returned or the disk destroyed. It seems likely that, as has been alleged, to require a second payment for the mechanical reproduction under these circumstances would simply have the effect of driving some of the copyrighted music off the air.

Ephemeral Recordings for Transmissions to Handicapped Audiences. As a counterpart to its amendment of section 110(8), the Committee adopted a new provision, subsection (d) of section 112, to provide an ephemeral recording exemption in the case of transmissions to the blind and deaf. New subsection would permit the making of one recording of a performance exempted under section 110(8), and its retention for an unlimited period. It would not permit the making of further reproductions or their exchange with other organizations.

Copyright Status of Ephemeral Recordings. A program reproduced in an ephemeral recording made under section 112 in many cases will constitute a motion picture, a sound recording, or some other kind of derivative work, and will thus be potentially copyrightable under section 103. In section 112(e) it is provided that ephemeral recordings are not to be copyrightable as derivative works except with the consent of the owners of the copyrighted material employed in them.

AMENDMENTS

2004—Subsec. (e)(3). Pub. L. 108–419, §5(b)(1), substituted first sentence for former first sentence which read: ''No later than 30 days after the date of the enactment of the Digital Millennium Copyright Act, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by paragraph (1) of this subsection during the period beginning on the date of the enactment of such Act and ending on December 31, 2000, or such other date as the parties may agree.'', substituted ''Copyright Royalty Judges licenses'' for ''Librarian of Congress licenses'' in third sentence, and struck out ''negotiation'' before ''proceeding'' in last sentence.

Subsec. (e)(4). Pub. L. 108–419, §5(b)(2), substituted first sentence for former first sentence which read: ''In the absence of license agreements negotiated under paragraph (2), during the 60-day period commencing 6 months after publication of the notice specified in paragraph (3), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of reasonable rates and terms which, subject to paragraph (5), shall be binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under this subsection during the period beginning on the date of the enactment of the Digital Millennium Copyright Act and ending on December 31, 2000, or such other date as the parties may agree.'', and substituted ''Copyright Royalty Judges'' for ''copyright arbitration royalty panel'' in third and fourth sentences and in concluding provisions, ''their decision'' for ''its decision'', ''described'' for ''negotiated as provided'', and ''Copyright Royalty Judges shall also establish'' for ''Librarian of Congress shall also establish''.

Subsec. (e)(5). Pub. L. 108–419, §5(b)(3), substituted ''decision by the Librarian of Congress or determination by the Copyright Royalty Judges'' for ''determination by a copyright arbitration royalty panel or decision by the Librarian of Congress''.

Subsec. (e)(6). Pub. L. 108–419, §5(b)(4), redesignated par. (7) as (6) and struck out former par. (6) which related to publication of notice of the initiation of voluntary negotiation proceedings as specified in par. (3).

Subsec. (e)(6)(A)(i). Pub. L. 108–419, §5(b)(5), substituted ''Copyright Royalty Judges'' for ''Librarian of Congress''.

Subsec. (e)(7) to (9). Pub. L. 108–419, §5(b)(4), redesignated pars. (8) and (9) as (7) and (8), respectively. Former par. (7) redesignated (6).

2002—Subsecs. (f), (g). Pub. L. 107–273 added subsec. (f) and redesignated former subsec. (f) as (g).

1999—Subsec. (e)(2). Pub. L. 106–44, §1(b)(1), redesignated par. (3) as (2).

Subsec. (e)(3). Pub. L. 106–44, §1(b)(1), (2), redesignated par. (4) as (3) and substituted ''(1)'' for ''(2)'' in first sentence. Former par. (3) redesignated (2).

Subsec. (e)(4). Pub. L. 106–44, §1(b)(1), (3), redesignated par. (5) as (4), substituted ''(2)'' for ''(3)'', ''(3)'' for ''(4)'', and ''(5)'' for ''(6)'' in first sentence, and substituted ''(2) and (3)'' for ''(3) and (4)'' in penultimate sentence of concluding provisions. Former par. (4) redesignated (3).

Subsec. (e)(5). Pub. L. 106–44, §1(b)(1), redesignated par. (6) as (5). Former par. (5) redesignated (4).

Subsec. (e)(6). Pub. L. 106–44, §1(b)(1), (4), redesignated par. (7) as (6), substituted ''(3)'' for ''(4)'' wherever appearing, and substituted ''(4)'' for ''(5)'' in two places. Former par. (6) redesignated (5).

Subsec. (e)(7) to (10). Pub. L. 106–44, §1(b)(1), redesignated pars. (8) to (10) as (7) to (9), respectively. Former par. (7) redesignated (6).

1998—Subsec. (a). Pub. L. 105–304, §402, designated existing provisions as par. (1), in introductory provisions inserted '', including a statutory license under section 114(f),'' after ''under a license'' and ''or for a transmitting organization that is a broadcast radio or television station licensed as such by the Federal Communications Commission and that makes a broadcast transmission of a performance of a sound recording in a digital format on a nonsubscription basis,'' after ''114(a),'', redesignated former pars. (1) to (3) as subpars. (A) to (C), respectively, and added par. (2).

Subsecs. (e), (f). Pub. L. 105–304, §405(b), added subsec. (e) and redesignated former subsec. (e) as (f).

EFFECTIVE DATE OF 2004 AMENDMENT

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

CONSTRUCTION OF 1998 AMENDMENT

Pub. L. 105–304, title IV, §405(c), Oct. 28, 1998, 112 Stat. 2902, provided that: ''Nothing in this section [amending this section and sections 114 and 801 to 803 of this title and enacting provisions set out as notes under section 114 of this title] or the amendments made by this section shall affect the scope of section 112(a) of title 17, United States Code, or the entitlement of any person to an exemption thereunder.''

§ 113. Scope of exclusive rights in pictorial, graphic, and sculptural works

(a) Subject to the provisions of subsections (b) and (c) of this section, the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.

(b) This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.

(c) In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to prevent the making, distribution, or display of pictures or photo-

graphs of such articles in connection with advertisements or commentaries related to the distribution or display of such articles, or in connection with news reports.

(d)(1) In a case in which—

(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and

(B) the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal,

then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.

(2) If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), the author's rights under paragraphs (2) and (3) of section 106A(a) shall apply unless—

(A) the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art, or

(B) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

For purposes of subparagraph (A), an owner shall be presumed to have made a diligent, good faith attempt to send notice if the owner sent such notice by registered mail to the author at the most recent address of the author that was recorded with the Register of Copyrights pursuant to paragraph (3). If the work is removed at the expense of the author, title to that copy of the work shall be deemed to be in the author.

(3) The Register of Copyrights shall establish a system of records whereby any author of a work of visual art that has been incorporated in or made part of a building, may record his or her identity and address with the Copyright Office. The Register shall also establish procedures under which any such author may update the information so recorded, and procedures under which owners of buildings may record with the Copyright Office evidence of their efforts to comply with this subsection.

(Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2560; Pub. L. 101–650, title VI, § 604, Dec. 1, 1990, 104 Stat. 5130.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94–1476

Section 113 deals with the extent of copyright protection in ''works of applied art.'' The section takes as its starting point the Supreme Court's decision in *Mazer v. Stein*, 347 U.S. 201 (1954) [74 S.Ct. 460, 98 L.Ed. 630, rehearing denied 74 S.Ct. 637, 347 U.S. 949, 98 L.Ed. 1096], and the first sentence of subsection (a) restates the basic principle established by that decision. The rule of *Mazer*, as affirmed by the bill, is that copyright in a pictorial, graphic, or sculptural work will not be affected if the work is employed as the design of a useful article, and will afford protection to the copyright owner against the unauthorized reproduction of his work in useful as well as nonuseful articles. The terms ''pictorial, graphic, and sculptural works'' and ''useful article'' are defined in section 101, and these definitions are discussed above in connection with section 102.

The broad language of section 106(1) and of subsection (a) of section 113 raises questions as to the extent of copyright protection for a pictorial, graphic, or sculptural work that portrays, depicts, or represents an image of a useful article in such a way that the utilitarian nature of the article can be seen. To take the example usually cited, would copyright in a drawing or model of an automobile give the artist the exclusive right to make automobiles of the same design?

The 1961 Report of the Register of Copyrights stated, on the basis of judicial precedent, that ''copyright in a pictorial, graphic, or sculptural work, portraying a useful article as such, does not extend to the manufacture of the useful article itself,'' and recommended specifically that ''the distinctions drawn in this area by existing court decisions'' not be altered by the statute. The Register's Supplementary Report, at page 48, cited a number of these decisions, and explained the insuperable difficulty of finding ''any statutory formulation that would express the distinction satisfactorily.'' Section 113(b) reflects the Register's conclusion that ''the real need is to make clear that there is no intention to change the present law with respect to the scope of protection in a work portraying a useful article as such.''

Section 113(c) provides that it would not be an infringement of copyright, where a copyright work has been lawfully published as the design of useful articles, to make, distribute or display pictures of the articles in advertising, in feature stories about the articles, or in the news reports.

In conformity with its deletion from the bill of Title II, relating to the protection of ornamental designs of useful articles, the Committee has deleted subsections (b), (c), and (d) of section 113 of S. 22 as adopted by the Senate, since they are no longer relevant.

REFERENCES IN TEXT

Section 610(a) of the Visual Artists Rights Act of 1990 [Pub. L. 101–650], referred to in subsec. (d)(1)(B), is set out as an Effective Date note under section 106A of this title.

AMENDMENTS

1990—Subsec. (d). Pub. L. 101–650 added subsec. (d).

EFFECTIVE DATE OF 1990 AMENDMENT

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

§ 114. Scope of exclusive rights in sound recordings

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).

(b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is