

§25.5 COPYRIGHT TERM EXTENSION

The SPEAKER pro tempore, Mr. SHIMKUS, pursuant to House Resolution 390 and rule XXIII, declared the House resolved into the Committee of the Whole House on the state of the Union for the consideration of the bill (H.R. 2589) to amend the provisions of title 17, United States Code, with respect to the duration of copyright, and for other purposes.

The SPEAKER pro tempore, Mr. SHIMKUS, by unanimous consent, designated Mr. EVERETT as Chairman of the Committee of the Whole.

The Acting Chairman, Mr. DIAZ-BALART assumed the Chair; and after some time spent therein,

§25.6 RECORDED VOTE

A recorded vote by electronic device was ordered in the Committee of the Whole on the following amendment submitted by Mr. MCCOLLUM to the amendment by Mr. SENSENBRENNER:

Amendment submitted by Mr. MCCOLLUM:

In lieu of the matter proposed to be inserted as title II, insert the following:

TITLE II—MUSIC LICENSING EXEMPTION FOR FOOD SERVICE OR DRINKING ESTABLISHMENTS

SEC. 201. SHORT TITLE.

This title may be cited as the "Fairness In Music Licensing Act of 1998."

SEC. 202. EXEMPTION.

Section 110(5) of title 17, United States Code is amended—

(1) by striking "(5)" and inserting "(5)(A) except as provided in subparagraph (B).";

(2) by adding at the end the following:

"(B) communication by a food service or drinking establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if—

"(i) either the establishment in which the communication occurs has less than 3500 gross square feet of space (excluding space used for customer parking), or the establishment in which the communication occurs has 3500 gross square feet of space or more (excluding space used for customer parking) and—

"(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

"(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

"(ii) no direct charge is made to see or hear the transmission or retransmission;

"(iii) the transmission or retransmission is not further transmitted beyond the food service or drinking establishment where it is received; and

"(iv) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed;"; and

(3) by adding after paragraph (10) the following:

"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".

SEC. 203. LICENSING BY PERFORMING RIGHTS SOCIETIES.

(a) IN GENERAL.—Chapter 5 of title 17, United States Code, is amended by adding at the end the following:

"§512. determinations of reasonable license fee for individual proprietors

"In the case of any performing rights society subject to a consent decree which provides for the determination of reasonable license fees to be charged by the performing rights society, notwithstanding the provisions of that consent decree, an individual proprietor who owns or operates fewer than 3 food service or drinking establishments in which nondramatic musical works are performed publicly and who claims that any license agreement offered by that performing rights society to the industry of which the individual proprietor is a member is unreasonable in its license fee as to that individual proprietor, shall be entitled to determination of a reasonable license fee as follows:

"(1) The individual proprietor may commence such proceeding for determination of a reasonable license fee by filing an application in the applicable district court under paragraph (2) that a rate disagreement exists and by serving a copy of the application on the performing rights society. Such proceeding shall commence in the applicable district court within 90 days after the service of such copy, except that such 90-day requirement shall be subject to the administrative requirements of the court.

"(2) The proceeding under paragraph (1) shall be held, at the individual proprietor's election, in the judicial district of the district court with jurisdiction over the applicable consent decree or in that place of holding court of a district court that is the seat of the Federal circuit (other than the Court of Appeals for the Federal Circuit) in which the proprietor's establishment is located.

"(3) Such proceeding shall be held before the judge of the court with jurisdiction over the consent decree governing the performing rights society. At the discretion of the court, the proceeding shall be held before a special master or magistrate judge appointed by such judge. Should that consent decree provide for the appointment of an advisor or advisors to the court for any purpose, any such advisor shall be the special master so named by the court.

"(4) In any such proceeding, the industry rate, or, in the absence of an industry rate, the most recent license fee agreed to by the parties or determined by the court, shall be presumed to have been reasonable at the time it was agreed to or determined by the court. The burden of proof shall be on the individual proprietor to establish the reasonableness of any other fee it requests.

"(5) Pending the completion of such proceeding, the individual proprietor shall have the right to perform publicly the copyrighted musical compositions in the repertoire of the performing rights society, and shall pay an interim license fee, subject to

retroactive adjustment when a final fee has been determined, in an amount equal to the industry rate, or, in the absence of an industry rate, the amount of the most recent license fee agreed to by the parties. Failure to pay such interim license fee shall result in immediate dismissal of the proceeding, and the individual proprietor shall then be deemed to have had no right to perform the copyrighted musical compositions in the repertoire of the performing rights society under this section from the date it submitted its notice commencing the proceeding.

"(6) Any decision rendered in such proceeding by a special master or magistrate judge named under paragraph (3) shall be reviewed by the presiding judge. Such proceeding, including such review, shall be concluded within 6 months after its commencement.

"(7) Any such final determination shall be binding only as to the individual proprietor commencing the proceeding, and shall not be applicable to any other proprietor or any other performing rights society, and the performing rights society shall be relieved of any obligation of nondiscrimination among similarly situated music users that may be imposed by the consent decree governing its operations.

"(8) For purposes of this section, the term 'industry rate' means the license fee a performing rights society has agreed to with, or which has been determined by the court for, a significant segment of the music user industry to which the individual proprietor belongs."

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 5 of title 17, United States Code, is amended by adding after the item relating to section 511 the following:

"512. Determinations of reasonable license fee for individual proprietors."

SEC. 204. DEFINITIONS.

Section 101 of title 17, United States Code, is amended—

(1) by inserting after the definition of "display" the following:

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

(2) by inserting after the definition of "fixed" the following:

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

(3) by inserting after the definition of "perform" the following:

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

(4) by inserting after the definition of "pictorial, graphic and sculptural works" the following:

"A 'proprietor' is an individual, corporation, partnership, or other entity, as the case may be, that owns a food service or drinking establishment. No owner or operator of a radio or television station licensed by the Federal Communications Commission, cable system or satellite carrier, cable or satellite carrier service or programmer, Internet service provider, online service provider, tele-

communications company, or any other such audio-visual service or programmer now known or as may be developed in the future, commercial subscription music service, or owner or operator of any other transmission service, or owner of any other establishment in which the service to the public of food or drink is not the primary purpose, shall under any circumstances be deemed to be a proprietor."

SEC. 205. CONSTRUCTION OF TITLE.

Except as otherwise provided in this title, nothing in this title shall be construed to relieve any performing rights society of any obligation under any State or local statute, ordinance, or law, or consent decree or other court order governing its operation, as such statute, ordinance, law, decree, or order is in effect on the date of the enactment of this title, as it may be amended after such date, or as it may be issued or agreed to after such date.

SEC. 206. EFFECTIVE DATE.

This title and the amendments made by this title shall take effect 90 days after the date of the enactment of this title.

Amendment submitted by Mr. SENBRENNER:

Page 1, insert before section 1 the following:

TITLE I—COPYRIGHT TERM EXTENSION

Strike section 1 and insert the following:

SEC. 101. SHORT TITLE.

This title may be referred to as the "Copyright Term Extension Act".

Redesignate sections 2 through 5 as sections 102 through 105, respectively.

In section 105, as so redesignated, strike "this Act" and insert "this title".

Strike section 6 and insert the following:

SEC. 106. EFFECTIVE DATE.

This title and the amendments made by this title shall take effect on the date of the enactment of this Act.

Add at the end the following:

TITLE II—MUSIC LICENSING

SEC. 201. SHORT TITLE.

This title may be cited as the "Fairness in Musical Licensing Act of 1998".

SEC. 202. EXEMPTION OF CERTAIN MUSIC USES FROM COPYRIGHT PROTECTION.

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

"(5) communication by electronic device of a transmission embodying a performance or display of a nondramatic musical work by the public reception of a broadcast, cable, satellite, or other transmission, if—

"(A)(i) the rooms or areas within the establishment where the transmission is intended to be received by the general public contains less than 3,500 square feet, excluding any space used for customer parking; or

"(ii) the rooms or areas within the establishment where the transmission is intended to be received by the general public contains 3,500 square feet or more, excluding any space used for customer parking, if—

"(I) in the case of performance by audio means only, the performance is transmitted by means of a total of not more than 6 speakers (excluding any speakers in the device receiving the communication), of which not more than 4 speakers are located in any 1 room or area; or

"(II) in the case of a performance or display by visual or audiovisual means, any visual portion of the performance or display is communicated by means of not more than 2 audio visual devices, if no such audio visual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is transmitted by means of a total of not more than 6 speakers (excluding any speakers in the device receiv-

ing the communication), of which not more than 4 speakers are located in any 1 room or area;

"(B) no direct charge is made to see or hear the transmission;

"(C) the transmission is not further transmitted to the public beyond the establishment where it is received; and

"(D) the transmission is licensed."

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

(1) by striking "a vending" and inserting "an";

(2) by striking "sole";

(3) by inserting "or of the audio, video, or other devices utilized in the performance," after "phonorecords of the work,"; and

(4) by striking "and is within the immediate area where the sale is occurring".

SEC. 203. BINDING ARBITRATION OF RATE DISPUTES INVOLVING PERFORMING RIGHTS SOCIETIES.

(a) **IN GENERAL.**—Section 504 of title 17, United States Code, is amended by adding at the end the following new subsection:

"(d) **PERFORMING RIGHTS SOCIETIES; BINDING ARBITRATION.**—

"(1) **ARBITRATION OF DISPUTES PRIOR TO COURT ACTION.**—

"(A) **ARBITRATION.**—(i) If a general music user and a performing rights society are unable to agree on the appropriate rate or fee to be paid for the user's past or future performance of musical works in the repertoire of the performing rights society, the general music user shall, in lieu of any other dispute-resolution mechanism established by any judgment or decree governing the operation of the performing rights society, be entitled to binding arbitration of such disagreement pursuant to the rules of the American Arbitration Association. The music user may initiate such arbitration.

"(ii) The arbitrator in such binding arbitration shall determine a fair and reasonable rate or fee for the general music user's past and future performance of musical works in such society's repertoire and shall determine whether the user's past performances of such musical works, if any, infringed the copyrights of works in the society's repertoire. If the arbitrator determines that the general music user's past performances of such musical works infringed the copyrights of works in the society's repertoire, the arbitrator shall impose a penalty for such infringement. Such penalty shall not exceed the arbitrator's determination of the fair and reasonable license fee for the performances at issue.

"(B) **DEFINITIONS.**—(i) For purposes of this paragraph, a 'general music user' is any person who performs musical works publicly but is not engaged in the transmission of musical works to the general public or to subscribers through broadcast, cable, satellite, or other transmission.

"(ii) For purposes of this paragraph, transmissions within a single commercial establishment or within establishments under common ownership or control are not transmissions to the general public.

"(iii) For purposes of clause (ii), an 'establishment' is a retail business, restaurant, bar, inn, tavern, or any other place of business in which the public may assemble.

"(C) **ENFORCEMENT OF ARBITRATOR'S DETERMINATIONS.**—An arbitrator's determination under this paragraph is binding on the parties and may be enforced pursuant to sections 9 through 13 of title 9.

"(2) **COURT-ANNEXED ARBITRATION.**—(A) In any civil action brought against a general music user, as defined in paragraph (1) for infringement of the right granted in section 106(4) involving a musical work that is in the repertoire of a performing rights society, if the general music user admits the prior pub-

lic performance of one or more works in the repertoire of the performing rights society but contests the rate or the amount of the license fee demanded by such society for such performance, the dispute shall, if requested by the general music user, be submitted to arbitration under section 652(e) of title 28. In such arbitration proceeding, the arbitrator shall determine the appropriate rate and amount owed by the music user to the performing rights society for all past public performances of musical works in the society's repertoire. The amount of the license fee shall not exceed two times the amount of the blanket license fee that would be applied by the society to the music user for the year or years in which the performances occurred. In addition, the arbitrator shall, if requested by the music user, determine a fair and reasonable rate or license fee for the music user's future public performances of the musical works in such society's repertoire.

"(B) As used in this paragraph, the term 'blanket license' means a license provided by a performing rights society that authorizes the unlimited performance of musical works in the society's repertoire, for a fee that does not vary with the quantity or type of performances of musical works in the society's repertoire.

"(3) **TERM OF LICENSE FEE DETERMINATION.**—In any arbitration proceeding initiated under this subsection, the arbitrator's determination of a fair and reasonable rate or license fee for the performance of the music in the repertoire of the performing rights society concerned shall apply for a period of not less than 3 years nor more than 5 years after the date of the arbitrator's determination."

(b) **ACTIONS THAT SHALL BE REFERRED TO ARBITRATION.**—Section 652 of title 28, United States Code, is amended by adding at the end the following:

"(e) **ACTIONS THAT SHALL BE REFERRED TO ARBITRATION.**—In any civil action against a general music user for infringement of the right granted in section 106(4) of title 17 involving a musical work that is in the repertoire of a performing rights society, if the general music user admits the public performance of any musical work in the repertoire of the performing rights society but contests the rate or the amount of the license fee demanded by the society for such performance, the district court shall, if requested by the general music user, refer the dispute to arbitration, which shall be conducted in accordance with section 504(d)(2) of title 17. Each district court shall establish procedures by local rule authorizing the use of arbitration under this subsection. The definitions set forth in title 17 apply to the terms used in this subsection."

SEC. 204. VICARIOUS LIABILITY PROHIBITED.

Section 501 of title 17, United States Code, is amended by adding at the end the following:

"(f) A landlord, an organizer or sponsor of a convention, exposition, or meeting, a facility owner, or any other person making space available to another party by contract, shall not be liable under any theory of vicarious or contributory infringement with respect to an infringing public performance of a copyrighted work by a tenant, lessee, subtenant, sublessee, licensee, exhibitor, or other user of such space on the ground that—

"(1) a contract for such space provides the landlord, organizer or sponsor, facility owner, or other person a right or ability to control such space and compensation for the use of such space; or

"(2) the landlord, organizer or sponsor, facility owner, or other person has or had at the time of the infringing performance actual control over some aspects of the use of such space, if the contract for the use of such space prohibits infringing public perform-

