every such act of distribution of the phonorecord under this clause equal to the proportion of the revenue received by the compulsory licensee from distribution of the phonorecord under subsection (a)(1)(A)(ii)(II) that is payable by a compulsory licensee under that clause and under chapter 8. The Register of Copyrights shall issue regulations to carry out the purpose of this subparagraph.

(I) PAYMENT OF ROYALTIES AND STATEMENTS OF ACCOUNT.—Except as provided in paragraphs (4)(A)(i) and (10)(B) of subsection (d), royalty payments shall be made on or before the twentieth day of each month and shall include all royalties for the month next preceding. Each monthly payment shall be made under oath and shall comply with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall also prescribe regulations under which detailed cumulative annual statements of account, certified by a certified public accountant, shall be filed for every compulsory license under subsection (a). The regulations covering both the monthly and the annual statements of account shall prescribe the form, content, and manner of certification with respect to the number of records made and the number of records distributed.

(J) NOTICE OF DEFAULT AND TERMINATION OF COMPULSORY LICENSE.—In the case of a license obtained under paragraph (1), (2)(A), or (3) of subsection (b), if the copyright owner

does not receive the monthly payment and the monthly and annual statements of account when due, the owner may give written notice to the licensee that, unless the default is remedied not later than 30 days after the date on which the notice is sent, the compulsory license will be automatically terminated. Such termination renders either the making or the distribution, or both, of all phonorecords for which the royalty has not been paid, actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506. In the case of a license obtained under subsection (b)(2)(B), license authority under the compulsory license may be terminated as provided in subsection (d)(4)(E).

(d) BLANKET LICENSE FOR DIGITAL USES, MECHANICAL LICENSING COLLECTIVE, AND DIGITAL LICENSEE COORDINATOR.—

(1) BLANKET LICENSE FOR DIGITAL USES.—

(A) IN GENERAL.—A digital music provider that qualifies for a compulsory license under subsection (a) may, by complying with the terms and conditions of this subsection, obtain a blanket license from copyright owners through the mechanical licensing collective to make and distribute digital phonorecord deliveries of musical works through one or more covered activities.

(B) INCLUDED ACTIVITIES.—A blanket license—

(i) covers all musical works (or shares of such works) available for compulsory licensing under this section for purposes of engaging in covered activities, except as provided in subparagraph (C);

(ii) includes the making and distribution of server, intermediate, archival, and incidental reproductions of musical works that are reasonable and necessary for the digital music provider to engage in covered activities licensed under this subsection, solely for the purpose of engaging in such covered activities; and

(iii) does not cover or include any rights or uses other than those described in clauses (i) and (ii).

(C) OTHER LICENSES.—A voluntary license for covered activities entered into by or under the authority of 1 or more copyright owners and 1 or more digital music providers, or authority to make and distribute permanent downloads of a musical work obtained by a digital music provider from a sound recording copyright owner pursuant to an individual download license, shall be given effect in lieu of a blanket license under this subsection with respect to the musical works (or shares thereof) covered by such voluntary license or individual download authority and the following conditions apply:

(i) Where a voluntary license or individual download license applies, the license authority provided under the blanket license shall exclude any musical works (or shares thereof) subject to the voluntary license or individual download license.

(ii) An entity engaged in covered activities under a voluntary license or authority obtained pursuant to an individual download license that is a significant non-blanket licensee shall comply with paragraph (6)(A).

(iii) The rates and terms of any voluntary license shall be subject to the second sentence of clause (i) and clause (ii) of subsection (c)(2)(A) and paragraph (9)(C), as applicable.

(D) PROTECTION AGAINST INFRINGEMENT ACTIONS.—A digital music provider that obtains and complies with the terms of a valid blanket license under this subsection shall not be subject to an action for infringement of the exclusive rights provided by paragraphs (1) and (3) of section 106 under this title arising from use of a musical work (or share thereof) to engage in covered activities authorized by such license, subject to paragraph (4)(E).

(E) OTHER REQUIREMENTS AND CONDITIONS APPLY.—Except as expressly provided in this subsection, each requirement, limitation, condition, privilege, right, and remedy otherwise applicable to compulsory licenses under this section shall apply to compulsory blanket licenses under this subsection.

(2) AVAILABILITY OF BLANKET LICENSE.—

(A) PROCEDURE FOR OBTAINING LICENSE.—A digital music provider may obtain a blanket license by submitting a notice of license to the mechanical licensing collective that specifies the particular covered activities in which the digital music provider seeks to engage, as follows:

(i) The notice of license shall comply in form and substance with requirements that the Register of Copyrights shall establish by regulation.

(ii) Unless rejected in writing by the mechanical licensing collective not later than 30 calendar days after the date on which the mechanical licensing collective receives the notice, the blanket license shall be effective as of the date on which the notice of license was sent by the digital music provider, as shown by a physical or electronic record.

(iii) A notice of license may only be rejected by the mechanical licensing collective if—

(I) the digital music provider or notice of license does not meet the requirements of this section or applicable regulations, in which case the requirements at issue shall be specified with reasonable particularity in the notice of rejection; or

(II) the digital music provider has had a blanket license terminated by the mechanical licensing collective during the 3-year period preceding the date on which the mechanical licensing collective receives the notice pursuant to paragraph (4)(E).

(iv) If a notice of license is rejected under clause (iii)(I), the digital music provider shall have 30 calendar days after re-

ceipt of the notice of rejection to cure any deficiency and submit an amended notice of license to the mechanical licensing collective. If the deficiency has been cured, the mechanical licensing collective shall so confirm in writing, and the license shall be effective as of the date that the original notice of license was provided by the digital music provider.

(v) A digital music provider that believes a notice of license was improperly rejected by the mechanical licensing collective may seek review of such rejection in an appropriate district court of the United States. The district court shall determine the matter *de novo* based on the record before the mechanical licensing collective and any additional evidence presented by the parties.

(B) BLANKET LICENSE EFFECTIVE DATE.— Blanket licenses shall be made available by the mechanical licensing collective on and after the license availability date. No such license shall be effective prior to the license availability date.

(3) MECHANICAL LICENSING COLLECTIVE.—

(A) IN GENERAL.—The mechanical licensing collective shall be a single entity that—

(i) is a nonprofit entity, not owned by any other entity, that is created by copyright owners to carry out responsibilities under this subsection;

(ii) is endorsed by, and enjoys substantial support from, musical work copyright owners that together represent the greatest percentage of the licensor market for uses of such works in covered activities, as measured over the preceding 3 full calendar years;

(iii) is able to demonstrate to the Register of Copyrights that the entity has, or will have prior to the license availability date, the administrative and technological capabilities to perform the required functions of the mechanical licensing collective under this subsection and that is governed by a board of directors in accordance with subparagraph (D)(i); and

(iv) has been designated by the Register of Copyrights, with the approval of the Librarian of Congress pursuant to section 702, in accordance with subparagraph (B).

(B) DESIGNATION OF MECHANICAL LICENSING COLLECTIVE.—

(i) INITIAL DESIGNATION.—Not later than 270 days after the enactment date, the Register of Copyrights shall initially designate the mechanical licensing collective as follows:

(I) Not later than 90 calendar days after the enactment date, the Register shall publish notice in the Federal Register soliciting information to assist in identifying the appropriate entity to serve as the mechanical licensing collective, including the name and affiliation of each member of the board of directors described under subparagraph (D)(i) and each committee established pursuant to clauses (iii), (iv), and (v) of subparagraph (D).

(II) After reviewing the information requested under subclause (I) and making a designation, the Register shall publish notice in the Federal Register setting forth—

- (aa) the identity of and contact information for the mechanical licensing collective; and
- (bb) the reasons for the designation.

(ii) PERIODIC REVIEW OF DESIGNATION.— Following the initial designation of the mechanical licensing collective, the Register shall, every 5 years, beginning with the fifth full calendar year to commence after the initial designation, publish notice in the Federal Register in the month of January soliciting information concerning whether the existing designation should be continued, or a different entity meeting the criteria described in clauses (i) through (iii) of subparagraph (A) shall be designated. Following publication of such notice, the Register shall—

(I) after reviewing the information submitted and conducting additional proceedings as appropriate, publish notice in the Federal Register of a continuing designation or new designation of the mechanical licensing collective, as the case may be, and the reasons for such a designation, with any new designation to be effective as of the first day of a month that is not less than 6 months and not longer than 9 months after the date on which the Register publishes the notice, as specified by the Register; and

(II) if a new entity is designated as the mechanical licensing collective, adopt regulations to govern the transfer of licenses, funds, records, data, and administrative responsibilities from the existing mechanical licensing collective to the new entity.

(iii) CLOSEST ALTERNATIVE DESIGNATION.—If the Register is unable to identify an entity that fulfills each of the qualifications set forth in clauses (i) through (iii) of subparagraph (A), the Register shall designate the entity that most nearly fulfills such qualifications for purposes of carrying out the responsibilities of the mechanical licensing collective.

(C) AUTHORITIES AND FUNCTIONS.—

(i) IN GENERAL.—The mechanical licensing collective is authorized to perform the following functions, subject to more particular requirements as described in this subsection:

(I) Offer and administer blanket licenses, including receipt of notices of license and reports of usage from digital music providers.

(II) Collect and distribute royalties from digital music providers for covered activities.

(III) Engage in efforts to identify musical works (and shares of such works) embodied in particular sound recordings, and to identify and locate the copyright

owners of such musical works (and shares of such works).

(IV) Maintain the musical works database and other information relevant to the administration of licensing activities under this section.

(V) Administer a process by which copyright owners can claim ownership of musical works (and shares of such works), and a process by which royalties for works for which the owner is not identified or located are equitably distributed to known copyright owners.

(VI) Administer collections of the administrative assessment from digital music providers and significant non-blanket licensees, including receipt of notices of nonblanket activity.

(VII) Invest in relevant resources, and arrange for services of outside vendors and others, to support the activities of the mechanical licensing collective.

(VIII) Engage in legal and other efforts to enforce rights and obligations under this subsection, including by filing bankruptcy proofs of claims for amounts owed under licenses, and acting in coordination with the digital licensee coordinator.

(IX) Initiate and participate in proceedings before the Copyright Royalty Judges to establish the administrative assessment under this subsection.

(X) Initiate and participate in proceedings before the Copyright Office with respect to activities under this subsection.

(XI) Gather and provide documentation for use in proceedings before the Copyright Royalty Judges to set rates and terms under this section.

(XII) Maintain records of the activities of the mechanical licensing collective and engage in and respond to audits described in this subsection.

(XIII) Engage in such other activities as may be necessary or appropriate to fulfill the responsibilities of the mechanical licensing collective under this subsection.

(ii) RESTRICTIONS CONCERNING LICENSING AND ADMINISTRATIVE ACTIVITIES.—With respect to the administration of licenses, except as provided in clauses (i) and (iii) and subparagraph (E)(v), the mechanical licensing collective may only—

(I) issue blanket licenses pursuant to subsection (d)(1); and

(II) administer blanket licenses for reproduction or distribution rights in musical works for covered activities, including collecting and distributing royalties, pursuant to blanket licenses.

(iii) ADDITIONAL ADMINISTRATIVE ACTIVITIES.—Subject to paragraph (11)(C), the mechanical licensing collective may also administer, including by collecting and distributing royalties, voluntary licenses issued by, or individual download licenses obtained from, copyright owners only for

reproduction or distribution rights in musical works for covered activities, for which the mechanical licensing collective shall charge reasonable fees for such services.

(iv) RESTRICTION ON LOBBYING.—The mechanical licensing collective may not engage in government lobbying activities, but may engage in the activities described in subclauses (IX), (X), and (XI) of clause (i).

(D) GOVERNANCE.—

(i) BOARD OF DIRECTORS.—The mechanical licensing collective shall have a board of directors consisting of 14 voting members and 3 nonvoting members, as follows:

(I) Ten voting members shall be representatives of music publishers—

(aa) to which songwriters have assigned exclusive rights of reproduction and distribution of musical works with respect to covered activities; and

(bb) none of which may be owned by, or under common control with, any other board member.

(II) Four voting members shall be professional songwriters who have retained and exercise exclusive rights of reproduction and distribution with respect to covered activities with respect to musical works they have authored.

(III) One nonvoting member shall be a representative of the nonprofit trade association of music publishers that represents the greatest percentage of the licensor market for uses of musical works in covered activities, as measured for the 3-year period preceding the date on which the member is appointed.

(IV) One nonvoting member shall be a representative of the digital licensee coordinator, provided that a digital licensee coordinator has been designated pursuant to paragraph (5)(B). Otherwise, the nonvoting member shall be the nonprofit trade association of digital licensees that represents the greatest percentage of the licensee market for uses of musical works in covered activities, as measured over the preceding 3 full calendar years.

(V) One nonvoting member shall be a representative of a nationally recognized nonprofit trade association whose primary mission is advocacy on behalf of songwriters in the United States.

(ii) BYLAWS.—

(I) ESTABLISHMENT.—Not later than 1 year after the date on which the mechanical licensing collective is initially designated by the Register of Copyrights under subparagraph (B)(i), the collective shall establish bylaws to determine issues relating to the governance of the collective, including, but not limited to—

(aa) the length of the term for each member of the board of directors;

(bb) the staggering of the terms of the members of the board of directors;

(cc) a process for filling a seat on the board of directors that is vacated before the end of the term with respect to that seat;

(dd) a process for electing a member to the board of directors; and

(ee) a management structure for daily operation of the collective.

(II) PUBLIC AVAILABILITY.—The mechanical licensing collective shall make the bylaws established under subclause (I) available to the public.

(iii) BOARD MEETINGS.—The board of directors shall meet not less frequently than biannually and discuss matters pertinent to the operations of the mechanical licensing collective, including the mechanical licensing collective budget.

(iv) OPERATIONS ADVISORY COMMITTEE.—The board of directors of the mechanical licensing collective shall establish an operations advisory committee consisting of not fewer than 6 members to make recommendations to the board of directors concerning the operations of the mechanical licensing collective, including the efficient investment in and deployment of information technology and data resources. Such committee shall have an equal number of members of the committee who are—

(I) musical work copyright owners who are appointed by the board of directors of the mechanical licensing collective; and

(II) representatives of digital music providers who are appointed by the digital licensee coordinator.

(v) UNCLAIMED ROYALTIES OVERSIGHT COMMITTEE.—The board of directors of the mechanical licensing collective shall establish and appoint an unclaimed royalties oversight committee consisting of 10 members, 5 of which shall be musical work copyright owners and 5 of which shall be professional songwriters whose works are used in covered activities.

(vi) DISPUTE RESOLUTION COMMITTEE.—The board of directors of the mechanical licensing collective shall establish and appoint a dispute resolution committee that shall—

(I) consist of not fewer than 6 members; and

(II) include an equal number of representatives of musical work copyright owners and professional songwriters.

(vii) MECHANICAL LICENSING COLLECTIVE ANNUAL REPORT.—

(I) IN GENERAL.—Not later than June 30 of each year commencing after the license availability date, the mechanical licensing collective shall post, and make available online for a period of not less than 3 years, an annual report that sets forth information regarding—

(aa) the operational and licensing practices of the collective; and

(bb) how royalties are collected and distributed;

(cc) budgeting and expenditures;

(dd) the collective total costs for the preceding calendar year;

(ee) the projected annual mechanical licensing collective budget;

(ff) aggregated royalty receipts and payments;

(gg) expenses that are more than 10 percent of the annual mechanical licensing collective budget; and

(hh) the efforts of the collective to locate and identify copyright owners of unmatched musical works (and shares of works).

(II) SUBMISSION.—On the date on which the mechanical licensing collective posts each report required under subclause (I), the collective shall provide a copy of the report to the Register of Copyrights.

(viii) INDEPENDENT OFFICERS.—An individual serving as an officer of the mechanical licensing collective may not, at the same time, also be an employee or agent of any member of the board of directors of the collective or any entity represented by a member of the board of directors, as described in clause (i).

(ix) OVERSIGHT AND ACCOUNTABILITY.—

(I) IN GENERAL.—The mechanical licensing collective shall—

(aa) ensure that the policies and practices of the collective are transparent and accountable;

(bb) identify a point of contact for publisher inquiries and complaints with timely redress; and

(cc) establish an anti-comingling policy for funds not collected under this section and royalties collected under this section.

(II) AUDITS.—

(aa) IN GENERAL.—Beginning in the fourth full calendar year that begins after the initial designation of the mechanical licensing collective by the Register of Copyrights under subparagraph (B)(i), and in every fifth calendar year thereafter, the collective shall retain a qualified auditor that shall—

(AA) examine the books, records, and operations of the collective;

(BB) prepare a report for the board of directors of the collective with respect to the matters described in item (bb); and

(CC) not later than December 31 of the year in which the qualified auditor is retained, deliver the report described in subitem (BB) to the board of directors of the collective.

(bb) MATTERS ADDRESSED.—Each report prepared under item (aa) shall address the implementation and efficacy of procedures of the mechanical licensing collective—

(AA) for the receipt, handling, and distribution of royalty funds, including any amounts held as unclaimed royalties;

(BB) to guard against fraud, abuse, waste, and the unreasonable use of funds; and

(CC) to protect the confidentiality of financial, proprietary, and other sensitive information.

(cc) PUBLIC AVAILABILITY.—With respect to each report prepared under item (aa), the mechanical licensing collective shall—

(AA) submit the report to the Register of Copyrights; and

(BB) make the report available to the public.

(E) MUSICAL WORKS DATABASE.—

(i) ESTABLISHMENT AND MAINTENANCE OF DATABASE.—The mechanical licensing collective shall establish and maintain a database containing information relating to musical works (and shares of such works) and, to the extent known, the identity and location of the copyright owners of such works (and shares thereof) and the sound recordings in which the musical works are embodied. In furtherance of maintaining such database, the mechanical licensing collective shall engage in efforts to identify the musical works embodied in particular sound recordings, as well as to identify and locate the copyright owners of such works (and shares thereof), and update such data as appropriate.

(ii) MATCHED WORKS.—With respect to musical works (and shares thereof) that have been matched to copyright owners, the musical works database shall include—

(I) the title of the musical work;

(II) the copyright owner of the work (or share thereof), and the ownership percentage of that owner;

(III) contact information for such copyright owner;

(IV) to the extent reasonably available to the mechanical licensing collective—

(aa) the international standard musical work code for the work; and

(bb) identifying information for sound recordings in which the musical work is embodied, including the name of the sound recording, featured artist, sound recording copyright owner, producer, international standard recording code, and other information commonly used to assist in associating sound recordings with musical works; and

(V) such other information as the Register of Copyrights may prescribe by regulation.

(iii) UNMATCHED WORKS.—With respect to unmatched musical works (and shares of works) in the database, the musical works database shall include—

(I) to the extent reasonably available to the mechanical licensing collective—

(aa) the title of the musical work;

(bb) the ownership percentage for which an owner has not been identified;

(cc) if a copyright owner has been identified but not located, the identity of such owner and the ownership percentage of that owner;

(dd) identifying information for sound recordings in which the work is embodied, including sound recording name, featured artist, sound recording copyright owner, producer, international standard recording code, and other information commonly used to assist in associating sound recordings with musical works; and

(ee) any additional information reported to the mechanical licensing collective that may assist in identifying the work; and

(II) such other information relating to the identity and ownership of musical works (and shares of such works) as the Register of Copyrights may prescribe by regulation.

(iv) SOUND RECORDING INFORMATION.—Each musical work copyright owner with any musical work listed in the musical works database shall engage in commercially reasonable efforts to deliver to the mechanical licensing collective, including for use in the musical works database, to the extent such information is not then available in the database, information regarding the names of the sound recordings in which that copyright owner's musical works (or shares thereof) are embodied, to the extent practicable.

(v) ACCESSIBILITY OF DATABASE.—The musical works database shall be made available to members of the public in a searchable, online format, free of charge. The mechanical licensing collective shall make such database available in a bulk, machine-readable format, through a widely available software application, to the following entities:

(I) Digital music providers operating under the authority of valid notices of license, free of charge.

(II) Significant nonblanket licensees in compliance with their obligations under paragraph (6), free of charge.

(III) Authorized vendors of the entities described in subclauses (I) and (II), free of charge.

(IV) The Register of Copyrights, free of charge (but the Register shall not treat such database or any information therein as a Government record).

(V) Any other person or entity for a fee not to exceed the marginal cost to the mechanical licensing collective of providing the database to such person or entity.

(vi) ADDITIONAL REQUIREMENTS.—The Register of Copyrights shall establish requirements by regulations to ensure the usability, interoperability, and usage restrictions of the musical works database.

(F) NOTICES OF LICENSE AND NONBLANKET ACTIVITY.—

(i) NOTICES OF LICENSES.—The mechanical licensing collective shall receive, review, and confirm or reject notices of license from digital music providers, as provided in paragraph (2)(A). The collective shall maintain a current, publicly accessible list of blanket licenses that includes contact information for the licensees and the effective dates of such licenses.

(ii) NOTICES OF NONBLANKET ACTIVITY.—The mechanical licensing collective shall receive notices of nonblanket activity from significant nonblanket licensees, as provided in paragraph (6)(A). The collective shall maintain a current, publicly accessible list of notices of nonblanket activity that includes contact information for significant nonblanket licensees and the dates of receipt of such notices.

(G) COLLECTION AND DISTRIBUTION OF ROYALTIES.—

(i) IN GENERAL.—Upon receiving reports of usage and payments of royalties from digital music providers for covered activities, the mechanical licensing collective shall—

(I) engage in efforts to—

(aa) identify the musical works embodied in sound recordings reflected in such reports, and the copyright owners of such musical works (and shares thereof);

(bb) confirm uses of musical works subject to voluntary licenses and individual download licenses, and the corresponding pro rata amounts to be deducted from royalties that would otherwise be due under the blanket license; and

(cc) confirm proper payment of royalties due;

(II) distribute royalties to copyright owners in accordance with the usage and other information contained in such reports, as well as the ownership and other information contained in the records of the collective; and

(III) deposit into an interest-bearing account, as provided in subparagraph (H)(ii), royalties that cannot be distributed due to—

(aa) an inability to identify or locate a copyright owner of a musical work (or share thereof); or

(bb) a pending dispute before the dispute resolution committee of the mechanical licensing collective.

(ii) OTHER COLLECTION EFFORTS.—Any royalties recovered by the mechanical licensing collective as a result of efforts to enforce rights or obligations under a blanket license, including through a bankruptcy proceeding or other legal action, shall be distributed to copyright owners based on available usage information and in accordance with the procedures described in subclauses (I) and (II) of clause (i), on a pro rata basis in proportion to the overall percentage recovery of the total royalties owed, with any pro rata share of

royalties that cannot be distributed deposited in an interest-bearing account as provided in subparagraph (H)(ii).

(H) HOLDING OF ACCRUED ROYALTIES.—

(i) HOLDING PERIOD.—The mechanical licensing collective shall hold accrued royalties associated with particular musical works (and shares of works) that remain unmatched for a period of not less than 3 years after the date on which the funds were received by the mechanical licensing collective, or not less than 3 years after the date on which the funds were accrued by a digital music provider that subsequently transferred such funds to the mechanical licensing collective pursuant to paragraph (10)(B), whichever period expires sooner.

(ii) INTEREST-BEARING ACCOUNT.—Accrued royalties for unmatched works (and shares thereof) shall be maintained by the mechanical licensing collective in an interest-bearing account that earns monthly interest—

(I) at the Federal, short-term rate; and

(II) that accrues for the benefit of copyright owners entitled to payment of such accrued royalties.

(I) MUSICAL WORKS CLAIMING PROCESS.—When a copyright owner of an unmatched work (or share of a work) has been identified and located in accordance with the procedures of the mechanical licensing collective, the collective shall—

(i) update the musical works database and the other records of the collective accordingly; and

(ii) provided that accrued royalties for the musical work (or share thereof) have not yet been included in a distribution pursuant to subparagraph (J)(i), pay such accrued royalties and a proportionate amount of accrued interest associated with that work (or share thereof) to the copyright owner, accompanied by a cumulative statement of account reflecting usage of such work and accrued royalties based on information provided by digital music providers to the mechanical licensing collective.

(J) DISTRIBUTION OF UNCLAIMED ACCRUED ROYALTIES.—

(i) DISTRIBUTION PROCEDURES.—After the expiration of the prescribed holding period for accrued royalties provided in subparagraph (H)(i), the mechanical licensing collective shall distribute such accrued royalties, along with a proportionate share of accrued interest, to copyright owners identified in the records of the collective, subject to the following requirements, and in accordance with the policies and procedures established under clause (ii):

(I) The first such distribution shall occur on or after January 1 of the second full calendar year to commence after the license availability date, with not less than 1 such distribution to take place during each calendar year thereafter.

(II) Copyright owners' payment shares for unclaimed accrued royalties for par-

ticular reporting periods shall be determined in a transparent and equitable manner based on data indicating the relative market shares of such copyright owners as reflected in reports of usage provided by digital music providers for covered activities for the periods in question, including, in addition to usage data provided to the mechanical licensing collective, usage data provided to copyright owners under voluntary licenses and individual download licenses for covered activities, to the extent such information is available to the mechanical licensing collective. In furtherance of the determination of equitable market shares under this subparagraph—

(aa) the mechanical licensing collective may require copyright owners seeking distributions of unclaimed accrued royalties to provide, or direct the provision of, information concerning the usage of musical works under voluntary licenses and individual download licenses for covered activities; and

(bb) the mechanical licensing collective shall take appropriate steps to safeguard the confidentiality and security of usage, financial, and other sensitive data used to compute market shares in accordance with the confidentiality provisions prescribed by the Register of Copyrights under paragraph (12)(C).

(ii) ESTABLISHMENT OF DISTRIBUTION POLICIES.—The unclaimed royalties oversight committee established under subparagraph (D)(v) shall establish policies and procedures for the distribution of unclaimed accrued royalties and accrued interest in accordance with this subparagraph, including the provision of usage data to copyright owners to allocate payments and credits to songwriters pursuant to clause (iv), subject to the approval of the board of directors of the mechanical licensing collective.

(iii) PUBLIC NOTICE OF UNCLAIMED ACCRUED ROYALTIES.—The mechanical licensing collective shall—

(I) maintain a publicly accessible online facility with contact information for the collective that lists unmatched musical works (and shares of works), through which a copyright owner may assert an ownership claim with respect to such a work (and a share of such a work);

(II) engage in diligent, good-faith efforts to publicize, throughout the music industry—

(aa) the existence of the collective and the ability to claim unclaimed accrued royalties for unmatched musical works (and shares of such works) held by the collective;

(bb) the procedures by which copyright owners may identify themselves and provide contact, ownership, and other relevant information to the col-

lective in order to receive payments of accrued royalties;

(cc) any transfer of accrued royalties for musical works under paragraph (10)(B), not later than 180 days after the date on which the transfer is received; and

(dd) any pending distribution of unclaimed accrued royalties and accrued interest, not less than 90 days before the date on which the distribution is made; and

(III) as appropriate, participate in music industry conferences and events for the purpose of publicizing the matters described in subclause (II).

(iv) SONGWRITER PAYMENTS.—Copyright owners that receive a distribution of unclaimed accrued royalties and accrued interest shall pay or credit a portion to songwriters (or the authorized agents of songwriters) on whose behalf the copyright owners license or administer musical works for covered activities, in accordance with applicable contractual terms, but notwithstanding any agreement to the contrary—

(I) such payments and credits to songwriters shall be allocated in proportion to reported usage of individual musical works by digital music providers during the reporting periods covered by the distribution from the mechanical licensing collective; and

(II) in no case shall the payment or credit to an individual songwriter be less than 50 percent of the payment received by the copyright owner attributable to usage of musical works (or shares of works) of that songwriter.

(K) DISPUTE RESOLUTION.—The dispute resolution committee established under subparagraph (D)(vi) shall establish policies and procedures—

(i) for copyright owners to address in a timely and equitable manner disputes relating to ownership interests in musical works licensed under this section and allocation and distribution of royalties by the mechanical licensing collective, subject to the approval of the board of directors of the mechanical licensing collective;

(ii) that shall include a mechanism to hold disputed funds in accordance with the requirements described in subparagraph (H)(ii) pending resolution of the dispute; and

(iii) except as provided in paragraph (11)(D), that shall not affect any legal or equitable rights or remedies available to any copyright owner or songwriter concerning ownership of, and entitlement to royalties for, a musical work.

(L) VERIFICATION OF PAYMENTS BY MECHANICAL LICENSING COLLECTIVE.—

(i) VERIFICATION PROCESS.—A copyright owner entitled to receive payments of royalties for covered activities from the mechanical licensing collective may, individ-

ually or with other copyright owners, conduct an audit of the mechanical licensing collective to verify the accuracy of royalty payments by the mechanical licensing collective to such copyright owner, as follows:

(I) A copyright owner may audit the mechanical licensing collective only once in a year for any or all of the 3 calendar years preceding the year in which the audit is commenced, and may not audit records for any calendar year more than once.

(II) The audit shall be conducted by a qualified auditor, who shall perform the audit during the ordinary course of business by examining the books, records, and data of the mechanical licensing collective, according to generally accepted auditing standards and subject to applicable confidentiality requirements prescribed by the Register of Copyrights under paragraph (12)(C).

(III) The mechanical licensing collective shall make such books, records, and data available to the qualified auditor and respond to reasonable requests for relevant information, and shall use commercially reasonable efforts to facilitate access to relevant information maintained by third parties.

(IV) To commence the audit, any copyright owner shall file with the Copyright Office a notice of intent to conduct an audit of the mechanical licensing collective, identifying the period of time to be audited, and shall simultaneously deliver a copy of such notice to the mechanical licensing collective. The Register of Copyrights shall cause the notice of audit to be published in the Federal Register not later than 45 calendar days after the date on which the notice is received.

(V) The qualified auditor shall determine the accuracy of royalty payments, including whether an underpayment or overpayment of royalties was made by the mechanical licensing collective to each auditing copyright owner, except that, before providing a final audit report to any such copyright owner, the qualified auditor shall provide a tentative draft of the report to the mechanical licensing collective and allow the mechanical licensing collective a reasonable opportunity to respond to the findings, including by clarifying issues and correcting factual errors.

(VI) The auditing copyright owner or owners shall bear the cost of the audit. In case of an underpayment to any copyright owner, the mechanical licensing collective shall pay the amounts of any such underpayment to such auditing copyright owner, as appropriate. In case of an overpayment by the mechanical licensing collective, the mechanical licensing collective may debit the account of the auditing copyright owner or owners for such overpaid amounts, or such

owner or owners shall refund overpaid amounts to the mechanical licensing collective, as appropriate.

(ii) ALTERNATIVE VERIFICATION PROCEDURES.—Nothing in this subparagraph shall preclude a copyright owner and the mechanical licensing collective from agreeing to audit procedures different from those described in this subparagraph, except that a notice of the audit shall be provided to and published by the Copyright Office as described in clause (i)(IV).

(M) RECORDS OF MECHANICAL LICENSING COLLECTIVE.—

(i) RECORDS MAINTENANCE.—The mechanical licensing collective shall ensure that all material records of the operations of the mechanical licensing collective, including those relating to notices of license, the administration of the claims process of the mechanical licensing collective, reports of usage, royalty payments, receipt and maintenance of accrued royalties, royalty distribution processes, and legal matters, are preserved and maintained in a secure and reliable manner, with appropriate commercially reasonable safeguards against unauthorized access, copying, and disclosure, and subject to the confidentiality requirements prescribed by the Register of Copyrights under paragraph (12)(C) for a period of not less than 7 years after the date of creation or receipt, whichever occurs later.

(ii) RECORDS ACCESS.—The mechanical licensing collective shall provide prompt access to electronic and other records pertaining to the administration of a copyright owner's musical works upon reasonable written request of the owner or the authorized representative of the owner.

(4) TERMS AND CONDITIONS OF BLANKET LICENSE.—A blanket license is subject to, and conditioned upon, the following requirements:

(A) ROYALTY REPORTING AND PAYMENTS.—

(i) MONTHLY REPORTS AND PAYMENT.—A digital music provider shall report and pay royalties to the mechanical licensing collective under the blanket license on a monthly basis in accordance with clause (ii) and subsection (c)(2)(I), except that the monthly reporting shall be due on the date that is 45 calendar days, rather than 20 calendar days, after the end of the monthly reporting period.

(ii) DATA TO BE REPORTED.—In reporting usage of musical works to the mechanical licensing collective, a digital music provider shall provide usage data for musical works used under the blanket license and usage data for musical works used in covered activities under voluntary licenses and individual download licenses. In the report of usage, the digital music provider shall—

(I) with respect to each sound recording embodying a musical work—

(aa) provide identifying information for the sound recording, including sound recording name, featured artist,

and, to the extent acquired by the digital music provider in connection with its use of sound recordings of musical works to engage in covered activities, including pursuant to subparagraph (B), sound recording copyright owner, producer, international standard recording code, and other information commonly used in the industry to identify sound recordings and match them to the musical works the sound recordings embody;

(bb) to the extent acquired by the digital music provider in the metadata provided by sound recording copyright owners or other licensors of sound recordings in connection with the use of sound recordings of musical works to engage in covered activities, including pursuant to subparagraph (B), provide information concerning authorship and ownership of the applicable rights in the musical work embodied in the sound recording (including each songwriter, publisher name, and respective ownership share) and the international standard musical work code; and

(cc) provide the number of digital phonorecord deliveries of the sound recording, including limited downloads and interactive streams;

(II) identify and provide contact information for all musical work copyright owners for works embodied in sound recordings as to which a voluntary license, rather than the blanket license, is in effect with respect to the uses being reported; and

(III) provide such other information as the Register of Copyrights shall require by regulation.

(iii) FORMAT AND MAINTENANCE OF REPORTS.—Reports of usage provided by digital music providers to the mechanical licensing collective shall be in a machine-readable format that is compatible with the information technology systems of the mechanical licensing collective and meets the requirements of regulations adopted by the Register of Copyrights. The Register shall also adopt regulations setting forth requirements under which records of use shall be maintained and made available to the mechanical licensing collective by digital music providers engaged in covered activities under a blanket license.

(iv) ADOPTION OF REGULATIONS.—The Register of Copyrights shall adopt regulations—

(I) setting forth requirements under which records of use shall be maintained and made available to the mechanical licensing collective by digital music providers engaged in covered activities under a blanket license; and

(II) regarding adjustments to reports of usage by digital music providers, including mechanisms to account for overpayment and underpayment of royalties in prior periods.

(B) COLLECTION OF SOUND RECORDING INFORMATION.—A digital music provider shall engage in good-faith, commercially reasonable efforts to obtain from sound recording copyright owners and other licensors of sound recordings made available through the service of such digital music provider information concerning—

(i) sound recording copyright owners, producers, international standard recording codes, and other information commonly used in the industry to identify sound recordings and match them to the musical works the sound recordings embody; and

(ii) the authorship and ownership of musical works, including songwriters, publisher names, ownership shares, and international standard musical work codes.

(C) PAYMENT OF ADMINISTRATIVE ASSESSMENT.—A digital music provider and any significant nonblanket licensee shall pay the administrative assessment established under paragraph (7)(D) in accordance with this subsection and applicable regulations.

(D) VERIFICATION OF PAYMENTS BY DIGITAL MUSIC PROVIDERS.—

(i) VERIFICATION PROCESS.—The mechanical licensing collective may conduct an audit of a digital music provider operating under the blanket license to verify the accuracy of royalty payments by the digital music provider to the mechanical licensing collective as follows:

(I) The mechanical licensing collective may commence an audit of a digital music provider not more frequently than once in any 3-calendar-year period to cover a verification period of not more than the 3 full calendar years preceding the date of commencement of the audit, and such audit may not audit records for any such 3-year verification period more than once.

(II) The audit shall be conducted by a qualified auditor, who shall perform the audit during the ordinary course of business by examining the books, records, and data of the digital music provider, according to generally accepted auditing standards and subject to applicable confidentiality requirements prescribed by the Register of Copyrights under paragraph (12)(C).

(III) The digital music provider shall make such books, records, and data available to the qualified auditor and respond to reasonable requests for relevant information, and shall use commercially reasonable efforts to provide access to relevant information maintained with respect to a digital music provider by third parties.

(IV) To commence the audit, the mechanical licensing collective shall file with the Copyright Office a notice of intent to conduct an audit of the digital music provider, identifying the period of time to be audited, and shall simultaneously deliver a copy of such notice to the digital music provider. The Register

of Copyrights shall cause the notice of audit to be published in the Federal Register not later than 45 calendar days after the date on which notice is received.

(V) The qualified auditor shall determine the accuracy of royalty payments, including whether an underpayment or overpayment of royalties was made by the digital music provider to the mechanical licensing collective, except that, before providing a final audit report to the mechanical licensing collective, the qualified auditor shall provide a tentative draft of the report to the digital music provider and allow the digital music provider a reasonable opportunity to respond to the findings, including by clarifying issues and correcting factual errors.

(VI) The mechanical licensing collective shall pay the cost of the audit, unless the qualified auditor determines that there was an underpayment by the digital music provider of not less than 10 percent, in which case the digital music provider shall bear the reasonable costs of the audit, in addition to paying the amount of any underpayment to the mechanical licensing collective. In case of an overpayment by the digital music provider, the mechanical licensing collective shall provide a credit to the account of the digital music provider.

(VII) A digital music provider may not assert section 507 or any other Federal or State statute of limitations, doctrine of laches or estoppel, or similar provision as a defense to a legal action arising from an audit under this subparagraph if such legal action is commenced not more than 6 years after the commencement of the audit that is the basis for such action.

(ii) ALTERNATIVE VERIFICATION PROCEDURES.—Nothing in this subparagraph shall preclude the mechanical licensing collective and a digital music provider from agreeing to audit procedures different from those described in this subparagraph, except that a notice of the audit shall be provided to and published by the Copyright Office as described in clause (i)(IV).

(E) DEFAULT UNDER BLANKET LICENSE.—

(i) CONDITIONS OF DEFAULT.—A digital music provider shall be in default under a blanket license if the digital music provider—

(I) fails to provide 1 or more monthly reports of usage to the mechanical licensing collective when due;

(II) fails to make a monthly royalty or late fee payment to the mechanical licensing collective when due, in all or material part;

(III) provides 1 or more monthly reports of usage to the mechanical licensing collective that, on the whole, is or are materially deficient as a result of in-

accurate, missing, or unreadable data, where the correct data was available to the digital music provider and required to be reported under this section and applicable regulations;

(IV) fails to pay the administrative assessment as required under this subsection and applicable regulations; or

(V) after being provided written notice by the mechanical licensing collective, refuses to comply with any other material term or condition of the blanket license under this section for a period of not less than 60 calendar days.

(ii) NOTICE OF DEFAULT AND TERMINATION.—In case of a default by a digital music provider, the mechanical licensing collective may proceed to terminate the blanket license of the digital music provider as follows:

(I) The mechanical licensing collective shall provide written notice to the digital music provider describing with reasonable particularity the default and advising that unless such default is cured not later than 60 calendar days after the date of the notice, the blanket license will automatically terminate at the end of that period.

(II) If the digital music provider fails to remedy the default before the end of the 60-day period described in subclause (I), the license shall terminate without any further action on the part of the mechanical licensing collective. Such termination renders the making of all digital phonorecord deliveries of all musical works (and shares thereof) covered by the blanket license for which the royalty or administrative assessment has not been paid actionable as acts of infringement under section 501 and subject to the remedies provided by sections 502 through 506.

(iii) NOTICE TO COPYRIGHT OWNERS.—The mechanical licensing collective shall provide written notice of any termination under this subparagraph to copyright owners of affected works.

(iv) REVIEW BY FEDERAL DISTRICT COURT.—A digital music provider that believes a blanket license was improperly terminated by the mechanical licensing collective may seek review of such termination in an appropriate district court of the United States. The district court shall determine the matter de novo based on the record before the mechanical licensing collective and any additional supporting evidence presented by the parties.

(5) DIGITAL LICENSEE COORDINATOR.—

(A) IN GENERAL.—The digital licensee coordinator shall be a single entity that—

(i) is a nonprofit, not owned by any other entity, that is created to carry out responsibilities under this subsection;

(ii) is endorsed by and enjoys substantial support from digital music providers and significant nonblanket licensees that together represent the greatest percentage

of the licensee market for uses of musical works in covered activities, as measured over the preceding 3 calendar years;

(iii) is able to demonstrate that it has, or will have prior to the license availability date, the administrative capabilities to perform the required functions of the digital licensee coordinator under this subsection; and

(iv) has been designated by the Register of Copyrights, with the approval of the Librarian of Congress pursuant to section 702, in accordance with subparagraph (B).

(B) DESIGNATION OF DIGITAL LICENSEE COORDINATOR.—

(i) **INITIAL DESIGNATION.**—The Register of Copyrights shall initially designate the digital licensee coordinator not later than 270 days after the enactment date, in accordance with the same procedure described for designation of the mechanical licensing collective in paragraph (3)(B)(i).

(ii) **PERIODIC REVIEW OF DESIGNATION.**—Following the initial designation of the digital licensee coordinator, the Register of Copyrights shall, every 5 years, beginning with the fifth full calendar year to commence after the initial designation, determine whether the existing designation should be continued, or a different entity meeting the criteria described in clauses (i) through (iii) of subparagraph (A) should be designated, in accordance with the same procedure described for the mechanical licensing collective in paragraph (3)(B)(ii).

(iii) **INABILITY TO DESIGNATE.**—If the Register of Copyrights is unable to identify an entity that fulfills each of the qualifications described in clauses (i) through (iii) of subparagraph (A) to serve as the digital licensee coordinator, the Register may decline to designate a digital licensee coordinator. The determination of the Register not to designate a digital licensee coordinator shall not negate or otherwise affect any provision of this subsection except to the limited extent that a provision references the digital licensee coordinator. In such case, the reference to the digital licensee coordinator shall be without effect unless and until a new digital licensee coordinator is designated.

(C) AUTHORITIES AND FUNCTIONS.—

(i) **IN GENERAL.**—The digital licensee coordinator is authorized to perform the following functions, subject to more particular requirements as described in this subsection:

(I) Establish a governance structure, criteria for membership, and any dues to be paid by its members.

(II) Engage in efforts to enforce notice and payment obligations with respect to the administrative assessment, including by receiving information from and coordinating with the mechanical licensing collective.

(III) Initiate and participate in proceedings before the Copyright Royalty

Judges to establish the administrative assessment under this subsection.

(IV) Initiate and participate in proceedings before the Copyright Office with respect to activities under this subsection.

(V) Gather and provide documentation for use in proceedings before the Copyright Royalty Judges to set rates and terms under this section.

(VI) Maintain records of its activities.

(VII) Assist in publicizing the existence of the mechanical licensing collective and the ability of copyright owners to claim royalties for unmatched musical works (and shares of works) through the collective.

(VIII) Engage in such other activities as may be necessary or appropriate to fulfill its responsibilities under this subsection.

(ii) **RESTRICTION ON LOBBYING.**—The digital licensee coordinator may not engage in government lobbying activities, but may engage in the activities described in subclauses (III), (IV), and (V) of clause (i).

(iii) **ASSISTANCE WITH PUBLICITY FOR UNCLAIMED ROYALTIES.**—The digital licensee coordinator shall make reasonable, good-faith efforts to assist the mechanical licensing collective in the efforts of the collective to locate and identify copyright owners of unmatched musical works (and shares of such works) by encouraging digital music providers to publicize the existence of the collective and the ability of copyright owners to claim unclaimed accrued royalties, including by—

(I) posting contact information for the collective at reasonably prominent locations on digital music provider websites and applications; and

(II) conducting in-person outreach activities with songwriters.

(6) REQUIREMENTS FOR SIGNIFICANT NON-BLANKET LICENSEES.—

(A) IN GENERAL.—

(i) **NOTICE OF ACTIVITY.**—Not later than 45 calendar days after the license availability date, or 45 calendar days after the end of the first full calendar month in which an entity initially qualifies as a significant nonblanket licensee, whichever occurs later, a significant nonblanket licensee shall submit a notice of nonblanket activity to the mechanical licensing collective. The notice of nonblanket activity shall comply in form and substance with requirements that the Register of Copyrights shall establish by regulation, and a copy shall be made available to the digital licensee coordinator.

(ii) **REPORTING AND PAYMENT OBLIGATIONS.**—The notice of nonblanket activity submitted to the mechanical licensing collective shall be accompanied by a report of usage that contains the information described in paragraph (4)(A)(ii), as well as any payment of the administrative assessment required under this subsection and

applicable regulations. Thereafter, subject to clause (iii), a significant nonblanket licensee shall continue to provide monthly reports of usage, accompanied by any required payment of the administrative assessment, to the mechanical licensing collective. Such reports and payments shall be submitted not later than 45 calendar days after the end of the calendar month being reported.

(iii) DISCONTINUATION OF OBLIGATIONS.—An entity that has submitted a notice of nonblanket activity to the mechanical licensing collective that has ceased to qualify as a significant nonblanket licensee may so notify the collective in writing. In such case, as of the calendar month in which such notice is provided, such entity shall no longer be required to provide reports of usage or pay the administrative assessment, but if such entity later qualifies as a significant nonblanket licensee, such entity shall again be required to comply with clauses (i) and (ii).

(B) REPORTING BY MECHANICAL LICENSING COLLECTIVE TO DIGITAL LICENSEE COORDINATOR.—

(i) MONTHLY REPORTS OF NONCOMPLIANT LICENSEES.—The mechanical licensing collective shall provide monthly reports to the digital licensee coordinator setting forth any significant nonblanket licensees of which the collective is aware that have failed to comply with subparagraph (A).

(ii) TREATMENT OF CONFIDENTIAL INFORMATION.—The mechanical licensing collective and digital licensee coordinator shall take appropriate steps to safeguard the confidentiality and security of financial and other sensitive data shared under this subparagraph, in accordance with the confidentiality requirements prescribed by the Register of Copyrights under paragraph (12)(C).

(C) LEGAL ENFORCEMENT EFFORTS.—

(i) FEDERAL COURT ACTION.—Should the mechanical licensing collective or digital licensee coordinator become aware that a significant nonblanket licensee has failed to comply with subparagraph (A), either may commence an action in an appropriate district court of the United States for damages and injunctive relief. If the significant nonblanket licensee is found liable, the court shall, absent a finding of excusable neglect, award damages in an amount equal to three times the total amount of the unpaid administrative assessment and, notwithstanding anything to the contrary in section 505, reasonable attorney's fees and costs, as well as such other relief as the court determines appropriate. In all other cases, the court shall award relief as appropriate. Any recovery of damages shall be payable to the mechanical licensing collective as an offset to the collective total costs.

(ii) STATUTE OF LIMITATIONS FOR ENFORCEMENT ACTION.—Any action described in this subparagraph shall be commenced

within the time period described in section 507(b).

(iii) OTHER RIGHTS AND REMEDIES PRESERVED.—The ability of the mechanical licensing collective or digital licensee coordinator to bring an action under this subparagraph shall in no way alter, limit or negate any other right or remedy that may be available to any party at law or in equity.

(7) FUNDING OF MECHANICAL LICENSING COLLECTIVE.—

(A) IN GENERAL.—The collective total costs shall be funded by—

(i) an administrative assessment, as such assessment is established by the Copyright Royalty Judges pursuant to subparagraph (D) from time to time, to be paid by—

(I) digital music providers that are engaged, in all or in part, in covered activities pursuant to a blanket license; and

(II) significant nonblanket licensees; and

(ii) voluntary contributions from digital music providers and significant nonblanket licensees as may be agreed with copyright owners.

(B) VOLUNTARY CONTRIBUTIONS.—

(i) AGREEMENTS CONCERNING CONTRIBUTIONS.—Except as provided in clause (ii), voluntary contributions by digital music providers and significant nonblanket licensees shall be determined by private negotiation and agreement, and the following conditions apply:

(I) The date and amount of each voluntary contribution to the mechanical licensing collective shall be documented in a writing signed by an authorized agent of the mechanical licensing collective and the contributing party.

(II) Such agreement shall be made available as required in proceedings before the Copyright Royalty Judges to establish or adjust the administrative assessment in accordance with applicable statutory and regulatory provisions and rulings of the Copyright Royalty Judges.

(ii) TREATMENT OF CONTRIBUTIONS.—Each voluntary contribution described in clause (i) shall be treated for purposes of an administrative assessment proceeding as an offset to the collective total costs that would otherwise be recovered through the administrative assessment. Any allocation or reallocation of voluntary contributions between or among individual digital music providers or significant nonblanket licensees shall be a matter of private negotiation and agreement among such parties and outside the scope of the administrative assessment proceeding.

(C) INTERIM APPLICATION OF ACCRUED ROYALTIES.—In the event that the administrative assessment, together with any funding from voluntary contributions as provided in subparagraphs (A) and (B), is inadequate to cover current collective total costs, the collective, with approval of its board of direc-

tors, may apply unclaimed accrued royalties on an interim basis to defray such costs, subject to future reimbursement of such royalties from future collections of the assessment.

(D) DETERMINATION OF ADMINISTRATIVE ASSESSMENT.—

(i) ADMINISTRATIVE ASSESSMENT TO COVER COLLECTIVE TOTAL COSTS.—The administrative assessment shall be used solely and exclusively to fund the collective total costs.

(ii) SEPARATE PROCEEDING BEFORE COPYRIGHT ROYALTY JUDGES.—The amount and terms of the administrative assessment shall be determined and established in a separate and independent proceeding before the Copyright Royalty Judges, according to the procedures described in clauses (iii) and (iv). The administrative assessment determined in such proceeding shall—

(I) be wholly independent of royalty rates and terms applicable to digital music providers, which shall not be taken into consideration in any manner in establishing the administrative assessment;

(II) be established by the Copyright Royalty Judges in an amount that is calculated to defray the reasonable collective total costs;

(III) be assessed based on usage of musical works by digital music providers and significant nonblanket licensees in covered activities under both compulsory and nonblanket licenses;

(IV) may be in the form of a percentage of royalties payable under this section for usage of musical works in covered activities (regardless of whether a different rate applies under a voluntary license), or any other usage-based metric reasonably calculated to equitably allocate the collective total costs across digital music providers and significant nonblanket licensees engaged in covered activities, and shall include as a component a minimum fee for all digital music providers and significant nonblanket licensees; and

(V) take into consideration anticipated future collective total costs and collections of the administrative assessment, including, as applicable—

(aa) any portion of past actual collective total costs of the mechanical licensing collective not funded by previous collections of the administrative assessment or voluntary contributions because such collections or contributions together were insufficient to fund such costs;

(bb) any past collections of the administrative assessment and voluntary contributions that exceeded past actual collective total costs, resulting in a surplus; and

(cc) the amount of any voluntary contributions by digital music providers or significant nonblanket licens-

ees in relevant periods, described in subparagraphs (A) and (B) of paragraph (7).

(iii) INITIAL ADMINISTRATIVE ASSESSMENT.—The procedure for establishing the initial administrative assessment shall be as follows:

(I) Not later than 270 days after the enactment date, the Copyright Royalty Judges shall commence a proceeding to establish the initial administrative assessment by publishing a notice in the Federal Register seeking petitions to participate.

(II) The mechanical licensing collective and digital licensee coordinator shall participate in the proceeding described in subclause (I), along with any interested copyright owners, digital music providers or significant nonblanket licensees that have notified the Copyright Royalty Judges of their desire to participate.

(III) The Copyright Royalty Judges shall establish a schedule for submission by the parties of information that may be relevant to establishing the administrative assessment, including actual and anticipated collective total costs of the mechanical licensing collective, actual and anticipated collections from digital music providers and significant nonblanket licensees, and documentation of voluntary contributions, as well as a schedule for further proceedings, which shall include a hearing, as the Copyright Royalty Judges determine appropriate.

(IV) The initial administrative assessment shall be determined, and such determination shall be published in the Federal Register by the Copyright Royalty Judges, not later than 1 year after commencement of the proceeding described in this clause. The determination shall be supported by a written record. The initial administrative assessment shall be effective as of the license availability date, and shall continue in effect unless and until an adjusted administrative assessment is established pursuant to an adjustment proceeding under clause (iv).

(iv) ADJUSTMENT OF ADMINISTRATIVE ASSESSMENT.—The administrative assessment may be adjusted by the Copyright Royalty Judges periodically, in accordance with the following procedures:

(I) Not earlier than 1 year after the most recent publication of a determination of the administrative assessment by the Copyright Royalty Judges, the mechanical licensing collective, the digital licensee coordinator, or one or more interested copyright owners, digital music providers, or significant nonblanket licensees, may file a petition with the Copyright Royalty Judges in the month of May to commence a proceeding to adjust the administrative assessment.

(II) Notice of the commencement of such proceeding shall be published in the

Federal Register in the month of June following the filing of any petition, with a schedule of requested information and additional proceedings, as described in clause (iii)(III). The mechanical licensing collective and digital licensee coordinator shall participate in such proceeding, along with any interested copyright owners, digital music providers, or significant nonblanket licensees that have notified the Copyright Royalty Judges of their desire to participate.

(III) The determination of the adjusted administrative assessment, which shall be supported by a written record, shall be published in the Federal Register during June of the calendar year following the commencement of the proceeding. The adjusted administrative assessment shall take effect January 1 of the year following such publication.

(v) ADOPTION OF VOLUNTARY AGREEMENTS.—In lieu of reaching their own determination based on evaluation of relevant data, the Copyright Royalty Judges shall approve and adopt a negotiated agreement to establish the amount and terms of the administrative assessment that has been agreed to by the mechanical licensing collective and the digital licensee coordinator (or if none has been designated, interested digital music providers and significant nonblanket licensees representing more than half of the market for uses of musical works in covered activities), except that the Copyright Royalty Judges shall have the discretion to reject any such agreement for good cause shown. An administrative assessment adopted under this clause shall apply to all digital music providers and significant nonblanket licensees engaged in covered activities during the period the administrative assessment is in effect.

(vi) CONTINUING AUTHORITY TO AMEND.—The Copyright Royalty Judges shall retain continuing authority to amend a determination of an administrative assessment to correct technical or clerical errors, or modify the terms of implementation, for good cause, with any such amendment to be published in the Federal Register.

(vii) APPEAL OF ADMINISTRATIVE ASSESSMENT.—The determination of an administrative assessment by the Copyright Royalty Judges shall be appealable, not later than 30 calendar days after publication in the Federal Register, to the Court of Appeals for the District of Columbia Circuit by any party that fully participated in the proceeding. The administrative assessment as established by the Copyright Royalty Judges shall remain in effect pending the final outcome of any such appeal, and the mechanical licensing collective, digital licensee coordinator, digital music providers, and significant nonblanket licensees shall implement appropriate financial or other measures not later than 90 days after any modification of the assessment to reflect and account for such outcome.

(viii) REGULATIONS.—The Copyright Royalty Judges may adopt regulations to govern the conduct of proceedings under this paragraph.

(8) ESTABLISHMENT OF RATES AND TERMS UNDER BLANKET LICENSE.—

(A) RESTRICTIONS ON RATESETTING PARTICIPATION.—Neither the mechanical licensing collective nor the digital licensee coordinator shall be a party to a proceeding described in subsection (c)(1)(E), except that the mechanical licensing collective or the digital licensee coordinator may gather and provide financial and other information for the use of a party to such a proceeding and comply with requests for information as required under applicable statutory and regulatory provisions and rulings of the Copyright Royalty Judges.

(B) APPLICATION OF LATE FEES.—In any proceeding described in subparagraph (A) in which the Copyright Royalty Judges establish a late fee for late payment of royalties for uses of musical works under this section, such fee shall apply to covered activities under blanket licenses, as follows:

(i) Late fees for past due royalty payments shall accrue from the due date for payment until payment is received by the mechanical licensing collective.

(ii) The availability of late fees shall in no way prevent a copyright owner or the mechanical licensing collective from asserting any other rights or remedies to which such copyright owner or the mechanical licensing collective may be entitled under this title.

(C) INTERIM RATE AGREEMENTS IN GENERAL.—For any covered activity for which no rate or terms have been established by the Copyright Royalty Judges, the mechanical licensing collective and any digital music provider may agree to an interim rate and terms for such activity under the blanket license, and any such rate and terms—

(i) shall be treated as nonprecedential and not cited or relied upon in any rate-setting proceeding before the Copyright Royalty Judges or any other tribunal; and

(ii) shall automatically expire upon the establishment of a rate and terms for such covered activity by the Copyright Royalty Judges, under subsection (c)(1)(E).

(D) ADJUSTMENTS FOR INTERIM RATES.—The rate and terms established by the Copyright Royalty Judges for a covered activity to which an interim rate and terms have been agreed under subparagraph (C) shall supersede the interim rate and terms and apply retroactively to the inception of the activity under the blanket license. In such case, not later than 90 days after the effective date of the rate and terms established by the Copyright Royalty Judges—

(i) if the rate established by the Copyright Royalty Judges exceeds the interim rate, the digital music provider shall pay to the mechanical licensing collective the amount of any underpayment of royalties due; or

(ii) if the interim rate exceeds the rate established by the Copyright Royalty Judges, the mechanical licensing collective shall credit the account of the digital music provider for the amount of any overpayment of royalties due.

(9) TRANSITION TO BLANKET LICENSES.—

(A) SUBSTITUTION OF BLANKET LICENSE.—On the license availability date, a blanket license shall, without any interruption in license authority enjoyed by such digital music provider, be automatically substituted for and supersede any existing compulsory license previously obtained under this section by the digital music provider from a copyright owner to engage in 1 or more covered activities with respect to a musical work, except that such substitution shall not apply to any authority obtained from a record company pursuant to a compulsory license to make and distribute permanent downloads unless and until such record company terminates such authority in writing to take effect at the end of a monthly reporting period, with a copy to the mechanical licensing collective.

(B) EXPIRATION OF EXISTING LICENSES.—Except to the extent provided in subparagraph (A), on and after the license availability date, licenses other than individual download licenses obtained under this section for covered activities prior to the license availability date shall no longer continue in effect.

(C) TREATMENT OF VOLUNTARY LICENSES.—A voluntary license for a covered activity in effect on the license availability date will remain in effect unless and until the voluntary license expires according to the terms of the voluntary license, or the parties agree to amend or terminate the voluntary license. In a case where a voluntary license for a covered activity entered into before the license availability date incorporates the terms of this section by reference, the terms so incorporated (but not the rates) shall be those in effect immediately prior to the license availability date, and those terms shall continue to apply unless and until such voluntary license is terminated or amended, or the parties enter into a new voluntary license.

(D) FURTHER ACCEPTANCE OF NOTICES FOR COVERED ACTIVITIES BY COPYRIGHT OFFICE.—On and after the enactment date—

(i) the Copyright Office shall no longer accept notices of intention with respect to covered activities; and

(ii) notices of intention filed before the enactment date will no longer be effective or provide license authority with respect to covered activities, except that, before the license availability date, there shall be no liability under section 501 for the reproduction or distribution of a musical work (or share thereof) in covered activities if a valid notice of intention was filed for such work (or share) before the enactment date.

(10) PRIOR UNLICENSED USES.—

(A) LIMITATION ON LIABILITY IN GENERAL.—A copyright owner that commences an ac-

tion under section 501 on or after January 1, 2018, against a digital music provider for the infringement of the exclusive rights provided by paragraph (1) or (3) of section 106 arising from the unauthorized reproduction or distribution of a musical work by such digital music provider in the course of engaging in covered activities prior to the license availability date, shall, as the copyright owner's sole and exclusive remedy against the digital music provider, be eligible to recover the royalty prescribed under subsection (c)(1)(C) and chapter 8, from the digital music provider, provided that such digital music provider can demonstrate compliance with the requirements of subparagraph (B), as applicable. In all other cases the limitation on liability under this subparagraph shall not apply.

(B) REQUIREMENTS FOR LIMITATION ON LIABILITY.—The following requirements shall apply on the enactment date and through the end of the period that expires 90 days after the license availability date to digital music providers seeking to avail themselves of the limitation on liability described in subparagraph (A):

(i) Not later than 30 calendar days after first making a particular sound recording of a musical work available through its service via one or more covered activities, or 30 calendar days after the enactment date, whichever occurs later, a digital music provider shall engage in good-faith, commercially reasonable efforts to identify and locate each copyright owner of such musical work (or share thereof). Such required matching efforts shall include the following:

(I) Good-faith, commercially reasonable efforts to obtain from the owner of the corresponding sound recording made available through the digital music provider's service the following information:

(aa) Sound recording name, featured artist, sound recording copyright owner, producer, international standard recording code, and other information commonly used in the industry to identify sound recordings and match them to the musical works they embody.

(bb) Any available musical work ownership information, including each songwriter and publisher name, percentage ownership share, and international standard musical work code.

(II) Employment of 1 or more bulk electronic matching processes that are available to the digital music provider through a third-party vendor on commercially reasonable terms, except that a digital music provider may rely on its own bulk electronic matching process if that process has capabilities comparable to or better than those available from a third-party vendor on commercially reasonable terms.

(ii) The required matching efforts shall be repeated by the digital music provider

not less than once per month for so long as the copyright owner remains unidentified or has not been located.

(iii) If the required matching efforts are successful in identifying and locating a copyright owner of a musical work (or share thereof) by the end of the calendar month in which the digital music provider first makes use of the work, the digital music provider shall provide statements of account and pay royalties to such copyright owner in accordance with this section and applicable regulations.

(iv) If the copyright owner is not identified or located by the end of the calendar month in which the digital music provider first makes use of the work, the digital music provider shall accrue and hold royalties calculated under the applicable statutory rate in accordance with usage of the work, from initial use of the work until the accrued royalties can be paid to the copyright owner or are required to be transferred to the mechanical licensing collective, as follows:

(I) Accrued royalties shall be maintained by the digital music provider in accordance with generally accepted accounting principles.

(II) If a copyright owner of an unmatched musical work (or share thereof) is identified and located by or to the digital music provider before the license availability date, the digital music provider shall—

(aa) not later than 45 calendar days after the end of the calendar month during which the copyright owner was identified and located, pay the copyright owner all accrued royalties, such payment to be accompanied by a cumulative statement of account that includes all of the information that would have been provided to the copyright owner had the digital music provider been providing monthly statements of account to the copyright owner from initial use of the work in accordance with this section and applicable regulations, including the requisite certification under subsection (c)(2)(I);

(bb) beginning with the accounting period following the calendar month in which the copyright owner was identified and located, and for all other accounting periods prior to the license availability date, provide monthly statements of account and pay royalties to the copyright owner as required under this section and applicable regulations; and

(cc) beginning with the monthly royalty reporting period commencing on the license availability date, report usage and pay royalties for such musical work (or share thereof) for such reporting period and reporting periods thereafter to the mechanical licensing collective, as required under this subsection and applicable regulations.

(III) If a copyright owner of an unmatched musical work (or share thereof) is not identified and located by the license availability date, the digital music provider shall—

(aa) not later than 45 calendar days after the license availability date, transfer all accrued royalties to the mechanical licensing collective, such payment to be accompanied by a cumulative statement of account that includes all of the information that would have been provided to the copyright owner had the digital music provider been serving monthly statements of account on the copyright owner from initial use of the work in accordance with this section and applicable regulations, including the requisite certification under subsection (c)(2)(I), and accompanied by an additional certification by a duly authorized officer of the digital music provider that the digital music provider has fulfilled the requirements of clauses (i) and (ii) of subparagraph (B) but has not been successful in locating or identifying the copyright owner; and

(bb) beginning with the monthly royalty reporting period commencing on the license availability date, report usage and pay royalties for such musical work (or share thereof) for such period and reporting periods thereafter to the mechanical licensing collective, as required under this subsection and applicable regulations.

(v) A digital music provider that complies with the requirements of this subparagraph with respect to unmatched musical works (or shares of works) shall not be liable for or accrue late fees for late payments of royalties for such works until such time as the digital music provider is required to begin paying monthly royalties to the copyright owner or the mechanical licensing collective, as applicable.

(C) ADJUSTED STATUTE OF LIMITATIONS.—Notwithstanding anything to the contrary in section 507(b), with respect to any claim of infringement of the exclusive rights provided by paragraphs (1) and (3) of section 106 against a digital music provider arising from the unauthorized reproduction or distribution of a musical work by such digital music provider in the course of engaging in covered activities that accrued not more than 3 years prior to the license availability date, such action may be commenced not later than the later of—

- (i) 3 years after the date on which the claim accrued; or
- (ii) 2 years after the license availability date.

(D) OTHER RIGHTS AND REMEDIES RESERVED.—Except as expressly provided in this paragraph, nothing in this paragraph shall be construed to alter, limit, or negate any right or remedy of a copyright owner

with respect to unauthorized use of a musical work.

(11) LEGAL PROTECTIONS FOR LICENSING ACTIVITIES.—

(A) EXEMPTION FOR COMPULSORY LICENSE ACTIVITIES.—The antitrust exemption described in subsection (c)(1)(D) shall apply to negotiations and agreements between and among copyright owners and persons entitled to obtain a compulsory license for covered activities, and common agents acting on behalf of such copyright owners or persons, including with respect to the administrative assessment established under this subsection.

(B) LIMITATION ON COMMON AGENT EXEMPTION.—Notwithstanding the antitrust exemption provided in subsection (c)(1)(D) and subparagraph (A) of this paragraph (except for the administrative assessment referenced in such subparagraph (A) and except as provided in paragraph (8)(C)), neither the mechanical licensing collective nor the digital licensee coordinator shall serve as a common agent with respect to the establishment of royalty rates or terms under this section.

(C) ANTITRUST EXEMPTION FOR ADMINISTRATIVE ACTIVITIES.—Notwithstanding any provision of the antitrust laws, copyright owners and persons entitled to obtain a compulsory license under this section may designate the mechanical licensing collective to administer voluntary licenses for the reproduction or distribution of musical works in covered activities on behalf of such copyright owners and persons, subject to the following conditions:

(i) Each copyright owner shall establish the royalty rates and material terms of any such voluntary license individually and not in agreement, combination, or concert with any other copyright owner.

(ii) Each person entitled to obtain a compulsory license under this section shall establish the royalty rates and material terms of any such voluntary license individually and not in agreement, combination, or concert with any other digital music provider.

(iii) The mechanical licensing collective shall maintain the confidentiality of the voluntary licenses in accordance with the confidentiality provisions prescribed by the Register of Copyrights under paragraph (12)(C).

(D) LIABILITY FOR GOOD-FAITH ACTIVITIES.—The mechanical licensing collective shall not be liable to any person or entity based on a claim arising from its good-faith administration of policies and procedures adopted and implemented to carry out the responsibilities described in subparagraphs (J) and (K) of paragraph (3), except to the extent of correcting an underpayment or overpayment of royalties as provided in paragraph (3)(L)(i)(VI), but the collective may participate in a legal proceeding as a stakeholder party if the collective is holding funds that are the subject of a dispute between copyright owners. For purposes of this

subparagraph, the term “good-faith administration” means administration in a manner that is not grossly negligent.

(E) PREEMPTION OF STATE PROPERTY LAWS.—The holding and distribution of funds by the mechanical licensing collective in accordance with this subsection shall supersede and preempt any State law (including common law) concerning escheatment or abandoned property, or any analogous provision, that might otherwise apply.

(F) RULE OF CONSTRUCTION.—Except as expressly provided in this subsection, nothing in this subsection shall negate or limit the ability of any person to pursue an action in Federal court against the mechanical licensing collective or any other person based upon a claim arising under this title or other applicable law.

(12) REGULATIONS.—

(A) ADOPTION BY REGISTER OF COPYRIGHTS AND COPYRIGHT ROYALTY JUDGES.—The Register of Copyrights may conduct such proceedings and adopt such regulations as may be necessary or appropriate to effectuate the provisions of this subsection, except for regulations concerning proceedings before the Copyright Royalty Judges to establish the administrative assessment, which shall be adopted by the Copyright Royalty Judges.

(B) JUDICIAL REVIEW OF REGULATIONS.—Except as provided in paragraph (7)(D)(vii), regulations adopted under this subsection shall be subject to judicial review pursuant to chapter 7 of title 5.

(C) PROTECTION OF CONFIDENTIAL INFORMATION.—The Register of Copyrights shall adopt regulations to provide for the appropriate procedures to ensure that confidential, private, proprietary, or privileged information contained in the records of the mechanical licensing collective and digital licensee coordinator is not improperly disclosed or used, including through any disclosure or use by the board of directors or personnel of either entity, and specifically including the unclaimed royalties oversight committee and the dispute resolution committee of the mechanical licensing collective.

(13) SAVINGS CLAUSES.—

(A) LIMITATION ON ACTIVITIES AND RIGHTS COVERED.—This subsection applies solely to uses of musical works subject to licensing under this section. The blanket license shall not be construed to extend or apply to activities other than covered activities or to rights other than the exclusive rights of reproduction and distribution licensed under this section, or serve or act as the basis to extend or expand the compulsory license under this section to activities and rights not covered by this section on the day before the enactment date.

(B) RIGHTS OF PUBLIC PERFORMANCE NOT AFFECTED.—The rights, protections, and immunities granted under this subsection, the data concerning musical works collected and made available under this subsection, and the definitions under subsection (e) shall not

extend to, limit, or otherwise affect any right of public performance in a musical work.

(e) DEFINITIONS.—As used in this section:

(1) ACCRUED INTEREST.—The term “accrued interest” means interest accrued on accrued royalties, as described in subsection (d)(3)(H)(ii).

(2) ACCRUED ROYALTIES.—The term “accrued royalties” means royalties accrued for the reproduction or distribution of a musical work (or share thereof) in a covered activity, calculated in accordance with the applicable royalty rate under this section.

(3) ADMINISTRATIVE ASSESSMENT.—The term “administrative assessment” means the fee established pursuant to subsection (d)(7)(D).

(4) AUDIT.—The term “audit” means a royalty compliance examination to verify the accuracy of royalty payments, or the conduct of such an examination, as applicable.

(5) BLANKET LICENSE.—The term “blanket license” means a compulsory license described in subsection (d)(1)(A) to engage in covered activities.

(6) COLLECTIVE TOTAL COSTS.—The term “collective total costs”—

(A) means the total costs of establishing, maintaining, and operating the mechanical licensing collective to fulfill its statutory functions, including—

(i) startup costs;

(ii) financing, legal, audit, and insurance costs;

(iii) investments in information technology, infrastructure, and other long-term resources;

(iv) outside vendor costs;

(v) costs of licensing, royalty administration, and enforcement of rights;

(vi) costs of bad debt; and

(vii) costs of automated and manual efforts to identify and locate copyright owners of musical works (and shares of such musical works) and match sound recordings to the musical works the sound recordings embody; and

(B) does not include any added costs incurred by the mechanical licensing collective to provide services under voluntary licenses.

(7) COVERED ACTIVITY.—The term “covered activity” means the activity of making a digital phonorecord delivery of a musical work, including in the form of a permanent download, limited download, or interactive stream, where such activity qualifies for a compulsory license under this section.

(8) DIGITAL MUSIC PROVIDER.—The term “digital music provider” means a person (or persons operating under the authority of that person) that, with respect to a service engaged in covered activities—

(A) has a direct contractual, subscription, or other economic relationship with end users of the service, or, if no such relationship with end users exists, exercises direct control over the provision of the service to end users;

(B) is able to fully report on any revenues and consideration generated by the service; and

(C) is able to fully report on usage of sound recordings of musical works by the service (or procure such reporting).

(9) DIGITAL LICENSEE COORDINATOR.—The term “digital licensee coordinator” means the entity most recently designated pursuant to subsection (d)(5).

(10) DIGITAL PHONORECORD DELIVERY.—The term “digital phonorecord delivery” means each individual delivery of a phonorecord by digital transmission of a sound recording that results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any musical work embodied therein, and includes a permanent download, a limited download, or an interactive stream. A digital phonorecord delivery does not result from a real-time, noninteractive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible. A digital phonorecord delivery does not include the digital transmission of sounds accompanying a motion picture or other audiovisual work as defined in section 101.

(11) ENACTMENT DATE.—The term “enactment date” means the date of the enactment of the Musical Works Modernization Act.

(12) INDIVIDUAL DOWNLOAD LICENSE.—The term “individual download license” means a compulsory license obtained by a record company to make and distribute, or authorize the making and distribution of, permanent downloads embodying a specific individual musical work.

(13) INTERACTIVE STREAM.—The term “interactive stream” means a digital transmission of a sound recording of a musical work in the form of a stream, where the performance of the sound recording by means of such transmission is not exempt under section 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under section 114(d)(2). An interactive stream is a digital phonorecord delivery.

(14) INTERESTED.—The term “interested”, as applied to a party seeking to participate in a proceeding under subsection (d)(7)(D), is a party as to which the Copyright Royalty Judges have not determined that the party lacks a significant interest in such proceeding.

(15) LICENSE AVAILABILITY DATE.—The term “license availability date” means January 1 following the expiration of the 2-year period beginning on the enactment date.

(16) LIMITED DOWNLOAD.—The term “limited download” means a digital transmission of a sound recording of a musical work in the form of a download, where such sound recording is accessible for listening only for a limited amount of time or specified number of times.

(17) MATCHED.—The term “matched”, as applied to a musical work (or share thereof), means that the copyright owner of such work

(or share thereof) has been identified and located.

(18) MECHANICAL LICENSING COLLECTIVE.—The term ‘‘mechanical licensing collective’’ means the entity most recently designated as such by the Register of Copyrights under subsection (d)(3).

(19) MECHANICAL LICENSING COLLECTIVE BUDGET.—The term ‘‘mechanical licensing collective budget’’ means a statement of the financial position of the mechanical licensing collective for a fiscal year or quarter thereof based on estimates of expenditures during the period and proposals for financing those expenditures, including a calculation of the collective total costs.

(20) MUSICAL WORKS DATABASE.—The term ‘‘musical works database’’ means the database described in subsection (d)(3)(E).

(21) NONPROFIT.—The term ‘‘nonprofit’’ means a nonprofit created or organized in a State.

(22) NOTICE OF LICENSE.—The term ‘‘notice of license’’ means a notice from a digital music provider provided under subsection (d)(2)(A) for purposes of obtaining a blanket license.

(23) NOTICE OF NONBLANKET ACTIVITY.—The term ‘‘notice of nonblanket activity’’ means a notice from a significant nonblanket licensee provided under subsection (d)(6)(A) for purposes of notifying the mechanical licensing collective that the licensee has been engaging in covered activities.

(24) PERMANENT DOWNLOAD.—The term ‘‘permanent download’’ means a digital transmission of a sound recording of a musical work in the form of a download, where such sound recording is accessible for listening without restriction as to the amount of time or number of times it may be accessed.

(25) QUALIFIED AUDITOR.—The term ‘‘qualified auditor’’ means an independent, certified public accountant with experience performing music royalty audits.

(26) RECORD COMPANY.—The term ‘‘record company’’ means an entity that invests in, produces, and markets sound recordings of musical works, and distributes such sound recordings for remuneration through multiple sales channels, including a corporate affiliate of such an entity engaged in distribution of sound recordings.

(27) REPORT OF USAGE.—The term ‘‘report of usage’’ means a report reflecting an entity’s usage of musical works in covered activities described in subsection (d)(4)(A).

(28) REQUIRED MATCHING EFFORTS.—The term ‘‘required matching efforts’’ means efforts to identify and locate copyright owners of musical works as described in subsection (d)(10)(B)(i).

(29) SERVICE.—The term ‘‘service’’, as used in relation to covered activities, means any site, facility, or offering by or through which sound recordings of musical works are digitally transmitted to members of the public.

(30) SHARE.—The term ‘‘share’’, as applied to a musical work, means a fractional ownership interest in such work.

(31) SIGNIFICANT NONBLANKET LICENSEE.—The term ‘‘significant nonblanket licensee’’—

(A) means an entity, including a group of entities under common ownership or control that, acting under the authority of one or more voluntary licenses or individual download licenses, offers a service engaged in covered activities, and such entity or group of entities—

(i) is not currently operating under a blanket license and is not obligated to provide reports of usage reflecting covered activities under subsection (d)(4)(A);

(ii) has a direct contractual, subscription, or other economic relationship with end users of the service or, if no such relationship with end users exists, exercises direct control over the provision of the service to end users; and

(iii) either—

(I) on any day in a calendar month, makes more than 5,000 different sound recordings of musical works available through such service; or

(II) derives revenue or other consideration in connection with such covered activities greater than \$50,000 in a calendar month, or total revenue or other consideration greater than \$500,000 during the preceding 12 calendar months; and

(B) does not include—

(i) an entity whose covered activity consists solely of free-to-the-user streams of segments of sound recordings of musical works that do not exceed 90 seconds in length, are offered only to facilitate a licensed use of musical works that is not a covered activity, and have no revenue directly attributable to such streams constituting the covered activity; or

(ii) a ‘‘public broadcasting entity’’ as defined in section 118(f).

(32) SONGWRITER.—The term ‘‘songwriter’’ means the author of all or part of a musical work, including a composer or lyricist.

(33) STATE.—The term ‘‘State’’ means each State of the United States, the District of Columbia, and each territory or possession of the United States.

(34) UNCLAIMED ACCRUED ROYALTIES.—The term ‘‘unclaimed accrued royalties’’ means accrued royalties eligible for distribution under subsection (d)(3)(J).

(35) UNMATCHED.—The term ‘‘unmatched’’, as applied to a musical work (or share thereof), means that the copyright owner of such work (or share thereof) has not been identified or located.

(36) VOLUNTARY LICENSE.—The term ‘‘voluntary license’’ means a license for use of a musical work (or share thereof) other than a compulsory license obtained under this section.

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2561; Pub. L. 98-450, § 3, Oct. 4, 1984, 98 Stat. 1727; Pub. L. 104-39, § 4, Nov. 1, 1995, 109 Stat. 344; Pub. L. 105-80, §§ 4, 10, 12(a)(7), Nov. 13, 1997, 111 Stat. 1531, 1534; Pub. L. 108-419, § 5(d), Nov. 30, 2004, 118 Stat. 2364; Pub. L. 109-303, § 4(c), Oct. 6, 2006, 120 Stat. 1482; Pub. L. 110-403, title II, § 209(a)(3), Oct. 13, 2008, 122 Stat. 4264; Pub. L. 111-295, § 6(g),

Dec. 9, 2010, 124 Stat. 3181; Pub. L. 115–264, title I, §102(a), Oct. 11, 2018, 132 Stat. 3677.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94–1476

The provisions of section 1(e) and 101(e) of the present law [sections 1(e) and 101(e) of former title 17], establishing a system of compulsory licensing for the making and distribution of phonorecords of copyrighted music, are retained with a number of modifications and clarifications in section 115 of the bill. Under these provisions, which represented a compromise of the most controversial issue of the 1909 act, a musical composition that has been reproduced in phonorecords with the permission of the copyright owner may generally be reproduced in phonorecords by another person, if that person notifies the copyright owner and pays a specified royalty.

The fundamental question of whether to retain the compulsory license or to do away with it altogether was a major issue during earlier stages of the program for general revision of the copyright law. At the hearings it was apparent that the argument on this point had shifted, and the real issue was not whether to retain the compulsory license but how much the royalty rate under it should be. The arguments for and against retention of the compulsory license are outlined at pages 66–67 of this Committee's 1967 report (H. Rept. No. 83, 90th Cong., 1st Sess.). The Committee's conclusion on this point remains the same as in 1967: “that a compulsory licensing system is still warranted as a condition for the rights of reproducing and distributing phonorecords of copyrighted music,” but “that the present system is unfair and unnecessarily burdensome on copyright owners, and that the present statutory rate is too low.”

Availability and Scope of Compulsory License. Subsection (a) of section 115 deals with three doubtful questions under the present law: (1) the nature of the original recording that will make the work available to others for recording under a compulsory license; (2) the nature of the sound recording that can be made under a compulsory license; and (3) the extent to which someone acting under a compulsory license can depart from the work as written or recorded without violating the copyright owner's right to make an “arrangement” or other derivative work. The first two of these questions are answered in clause (1) of section 115(a), and the third is the subject of clause (2).

The present law, though not altogether clear, apparently bases compulsory licensing on the making or licensing of the first recording, even if no authorized records are distributed to the public. The first sentence of section 115(a)(1) would change the basis for compulsory licensing to authorized public distribution of phonorecords (including disks and audio tapes but not the sound tracks or other sound records accompanying a motion picture or other audiovisual work). Under the clause, a compulsory license would be available to anyone as soon as “phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner.”

The second sentence of clause (1), which has been the subject of some debate, provides that “a person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use.” This provision was criticized as being discriminatory against background music systems, since it would prevent a background music producer from making recordings without the express consent of the copyright owner; it was argued that this could put the producer at a great competitive disadvantage with performing rights societies, allow discrimination, and destroy or prevent entry of businesses. The committee concluded, however, that the purpose of the compulsory license does not extend to manufacturers of phonorecords that are intended primarily for commercial use, including not only broadcasters and jukebox operators but also background music services.

The final sentence of clause (1) provides that a person may not obtain a compulsory license for use of the work in the duplication of a sound recording made by another, unless the sound recording being duplicated was itself fixed lawfully and the making of phonorecords duplicated from it was authorized by the owner of copyright in the sound recording (or, if the recording was fixed before February 15, 1972, by the voluntary or compulsory licensee of the music used in the recording). The basic intent of this sentence is to make clear that a person is not entitled to a compulsory license of copyrighted musical works for the purpose of making an unauthorized duplication of a musical sound recording originally developed and produced by another. It is the view of the Committee that such was the original intent of the Congress in enacting the 1909 Copyright Act, and it has been so construed by the 3d, 5th, 9th and 10th Circuits in the following cases: *Duchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir.), cert. denied, 409 U.S. 847 (1972) [93 S.Ct. 52, 34 L.Ed.2d 88]; *Edward B. Marks Music Corp. v. Colorado Magnetics, Inc.*, 497 F.2d 285, aff'd on rehearing en banc, 497 F.2d 292 (10th Cir. 1974), cert. denied, 419 U.S. 1120 (1975) [95 S.Ct. 801, 42 L.Ed.2d 819]; *Jondora Music Publishing Co. v. Melody Recordings, Inc.*, 506 F.2d 392 (3d Cir. 1974, as amended 1975), cert. denied, 421 U.S. 1012 (1975) [95 S.Ct. 2417, 44 L.Ed.2d 680]; and *Fame Publishing Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667 (5th Cir.), cert. denied, 423 U.S. 841 (1975) [96 S.Ct. 73, 46 L.Ed.2d 61].

Under this provision, it would be possible to obtain a compulsory license for the use of copyrighted music under section 115 if the owner of the sound recording being duplicated authorizes its duplication. This does not, however, in any way require the owner of the original sound recording to grant a license to duplicate the original sound recording. It is not intended that copyright protection for sound recordings be circumscribed by requiring the owners of sound recordings to grant a compulsory license to unauthorized duplicators or others.

The second clause of subsection (a) is intended to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be perverted, distorted, or travestied. Clause (2) permits arrangements of a work “to the extent necessary to conform it to the style or manner of interpretation of the performance involved,” so long as it does not “change the basic melody or fundamental character of the work.” The provision also prohibits the compulsory licensee from claiming an independent copyright in his arrangement as a “derivative work” without the express consent of the copyright owner.

Procedure for Obtaining Compulsory License. Section 115(b)(1) requires anyone who wishes to take advantage of the compulsory licensing provisions to serve a “notice of intention to obtain a compulsory license,” which is much like the “notice of intention to use” required by the present law. Under section 115, the notice must be served before any phonorecords are distributed, but service can take place “before or within 30 days after making” any phonorecords. The notice is to be served on the copyright owner, but if the owner is not identified in the Copyright Office records, “it shall be sufficient to file the notice of intention in the Copyright Office.”

The Committee deleted clause (2) of section 115(b) of S. 22 as adopted by the Senate. The provision was a vestige of jukebox provisions in earlier bills, and its requirements no longer served any useful purpose.

Clause (2) [formerly clause (3)] of section 115(b) [cl. (2) of subsec. (b) of this section] provides that “failure to serve or file the notice required by clause (1) * * * forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506.” The remedies provided in section 501 are those applicable to infringements generally.

Royalty Payable Under Compulsory License. *Identification of Copyright Owner.*—Under the present law a copyright owner is obliged to file a “notice of use” in the Copyright Office, stating that the initial recording of the copyrighted work has been made or licensed, in order to recover against an unauthorized record manufacturer. This requirement has resulted in a technical loss of rights in some cases, and serves little or no purpose where the registration and assignment records of the Copyright Office already show the facts of ownership. Section 115(c)(1) therefore drops any formal “notice of use” requirements and merely provides that, “to be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office.” On the other hand, since proper identification is an important precondition of recovery, the bill further provides that “the owner is entitled to royalties for phonorecords manufactured and distributed after being so identified, but is not entitled to recover for any phonorecords previously made and distributed.”

Basis of Royalty.—Under the present statute the specified royalty is payable “on each such part manufactured,” regardless of how many “parts” (i.e., records) are sold. This basis for calculating the royalty has been revised in section 115(c)(2) to provide that “the royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license.” This basis is more compatible with the general practice in negotiated licenses today. It is unjustified to require a compulsory licensee to pay license fees on records which merely go into inventory, which may later be destroyed, and from which the record producer gains no economic benefit.

It is intended that the Register of Copyrights will prescribe regulations insuring that copyright owners will receive full and prompt payment for all phonorecords made and distributed. Section 115(c)(2) states that “a phonorecord is considered ‘distributed’ if the person exercising the compulsory license has voluntarily and permanently parted with its possession.” For this purpose, the concept of “distribution” comprises any act by which the person exercising the compulsory license voluntarily relinquishes possession of a phonorecord (considered as a fungible unit), regardless of whether the distribution is to the public, passes title, constitutes a gift, or is sold, rented, leased, or loaned, unless it is actually returned and the transaction cancelled. Neither involuntary relinquishment, as through theft or fire, nor the destruction of unwanted records, would constitute “distribution.”

The term “made” is intended to be broader than “manufactured,” and to include within its scope every possible manufacturing or other process capable of reproducing a sound recording in phonorecords. The use of the phrase “made and distributed” establishes the basis upon which the royalty rate for compulsory licensing under section 115 is to be calculated, but it is in no way intended to weaken the liability of record pressers and other manufacturers and makers of phonorecords for copyright infringement where the compulsory licensing requirements have not been met. As under the present law, even if a presser, manufacturer, or other maker had no role in the distribution process, that person would be regarded as jointly and severally liable in a case where the court finds that infringement has taken place because of failure to comply with the provisions of section 115.

Under existing practices in the record industry, phonorecords are distributed to wholesalers and retailers with the privilege of returning unsold copies for credit or exchange. As a result, the number of recordings that have been “permanently” distributed will not usually be known until some time—six or seven months on the average—after the initial distribution. In recognition of this problem, it has become a well-established industry practice, under negotiated licenses, for record companies to maintain reasonable reserves of the mechanical royalties due the copyright owners, against which royalties on the returns can be offset.

The Committee recognizes that this practice may be consistent with the statutory requirements for monthly compulsory license accounting reports, but recognizes the possibility that, without proper safeguards, the maintenance of such reserves could be manipulated to avoid making payments of the full amounts owing to copyright owners. Under these circumstances, the regulations prescribed by the Register of Copyrights should contain detailed provisions ensuring that the ultimate disposition of every phonorecord made under a compulsory license is accounted for, and that payment is made for every phonorecord “voluntarily and permanently” distributed. In particular, the Register should prescribe a point in time when, for accounting purposes under section 115, a phonorecord will be considered “permanently distributed,” and should prescribe the situations in which a compulsory licensee is barred from maintaining reserves (e.g., situations in which the compulsory licensee has frequently failed to make payments in the past.)

Rate of Royalty.—A large preponderance of the extensive testimony presented to the Committee on section 115 was devoted to the question of the amount of the statutory royalty rate. An extensive review and analysis of the testimony and arguments received on this question appear in the 1974 Senate report (S. Rep. No. 94-473) at page 71-94.

While upon initial review it might be assumed that the rate established in 1909 would not be reasonable at the present time, the committee believes that an increase in the mechanical royalty rate must be justified on the basis of existing economic conditions and not on the mere passage of 67 years. Following a thorough analysis of the problem, the Committee considers that an increase of the present two-cent royalty to a rate of $\frac{2}{3}$ cents (or .6 of one cent per minute or fraction of playing time) is justified. This rate will be subject to review by the Copyright Royalty Commission, as provided by section 801, in 1980 and at 10-year intervals thereafter.

Accounting and Payment of Royalties; Effect of Default. Clause (3) of Section 115(c) provides that royalty payments are to be made on a monthly basis, in accordance with requirements that the Register of Copyrights shall prescribe by regulation. In order to increase the protection of copyright proprietors against economic harm from companies which might refuse or fail to pay their just obligations, compulsory licensees will also be required to make a detailed cumulative annual statement of account, certified by a Certified Public Accountant.

A source of criticism with respect to the compulsory licensing provisions of the present statute has been the rather ineffective sanctions against default by compulsory licensees. Clause (4) of section 115(c) corrects this defect by permitting the copyright owner to serve written notice on a defaulting licensee, and by providing for termination of the compulsory license if the default is not remedied within 30 days after notice is given. Termination under this clause “renders either the making or the distribution, or both, of all phonorecords for which the royalty had not been paid, actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506.”

Editorial Notes

REFERENCES IN TEXT

The date of enactment of the Digital Performance Right in Sound Recordings Act of 1995, referred to in subsec. (c)(2)(F)(iii), is the date of enactment of Pub. L. 104-39, which was approved Nov. 1, 1995.

The date of the enactment of the Musical Works Modernization Act, referred to in subsec. (e)(11), is the date of enactment of title I of Pub. L. 115-264, which was approved Oct. 11, 2018.

AMENDMENTS

2018—Subsec. (a). Pub. L. 115-264, §102(a)(1)(A), inserted “in General” after “Availability and Scope of Compulsory License” in heading.

Subsec. (a)(1). Pub. L. 115–264, §102(a)(1)(B), added par. (1) and struck out former par. (1) which read as follows: “When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery. A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording or, if the sound recording was fixed before February 15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the copyright in the musical work or pursuant to a valid compulsory license for use of such work in a sound recording.”

Subsec. (a)(2). Pub. L. 115–264, §102(a)(1)(C), inserted heading.

Subsec. (b). Pub. L. 115–264, §102(a)(2), added subsec. (b) and struck out former subsec. (b). Prior to amendment, text read as follows:

“(1) Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention to do so on the copyright owner. If the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served, it shall be sufficient to file the notice of intention in the Copyright Office. The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

“(2) Failure to serve or file the notice required by clause (1) forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.”

Subsec. (c). Pub. L. 115–264, §102(a)(3), amended subsec. (c) generally. Prior to amendment, subsec. (c) related to royalty payable under compulsory license.

Subsec. (d). Pub. L. 115–264, §102(a)(4), amended subsec. (d) generally. Prior to amendment, text read as follows: “As used in this section, the following term has the following meaning: A ‘digital phonorecord delivery’ is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.”

Subsec. (e). Pub. L. 115–264, §102(a)(5), added subsec. (e).

2010—Subsec. (c)(3)(G)(i). Pub. L. 111–295 made technical correction to directory language of Pub. L. 110–403, §209(a)(3)(A). See 2008 Amendment note below.

2008—Subsec. (c)(3)(G)(i). Pub. L. 110–403, §209(a)(3)(A), as amended by Pub. L. 111–295 struck out “and section 509” after “506” in introductory provisions.

Subsec. (c)(6). Pub. L. 110–403, §209(a)(3)(B), struck out “and 509” before period at end.

2006—Subsec. (c)(3)(B). Pub. L. 109–303, §4(c)(1), substituted “this subparagraph and subparagraphs (C) through (E)” for “subparagraphs (B) through (F)”.

Subsec. (c)(3)(D). Pub. L. 109–303, §4(c)(2), inserted “in subparagraphs (B) and (C)” after “described” in third sentence.

Subsec. (c)(3)(E)(i), (ii)(I). Pub. L. 109–303, §4(c)(3), substituted “(C) and (D)” for “(C) or (D)” wherever appearing.

2004—Subsec. (c)(3)(A)(ii). Pub. L. 108–419, §5(d)(1), substituted “(E)” for “(F)”.

Subsec. (c)(3)(B). Pub. L. 108–419, §5(d)(2)(C), which directed substitution of “this subparagraph and subparagraphs (C) through (E)” for “subparagraphs (C) through (F)”, could not be executed because “subparagraphs (C) through (F)” does not appear in text.

Pub. L. 108–419, §5(d)(2)(A), (B), substituted “under this section” for “under this paragraph” and inserted “on a nonexclusive basis” after “common agents”.

Subsec. (c)(3)(C). Pub. L. 108–419, §5(d)(3), substituted first sentence for former first sentence which read: “During the period of June 30, 1996, through December 31, 1996, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by subparagraph (A) during the period beginning January 1, 1998, and ending on the effective date of any new terms and rates established pursuant to subparagraph (C), (D) or (F), or such other date (regarding digital phonorecord deliveries) as the parties may agree.”, substituted “Copyright Royalty Judges” for “Librarian of Congress” in third sentence, and struck out “negotiation” before “proceeding” in last sentence.

Subsec. (c)(3)(D). Pub. L. 108–419, §5(d)(4), substituted first sentence for former first sentence which read: “In the absence of license agreements negotiated under subparagraphs (B) and (C), upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine a schedule of rates and terms which, subject to subparagraph (E), shall be binding on all copyright owners of nondramatic musical works and persons entitled to obtain a compulsory license under subsection (a)(1) during the period beginning January 1, 1998, and ending on the effective date of any new terms and rates established pursuant to subparagraph (C), (D) or (F), or such other date (regarding digital phonorecord deliveries) as may be determined pursuant to subparagraphs (B) and (C).”, substituted “Copyright Royalty Judges may consider” for “copyright arbitration royalty panel may consider” and “described” for “negotiated as provided in subparagraphs (B) and (C)” in third sentence, and “Copyright Royalty Judges shall also establish” for “Librarian of Congress shall also establish” in last sentence.

Subsec. (c)(3)(E)(i). Pub. L. 108–419, §5(d)(5)(A), substituted “Librarian of Congress and Copyright Royalty Judges” for “Librarian of Congress” in first sentence and “(C) or (D) shall be given effect as to digital phonorecord deliveries” for “(C), (D) or (F) shall be given effect” in second sentence.

Subsec. (c)(3)(E)(ii)(I). Pub. L. 108–419, §5(d)(5)(B), substituted “(C) or (D)” for “(C), (D) or (F)” in two places.

Subsec. (c)(3)(F) to (L). Pub. L. 108–419, §5(d)(6), redesignated subpars. (G) to (L) as (F) to (K), respectively, and struck out former subpar. (F), which read as follows: “The procedures specified in subparagraphs (C) and (D) shall be repeated and concluded, in accordance with regulations that the Librarian of Congress shall prescribe, in each fifth calendar year after 1997, except to the extent that different years for the repeating and concluding of such proceedings may be determined in accordance with subparagraphs (B) and (C).”

1997—Subsec. (c)(3)(D). Pub. L. 105–80, §4, struck out “and publish in the Federal Register” before “a schedule of rates and terms”.

Subsec. (c)(3)(E)(i). Pub. L. 105–80, §12(a)(7)(A), substituted “paragraphs (1) and (3) of section 106” for “sections 106(1) and (3)” in two places.

Subsec. (c)(3)(E)(ii)(II). Pub. L. 105–80, §12(a)(7)(A), substituted “paragraphs (1) and (3) of section 106” for “sections 106(1) and 106(3)”.

Subsec. (d). Pub. L. 105–80, §10, amended directory language of Pub. L. 104–39, §4. See 1995 Amendment note below.

1995—Subsec. (a)(1). Pub. L. 104–39, §4(1), substituted “any other person, including those who make phonorecords or digital phonorecord deliveries,” for “any other person” in first sentence and inserted before period at end of second sentence “, including by means of a digital phonorecord delivery”.

Subsec. (c)(2). Pub. L. 104–39, §4(2), inserted “and other than as provided in paragraph (3),” after “For this purpose,” in second sentence.

Subsec. (c)(3) to (6). Pub. L. 104–39, §4(3), added pars. (3) and redesignated former pars. (3) to (5) as (4) to (6), respectively.

Subsec. (d). Pub. L. 104–39, §4(4), as renumbered by Pub. L. 105–80, §10, added subsec. (d).

1984—Subsec. (c)(3) to (5). Pub. L. 98–450 added par. (3) and redesignated existing pars. (3) and (4) as (4) and (5), respectively.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2018 AMENDMENT

Pub. L. 115–264, title I, §102(c), Oct. 11, 2018, 132 Stat. 3722, provided that: “The amendments made by subsection (a)(3) [amending this section] and section 103(g)(2) [amending section 801 of this title] shall apply to any proceeding before the Copyright Royalty Judges that is commenced on or after the date of the enactment of this Act [Oct. 11, 2018].”

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109–303 effective as if included in the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. 108–419, see section 6 of Pub. L. 109–303, set out as a note under section 111 of this title.

EFFECTIVE DATE OF 2004 AMENDMENT

Amendment by Pub. L. 108–419 effective 6 months after Nov. 30, 2004, subject to transition provisions, see section 6 of Pub. L. 108–419, set out as an Effective Date; Transition Provisions note under section 801 of this title.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–39 effective 3 months after Nov. 1, 1995, see section 6 of Pub. L. 104–39, set out as a note under section 101 of this title.

TECHNICAL AND CONFORMING AMENDMENTS TO TITLE 37, PART 385 OF THE CODE OF FEDERAL REGULATIONS

Pub. L. 115–264, title I, §102(d), Oct. 11, 2018, 132 Stat. 3722, provided that: “Not later than 270 days after the date of enactment of this Act [Oct. 11, 2018], the Copyright Royalty Judges shall amend the regulations for section 115 of title 17, United States Code, in part 385 of title 37, Code of Federal Regulations, to conform the definitions used in such part to the definitions of the same terms described in section 115(e) of title 17, United States Code, as added by subsection (a). In so doing, the Copyright Royalty Judges shall make adjustments to the language of the regulations as necessary to achieve the same purpose and effect as the original regulations with respect to the rates and terms previously adopted by the Copyright Royalty Judges.”

COPYRIGHT OFFICE PUBLIC OUTREACH AND EDUCATIONAL ACTIVITIES

Pub. L. 115–264, title I, §102(e), Oct. 11, 2018, 132 Stat. 3722, provided that: “The Register of Copyrights shall engage in public outreach and educational activities—

“(1) regarding the amendments made by subsection (a) to section 115 of title 17, United States Code, including the responsibilities of the mechanical licensing collective designated under those amendments;

“(2) which shall include educating songwriters and other interested parties with respect to the process

established under section 115(d)(3)(C)(i)(V) of title 17, United States Code, as added by subsection (a), by which—

“(A) a copyright owner may claim ownership of musical works (and shares of such works); and

“(B) royalties for works for which the owner is not identified or located shall be equitably distributed to known copyright owners; and

“(3) which the Register shall make available online.”

UNCLAIMED ROYALTIES STUDY AND RECOMMENDATIONS

Pub. L. 115–264, title I, §102(f), Oct. 11, 2018, 132 Stat. 3722, provided that:

“(1) IN GENERAL.—Not later than 2 years after the date on which the Register of Copyrights initially designates the mechanical licensing collective under section 115(d)(3)(B)(i) of title 17, United States Code, as added by subsection (a)(4), the Register, in consultation with the Comptroller General of the United States, and after soliciting and reviewing comments and relevant information from music industry participants and other interested parties, shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report that recommends best practices that the collective may implement in order to—

“(A) identify and locate musical work copyright owners with unclaimed accrued royalties held by the collective;

“(B) encourage musical work copyright owners to claim the royalties of those owners; and

“(C) reduce the incidence of unclaimed royalties.

“(2) CONSIDERATION OF RECOMMENDATIONS.—The mechanical licensing collective shall carefully consider, and give substantial weight to, the recommendations submitted by the Register of Copyrights under paragraph (1) when establishing the procedures of the collective with respect to the—

“(A) identification and location of musical work copyright owners; and

“(B) distribution of unclaimed royalties.”

PERSONS OPERATING UNDER PREDECESSOR COMPULSORY LICENSING PROVISIONS

Pub. L. 94–553, title I, §106, Oct. 19, 1976, 90 Stat. 2599, provided that: “In any case where, before January 1, 1978, a person has lawfully made parts of instruments serving to reproduce mechanically a copyrighted work under the compulsory license provisions of section 1(e) of title 17 as it existed on December 31, 1977, such person may continue to make and distribute such parts embodying the same mechanical reproduction without obtaining a new compulsory license under the terms of section 115 of title 17 as amended by the first section of this Act [this section]. However, such parts made on or after January 1, 1978, constitute phonorecords and are otherwise subject to the provisions of said section 115 [this section].”

§ 116. Negotiated licenses for public performances by means of coin-operated phonorecord players

(a) APPLICABILITY OF SECTION.—This section applies to any nondramatic musical work embodied in a phonorecord.

(b) NEGOTIATED LICENSES.—

(1) AUTHORITY FOR NEGOTIATIONS.—Any owners of copyright in works to which this section applies and any operators of coin-operated phonorecord players may negotiate and agree upon the terms and rates of royalty payments for the performance of such works and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

(2) CHAPTER 8 PROCEEDING.—Parties not subject to such a negotiation may have the terms and rates and the division of fees described in paragraph (1) determined in a proceeding in accordance with the provisions of chapter 8.

(c) LICENSE AGREEMENTS SUPERIOR TO DETERMINATIONS BY COPYRIGHT ROYALTY JUDGES.—License agreements between one or more copyright owners and one or more operators of coin-operated phonorecord players, which are negotiated in accordance with subsection (b), shall be given effect in lieu of any otherwise applicable determination by the Copyright Royalty Judges.

(d) DEFINITIONS.—As used in this section, the following terms mean the following:

(1) A “coin-operated phonorecord player” is a machine or device that—

(A) is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by the insertion of coins, currency, tokens, or other monetary units or their equivalent;

(B) is located in an establishment making no direct or indirect charge for admission;

(C) is accompanied by a list which is comprised of the titles of all the musical works available for performance on it, and is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

(D) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

(2) An “operator” is any person who, alone or jointly with others—

(A) owns a coin-operated phonorecord player;

(B) has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or

(C) has the power to exercise primary control over the selection of the musical works made available for public performance on a coin-operated phonorecord player.

(Added Pub. L. 100-568, § 4(a)(4), Oct. 31, 1988, 102 Stat. 2855, § 116A; renumbered § 116 and amended Pub. L. 103-198, § 3(b)(1), Dec. 17, 1993, 107 Stat. 2309; Pub. L. 105-80, § 5, Nov. 13, 1997, 111 Stat. 1531; Pub. L. 108-419, § 5(e), Nov. 30, 2004, 118 Stat. 2365.)

Editorial Notes

PRIOR PROVISIONS

A prior section 116, Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2562; Pub. L. 100-568, § 4(b)(1), Oct. 31, 1988, 102 Stat. 2857, related to scope of exclusive rights in nondramatic musical works and compulsory licenses for public performances by means of coin-operated phonorecord players, prior to repeal by Pub. L. 103-198, § 3(a), Dec. 17, 1993, 107 Stat. 2309.

AMENDMENTS

2004—Subsec. (b)(2). Pub. L. 108-419, § 5(e)(1), amended heading and text of par. (2) generally. Prior to amendment, text read as follows: “Parties not subject to such a negotiation may determine, by arbitration in accord-

ance with the provisions of chapter 8, the terms and rates and the division of fees described in paragraph (1).”

Subsec. (c). Pub. L. 108-419, § 5(e)(2), substituted “Determinations by Copyright Royalty Judges” for “Copyright Arbitration Royalty Panel Determinations” in heading and “the Copyright Royalty Judges” for “a copyright arbitration royalty panel” in text.

1997—Subsec. (b)(2). Pub. L. 105-80, § 5(1), amended par. (2) generally. Prior to amendment, par. (2) read as follows:

“(2) ARBITRATION.—Parties to such a negotiation, within such time as may be specified by the Librarian of Congress by regulation, may determine the result of the negotiation by arbitration. Such arbitration shall be governed by the provisions of title 9, to the extent such title is not inconsistent with this section. The parties shall give notice to the Librarian of Congress of any determination reached by arbitration and any such determination shall, as between the parties to the arbitration, be dispositive of the issues to which it relates.”

Subsec. (d). Pub. L. 105-80, § 5(2), added subsec. (d).

1993—Pub. L. 103-198, § 3(b)(1)(A), renumbered section 116A of this title as this section.

Subsec. (b). Pub. L. 103-198, § 3(b)(1)(B), (C), redesignated subsec. (c) as (b), substituted “Librarian of Congress” for “Copyright Royalty Tribunal” in two places in par. (2), and struck out former subsec. (b) which related to limitation on exclusive right if licenses not negotiated.

Subsec. (c). Pub. L. 103-198, § 3(b)(1)(B), (D), redesignated subsec. (d) as (c), in heading substituted “Arbitration Royalty Panel” for “Royalty Tribunal”, and in text substituted “subsection (b)” for “subsection (c)” and “a copyright arbitration royalty panel” for “the Copyright Royalty Tribunal”.

Subsecs. (d) to (g). Pub. L. 103-198, § 3(b)(1)(B), (E), redesignated subsec. (d) as (c) and struck out subsecs. (e) to (g) which provided, in subsec. (e), for a schedule for negotiation of licenses, in subsec. (f), for a suspension of various ratemaking activities by the Copyright Royalty Tribunal, and in subsec. (g), for transition provisions and retention of Copyright Royalty Tribunal jurisdiction.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2004 AMENDMENT

Amendment by Pub. L. 108-419 effective 6 months after Nov. 30, 2004, subject to transition provisions, see section 6 of Pub. L. 108-419, set out as an Effective Date; Transition Provisions note under section 801 of this title.

EFFECTIVE DATE

Section effective Mar. 1, 1989, with any cause of action arising under this title before such date being governed by provisions as in effect when cause of action arose, see section 13 of Pub. L. 100-568, set out as an Effective Date of 1988 Amendment note under section 101 of this title.

[\$ 116A. Renumbered § 116]

§ 117. Limitations on exclusive rights: Computer programs

(a) MAKING OF ADDITIONAL COPY OR ADAPTA-TION BY OWNER OF COPY.—Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a

machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

(b) LEASE, SALE, OR OTHER TRANSFER OF ADDITIONAL COPY OR ADAPTATION.—Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.

(c) MACHINE MAINTENANCE OR REPAIR.—Notwithstanding the provisions of section 106, it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine, if—

(1) such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed; and

(2) with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not accessed or used other than to make such new copy by virtue of the activation of the machine.

(d) DEFINITIONS.—For purposes of this section—

(1) the “maintenance” of a machine is the servicing of the machine in order to make it work in accordance with its original specifications and any changes to those specifications authorized for that machine; and

(2) the “repair” of a machine is the restoring of the machine to the state of working in accordance with its original specifications and any changes to those specifications authorized for that machine.

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2565; Pub. L. 96-517, § 10(b), Dec. 12, 1980, 94 Stat. 3028; Pub. L. 105-304, title III, § 302, Oct. 28, 1998, 112 Stat. 2887.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

As the program for general revision of the copyright law has evolved, it has become increasingly apparent that in one major area the problems are not sufficiently developed for a definitive legislative solution. This is the area of computer uses of copyrighted works: the use of a work ‘in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information.’ The Commission on New Technological Uses is, among other things, now engaged in making a thorough study of the emerging patterns in this field and it will, on the basis of its findings, recommend definitive copyright provisions to deal with the situation.

Since it would be premature to change existing law on computer uses at present, the purpose of section 117 is to preserve the status quo. It is intended neither to cut off any rights that may now exist, nor to create

new rights that might be denied under the Act of 1909 or under common law principles currently applicable.

The provision deals only with the exclusive rights of a copyright owner with respect to computer uses, that is, the bundle of rights specified for other types of uses in section 106 and qualified in sections 107 through 116 and 118. With respect to the copyrightability of computer programs, the ownership of copyrights in them, the term of protection, and the formal requirements of the remainder of the bill, the new statute would apply.

Under section 117, an action for infringement of a copyrighted work by means of a computer would necessarily be a federal action brought under the new title 17. The court, in deciding the scope of exclusive rights in the computer area, would first need to determine the applicable law, whether State statutory or common law or the Act of 1909. Having determined what law was applicable, its decision would depend upon its interpretation of what that law was on the point on the day before the effective date of the new statute.

Editorial Notes

AMENDMENTS

1998—Pub. L. 105-304 designated existing provisions as subsecs. (a) and (b), inserted headings, and added subsecs. (c) and (d).

1980—Pub. L. 96-517 substituted provision respecting limitations on exclusive rights in connection with computer programs for prior provision enunciating scope of exclusive rights and use of the work in conjunction with computers and similar information systems and declaring owner of copyright in a work without any greater or lesser rights with respect to the use of the work in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information, or in conjunction with any similar device, machine, or process, than those afforded to works under the law, whether this title or the common law or statutes of a State, in effect on Dec. 31, 1977, as held applicable and construed by the court in an action brought under this title.

§ 118. Scope of exclusive rights: Use of certain works in connection with noncommercial broadcasting

(a) The exclusive rights provided by section 106 shall, with respect to the works specified by subsection (b) and the activities specified by subsection (d),¹ be subject to the conditions and limitations prescribed by this section.

(b) Notwithstanding any provision of the antitrust laws, any owners of copyright in published nondramatic musical works and published pictorial, graphic, and sculptural works and any public broadcasting entities, respectively, may negotiate and agree upon the terms and rates of royalty payments and the proportionate division of fees paid among various copyright owners, and may designate common agents to negotiate, agree to, pay, or receive payments.

(1) Any owner of copyright in a work specified in this subsection or any public broadcasting entity may submit to the Copyright Royalty Judges proposed licenses covering such activities with respect to such works.

(2) License agreements voluntarily negotiated at any time between one or more copyright owners and one or more public broadcasting entities shall be given effect in lieu of any determination by the Librarian of Congress or the Copyright Royalty Judges, if copies of such agreements are filed with the Copy-

¹ See References in Text note below.

right Royalty Judges within 30 days of execution in accordance with regulations that the Copyright Royalty Judges shall issue.

(3) Voluntary negotiation proceedings initiated pursuant to a petition filed under section 804(a) for the purpose of determining a schedule of terms and rates of royalty payments by public broadcasting entities to owners of copyright in works specified by this subsection and the proportionate division of fees paid among various copyright owners shall cover the 5-year period beginning on January 1 of the second year following the year in which the petition is filed. The parties to each negotiation proceeding shall bear their own costs.

(4) In the absence of license agreements negotiated under paragraph (2) or (3), the Copyright Royalty Judges shall, pursuant to chapter 8, conduct a proceeding to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (2), shall be binding on all owners of copyright in works specified by this subsection and public broadcasting entities, regardless of whether such copyright owners have submitted proposals to the Copyright Royalty Judges. In establishing such rates and terms the Copyright Royalty Judges may consider the rates for comparable circumstances under voluntary license agreements negotiated as provided in paragraph (2) or (3). The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such use shall be kept by public broadcasting entities.

(c) Subject to the terms of any voluntary license agreements that have been negotiated as provided by subsection (b)(2) or (3), a public broadcasting entity may, upon compliance with the provisions of this section, including the rates and terms established by the Copyright Royalty Judges under subsection (b)(4), engage in the following activities with respect to published nondramatic musical works and published pictorial, graphic, and sculptural works:

(1) performance or display of a work by or in the course of a transmission made by a noncommercial educational broadcast station referred to in subsection (f); and

(2) production of a transmission program, reproduction of copies or phonorecords of such a transmission program, and distribution of such copies or phonorecords, where such production, reproduction, or distribution is made by a nonprofit institution or organization solely for the purpose of transmissions specified in paragraph (1); and

(3) the making of reproductions by a governmental body or a nonprofit institution of a transmission program simultaneously with its transmission as specified in paragraph (1), and the performance or display of the contents of such program under the conditions specified by paragraph (1) of section 110, but only if the reproductions are used for performances or displays for a period of no more than seven days from the date of the transmission specified in paragraph (1), and are destroyed before or at the end of such period. No person supplying, in accordance with paragraph (2), a re-

production of a transmission program to governmental bodies or nonprofit institutions under this paragraph shall have any liability as a result of failure of such body or institution to destroy such reproduction: *Provided*, That it shall have notified such body or institution of the requirement for such destruction pursuant to this paragraph: *And provided further*, That if such body or institution itself fails to destroy such reproduction it shall be deemed to have infringed.

(d) Except as expressly provided in this subsection, this section shall have no applicability to works other than those specified in subsection (b). Owners of copyright in nondramatic literary works and public broadcasting entities may, during the course of voluntary negotiations, agree among themselves, respectively, as to the terms and rates of royalty payments without liability under the antitrust laws. Any such terms and rates of royalty payments shall be effective upon filing with the Copyright Royalty Judges, in accordance with regulations that the Copyright Royalty Judges shall prescribe as provided in section 803(b)(6).

(e) Nothing in this section shall be construed to permit, beyond the limits of fair use as provided by section 107, the unauthorized dramatization of a nondramatic musical work, the production of a transmission program drawn to any substantial extent from a published compilation of pictorial, graphic, or sculptural works, or the unauthorized use of any portion of an audiovisual work.

(f) As used in this section, the term "public broadcasting entity" means a noncommercial educational broadcast station as defined in section 397 of title 47 and any nonprofit institution or organization engaged in the activities described in paragraph (2) of subsection (c).

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2565; Pub. L. 103-198, § 4, Dec. 17, 1993, 107 Stat. 2309; Pub. L. 106-44, § 1(g)(3), Aug. 5, 1999, 113 Stat. 222; Pub. L. 107-273, div. C, title III, § 132107, Nov. 2, 2002, 116 Stat. 1909; Pub. L. 108-419, § 5(f), Nov. 30, 2004, 118 Stat. 2365; Pub. L. 109-303, § 4(d), Oct. 6, 2006, 120 Stat. 1482.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

General Background. During its consideration of revision legislation in 1975, the Senate Judiciary Committee adopted an amendment offered by Senator Charles McC. Mathias. The amendment, now section 118 of the Senate bill [this section], grants to public broadcasting a compulsory license for use of nondramatic literary and musical works, as well as pictorial, graphic, and sculptural works, subject to payment of reasonable royalty fees to be set by the Copyright Royalty Tribunal established by that bill. The Mathias amendment requires that public broadcasters, at periodic intervals, file a notice with the Copyright Office containing information required by the Register of Copyrights and deposit a statement of account and the total royalty fees for the period covered by the statement. In July of each year all persons having a claim to such fees are to file their claims with the Register of Copyrights. If no controversy exists, the Register would distribute the royalties to the various copyright owners and their agents after deducting reasonable administrative costs; controversies are to be settled by the Tribunal.

On July 10, 1975, the House Subcommittee heard testimony on the Mathias amendment from representatives of public broadcasters, authors, publishers, and music performing rights societies. The public broadcasters pointed to Congressional concern for the development of their activities as evidenced by the Public Broadcasting Act [47 U.S.C. 390 et seq.]. They urged that a compulsory license was essential to assure public broadcasting broad access to copyrighted materials at reasonable royalties and without administratively cumbersome and costly "clearance" problems that would impair the vitality of their operations. The opponents of the amendment argued that the nature of public broadcasting has changed significantly in the past decade, to the extent that it now competes with commercial broadcasting as a national entertainment and cultural medium. They asserted that the performing rights society arrangements under which copyrighted music is licensed for performance removed any problem in clearing music for broadcasting, and that voluntary agreements could adequately resolve the copyright problems feared by public broadcasters, at less expense and burden than the compulsory license, for synchronization and literary rights. The authors of literary works stressed that a compulsory licensing system would deny them the fundamental right to control the use of their works and protect their reputation in a major communications medium.

General Policy Considerations. The Committee is cognizant of the intent of Congress, in enacting the Public Broadcasting Act on November 7, 1967 [47 U.S.C. 390 et seq.], that encouragement and support of noncommercial broadcasting is in the public interest. It is also aware that public broadcasting may encounter problems not confronted by commercial broadcasting enterprises, due to such factors as the special nature of programming, repeated use of programs, and, of course, limited financial resources. Thus, the Committee determined that the nature of public broadcasting does warrant special treatment in certain areas. However, the Committee did not feel that the broad compulsory license provided in the Senate bill is necessary to the continued successful operation of public broadcasting. In addition, the Committee believes that the system provided in the Senate bill for the deposit of royalty fees with the Copyright Office for distribution to claimants, and the resolution of disputes over such distribution by a statutory tribunal, can be replaced by payments directly between the parties, without the intervention of government machinery and its attendant administrative costs.

In general, the Committee amended the public broadcasting provisions of the Senate bill toward attainment of the objective clearly stated in the Report of the Senate Judiciary Committee, namely, that copyright owners and public broadcasters be encouraged to reach voluntary private agreements.

Procedures. Not later than thirty days following the publication by the President of the notice announcing the initial appointments to the Copyright Royalty Commission (specified in Chapter 8 [§801 et seq. of this title]), the Chairman of the Commission is to publish notice in the Federal Register of the initiation of proceedings to determine "reasonable terms and rates" for certain uses of published nondramatic musical works and published pictorial, graphic and sculptural works, during a period ending on December 31, 1982.

Copyright owners and public broadcasting entities that do not reach voluntary agreement are bound by the terms and rates established by the Commission, which are to be published in the Federal Register within six months of the notice of initiation of proceedings. During the period between the effective date of the Act [Jan. 1, 1978] and the publication of the rates and terms, the Committee has preserved the status quo by providing, in section 118(b)(4), that the Act does not afford to copyright owners or public broadcasting entities any greater or lesser rights with respect to the relevant uses of nondramatic musical works and pictorial, graphic, and sculptural works than those afforded under the law in effect on December 31, 1977.

License agreements that have been voluntarily negotiated supersede, as between the parties to the agreement, the terms and rates established by the Commission, provided that copies of the agreements are properly filed with the Copyright Office within 30 days of execution. Under clause (2) of section 118(b), the agreements may be negotiated "at any time"—whether before, during, or after determinations by the Commission.

Under section 118(c), the procedures for the Commission's establishing such rates and terms are to be repeated in the last half of 1982 and every five years thereafter.

Establishment of Reasonable Terms and Rates. In establishing reasonable terms and rates for public broadcasting use of the specified works, the Commission, under clause (b)(1) of section 118, is to consider proposals timely submitted to it, as well as "any other relevant information", including that put forward for its consideration "by any interested party."

The Committee does not intend that owners of copyrighted material be required to subsidize public broadcasting. It is intended that the Commission assure a fair return to copyright owners without unfairly burdening public broadcasters. Section 118(b)(3) provides that "the Commission may consider the rates for comparable circumstances under voluntary license agreements." The Commission is also expected to consider both the general public interest in encouraging the growth and development of public broadcasting, and the "promotion of science and the useful arts" through the encouragement of musical and artistic creation.

The Committee anticipates that the "terms" established by the Commission shall include provisions as to acceptable methods of payment of royalties by public broadcasting entities to copyright owners. For example, where the whereabouts of the copyright owner may not be readily known, the terms should specify the nature of the obligation of the public broadcasting entity to locate the owner, or to set aside or otherwise assure payment of appropriate royalties, should he or she appear and make a claim. Section 118(b)(3) requires the Commission "to establish requirements by which copyright owners may receive reasonable notice of the use of their works." The Committee intends that these requirements shall not impose undue hardships on public broadcasting entities and, in the above illustration, shall provide for the specific termination of any period during which the public broadcasting entity is required to set aside payments. It is expected that, in some cases, especially in the area of pictorial, graphic, and sculptural works, the whereabouts of the owners of copyright may not be known and they may never appear to claim payment of royalties.

The Commission is also to establish record keeping requirements for public broadcasting entities in order to facilitate the identification, calculation, allocation and payment of claims and royalties.

Works Affected. Under sections 118(b) and (e) of the Committee's amendment, the establishment of rates and terms by the Copyright Royalty Commission pertains only to the use of published nondramatic musical works, and published pictorial, graphic, and sculptural works. As under the Senate bill, rights in plays, operas, ballet and other stage presentations, motion pictures, and other audiovisual works are not affected.

Section 118(f) is intended to make clear that this section does not permit unauthorized use, beyond the limits of section 107, of individual frames from a filmstrip or any other portion of any audiovisual work. Additionally, the application of this section to pictorial, graphic, and sculptural works does not extend to the production of transmission programs drawn to any substantial extent from a compilation of such works.

The Committee also concluded that the performance of nondramatic literary works should not be subject to Commission determination. It was particularly concerned that a compulsory license for literary works would result in loss of control by authors over the use of their work in violation of basic principles of artistic

and creative freedom. It is recognized that copyright not only provides compensation to authors, but also protection as to how and where their works are used. The Committee was assured by representatives of authors and publishers that licensing arrangements for readings from their books, poems, and other works on public broadcasting programs for reasonable compensation and under reasonable safeguards for authors' rights could be worked out in private negotiation. The Committee strongly urges the parties to work toward mutually acceptable licenses; to facilitate their negotiations and aid in the possible establishment of clearance mechanisms and rates, the Committee's amendment provides the parties, in section 118(e)(1), with an appropriately limited exemption from the antitrust laws [15 U.S.C. 1 et seq.].

The Committee has also provided, in paragraph (2) of clause (e), that on January 3, 1980, the Register of Copyrights, after consultation with the interested parties, shall submit a report to Congress on the extent to which voluntary licensing arrangements have been reached with respect to public broadcast use of nondramatic literary works, and present legislative or other recommendations, if warranted.

The use of copyrighted sound recordings in educational television and radio programs distributed by or through public broadcasting entities is governed by section 114 and is discussed in connection with that section.

Activities Affected. Section 118(d) specifies the activities which may be engaged in by public broadcasting entities under terms and rates established by the Commission. These include the performance or display of published nondramatic musical works, and of published pictorial, graphic, and sculptural works, in the course of transmissions by noncommercial educational broadcast stations; and the production, reproduction, and distribution of transmission programs including such works by nonprofit organizations for the purpose of such transmissions. It is the intent of the Committee that "interconnection" activities serving as a technical adjunct to such transmissions, such as the use of satellites or microwave equipment, be included within the specified activities.

Paragraph (3) of clause (d) also includes the reproduction, simultaneously with transmission, of public broadcasting programs by governmental bodies or nonprofit institutions, and the performance or display of the contents of the reproduction under the conditions of section 110(1). However, the reproduction so made must be destroyed at the end of seven days from the transmission.

This limited provision for unauthorized simultaneous or off-the-air reproduction is limited to nondramatic musical works and pictorial, graphic and sculptural works included in public broadcasting transmissions. It does not extend to other works included in the transmissions, or to the entire transmission program.

It is the intent of the Committee that schools be permitted to engage in off-the-air reproduction to the extent and under the conditions provided in [section] 118(d)(3); however, in the event a public broadcasting station or producer makes the reproduction and distributes a copy to the school, the station or producer will not be held liable for the school's failure to destroy the reproduction, provided it has given notice of the requirement of destruction. In such a case the school itself, although it did not engage in the act of reproduction, is deemed an infringer fully subject to the remedies provided in Chapter 5 of the Act [§501 et seq. of this title]. The establishment of standards for adequate notice under this provision should be considered by the Commission.

Section 118(f) makes it clear that the rights of performance and other activities specified in subsection (d) do not extend to the unauthorized dramatization of a nondramatic musical work.

Editorial Notes

REFERENCES IN TEXT

Subsection (d), referred to in subsec. (a), was redesignated as subsection (c) of this section by Pub. L. 108-419, §5(f)(2), Nov. 30, 2004, 118 Stat. 2366.

AMENDMENTS

2006—Subsec. (b)(3). Pub. L. 109-303, §4(d)(1), substituted "owners of copyright in works" for "copyright owners in works".

Subsec. (c). Pub. L. 109-303, §4(d)(2), substituted "established by the Copyright Royalty Judges under subsection (b)(4), engage" for "established by the Copyright Royalty Judges under subsection (b)(4), to the extent that they were accepted by the Librarian of Congress, engage" in introductory provisions and "(f)" for "(g)" in par. (1).

2004—Subsec. (b)(1). Pub. L. 108-419, §5(f)(1)(A), substituted "Copyright Royalty Judges" for "Librarian of Congress" in first sentence and struck out at end "The Librarian of Congress shall proceed on the basis of the proposals submitted as well as any other relevant information. The Librarian of Congress shall permit any interested party to submit information relevant to such proceedings."

Subsec. (b)(2). Pub. L. 108-419, §5(f)(1)(B), substituted "Librarian of Congress or the Copyright Royalty Judges, if copies of such agreements are filed with the Copyright Royalty Judges within 30 days of execution in accordance with regulations that the Copyright Royalty Judges shall issue" for "Librarian of Congress: *Provided*, That copies of such agreements are filed in the Copyright Office within thirty days of execution in accordance with regulations that the Register of Copyrights shall prescribe".

Subsec. (b)(3), (4). Pub. L. 108-419, §5(f)(1)(C), added pars. (3) and (4), redesignated second and third sentences of former par. (3) as second and third sentences of par. (4), substituted "Copyright Royalty Judges" for "copyright arbitration royalty panel" and "paragraph (2) or (3)" for "paragraph (2)" in second sentence of par. (4), substituted "Copyright Royalty Judges" for "Librarian of Congress" in last sentence of par. (4), and struck out "(3) In the absence of license agreements negotiated under paragraph (2), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (2), shall be binding on all owners of copyright in works specified by this subsection and public broadcasting entities, regardless of whether such copyright owners have submitted proposals to the Librarian of Congress."

Subsec. (c). Pub. L. 108-419, §5(f)(3)(C), which directed substitution of "the Copyright Royalty Judges under subsection (b)(3), to the extent that they were accepted by the Librarian of Congress" for "a copyright arbitration royalty panel under subsection (b)(3)" in introductory provisions, was executed before the amendment by Pub. L. 108-419, §5(f)(3)(B), to reflect the probable intent of Congress. See below.

Pub. L. 108-419, §5(f)(3)(B), substituted "(b)(4)" for "(b)(3)" in introductory provisions. See above.

Pub. L. 108-419, §5(f)(3)(A), substituted "(b)(2) or (3)" for "(b)(2)" in introductory provisions.

Pub. L. 108-419, §5(f)(2), redesignated subsec. (d) as (c) and struck out former subsec. (c) which read as follows: "The initial procedure specified in subsection (b) shall be repeated and concluded between June 30 and December 31, 1997, and at five-year intervals thereafter, in accordance with regulations that the Librarian of Congress shall prescribe."

Subsec. (d). Pub. L. 108-419, §5(f)(2), (4), redesignated subsec. (e) as (d) and substituted "with the Copyright Royalty Judges" for "in the Copyright Office" and "Copyright Royalty Judges shall prescribe as provided in section 803(b)(6)" for "Register of Copyrights shall prescribe". Former subsec. (d) redesignated (c).

Subsec. (e). Pub. L. 108–419, §5(f)(2), redesignated subsec. (f) as (e). Former subsec. (e) redesignated (d).

Subsec. (f). Pub. L. 108–419, §5(f)(2), (5), redesignated subsec. (g) as (f) and substituted “(c)” for “(d)”. Former subsec. (f) redesignated (e).

Subsec. (g). Pub. L. 108–419, §5(f)(2), redesignated subsec. (g) as (f).

2002—Subsec. (b)(1). Pub. L. 107–273 struck out “to it” after “proposals submitted” in second sentence.

1999—Subsec. (e). Pub. L. 106–44 struck out “(1)” before “Owners of” and struck out par. (2) which read as follows: “On January 3, 1980, the Register of Copyrights, after consulting with authors and other owners of copyright in nondramatic literary works and their representatives, and with public broadcasting entities and their representatives, shall submit to the Congress a report setting forth the extent to which voluntary licensing arrangements have been reached with respect to the use of nondramatic literary works by such broadcast stations. The report should also describe any problems that may have arisen, and present legislative or other recommendations, if warranted.”

1993—Subsec. (b). Pub. L. 103–198, §4(1)(A), (B), struck out first two sentences which read as follows: “Not later than thirty days after the Copyright Royalty Tribunal has been constituted in accordance with section 802, the Chairman of the Tribunal shall cause notice to be published in the Federal Register of the initiation of proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by subsection (d) with respect to published nondramatic musical works and published pictorial, graphic, and sculptural works during a period beginning as provided in clause (3) of this subsection and ending on December 31, 1982. Copyright owners and public broadcasting entities shall negotiate in good faith and cooperate fully with the Tribunal in an effort to reach reasonable and expeditious results.”, and in third sentence substituted “published nondramatic musical works and published pictorial, graphic, and sculptural works” for “works specified by this subsection”.

Subsec. (b)(1). Pub. L. 103–198, §4(1)(C), struck out “, within one hundred and twenty days after publication of the notice specified in this subsection,” after “broadcasting entity may” and substituted “Librarian of Congress” for “Copyright Royalty Tribunal” wherever appearing.

Subsec. (b)(2). Pub. L. 103–198, §4(1)(D), substituted “Librarian of Congress” for “Tribunal”.

Subsec. (b)(3). Pub. L. 103–198, §4(1)(E)(ii), (iii), in second sentence, substituted “copyright arbitration royalty panel” for “Copyright Royalty Tribunal” and “paragraph (2)” for “clause (2) of this subsection”, and in last sentence, substituted “Librarian of Congress” for “Copyright Royalty Tribunal”.

Pub. L. 103–198, §4(1)(E)(i), substituted first sentence for former first sentence which read as follows: “Within six months, but not earlier than one hundred and twenty days, from the date of publication of the notice specified in this subsection the Copyright Royalty Tribunal shall make a determination and publish in the Federal Register a schedule of rates and terms which, subject to clause (2) of this subsection, shall be binding on all owners of copyright in works specified by this subsection and public broadcasting entities, regardless of whether or not such copyright owners and public broadcasting entities have submitted proposals to the Tribunal.”

Subsec. (b)(4). Pub. L. 103–198, §4(1)(F), struck out par. (4) which read as follows: “With respect to the period beginning on the effective date of this title and ending on the date of publication of such rates and terms, this title shall not afford to owners of copyright or public broadcasting entities any greater or lesser rights with respect to the activities specified in subsection (d) as applied to works specified in this subsection than those afforded under the law in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.”

Subsec. (c). Pub. L. 103–198, §4(2), substituted “1997” for “1982” and “Librarian of Congress” for “Copyright Royalty Tribunal”.

Subsec. (d). Pub. L. 103–198, §4(3), in introductory provisions, struck out “to the transitional provisions of subsection (b)(4), and” after “Subject” and substituted “a copyright arbitration royalty panel” for “the Copyright Royalty Tribunal”, and in pars. (2) and (3), substituted “paragraph” for “clause” wherever appearing.

Subsec. (g). Pub. L. 103–198, §4(4), substituted “paragraph” for “clause”.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109–303 effective as if included in the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. 108–419, see section 6 of Pub. L. 109–303, set out as a note under section 111 of this title.

EFFECTIVE DATE OF 2004 AMENDMENT

Amendment by Pub. L. 108–419 effective 6 months after Nov. 30, 2004, subject to transition provisions, see section 6 of Pub. L. 108–419, set out as an Effective Date; Transition Provisions note under section 801 of this title.

EFFECTIVE DATE

Section effective Oct. 19, 1976, see section 102 of Pub. L. 94–553, set out as a note preceding section 101 of this title.

§ 119. Limitations on exclusive rights: Secondary transmissions of distant television programming by satellite

(a) SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS.—

(1) NON-NETWORK STATIONS.—Subject to the provisions of paragraphs (3), (4), and (6) of this subsection and section 114(d), secondary transmissions of a performance or display of a work embodied in a primary transmission made by a non-network station shall be subject to statutory licensing under this section if the secondary transmission is made by a satellite carrier to the public for private home viewing or for viewing in a commercial establishment, with regard to secondary transmissions the satellite carrier is in compliance with the rules, regulations, or authorizations of the Federal Communications Commission governing the carriage of television broadcast station signals, and the carrier makes a direct or indirect charge for each retransmission service to each subscriber receiving the secondary transmission or to a distributor that has contracted with the carrier for direct or indirect delivery of the secondary transmission to the public for private home viewing or for viewing in a commercial establishment.

(2) NETWORK STATIONS.—

(A) IN GENERAL.—Subject to the provisions of subparagraph (B) of this paragraph and paragraphs (3), (4), (5), and (6) of this subsection and section 114(d), secondary transmissions of a performance or display of a work embodied in a primary transmission made by a network station shall be subject to statutory licensing under this section if the secondary transmission is made by a satellite carrier to the public for private home viewing, with regard to secondary transmissions the satellite carrier is in compliance with the rules, regulations, or authorizations of the Federal Communications Commission governing the carriage of tele-

vision broadcast station signals, the carrier makes a direct or indirect charge for such retransmission service to each subscriber receiving the secondary transmission, and the carrier provides local-into-local service to all DMAs. Failure to reach an agreement with a network station to retransmit the signals of the station shall not be construed to affect compliance with providing local-into-local service to all DMAs if the satellite carrier has the capability to retransmit such signals when an agreement is reached.

(B) SECONDARY TRANSMISSIONS TO UNSERVED HOUSEHOLDS.—

(i) IN GENERAL.—The statutory license provided for in subparagraph (A) shall be limited to secondary transmissions of the signals of no more than two network stations in a single day for each television network to persons who reside in unserved households.

(ii) SHORT MARKETS.—In the case of secondary transmissions to households located in short markets, subject to clause (i), the statutory license shall be further limited to secondary transmissions of only those primary transmissions of network stations that embody the programming of networks not offered on the primary stream or the multicast stream transmitted by any network station in that market.

(C) SUBMISSION OF SUBSCRIBER LISTS TO NETWORKS.—

(i) INITIAL LISTS.—A satellite carrier that makes secondary transmissions of a primary transmission made by a network station pursuant to subparagraph (A) shall, not later than 90 days after commencing such secondary transmissions, submit to the network that owns or is affiliated with the network station a list identifying (by name and address, including street or rural route number, city, State, and 9-digit zip code) all subscribers to which the satellite carrier makes secondary transmissions of that primary transmission to subscribers in unserved households.

(ii) MONTHLY LISTS.—After the submission of the initial lists under clause (i), the satellite carrier shall, not later than the 15th of each month, submit to the network a list, aggregated by designated market area, identifying (by name and address, including street or rural route number, city, State, and 9-digit zip code) any persons who have been added or dropped as subscribers under clause (i) since the last submission under this subparagraph.

(iii) USE OF SUBSCRIBER INFORMATION.—Subscriber information submitted by a satellite carrier under this subparagraph may be used only for purposes of monitoring compliance by the satellite carrier with this subsection.

(iv) APPLICABILITY.—The submission requirements of this subparagraph shall apply to a satellite carrier only if the network to which the submissions are to be made places on file with the Register of Copyrights a document identifying the

name and address of the person to whom such submissions are to be made. The Register shall maintain for public inspection a file of all such documents.

(3) NONCOMPLIANCE WITH REPORTING AND PAYMENT REQUIREMENTS.—Notwithstanding the provisions of paragraphs (1) and (2), the willful or repeated secondary transmission to the public by a satellite carrier of a primary transmission made by a non-network station or a network station and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, where the satellite carrier has not deposited the statement of account and royalty fee required by subsection (b), or has failed to make the submissions to networks required by paragraph (2)(C).

(4) WILLFUL ALTERATIONS.—Notwithstanding the provisions of paragraphs (1) and (2), the secondary transmission to the public by a satellite carrier of a performance or display of a work embodied in a primary transmission made by a non-network station or a network station is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcement transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the satellite carrier through changes, deletions, or additions, or is combined with programming from any other broadcast signal.

(5) VIOLATION OF TERRITORIAL RESTRICTIONS ON STATUTORY LICENSE FOR NETWORK STATIONS.—

(A) INDIVIDUAL VIOLATIONS.—The willful or repeated secondary transmission by a satellite carrier of a primary transmission made by a network station and embodying a performance or display of a work to a subscriber who is not eligible to receive the transmission under this section is actionable as an act of infringement under section 501 and is fully subject to the remedies provided by sections 502 through 506, except that—

(i) no damages shall be awarded for such act of infringement if the satellite carrier took corrective action by promptly withdrawing service from the ineligible subscriber, and

(ii) any statutory damages shall not exceed \$250 for such subscriber for each month during which the violation occurred.

(B) PATTERN OF VIOLATIONS.—If a satellite carrier engages in a willful or repeated pattern or practice of delivering a primary transmission made by a network station and embodying a performance or display of a work to subscribers who are not eligible to receive the transmission under this section, then in addition to the remedies set forth in subparagraph (A)—

(i) if the pattern or practice has been carried out on a substantially nationwide

basis, the court shall order a permanent injunction barring the secondary transmission by the satellite carrier, for private home viewing, of the primary transmissions of any primary network station affiliated with the same network, and the court may order statutory damages of not to exceed \$2,500,000 for each 3-month period during which the pattern or practice was carried out; and

(ii) if the pattern or practice has been carried out on a local or regional basis, the court shall order a permanent injunction barring the secondary transmission, for private home viewing in that locality or region, by the satellite carrier of the primary transmissions of any primary network station affiliated with the same network, and the court may order statutory damages of not to exceed \$2,500,000 for each 6-month period during which the pattern or practice was carried out.

(C) PREVIOUS SUBSCRIBERS EXCLUDED.—Subparagraphs (A) and (B) do not apply to secondary transmissions by a satellite carrier to persons who subscribed to receive such secondary transmissions from the satellite carrier or a distributor before November 16, 1988.

(D) BURDEN OF PROOF.—In any action brought under this paragraph, the satellite carrier shall have the burden of proving that its secondary transmission of a primary transmission by a network station is to a subscriber who is eligible to receive the secondary transmission under this section.

The court shall direct one half of any statutory damages ordered under clause (i)¹ to be deposited with the Register of Copyrights for distribution to copyright owners pursuant to subsection (b). The Copyright Royalty Judges shall issue regulations establishing procedures for distributing such funds, on a proportional basis, to copyright owners whose works were included in the secondary transmissions that were the subject of the statutory damages.

(6) DISCRIMINATION BY A SATELLITE CARRIER.—Notwithstanding the provisions of paragraph (1), the willful or repeated secondary transmission to the public by a satellite carrier of a performance or display of a work embodied in a primary transmission made by a non-network station or a network station is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, if the satellite carrier unlawfully discriminates against a distributor.

(7) GEOGRAPHIC LIMITATION ON SECONDARY TRANSMISSIONS.—The statutory license created by this section shall apply only to secondary transmissions to households located in the United States.

(8) SERVICE TO RECREATIONAL VEHICLES AND COMMERCIAL TRUCKS.—

(A) EXEMPTION.—

(i) IN GENERAL.—For purposes of this subsection, and subject to clauses (ii) and (iii),

the term “unserved household” shall include—

(I) recreational vehicles as defined in regulations of the Secretary of Housing and Urban Development under section 3282.8 of title 24, Code of Federal Regulations; and

(II) commercial trucks that qualify as commercial motor vehicles under regulations of the Secretary of Transportation under section 383.5 of title 49, Code of Federal Regulations.

(ii) LIMITATION.—Clause (i) shall apply only to a recreational vehicle or commercial truck if any satellite carrier that proposes to make a secondary transmission of a network station to the operator of such a recreational vehicle or commercial truck complies with the documentation requirements under subparagraphs (B) and (C).

(iii) EXCLUSION.—For purposes of this subparagraph, the terms “recreational vehicle” and “commercial truck” shall not include any fixed dwelling, whether a mobile home or otherwise.

(B) DOCUMENTATION REQUIREMENTS.—A recreational vehicle or commercial truck shall be deemed to be an unserved household beginning 10 days after the relevant satellite carrier provides to the network that owns or is affiliated with the network station that will be secondarily transmitted to the recreational vehicle or commercial truck the following documents:

(i) DECLARATION.—A signed declaration by the operator of the recreational vehicle or commercial truck that the satellite dish is permanently attached to the recreational vehicle or commercial truck, and will not be used to receive satellite programming at any fixed dwelling.

(ii) REGISTRATION.—In the case of a recreational vehicle, a copy of the current State vehicle registration for the recreational vehicle.

(iii) REGISTRATION AND LICENSE.—In the case of a commercial truck, a copy of—

(I) the current State vehicle registration for the truck; and

(II) a copy of a valid, current commercial driver's license, as defined in regulations of the Secretary of Transportation under section 383 of title 49, Code of Federal Regulations, issued to the operator.

(C) UPDATED DOCUMENTATION REQUIREMENTS.—If a satellite carrier wishes to continue to make secondary transmissions to a recreational vehicle or commercial truck for more than a 2-year period, that carrier shall provide each network, upon request, with updated documentation in the form described under subparagraph (B) during the 90 days before expiration of that 2-year period.

(9) STATUTORY LICENSE CONTINGENT ON COMPLIANCE WITH FCC RULES AND REMEDIAL STEPS.—Notwithstanding any other provision of this section, the willful or repeated secondary transmission to the public by a satellite carrier of a primary transmission em-

¹ So in original. Probably means subpar. (B)(i).

bodying a performance or display of a work made by a broadcast station licensed by the Federal Communications Commission is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, if, at the time of such transmission, the satellite carrier is not in compliance with the rules, regulations, and authorizations of the Federal Communications Commission concerning the carriage of television broadcast station signals.

(10) RESTRICTED TRANSMISSION OF OUT-OF-STATE DISTANT NETWORK SIGNALS INTO CERTAIN MARKETS.—

(A) OUT-OF-STATE NETWORK AFFILIATES.—

Notwithstanding any other provision of this title, the statutory license in this subsection and subsection (b) shall not apply to any secondary transmission of the primary transmission of a network station located outside of the State of Alaska to any subscriber in that State to whom the secondary transmission of the primary transmission of a television station located in that State is made available by the satellite carrier pursuant to section 122.

(B) EXCEPTION.—The limitation in subparagraph (A) shall not apply to the secondary transmission of the primary transmission of a digital signal of a network station located outside of the State of Alaska if at the time that the secondary transmission is made, no television station licensed to a community in the State and affiliated with the same network makes primary transmissions of a digital signal.

(b) DEPOSIT OF STATEMENTS AND FEES; VERIFICATION PROCEDURES.—

(1) DEPOSITS WITH THE REGISTER OF COPYRIGHTS.—A satellite carrier whose secondary transmissions are subject to statutory licensing under subsection (a) shall, on a semi-annual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation—

(A) a statement of account, covering the preceding 6-month period, specifying the names and locations of all non-network stations and network stations whose signals were retransmitted, at any time during that period, to subscribers as described in subsections (a)(1) and (a)(2), the total number of subscribers that received such retransmissions, and such other data as the Register of Copyrights may from time to time prescribe by regulation;

(B) a royalty fee payable to copyright owners pursuant to paragraph (4) for that 6-month period, computed by multiplying the total number of subscribers receiving each secondary transmission of a primary stream or multicast stream of each non-network station or network station during each calendar year month by the appropriate rate in effect under this subsection; and

(C) a filing fee, as determined by the Register of Copyrights pursuant to section 708(a).

(2) VERIFICATION OF ACCOUNTS AND FEE PAYMENTS.—The Register of Copyrights shall issue

regulations to permit interested parties to verify and audit the statements of account and royalty fees submitted by satellite carriers under this subsection.

(3) INVESTMENT OF FEES.—The Register of Copyrights shall receive all fees (including the filing fee specified in paragraph (1)(C)) deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section (other than the costs deducted under paragraph (5)), shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing securities of the United States for later distribution with interest by the Librarian of Congress as provided by this title.

(4) PERSONS TO WHOM FEES ARE DISTRIBUTED.—The royalty fees deposited under paragraph (3) shall, in accordance with the procedures provided by paragraph (5), be distributed to those copyright owners whose works were included in a secondary transmission made by a satellite carrier during the applicable 6-month accounting period and who file a claim with the Copyright Royalty Judges under paragraph (5).

(5) PROCEDURES FOR DISTRIBUTION.—The royalty fees deposited under paragraph (3) shall be distributed in accordance with the following procedures:

(A) FILING OF CLAIMS FOR FEES.—During the month of July in each year, each person claiming to be entitled to statutory license fees for secondary transmissions shall file a claim with the Copyright Royalty Judges, in accordance with requirements that the Copyright Royalty Judges shall prescribe by regulation. For purposes of this paragraph, any claimants may agree among themselves as to the proportionate division of statutory license fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) DETERMINATION OF CONTROVERSY; DISTRIBUTIONS.—After the first day of August of each year, the Copyright Royalty Judges shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Copyright Royalty Judges determine that no such controversy exists, the Copyright Royalty Judges shall authorize the Librarian of Congress to proceed to distribute such fees to the copyright owners entitled to receive them, or to their designated agents, subject to the deduction of reasonable administrative costs under this section. If the Copyright Royalty Judges find the existence of a controversy, the Copyright Royalty Judges shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(C) WITHHOLDING OF FEES DURING CONTROVERSY.—During the pendency of any proceeding under this subsection, the Copyright Royalty Judges shall have the discretion to authorize the Librarian of Congress to proceed to distribute any amounts that are not in controversy.

(c) ADJUSTMENT OF ROYALTY FEES.—

(1) APPLICABILITY AND DETERMINATION OF ROYALTY FEES FOR SIGNALS.—

(A) INITIAL FEE.—The appropriate fee for purposes of determining the royalty fee under subsection (b)(1)(B) for the secondary transmission of the primary transmissions of network stations and non-network stations shall be the appropriate fee set forth in part 258 of title 37, Code of Federal Regulations, as in effect on July 1, 2009, as modified under this paragraph.

(B) FEE SET BY VOLUNTARY NEGOTIATION.—On or before June 1, 2010, the Copyright Royalty Judges shall cause to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining the royalty fee to be paid by satellite carriers for the secondary transmission of the primary transmissions of network stations and non-network stations under subsection (b)(1)(B).

(C) NEGOTIATIONS.—Satellite carriers, distributors, and copyright owners entitled to royalty fees under this section shall negotiate in good faith in an effort to reach a voluntary agreement or agreements for the payment of royalty fees. Any such satellite carriers, distributors and copyright owners may at any time negotiate and agree to the royalty fee, and may designate common agents to negotiate, agree to, or pay such fees. If the parties fail to identify common agents, the Copyright Royalty Judges shall do so, after requesting recommendations from the parties to the negotiation proceeding. The parties to each negotiation proceeding shall bear the cost thereof.

(D) AGREEMENTS BINDING ON PARTIES; FILING OF AGREEMENTS; PUBLIC NOTICE.—

(i) VOLUNTARY AGREEMENTS; FILING.—Voluntary agreements negotiated at any time in accordance with this paragraph shall be binding upon all satellite carriers, distributors, and copyright owners that are parties thereto. Copies of such agreements shall be filed with the Copyright Office within 30 days after execution in accordance with regulations that the Register of Copyrights shall prescribe.

(ii) PROCEDURE FOR ADOPTION OF FEES.—

(I) PUBLICATION OF NOTICE.—Within 10 days after publication in the Federal Register of a notice of the initiation of voluntary negotiation proceedings, parties who have reached a voluntary agreement may request that the royalty fees in that agreement be applied to all satellite carriers, distributors, and copyright owners without convening a proceeding under subparagraph (F).

(II) PUBLIC NOTICE OF FEES.—Upon receiving a request under subclause (I), the Copyright Royalty Judges shall immediately provide public notice of the royalty fees from the voluntary agreement and afford parties an opportunity to state that they object to those fees.

(III) ADOPTION OF FEES.—The Copyright Royalty Judges shall adopt the royalty fees from the voluntary agreement for

all satellite carriers, distributors, and copyright owners without convening the proceeding under subparagraph (F) unless a party with an intent to participate in that proceeding and a significant interest in the outcome of that proceeding objects under subclause (II).

(E) PERIOD AGREEMENT IS IN EFFECT.—The obligation to pay the royalty fees established under a voluntary agreement which has been filed with the Copyright Royalty Judges in accordance with this paragraph shall become effective on the date specified in the agreement and shall remain in effect in accordance with the terms of the agreement until the subscriber for which the royalty is payable is no longer eligible to receive a secondary transmission pursuant to the license under this section.

(F) FEE SET BY COPYRIGHT ROYALTY JUDGES PROCEEDING.—

(i) NOTICE OF INITIATION OF THE PROCEEDING.—On or before September 1, 2010, the Copyright Royalty Judges shall cause notice to be published in the Federal Register of the initiation of a proceeding for the purpose of determining the royalty fees to be paid for the secondary transmission of the primary transmissions of network stations and non-network stations under subsection (b)(1)(B) by satellite carriers and distributors—

(I) in the absence of a voluntary agreement filed in accordance with subparagraph (D) that establishes royalty fees to be paid by all satellite carriers and distributors; or

(II) if an objection to the fees from a voluntary agreement submitted for adoption by the Copyright Royalty Judges to apply to all satellite carriers, distributors, and copyright owners is received under subparagraph (D) from a party with an intent to participate in the proceeding and a significant interest in the outcome of that proceeding.

Such proceeding shall be conducted under chapter 8.

(ii) ESTABLISHMENT OF ROYALTY FEES.—In determining royalty fees under this subparagraph, the Copyright Royalty Judges shall establish fees for the secondary transmissions of the primary transmissions of network stations and non-network stations that most clearly represent the fair market value of secondary transmissions, except that the Copyright Royalty Judges shall adjust royalty fees to account for the obligations of the parties under any applicable voluntary agreement filed with the Copyright Royalty Judges in accordance with subparagraph (D). In determining the fair market value, the Judges shall base their decision on economic, competitive, and programming information presented by the parties, including—

(I) the competitive environment in which such programming is distributed, the cost of similar signals in similar pri-

vate and compulsory license market-places, and any special features and con-ditions of the retransmission market-place;

(II) the economic impact of such fees on copyright owners and satellite car-riers; and

(III) the impact on the continued avail-ability of secondary transmissions to the public.

(iii) EFFECTIVE DATE FOR DECISION OF COPYRIGHT ROYALTY JUDGES.—The obliga-tion to pay the royalty fees established under a determination that is made by the Copyright Royalty Judges in a proceeding under this paragraph shall be effective as of January 1, 2010.

(iv) PERSONS SUBJECT TO ROYALTY FEES.—The royalty fees referred to in clause (iii) shall be binding on all satellite carriers, dis-tributors and copyright owners, who are not party to a voluntary agreement filed with the Copyright Office under subpara-graph (D).

(2) ANNUAL ROYALTY FEE ADJUSTMENT.—Ef-fective January 1 of each year, the royalty fee payable under subsection (b)(1)(B) for the sec-ondary transmission of the primary trans-missions of network stations and non-network stations shall be adjusted by the Copyright Royalty Judges to reflect any changes occur-ring in the cost of living as determined by the most recent Consumer Price Index (for all con-sumers and for all items) published by the Sec-retary of Labor before December 1 of the pre-ceding year. Notification of the adjusted fees shall be published in the Federal Register at least 25 days before January 1.

(d) DEFINITIONS.—As used in this section—

(1) DISTRIBUTOR.—The term “distributor” means an entity that contracts to distribute secondary transmissions from a satellite car-rier and, either as a single channel or in a package with other programming, provides the secondary transmission either directly to indi-vidual subscribers or indirectly through other program distribution entities in accordance with the provisions of this section.

(2) NETWORK STATION.—The term “network station” means—

(A) a television station licensed by the Federal Communications Commission, in-cluding any translator station or terrestrial sat-ellite station that rebroadcasts all or substan-tially all of the programming broad-cast by a network station, that is owned or operated by, or affiliated with, one or more of the television networks in the United States that offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States; or

(B) a noncommercial educational broad-cast station (as defined in section 397 of the Communications Act of 1934);

except that the term does not include the sig-nal of the Alaska Rural Communications Serv-ice, or any successor entity to that service.

(3) PRIMARY NETWORK STATION.—The term “primary network station” means a network

station that broadcasts or rebroadcasts the basic programming service of a particular na-tional network.

(4) PRIMARY TRANSMISSION.—The term “pri-mary transmission” has the meaning given that term in section 111(f) of this title.

(5) PRIVATE HOME VIEWING.—The term “pri-vate home viewing” means the viewing, for private use in a household by means of sat-ellite reception equipment that is operated by an individual in that household and that serves only such household, of a secondary transmission delivered by a satellite carrier of a primary transmission of a television station licensed by the Federal Communications Com-mission.

(6) SATELLITE CARRIER.—The term “satellite carrier” means an entity that uses the facil-ities of a satellite or satellite service licensed by the Federal Communications Commission and operates in the Fixed-Satellite Service under part 25 of title 47, Code of Federal Regu-lations, or the Direct Broadcast Satellite Service under part 100 of title 47, Code of Fed-eral Regulations, to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases a capacity or service on a satellite in order to provide such point-to-multipoint distribution, except to the extent that such entity provides such distribu-tion pursuant to tariff under the Communica-tions Act of 1934, other than for private home viewing pursuant to this section.

(7) SECONDARY TRANSMISSION.—The term “secondary transmission” has the meaning given that term in section 111(f) of this title.

(8) SUBSCRIBER; SUBSCRIBE.—

(A) SUBSCRIBER.—The term “subscriber” means a person or entity that receives a sec-ondary transmission service from a satellite car-rier and pays a fee for the service, di-rectly or indi-rectly, to the satellite carrier or to a distributor.

(B) SUBSCRIBE.—The term “subscribe” means to elect to become a subscriber.

(9) NON-NETWORK STATION.—The term “non-net-work station” means a television station, other than a network station, licensed by the Federal Communications Commission, that is secondar-ily transmitted by a satellite carrier.

(10) UNSERVED HOUSEHOLD.—The term “unserved household”, with respect to a par-ticular television network, means a household that—

(A) is a subscriber to whom subsection (a)(8) applies; or

(B) is a subscriber located in a short mar-ket.

(11) LOCAL MARKET.—The term “local mar-ket” has the meaning given such term under section 122(j).

(12) COMMERCIAL ESTABLISHMENT.—The term “commercial establishment”—

(A) means an establishment used for com-mercial purposes, such as a bar, restaurant, pri-ate office, fitness club, oil rig, retail store, bank or other financial institution, supermarket, automobile or boat dealership, or any other establishment with a common busi-ness area; and

(B) does not include a multi-unit permanent or temporary dwelling where private home viewing occurs, such as a hotel, dormitory, hospital, apartment, condominium, or prison.

(13) MULTICAST STREAM.—The term “multicast stream” means a digital stream containing programming and program-related material affiliated with a television network, other than the primary stream.

(14) PRIMARY STREAM.—The term “primary stream” means—

(A) the single digital stream of programming as to which a television broadcast station has the right to mandatory carriage with a satellite carrier under the rules of the Federal Communications Commission in effect on July 1, 2009; or

(B) if there is no stream described in subparagraph (A), then either—

(i) the single digital stream of programming associated with the network last transmitted by the station as an analog signal; or

(ii) if there is no stream described in clause (i), then the single digital stream of programming affiliated with the network that, as of July 1, 2009, had been offered by the television broadcast station for the longest period of time.

(15) LOCAL-INTO-LOCAL SERVICE TO ALL DMAS.—The term “local-into-local service to all DMAs” has the meaning given such term in subsection (f)(7).

(16) SHORT MARKET.—The term “short market” means a local market in which programming of one or more of the four most widely viewed television networks nationwide is not offered on either the primary stream or multicast stream transmitted by any network station in that market or is temporarily or permanently unavailable as a result of an act of god² or other force majeure event beyond the control of the carrier.

(e) EXPEDITED CONSIDERATION BY JUSTICE DEPARTMENT OF VOLUNTARY AGREEMENTS TO PROVIDE SATELLITE SECONDARY TRANSMISSIONS TO LOCAL MARKETS.—

(1) IN GENERAL.—In a case in which no satellite carrier makes available, to subscribers located in a local market, as defined in section 122(j)(2), the secondary transmission into that market of a primary transmission of one or more television broadcast stations licensed by the Federal Communications Commission, and two or more satellite carriers request a business review letter in accordance with section 50.6 of title 28, Code of Federal Regulations (as in effect on July 7, 2004), in order to assess the legality under the antitrust laws of proposed business conduct to make or carry out an agreement to provide such secondary transmission into such local market, the appropriate official of the Department of Justice shall respond to the request no later than 90 days after the date on which the request is received.

(2) DEFINITION.—For purposes of this subsection, the term “antitrust laws”—

(A) has the meaning given that term in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent such section 5 applies to unfair methods of competition; and

(B) includes any State law similar to the laws referred to in paragraph (1).

(f) CERTAIN WAIVERS GRANTED TO PROVIDERS OF LOCAL-INTO-LOCAL SERVICE TO ALL DMAS.—

(1) INJUNCTION WAIVER.—A court that issued an injunction pursuant to subsection (a)(5)(B) before the date of the enactment of this subsection shall waive such injunction if the court recognizes the entity against which the injunction was issued as a qualified carrier.

(2) LIMITED TEMPORARY WAIVER.—

(A) IN GENERAL.—Upon a request made by a satellite carrier, a court that issued an injunction against such carrier under subsection (a)(5)(B) before the date of the enactment of this subsection shall waive such injunction with respect to the statutory license provided under subsection (a)(2) to the extent necessary to allow such carrier to make secondary transmissions of primary transmissions made by a network station to unserved households located in short markets in which such carrier was not providing local service pursuant to the license under section 122 as of December 31, 2009.

(B) EXPIRATION OF TEMPORARY WAIVER.—A temporary waiver of an injunction under subparagraph (A) shall expire after the end of the 120-day period beginning on the date such temporary waiver is issued unless extended for good cause by the court making the temporary waiver.

(C) FAILURE TO PROVIDE LOCAL-INTO-LOCAL SERVICE TO ALL DMAS.—

(i) FAILURE TO ACT REASONABLY AND IN GOOD FAITH.—If the court issuing a temporary waiver under subparagraph (A) determines that the satellite carrier that made the request for such waiver has failed to act reasonably or has failed to make a good faith effort to provide local-into-local service to all DMAs, such failure—

(I) is actionable as an act of infringement under section 501 and the court may in its discretion impose the remedies provided for in sections 502 through 506 and subsection (a)(6)(B) of this section;³ and

(II) shall result in the termination of the waiver issued under subparagraph (A).

(ii) FAILURE TO PROVIDE LOCAL-INTO-LOCAL SERVICE.—If the court issuing a temporary waiver under subparagraph (A) determines that the satellite carrier that made the request for such waiver has failed to provide local-into-local service to all DMAs, but determines that the carrier acted reasonably and in good faith, the court may in its discretion impose financial penalties that reflect—

²So in original. Probably should be capitalized.

³See References in Text note below.

- (I) the degree of control the carrier had over the circumstances that resulted in the failure;
 - (II) the quality of the carrier's efforts to remedy the failure; and
 - (III) the severity and duration of any service interruption.
- (D) SINGLE TEMPORARY WAIVER AVAILABLE.—An entity may only receive one temporary waiver under this paragraph.
- (E) SHORT MARKET DEFINED.—For purposes of this paragraph, the term “short market” means a local market in which programming of one or more of the four most widely viewed television networks nationwide as measured on the date of the enactment of this subsection is not offered on the primary stream transmitted by any local television broadcast station.
- (3) ESTABLISHMENT OF QUALIFIED CARRIER RECOGNITION.—
- (A) STATEMENT OF ELIGIBILITY.—An entity seeking to be recognized as a qualified carrier under this subsection shall file a statement of eligibility with the court that imposed the injunction. A statement of eligibility must include—
 - (i) an affidavit that the entity is providing local-into-local service to all DMAs;
 - (ii) a motion for a waiver of the injunction;
 - (iii) a motion that the court appoint a special master under Rule 53 of the Federal Rules of Civil Procedure;
 - (iv) an agreement by the carrier to pay all expenses incurred by the special master under paragraph (4)(B)(ii); and
 - (v) a certification issued pursuant to section 342(a) of Communications Act of 1934.
 - (B) GRANT OF RECOGNITION AS A QUALIFIED CARRIER.—Upon receipt of a statement of eligibility, the court shall recognize the entity as a qualified carrier and issue the waiver under paragraph (1). Upon motion pursuant to subparagraph (A)(iii), the court shall appoint a special master to conduct the examination and provide a report to the court as provided in paragraph (4)(B).
 - (C) VOLUNTARY TERMINATION.—At any time, an entity recognized as a qualified carrier may file a statement of voluntary termination with the court certifying that it no longer wishes to be recognized as a qualified carrier. Upon receipt of such statement, the court shall reinstate the injunction waived under paragraph (1).
 - (D) LOSS OF RECOGNITION PREVENTS FUTURE RECOGNITION.—No entity may be recognized as a qualified carrier if such entity had previously been recognized as a qualified carrier and subsequently lost such recognition or voluntarily terminated such recognition under subparagraph (C).
- (4) QUALIFIED CARRIER OBLIGATIONS AND COMPLIANCE.—
- (A) CONTINUING OBLIGATIONS.—
 - (i) IN GENERAL.—An entity recognized as a qualified carrier shall continue to provide local-into-local service to all DMAs.
 - (ii) COOPERATION WITH COMPLIANCE EXAMINATION.—An entity recognized as a qualified carrier shall fully cooperate with the special master appointed by the court under paragraph (3)(B) in an examination set forth in subparagraph (B).
- (B) QUALIFIED CARRIER COMPLIANCE EXAMINATION.—
- (i) EXAMINATION AND REPORT.—A special master appointed by the court under paragraph (3)(B) shall conduct an examination of, and file a report on, the qualified carrier's compliance with the royalty payment and household eligibility requirements of the license under this section. The report shall address the qualified carrier's conduct during the period beginning on the date on which the qualified carrier is recognized as such under paragraph (3)(B) and ending on April 30, 2012.
 - (ii) RECORDS OF QUALIFIED CARRIER.—Beginning on the date that is one year after the date on which the qualified carrier is recognized as such under paragraph (3)(B), but not later than December 1, 2011, the qualified carrier shall provide the special master with all records that the special master considers to be directly pertinent to the following requirements under this section:
 - (I) Proper calculation and payment of royalties under the statutory license under this section.
 - (II) Provision of service under this license to eligible subscribers only.
 - (iii) SUBMISSION OF REPORT.—The special master shall file the report required by clause (i) not later than July 24, 2012, with the court referred to in paragraph (1) that issued the injunction, and the court shall transmit a copy of the report to the Register of Copyrights, the Committees on the Judiciary and on Energy and Commerce of the House of Representatives, and the Committees on the Judiciary and on Commerce, Science, and Transportation of the Senate.
 - (iv) EVIDENCE OF INFRINGEMENT.—The special master shall include in the report a statement of whether the examination by the special master indicated that there is substantial evidence that a copyright holder could bring a successful action under this section against the qualified carrier for infringement.
 - (v) SUBSEQUENT EXAMINATION.—If the special master's report includes a statement that its examination indicated the existence of substantial evidence that a copyright holder could bring a successful action under this section against the qualified carrier for infringement, the special master shall, not later than 6 months after the report under clause (i) is filed, initiate another examination of the qualified carrier's compliance with the royalty payment and household eligibility requirements of the license under this section since the last report was filed under clause (iii). The special master shall file a report

on the results of the examination conducted under this clause with the court referred to in paragraph (1) that issued the injunction, and the court shall transmit a copy to the Register of Copyrights, the Committees on the Judiciary and on Energy and Commerce of the House of Representatives, and the Committees on the Judiciary and on Commerce, Science, and Transportation of the Senate. The report shall include a statement described in clause (iv).

(vi) COMPLIANCE.—Upon motion filed by an aggrieved copyright owner, the court recognizing an entity as a qualified carrier shall terminate such designation upon finding that the entity has failed to cooperate with an examination required by this subparagraph.

(vii) OVERSIGHT.—During the period of time that the special master is conducting an examination under this subparagraph, the Comptroller General shall monitor the degree to which the entity seeking to be recognized or recognized as a qualified carrier under paragraph (3) is complying with the special master's examination. The qualified carrier shall make available to the Comptroller General all records and individuals that the Comptroller General considers necessary to meet the Comptroller General's obligations under this clause. The Comptroller General shall report the results of the monitoring required by this clause to the Committees on the Judiciary and on Energy and Commerce of the House of Representatives and the Committees on the Judiciary and on Commerce, Science, and Transportation of the Senate at intervals of not less than six months during such period.

(C) AFFIRMATION.—A qualified carrier shall file an affidavit with the district court and the Register of Copyrights 30 months after such status was granted stating that, to the best of the affiant's knowledge, it is in compliance with the requirements for a qualified carrier. The qualified carrier shall attach to its affidavit copies of all reports or orders issued by the court, the special master, and the Comptroller General.

(D) COMPLIANCE DETERMINATION.—Upon the motion of an aggrieved television broadcast station, the court recognizing an entity as a qualified carrier may make a determination of whether the entity is providing local-into-local service to all DMAs.

(E) PLEADING REQUIREMENT.—In any motion brought under subparagraph (D), the party making such motion shall specify one or more designated market areas (as such term is defined in section 122(j)(2)(C)) for which the failure to provide service is being alleged, and, for each such designated market area, shall plead with particularity the circumstances of the alleged failure.

(F) BURDEN OF PROOF.—In any proceeding to make a determination under subparagraph (D), and with respect to a designated market area for which failure to provide service is alleged, the entity recognized as a

qualified carrier shall have the burden of proving that the entity provided local-into-local service with a good quality satellite signal to at least 90 percent of the households in such designated market area (based on the most recent census data released by the United States Census Bureau) at the time and place alleged.

(5) FAILURE TO PROVIDE SERVICE.—

(A) PENALTIES.—If the court recognizing an entity as a qualified carrier finds that such entity has willfully failed to provide local-into-local service to all DMAs, such finding shall result in the loss of recognition of the entity as a qualified carrier and the termination of the waiver provided under paragraph (1), and the court may, in its discretion—

(i) treat such failure as an act of infringement under section 501, and subject such infringement to the remedies provided for in sections 502 through 506 and subsection (a)(6)(B) of this section;³ and

(ii) impose a fine of not less than \$250,000 and not more than \$5,000,000.

(B) EXCEPTION FOR NONWILLFUL VIOLATION.—If the court determines that the failure to provide local-into-local service to all DMAs is nonwillful, the court may in its discretion impose financial penalties for non-compliance that reflect—

(i) the degree of control the entity had over the circumstances that resulted in the failure;

(ii) the quality of the entity's efforts to remedy the failure and restore service; and

(iii) the severity and duration of any service interruption.

(6) PENALTIES FOR VIOLATIONS OF LICENSE.—A court that finds, under subsection (a)(6)(A),³ that an entity recognized as a qualified carrier has willfully made a secondary transmission of a primary transmission made by a network station and embodying a performance or display of a work to a subscriber who is not eligible to receive the transmission under this section shall reinstate the injunction waived under paragraph (1), and the court may order statutory damages of not more than \$2,500,000.

(7) LOCAL-INTO-LOCAL SERVICE TO ALL DMAS DEFINED.—For purposes of this subsection:

(A) IN GENERAL.—An entity provides “local-into-local service to all DMAs” if the entity provides local service in all designated market areas (as such term is defined in section 122(j)(2)(C)) pursuant to the license under section 122, except for designated market areas where the entity is temporarily or permanently unable to provide local service as a result of an act of god² or other force majeure event beyond the control of the entity.

(B) HOUSEHOLD COVERAGE.—For purposes of subparagraph (A), an entity that makes available local-into-local service with a good quality satellite signal to at least 90 percent of the households in a designated market area based on the most recent census data released by the United States Census Bureau shall be considered to be providing local service to such designated market area.

(C) GOOD QUALITY SATELLITE SIGNAL DEFINED.—The term “good quality satellite signal” has the meaning given such term under section 342(e)(2) of Communications⁴ Act of 1934.

(Added Pub. L. 100-667, title II, § 202(2), Nov. 16, 1988, 102 Stat. 3949; amended Pub. L. 103-198, § 5, Dec. 17, 1993, 107 Stat. 2310; Pub. L. 103-369, § 2, Oct. 18, 1994, 108 Stat. 3477; Pub. L. 104-39, § 5(c), Nov. 1, 1995, 109 Stat. 348; Pub. L. 105-80, §§ 1, 12(a)(8), Nov. 13, 1997, 111 Stat. 1529, 1535; Pub. L. 106-44, § 1(g)(4), Aug. 5, 1999, 113 Stat. 222; Pub. L. 106-113, div. B, § 1000(a)(9) [title I, §§ 1004-1007, 1008(b), 1011(b)(2), (c)], Nov. 29, 1999, 113 Stat. 1536, 1501A-527 to 1501A-531, 1501A-537, 1501A-543, 1501A-544; Pub. L. 107-273, div. C, title III, §§ 13209, 13210(1), (8), Nov. 2, 2002, 116 Stat. 1908, 1909; Pub. L. 108-419, § 5(g), (h), Nov. 30, 2004, 118 Stat. 2367; Pub. L. 108-447, div. J, title IX [title I, §§ 101(b)-105, 107(a), 108, 111(a)], Dec. 8, 2004, 118 Stat. 3394-3408; Pub. L. 109-303, § 4(e), (g), Oct. 6, 2006, 120 Stat. 1482, 1483; Pub. L. 110-403, title II, § 209(a)(4), Oct. 13, 2008, 122 Stat. 4264; Pub. L. 111-118, div. B, § 1003(a)(1), Dec. 19, 2009, 123 Stat. 3469; Pub. L. 111-144, § 10(a)(1), Mar. 2, 2010, 124 Stat. 47; Pub. L. 111-151, § 2(a)(1), Mar. 26, 2010, 124 Stat. 1027; Pub. L. 111-157, § 9(a)(1), Apr. 15, 2010, 124 Stat. 1118; Pub. L. 111-175, title I, §§ 102(a)(1), (b)-(k), 105, May 27, 2010, 124 Stat. 1219-1226, 1239; Pub. L. 111-295, § 6(c), Dec. 9, 2010, 124 Stat. 3181; Pub. L. 113-200, title II, §§ 201(2), 202(a), Dec. 4, 2014, 128 Stat. 2066; Pub. L. 116-94, div. P, title XI, § 1102(a), (c)(1), Dec. 20, 2019, 133 Stat. 3201, 3203.)

Editorial Notes

REFERENCES IN TEXT

The Communications Act of 1934, referred to in subsec. (d)(6), is act June 19, 1934, ch. 652, 48 Stat. 1064, which is classified principally to chapter 5 (§151 et seq.) of Title 47, Telecommunications. Sections 342 and 397 of the Act are classified to sections 342 and 397, respectively, of Title 47. For complete classification of this Act to the Code, see section 609 of Title 47 and Tables.

The date of the enactment of this subsection, referred to in subsec. (f)(1), (2)(A), (E), is the date of enactment of Pub. L. 111-175, which shall be deemed to refer to Feb. 27, 2010. See section 307(a) of Pub. L. 111-175, set out as an Effective Date of 2010 Amendment note under section 111 of this title.

Subsection (a)(6) of this section, referred to in subsec. (f)(2)(C)(i)(I), (5)(A)(i), (6), was redesignated subsec. (a)(5) of this section by Pub. L. 116-94, div. P, title XI, § 1102(a)(1)(C), Dec. 20, 2019, 133 Stat. 3202.

The Federal Rules of Civil Procedure, referred to in subsec. (f)(3)(A)(iii), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2019—Subsec. (a)(1). Pub. L. 116-94, § 1102(c)(1)(A)(i), substituted “paragraphs (3), (4), and (6)” for “paragraphs (4), (5), and (7)”.

Subsec. (a)(2)(A). Pub. L. 116-94, § 1102(a)(1)(A)(i), (c)(1)(A)(ii), substituted “paragraphs (3), (4), (5), and (6)” for “paragraphs (4), (5), (6), and (7)” and “signals,” for “signals, and”, inserted “, and the carrier provides local-into-local service to all DMAs” after “receiving the secondary transmission”, and inserted at end “Failure to reach an agreement with a network station to retransmit the signals of the station shall not be construed to affect compliance with providing local-

into-local service to all DMAs if the satellite carrier has the capability to retransmit such signals when an agreement is reached.”

Subsec. (a)(2)(B)(ii), (iii). Pub. L. 116-94, § 1102(a)(1)(A)(ii), added cl. (ii) and struck out former cl. (ii) and (iii) which related to accurate determinations of eligibility and C-band exemption to unserved households, respectively.

Subsec. (a)(3). Pub. L. 116-94, § 1102(a)(1)(B), (C), redesignated par. (4) as (3) and struck out former par. (3) which related to statutory license where retransmissions into local market available.

Subsec. (a)(4), (5). Pub. L. 116-94, § 1102(a)(1)(C), redesignated pars. (5) and (6) as (4) and (5), respectively. Former par. (4) redesignated (3).

Subsec. (a)(6). Pub. L. 116-94, § 1102(a)(1)(C), redesignated par. (7) as (6). Former par. (6) redesignated (5).

Subsec. (a)(6)(E). Pub. L. 116-94, § 1102(a)(1)(B), struck out subparagraph (E). Text read as follows: “The secondary transmission by a satellite carrier of a performance or display of a work embodied in a primary transmission made by a network station to subscribers who do not reside in unserved households shall not be an act of infringement if—

“(i) the station on May 1, 1991, was retransmitted by a satellite carrier and was not on that date owned or operated by or affiliated with a television network that offered interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more States;

“(ii) as of July 1, 1998, such station was retransmitted by a satellite carrier under the statutory license of this section; and

“(iii) the station is not owned or operated by or affiliated with a television network that, as of January 1, 1995, offered interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more States.”

Subsec. (a)(7), (8). Pub. L. 116-94, § 1102(a)(1)(C), redesignated pars. (8) and (11) as (7) and (8), respectively. Former par. (7) redesignated (6).

Subsec. (a)(9). Pub. L. 116-94, § 1102(a)(1)(B), (C), redesignated par. (12) as (9) and struck out former par. (9). Prior to amendment, text of par. (9) read as follows: “In any civil action filed relating to the eligibility of subscribing households as unserved households—

“(A) a network station challenging such eligibility shall, within 60 days after receipt of the measurement results and a statement of such costs, reimburse the satellite carrier for any signal intensity measurement that is conducted by that carrier in response to a challenge by the network station and that establishes the household is an unserved household; and

“(B) a satellite carrier shall, within 60 days after receipt of the measurement results and a statement of such costs, reimburse the network station challenging such eligibility for any signal intensity measurement that is conducted by that station and that establishes the household is not an unserved household.”

Subsec. (a)(10). Pub. L. 116-94, § 1102(a)(1)(B), (C), redesignated par. (14) as (10) and struck out former par. (10). Prior to amendment, text of par. (10) read as follows: “If a network station makes a reasonable attempt to conduct a site measurement of its signal at a subscriber’s household and is denied access for the purpose of conducting the measurement, and is otherwise unable to conduct a measurement, the satellite carrier shall within 60 days notice thereof, terminate service of the station’s network to that household.”

Subsec. (a)(11), (12). Pub. L. 116-94, § 1102(a)(1)(C), redesignated pars. (11) and (12) as (8) and (9), respectively.

Subsec. (a)(13). Pub. L. 116-94, § 1102(a)(1)(B), struck out par. (13). Text read as follows: “A subscriber who is denied the secondary transmission of a signal of a network station under subsection (a)(2)(B) may request a waiver from such denial by submitting a request, through the subscriber’s satellite carrier, to the network station asserting that the secondary transmission

⁴So in original. Probably should be preceded by “the”.

is prohibited. The network station shall accept or reject a subscriber's request for a waiver within 30 days after receipt of the request. If a television network station fails to accept or reject a subscriber's request for a waiver within the 30-day period after receipt of the request, that station shall be deemed to agree to the waiver request and have filed such written waiver. Unless specifically stated by the network station, a waiver that was granted before the date of the enactment of the Satellite Home Viewer Extension and Reauthorization Act of 2004 under section 339(c)(2) of the Communications Act of 1934, and that was in effect on such date of enactment, shall constitute a waiver for purposes of this paragraph."

Subsec. (a)(14). Pub. L. 116–94, §1102(a)(1)(C), redesignated par. (14) as (10).

Subsec. (c)(1)(E). Pub. L. 116–94, §1102(a)(2), substituted "in the agreement and shall remain in effect in accordance with the terms of the agreement until the subscriber for which the royalty is payable is no longer eligible to receive a secondary transmission pursuant to the license under this section." for "in the agreement, and shall remain in effect until December 31, 2019, or in accordance with the terms of the agreement, whichever is later."

Subsec. (d)(10). Pub. L. 116–94, §1102(a)(3)(A), redesignated subpar. (D) as (A) and substituted "subsection (a)(8)" for "subsection (a)(11)", added subpar. (B), and struck out former subpars. (A) to (C) and (E) which read as follows:

"(A) cannot receive, through the use of an antenna, an over-the-air signal containing the primary stream, or, on or after the qualifying date, the multicast stream, originating in that household's local market and affiliated with that network of—

"(i) if the signal originates as an analog signal, Grade B intensity as defined by the Federal Communications Commission in section 73.683(a) of title 47, Code of Federal Regulations, as in effect on January 1, 1999; or

"(ii) if the signal originates as a digital signal, intensity defined in the values for the digital television noise-limited service contour, as defined in regulations issued by the Federal Communications Commission (section 73.622(e) of title 47, Code of Federal Regulations), as such regulations may be amended from time to time;

"(B) is subject to a waiver that meets the standards of subsection (a)(13), whether or not the waiver was granted before the date of the enactment of the Satellite Television Extension and Localism Act of 2010;

"(C) is a subscriber to whom subsection (e) applies;

"(E) is a subscriber to whom the exemption under subsection (a)(2)(B)(iii) applies."

Subsec. (d)(13) to (16). Pub. L. 116–94, §1102(a)(3)(B)–(D), redesignated pars. (14) and (15) as (13) and (14), respectively, added pars. (15) and (16), and struck out former par. (13) which defined the term "qualifying date" for purposes of former subsec. (d)(10)(A).

Subsec. (e). Pub. L. 116–94, §1102(a)(4), (6), redesignated subsec. (f) as (e) and struck out former subsec. (e). Prior to amendment, text of subsec. (e) read as follows: "Until December 31, 2019, a subscriber who does not receive a signal of Grade A intensity (as defined in the regulations of the Federal Communications Commission under section 73.683(a) of title 47, Code of Federal Regulations, as in effect on January 1, 1999, or predicted by the Federal Communications Commission using the Individual Location Longley-Rice methodology described by the Federal Communications Commission in Docket No. 98–201) of a local network television broadcast station shall remain eligible to receive signals of network stations affiliated with the same network, if that subscriber had satellite service of such network signal terminated after July 11, 1998, and before October 31, 1999, as required by this section, or received such service on October 31, 1999."

Subsec. (f). Pub. L. 116–94, §1102(a)(6), (c)(1)(B), redesignated subsec. (g) as (f) and substituted "subsection

(a)(5)(B)" for "subsection (a)(7)(B)" in pars. (1) and (2)(A). Former subsec. (f) redesignated (e).

Subsec. (g). Pub. L. 116–94, §1102(a)(6), redesignated subsec. (g) as (f).

Subsec. (g)(7)(A). Pub. L. 116–94, §1102(a)(5), inserted "except for designated market areas where the entity is temporarily or permanently unable to provide local service as a result of an act of god or other force majeure event beyond the control of the entity" after "section 122".

Subsec. (h). Pub. L. 116–94, §1102(a)(4), struck out subsec. (h). Text read as follows: "This section shall cease to be effective on December 31, 2019."

2014—Subsec. (c)(1)(E). Pub. L. 113–200, §201(2)(A), substituted "2019" for "2014".

Subsec. (e). Pub. L. 113–200, §201(2)(B), substituted "2019" for "2014".

Subsec. (h). Pub. L. 113–200, §202(a), added subsec. (h).

2010—Pub. L. 111–175, §102(a)(1), substituted "distant television programming by satellite" for "superstations and network stations for private home viewing" in section catchline.

Subsec. (a). Pub. L. 111–175, §102(h)(1)(B), (C), redesignated pars. (4) to (14) and (16) as (3) to (13) and (14), respectively, and struck out former pars. (3) and (15) which related to secondary transmissions of significantly viewed signals and carriage of low power television stations, respectively.

Subsec. (a)(1). Pub. L. 111–175, §102(h)(2)(A)(i), substituted "(4), (5), and (7)" for "(5), (6), and (8)".

Pub. L. 111–175, §102(g)(2), which directed amendment of section by substituting "non-network stations" for "superstations" wherever appearing in headings, was executed by substituting "NON-NETWORK STATIONS" for "SUPERSTATIONS" in par. (1) heading, to reflect the probable intent of Congress.

Pub. L. 111–175, §102(g)(1), substituted "non-network station" for "superstation".

Subsec. (a)(2)(A). Pub. L. 111–175, §102(h)(2)(A)(ii)(I), substituted "subparagraph (B) of this paragraph and paragraphs (4), (5), (6), and (7)" for "subparagraphs (B) and (C) of this paragraph and paragraphs (5), (6), (7), and (8)".

Subsec. (a)(2)(B)(i). Pub. L. 111–175, §102(h)(2)(A)(ii)(II), struck out "The limitation in this clause shall not apply to secondary transmissions under paragraph (3)." at end.

Subsec. (a)(2)(B)(ii)(III). Pub. L. 111–175, §102(i)(1), added subcl. (III).

Subsec. (a)(2)(B)(iii)(II). Pub. L. 111–175, §102(i)(5), (k)(1), substituted "In this clause," for "In this clause" and "Code of Federal Regulations" for "of the Code of Federal Regulations".

Subsec. (a)(2)(C). Pub. L. 111–175, §102(h)(1)(A), redesignated subpar. (D) as (C) and struck out former subpar. (C), which related to exceptions.

Subsec. (a)(2)(C)(i), (ii). Pub. L. 111–175, §102(h)(2)(A)(ii)(III), added cl. (i) and (ii) and struck out former cl. (i) and (ii) which related to initial lists and monthly lists, respectively.

Subsec. (a)(2)(D). Pub. L. 111–175, §102(h)(1)(A), redesignated subpar. (D) as (C).

Subsec. (a)(3)(A). Pub. L. 111–175, §102(i)(2)(A), struck out "analog" after "subscribers to" in subpar. heading, substituted "distant" for "distant analog" and "primary" for "primary analog" wherever appearing in headings and text, and struck out "analog" after "receive such local" in cl. (i)(I)(bb).

Subsec. (a)(3)(B), (C). Pub. L. 111–175, §102(i)(2)(B), added subpars. (B) and (C) and struck out former subpars. (B) and (C) which related to rules for other subscribers and future applicability, respectively.

Subsec. (a)(3)(D). Pub. L. 111–175, §102(i)(2)(B), (C), redesigned subpar. (E) as (D) and struck out former subpar. (D) which related to special rules for distant digital signals.

Subsec. (a)(3)(E). Pub. L. 111–175, §102(i)(2)(C), (D), redesignated subpar. (F) as (E) and substituted "(B) or (C)" for "(C) or (D)". Former subpar. (E) redesignated (D).

Pub. L. 111-175, § 102(h)(2)(A)(iii), struck out “under paragraph (3) or” after “transmissions” and substituted “paragraph (11)” for “paragraph (12)”.

Subsec. (a)(3)(F), (G). Pub. L. 111-175, § 102(i)(2)(C), (E), redesignated subparagraph (G) as (F) and inserted “9-digit” before “zip code”. Former subparagraph (F) redesignated (E).

Subsec. (a)(4). Pub. L. 111-175, § 102(i)(4), struck out “and 509” after “506”.

Subsec. (a)(5). Pub. L. 111-175, § 102(g)(1), substituted “non-network station” for “superstation”.

Subsec. (a)(6). Pub. L. 111-175, § 102(i)(3)(C), inserted concluding provisions.

Pub. L. 111-175, § 102(g)(1), substituted “non-network station” for “superstation”.

Subsec. (a)(6)(A)(ii). Pub. L. 111-175, § 102(i)(3)(A), substituted “\$250” for “\$5”.

Subsec. (a)(6)(B)(i). Pub. L. 111-175, § 102(i)(3)(B)(i), substituted “\$2,500,000 for each 3-month period” for “\$250,000 for each 6-month period”.

Subsec. (a)(6)(B)(ii). Pub. L. 111-175, § 102(i)(3)(B)(ii), substituted “\$2,500,000” for “\$250,000”.

Subsec. (a)(8). Pub. L. 111-175, § 102(g)(1), substituted “non-network station” for “superstation”.

Subsec. (a)(11)(A)(i)(I), (II), (B)(iii)(II). Pub. L. 111-175, § 102(k)(1), substituted “, Code of Federal Regulations”, for “of the Code of Federal Regulations”.

Subsec. (b). Pub. L. 111-175, § 102(d)(1), amended heading generally. Prior to amendment, heading read as follows: “STATUTORY LICENSE FOR SECONDARY TRANSMISSIONS FOR PRIVATE HOME VIEWING.—”.

Subsec. (b)(1). Pub. L. 111-175, § 102(h)(2)(B), struck out concluding provisions which read as follows: “Notwithstanding the provisions of subparagraph (B), a satellite carrier whose secondary transmissions are subject to statutory licensing under paragraph (1) or (2) of subsection (a) shall have no royalty obligation for secondary transmissions to a subscriber under paragraph (3) of such subsection.”

Subsec. (b)(1)(A). Pub. L. 111-175, § 102(g)(2), substituted “non-network stations” for “superstations”.

Subsec. (b)(1)(B). Pub. L. 111-175, § 102(d)(2), added subparagraph (B) and struck out former subparagraph (B) which read as follows: “a royalty fee for that 6-month period, computed by multiplying the total number of subscribers receiving each secondary transmission of each superstation or network station during each calendar month by the appropriate rate in effect under this section; and”.

Subsec. (b)(1)(C). Pub. L. 111-175, § 102(c), added subparagraph (C).

Subsec. (b)(2). Pub. L. 111-175, § 102(d)(4), added paragraph (2). Former paragraph (2) redesignated (3).

Subsec. (b)(3). Pub. L. 111-175, § 102(d)(3), (5), redesignated paragraph (2) as (3), inserted “(including the filing fee specified in paragraph (1)(C))” after “shall receive all fees”, and substituted “paragraph (5)” for “paragraph (4)”. Former paragraph (3) redesignated (4).

Subsec. (b)(4). Pub. L. 111-175, § 102(d)(3), (6), redesigned paragraph (3) as (4), substituted “paragraph (3)” for “paragraph (2)”, and substituted “paragraph (5)” for “paragraph (4)” in two places. Former paragraph (4) redesigned (5).

Subsec. (b)(5). Pub. L. 111-175, § 102(d)(3), (7), redesigned paragraph (4) as (5) and substituted “paragraph (3)” for “paragraph (2)” in introductory provisions.

Subsec. (c)(1). Pub. L. 111-175, § 102(e)(1)(A), struck out “analog” after “fees for” in heading.

Subsec. (c)(1)(A). Pub. L. 111-175, § 102(e)(1)(B), (g)(2), substituted “primary transmissions” for “primary analog transmissions”, “non-network stations” for “superstations”, and “July 1, 2009” for “July 1, 2004”.

Subsec. (c)(1)(B). Pub. L. 111-175, § 102(e)(1)(C), (g)(2), substituted “June 1, 2010, the Copyright Royalty Judges” for “January 2, 2005, the Librarian of Congress”, “primary transmissions” for “primary analog transmission”, and “non-network stations” for “superstations”.

Subsec. (c)(1)(C). Pub. L. 111-175, § 102(e)(1)(D), substituted “Copyright Royalty Judges” for “Librarian of Congress”.

Subsec. (c)(1)(D)(i). Pub. L. 111-175, § 102(e)(1)(E)(i), inserted heading and substituted “that are parties” for “that a parties”.

Subsec. (c)(1)(D)(ii). Pub. L. 111-175, § 102(e)(1)(E)(ii)(I), inserted heading.

Subsec. (c)(1)(D)(ii)(I). Pub. L. 111-175, § 102(e)(1)(E)(ii)(I), (II), inserted heading and substituted “a proceeding under subparagraph (F)” for “an arbitration proceeding pursuant to subparagraph (E)”.

Subsec. (c)(1)(D)(ii)(II). Pub. L. 111-175, § 102(e)(1)(E)(ii)(II), inserted heading and substituted “Upon receiving a request under subclause (I), the Copyright Royalty Judges” for “Upon receiving a request under subclause (I), the Librarian of Congress”.

Subsec. (c)(1)(D)(ii)(III). Pub. L. 111-175, § 102(e)(1)(E)(ii)(IV), inserted heading and substituted “The Copyright Royalty Judges” for “The Librarian”, “the proceeding under subparagraph (F)” for “an arbitration proceeding”, and “that proceeding” for “the arbitration proceeding”.

Subsec. (c)(1)(E). Pub. L. 111-175, § 102(e)(1)(F), substituted “Copyright Royalty Judges” for “Copyright Office” and “December 31, 2014” for “May 31, 2010”.

Pub. L. 111-175, § 9(a)(1)(A), substituted “May 31, 2010” for “April 30, 2010”.

Pub. L. 111-151, § 2(a)(1)(A), substituted “April 30, 2010” for “March 28, 2010”.

Pub. L. 111-144, § 10(a)(1)(A), substituted “March 28, 2010” for “February 28, 2010”.

Subsec. (c)(1)(F). Pub. L. 111-175, § 102(e)(1)(G)(i), substituted “copyright royalty judges proceeding” for “compulsory arbitration” in heading.

Subsec. (c)(1)(F)(i). Pub. L. 111-175, § 102(e)(1)(G)(ii)(I), (II), (IV), (g)(2), in heading, substituted “the proceeding” for “proceedings”, in introductory provisions, substituted “September 1, 2010, the Copyright Royalty Judges” for “May 1, 2005, the Librarian of Congress”, “a proceeding” for “arbitration proceedings”, “fees to be paid” for “fee to be paid”, “the primary transmissions” for “primary analog transmission”, “non-network stations” for “superstations”, and “distributors” for “distributors”, and amended concluding provisions generally. Prior to amendment, concluding provisions read as follows: “Such arbitration proceeding shall be conducted under chapter 8 as in effect on the day before the date of the enactment of the Copyright Royalty and Distribution Act of 2004.”

Subsec. (c)(1)(F)(i)(II). Pub. L. 111-175, § 102(e)(1)(G)(ii)(III), substituted “Copyright Royalty Judges” for “Librarian of Congress” and struck out “arbitration” after “participate in the”.

Subsec. (c)(1)(F)(ii). Pub. L. 111-175, § 102(e)(1)(G)(iii), amended introductory provisions generally. Prior to amendment, introductory provisions read as follows: “In determining royalty fees under this subparagraph, the copyright arbitration royalty panel appointed under chapter 8, as in effect on the day before the date of the enactment of the Copyright Royalty and Distribution Act of 2004 shall establish fees for the secondary transmissions of the primary analog transmission of network stations and superstations that most clearly represent the fair market value of secondary transmissions, except that the Librarian of Congress and any copyright arbitration royalty panel shall adjust those fees to account for the obligations of the parties under any applicable voluntary agreement filed with the Copyright Office pursuant to subparagraph (D). In determining the fair market value, the panel shall base its decision on economic, competitive, and programming information presented by the parties, including—”.

Subsec. (c)(1)(F)(iii). Pub. L. 111-175, § 102(e)(1)(G)(iv), amended clause (iii) generally. Prior to amendment, text read as follows: “The obligation to pay the royalty fee established under a determination which—

“(I) is made by a copyright arbitration royalty panel in an arbitration proceeding under this paragraph and is adopted by the Librarian of Congress under section 802(f), as in effect on the day before the date of the enactment of the Copyright Royalty and Distribution Act of 2004; or

“(II) is established by the Librarian under section 802(f) as in effect on the day before such date of enactment shall be effective as of January 1, 2005.” Subsec. (c)(1)(F)(iv). Pub. L. 111-175, §102(e)(1)(G)(v), substituted “fees” for “fee” in heading and substituted “fees referred to in clause (iii)” for “fee referred to in (iii)” in text.

Subsec. (c)(2). Pub. L. 111-175, §102(e)(2), amended par. (2) generally. Prior to amendment, par. (2) related to applicability and determination of royalty fees for digital signals.

Subsec. (d)(1). Pub. L. 111-175, §102(f)(6), substituted “that contracts” for “which contracts”.

Subsec. (d)(2)(A). Pub. L. 111-175, §102(f)(6), substituted “that offer” for “which offer”.

Subsec. (d)(5). Pub. L. 111-175, §102(f)(6), substituted “that is operated” for “which is operated” and “that serves” for “which serves”.

Subsec. (d)(6). Pub. L. 111-175, §102(k), substituted “, Code of Federal Regulations, or the Direct Broadcast Satellite Service under part 100 of title 47, Code of Federal Regulations” for “of the Code of Federal Regulations or the Direct Broadcast Satellite Service under part 100 of title 47 of the Code of Federal Regulations”.

Subsec. (d)(8). Pub. L. 111-175, §102(f)(1), amended par. (8) generally. Prior to amendment, text read as follows: “The term ‘subscriber’ means an individual or entity that receives a secondary transmission service by means of a secondary transmission from a satellite carrier and pays a fee for the service, directly or indirectly, to the satellite carrier or to a distributor in accordance with the provisions of this section.”

Subsec. (d)(9). Pub. L. 111-175, §102(g)(1), which directed amendment of section by substituting “non-network station” for “superstation” wherever appearing in headings, was executed by substituting “NON-NETWORK STATION” for “SUPERSTATION” in par. (9) heading, to reflect the probable intent of Congress.

Pub. L. 111-175, §102(g)(1), substituted “non-network station” for “superstation”.

Subsec. (d)(10)(A). Pub. L. 111-175, §102(b)(1)(A), added subparagraph. (A) and struck out former subparagraph. (A) which read as follows: “cannot receive, through the use of a conventional, stationary, outdoor rooftop receiving antenna, an over-the-air signal of a primary network station affiliated with that network of Grade B intensity as defined by the Federal Communications Commission under section 73.683(a) of title 47 of the Code of Federal Regulations, as in effect on January 1, 1999.”

Subsec. (d)(10)(B). Pub. L. 111-175, §102(b)(1)(B), substituted “subsection (a)(13),” for “subsection (a)(14),” and “Satellite Television Extension and Localism Act of 2010” for “Satellite Home Viewer Extension and Reauthorization Act of 2004”.

Subsec. (d)(10)(D). Pub. L. 111-175, §102(b)(1)(C), substituted “(a)(11)” for “(a)(12)”.

Subsec. (d)(11). Pub. L. 111-175, §102(f)(2), amended par. (11) generally. Prior to amendment, text read as follows: “The term ‘local market’ has the meaning given such term under section 122(j), except that with respect to a low power television station, the term ‘local market’ means the designated market area in which the station is located.”

Subsec. (d)(12), (13). Pub. L. 111-175, §102(f)(3), redesignated pars. (13) and (14) as (12) and (13), respectively, and struck out former par. (12). Text read as follows: “The term ‘low power television station’ means a low power television as defined under section 74.701(f) of title 47, Code of Federal Regulations, as in effect on June 1, 2004. For purposes of this paragraph, the term ‘low power television station’ includes a low power television station that has been accorded primary status as a Class A television licensee under section 73.6001(a) of title 47, Code of Federal Regulations.”

Subsec. (d)(14). Pub. L. 111-175, §102(f)(4), added par. (14). Former par. (14) redesignated (13).

Pub. L. 111-175, §102(b)(2), added par. (14).

Subsec. (d)(15). Pub. L. 111-175, §102(f)(5), added par. (15).

Subsec. (e). Pub. L. 111-175, §102(j), (k)(1), substituted “December 31, 2014” for “May 31, 2010” and “, Code of

Federal Regulations” for “of the Code of Federal Regulations”.

Pub. L. 111-157, §9(a)(1)(B), substituted “May 31, 2010” for “April 30, 2010”.

Pub. L. 111-151, §2(a)(1)(B), substituted “April 30, 2010” for “March 28, 2010”.

Pub. L. 111-144, §10(a)(1)(B), substituted “March 28, 2010” for “February 28, 2010”.

Subsec. (g). Pub. L. 111-175, §105, added subsec. (g).

Subsec. (g)(4)(B)(vi). Pub. L. 111-295 substituted “an examination” for “the examinations”.

2009—Subsecs. (c)(1)(E), (e). Pub. L. 111-118 substituted “February 28, 2010” for “December 31, 2009”.

2008—Subsec. (a)(6). Pub. L. 110-403, §209(a)(4)(A), substituted “section 510” for “sections 509 and 510”.

Subsec. (a)(7)(A). Pub. L. 110-403, §209(a)(4)(B), struck out “and 509” after “506” in introductory provisions.

Subsec. (a)(8), (13). Pub. L. 110-403, §209(a)(4)(C), (D), struck out “and 509” after “506”.

2006—Subsec. (b)(4)(B). Pub. L. 109-303, §4(e)(1)(A), substituted second sentence for former second sentence which read as follows: “If the Copyright Royalty Judges determine that no such controversy exists, the Librarian of Congress shall, after deducting reasonable administrative costs under this paragraph, distribute such fees to the copyright owners entitled to receive them, or to their designated agents.”

Subsec. (b)(4)(C). Pub. L. 109-303, §4(e)(1)(B), amended subparagraph. (C) generally. Prior to amendment, text of subparagraph. (C) read as follows: “During the pendency of any proceeding under this subsection, the Copyright Royalty Judges shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have the discretion to proceed to distribute any amounts that are not in controversy.”

Subsec. (c). Pub. L. 109-303, §4(g), deemed amendment by Pub. L. 108-419, §5(h), never to have been enacted. See 2004 Amendment note below.

Subsec. (c)(1)(F)(i). Pub. L. 109-303, §4(e)(2), substituted “arbitration” for “arbitrary” in concluding provisions.

2004—Subsec. (a)(1). Pub. L. 108-447, §107(a)(1), inserted “or for viewing in a commercial establishment” after “for private home viewing” in two places and substituted “subscriber” for “household”.

Pub. L. 108-447, §102(1), struck out “and pbs satellite feed” after “Superstations” in heading, substituted “paragraphs (5), (6), and (8)” for “paragraphs (3), (4), and (6)” and struck out “or by the Public Broadcasting Service satellite feed” after “primary transmission made by a superstation” in first sentence, and struck out at end “In the case of the Public Broadcasting Service satellite feed, the statutory license shall be effective until January 1, 2002.”

Subsec. (a)(2)(A). Pub. L. 108-447, §102(2)(A), substituted “paragraphs (5), (6), (7), and (8)” for “paragraphs (3), (4), (5), and (6)”.

Subsec. (a)(2)(B)(i). Pub. L. 108-447, §102(7), inserted at end “The limitation in this clause shall not apply to secondary transmissions under paragraph (3).”

Subsec. (a)(2)(C), (D). Pub. L. 108-447, §102(2)(B), added subpars. (C) and (D) and struck out heading and text of former subparagraph. (C). Text read as follows: “A satellite carrier that makes secondary transmissions of a primary transmission made by a network station pursuant to subparagraph (A) shall, 90 days after commencing such secondary transmissions, submit to the network that owns or is affiliated with the network station a list identifying (by name and street address, including county and zip code) all subscribers to which the satellite carrier makes secondary transmissions of that primary transmission. Thereafter, on the 15th of each month, the satellite carrier shall submit to the network a list identifying (by name and street address, including county and zip code) any persons who have been added or dropped as such subscribers since the last submission under this subparagraph. Such subscriber information submitted by a satellite carrier may be used only for purposes of monitoring compliance by the

satellite carrier with this subsection. The submission requirements of this subparagraph shall apply to a satellite carrier only if the network to whom the submissions are to be made places on file with the Register of Copyrights a document identifying the name and address of the person to whom such submissions are to be made. The Register shall maintain for public inspection a file of all such documents.”

Subsec. (a)(8) to (6). Pub. L. 108-447, §§102(5), (6), 103(1), added pars. (3) and (4) and redesignated former pars. (3) and (4) as (5) and (6), respectively. Former pars. (5) and (6) redesignated (7) and (8), respectively.

Subsec. (a)(7). Pub. L. 108-447, §102(5), redesignated par. (5) as (7). Former par. (7) redesignated (9).

Subsec. (a)(7)(A). Pub. L. 108-447, §103(6)(A), substituted “who is not eligible to receive the transmission under this section” for “who does not reside in an unserved household” in introductory provisions.

Subsec. (a)(7)(B). Pub. L. 108-447, §103(6)(B), substituted “who are not eligible to receive the transmission under this section” for “who do not reside in unserved households” in introductory provisions.

Subsec. (a)(7)(D). Pub. L. 108-447, §103(6)(C), substituted “is to a subscriber who is eligible to receive the secondary transmission under this section” for “is for private home viewing to an unserved household”.

Subsec. (a)(8). Pub. L. 108-447, §102(3), (5), redesignated par. (6) as (8) and struck out former par. (8) which related to transitional signal intensity measurement procedures.

Subsec. (a)(9) to (13). Pub. L. 108-447, §102(4), (5), redesignated pars. (7) and (9) to (12) as (9) and (10) to (13), respectively.

Subsec. (a)(14). Pub. L. 108-447, §103(2), added par. (14).

Subsec. (a)(15). Pub. L. 108-447, §104, added par. (15).

Subsec. (a)(16). Pub. L. 108-447, §111(a), added par. (16).

Subsec. (b)(1). Pub. L. 108-447, §103(4), inserted at end: “Notwithstanding the provisions of subparagraph (B), a satellite carrier whose secondary transmissions are subject to statutory licensing under paragraph (1) or (2) of subsection (a) shall have no royalty obligation for secondary transmissions to a subscriber under paragraph (3) of such subsection.”

Subsec. (b)(1)(A). Pub. L. 108-447, §107(a)(2), struck out “for private home viewing” after “to subscribers”.

Subsec. (b)(1)(B). Pub. L. 108-447, §103(3), added subpar. (B) and struck out former subpar. (B) which read as follows: “a royalty fee for that 6-month period, computed by—

“(i) multiplying the total number of subscribers receiving each secondary transmission of a superstation during each calendar month by 17.5 cents per subscriber in the case of superstations that as retransmitted by the satellite carrier include any program which, if delivered by any cable system in the United States, would be subject to the syndicated exclusivity rules of the Federal Communications Commission, and 14 cents per subscriber in the case of superstations that are syndex-proof as defined in section 258.2 of title 37, Code of Federal Regulations;

“(ii) multiplying the number of subscribers receiving each secondary transmission of a network station or the Public Broadcasting Service satellite feed during each calendar month by 6 cents; and

“(iii) adding together the totals computed under clauses (i) and (ii).”

Subsec. (b)(3). Pub. L. 108-447, §107(a)(2), struck out “for private home viewing” after “secondary transmission”.

Pub. L. 108-419, §5(g)(1), substituted “Copyright Royalty Judges” for “Librarian of Congress”.

Subsec. (b)(4)(A). Pub. L. 108-447, §107(a)(2), struck out “for private home viewing” after “secondary transmissions”.

Pub. L. 108-419, §5(g)(2)(A), substituted “Copyright Royalty Judges” for “Librarian of Congress” in two places.

Subsec. (b)(4)(B), (C). Pub. L. 108-419, §5(g)(2)(B), reenacted headings without change and amended text generally, substituting provisions relating to duties of

Copyright Royalty Judges concerning determination of royalty fee controversies and distribution of royalty fees for provisions relating to duties of Librarian of Congress relating to such determination and distribution.

Subsec. (c). Pub. L. 108-447, §103(5), amended heading and text of subsec. (c) generally. Prior to amendment, text related to adjustment, determination, arbitration, and reduction of royalty fees.

Pub. L. 108-419, §5(h), which directed amendment of subsec. (c) by substituting “Copyright Royalty Judges” for “Librarian of Congress” in par. (2)(B), “Copyright Royalty Judges shall prescribe as provided in section 803(b)(6)” for “Register of Copyrights shall prescribe” in par. (2)(C), “proceedings” for “arbitration proceedings” and for “arbitration proceeding” in par. (3)(A), “Copyright Royalty Judges” for “copyright arbitration royalty panel appointed under chapter 8” and “Copyright Royalty Judges shall base their determination” for “panel shall base its decision” in par. (3)(B), “determination under chapter 8” for “decision of arbitration panel or order of librarian” in heading of par. (3)(C), and “(i) is made by the Copyright Royalty Judges pursuant to this paragraph and becomes final, or” and “(ii) is made by the court on appeal under section 803(d)(3),” for cls. (i) and (ii), respectively, of par. (3)(C), was deemed never to have been enacted by Pub. L. 109-303, §4(g). See Removal of Inconsistent Provisions note below.

Subsec. (d)(1). Pub. L. 108-447, §107(a)(3), struck out “for private home viewing” after “individual subscribers” and inserted “in accordance with the provisions of this section” before the period at end.

Subsec. (d)(2)(A). Pub. L. 108-447, §105(1), substituted “a television station licensed by the Federal Communications Commission” for “a television broadcast station”.

Subsec. (d)(6). Pub. L. 108-447, §107(a)(4), inserted “pursuant to this section” before period at end.

Subsec. (d)(8). Pub. L. 108-447, §107(a)(5), substituted “or entity that” for “who”, struck out “for private home viewing” after “transmission service”, and inserted “in accordance with the provisions of this section” before period at end.

Subsec. (d)(9). Pub. L. 108-447, §105(2), amended heading and text of par. (9) generally. Prior to amendment, text read as follows: “The term ‘superstation’—

“(A) means a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier; and

“(B) except for purposes of computing the royalty fee, includes the Public Broadcasting Service satellite feed.”

Subsec. (d)(10)(B). Pub. L. 108-447, §105(3)(A), substituted “that meets the standards of subsection (a)(14) whether or not the waiver was granted before the date of the enactment of the Satellite Home Viewer Extension and Reauthorization Act of 2004” for “granted under regulations established under section 339(c)(2) of the Communications Act of 1934”.

Subsec. (d)(10)(D). Pub. L. 108-447, §105(3)(B), substituted ““(a)(12)” for ““(a)(11)”.

Subsec. (d)(11) to (13). Pub. L. 108-447, §105(4), added pars. (11) to (13) and struck out former pars. (11) and (12) which read as follows:

“(11) LOCAL MARKET.—The term ‘local market’ has the meaning given such term under section 122(j).

“(12) PUBLIC BROADCASTING SERVICE SATELLITE FEED.—The term ‘Public Broadcasting Service satellite feed’ means the national satellite feed distributed and designated for purposes of this section by the Public Broadcasting Service consisting of educational and informational programming intended for private home viewing, to which the Public Broadcasting Service holds national terrestrial broadcast rights.”

Subsec. (e). Pub. L. 108-447, §101(b), substituted “December 31, 2009” for “December 31, 2004”.

Subsec. (f). Pub. L. 108-447, §108, added subsec. (f).

2002—Subsec. (a)(1). Pub. L. 107-273, §13209(3)(B), amended Pub. L. 106-113, §1000(a)(9) [title I, §1011(b)(2)(A)]. See 1999 Amendment note below.

Pub. L. 107-273, §13209(3)(A), amended Pub. L. 106-113, §1000(a)(9) [title I, §1006(a)]. See 1999 Amendment note below.

Subsec. (a)(2)(A). Pub. L. 107-273, §13209(1)(A), made technical correction to directory language of Pub. L. 106-113, §1000(a)(9) [title I, §1007(2)]. See 1999 Amendment note below.

Subsec. (a)(6). Pub. L. 107-273, §13210(1), substituted “of a performance” for “of performance”.

Subsec. (a)(12). Pub. L. 107-273, §13209(1)(B), made technical correction to directory language of Pub. L. 106-113, §1000(a)(9) [title I, §1007(3)]. See 1999 Amendment note below.

Subsec. (b)(1)(A). Pub. L. 107-273, §13210(8), substituted “retransmitted” for “transmitted” and “retransmissions” for “transmissions”.

Subsec. (b)(1)(B)(ii). Pub. L. 107-273, §13209(2), made technical correction to directory language of Pub. L. 106-113, §1000(a)(9) [title I, §1006(b)]. See 1999 Amendment note below.

1999—Subsec. (a)(1). Pub. L. 106-113, §1000(a)(9) [title I, §1011(b)(2)(A)], as amended by Pub. L. 107-273, §13209(3)(B), substituted “performance or display of a work embodied in a primary transmission made by a superstation or by the Public Broadcasting Service satellite feed” for “primary transmission made by a superstation and embodying a performance or display of a work”.

Pub. L. 106-113, §1000(a)(9) [title I, §1007(1)], inserted “with regard to secondary transmissions the satellite carrier is in compliance with the rules, regulations, or authorizations of the Federal Communications Commission governing the carriage of television broadcast station signals,” after “satellite carrier to the public for private home viewing.”

Pub. L. 106-113, §1000(a)(9) [title I, §1006(a)], as amended by Pub. L. 107-273, §13209(3)(A), in heading substituted “Superstations and pbs satellite feed” for “Superstations” and in text inserted “In the case of the Public Broadcasting Service satellite feed, the statutory license shall be effective until January 1, 2002.” at end. Pub. L. 107-273, §13209(3)(A)(ii), which repealed Pub. L. 106-113, §1000(a)(9) [title I, §1006(a)(2)], was executed by striking out “or by the Public Broadcasting Service satellite feed” which had been inserted by section 1006(a)(2) after “of a primary transmission made by a superstation”, to reflect the probable intent of Congress.

Subsec. (a)(2)(A). Pub. L. 106-113, §1000(a)(9) [title I, §1011(b)(2)(A)], substituted “a performance or display of a work embodied in a primary transmission made by a network station” for “programming contained in a primary transmission made by a network station and embodying a performance or display of a work”.

Pub. L. 106-113, §1000(a)(9) [title I, §1007(2)], as amended by Pub. L. 107-273, §13209(1)(A), inserted “with regard to secondary transmissions the satellite carrier is in compliance with the rules, regulations, or authorizations of the Federal Communications Commission governing the carriage of television broadcast station signals,” after “satellite carrier to the public for private home viewing.”

Subsec. (a)(2)(B). Pub. L. 106-113, §1000(a)(9) [title I, §1005(a)(2)], reenacted heading without change and amended text generally. Prior to amendment, text read as follows: “The statutory license provided for in subparagraph (A) shall be limited to secondary transmissions to persons who reside in unserved households.”

Subsec. (a)(2)(C). Pub. L. 106-113, §1000(a)(9) [title I, §1011(c)], struck out “currently” after “all subscribers to which the satellite carrier” in first sentence.

Subsec. (a)(4). Pub. L. 106-113, §1000(a)(9) [title I, §1011(b)(2)(C)], inserted “a performance or display of a work embodied in” after “by a satellite carrier of” and struck out “and embodying a performance or display of a work” after “network station”.

Subsec. (a)(5)(E). Pub. L. 106-113, §1000(a)(9) [title I, §1005(b)], added subparagraph (E).

Subsec. (a)(6). Pub. L. 106-113, §1000(a)(9) [title I, §1011(b)(2)(D)], inserted “performance or display of a

work embodied in” after “by a satellite carrier of” and struck out “and embodying a performance or display of a work” after “network station”.

Subsec. (a)(8)(C)(ii). Pub. L. 106-44 substituted “within the network station’s” for “within the network’s station” in first sentence.

Subsec. (a)(11). Pub. L. 106-113, §1000(a)(9) [title I, §1005(d)], added par. (11).

Subsec. (a)(12). Pub. L. 106-113, §1000(a)(9) [title I, §1007(3)], as amended by Pub. L. 107-273, §13209(1)(B), added par. (12).

Subsec. (b)(1)(B)(ii). Pub. L. 106-113, §1000(a)(9) [title I, §1006(b)], as amended by Pub. L. 107-273, §13209(2), inserted “or the Public Broadcasting Service satellite feed” after “network station”.

Subsec. (c)(4). (5). Pub. L. 106-113, §1000(a)(9) [title I, §1004], added pars. (4) and (5).

Subsec. (d)(2). Pub. L. 106-113, §1000(a)(9) [title I, §1008(b)], substituted a semicolon for the period at end of subparagraph (B) and inserted concluding provisions.

Subsec. (d)(9). Pub. L. 106-113, §1000(a)(9) [title I, §1006(c)(1)], reenacted heading without change and amended text generally. Prior to amendment, text read as follows: “The term ‘superstation’ means a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier.”

Subsec. (d)(10). Pub. L. 106-113, §1000(a)(9) [title I, §1005(a)(1)], added par. (10) and struck out heading and text of former par. (10). Text read as follows: “The term ‘unserved household’, with respect to a particular television network, means a household that—

“(A) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network, and

“(B) has not, within 90 days before the date on which that household subscribes, either initially or on renewal, to receive secondary transmissions by a satellite carrier of a network station affiliated with that network, subscribed to a cable system that provides the signal of a primary network station affiliated with that network.”

Subsec. (d)(11). Pub. L. 106-113, §1000(a)(9) [title I, §1005(e)], reenacted heading without change and amended text generally. Prior to amendment, text read as follows: “The term ‘local market’ means the area encompassed within a network station’s predicted Grade B contour as that contour is defined by the Federal Communications Commission.”

Subsec. (d)(12). Pub. L. 106-113, §1000(a)(9) [title I, §1006(c)(2)], added par. (12).

Subsec. (e). Pub. L. 106-113, §1000(a)(9) [title I, §1005(c)], amended heading and text of subsec. (e) generally. Prior to amendment, text read as follows: “No provision of section 111 of this title or any other law (other than this section) shall be construed to contain any authorization, exemption, or license through which secondary transmissions by satellite carrier for private home viewing of programming contained in a primary transmission made by a superstation or a network station may be made without obtaining the consent of the copyright owner.”

1997—Subsec. (a)(5)(C). Pub. L. 105-80, §1(3), amended Pub. L. 103-369, §2(5)(A). See 1994 Amendment note below.

Subsec. (b)(1)(B)(i). Pub. L. 105-80, §1(1), amended Pub. L. 103-369, §2(3)(A). See 1994 Amendment note below.

Subsec. (c)(1). Pub. L. 105-80, §12(a)(8), which directed substitution of “unless” for “until unless” before “a royalty fee”, could not be executed because “until” did not appear subsequent to amendment by Pub. L. 103-369, §2(4)(A), as amended by Pub. L. 105-80, §1(2). See 1994 Amendment note below.

Pub. L. 105-80, §1(2), amended Pub. L. 103-369, §2(4)(A). See 1994 Amendment note below.

Subsec. (c)(2)(A), (D), (3)(A)–(C). Pub. L. 105-80, §1(2), amended Pub. L. 103-369, §2(4). See 1994 Amendment notes below.

1995—Subsec. (a)(1), (2)(A). Pub. L. 104-39 inserted “and section 114(d)” after “of this subsection”.

1994—Subsec. (a)(2)(C). Pub. L. 103-369, §2(1), struck out “90 days after the effective date of the Satellite Home Viewer Act of 1988, or” before “90 days after commencing”, “whichever is later,” before “submit to the network that owns”, and “, on or after the effective date of the Satellite Home Viewer Act of 1988,” after “Register of Copyrights”, and inserted “name and” after “identifying (by” in two places.

Subsec. (a)(5)(C). Pub. L. 103-369, §2(5)(A), as amended by Pub. L. 105-80, §1(3), substituted “November 16, 1988” for “the date of the enactment of the Satellite Home Viewer Act of 1988”.

Subsec. (a)(5)(D). Pub. L. 103-369, §2(2), added subparagraph (D).

Subsec. (a)(8) to (10). Pub. L. 103-369, §2(5)(B), added paragraphs (8) to (10).

Subsec. (b)(1)(B)(i). Pub. L. 103-369, §2(3)(A), as amended by Pub. L. 105-80, §1(1), substituted “17.5 cents per subscriber in the case of superstations that as retransmitted by the satellite carrier include any program which, if delivered by any cable system in the United States, would be subject to the syndicated exclusivity rules of the Federal Communications Commission, and 14 cents per subscriber in the case of superstations that are syndex-proof as defined in section 258.2 of title 37, Code of Federal Regulations” for “12 cents”.

Subsec. (b)(1)(B)(ii). Pub. L. 103-369, §2(3)(B), substituted “6 cents” for “3 cents”.

Subsec. (c)(1). Pub. L. 103-369, §2(4)(A), as amended by Pub. L. 105-80, §1(2), struck out “until December 31, 1992,” before “unless a royalty fee”, substituted “paragraph (2) or (3) of this subsection” for “paragraph (2), (3), or (4) of this subsection”, and struck out at end “After that date, the fee shall be determined either in accordance with the voluntary negotiation procedure specified in paragraph (2) or in accordance with the compulsory arbitration procedure specified in paragraphs (3) and (4).”

Subsec. (c)(2)(A). Pub. L. 103-369, §2(4)(B)(i), as amended by Pub. L. 105-80, §1(2), substituted “July 1, 1996” for “July 1, 1991”.

Subsec. (c)(2)(D). Pub. L. 103-369, §2(4)(B)(ii), as amended by Pub. L. 105-80, §1(2), substituted “December 31, 1999, or in accordance with the terms of the agreement, whichever is later” for “December 31, 1994”.

Subsec. (c)(3)(A). Pub. L. 103-369, §2(4)(C)(i), as amended by Pub. L. 105-80, §1(2), substituted “January 1, 1997” for “December 31, 1991”.

Subsec. (c)(3)(B). Pub. L. 103-369, §2(4)(C)(ii), as amended by Pub. L. 105-80, §1(2), amended subparagraph (B) generally. Prior to amendment, subparagraph (B) read as follows:

“(B) FACTORS FOR DETERMINING ROYALTY FEES.—In determining royalty fees under this paragraph, the copyright arbitration royalty panel appointed under chapter 8 shall consider the approximate average cost to a cable system for the right to secondarily transmit to the public a primary transmission made by a broadcast station, the fee established under any voluntary agreement filed with the Copyright Office in accordance with paragraph (2), and the last fee proposed by the parties, before proceedings under this paragraph, for the secondary transmission of superstations or network stations for private home viewing. The fee shall also be calculated to achieve the following objectives:

“(i) To maximize the availability of creative works to the public.

“(ii) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

“(iii) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

“(iv) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.”

Subsec. (o)(3)(C). Pub. L. 103-369, §2(4)(C)(iii), as amended by Pub. L. 105-80, §1(2), inserted before period at end “or July 1, 1997, whichever is later”.

Subsec. (d)(2). Pub. L. 103-369, §2(6)(A), amended paragraph (2) generally. Prior to amendment, paragraph (2) read as follows:

“(2) NETWORK STATION.—The term ‘network station’ has the meaning given that term in section 111(f) of this title, and includes any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station.”

Subsec. (d)(6). Pub. L. 103-369, §2(6)(B), inserted “and operates in the Fixed-Satellite Service under part 25 of title 47 of the Code of Federal Regulations or the Direct Broadcast Satellite Service under part 100 of title 47 of the Code of Federal Regulations” after “Federal Communications Commission”.

Subsec. (d)(11). Pub. L. 103-369, §2(6)(C), added paragraph (11).

1993—Subsec. (b)(1). Pub. L. 103-198, §5(1)(A), struck out “, after consultation with the Copyright Royalty Tribunal,” in introductory provisions after “Register shall” and in subparagraph (A) after “Copyrights may”.

Subsec. (b)(2), (3). Pub. L. 103-198, §5(1)(B), (C), substituted “Librarian of Congress” for “Copyright Royalty Tribunal”.

Subsec. (b)(4). Pub. L. 103-198, §5(1)(D), in subparagraph (A), substituted “Librarian of Congress” for “Copyright Royalty Tribunal” after “claim with the” and for “Tribunal” after “requirements that the”, in subparagraph (B), substituted “Librarian of Congress” for “Copyright Royalty Tribunal” before “shall determine” and for “Tribunal” wherever else appearing, and substituted “convene a copyright arbitration royalty panel” for “conduct a proceeding”, and in subparagraph (C), substituted “Librarian of Congress” for “Copyright Royalty Tribunal”.

Subsec. (c). Pub. L. 103-198, §5(2)(A), substituted “Adjustment” for “Determination” in heading.

Subsec. (c)(2). Pub. L. 103-198, §5(2)(B), substituted “Librarian of Congress” for “Copyright Royalty Tribunal” in subpars. (A) and (B).

Subsec. (c)(3)(A). Pub. L. 103-198, §5(2)(C)(i), substituted “Librarian of Congress” for “Copyright Royalty Tribunal” and substituted last sentence for former last sentence which read as follows: “Such notice shall include the names and qualifications of potential arbitrators chosen by the Tribunal from a list of available arbitrators obtained from the American Arbitration Association or such similar organization as the Tribunal shall select.”

Subsec. (c)(3)(B). Pub. L. 103-198, §5(2)(C)(ii), (iii), redesignated subparagraph (D) as (B), substituted “copyright arbitration royalty panel appointed under chapter 8” for “Arbitration Panel” in introductory provisions, and struck out former subparagraph (B) which provided for the selection of an Arbitration Panel.

Subsec. (c)(3)(C). Pub. L. 103-198, §5(2)(C)(ii), (v), redesigned subparagraph (G) as (C), amended subparagraph (G) generally, substituting provisions relating to period during which decision of arbitration panel or order of Librarian of Congress becomes effective for provisions relating to period during which decision of Arbitration Panel or order of Copyright Royalty Tribunal became effective, and struck out former subparagraph (C) which related to proceedings in arbitration.

Subsec. (c)(3)(D). Pub. L. 103-198, §5(2)(C)(vi), redesignated subparagraph (H) as (D) and substituted “referred to in subparagraph (C)” for “adopted or ordered under subparagraph (F)”. Former subparagraph (D) redesignated (B).

Subsec. (c)(3)(E) to (H). Pub. L. 103-198, §5(2)(C)(iv)–(vi)(I), struck out subparagraph (E) which required the Arbitration Panel to report to the Copyright Royalty Tribunal not later than 60 days after publication of notice initiating an arbitration proceeding, struck out subparagraph (F) which required action by the

Tribunal within 60 days after receiving the report by the Panel, and redesignated subpars. (G) and (H) as (C) and (D), respectively.

Subsec. (c)(4). Pub. L. 103–198, §5(2)(D), struck out par. (4) which established procedures for judicial review of decisions of the Copyright Royalty Tribunal.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–175 effective Feb. 27, 2010, see section 307(a) of Pub. L. 111–175, set out as a note under section 111 of this title.

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109–303 effective as if included in the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. 108–419, see section 6 of Pub. L. 109–303, set out as a note under section 111 of this title.

EFFECTIVE DATE OF 2004 AMENDMENT

Amendment by Pub. L. 108–419 effective 6 months after Nov. 30, 2004, subject to transition provisions, see section 6 of Pub. L. 108–419, set out as an Effective Date; Transition Provisions note under section 801 of this title.

EFFECTIVE DATE OF 1999 AMENDMENT

Amendment by section 1000(a)(9) [title I, §§1004, 1006] of Pub. L. 106–113 effective July 1, 1999, and amendment by section 1000(a)(9) [title I, §§1005, 1007, 1008(b), 1011(b)(2), (c)] of Pub. L. 106–113 effective Nov. 29, 1999, see section 1000(a)(9) [title I, §1012] of Pub. L. 106–113, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1997 AMENDMENT

Pub. L. 105–80, §13, Nov. 13, 1997, 111 Stat. 1536, provided that:

“(a) IN GENERAL.—Except as provided in subsections (b) and (c), the amendments made by this Act [amending this section, sections 101, 104A, 108 to 110, 114 to 116, 303, 304, 405, 407, 411, 504, 509, 601, 708, 801 to 803, 909, 910, 1006, and 1007 of this title, and section 2319 of Title 18, Crimes and Criminal Procedure, and amending provisions set out as a note under section 914 of this title] shall take effect on the date of the enactment of this Act [Nov. 13, 1997].

“(b) SATELLITE HOME VIEWER ACT.—The amendments made by section 1 [amending this section] shall be effective as if enacted as part of the Satellite Home Viewer Act of 1994 (Public Law 103–369).

“(c) TECHNICAL AMENDMENT.—The amendment made by section 12(b)(1) [amending provisions set out as a note under section 914 of this title] shall be effective as if enacted on November 9, 1987.”

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–39 effective 3 months after Nov. 1, 1995, see section 6 of Pub. L. 104–39, set out as a note under section 101 of this title.

EFFECTIVE AND TERMINATION DATES OF 1994 AMENDMENT

Pub. L. 103–369, §6, Oct. 18, 1994, 108 Stat. 3481, provided that:

“(a) IN GENERAL.—Except as provided in subsections (b) and (d), this Act [amending this section and section 111 of this title, enacting provisions set out as notes under this section and section 101 of this title, and repealing provisions set out as a note under this section] and the amendments made by this Act take effect on the date of the enactment of this Act [Oct. 18, 1994].

“(b) BURDEN OF PROOF PROVISIONS.—The provisions of section 119(a)(5)(D) of title 17, United States Code (as added by section 2(2) of this Act) relating to the burden of proof of satellite carriers, shall take effect on January 1, 1997, with respect to civil actions relating to the eligibility of subscribers who subscribed to service as

an unserved household before the date of the enactment of this Act.

“(c) TRANSITIONAL SIGNAL INTENSITY MEASUREMENT PROCEDURES.—The provisions of [former] section 119(a)(8) of title 17, United States Code (as added by section 2(5) of this Act), relating to transitional signal intensity measurements, shall cease to be effective on December 31, 1996.

“(d) LOCAL SERVICE AREA OF A PRIMARY TRANSMITTER.—The amendment made by section 3(b) [amending section 111 of this title], relating to the definition of the local service area of a primary transmitter, shall take effect on July 1, 1994.”

EFFECTIVE DATE

Pub. L. 100–667, title II, §206, Nov. 16, 1988, 102 Stat. 3960, provided that: “This title and the amendments made by this title [enacting this section and sections 612 and 613 of Title 47, Telecommunications, amending sections 111, 501, 801, and 804 of this title and section 605 of Title 47, and enacting provisions set out as notes under this section and section 101 of this title] take effect on January 1, 1989, except that the authority of the Register of Copyrights to issue regulations pursuant to section 119(b)(1) of title 17, United States Code, as added by section 202 of this Act, takes effect on the date of the enactment of this Act [Nov. 16, 1988].”

Pub. L. 100–667, title II, §207, Nov. 16, 1988, 102 Stat. 3960, provided that this title and the amendments made by this title (other than the amendments made by section 205 [amending section 605 of Title 47]) cease to be effective on Dec. 31, 1994, prior to repeal by Pub. L. 103–369, §4(b), Oct. 18, 1994, 108 Stat. 3481.

TERMINATION OF SECTION

Pub. L. 111–175, title I, §107(a), May 27, 2010, 124 Stat. 1245, which provided that this section would cease to be effective on Dec. 31, 2014, was repealed by Pub. L. 113–200, title II, §202(b), Dec. 4, 2014, 128 Stat. 2066.

Pub. L. 111–118, div. B, §1003(a)(2)(A), Dec. 19, 2009, 123 Stat. 3469, as amended by Pub. L. 111–144, §10(a)(2), Mar. 2, 2010, 124 Stat. 47; Pub. L. 111–151, §2(a)(2), Mar. 26, 2010, 124 Stat. 1027; Pub. L. 111–157, §9(a)(2), Apr. 15, 2010, 124 Stat. 1119, which provided that this section would cease to be effective on May 31, 2010, was repealed by Pub. L. 111–175, title I, §107(b), May 27, 2010, 124 Stat. 1245.

Pub. L. 103–369, §4(a), Oct. 18, 1994, 108 Stat. 3481, as amended by Pub. L. 106–113, div. B, §1000(a)(9) [title I, §1003], Nov. 29, 1999, 113 Stat. 1536, 1501A–527; Pub. L. 108–447, div. J, title IX [title I, §101(a)], Dec. 8, 2004, 118 Stat. 3394, which provided that this section would cease to be effective on Dec. 31, 2009, was repealed by Pub. L. 111–118, div. B, §1003(a)(2)(B), Dec. 19, 2009, 123 Stat. 3469.

PREVIOUSLY COVERED SUBSCRIBERS UNDER THE STELA REAUTHORIZATION ACT OF 2014

Pub. L. 116–94, div. P, title XI, §1102(b), Dec. 20, 2019, 133 Stat. 3203, provided that:

“(1) IN GENERAL.—A subscriber of a satellite carrier who receives the secondary transmission of a network station under the statutory license in section 119 of title 17, United States Code, as in effect on the day before the date of the enactment of this Act [Dec. 20, 2019], and to whom subsection (a)(2)(B) of such section, as amended by subsection (a), does not apply, shall continue to be eligible to receive that secondary transmission from such carrier under such license, and at the royalty rate established for such license by the Copyright Royalty Board or voluntary agreement, as applicable, until the date that is the earlier of—

“(A) May 31, 2020; or

“(B) the date on which such carrier provides local-into-local service to all DMAs.

“(2) DEFINITIONS.—In this subsection, the terms ‘satellite carrier’, ‘subscriber’, ‘secondary transmission’, ‘network station’, and ‘local-into-local service to all DMAs’ have the meaning given those terms in section 119 of title 17, United States Code.”

REMOVAL OF INCONSISTENT PROVISIONS

Pub. L. 109–303, §4(g), Oct. 6, 2006, 120 Stat. 1483, provided that: “The amendments contained in subsection (h) of section 5 of the Copyright Royalty and Distribution Reform Act of 2004 [Pub. L. 108–419, amending this section] shall be deemed never to have been enacted.”

EFFECT ON CERTAIN PROCEEDINGS

Pub. L. 108–447, div. J, title IX [title I, §106], Dec. 8, 2004, 118 Stat. 3406, provided that: “Nothing in this title [see Short Title of 2004 Amendment note set out under section 101 of this title] shall modify any remedy imposed on a party that is required by the judgment of a court in any action that was brought before May 1, 2004, against that party for a violation of section 119 of title 17, United States Code.”

APPLICABILITY OF 1994 AMENDMENT

Pub. L. 103–369, §5, Oct. 14, 1994, 108 Stat. 3481, provided that: “The amendments made by this section apply only to section 119 of title 17, United States Code.”

§ 120. Scope of exclusive rights in architectural works

(a) PICTORIAL REPRESENTATIONS PERMITTED.—The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.

(b) ALTERATIONS TO AND DESTRUCTION OF BUILDINGS.—Notwithstanding the provisions of section 106(2), the owners of a building embodying an architectural work may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building.

(Added Pub. L. 101–650, title VII, §704(a), Dec. 1, 1990, 104 Stat. 5133.)

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE

Section applicable to any architectural work created on or after Dec. 1, 1990, and any architectural work, that, on Dec. 1, 1990, is unconstructed and embodied in unpublished plans or drawings, except that protection for such architectural work under this title terminates on Dec. 31, 2002, unless the work is constructed by that date, see section 706 of Pub. L. 101–650, set out as an Effective Date of 1990 Amendment note under section 101 of this title.

§ 121. Limitations on exclusive rights: Reproduction for blind or other people with disabilities

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for an authorized entity to reproduce or to distribute in the United States copies or phonorecords of a previously published literary work or of a previously published musical work that has been fixed in the form of text or notation if such copies or phonorecords are reproduced or distributed in accessible formats exclusively for use by eligible persons.

(b)(1) Copies or phonorecords to which this section applies shall—

(A) not be reproduced or distributed in the United States in a format other than an accessible format exclusively for use by eligible persons;

(B) bear a notice that any further reproduction or distribution in a format other than an accessible format is an infringement; and

(C) include a copyright notice identifying the copyright owner and the date of the original publication.

(2) The provisions of this subsection shall not apply to standardized, secure, or norm-referenced tests and related testing material, or to computer programs, except the portions thereof that are in conventional human language (including descriptions of pictorial works) and displayed to users in the ordinary course of using the computer programs.

(c) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a publisher of print instructional materials for use in elementary or secondary schools to create and distribute to the National Instructional Materials Access Center copies of the electronic files described in sections 612(a)(23)(C), 613(a)(6), and section 674(e) of the Individuals with Disabilities Education Act that contain the contents of print instructional materials using the National Instructional Material Accessibility Standard (as defined in section 674(e)(3) of that Act), if—

(1) the inclusion of the contents of such print instructional materials is required by any State educational agency or local educational agency;

(2) the publisher had the right to publish such print instructional materials in print formats; and

(3) such copies are used solely for reproduction or distribution of the contents of such print instructional materials in accessible formats.

(d) For purposes of this section, the term—

(1) “accessible format” means an alternative manner or form that gives an eligible person access to the work when the copy or phonorecord in the accessible format is used exclusively by the eligible person to permit him or her to have access as feasibly and comfortably as a person without such disability as described in paragraph (3);

(2) “authorized entity” means a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities;

(3) “eligible person” means an individual who, regardless of any other disability—

(A) is blind;

(B) has a visual impairment or perceptual or reading disability that cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or

(C) is otherwise unable, through physical disability, to hold or manipulate a book or

to focus or move the eyes to the extent that would be normally acceptable for reading; and

(4) “print instructional materials” has the meaning given under section 674(e)(3)(C) of the Individuals with Disabilities Education Act.

(Added Pub. L. 104-197, title III, §316(a), Sept. 16, 1996, 110 Stat. 2416; amended Pub. L. 106-379, §3(b), Oct. 27, 2000, 114 Stat. 1445; Pub. L. 107-273, div. C, title III, §13210(3)(A), Nov. 2, 2002, 116 Stat. 1909; Pub. L. 108-446, title III, §306, Dec. 3, 2004, 118 Stat. 2807; Pub. L. 115-261, §2(a)(1), Oct. 9, 2018, 132 Stat. 3667.)

Editorial Notes

REFERENCES IN TEXT

Sections 612, 613, and 674 of the Individuals with Disabilities Education Act, referred to in subsecs. (c) and (d)(4), are classified to sections 1412, 1413, and 1474, respectively, of Title 20, Education.

AMENDMENTS

2018—Subsec. (a). Pub. L. 115-261, §2(a)(1)(A), inserted “in the United States” after “distribute” and “or of a previously published musical work that has been fixed in the form of text or notation” after “literary work”, struck out ““nondramatic” after “previously published”, and substituted “accessible formats” for “specialized formats” and “eligible persons” for “blind or other persons with disabilities”.

Subsec. (b)(1)(A). Pub. L. 115-261, §2(a)(1)(B)(i), inserted “in the United States” after “distributed” and substituted “an accessible format” for “a specialized format” and “eligible persons” for “blind or other persons with disabilities”.

Subsec. (b)(1)(B). Pub. L. 115-261, §2(a)(1)(B)(ii), substituted “an accessible format” for “a specialized format”.

Subsec. (c)(3). Pub. L. 115-261, §2(a)(1)(C), substituted “accessible formats” for “specialized formats”.

Subsec. (d). Pub. L. 115-261, §2(a)(1)(D), added pars. (1) and (3), redesignated former pars. (1) and (3) as (2) and (4), respectively, substituted a period for “; and” at end of par. (4), and struck out former pars. (2) and (4) which defined “blind or other persons with disabilities” and “specialized formats”, respectively.

2004—Subsec. (e). Pub. L. 108-446, §306(2), added subsec. (c). Former subsec. (c) redesignated (d).

Subsec. (d). Pub. L. 108-446, §306(1), redesignated subsec. (c) as (d).

Subsec. (d)(3), (4). Pub. L. 108-446, §306(3), added pars. (3) and (4) and struck out former par. (3) which read as follows: “‘specialized formats’ means braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities.”

2002—Pub. L. 107-273 substituted “Reproduction” for “reproduction” in section catchline.

2000—Subsec. (a). Pub. L. 106-379 substituted “section 106” for “sections 106 and 710”.

§ 121A. Limitations on exclusive rights: reproduction for blind or other people with disabilities in Marrakesh Treaty countries

(a) Notwithstanding the provisions of sections 106 and 602, it is not an infringement of copyright for an authorized entity, acting pursuant to this section, to export copies or phonorecords of a previously published literary work or of a previously published musical work that has been fixed in the form of text or notation in accessible formats to another country when the exportation is made either to—

(1) an authorized entity located in a country that is a Party to the Marrakesh Treaty; or

(2) an eligible person in a country that is a Party to the Marrakesh Treaty,

if prior to the exportation of such copies or phonorecords, the authorized entity engaged in the exportation did not know or have reasonable grounds to know that the copies or phonorecords would be used other than by eligible persons.

(b) Notwithstanding the provisions of sections 106 and 602, it is not an infringement of copyright for an authorized entity or an eligible person, or someone acting on behalf of an eligible person, acting pursuant to this section, to import copies or phonorecords of a previously published literary work or of a previously published musical work that has been fixed in the form of text or notation in accessible formats.

(c) In conducting activities under subsection (a) or (b), an authorized entity shall establish and follow its own practices, in keeping with its particular circumstances, to—

(1) establish that the persons the authorized entity serves are eligible persons;

(2) limit to eligible persons and authorized entities the distribution of accessible format copies by the authorized entity;

(3) discourage the reproduction and distribution of unauthorized copies;

(4) maintain due care in, and records of, the handling of copies of works by the authorized entity, while respecting the privacy of eligible persons on an equal basis with others; and

(5) facilitate effective cross-border exchange of accessible format copies by making publicly available—

(A) the titles of works for which the authorized entity has accessible format copies or phonorecords and the specific accessible formats in which they are available; and

(B) information on the policies, practices, and authorized entity partners of the authorized entity for the cross-border exchange of accessible format copies.

(d) Nothing in this section shall be construed to establish—

(1) a cause of action under this title; or

(2) a basis for regulation by any Federal agency.

(e) Nothing in this section shall be construed to limit the ability to engage in any activity otherwise permitted under this title.

(f) For purposes of this section—

(1) the terms “accessible format”, “authorized entity”, and “eligible person” have the meanings given those terms in section 121; and

(2) the term “Marrakesh Treaty” means the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities concluded at Marrakesh, Morocco, on June 28, 2013.

(Added Pub. L. 115-261, §2(a)(2), Oct. 9, 2018, 132 Stat. 3668.)

§ 122. Limitations on exclusive rights: Secondary transmissions of local television programming by satellite

(a) SECONDARY TRANSMISSIONS INTO LOCAL MARKETS.—

(1) SECONDARY TRANSMISSIONS OF TELEVISION BROADCAST STATIONS WITHIN A LOCAL MARKET.—

A secondary transmission of a performance or display of a work embodied in a primary transmission of a television broadcast station into the station's local market shall be subject to statutory licensing under this section if—

(A) the secondary transmission is made by a satellite carrier to the public;

(B) with regard to secondary transmissions, the satellite carrier is in compliance with the rules, regulations, or authorizations of the Federal Communications Commission governing the carriage of television broadcast station signals; and

(C) the satellite carrier makes a direct or indirect charge for the secondary transmission to—

(i) each subscriber receiving the secondary transmission; or

(ii) a distributor that has contracted with the satellite carrier for direct or indirect delivery of the secondary transmission to the public.

(2) SIGNIFICANTLY VIEWED STATIONS.—

(A) IN GENERAL.—A secondary transmission of a performance or display of a work embodied in a primary transmission of a television broadcast station to subscribers who receive secondary transmissions of primary transmissions under paragraph (1) shall be subject to statutory licensing under this paragraph if the secondary transmission is of the primary transmission of a network station or a non-network station to a subscriber who resides outside the station's local market but within a community in which the signal has been determined by the Federal Communications Commission to be significantly viewed in such community, pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, applicable to determining with respect to a cable system whether signals are significantly viewed in a community.

(B) WAIVER.—A subscriber who is denied the secondary transmission of the primary transmission of a network station or a non-network station under subparagraph (A) may request a waiver from such denial by submitting a request, through the subscriber's satellite carrier, to the network station or non-network station in the local market affiliated with the same network or non-network where the subscriber is located. The network station or non-network station shall accept or reject the subscriber's request for a waiver within 30 days after receipt of the request. If the network station or non-network station fails to accept or reject the subscriber's request for a waiver within that 30-day period, that network station or non-network station shall be deemed to agree to the waiver request.

(3) SECONDARY TRANSMISSION OF LOW POWER PROGRAMMING.—

(A) IN GENERAL.—Subject to subparagraphs

(B) and (C), a secondary transmission of a performance or display of a work embodied in a primary transmission of a television

broadcast station to subscribers who receive secondary transmissions of primary transmissions under paragraph (1) shall be subject to statutory licensing under this paragraph if the secondary transmission is of the primary transmission of a television broadcast station that is licensed as a low power television station, to a subscriber who resides within the same designated market area as the station that originates the transmission.

(B) NO APPLICABILITY TO REPEATERS AND TRANSLATORS.—Secondary transmissions provided for in subparagraph (A) shall not apply to any low power television station that retransmits the programs and signals of another television station for more than 2 hours each day.

(C) NO IMPACT ON OTHER SECONDARY TRANSMISSIONS OBLIGATIONS.—A satellite carrier that makes secondary transmissions of a primary transmission of a low power television station under a statutory license provided under this section is not required, by reason of such secondary transmissions, to make any other secondary transmissions.

(4) SPECIAL EXCEPTIONS.—A secondary transmission of a performance or display of a work embodied in a primary transmission of a television broadcast station to subscribers who receive secondary transmissions of primary transmissions under paragraph (1) shall, if the secondary transmission is made by a satellite carrier that complies with the requirements of paragraph (1), be subject to statutory licensing under this paragraph as follows:

(A) STATES WITH SINGLE FULL-POWER NETWORK STATION.—In a State in which there is licensed by the Federal Communications Commission a single full-power station that was a network station on January 1, 1995, the statutory license provided for in this paragraph shall apply to the secondary transmission by a satellite carrier of the primary transmission of that station to any subscriber in a community that is located within that State and that is not within the first 50 television markets as listed in the regulations of the Commission as in effect on such date (47 C.F.R. 76.51).

(B) STATES WITH ALL NETWORK STATIONS AND NON-NETWORK STATIONS IN SAME LOCAL MARKET.—In a State in which all network stations and non-network stations licensed by the Federal Communications Commission within that State as of January 1, 1995, are assigned to the same local market and that local market does not encompass all counties of that State, the statutory license provided under this paragraph shall apply to the secondary transmission by a satellite carrier of the primary transmissions of such station to all subscribers in the State who reside in a local market that is within the first 50 major television markets as listed in the regulations of the Commission as in effect on such date (section 76.51 of title 47, Code of Federal Regulations).

(C) ADDITIONAL STATIONS.—In the case of that State in which are located 4 counties that—

(i) on January 1, 2004, were in local markets principally comprised of counties in another State, and

(ii) had a combined total of 41,340 television households, according to the U.S. Television Household Estimates by Nielsen Media Research for 2004,

the statutory license provided under this paragraph shall apply to secondary transmissions by a satellite carrier to subscribers in any such county of the primary transmissions of any network station located in that State, if the satellite carrier was making such secondary transmissions to any subscribers in that county on January 1, 2004.

(D) CERTAIN ADDITIONAL STATIONS.—If 2 adjacent counties in a single State are in a local market comprised principally of counties located in another State, the statutory license provided for in this paragraph shall apply to the secondary transmission by a satellite carrier to subscribers in those 2 counties of the primary transmissions of any network station located in the capital of the State in which such 2 counties are located, if—

(i) the 2 counties are located in a local market that is in the top 100 markets for the year 2003 according to Nielsen Media Research; and

(ii) the total number of television households in the 2 counties combined did not exceed 10,000 for the year 2003 according to Nielsen Media Research.

(E) NETWORKS OF NONCOMMERCIAL EDUCATIONAL BROADCAST STATIONS.—In the case of a system of three or more noncommercial educational broadcast stations licensed to a single State, public agency, or political, educational, or special purpose subdivision of a State, the statutory license provided for in this paragraph shall apply to the secondary transmission of the primary transmission of such system to any subscriber in any county or county equivalent within such State, if such subscriber is located in a designated market area that is not otherwise eligible to receive the secondary transmission of the primary transmission of a noncommercial educational broadcast station located within the State pursuant to paragraph (1).

(5) APPLICABILITY OF ROYALTY RATES AND PROCEDURES.—The royalty rates and procedures under section 119(b) shall apply to the secondary transmissions to which the statutory license under paragraph (4) applies.

(b) REPORTING REQUIREMENTS.—

(1) INITIAL LISTS.—A satellite carrier that makes secondary transmissions of a primary transmission made by a network station under subsection (a) shall, within 90 days after commencing such secondary transmissions, submit to the network that owns or is affiliated with the network station—

(A) a list identifying (by name in alphabetical order and street address, including county and 9-digit zip code) all subscribers to which the satellite carrier makes sec-

ondary transmissions of that primary transmission under subsection (a); and

(B) a separate list, aggregated by designated market area (by name and address, including street or rural route number, city, State, and 9-digit zip code), which shall indicate those subscribers being served pursuant to paragraph (2) of subsection (a).

(2) SUBSEQUENT LISTS.—After the list is submitted under paragraph (1), the satellite carrier shall, on the 15th of each month, submit to the network—

(A) a list identifying (by name in alphabetical order and street address, including county and 9-digit zip code) any subscribers who have been added or dropped as subscribers since the last submission under this subsection; and

(B) a separate list, aggregated by designated market area (by name and street address, including street or rural route number, city, State, and 9-digit zip code), identifying those subscribers whose service pursuant to paragraph (2) of subsection (a) has been added or dropped since the last submission under this subsection.

(3) USE OF SUBSCRIBER INFORMATION.—Subscriber information submitted by a satellite carrier under this subsection may be used only for the purposes of monitoring compliance by the satellite carrier with this section.

(4) REQUIREMENTS OF NETWORKS.—The submission requirements of this subsection shall apply to a satellite carrier only if the network to which the submissions are to be made places on file with the Register of Copyrights a document identifying the name and address of the person to whom such submissions are to be made. The Register of Copyrights shall maintain for public inspection a file of all such documents.

(c) NO ROYALTY FEE REQUIRED FOR CERTAIN SECONDARY TRANSMISSIONS.—A satellite carrier whose secondary transmissions are subject to statutory licensing under paragraphs (1), (2), and (3) of subsection (a) shall have no royalty obligation for such secondary transmissions.

(d) NONCOMPLIANCE WITH REPORTING AND REGULATORY REQUIREMENTS.—Notwithstanding subsection (a), the willful or repeated secondary transmission to the public by a satellite carrier into the local market of a television broadcast station of a primary transmission embodying a performance or display of a work made by that television broadcast station is actionable as an act of infringement under section 501, and is fully subject to the remedies provided under sections 502 through 506, if the satellite carrier has not complied with the reporting requirements of subsection (b) or with the rules, regulations, and authorizations of the Federal Communications Commission concerning the carriage of television broadcast signals.

(e) WILLFUL ALTERATIONS.—Notwithstanding subsection (a), the secondary transmission to the public by a satellite carrier into the local market of a television broadcast station of a performance or display of a work embodied in a primary transmission made by that television broadcast station is actionable as an act of in-

fringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcement transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the satellite carrier through changes, deletions, or additions, or is combined with programming from any other broadcast signal.

(f) VIOLATION OF TERRITORIAL RESTRICTIONS ON STATUTORY LICENSE FOR TELEVISION BROADCAST STATIONS.—

(1) INDIVIDUAL VIOLATIONS.—The willful or repeated secondary transmission to the public by a satellite carrier of a primary transmission embodying a performance or display of a work made by a television broadcast station to a subscriber who does not reside in that station's local market, and is not subject to statutory licensing under section 119, subject to statutory licensing by reason of paragraph (2)(A), (3), or (4) of subsection (a), or subject to a private licensing agreement, is actionable as an act of infringement under section 501 and is fully subject to the remedies provided by sections 502 through 506, except that—

(A) no damages shall be awarded for such act of infringement if the satellite carrier took corrective action by promptly withdrawing service from the ineligible subscriber; and

(B) any statutory damages shall not exceed \$250 for such subscriber for each month during which the violation occurred.

(2) PATTERN OF VIOLATIONS.—If a satellite carrier engages in a willful or repeated pattern or practice of secondarily transmitting to the public a primary transmission embodying a performance or display of a work made by a television broadcast station to subscribers who do not reside in that station's local market, and are not subject to statutory licensing under section 119, subject to statutory licensing by reason of paragraph (2)(A), (3), or (4) of subsection (a), or subject to a private licensing agreement, then in addition to the remedies under paragraph (1)—

(A) if the pattern or practice has been carried out on a substantially nationwide basis, the court—

(i) shall order a permanent injunction barring the secondary transmission by the satellite carrier of the primary transmissions of that television broadcast station (and if such television broadcast station is a network station, all other television broadcast stations affiliated with such network); and

(ii) may order statutory damages not exceeding \$2,500,000 for each 6-month period during which the pattern or practice was carried out; and

(B) if the pattern or practice has been carried out on a local or regional basis with respect to more than one television broadcast station, the court—

(i) shall order a permanent injunction barring the secondary transmission in that locality or region by the satellite carrier of the primary transmissions of any television broadcast station; and

(ii) may order statutory damages not exceeding \$2,500,000 for each 6-month period during which the pattern or practice was carried out.

(g) BURDEN OF PROOF.—In any action brought under subsection (f), the satellite carrier shall have the burden of proving that its secondary transmission of a primary transmission by a television broadcast station is made only to subscribers located within that station's local market or subscribers being served in compliance with section 119, paragraph (2)(A), (3), or (4) of subsection (a), or a private licensing agreement.

(h) GEOGRAPHIC LIMITATIONS ON SECONDARY TRANSMISSIONS.—The statutory license created by this section shall apply to secondary transmissions to locations in the United States.

(i) EXCLUSIVITY WITH RESPECT TO SECONDARY TRANSMISSIONS OF BROADCAST STATIONS BY SATELLITE TO MEMBERS OF THE PUBLIC.—No provision of section 111 or any other law (other than this section and section 119) shall be construed to contain any authorization, exemption, or license through which secondary transmissions by satellite carriers of programming contained in a primary transmission made by a television broadcast station may be made without obtaining the consent of the copyright owner.

(j) DEFINITIONS.—In this section—

(1) DISTRIBUTOR.—The term “distributor” means an entity that contracts to distribute secondary transmissions from a satellite carrier and, either as a single channel or in a package with other programming, provides the secondary transmission either directly to individual subscribers or indirectly through other program distribution entities.

(2) LOCAL MARKET.—

(A) IN GENERAL.—The term “local market”, in the case of both commercial and noncommercial television broadcast stations, means the designated market area in which a station is located, and—

(i) in the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area are within the same local market; and

(ii) in the case of a noncommercial educational television broadcast station, the market includes any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station.

(B) COUNTY OF LICENSE.—In addition to the area described in subparagraph (A), a station's local market includes the county in which the station's community of license is located.

(C) DESIGNATED MARKET AREA.—For purposes of subparagraph (A), the term “designated market area” means a designated market area, as determined by Nielsen

Media Research and published in the 1999–2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates or any successor publication.

(D) CERTAIN AREAS OUTSIDE OF ANY DESIGNATED MARKET AREA.—Any census area, borough, or other area in the State of Alaska that is outside of a designated market area, as determined by Nielsen Media Research, shall be deemed to be part of one of the local markets in the State of Alaska. A satellite carrier may determine which local market in the State of Alaska will be deemed to be the relevant local market in connection with each subscriber in such census area, borough, or other area.

(E) MARKET DETERMINATIONS.—The local market of a commercial television broadcast station may be modified by the Federal Communications Commission in accordance with section 338(l) of the Communications Act of 1934 (47 U.S.C. 338).

(3) LOW POWER TELEVISION STATION.—The term “low power television station” means a low power TV station as defined in section 74.701(f) of title 47, Code of Federal Regulations, as in effect on June 1, 2004. For purposes of this paragraph, the term “low power television station” includes a low power television station that has been accorded primary status as a Class A television licensee under section 73.6001(a) of title 47, Code of Federal Regulations.

(4) NETWORK STATION; NON-NETWORK STATION; SATELLITE CARRIER; SECONDARY TRANSMISSION.—The terms “network station”, “non-network station”, “satellite carrier”, and “secondary transmission” have the meanings given such terms under section 119(d).

(5) NONCOMMERCIAL EDUCATIONAL BROADCAST STATION.—The term “noncommercial educational broadcast station” means a television broadcast station that is a noncommercial educational broadcast station as defined in section 397 of the Communications Act of 1934, as in effect on the date of the enactment of the Satellite Television Extension and Localism Act of 2010.

(6) SUBSCRIBER.—The term “subscriber”, means a person or entity that receives a secondary transmission service from a satellite carrier and pays a fee for the service, directly or indirectly, to the satellite carrier or to a distributor.

(7) TELEVISION BROADCAST STATION.—The term “television broadcast station”—

(A) means an over-the-air, commercial or noncommercial television broadcast station licensed by the Federal Communications Commission under subpart E of part 73 of title 47, Code of Federal Regulations, except that such term does not include a low-power or translator television station; and

(B) includes a television broadcast station licensed by an appropriate governmental authority of Canada or Mexico if the station broadcasts primarily in the English language and is a network station as defined in section 119(d)(2)(A).

(Added Pub. L. 106–113, div. B, § 1000(a)(9) [title I, § 1002(a)], Nov. 29, 1999, 113 Stat. 1536, 1501A–523; amended Pub. L. 107–273, div. C, title III, § 13210(2)(A), Nov. 2, 2002, 116 Stat. 1909; Pub. L. 108–447, div. J, title IX [title I, § 111(b)], Dec. 8, 2004, 118 Stat. 3409; Pub. L. 110–403, title II, § 209(a)(5), Oct. 13, 2008, 122 Stat. 4264; Pub. L. 111–175, title I, § 103(a)(1), (b)–(f), May 27, 2010, 124 Stat. 1227–1230; Pub. L. 113–200, title II, § 204, Dec. 4, 2014, 128 Stat. 2067.)

Editorial Notes

REFERENCES IN TEXT

Section 397 of the Communications Act of 1934, referred to in subsec. (j)(5), is classified to section 397 of Title 47, Telecommunications.

The date of the enactment of the Satellite Television Extension and Localism Act of 2010, referred to in subsec. (j)(5), is the date of enactment of Pub. L. 111–175, which shall be deemed to refer to Feb. 27, 2010, see section 307(a) of Pub. L. 111–175, set out as an Effective Date of 2010 Amendment note under section 111 of this title.

AMENDMENTS

2014—Subsec. (j)(2)(B) to (D). Pub. L. 113–200, § 204(1), realigned margins.

Subsec. (j)(2)(E). Pub. L. 113–200, § 204(2), added subpar. (E).

2010—Pub. L. 111–175, § 103(a)(1), substituted “of local television programming by satellite” for “by satellite carriers within local markets” in section catchline.

Subsec. (a). Pub. L. 111–175, § 103(b), amended subsec. (a) generally. Prior to amendment, subsec. (a) related to secondary transmissions of television broadcast stations by satellite carriers.

Subsec. (b)(1). Pub. L. 111–175, § 103(c)(1), substituted “station—” for “station a list identifying (by name in alphabetical order and street address, including county and zip code) all subscribers to which the satellite carrier makes secondary transmissions of that primary transmission under subsection (a).” and added subpars. (A) and (B).

Subsec. (b)(2). Pub. L. 111–175, § 103(c)(2), substituted “network—” for “network a list identifying (by name in alphabetical order and street address, including county and zip code) any subscribers who have been added or dropped as subscribers since the last submission under this subsection.” and added subpars. (A) and (B).

Subsec. (c). Pub. L. 111–175, § 103(d), inserted “for Certain Secondary Transmissions” after “Required” in heading and substituted “paragraphs (1), (2), and (3) of subsection (a)” for “subsection (a)” in text.

Subsec. (f)(1). Pub. L. 111–175, § 103(e)(2)(A), substituted “section 119, subject to statutory licensing by reason of paragraph (2)(A), (3), or (4) of subsection (a), or subject to” for “section 119 or” in introductory provisions.

Subsec. (f)(1)(B). Pub. L. 111–175, § 103(e)(1)(A), substituted “\$250” for “\$5”.

Subsec. (f)(2). Pub. L. 111–175, § 103(e)(2)(A), substituted “section 119, subject to statutory licensing by reason of paragraph (2)(A), (3), or (4) of subsection (a), or subject to” for “section 119 or” in introductory provisions.

Subsec. (f)(2)(A)(ii), (B)(ii). Pub. L. 111–175, § 103(e)(1)(B), substituted “\$2,500,000” for “\$250,000”.

Subsec. (g). Pub. L. 111–175, § 103(e)(2)(B), substituted “section 119, paragraph (2)(A), (3), or (4) of subsection (a), or” for “section 119 or”.

Subsec. (j)(1). Pub. L. 111–175, § 103(f)(1), substituted “that contracts” for “which contracts”.

Subsec. (j)(3). Pub. L. 111–175, § 103(f)(4), added par. (3). Former par. (3) redesignated (4).

Subsec. (j)(4). Pub. L. 111–175, § 103(f)(3), redesignated par. (3) as (4) and inserted “non-network station;” after

“Network station;” in heading and “‘non-network station,’” after “‘network station’,” in text. Former par. (4) redesignated (6).

Subsec. (j)(5). Pub. L. 111–175, §103(f)(5), added par. (5). Former par. (5) redesignated (7).

Subsec. (j)(6). Pub. L. 111–175, §103(f)(6), amended par. (6) generally. Prior to amendment, text read as follows: “The term ‘subscriber’ means a person who receives a secondary transmission service from a satellite carrier and pays a fee for the service, directly or indirectly, to the satellite carrier or to a distributor.”

Pub. L. 111–175, §103(f)(2), redesignated par. (4) as (6).

Subsec. (j)(7). Pub. L. 111–175, §103(f)(2), redesigned par. (5) as (7).

2008—Subsec. (d). Pub. L. 110–403, §209(a)(5)(A), struck out “and 509” after “506”.

Subsec. (e). Pub. L. 110–403, §209(a)(5)(B), substituted “section 510” for “sections 509 and 510”.

Subsec. (f)(1). Pub. L. 110–403, §209(a)(5)(C), struck out “and 509” after “506” in introductory provisions.

2004—Subsec. (j)(2)(D). Pub. L. 108–447 added subparagraph (D).

2002—Pub. L. 107–273 substituted “rights: Secondary” for “rights; secondary” in section catchline.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–175 effective Feb. 27, 2010, see section 307(a) of Pub. L. 111–175, set out as a note under section 111 of this title.

EFFECTIVE DATE

Section effective July 1, 1999, see section 1000(a)(9) [title I, §1012] of Pub. L. 106–113, set out as an Effective Date of 1999 Amendment note under section 101 of this title.

CHAPTER 2—COPYRIGHT OWNERSHIP AND TRANSFER

Sec.

- 201. Ownership of copyright.
- 202. Ownership of copyright as distinct from ownership of material object.
- 203. Termination of transfers and licenses granted by the author.
- 204. Execution of transfers of copyright ownership.
- 205. Recordation of transfers and other documents.

§ 201. Ownership of copyright

(a) INITIAL OWNERSHIP.—Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

(b) WORKS MADE FOR HIRE.—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) CONTRIBUTIONS TO COLLECTIVE WORKS.—Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular

collective work, any revision of that collective work, and any later collective work in the same series.

(d) TRANSFER OF OWNERSHIP.—

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

(e) INVOLUNTARY TRANSFER.—When an individual author’s ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.

(Pub. L. 94–553, title I, §101, Oct. 19, 1976, 90 Stat. 2568; Pub. L. 95–598, title III, §313, Nov. 6, 1978, 92 Stat. 2676.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94–1476

Initial Ownership. Two basic and well-established principles of copyright law are restated in section 201(a): that the source of copyright ownership is the author of the work, and that, in the case of a “joint work,” the coauthors of the work are likewise co-owners of the copyright. Under the definition of section 101, a work is “joint” if the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as “inseparable or interdependent parts of a unitary whole.” The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit, although the parts themselves may be either “inseparable” (as the case of a novel or painting) or “interdependent” (as in the case of a motion picture, opera, or the words and music of a song). The definition of “joint work” is to be contrasted with the definition of “collective work,” also in section 101, in which the elements of merger and unity are lacking; there the key elements are assemblage or gathering of “separate and independent works *** into a collective whole.”

The definition of “joint works” has prompted some concern lest it be construed as converting the authors of previously written works, such as plays, novels, and music, into coauthors of a motion picture in which their work is incorporated. It is true that a motion picture would normally be a joint rather than a collective work with respect to those authors who actually work on the film, although their usual status as employees for hire would keep the question of coownership from coming up. On the other hand, although a novelist, playwright, or songwriter may write a work with the hope or expectation that it will be used in a motion picture, this is clearly a case of separate or independent authorship rather than one where the basic intention behind the writing of the work was for motion picture