

**Nimmer**  
**on**  
**Copyright**

**MELVILLE B. NIMMER**  
**DAVID NIMMER**



**LexisNexis**

# Materials on 2004-2005 Amendments

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[A]—Selected Sections of the Copyright Act of 1976, as Amended in  
2004 — 2005

In this Section A, ~~striketroughs~~ denote deletions and *italics* denote additions. The Public Law mandating the specific deletion or addition is noted in the accompanying footnote.

§ 101. DEFINITIONS

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

\* \* \*

“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.

*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.<sup>1</sup>*

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

\* \* \*

“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.

*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.<sup>2</sup>*

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

<sup>1</sup> NOTE: Added by Pub. L. No. 108-419, Sec. 4.

<sup>2</sup> NOTE: Added by Pub. L. No. 109-9, Sec. 102(c).

or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

\* \* \*

**§ 108. LIMITATIONS ON EXCLUSIVE RIGHTS: REPRODUCTION BY LIBRARIES AND ARCHIVES**

(a) \* \* \*

(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) and (c)~~ (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).<sup>3</sup>

\* \* \*

**§ 110. LIMITATIONS ON EXCLUSIVE RIGHTS: EXEMPTION OF CERTAIN PERFORMANCES AND DISPLAYS**

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

\* \* \*

(9) performance on a single occasion of a dramatic literary work published at least ten 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; ~~and~~<sup>4</sup>

(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 nonprofit 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

<sup>3</sup> NOTE: Amended by Pub. L. No. 109-9, Sec. 402.

<sup>4</sup> NOTE: Amended by Pub. L. No. 109-9, Sec. 202(a)(1).

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;<sup>5</sup> and<sup>5</sup>

*(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.<sup>6</sup>*

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.

\* \* \*

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*

<sup>5</sup> NOTE: Amended by Pub. L. No. 109-9, Sec. 202(a)(2).

<sup>6</sup> NOTE: Added by Pub. L. No. 109-9, Sec. 202(a)(3).

*granted under any other section of this title or under any other paragraph of this section.*<sup>7</sup>

\* \* \*

**§ 111. LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY TRANSMISSIONS**

(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 clause (2) of section 110 [17 USCS § 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 clause 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 ~~for private home viewing~~ pursuant to a statutory license under section 119 [17 USCS § 119];<sup>8</sup> or

(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

<sup>7</sup> NOTE: Added by Pub. L. No. 109-9, Sec. 202(a)(4).

<sup>8</sup> NOTE: Amended by Pub. L. No. 108-447, Sec. 107(b).

in a primary transmission is actionable as an act of infringement under section 501 [17 USCS § 501], and is fully subject to the remedies provided by sections 502 through 506 and 509 [17 USCS § § 502-506 and 509], 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 clauses (2), (3), and (4) of this subsection and section 114(d) [17 USCS § 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 clause (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 [17 USCS § 501], and is fully subject to the remedies provided by sections 502 through 506 and 509 [17 USCS § § 502-506 and 509], 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 clause (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 [17 USCS § 501], and is fully subject to the remedies provided by sections 502 through 506 [17 USCS § § 502-506] and sections 509 and 510 [17 USCS § § 509 and 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 clause (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 [17 USCS § 501], and is fully subject to the remedies provided by sections 502 through 506 [17 USCS § § 502-506] and section 509 [17 USCS § 509], 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) 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—



(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 ~~for private home-viewing~~ pursuant to section 119 [17 USCS § 119].<sup>9</sup> Such statement shall also include a special statement of account covering any nonnetwork 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; and

(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee 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 said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

(i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv);

(ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent;

(iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;

(iv) 0.2 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; and

in computing the amounts payable under paragraph (ii) through (iv), above, any fraction of a distant signal equivalent shall be computed at its fractional

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<sup>9</sup> NOTE: Amended by Pub. L. No. 108-447, Sec. 107(b).

value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter; and

(C) 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 total \$ 80,000 or less, gross receipts of the cable system for the purpose of this subclause shall be computed by subtracting from such actual gross receipts the amount by which \$ 80,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than \$ 3,000. The royalty fee payable under this subclause shall be 0.5 of 1 per centum, regardless of the number of distant signal equivalents, if any; and

(D) 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 \$ 80,000 but less than \$ 160,000, the royalty fee payable under this subclause shall be (i) 0.5 of 1 per centum of any gross receipts up to \$ 80,000; and (ii) 1 per centum of any gross receipts in excess of \$ 80,000 but less than \$ 160,000, regardless of the number of distant signal equivalents, if any.

(2) 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 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~~ *the Copyright Royalty Judges* in the event a controversy over such distribution exists.<sup>10</sup>

(3) The royalty fees thus deposited shall, in accordance with the procedures provided by clause (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 nonnetwork television program in whole or in part beyond the local service area of the primary transmitter; and

(B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (1)(A); and

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<sup>10</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(a)(1).

(C) any such owner whose work was included in nonnetwork 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) 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 ~~Librarian of Congress~~ *Copyright Royalty Judges*, in accordance with requirements that the ~~Librarian of Congress~~ *Copyright Royalty Judges* shall prescribe by regulation.<sup>11</sup> 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 ~~Librarian of Congress shall, upon the recommendation of the Register of Copyrights,~~ *Copyright Royalty Judges shall* determine whether there exists a controversy concerning the distribution of royalty fees.<sup>12</sup> If the ~~Librarian determines~~ *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.<sup>13</sup> If the ~~Librarian~~ *Copyright Royalty Judges* finds the existence of a controversy, the ~~Librarian~~ *Copyright Royalty Judges* shall, pursuant to chapter 8 of this title [17 USCS § § 801 et seq.], ~~convene a copyright arbitration royalty panel~~ *conduct a proceeding* to determine the distribution of royalty fees.<sup>14</sup>

(C) During the pendency of any proceeding under this subsection, the ~~Librarian of Congress~~ *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.<sup>15</sup>

(e) NONSIMULTANEOUS SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

<sup>11</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(a)(2)(A).

<sup>12</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(a)(2)(B)(i).

<sup>13</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(a)(2)(B)(ii).

<sup>14</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(a)(2)(B)(iii).

<sup>15</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(a)(2)(C).

\* \* \*

**§ 112. LIMITATIONS ON EXCLUSIVE RIGHTS: EPHEMERAL RECORDINGS**

\* \* \*

(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) [17 USCS § 114(d)(1)(C)(iv)] or under a statutory license in accordance with section 114(f) [17 USCS § 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) [17 USCS § 114(f)] or the limitation on exclusive rights specified by section 114(d)(1)(C)(iv) [17 USCS § 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 recordings 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) ~~No later than 30 days after the date of the enactment of the Digital Millennium Copyright Act [enacted Oct. 28, 1998], 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 [enacted Oct. 28, 1998] and ending on December 31, 2000, or such other date as the parties may agree. 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.~~<sup>16</sup> 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 ~~Librarian of Congress~~ Copyright Royalty Judges licenses covering such activities with respect to such sound recordings.<sup>17</sup> The parties to each ~~negotiation~~ proceeding shall bear their own costs.<sup>18</sup>

~~(4) 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 [17 USCS § § 801 et seq.], 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 [enacted Oct. 28, 1998] and ending on December 31, 2000, or such other date as the parties may agree. 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.~~<sup>19</sup> Such rates shall include a minimum fee for each type of service offered by transmitting organizations. The ~~copyright arbitration royalty panel~~ 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.<sup>20</sup> In determining such rates and terms, the ~~copyright arbitration royalty panel~~ Copyright Royalty Judges shall base ~~its decision~~ their decision on economic, competitive, and programming information presented by the parties, including—<sup>21</sup>

<sup>16</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(b)(1)(A).

<sup>17</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(b)(1)(B).

<sup>18</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(b)(1)(B).

<sup>19</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(b)(2)(A).

<sup>20</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(b)(2)(B).

<sup>21</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(b)(2)(B), (C).

(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 arbitration royalty panel~~ *Copyright Royalty Judges* may consider the rates and terms under voluntary license agreements ~~negotiated as provided~~ *described* in paragraphs (2) and (3).<sup>22</sup> The ~~Librarian of Congress~~ *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.<sup>23</sup>

(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 ~~determination by a copyright arbitration royalty panel or decision by the Librarian of Congress~~ *decision by the Librarian of Congress or determination by the Copyright Royalty Judges*.<sup>24</sup>

~~(6) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in paragraph (3) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, in the first week of January 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with paragraph (3). The procedures specified in paragraph (4) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1) [17 USC § 803(a)(1)], during a 60-day period commencing on July 1, 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with paragraph (3). The procedures specified in paragraph (4) shall be concluded in accordance with section 802 [17 USC § 802].~~<sup>25</sup>

~~(7)~~ (6)<sup>26</sup> (A) Any person who wishes to make a phonorecord of a sound recording under a statutory license in accordance with this subsection may do

<sup>22</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(b)(2)(B), (D).

<sup>23</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(b)(2)(B).

<sup>24</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(b)(3).

<sup>25</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(b)(4).

<sup>26</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(b)(4).

so without infringing the exclusive right of the copyright owner of the sound recording under section 106(1) [17 USCS § 106(1)]—

(i) by complying with such notice requirements as the ~~Librarian of Congress~~ *Copyright Royalty Judges* shall prescribe by regulation and by paying royalty fees in accordance with this subsection;<sup>27</sup> 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.

~~(8)~~ (7)<sup>28</sup> 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 [17 USCS § 1201(a)(1)] for engaging in such activities as are necessary to make such phonorecords as permitted under this subsection.

~~(9)~~ (8)<sup>29</sup> 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 [17 USCS § § 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) [17 USCS § § 106(4) and 106(6)].

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## § 114. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS

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### (f) LICENSES FOR CERTAIN NONEXEMPT TRANSMISSIONS.—

<sup>27</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(b)(5).

<sup>28</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(b)(4).

<sup>29</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(b)(4).

~~(1) (A) No later than 30 days after the enactment of the Digital Performance Right in Sound Recordings Act of 1995 [enacted Nov. 1, 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). Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services specified by 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, 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.<sup>30</sup> Such terms and rates shall distinguish among the different types of digital audio transmission services then in operation. Any copyright owners of sound recordings, preexisting subscription services, or preexisting satellite digital audio radio services may submit to the Librarian of Congress Copyright Royalty Judges licenses covering such subscription transmissions with respect to such sound recordings.<sup>31</sup> The parties to each negotiation proceeding shall bear their own costs.<sup>32</sup>~~

~~(B) 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) [17 USCS § 803(a)(1)], the Librarian of Congress shall, pursuant to chapter 8 [17 USCS § 801 et seq.], 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. The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (3), 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), a transitional period provided under~~

<sup>30</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(c)(1)(A)(i).

<sup>31</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(c)(1)(A)(ii).

<sup>32</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(c)(1)(A)(iii).



*section 6(b)(3) of the Copyright Royalty and Distribution Reform Act of 2004, or such other period as the parties may agree.*<sup>33</sup> In establishing rates and terms for preexisting subscription services and preexisting satellite digital audio radio services, in addition to the objectives set forth in section 801(b)(1) [17 USCS § 801(b)(1)], the ~~copyright arbitration royalty panel~~ *Copyright Royalty Judges* may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements ~~negotiated as provided described~~ in subparagraph (A).<sup>34</sup>

~~(C) (i) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in subparagraph (A) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe—~~

~~(F) no later than 30 days after a petition is filed by any copyright owners of sound recordings, any preexisting subscription services, or any preexisting satellite digital audio radio services indicating that a new type of subscription digital audio transmission service on which sound recordings are performed is or is about to become operational; and—~~

~~(H) in the first week of January 2001, and at 5-year intervals thereafter.~~

~~(ii) The procedures specified in subparagraph (B) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1) [17 USCS § 803(a)(1)] during a 60-day period commencing—~~

~~(F) 6 months after publication of a notice of the initiation of voluntary negotiation proceedings under subparagraph (A) pursuant to a petition under clause (i)(F) of this subparagraph; or—~~

~~(H) on July 1, 2001, and at 5-year intervals thereafter.~~

~~(iii) The procedures specified in subparagraph (B) shall be concluded in accordance with section 802 [17 USCS § 802].~~

*(C) The procedures under subparagraphs (A) and (B) also shall be initiated pursuant to a petition filed by any copyright owners of sound recordings, any preexisting subscription services, or any preexisting satellite digital audio radio services indicating that a new type of subscription digital audio transmission service on which sound recordings are performed is or is about to become operational, for the purpose of determining reasonable terms and rates of royalty payments with respect to such new type of transmission 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 subscription digital*

<sup>33</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(c)(1)(B)(i).

<sup>34</sup> NOTE: Amended by Pub. L. No. 108-419, Sec. 5(c)(1)(B)(ii), (iii).