

PERFORMANCE RIGHTS ACT

DECEMBER 14, 2010.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany H.R. 848]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 848) to provide parity in radio performance rights under title 17, United States Code, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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THE AMENDMENT

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Performance Rights Act”.

SEC. 2. ESTABLISHING EQUITABLE TREATMENT FOR TERRESTRIAL, CABLE, SATELLITE, AND INTERNET SERVICES.

(a) **PERFORMANCE RIGHT APPLICABLE TO RADIO TRANSMISSIONS GENERALLY.**—Section 106(6) of title 17, United States Code, is amended to read as follows:

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

(b) **INCLUSION OF TERRESTRIAL BROADCASTS IN EXISTING PERFORMANCE RIGHT.**—Section 114(d)(1) of title 17, United States Code, is amended—

(1) in the matter preceding subparagraph (A), by striking “a digital” and inserting “an”; and

(2) by striking subparagraph (A).

(c) **INCLUSION OF TERRESTRIAL BROADCASTS IN EXISTING STATUTORY LICENSE SYSTEM.**—Section 114(j)(6) of title 17, United States Code, is amended by striking “digital”.

(d) **ENSURING PLATFORM PARITY.**—Section 114(f) of title 17, United States Code, is amended—

(1) by striking paragraph (1);

(2) by redesignating paragraphs (2), (3), (4), and (5) as paragraphs (1), (2), (3), and (4), respectively; and

(3) in paragraph (1), as redesignated—

(A) in subparagraph (A), by striking “under chapter 8” and all that follows through the end of the third sentence and inserting “under chapter 8 shall determine reasonable rates and terms of royalty payments for transmissions subject to statutory licensing under subsection (d)(2) during 5-year periods beginning on January 1 of the second year following the year in which the proceedings are to be commenced, 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.”;

(B) in subparagraph (B)—

(i) in the second sentence, by striking “eligible nonsubscription transmission”; and

(ii) in the third sentence, by striking “eligible nonsubscription services and new subscription” and all that follows through “subparagraph (A)” and inserting “services, in addition to the objectives set forth in subparagraphs (A), (B), and (C) of section 801(b)(1), the Copyright Royalty Judges may consider the rates and terms for comparable types of services and comparable circumstances under voluntary license agreements. Notwithstanding section 801(b)(1), the provisions of section 801(b)(1)(D) shall not be taken into account by the Copyright Royalty Judges in any proceeding under this section”;

(C) by striking subparagraph (C) and inserting the following:

“(C) The procedures under subparagraphs (A) and (B) shall also be initiated pursuant to a petition filed by any copyright owner of sound recordings 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 determining 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 preexisting services most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.”.

(e) **TECHNICAL AND CONFORMING AMENDMENTS.**—

(1) **SECTION 114(F).**—Section 114(f) of title 17, United States Code (as amended by subsection (d)), is further amended—

(A) in paragraph (1)(B), in the first sentence, by striking “paragraph (3)” and inserting “paragraph (2)”; and

(B) in paragraph (4)(C), by striking “under paragraph (4)” and inserting “under paragraph (3)”.

(2) **SECTION 114(J).**—Section 114(j)(6) of title 17, United States Code, is amended by striking “retransmissions of broadcast transmissions” and inserting “broadcast transmissions and retransmissions of broadcast transmissions”.

(3) **SECTION 804.**—Section 804(b)(3)(C) of title 17, United States Code, is amended—

(A) in clause (i), by striking “and 114(f)(2)(C)”;

(B) in clause (iii)(II), by striking “114(f)(4)(B)(ii)” and inserting “114(f)(3)(B)(ii)”; and

(C) in clause (iv), by striking “or 114(f)(2)(C), as the case may be”.

SEC. 3. TREATMENT FOR MINORITY, FEMALE, RELIGIOUS, RURAL, SMALL, NONCOMMERCIAL, PUBLIC, EDUCATIONAL, AND COMMUNITY STATIONS AND CERTAIN USES.

(a) **MINORITY, FEMALE, RELIGIOUS, RURAL, SMALL, NONCOMMERCIAL, PUBLIC, EDUCATIONAL, AND COMMUNITY RADIO STATIONS.—**

(1) **IN GENERAL.**—Section 114(f)(1) of title 17, United States Code, as redesignated by section 2(d), is amended by adding at the end the following:

“(D)(i) Notwithstanding the provisions of subparagraphs (A) through (C), each individual terrestrial broadcast station that has gross revenues within a range specified in clause (ii) may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee as provided in clause (ii), in lieu of the amount such station would otherwise be required to pay under this paragraph. Such royalty fee shall not be taken into account in determining royalty rates in a proceeding under chapter 8, or in any other administrative, judicial, or other Federal Government proceeding.

“(ii) As provided in clause (i), each individual terrestrial broadcast station that has gross revenues in any calendar year of—

“(I) less than \$100,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of \$500 per year;

“(II) at least \$100,000 but less than \$500,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of \$2,500 per year; and

“(III) at least \$500,000 but less than \$1,250,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of \$5,000 per year.

“(E)(i) Notwithstanding the provisions of subparagraphs (A) through (C), each individual terrestrial broadcast station that is a public broadcasting entity as defined in section 118(f) and that has gross revenues within a range specified in clause (ii) may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee as provided in clause (ii), in lieu of the amount such station would otherwise be required to pay under this paragraph. Such royalty fee shall not be taken into account in determining royalty rates in a proceeding under chapter 8, or in any other administrative, judicial, or other Federal Government proceeding.

“(ii) As provided in clause (i), each individual terrestrial broadcast station that is a public broadcasting entity as defined in section 118(f) and has gross receipts in any calendar year of—

“(I) less than \$100,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of \$500 per year; and

“(II) \$100,000 or more may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of \$1,000 per year.

“(F) Notwithstanding the provisions of subparagraphs (A) through (E), each individual terrestrial broadcast station that had total gross revenues during the 4 full calendar quarters immediately preceding the date of enactment of the Performance Rights Act of—

“(i) less than \$5,000,000 shall not be required to pay a royalty under this paragraph during the 3 years immediately following the date of enactment of the Performance Rights Act; and

“(ii) \$5,000,000 or more shall not be required to pay a royalty under this paragraph during the 1 year immediately following the date of enactment of the Performance Rights Act.

The provisions of this subparagraph shall not be taken into account in determining royalty rates in a proceeding under chapter 8, or in any other administrative, judicial, or other Federal Government proceeding.”

(2) **PAYMENT DATE.**—A payment under subparagraph (D) or (E) of section 114(f)(1) of title 17, United States Code, as added by paragraph (1), shall not be due until the due date of the first royalty payments for nonsubscription broadcast transmissions that are determined, after the date of the enactment of this Act, under such section 114(f)(2) by reason of the amendment made by section 2(b)(2) of this Act.

(b) **TRANSMISSION OF RELIGIOUS SERVICES; INCIDENTAL USES OF MUSIC.**—Section 114(d)(1) of title 17, United States Code, as amended by section 2(b), is further amended by inserting the following before subparagraph (B):

“(A) an eligible nonsubscription transmission of—

“(i) services at a place of worship or other religious assembly; and

“(ii) an incidental use of a musical sound recording;”.

SEC. 4. AVAILABILITY OF PER PROGRAM LICENSE.

Section 114(f)(1)(B) of title 17, United States Code, as redesignated by section 2(d), is amended by inserting after the second sentence the following new sentence: “Such rates and terms shall include a per program license option for terrestrial broadcast stations that make limited feature uses of sound recordings.”

SEC. 5. NO HARMFUL EFFECTS ON SONGWRITERS.

(a) NO ADVERSE AFFECT ON LICENSE FEES FOR UNDERLYING MUSICAL WORKS; NECESSITY FOR OTHER LICENSES.—

(1) IN GENERAL.—Section 114(i) of title 17, United States Code, is amended to read as follows:

“(i) NO ADVERSE AFFECT ON LICENSE FEES FOR UNDERLYING MUSICAL WORKS; NECESSITY FOR OTHER LICENSES.—

“(1) NO ADVERSE AFFECT ON LICENSE FEES FOR UNDERLYING MUSICAL WORKS.—License fees payable for the public performance of sound recordings under section 106(6) shall not be cited, taken into account, or otherwise used in any administrative, judicial, or other governmental forum or proceeding, or otherwise, to set or adjust the license fees payable to copyright owners of musical works or their representatives for the public performance of their works, for the purpose of reducing or adversely affecting such license fees. License fees payable to copyright owners for the public performance of their musical works shall not be reduced or adversely affected in any respect as a result of the rights granted by section 106(6).

“(2) NECESSITY FOR OTHER LICENSES.—Notwithstanding the grant by an owner of copyright in a sound recording of an exclusive or nonexclusive license of the right under section 106(6) to perform the work publicly, a licensee of that sound recording may not publicly perform such sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording. 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.”

(2) CONFORMING AMENDMENT.—Section 114(d)(3)(C) of title 17, United States Code, is hereby repealed.

(b) PUBLIC PERFORMANCE RIGHTS AND ROYALTIES.—Nothing in this Act or the amendments made by this Act shall adversely affect in any respect the public performance rights of or royalties payable to songwriters or copyright owners of musical works.

(c) PRESERVATION OF ROYALTIES ON UNDERLYING WORKS PUBLICLY PERFORMED BY TERRESTRIAL BROADCAST STATIONS.—Section 114(f) of title 17, United States Code, (as amended by section 2(d)) is further amended by adding at the end the following new paragraph:

“(5) Notwithstanding any other provision of this section, under no circumstances shall the rates established by the Copyright Royalty Judges for the public performance of sound recordings be cited, taken into account, or otherwise used in any administrative, judicial, or other governmental forum or proceeding, or otherwise, to reduce or adversely affect the license fees payable to copyright owners of musical works or their representatives for the public performance of their works by terrestrial broadcast stations, and such license fees for the public performance of musical works shall be independent of license fees paid for the public performance of sound recordings.”

SEC. 6. PAYMENT OF CERTAIN ROYALTIES.

Section 114(g) of title 17, United States Code, is amended—

(1) by amending paragraph (1) to read as follows:

“(1) Except in the case of a transmission to which paragraph (5) applies or a transmission licensed under a statutory license in accordance with subsection (f) of this section, the following shall apply:

“(A) A featured recording artist who performs on a sound recording that has been licensed for public performance by means of an audio 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.

“(B)(i) In a case in which the copyright owner of a sound recording has licensed the sound recording for the public performance of the sound recording by means of an audio transmission, the copyright owner shall deposit 1 percent of the receipts from the license with the American Federation of Musicians and American Federation of Television and Radio Artists Intellectual Property Rights Distribution Fund (or any successor entity) (in this subparagraph referred to as the ‘Fund’) to be distributed to nonfeatured performers who have performed on sound recordings. The sound recording copyright owner shall make such deposits for receipts received during the

first half of a calendar year by August 15 and for receipts received during the second half of a calendar year by February 15 of the following calendar year.

“(ii) A sound recording copyright owner shall include with deposits under clause (i) information regarding the amount of such deposits attributable to each licensee and, subject to obtaining consent, if necessary, from such licensee, for each sound recording performed by means of an audio transmission by such licensee during the applicable time period, and to the extent included in the accounting reports provided by the licensee to the sound recording copyright owner—

“(I) the identity of the artist;

“(II) the International Standard Recording Code of the sound recording;

“(III) the title of the sound recording;

“(IV) the number of times the sound recording was transmitted;

and

“(V) the total amount of receipts collected from that licensee.

“(iii) The Fund shall make the distributions described in clause (i) as follows: 50 percent shall be paid to nonfeatured musicians (whether or not members of the American Federation of Musicians) and 50 percent shall be paid to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists). The Fund may, prior to making such distributions, deduct the reasonable costs related to making such distributions.

“(iv) The sound recording copyright owner shall not be required to provide any additional information to the Fund other than what is required under this subparagraph. Sound recording copyright owners shall use reasonable good faith efforts to include in all relevant licenses a requirement to report the information identified in subclauses (I) through (V) of clause (ii). Amounts required under clause (i) that are not paid by the date specified in such clause shall be subject to interest at the rate of 6 percent per annum for each day of nonpayment after the date the payment was due.”;

(2) in paragraph (2)(A), by striking “digital”; and

(3) by adding at the end the following new paragraph:

“(5) Notwithstanding paragraph (1), to the extent that a license granted by the copyright owner of a sound recording to a terrestrial broadcast station extends to such station’s nonsubscription broadcast transmissions otherwise licensable under a statutory license in accordance with subsection (f), the station shall pay to the agent designated to distribute statutory licensing receipts from the licensing of transmissions in accordance with subsection (f), 50 percent of the total royalties that the station is required to pay for such transmissions under the applicable license agreement. That agent shall distribute such payments in proportion to the distributions provided in subparagraphs (B) through (D) of paragraph (2), and such payments shall be the sole payments to which featured and nonfeatured artists are entitled by virtue of such transmissions under the direct license with that station.”.

SEC. 7. NO EFFECT ON LOCAL COMMUNITIES.

Section 114(f) of title 17, United States Code, (as amended by section 5(c)) is further amended by adding at the end the following new paragraph:

“(6) Neither this subsection nor the payment of royalties by broadcasters hereunder shall affect in any respect the public interest obligations of a broadcaster to its local community under part 73 of title 47 of the Code of Federal Regulations.”.

SEC. 8. PRESERVATION OF DIVERSITY.

Section 114(f) of title 17, United States Code, (as amended by section 7) is further amended by adding at the end the following new paragraph:

“(7) PRESERVATION OF DIVERSITY.—The Copyright Royalty Judges shall, in making determinations or adjustments of rates and terms of copyright royalty payments for public performances of sound recordings, consider evidence on the effect of such rates and terms on—

“(A) religious, minority-owned, female-owned, small, and noncommercial broadcasters;

“(B) non-music programming, including local news and information programming for stations that are part of station groups in which all stations within the group are located in one designated market area (as such term is defined in section 122(j)(2)(C)); and

“(C) religious, minority or minority-owned, and female or female-owned royalty recipients.”.

PURPOSE AND SUMMARY

H.R. 848, the “Performance Rights Act,” extends the scope of public performance rights to terrestrial broadcast performances. Under current law, owners of underlying “musical works” (i.e., the lyrics and musical notations), who in most cases include the songwriter or music publisher, are entitled to receive royalties from statutory licenses for the public performance of their works in terrestrial radio broadcasts. However, the copyright owners of sound recordings¹ and the artists featured in sound recordings do not have a comparable right to royalties for the public performance of their works in terrestrial radio broadcasts. This is in contrast to certain digital broadcast performances of songs, including cable, satellite, or webcasts—where the songwriters, performing artists, and copyright holders of sound recordings are all typically entitled to public performance royalties. H.R. 848 grants performers the right to receive compensation from terrestrial radio, and contains significant protections for the broadcast radio industry, including a scale-based fee system for radio stations with gross annual revenues of less than \$1.25 million, a one-to-three-year-delay of the bill’s implementation as to smaller and noncommercial broadcasters, and a requirement that, in making any royalty determinations, the Copyright Royalty Judges consider the effect on minority and religious broadcasters and religious and minority royalty recipients.

BACKGROUND AND NEED FOR THE LEGISLATION

I. BACKGROUND

A. History of Public Performance Rights

Article I, section 8, clause 8 of the Constitution grants Congress the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”² Congress first established copyright protection in sound recordings in 1971, when it granted the holders of such copyrights the right to control the reproduction, distribution, and adaptation of their works. The Copyright Act defines “sound recordings” as “works that result from the fixation of a series of musical, spoken, or other sounds . . . regardless of the nature of the material objects . . . in which they are embodied.”³ Congress did not grant copyright holders the right to control the public performance of their sound recordings, since it believed that possession of the three aforementioned rights would adequately compensate sound recording copyright holders.⁴

¹“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. 17 U.S.C. § 101.

²U.S. Const. art I, § 8, cl. 8.

³17 U.S.C. § 101.

⁴“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.” 17 U.S.C. § 101.

Controversy has always existed over whether the “bundle of rights” to a sound recording should include the right to control its public performance. In a 1978 report mandated by the 1976 amendments to the Copyright Act, the Register of Copyrights recommended that Congress add a sound recording performance right. The Register predicted that new “technological developments could well cause substantial changes in existing systems for public delivery of sound recordings . . . [and] [i]n that event, it [would be] . . . possible that a performance right would become the major source of income from, and incentive to, the creation of such works.”⁵

B. Internet Developments and the 1995 Solution

As the Register predicted, with the advent of significant technological advancements, including “[s]atellite and digital technologies [that made] possible the celestial jukebox, music on demand, and pay-per-listen services”⁶ on the Internet, came a potentially substantial new revenue stream. In particular, the growing popularity of Internet broadcasting (or “webcasting”) created an environment where the public performance of copyrighted sound recordings became an important new source of both revenue and piracy.

Congress was concerned that “in the absence of appropriate copyright protection in the digital environment . . . the creation of new sound recordings and musical works would be discouraged . . .”⁷ In 1995, Congress responded by enacting the Digital Performance Right in Sound Recordings Act (DPRA),⁸ amending section 106 of the Copyright Act to provide an exclusive performance right for digital audio transmissions.⁹

SoundExchange was created to administer the digital performance right and revenue stream created by the DPRA. SoundExchange is a non-profit organization that collects and distributes performance royalties for musicians, record labels, and other copyright holders of sound recordings. SoundExchange is the sole administrative entity for subscription services’ statutory license fees. The Copyright Royalty Board, comprising three Copyright Royalty Judges, governs the setting of fair market rates for recordings. The Copyright Royalty Judges are responsible for determining and adjusting the rates and terms of statutory copyright licenses and determining the distribution of royalties.

Significantly, the Digital Performance Right in Sound Recordings Act (DPRA) exempted “nonsubscription” transmissions and retransmissions of sound recordings such as television, radio, and business establishment broadcasts. The exemption was premised on the rationale that the public performance of sound recordings on television and radio benefits the owners of the sound recording by increasing record sales, and thus should not be compensable.¹⁰

For “subscription transmissions,” the DPRA created a statutory licensing scheme that mandated that the transmitter pay a royalty

⁵ Register of Copyrights, Report on Performance Right in Sound Recordings, H.R. Doc. No. 15, 95th Cong. (2d Sess. 1978).

⁶ S. Rep. No. 104–128 (1995).

⁷ S. Rep. No. 104–128 (1995).

⁸ 109 Stat. 336, Pub. L. No. 104–39 (Nov. 1, 1995).

⁹ A digital audio transmission is a “transmission in whole or in part in a digital or other non-analog format.” 17 U.S.C. § 101.

¹⁰ 17 U.S.C. § 114(d)(1).

and comply with “other requirements.”¹¹ These “other requirements” include refraining from 1) playing too many songs by one artist in close proximity, 2) publishing a program schedule in advance, or 3) causing a listener’s receiver equipment to switch from one channel to another in order to listen to more than one song of a single artist in a row, and 4) providing copyright management information for the songs broadcast.

For “interactive” transmissions, however, the Act did not include a statutory licensing mechanism, but instead required “interactive” transmission services to contract directly with the sound recording copyright owners, thus making licensing more difficult for these transmissions.¹²

C. Discussion Over the Intervening Years

Over the intervening years, commentators have debated the benefits and drawbacks of extending the public performance right to all sound recordings. The primary beneficiaries of the absence of a full public performance right in sound recordings are terrestrial radio stations. These broadcasters strongly oppose the recognition of a public performance right for sound recordings on a number of grounds, which include the expense involved in directly compensating copyright owners of such works, as well as the perception that recording artists are adequately compensated indirectly through the “free” promotional value that airplay provides. Others maintain that a general public performance right will encourage those who make sound recordings to increase their production and justly benefit the artists and musicians featured on sound recordings.

During the 109th Congress, Representatives Howard Berman and Mary Bono introduced H.R. 5361, the Platform Equality and Remedies for Rights Holders in Music Act of 2006, otherwise referred to as the PERFORM Act of 2006. The PERFORM Act sought to establish parity in the obligation to pay public performance royalties among all digital broadcasters, and required transmitting entities to employ reasonable, available, technologically feasible, and economically reasonable measures to prevent the recording of such broadcasts. During the 110th Congress, the Subcommittee on Courts, the Internet and Intellectual Property continued to explore performance rights platform parity. On July 31, 2007, the Subcommittee held an oversight hearing entitled, “Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century.”¹³

On December 18, 2007, H.R. 4789, the Performance Rights Act, was introduced by Representatives Berman, Darrell Issa, John Shadegg, Jane Harman, Marsha Blackburn, and Chairman John

¹¹“A ‘new subscription service’ is a service that performs sound recordings by means of non-interactive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service.” Subscribers pay for subscription services. 17 U.S.C. § 114(j)(8).

¹²“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.” 17 U.S.C. § 114(j)(7).

¹³On October 31, 2007, a non-binding resolution, H. Con. Res. 244, was introduced opposing any legislation to repeal the terrestrial radio broadcast exemption. The resolution attracted 226 cosponsors during the course of the 110th Congress. A similar resolution H. Con. Res 49, was introduced on February 12, 2009, during the 111th Congress. The resolution had attracted 143 cosponsors as of March 10, 2009, the date of the Committee’s hearing in the current Congress.

Conyers. The Subcommittee on Courts, the Internet and Intellectual Property held a legislative hearing on the bill on June 11, 2008, and reported the bill favorably by a voice vote at a markup on June 26, 2008.

On February 4, 2009, H.R., 848, the “Performance Rights Act,” was introduced by Chairman Conyers and eighteen Members of Congress including the following members of the Judiciary Committee: Representatives Issa, Berman, Debbie Wasserman Schultz, Anthony Weiner, Steve Cohen, Jerrold Nadler, Robert Wexler, Hank Johnson of Georgia, Adam Schiff, Brad Sherman, Sheila Jackson Lee of Texas, and Linda Sánchez. H.R. 848 is identical to the bill that the Courts Subcommittee had amended and reported favorably by voice vote to the full Judiciary Committee in 2008. The Judiciary Committee held a legislative hearing on H.R. 848 on March 10, 2009.

The Committee’s hearings and discussions have highlighted the need for Congress to correct a glaring omission within the copyright law and establish a performance right for sound recordings for terrestrial broadcasts. In an effort to ensure that royalties established take into account possible effects on minority and religious broadcasters, a provision was added to H.R. 848 at markup to require that the Copyright Royalty Judges consider the effect that determinations and adjustments of copyright royalty payments rates for sound recordings would have on religious, minority-owned, female-owned, small, and noncommercial broadcasters.

HEARINGS

The full Committee on the Judiciary held a hearing on March 10, 2009, to examine the merits of the Performance Rights Act. Testimony was received from Billy Corgan, Vocalist and Lead Guitarist, The Smashing Pumpkins; Mitch Bainwol, Chairman and Chief Executive Officer, Recording Industry Artist Association (RIAA); Paul Almeida, President, Department for Professional Employees, AFL-CIO; W. Lawrence Patrick, President, Patrick Communications; Stan Liebowitz, Ph.D., Ashbel Smith Distinguished Professor of Managerial Economics, University of Texas at Dallas; and Steve Newberry, Chairman of the Radio Board, National Association of Broadcasters (NAB).

COMMITTEE CONSIDERATION

On May 13, 2009, the Committee met in open session to mark up H.R. 848, and ordered the bill, as amended, favorably reported by a rollcall vote of 21 to 9, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee’s consideration of H.R. 848.

1. An amendment offered by Mr. Lungren to instruct the Government Accountability Office (GAO) to conduct a study within 6 months to determine the impact of the proposed legislation on local communities, on radio broadcasters and their stations, and on artists in the recording industry. Defeated 10 to 20.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman		X	
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt			
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters	X		
Mr. Delahunt		X	
Mr. Wexler		X	
Mr. Cohen		X	
Mr. Johnson			
Mr. Pierluisi			
Mr. Quigley		X	
Mr. Gutierrez			
Mr. Sherman		X	
Ms. Baldwin			
Mr. Gonzalez			
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez			
Ms. Wasserman Schultz		X	
Mr. Maffei		X	
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.		X	
Mr. Coble	X		
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Lungren	X		
Mr. Issa		X	
Mr. Forbes		X	
Mr. King			
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Rooney		X	
Mr. Harper	X		
Total	10	20	

2. Motion to order the bill favorably reported, as amended. Approved 21 to 9.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters		X	
Mr. Delahunt	X		
Mr. Wexler	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi			

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Quigley	X		
Mr. Gutierrez			
Mr. Sherman	X		
Ms. Baldwin			
Mr. Gonzalez			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Ms. Wasserman Schultz	X		
Mr. Maffei			
Mr. Smith, Ranking Member		X	
Mr. Sensenbrenner, Jr.	X		
Mr. Coble		X	
Mr. Gallegly			
Mr. Goodlatte	X		
Mr. Lungren		X	
Mr. Issa	X		
Mr. Forbes	X		
Mr. King			
Mr. Franks			
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Rooney	X		
Mr. Harper		X	
Total	21	9	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill H.R. 848, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 7, 2009.

Hon. JOHN CONYERS, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 848, the "Performance Rights Act."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie, who can be reached at 226-2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.
Ranking Member

H.R. 848—Performance Rights Act.

SUMMARY

H.R. 848 would expand the protections of certain copyright holders with respect to sound recordings broadcast by analog radio stations. Under current law, those copyright protections are extended to digital transmissions only. This expansion of copyright protections would allow performers to seek and collect royalties from radio stations that broadcast their work. H.R. 848 would require the Copyright Office to set rates and terms for royalty payments, with specific limits set for certain types of radio stations.

Based on information from the Copyright Office, CBO expects that the new requirement for Copyright Royalty Judges to set royalty rates and terms would be accomplished through its regular rate-setting procedures. Therefore, CBO estimates that implementing H.R. 848 would not have a significant effect on spending subject to appropriation.

Royalties for sound recordings are administered by SoundExchange, the private entity designated by the Copyright Office to perform the service. Because the amounts collected and spent by SoundExchange are not recorded on the Federal budget, CBO estimates that enacting H.R. 848 would have no effect on Federal revenues or direct spending. (Under current law, royalties for cable and satellite broadcast transmissions are administered by the Copyright Office and are recorded on the budget as Federal revenues and direct spending.)

H.R. 848 would impose an intergovernmental and private-sector mandate, as defined in the Unfunded Mandates Reform Act (UMRA), on over-the-air radio broadcasters by requiring them to pay new royalty fees to copyright holders of sound recordings. Based on information from industry sources, CBO estimates that the cost of complying with the mandate for public entities would be small and would fall well below the annual threshold for intergovernmental mandates (\$69 million in 2009, adjusted annually for inflation). Because the royalty rates for some broadcasters would

be established after enactment, CBO cannot determine whether the aggregate cost of complying with the mandate would exceed the annual threshold for private-sector mandates (\$139 million in 2009, adjusted annually for inflation).

ESTIMATED COST TO THE FEDERAL GOVERNMENT

CBO estimates that enacting H.R. 848 would have no significant impact on the Federal budget.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

H.R. 848 would impose an intergovernmental and private-sector mandate, as defined in UMRA, on over-the-air radio broadcasters by requiring them to pay royalty fees to holders of copyrights on sound recordings. Based on information from industry sources, CBO estimates that the cost of complying with the mandate would be small and would fall well below the annual threshold for intergovernmental mandates (\$69 million in 2009, adjusted annually for inflation). However, because the rate of royalty fees for some broadcasters would have to be established by the Copyright Royalty Judges, CBO cannot determine whether the aggregate cost of complying with the mandate would exceed the annual threshold for private-sector mandates (\$139 million in 2009, adjusted annually for inflation).

Under current law, over-the-air radio broadcasters only pay royalties to songwriters for the performance of their musical compositions. The bill would require those radio broadcasters to also pay royalties to holders of the copyrights on recordings (which may include performers and record companies). Under the bill, small, publicly owned, and religious stations would pay lower royalty fees than large and commercial stations. Those broadcasters could elect to pay a flat annual rate set by the bill and based on their annual revenues. However, royalty rates for stations that have gross revenues of \$1.25 million per year or more would be established by the Copyright Royalty Judges if broadcasters and performers are unable to negotiate rates on their own.

Based on data from industry sources regarding the number of over-the-air radio broadcasters, CBO estimates that the cost of complying with the mandate for publicly owned stations would be about \$500,000 a year. Also, based on those data, CBO estimates that commercial broadcasters that have gross revenues of less than \$1.25 million in any calendar year would pay a total of about \$16 million annually in royalty fees.

Data on the amount of royalty fees currently paid by cable stations, satellite operators, Internet broadcasters, and other digital media suggest that the total cost of new performance royalties for commercial radio broadcasters affected by the bill could be substantial. Information from industry sources indicates that about 1,800 over-the-air radio broadcasters currently have gross revenues in any year of \$1.25 million or more. However, because royalty fees have not been established for such broadcasters and because such fees could cause some broadcasters to shift their programming from music to other formats, CBO cannot determine whether the aggregate cost of complying with the mandate would exceed the annual threshold for private-sector mandates.

ESTIMATE PREPARED BY:

Federal Costs: Susan Willie
Impact on State, Local, and Tribal Governments: Elizabeth Cove
Delisle
Impact on the Private Sector: Paige Piper/Bach

ESTIMATE APPROVED BY:

Peter H. Fontaine
Assistant Director for Budget Analysis

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 848 amends Title 17 of the U.S. Code to provide parity in radio performance rights, to afford the performers of a musical work the right to receive compensation when their work is broadcast over terrestrial radio, while providing significant safeguards for all non-commercial stations and commercial stations with gross annual revenues totaling less than \$1.25 million, principally through a fee scale and delays in implementation.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds authority for this legislation in article I, section 8, clause 8 of the Constitution.

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R.848 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in such clause 9.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short Title. Section 1 sets forth the short title of the bill as the “Performance Rights Act.”

Sec. 2. Equitable Treatment for Terrestrial Broadcasts. Section 2 repeals the exemption for terrestrial broadcasters, and makes conforming changes by deleting references to the word “digital” from the types of audio transmissions that are subject to a performance right. With these changes, all terrestrial (over-the-air) broadcast transmissions, including analog audio transmissions, would be subject to sound recording performance rights, thereby providing parity for the technologies currently covered under the section 114 license.

The section further establishes rate standard parity among terrestrial broadcasters, cable, satellite, and Internet services, by creating one rate standard for Copyright Royalty Judges (CRJs) to consider, regardless of the platform involved. The new standard will be the old 801(b) standard minus subpart (D), which directed the CRJs to “minimize any disruptive impact on the structure of

the industries involved and on generally prevailing industry practices.” The CRJs will consider only 801(b)(1)(A)-(C).

Sec. 3. Treatment for Minority, Female, Religious, Rural, Small, Noncommercial, Public, Educational, and Community Stations and Certain Uses. Section 3 would create an accommodation for certain qualifying broadcasters from the negotiation and arbitrated rate-setting. Instead, such broadcasters would pay a prescribed flat fee. The section provides for a fee scale for commercial radio stations with gross annual revenues of less than \$1.25 million and all non-commercial stations, under which:

1. Commercial and non-commercial stations that have gross annual revenues of less than \$100,000 per year pay \$500 per year for the unlimited use of music.
2. Commercial stations with gross annual revenues of less than \$500,000 but more than \$100,000 per year pay \$2,500 per year for the unlimited use of music.
3. Commercial stations with gross annual revenues of less than \$1,250,000 but more than \$500,000 per year pay \$5,000 per year for the unlimited use of music.
4. Non-commercial radio stations with gross annual revenues of more than \$100,000 per year pay \$1,000 per year for the unlimited use of music.

Finally, the section provides a complete exemption for those stations that broadcast religious services or make “incidental use of musical sound recordings,” such as brief musical transitions in and out of commercials or program segments, or brief performances during news, talk, and sports programming.

The section delays the effect of royalty payments for 3 years for those broadcasters whose total gross revenue during the four full calendar quarters immediately preceding the date of enactment is less than \$5,000,000. For those with revenue over \$5,000,000, the bill delays any royalty payments for 1 year.

Sec. 4. Availability of Per Program License. Section 4 allows terrestrial radio stations to obtain program licenses for sound recordings (at separately set rates), in lieu of blanket licenses. In some cases, as with mixed-format stations, a radio station may not broadcast many featured uses of music. In such cases, rather than requiring a station to pay a general blanket license fee in the same amount paid by a station that primarily makes featured uses of music, this section requires the CRJs to establish a “per program license” so that such stations can choose only to pay for the music they use, which may be less costly than the general blanket license. This parallels the licenses offered by the performance rights organizations for performing the underlying musical copyright.

Sec. 5. No Harmful Effects on Songwriters. Section 5 protects songwriters from possible unintended consequences of providing this new performance right in sound recordings. It expressly provides that nothing in the Act shall adversely affect the royalties to songwriters, and ensures that license fees for the public performance of sound recordings will not be taken into account or cited to set or adjust the license fees payable to copyright owners of musical works. This section also makes clear that any licensing of the right under section 106(6) by an owner of a sound recording copy-

right does not allow the licensee to publicly perform the sound recording unless the licensee has obtained a license from the copyright owner of the underlying musical work.

Sec. 6. Payment of Certain Royalties. Section 6 codifies an agreement from 1994 among the major record companies, the American Federation of Television and Radio Artists (AFTRA), and the American Federation of Musicians (AFM). It requires payment by the labels to the unions equal to 1% of royalties from uses outside this statutory license for distribution to non-featured performers. This section also provides for direct payment to SoundExchange of 50% of any monies due pursuant to an agreement between the label and broadcaster for over-the-air performances that fall outside the statutory license. This portion will be distributed by SoundExchange to the performers independently, rather than via the labels.

Sec. 7. No Effect on Local Communities. Section 7 provides that the payment of royalties by a broadcaster shall not affect in any respect the public interest obligations for a broadcaster to its local community under part 73 of title 47 of the Code of Federal Regulations.

Sec. 8. Preservation of Diversity. Section 8 directs the CRJs to consider how their performance royalty determinations will affect: religious, small, non-commercial, minority-owned and religious-owned broadcasters; religious, minority or minority-owned, and female or female-owned royalty recipients; and non-music programming (such as news and informational programming) for stations part of a group located in a single designated market area.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 17, UNITED STATES CODE

* * * * *

CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

* * * * *

§ 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) * * *

* * * * *

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

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

* * * * *

§ 114. Scope of exclusive rights in sound recordings

(a) * * *

* * * * *

(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]** *an 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;]

(A) an eligible nonsubscription transmission of—

(i) services at a place of worship or other religious assembly; and

(ii) an incidental use of a musical sound recording;

* * * * *

(3) **LICENSES FOR TRANSMISSIONS BY INTERACTIVE SERVICES.**—

(A) * * *

* * * * *

[(C) Notwithstanding the grant of an exclusive or non-exclusive 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.]

* * * * *

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

[(1)(A) 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 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. 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 Copyright Royalty Judges licenses covering such sub-

scription transmissions with respect to such sound recordings. 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), a 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. 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), the 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 described in subparagraph (A).

[(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 audio transmission services most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.]

[(2)] (1)(A) Proceedings [under chapter 8 shall determine reasonable rates and terms of royalty payments for public performances of sound recordings by means of eligible non-subscription transmission services and new subscription 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 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. Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services and new subscription services then in operation and shall include a minimum fee for each such type of service. Any copyright owners of sound recordings or any entities performing sound recordings affected by this paragraph may submit to the Copyright Royalty Judges licenses covering such eligible nonsubscription transmissions and new subscription services with respect to such sound recordings.] *under chapter 8 shall determine reasonable rates and terms of royalty payments for transmissions subject to statutory licensing under subsection (d)(2) during 5-year periods beginning on January 1 of the second year following the year in which the proceedings are to be commenced, 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. 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 (3)] *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), a transitional period provided under section 6(b)(3) of the Copyright Royalty and Distribution Act of 2004, or such other period as the parties may agree. Such rates and terms shall distinguish among the different types of [eligible nonsubscription transmission] services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, 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. *Such rates and terms shall include a per program license option for terrestrial broadcast stations that make limited feature uses of sound recordings.* In establishing rates and terms for transmissions by [eligible nonsubscription services and new subscription services], 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 shall base its 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 its 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.

In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A)] *services, in addition to the objectives set forth in subparagraphs (A), (B), and (C) of section 801(b)(1), the Copyright Royalty Judges may consider the rates and terms for comparable types of services and comparable circumstances under voluntary license agreements. Notwithstanding section 801(b)(1), the provisions of section 801(b)(1)(D) shall not be taken into account by the Copyright Royalty Judges in any proceeding under this section.*

[(C) The procedures under subparagraphs (A) and (B) shall also be initiated pursuant to a petition filed by any copyright owners of sound recordings or any eligible nonsubscription service or new subscription service indicating that a new

type of eligible nonsubscription service or new subscription 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 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 preexisting subscription digital audio transmission services or preexisting satellite digital radio audio 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.】

(C) The procedures under subparagraphs (A) and (B) shall also be initiated pursuant to a petition filed by any copyright owner of sound recordings 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 determining 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 preexisting services most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.

(D)(i) Notwithstanding the provisions of subparagraphs (A) through (C), each individual terrestrial broadcast station that has gross revenues within a range specified in clause (ii) may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee as provided in clause (ii), in lieu of the amount such station would otherwise be required to pay under this paragraph. Such royalty fee shall not be taken into account in determining royalty rates in a proceeding under chapter 8, or in any other administrative, judicial, or other Federal Government proceeding.

(ii) As provided in clause (i), each individual terrestrial broadcast station that has gross revenues in any calendar year of—

(I) less than \$100,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of \$500 per year;

(II) at least \$100,000 but less than \$500,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of \$2,500 per year; and

(III) at least \$500,000 but less than \$1,250,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of \$5,000 per year.

(E)(i) Notwithstanding the provisions of subparagraphs (A) through (C), each individual terrestrial broadcast station that is a public broadcasting entity as defined in section 118(f) and that has gross revenues within a range specified in clause (ii) may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee as provided in clause (ii), in lieu of the amount such station would otherwise be required to pay under this paragraph. Such royalty fee shall not be taken into account in determining royalty rates in a proceeding under

chapter 8, or in any other administrative, judicial, or other Federal Government proceeding.

(ii) As provided in clause (i), each individual terrestrial broadcast station that is a public broadcasting entity as defined in section 118(f) and has gross receipts in any calendar year of—

(I) less than \$100,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of \$500 per year; and

(II) \$100,000 or more may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of \$1,000 per year.

(F) Notwithstanding the provisions of subparagraphs (A) through (E), each individual terrestrial broadcast station that had total gross revenues during the 4 full calendar quarters immediately preceding the date of enactment of the Performance Rights Act of—

(i) less than \$5,000,000 shall not be required to pay a royalty under this paragraph during the 3 years immediately following the date of enactment of the Performance Rights Act; and

(ii) \$5,000,000 or more shall not be required to pay a royalty under this paragraph during the 1 year immediately following the date of enactment of the Performance Rights Act.

The provisions of this subparagraph shall not be taken into account in determining royalty rates in a proceeding under chapter 8, or in any other administrative, judicial, or other Federal Government proceeding.

[(3)] (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.

[(4)] (3)(A) * * *

* * * * *

[(5)] (4)(A) * * *

* * * * *

(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 (4)] 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.

* * * * *

(5) *Notwithstanding any other provision of this section, under no circumstances shall the rates established by the Copyright Royalty Judges for the public performance of sound recordings be cited, taken into account, or otherwise used in any administrative, judicial, or other governmental forum or proceeding, or otherwise, to reduce or adversely affect the license fees payable to copyright owners of musical works or their representatives for the public performance of their works by terrestrial broadcast stations, and such license fees for the public performance of musical works shall be independent of license fees paid for the public performance of sound recordings.*

(6) *Neither this subsection nor the payment of royalties by broadcasters hereunder shall affect in any respect the public interest obligations of a broadcaster to its local community under part 73 of title 47 of the Code of Federal Regulations.*

(7) **PRESERVATION OF DIVERSITY.**—*The Copyright Royalty Judges shall, in making determinations or adjustments of rates and terms of copyright royalty payments for public performances of sound recordings, consider evidence on the effect of such rates and terms on—*

(A) *religious, minority-owned, female-owned, small, and noncommercial broadcasters;*

(B) *non-music programming, including local news and information programming for stations that are part of station groups in which all stations within the group are located in one designated market area (as such term is defined in section 122(j)(2)(C)); and*

(C) *religious, minority or minority-owned, and female or female-owned royalty recipients.*

(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.]

(1) *Except in the case of a transmission to which paragraph (5) applies or a transmission licensed under a statutory license in accordance with subsection (f) of this section, the following shall apply:*

(A) *A featured recording artist who performs on a sound recording that has been licensed for public performance by means of an audio 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.*

(B)(i) *In a case in which the copyright owner of a sound recording has licensed the sound recording for the public performance of the sound recording by means of an audio transmission, the copyright owner shall deposit 1 percent of the receipts from the license with the American Federation of Musicians and American Federation of Television and Radio Artists Intellectual Property Rights Distribution Fund (or any successor entity) (in this subparagraph referred to as the "Fund") to be distributed to nonfeatured performers who have performed on sound recordings. The sound recording copyright owner shall make such deposits for receipts received during the first half of a calendar year by August 15 and for receipts received during the second half of a calendar year by February 15 of the following calendar year.*

(ii) *A sound recording copyright owner shall include with deposits under clause (i) information regarding the amount of such deposits attributable to each licensee and, subject to obtaining consent, if necessary, from such licensee, for each sound recording performed by means of an audio transmission by such licensee during the applicable time period, and to the extent included in the accounting reports provided by the licensee to the sound recording copyright owner—*

(I) *the identity of the artist;*

(II) *the International Standard Recording Code of the sound recording;*

(III) *the title of the sound recording;*

(IV) *the number of times the sound recording was transmitted; and*

(V) *the total amount of receipts collected from that licensee.*

(iii) *The Fund shall make the distributions described in clause (i) as follows: 50 percent shall be paid to nonfeatured musicians (whether or not members of the American Federation of Musicians) and 50 percent shall be paid to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists). The Fund may, prior to making such distributions, deduct the reasonable costs related to making such distributions.*

(iv) *The sound recording copyright owner shall not be required to provide any additional information to the Fund other than what is required under this subparagraph. Sound recording copyright owners shall use reasonable good faith efforts to include in all relevant licenses a re-*

quirement to report the information identified in subclauses (I) through (V) of clause (ii). Amounts required under clause (i) that are not paid by the date specified in such clause shall be subject to interest at the rate of 6 percent per annum for each day of nonpayment after the date the payment was due.

(2) An agent designated 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.

* * * * *

(5) Notwithstanding paragraph (1), to the extent that a license granted by the copyright owner of a sound recording to a terrestrial broadcast station extends to such station's non-subscription broadcast transmissions otherwise licensable under a statutory license in accordance with subsection (f), the station shall pay to the agent designated to distribute statutory licensing receipts from the licensing of transmissions in accordance with subsection (f), 50 percent of the total royalties that the station is required to pay for such transmissions under the applicable license agreement. That agent shall distribute such payments in proportion to the distributions provided in subparagraphs (B) through (D) of paragraph (2), and such payments shall be the sole payments to which featured and nonfeatured artists are entitled by virtue of such transmissions under the direct license with that station.

* * * * *

[(i) NO EFFECT ON ROYALTIES FOR UNDERLYING WORKS.—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).**]**

(i) NO ADVERSE AFFECT ON LICENSE FEES FOR UNDERLYING MUSICAL WORKS; NECESSITY FOR OTHER LICENSES.—

(1) NO ADVERSE AFFECT ON LICENSE FEES FOR UNDERLYING MUSICAL WORKS.—*License fees payable for the public performance of sound recordings under section 106(6) shall not be cited, taken into account, or otherwise used in any administrative, judicial, or other governmental forum or proceeding, or otherwise, to set or adjust the license fees payable to copyright owners of musical works or their representatives for the public performance of their works, for the purpose of reducing or adversely affecting such license fees. License fees payable to copyright owners for the public performance of their musical works shall not be reduced or adversely affected in any respect as a result of the rights granted by section 106(6).*

(2) *NECESSITY FOR OTHER LICENSES.*—Notwithstanding the grant by an owner of copyright in a sound recording of an exclusive or nonexclusive license of the right under section 106(6) to perform the work publicly, a licensee of that sound recording may not publicly perform such sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording. 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.

(j) *DEFINITIONS.*—As used in this section, the following terms have the following meanings:

(1) * * *

* * * * *

(6) An “eligible nonsubscription transmission” is a non-interactive 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]** *broadcast transmissions and 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.

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CHAPTER 8—PROCEEDINGS BY COPYRIGHT ROYALTY JUDGES

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§ 804. Institution of proceedings

(a) * * *

(b) **TIMING OF PROCEEDINGS.**—

(1) * * *

* * * * *

(3) **SECTION 114 AND CORRESPONDING 112 PROCEEDINGS.**—

(A) * * *

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(C)(i) Notwithstanding any other provision of this chapter, this subparagraph shall govern proceedings commenced pursuant to section 114(f)(1)(C) **[and 114(f)(2)(C)]** concerning new types of services.

* * * * *

(iii) The proceeding shall follow the schedule set forth in subsections (b), (c), and (d) of section 803, except that—

(I) * * *

(II) the decision shall take effect as provided in subsections (c)(2) and (d)(2) of section 803 and section **[114(f)(4)(B)(ii)] 114(f)(3)(B)(ii)** and (C).

(iv) The rates and terms shall remain in effect for the period set forth in section 114(f)(1)(C) **or** 114(f)(2)(C), as the case may be**].**

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