# ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559


ADDENDA TO REPORT

PERFORMANCE RIGHTS IN SOUND RECORDINGS

The following excerpt is taken from Volume 42, No. 59 of the Federal Register for Monday, March 27, 1978 (pp. 12763-8).

[1410-03]

**LIBRARY OF CONGRESS**

**Copyright Office**

[Docket No. S77-6-D]

**PERFORMANCE RIGHTS IN SOUND RECORDINGS**

**Addenda to Report**

On Tuesday, March 21, 1978, the FEDERAL REGISTER published a notice that addenda to the January 3, 1978 Report of the Register of Copyrights were transmitted to Congress and are available for public inspection (43 FR 11773). The following is the Register's Statement referred to in the previous notice at 43 FR 11774, preceded by that Statement's letter of transmittal.

(17 U.S.C. 114.)

Dated: March 22, 1978.

BARBARA RINGER,
*Register of Copyrights.*

DANIEL J. BOORSTIN,
*Librarian of Congress.*

MARCH 22, 1978.

Dear MR. PRESIDENT:
Dear MR. SPEAKER:

On January 3, 1978, the Copyright Office submitted to Congress a Report on Performance Rights in Sound Recordings, pursuant to the mandate of section 114(d) of the 1976 Copyright Act, Pub. L. 94-553. At that time, I indicated the intention to submit four additional documents as addenda to the original Report. This is to advise you that these documents have been submitted. They include: (1) A Statement by the Register of Copyrights summarizing the position of the Copyright Office on the relevant issues, along with legislative recommendations; (2) an independently prepared historical analysis of labor union involvement in performance rights in sound recordings; (3) reply comments of the independent economic consultant who prepared the economic study included in the original Report of January 3, 1978, and submitted in response to comments on that study; and (4) a bibliography of works dealing with performance rights in sound recordings.

With the submission to Congress of the addenda described above, the Copyright Office believes it has fulfilled its responsibilities under section 114(d). The Copyright Office is prepared to furnish whatever further assistance the Congress deems necessary in this matter.

Sincerely yours,

DANIEL J. BOORSTIN,
*Librarian of Congress.*

Barbara Ringer,
Register of Copyrights.

## ADDENDUM TO THE REPORT OF THE REGISTER OF COPYRIGHTS ON PERFORMANCE RIGHTS IN SOUND RECORDINGS

Statement of the Register of Copyrights containing a Summary of Conclusions and Specific Legislative Recommendations.

### INTRODUCTION

The Congressional mandate to the Register of Copyrights contained in section 114(d) of the new copyright statute reads 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."

On January 3, 1978, I submitted to Congress our basic documentary report, consisting of some 2,600 pages, including appendices. The basic report includes analyses of the constitutional and legal issues presented by proposals for performance rights in sound recordings, the legislative history of previous proposals to create these rights under Federal Copyright law, and testimony and written comments representing current views on the subject in this country. The basic report seeks to review and analyze foreign systems for the protection of performance rights in sound recordings, and the existing structure for international protection in this field, including the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations. The basic report also includes an "economic impact analysis" of the proposals for performance royalty legislation, prepared by an independent economic consultant under contract with the Copyright Office.

After reviewing all of the material in the basic report, together with additional supplementary material,[1] I have prepared this statement in an effort to summarize the conclusions I have drawn from our research and analysis and to present specific recommendations for legislation. With the presentation of this statement, the Copyright Office believes that it has discharged all of its responsibilities under section 114(d).

It was understandable that enactment of section 114(d) was greeted with raised eyebrows and cynical smiles. Some of those who favored performance rights in sound recordings viewed it as a temporizing move, aimed at ducking the issue and delaying Congress' obligation to come to grips with the problem. Others, opponents of the principle of royalties for performance of sound recordings, expressed derision at the idea of entrusting a full-scale study of the problem to an official who had, in testimony before both Houses of Congress, expressed a personal commitment to that principle. The Register's Report could either be looked on as a time-consuming nuisance that had to be gotten out of the way before Congress could be induced to look at the problem again, or as something that could be dismissed as worthless because the views of the official responsible for it were already fixed and her conclusions were predictable.

Neither the idea nor the drafting of section 114(d) originated with anyone in the Copyright Office. When approached with the proposed compromise that subsection (d) reflects, we accepted the responsibility and the short deadline imposed by the new subsection with two thoughts in mind:

First, we agreed with those who felt that any full-scale effort to tie enactment of performance royalty legislation directly to the bill for general revision of the copyright law would seriously impair the chances for enactment of omnibus revision. Keeping the subject of performance royalty alive but splitting it off for later Congressional consideration reduced the twin dangers of lack of time to complete work on the bill for general revision, and concerted opposition to the bill as a whole.

Second, we also agreed that, with a problem as important and hotly contested as this one, Congress should have a fuller record and more thorough research and analysis on which to base its consideration of proposed legislation. Although the deadline for the report (January 3, 1978) coincided with the date on which the Copyright Office was required to implement the whole new copyright statute, we felt that it would be possible for us to complete both jobs on time

As I viewed the mandate in section 114(d), the important thing was to provide Congress with a body of reliable information that would help it to legislate intelligently and effectively on the subject of performance rights in sound recordings. Regarded in this way, the basic documentary report, together with the other three addenda, are far more important than this statement of conclusions and recommendations.

In approaching our task under section 114, we set up a project under the leadership of Ms. Harriet Oler to address the entire problem without any preconceptions and as thoroughly, objectively, searchingly, and comprehensively as possible. Ms. Oler analyzed the problem, laid out the project, and directed its implementation. She and the other members of her team, notably Richard Katz and Charlotte Bostick, deserve the highest praise for the end product of their work. I believe that their basic documentary report, including the independently-prepared studies by Stephen Werner and Robert Gorman, will be of immediate value to Congress in evaluating legislative proposals on the subject and will also be a lasting contribution to scholarship and literature in the copyright field.

Let me state it as plainly as possible: none of the material in the basic documentary report or in the other addenda was prepared to reflect or support any preexisting viewpoint or position of the Register of Copyrights or the Copyright Office. The only directions that were given to anyone connected with the project were to be as objective and honest as humanly possible—to search out the relevant facts and law and follow them wherever they might lead. Aside from the general statements of the scope of their studies as stated in their contracts, the work done by Mr. Werner and Professor Gorman was entirely independent of any direction from the Copyright Office, and their reports were presented exactly as received.

As Register of Copyrights since 1973 I have taken a consistent and rather strong public position in favor of the principle of performance royalties for sound recordings. This was no secret to anyone when section 114(d) was added to the revision bill and, in enacting that provision, Congress could hardly have expected me to abandon beliefs and convictions based on many years of personal research and experience in the field. What it could expect were two separate things: first, as full and objective a study by the Copyright Office of the problem as possible; and, second, an honest and unbiased statement of my conclusions and recommendations, as Register of Copyrights, based on a fresh review of the Copyright Office study.

This statement is intended to fulfill the second of these two obligations. My hope is that it will be of some help to Congress in considering this difficult problem, but that no one attach undue weight to any of its conclusions or recommendations. In particular, I hope that it will be considered as entirely separate from the Copyright Office's basic documentary report, so that the attacks on my conclusions and recommendations will not undermine the usefulness of the body of information brought together in the basic report.

### BASIC ISSUES AND CONCLUSIONS

The following is an effort to present, in outline form, the basic issues of public policy, constitutional law, economics, and Federal statutory law raised by proposals

[1] Three further addenda are being submitted to Congress concurrently with this statement: (1) a report, prepared by an independent legal consultant, of the history of labor union involvement with the issue of performance royalties over the past thirty years; (2) a supplementary report by the independent economic consultant; and (3) a bibliography on performance rights in sound recordings.

for performing rights in sound recordings, together with a bare statement of the conclusion I have reached on each of them, and a highly condensed discussion of the reasons behind each conclusion.

1. *The Fundamental Public Policy Issue*

*Issue:* Should performers, or record producers, or both, enjoy any rights under Federal law with respect to public performances of sound recordings to which the have contributed?

*Conclusion:* Yes.

*Discussion:* The Copyright Office supports the principle of copyright protection for the public performance of sound recordings. The lack of copyright protection for performers since the commercial development of phonograph records has had a drastic and destructive effect on both the performing and the recording arts. Professor Gorman's fascinating study shows that, in seeking to combat the vast technological unemployment resulting from the use of recorded rather than live performances, the labor union movement in the United States may in some ways have made the problem worse. It is too late to repair past wrongs, but this does not mean they should be allowed to continue. Congress should now do whatever it can to protect and encourage a vital artistic profession under the statute constitutionally intended for this purpose: the copyright law.

Broadcasters and other commercial users of recordings have performed them without permission or payment for generations. Users today look upon any requirement that they pay royalties as an unfair imposition in the nature of a "tax." However, any economic burden on the users of recordings for public performance is heavily outweighed, not only by the commerial benefits accruing directly from the use of copyrighted sound recordings, but also by the direct and indirect damage done to performers whenever recordings are used as a substitute for live performances. In all other areas the unauthorized use of a creative work is considered a copyright infringement if it results either in damage to the creator or in profits to the user. Sound recordings are creative works, and their unauthorized performance results in both damage and profits. To leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified.

2. *Constitutional Issues*

a. *Issue:* Are sound recordings "the writings of an author" within the meaning of the Constitution?

*Conclusion:* Yes.

*Discussion:* Arguments that sound recordings are not "writings" and that performers and record producers are not "authors" have become untenable. The courts have consistently upheld the constitutional eligibility of sound recordings for protection under the copyright law. Passage of the 1971 Sound Recording Amendment was a legislative declaration of this principle, which was reaffirmed in the Copyright Act of 1976.

b. *Issue:* Can sound recordings be "the writings of an author" for purposes of protection against unauthorized duplication (piracy or counterfeiting), but not for purposes of protection against unauthorized public performance?

*Conclusion:* No.

*Discussion:* Either a work is the "writing of an author" or it is not. If it is, the Constitution empowers Congress to grant it any protection that is considered justified. There is no basis, in logic or precedent, for suggesting that a work is a "writing" for some purposes and not for others.

c. *Issue:* Would Federal legislation to protect sound recordings against unauthorized public performance be unconstitutional: (i) if there has been no affirmative showing of a "need" on the part of the intended beneficiaries and hence no basis for asserting Congressional authority to "promote the progress of science and useful arts"; or (ii) if there has been an affirmative showing that compensation to the intended beneficiaries is "adequate" without protection of performing rights?

*Conclusion:* No.

*Discussion:* These are actually disguised economic arguments, not constitutional objections. Congressional authority to grant copyright protection has never been conditioned on any findings of need, or of the likelihood that productivity or creativity will increase. The established standard is that Congress has complete discretion to grant or withhold protection for the writings of authors, and that the courts will not look behind a Congressional enactment to determine whether or not it will actually provide incentives for creation and dissemination. It is perfectly appropriate to argue that a particular group of creators is adequately compensated through the exercise of certain rights under copyright law, and therefore Congress should not grant them additional rights. It is not appropriate to argue that a Federal statute granting these rights could be attacked on the constitutional ground that it did not "promote the progress of science and useful arts."

d. *Issue:* Would the establishment of performance rights interfere with the First Amendment rights of broadcasters and other users of sound recordings?

*Conclusion:* No.

*Discussion:* The courts have been generally unreceptive to arguments that the news media have a right to use copyrighted material, beyond the limits of fair use in particular cases, under theories of freedom of the press or freedom of speech. These arguments seem much weaker where the copyrighted material is being used for entertainment purposes, where the user is benefiting commercially from the use, or where the use is subject to compulsory licensing.

3. *Economic Issues*

a. *Issue:* Do the benefits accruing to performers and record producers from the "free airplay" of sound recordings represent adequate compensation in the form of increased record sales, increased attendance at live performances, and increased popularity of individual artists?

*Conclusion:* No, on balance and on consideration of all performers and record producers affected.

*Discussion:* This is the strongest argument put forward by broadcasters and other users. There is no question that broadcasting and jukebox performances give some recordings the kind of exposure that benefits their producers and individual performers through increased sales and popularity. The benefits are hit-or-miss and, if realized, are the result of acts that are outside the legal control of the creators of the works being exploited, that are of direct commercial advantage to the user, and that may damage other creators. The opportunity for benefit through increased sales, no matter how significant it may be temporarily for some "hit records," can hardly justify the outright denial of any performing rights to any sound recordings. That denial is inconsistent with the underlying philosophy of the copyright law: that of securing the benefits of creativity to the public by the encouragement of individual effort through private gain (*Mazer v. Stein* 347 U.S. 201 (1954)).

b. *Issue:* Would the imposition of performance royalties represent a financial burden on broadcasters so severe that stations would be forced to curtail or abandon certain kinds of programming (public service, classical, etc.) in favor of high-income producing programming in order to survive?

*Conclusion:* There is no hard economic evidence in the record to support arguments that a performance royalty would disrupt the broadcasting industry, adversely affect programming, and drive marginal stations out of business.

*Discussion:* This has been the single most difficult issue to assess accurately, because the arguments have consisted of polemics rather than facts. An independent economic analysis of potential financial effects on broadcasters was commissioned by the Copyright Office in an effort to provide an objective basis for evaluating the arguments and assertions on both sides of this issue. This study concludes on the basis of statistical analysis that the payment of royalties is unlikely to cause serious disruption within the broadcasting industry. There are arguments aplenty to the contrary, but there is no hard evidence to support them.

c. *Issue:* Would the imposition of a performance royalty be an unwarranted windfall for performers and record producers?

*Conclusion:* No.

*Discussion:* As for performers, the independent economic survey commissioned by the Copyright Office indicates that only a small proportion of performers participating in the production of recordings receive royalties from the sale of records and that, even if they do, royalties represent a very small proportion of their annual earnings. While the statistics collected with respect to record producers is less conclusive, the economic analysis concludes that the amount generated by the Danielson bill for record companies would be less than one-half of one percent of their estimated net sales.

4. *Legal Issues*

a. *Issue:* Assuming that some legal protection should be given to sound recordings against unauthorized public performance, should it be given under the Federal copyright statute?

*Conclusion:* Yes.

*Discussion:* Considerations of national uniformity, equal treatment and practical effectiveness all point to the importance of Federal protection for sound recordings, and under the Constitution the copyright law provides the appropriate legal framework. Preemption of state law under the new copyright statute leaves sound recordings worse off than they were before 1978, since previously an argument could be made for common law performance rights in sound recordings.

b. *Issue:* What form should protection take?

*Conclusion:* The best approach appears to be a form of compulsory licensing, as procedurally simple as possible.

*Discussion:* No one is arguing for exclusive rights, and it would be unrealistic to do so. The Danielson bill represents a good starting point for the development of definitive legislation.

c. *Issue:* Who should be the beneficiaries of protection?

*Conclusion:* There are several possibilities; since performers and record producers both contribute copyrightable authorship to sound recordings, they should both benefit.

*Discussion:* Special considerations that must be taken into account include the fact that many performers on records are "employees for hire," the unequal bargaining positions in some cases, and the status of arrangers.

*d. Issue:* How should the rates be set?

*Conclusion:* Congress should establish an initial schedule, which the Copyright Royalty Tribunal would be mandated to reexamine at stated intervals.

*Discussion:* It would seem necessary to establish minimum statutory rates at the outset, rather than leaving the initial task to the Tribunal. Review of the statutory rates by the Copyright Royalty Tribunal should be mandatory after a period of time sufficient to permit the development of a functioning collection and distribution system.

### LEGISLATIVE RECOMMENDATIONS

Section 114(d) asks the Register of Copyrights, among other things, to set forth "recommendations as to whether this section should be amended to provide for performers and copyright owners of copyrighted material by performance rights in such material," and to describe "specific legislative or other recommendations, if any."

Based on the conclusions outlined above, my general recommendation is that section 114 be amended to provide performance rights, subject to compulsory licensing, in copyrighted sound recordings, and that the benefits of this right be extended both to performers (including employees for hire) and to record producers as joint authors of sound recordings.

Specific legislative recommendations are embodied in the following draft bill, which is essentially a revision of the Danielson Bill (H.R. 6063, 95th Cong., 1st Sess. 1977).

### DRAFT BILL

A Bill to amend the copyright law, title 17 of the United States Code, to create public performance rights with respect to sound recordings, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That—

SECTION 1. This Act may be cited as "The Sound Recording Performance Rights Amendment of 1978."

SECTION 2. Section 101 of title 17 of the United States Code, as amended by Public Law 94-553, (90 Stat 2541) is hereby amended by deleting the definition of "perform" and inserting the following:

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

SECTION 3. Section 106 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541) is hereby amended by deleting clause (4) and inserting the following:

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

SECTION 4. Section 110 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541) is hereby amended as follows:

(a) In clause (2) insert the words "or of a sound recording" between the words "performance of a nondramatic literary or musical work" and "or display of a work,"

(b) In clause (3), insert the works "or of a* sound recording," between the words "of a religious nature," and the words "or display of a work,";

(c) In clause (4), insert the words "or of a sound recording," between the words "literary or musical work" and "otherwise than in a transmission";

(d) In clause (6), insert the words "or of a sound recording" between the words "nondramatic musical work" and "by a governmental body";

(e) In clause (7), insert the words "or of a sound recording" between the words "nondramatic musical work" and "by a vending establishment";

(f) In clause (8), insert the words "or of a sound recording embodying a performance of a nondramatic literary work," between the words "nondramatic literary work," and "by or in the course of a transmission"; and

(g) In clause (9), insert the words "or of a sound recording embodying a performance of a dramatic literary work that has been so published," between the words "date of the performance," and the words "by or in the course of a transmission".

SECTION 5. Section 111 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541) is hereby amended by inserting, in the second sentence of subsection (d)(5)(A), between the words "provisions of the antitrust laws," and "for purposes of this clause" the words "and subject to the provisions of section 114(c),".

SECTION 6. Section 112 of title 17 of the United States code, as amended by Public Law 94-553 (90 Stat. 2541) is hereby amended as follows:

(a) In subsection (a), delete the words "or under the limitations on exclusive rights in sound recordings specified by section 114(a)," and insert in their place "or under a compulsory license obtained in accordance with the provisions of section 114(c),".

(b) In subsection (b), delete the reference to "section 114(a)" and insert "section 114(b)(5)".

SECTION 7. Section 114 of title 17 of the United States Code as amended by Public Law 94-553 (90 Stat. 2541), is hereby amended in its entirety to read as follows:

*"§ 114 Scope of exclusive rights in sound recordings*

(a) LIMITATIONS ON EXCLUSIVE RIGHTS.—In addition to the limitations on exclusive rights provided by sections 107 through 112 and sections 116 through 118, and in addition to the compulsory licensing provisions of subsection (c) and the exemptions of subsection (d) of this section, the exclusive rights of the owner of copyright in a sound recording under clauses (1) through (4) of section 106 are further limited as follows:

(1) The exclusive right under clause (1) of section 106 is limited to the right to duplicate all or any part of the sound recording in the form of phonorecords, or of copies of motion pictures and other audiovisual works, that directly or indirectly recapture the actual sounds fixed in the recording;

(2) The exclusive right 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;

(3) The exclusive right under clause (4) of section 106 is limited to the right to perform publicly the actual sounds fixed in the recording;

(4) The exclusive rights under clauses (1) through (4) of section 106 do not extend to the making, duplication, reproduction, distribution, or performance 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; and

(5) The exclusive rights under clauses (1) through (4) 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(g)): *provided*, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

(b) RIGHTS IN SOUND RECORDING DISTINCT FROM RIGHTS IN UNDERLYING WORKS EMBODIED IN RECORDING.—The exclusive rights specified in clauses (1) through (4) of section 106 with respect to a copyrighted literary, musical or dramatic work, and such rights with respect to a sound recording in which such literary, musical, or dramatic work is embodied, are separate and independent rights under this title.

(c) COMPULSORY LICENSE FOR PUBLIC PERFORMANCE OF SOUND RECORDINGS.—(1) Subject to the limitations on exclusive rights provided by sections 107 through 112 and sections 116 through 118, and in addition to the other limitations on exclusive rights provided by this section, the exclusive right provided by clause (4) of section 106, to perform a sound recording publicly, is subject to compulsory licensing under the conditions specified by this subsection.

(2) When phonorecords of a sound recording have been distributed to the public in the United States or elsewhere under the authority of the copyright owner, any other person may, by complying with the provisions of this subsection, obtain a compulsory license to perform that sound recording publicly.

(3) Any person who wishes to obtain a compulsory license under this subsection shall fulfill the the following requirements:

(A) On or before ———, 19—, or at least thirty days before the public performance, if it occurs later, such person shall record in the Copyright Office a notice stating an intention to obtain a compulsory license under this subsection. Such notice shall be filed in accordance with requirements that the Register of Copyrights, after consultation with the Copyright Royalty Tribunal, shall prescribe by regulation, and shall contain the name and address of the compulsory licensee and any other information that such regulations may require. Such regulations shall also prescribe requirements for bringing the information in the statement up to date at regular intervals.

(B) The compulsory licensee shall deposit with the Register of Copyrights, at annual intervals, a statement of account and a total royalty fee for all public performances during the period covered by the statement, based on the royalty provisions of clauses (7) or (8) of this subsection. After consulta-

*Error; line should read: "(b) In clause (3),insert the words "or of a"

tion with the Copyright Royalty Tribunal, the Register of Copyrights shall prescribe regulations prescribing the time limits and requirements for the statement of account and royalty payment.

(4) Failure to record the notice, file the statement, or deposit the royalty fee as required by clause (3) of this subsection renders the public performance of a sound recording actionable as an act of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.

(5) Royalties under this subsection shall be payable only for performances of copyrighted sound recordings fixed on or after February 15, 1972.

(6) The compulsory licensee shall have the option of computing the royalty fees payable under this subsection on either a prorated basis, as provided in clause (7) or on a blanket basis, as provided in clause (8), and the annual statement of account filed by the compulsory licensee shall state the basis used for computing the fee.

(7) If computed on a prorated basis, the annual royalty fees payable under this subsection shall be calculated in accordance with standard formulas that the Copyright Royalty Tribunal shall prescribe by regulation, taking into account such factors as the proportion of commercial time, if any, devoted to the use of copyrighted sound recordings by the compulsory licensee during the applicable period, the extent to which the compulsory licensee is also the owner of copyright in the sound recordings performed during said period, and, if considered relevant by the Tribunal, the actual number of performances of copyrighted sound recordings during said period. The Tribunal shall prescribe separate formulas in accordance with the following:

(A) For radio or television stations licensed by the Federal Communications Commission, the fee shall be a specified fraction of one percentum of the station's net receipts from advertising sponsors during the applicable period;

(B) For other transmitters of performances of copyrighted sound recordings, including background music services, the fee shall be a specified fraction of two percentum of the compulsory licensee's gross receipts from subscribers or others who pay to receive the transmission during the applicable period; and

(C) For other users not otherwise exempted, the fee shall be based on the number of days during the applicable period on which performances of copyrighted sound recordings took place, and shall not exceed $5 per day of use.

(8) If computed on a blanket basis, the annual royalty fees payable under this section shall be calculated in accordance with the following:

(A) For a radio broadcast station licensed by the Federal Communications Commission, the blanket royalty shall depend upon the total amount of the station's gross receipts from advertising sponsors during the applicable period:

(i) Receipts of at least $25,000 but less than $100,000: $250;

(ii) Receipts of at least $100,000 but less than $200,000: $750;

(iii) Receipts of $200,000 or more: one percentum of the station's net receipts from advertising sponsors during the applicable period;

(B) For a television broadcast station licensed by the Federal Communications Commission, the blanket royalty shall depend on the total amount of the station's gross receipts from advertising sponsors during the applicable period:

(i) Receipts of a least $1,000,000 but less * than $4,000,000: $750;

(ii) Receipts of $4,000,000 or more: $1,500;

(C) For other transmitters of performances of copyrighted sound recordings, including background music services, the blanket royalty shall be two percentum of the compulsory licensee's gross receipts from subscribers or others who pay to receive the transmission during the applicable period;

(D) For other users not otherwise exempted, the blanket royalty shall be $25 per year for each location at which copyrighted sound recordings are performed.

(9) Public performances of copyrighted sound recordings by operators of coin-operated machines, as that term is defined by section 116, and by cable systems, as that term is defined by section 111, are subject to compulsory licensing under those respective sections, and not under this section. However, in distributing royalties to the owners of copyright in sound recordings under sections 116 and 111, the Copyright Royalty Tribunal shall be governed by clause (14) of this subsection. Nothing in this section excuses an operator of a coin-operated machine or a cable system from full liability for copyright infringement under this title for the performance of a copyrighted sound recording in case of failure to comply with the requirements of sections 116 or 111, respectively.

(10) The Register of Copyrights shall receive all fees 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 U.S. 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 an annual basis, a compilation of all statements of account covering the relevant annual period provided by subsection (c)(3) of this section.

(11) During the month of September in each year, every person claiming to be entitled to compulsory license fees under this section for performances during the preceding twelve-month period shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Such claim shall include an agreement to accept as final, except as provided in section 810 of this title, the determination of the Copyright Royalty Tribunal in any controversy concerning the distribution of royalty fees deposited under subclause (B) of subsection (c)(3) of this section to which the claimant is a party. Notwithstanding any provisions of the antitrust laws, for purposes of this subsection any claimants may, subject to the provisions of clause (14) of this subsection, agree among themselves as to the proportionate division of compulsory 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.

(12) After the first day of July of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees deposited under subclause (B) of this subsection (c)(3) during the twelve-month period of which claims have been filed under clause (11) of this section. 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 and performers entitled, or to their designated agents. If it finds that such a controversy exists, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(13) During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal 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.

(14) The royalties available for distribution by the Copyright Royalty Tribunal shall be divided between the owners of copyright as defined in subsection (e), and the performers, as also defined in said subsection, but in no case shall the proportionate share of the performers be less than fifty percent of the amount to be distributed. With respect to the various performers who contributed to the sounds fixed in a particular sound recording, the performers' share of royalties payable with respect to that sound recording shall be divided among them on a per capita basis, without regard to the nature, value, or length of their respective contributions. With respect to a particular sound recording, neither a performer nor a copyright owner shall be entitled to transfer his right to the royalties provided in this subsection to the copyright owner or the performer, respectively, and no such purported transfer shall be given effect by the Copyright Royalty Tribunal.

(d) EXEMPTIONS FROM LIABILITY AND COMPULSORY LICENSING.—In addition to users exempted from liability by other sections of this title or by other provisions of this section, any person who publicly performs a copyrighted sound recording and who would otherwise be subject to liability for such performance or to the compulsory licensing requirements of this section, is exempted from liability for infringement and from the compulsory licensing requirements of this section, during the applicable annual period, if during such period—

(1) In the case of a radio broadcast station licensed by the Federal Communications Commission, its gross receipts from advertising sponsors were less than $25,000; or

(2) In the case of a television broadcast station licensed by the Federal Communications Commission, its gross receipts from advertising sponsors were less than $1,000,000; or

(3) In the case of other transmitters of performances of copyrighted sound recordings, its gross receipts from subscribers or others who pay to receive transmissions during the applicable period were less than $10,000.

(e) DEFINITIONS.—As used in this section, the following terms and their variant forms mean the following:

(1) "Commercial time" is any transmission program, the time for which is paid for by a commercial sponsor, or any transmission program that is interrupted by a spot commercial announcement at intervals of less than fourteen and one half minutes.

(2) "Performers" are instrumental musicians, singers, conductors, actors, narrators,

*Error; line should read: "(i) Receipts of at least $1,000,000 but less"

and others whose performance of a literary, musical, or dramatic work is embodied in a sound recording. For purposes of this section, a person coming within this definition is regarded as a "performer" with respect to a particular sound recording whether or not that person's contributions to the sound recording was a "work made for hire" within the meaning of section 101.

(3) A "copyright owner" is the author of a sound recording, or a person or legal entity that has acquired all of the rights initially owned by one or more of the authors of the sound recording.

(4) "Net receipts from advertising sponsors" constitute gross receipts from advertising sponsors less any commissions paid by a radio or television station to advertising agencies.

(f) SOUNDS ACCOMPANYING A MOTION PICTURE OR OTHER AUDIOVISUAL WORK.—The sounds accompanying a motion picture or other audiovisual work are considered an integral part of the work that they accompany, and any person who uses the sounds accompanying a motion picture or other audiovisual work in violation of any of the exclusive rights of the owner of copyright in such work under clauses (1) through (4) of section 106 is an infringer of that owner's copyright. However, if such owner authorizes the public distribution of material objects that reproduce such sounds but do not include any accompanying motion picture or other audiovisual work, a compulsory licensee under section 116 or 111 or under subsection (c) of this section shall be freed from further liability for the public performance of the sounds by means of such material objects.

SECTION 8. Section 116 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541) is hereby amended as follows:

(a) In the title of the section insert the words "and sound recordings" after the words "nondramatic musical works" and before the colon;

(b) In subsection (a), between the words "nondramatic musical work embodied in a phonorecord," and the words "the exclusive right" insert the words "or of a sound recording of a performance of a nondramatic musical work,";

(c) In the second sentence of clause (2) of subsection (c), between the words "provisions of the antitrust laws," and "for purposes of this subsection," insert the words "and subject to the provisions of section 114(c),";

(d) In clause (4) of subsection (c), redesignate subclauses (A), (B), and (C) as "(B)", "(C)", and "(D)", respectively, and insert a new subclause (A) as follows:

"(A) to performers and owners of copyright in sound recordings, or their authorized agents, one-eighth of the total distributable royalties under this section, to be distributed as provided by section 114(c)(4)," and in the newly-designated subclause (B), between the words "every copyright owner" and the words "not affiliated with" insert the words "of a nondramatic musical work".

SECTION 9. In section 801 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541), amend subsection (b)(1) as follows: in the first sentence, between the words "as provided in sections" and "115 and 116, and" insert "114,"; and in the second sentence, between the words "applicable under sections" and "115 and 116 shall be calculated" insert "114,". Amend subsection (b)(3) by inserting, between the words "Copyrights under sections 111" and "116, and to determine" the following: ", 114,".

SECTION 10. In subsection (a) of section 804 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541), insert "114," following the words "as provided in sections" and "115 and 116, and with", and at the end of clause (2) of subsection (a) add a new subclause (D), as follows:

"(D) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates under section 114, such petition may be filed in 1988 and in each subsequent tenth calendar year."

In subsection (d) of section 804, insert ", 114," between the words "circumstances under sections 111" and "or 116, the Chairman".

SECTION 11. Amend section 809 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541), by inserting ", 114," between the words "royalty fees under sections 111" and "or 116, the Tribunal".

SECTION 12. This Act becomes effective six months after its enactment.

### COMMENTS ON DRAFT BILL

Among the many detailed questions raised by the Danielson Bill, the draft bill set out above, or both, the following deserve special consideration:

1. *Definitions.* The draft bill revises the definition of "perform" in section 101 to embrace sound recordings. Another possible amendment in that section might expand the definition of "fixed" to include cases where a work is being fixed simultaneously with its performance. An important question involves the rights of performers who are employees for hire; the draft bill does not change the definition of "work made for hire" in section 101, but defines "performers" in section 114 in a way that is intended to insure their right to share in performance royalties despite their employee status.

2. *Limitations on Performance Rights Generally.* The draft bill amends seven of the nine clauses of section 110 to add sound recordings to the material whose performances are exempted. Should clause (1) of section 110 also be amended to exclude from the exemption performances of sound recordings given by means of a phonorecord known to be unlawfully made? Should clauses (1) and (2) be amended to exclude from the exemptions sound recordings made expressly for instructional purposes?

3. *Exemption for Public Broadcasting.* The draft bill retains the exemptions for public broadcasting now in section 114.

4. *Act that Triggers the Compulsory License.* The draft bill follows the Danielson Bill in making compulsory licenses available when phonorecords of a sound recording have been publicly distributed anywhere. It does not limit the place of distribution to the United States (as in section 115), and it does not adopt proposals to allow a period of free use (30 days was suggested) before any liability would accrue.

5. *Administration.* The draft bill follows the pattern established in sections 111 and 116 of the Copyright Act of 1976, providing for filing in the Copyright Office and payment of fees there, but entrusting to the Copyright Royalty Tribunal the tasks of distributing royalties and adjusting rates.

6. *Criminal Penalties.* The Danielson Bill subjected a user who had not complied with the compulsory licensing requirements to full liability for copyright infringement, but insulated such a user from criminal liability even if the infringement was willful. The draft bill restores the possibility of criminal penalties in this situation.

7. *Royalty Rates.* The draft bill recasts the rate provisions of the Danielson Bill in an effort to make them a little simpler, but leaves the basic system and amounts largely untouched. The compulsory licensing rates for jukebox and cable performances are not increased in sections 116 and 111, so the beneficiaries of those sections would be required to share their pot with performers and record producers.

8. *Substitution of Negotiated Licenses.* The Danielson Bill allowed for the substitution of negotiated licenses and urged the formation of collecting agencies to make this possible. This raised a number of practical problems and inconsistencies, and the existence of the Copyright Royalty Tribunal adds a new factor. The draft bill is based on the premise that all licensing in this area will be compulsory.

9. *Distribution of Royalties.* The Danielson Bill provided for a mandatory fifty-fifty split between performers and "copyright owners". It did not come to grips with the status of performers who are employees for hire. The draft bill gives at least fifty percent of the royalties to performers on a per capita basis, regardless of their employment status, but allows performers to negotiate for more (not less) than a fifty percent share.

10. *Exemptions.* Both the Danielson Bill and the draft provide outright exemptions to smaller radio and television stations and music services.

11. *Definition of Performers.* Neither draft mentions arrangers, although in practice they are often assimilated to performers. Arguments can be made that employed arrangers should be entitled to share in the royalties under section 114.

12. *Soundtracks.* The draft bill seeks to clarify a difficult question: are "soundtrack recordings" subject to compulsory licensing when they are publicly performed?

### OTHER RECOMMENDATIONS

Finally, mention must be made of the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (the Rome Convention, adopted in 1961. This nobly-motivated and ambitious international instrument was years ahead of its time, but it has retained its vitality and has much to offer to the United States and its creative communities. This country could adhere to the Rome Convention if the proposed legislation were enacted, and the possibility should be thoroughly explored at the appropriate time.

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