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104TH CONGRESS  
1ST SESSION

# S. 227

To amend title 17, United States Code, to provide an exclusive right to perform sound recordings publicly by means of digital transmissions, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

JANUARY 13 (legislative day, JANUARY 10), 1995

Mr. HATCH (for himself and Mrs. FEINSTEIN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To amend title 17, United States Code, to provide an exclusive right to perform sound recordings publicly by means of digital transmissions, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Digital Performance  
5 Right in Sound Recordings Act of 1995”.

6 **SEC. 2. EXCLUSIVE RIGHTS IN COPYRIGHTED WORKS.**

7 Section 106 of title 17, United States Code, is  
8 amended—

1 (1) in paragraph (4) by striking “and” after  
2 the semicolon;

3 (2) in paragraph (5) by striking the period and  
4 inserting “; and”; and

5 (3) by adding at the end the following:

6 “(6) in the case of sound recordings, to perform  
7 the copyrighted work publicly by means of a digital  
8 transmission.”.

9 **SEC. 3. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORD-**  
10 **INGS.**

11 Section 114 of title 17, United States Code, is  
12 amended—

13 (1) in subsection (a) by striking “and (3)” and  
14 replacing it with “(3) and (6)”;

15 (2) in subsection (b) by deleting from the first  
16 sentence “phonorecords, or of copies of motion pic-  
17 tures and other audiovisual works,” and inserting  
18 “phonorecords or copies”;

19 (3) by striking subsection (d) and replacing it  
20 with the following new subsection (d):

21 “(d) **LIMITATIONS ON EXCLUSIVE RIGHT.**—Notwith-  
22 standing the provisions of section 106(6)—

23 “(1) **EXEMPT TRANSMISSIONS.**—The perform-  
24 ance of a sound recording publicly by means of a  
25 digital transmission, other than as part of an inter-

1 active service, is not an infringement of section  
2 106(6) if the performance is part of—

3 “(A) a nonsubscription transmission, such  
4 as a nonsubscription broadcast transmission;

5 “(B) a prior or simultaneous transmission  
6 incidental to a nonsubscription transmission,  
7 such as a feed received by and then  
8 retransmitted by the nonsubscription transmit-  
9 ter: *Provided*, That such incidental trans-  
10 missions do not include any subscription trans-  
11 mission directly for reception by members of  
12 the public;

13 “(C) a retransmission of a nonsubscription  
14 broadcast transmission: *Provided*, That, in the  
15 case of a retransmission of a radio station’s  
16 broadcast transmission, the transmission is not  
17 willfully or repeatedly retransmitted more than  
18 a radius of one hundred and fifty miles from  
19 the site of the radio broadcast transmitter;

20 “(D) a further transmission by a business,  
21 confined to its premises or the immediately sur-  
22 rounding vicinity, of a transmission described in  
23 paragraphs (A) or (B) of this subsection (d)(1);  
24 or

1           “(E) a retransmission otherwise subject to  
2           liability, if such transmission is simultaneous  
3           with the primary transmission and authorized  
4           by the primary transmitter, and the primary  
5           transmitter has been licensed to publicly per-  
6           form the sound recording.

7           “(2) SUBSCRIPTION TRANSMISSIONS.—In the  
8           case of a subscription transmission, the performance  
9           of a sound recording publicly by means of a digital  
10          transmission shall be subject to statutory licensing,  
11          in accordance with subsection (f) of this section, if—

12                 “(A) the transmission is not part of an  
13                 interactive service; and

14                 “(B) the transmission does not exceed the  
15                 sound recording performance complement.

16          “(3) RIGHTS NOT OTHERWISE LIMITED.—

17                 “(A) Except as expressly provided herein,  
18                 this section does not limit or impair the exclu-  
19                 sive right to perform a sound recording publicly  
20                 by means of a digital transmission under sec-  
21                 tion 106(6).

22                 “(B) Nothing in this section annuls or lim-  
23                 its in any way—

24                         “(i) the exclusive right to publicly per-  
25                         form a musical work, including by means

1 of a digital transmission, under section  
2 106(4),

3 “(ii) the exclusive rights to reproduce  
4 and distribute a sound recording or the  
5 musical work embodied therein under sec-  
6 tions 106(1) and 106(3), including by  
7 means of a digital phonorecord delivery as  
8 defined in section 115, or

9 “(iii) any other rights under any other  
10 clause of section 106, or remedies available  
11 under this title, as such rights or remedies  
12 exist either before or after the date of en-  
13 actment of this Act.”; and

14 “(4) by adding after subsection (d) the follow-  
15 ing:

16 “(e) **AUTHORITY FOR NEGOTIATIONS.**—Any copy-  
17 right owners of sound recordings and any entities perform-  
18 ing sound recordings affected by this section may nego-  
19 tiate and agree upon the terms and rates of royalty pay-  
20 ments for the performance of such sound recordings and  
21 the proportionate division of fees paid among copyright  
22 owners, and may designate common agents to negotiate,  
23 agree to, pay, or receive such royalty payments.

24 “(f) **LICENSES FOR SUBSCRIPTION TRANS-**  
25 **MISSIONS.**—

1           “(1) No later than thirty days after the enact-  
2           ment of this legislation, the Librarian of Congress  
3           shall cause notice to be published in the Federal  
4           Register of the initiation of voluntary negotiation  
5           proceedings for the purpose of determining reason-  
6           able terms and rates of royalty payments for the ac-  
7           tivities specified by subsection (d)(2) of this section  
8           during the period beginning on the effective date of  
9           this legislation and ending on December 31, 2000.  
10          Such terms and rates shall distinguish among the  
11          different types of digital transmission services then  
12          in operation. Any copyright owners of sound record-  
13          ings or any entities performing sound recordings af-  
14          fected by this section may submit to the Librarian  
15          of Congress licenses covering such activities with re-  
16          spect to such sound recordings. The parties to each  
17          negotiation proceeding shall bear their own costs.

18          “(2) In the absence of license agreements nego-  
19          tiated under paragraph (1), the Librarian of Con-  
20          gress shall, pursuant to chapter 8, convene a copy-  
21          right arbitration royalty panel to determine and pub-  
22          lish in the Federal Register a schedule of rates and  
23          terms which, subject to paragraph (3), shall be bind-  
24          ing on all copyright owners of sound recordings and  
25          entities performing sound recordings. In establishing

1 such rates and terms the copyright arbitration roy-  
2 alty panel may consider the rates for comparable  
3 types of digital transmission services and comparable  
4 circumstances under voluntary license agreements  
5 negotiated as provided in paragraph (1). The parties  
6 to the proceeding shall bear the entire cost thereof  
7 in such manner and proportion as the arbitration  
8 panels shall direct. The Librarian of Congress shall  
9 also establish requirements by which copyright own-  
10 ers may receive reasonable notice of the use of their  
11 sound recordings under this section, and under  
12 which records of such use shall be kept by entities  
13 performing sound recordings.

14 “(3) License agreements voluntarily negotiated  
15 at any time between one or more copyright owners  
16 of sound recordings and one or more entities per-  
17 forming sound recordings shall be given effect in lieu  
18 of any determination by the Librarian of Congress.

19 “(4) the procedures specified in paragraphs (1)  
20 and (2) shall be repeated and concluded, in accord-  
21 ance with regulations that the Librarian of Congress  
22 shall prescribe—

23 “(A) within a six-month period each time  
24 that a petition is filed by any copyright owners  
25 of sound recordings or any entities performing



1 sound recordings affected by this section indi-  
2 cating that a new type of digital transmission  
3 service on which sound recordings are per-  
4 formed is or is about to become operational,  
5 and

6 “(B) between June 30 and December 31,  
7 2000 and at five-year intervals thereafter.

8 “(5) Any person who wishes to perform a sound  
9 recording publicly by means of a subscription trans-  
10 mission under this subsection (f) may do so without  
11 infringing the exclusive right of the copyright owner  
12 of the sound recording by complying with such no-  
13 tice requirements as the Register of Copyrights shall  
14 prescribe by regulation and by paying royalty fees in  
15 accordance with this subsection, or, if such royalty  
16 fees have not been set, by agreeing to pay such roy-  
17 alty fees as shall be determined in accordance with  
18 this subsection, and any royalty payments in arrears  
19 shall be made on or before the twentieth day of the  
20 month next succeeding the month in which the roy-  
21 alty fees are set.

22 “(g) PROCEEDS FROM LICENSING OF SUBSCRIPTION  
23 TRANSMISSIONS.—In the case of a subscription trans-  
24 mission performance of a sound recording licensed under  
25 subsection (f) of this section, the copyright owner of the

1 exclusive right under section 106(6) of this title to publicly  
2 perform a sound recording by means of a digital trans-  
3 mission shall allocate to recording artists in the following  
4 manner its receipts from the licensing of subscription  
5 transmission performances of the sound recording in ac-  
6 cordance with subsection (f) of this section:

7           “(1) 2½ percent of the receipts shall be depos-  
8           ited in an escrow account managed by an independ-  
9           ent administrator jointly appointed by copyright  
10          owners of sound recordings and the American Fed-  
11          eration of Musicians (or any successor entity) to be  
12          distributed to nonfeatured musicians (whether or not  
13          members of the American Federation of Musicians)  
14          who have performed on sound recordings.

15           “(2) 2½ percent of the receipts shall be depos-  
16          ited in an escrow account managed by an independ-  
17          ent administrator jointly appointed by copyright  
18          owners of sound recordings and the American Fed-  
19          eration of Television and Radio Artists (or any suc-  
20          cessor entity) to be distributed to nonfeatured vocal-  
21          ists (whether or not members of the American Fed-  
22          eration of Television and Radio Artists) who have  
23          performed on sound recordings.

24           “(3) 45 percent of the receipts shall be allo-  
25          cated, on a per sound recording basis, to the record-

1       ing artist or artists featured on such sound record-  
2       ing (or the persons conveying rights in the artists'  
3       performance in the sound recordings).

4       “(h) LICENSING TO AFFILIATES.—Where the copy-  
5       right owner of a sound recording owns a controlling inter-  
6       est in, or otherwise possesses the power directly or indi-  
7       rectly to exercise a controlling influence over the manage-  
8       ment or policies of, an entity engaging in digital trans-  
9       missions covered by section 106(6) and licenses to such  
10      entity the right to publicly perform a sound recording by  
11      means of a digital transmission, the copyright owner shall  
12      make the licensed sound recording available under section  
13      106(6) on similar terms and conditions to all other simi-  
14      larly-situated entities offering similar types of digital  
15      transmission services, except that such copyright owner  
16      may—

17               “(1) impose reasonable requirements for credit-  
18      worthiness; and

19               “(2) establish different prices, terms, and con-  
20      ditions to take into account the types of services of-  
21      fered, the duration of the license, the geographic re-  
22      gion, the numbers of subscribers served, and any  
23      other relevant factors.

24       “(i) NO EFFECT ON ROYALTIES FOR UNDERLYING  
25      WORKS.—License fees payable for the public performance

1 of sound recordings under clause (6) of section 106 shall  
2 not be taken into account in any administrative, judicial  
3 or other governmental proceeding to set or adjust the roy-  
4 alties payable to copyright owners of musical works for  
5 the public performance of their works.

6 “(j) DEFINITIONS.—As used in this section, the fol-  
7 lowing terms have the following meanings:

8 “(1) A ‘broadcast transmission’ is a trans-  
9 mission made by a broadcast station licensed as such  
10 by the Federal Communications Commission.

11 “(2) An ‘interactive service’ is one that enables  
12 a member of the public to receive, on request, a  
13 transmission of a particular sound recording chosen  
14 by or on behalf of the recipient. The ability of indi-  
15 viduals to request that particular sound recordings  
16 be performed for reception by the public at large  
17 does not make a service interactive. If an entity of-  
18 fers both interactive and non-interactive services (ei-  
19 ther concurrently or at different times), the non-  
20 interactive component shall not be treated as part of  
21 an interactive service.

22 “(3) A ‘nonsubscription transmission’ is any  
23 transmission that is not a subscription transmission.

24 “(4) The ‘sound recording performance com-  
25 plement’ is the transmission of no more than—

1           “(A) two selections each day of sound re-  
2           cordings embodied in any one phonorecord dis-  
3           tributed in the United States for ultimate sale  
4           to consumers; or

5           “(B) three selections each day of sound re-  
6           cordings of performances—

7           “(i) by the same featured recording  
8           artist, or

9           “(ii) embodied in any set of  
10          phonorecords or compilation of sound re-  
11          cordings marketed together as a unit for  
12          ultimate sale to consumers.

13          “(5) A ‘subscription transmission’ is a trans-  
14          mission that is controlled and limited to particular  
15          recipients, and for which consideration is required to  
16          be paid or otherwise given by or on behalf of the re-  
17          cipient to receive the transmission or a package of  
18          transmissions including the transmission.”.

19 **SEC. 4. SCOPE OF EXCLUSIVE RIGHTS IN NONDRAMATIC**  
20 **MUSICAL WORKS: COMPULSORY LICENSE**  
21 **FOR MAKING AND DISTRIBUTING**  
22 **PHONORECORDS.**

23          Section 115 of title 17, United State Code, is amend-  
24 ed—

1           (1) by inserting before the period at the end of  
2 the second sentence in subsection (a)(1) the words  
3 “including by means of a digital phonorecord deliv-  
4 ery”;

5           (2) by inserting in the second sentence of sub-  
6 section (c)(2), after the words “For this purpose,”  
7 the words “and other than as provided in clause  
8 (3),”;

9           (3) by redesignating clauses (3), (4) and (5) of  
10 subsection (c) as clauses (4), (5) and (6), respec-  
11 tively, and by inserting the following new clause:

12           “(3)(A) A compulsory license under this section  
13 includes the right of the maker of a phonorecord of  
14 a nondramatic musical work under subsection (a)(1)  
15 to distribute or authorize distribution of the sound  
16 recording of such phonorecord by means of a digital  
17 transmission which constitutes a digital phonorecord  
18 delivery, regardless of whether the digital trans-  
19 mission is also a public performance of the sound re-  
20 cording under section 106(6) of this title or of any  
21 nondramatic musical work embodied therein under  
22 section 106(4) of this title. For every digital phono-  
23 record delivery by or under the authority of the com-  
24 pulsory licensee, the royalty payable by the compul-

1 sory licensee shall be the royalty prescribed under  
2 clause (2) and chapter 8 of this title.

3 “(B) Independent of any right of public per-  
4 formance under section 106(4), the copyright owner  
5 of a nondramatic musical work embodied in a sound  
6 recording has the right to receive royalty payments  
7 at the rates prescribed under this subsection when  
8 the digital transmission of that sound recording con-  
9 stitutes a digital phonorecord delivery. Unless au-  
10 thorized by said copyright owner of the nondramatic  
11 musical work or by any person who has obtained a  
12 compulsory license under this section, such a digital  
13 transmission, by whomever made, shall be actionable  
14 by the copyright owner in the nondramatic musical  
15 work as an act of infringement: *Provided, however,*  
16 That no such cause of action may be brought  
17 against a copyright owner of a sound recording un-  
18 less it authorized the digital phonorecord delivery.  
19 Any such cause of action shall be in addition to  
20 those available to the copyright owner of the musical  
21 work under section 106(4) and the copyright owner  
22 of the sound recording with respect to digital phono-  
23 record deliveries and under section 106(6).

24 “(C) Nothing in section 1008 shall be construed  
25 to prevent the exercise of the rights and remedies al-

1       lowed by clauses (3) and (7) and chapter 5 in the  
2       event of a digital phonorecord delivery, except that  
3       no action alleging infringement of copyright may be  
4       brought under this title against a manufacturer, im-  
5       porter or distributor of a digital audio recording de-  
6       vice, a digital audio recording medium, an analog re-  
7       cording device, or an analog recording medium, or  
8       against a consumer, based on the actions described  
9       in such section.

10       “(D) Nothing in this section annuls or limits in  
11       any way (i) the exclusive right to publicly perform  
12       a sound recording or the musical work embodied  
13       therein, including by means of a digital trans-  
14       mission, under sections 106(4) and 106(6), (ii) ex-  
15       cept for the compulsory licensing under the condi-  
16       tions specified by this section, the exclusive rights to  
17       reproduce and distribute the sound recording and  
18       the musical work embodied therein under sections  
19       106(1) and 106(3), including by means of a digital  
20       phonorecord delivery, or (iii) any other rights under  
21       any other clause of section 106, or remedies avail-  
22       able under this title, as such rights or remedies exist  
23       either before or after the date of enactment of this  
24       Act.”; and

25       (4) by adding after subsection (c) the following:



1       “(d) DEFINITIONS.—As used in this section, the fol-  
2       lowing term has the following meaning: A ‘digital phono-  
3       record delivery’ is each individual digital transmission of  
4       a sound recording which results in a specifically identified  
5       reproduction by or for any transmission recipient of a pho-  
6       norecord of that sound recording, regardless of whether  
7       the digital transmission is also a public performance of  
8       the sound recording or any nondramatic musical work em-  
9       bodied therein.”.

10   **SEC. 5. CONFORMING AMENDMENTS.**

11       (a) DEFINITIONS.—Section 101 of title 17, United  
12       States Code, is amended by inserting after the definition  
13       of “device”, “machine”, or “process” the following:

14               “A ‘digital transmission’ is a transmission in  
15       whole or in part in a digital or other non-analog for-  
16       mat.”.

17       (b) LIMITATIONS ON EXCLUSIVE RIGHTS: SECOND-  
18       ARY TRANSMISSIONS.—Section 111(c)(1) of title 17,  
19       United States Code, is amended in the first sentence by  
20       striking “The” and inserting “Except in the case of a per-  
21       formance of a sound recording in the course of a digital  
22       transmission, the”.

23       (c) LIMITATIONS ON EXCLUSIVE RIGHTS: SECOND-  
24       ARY TRANSMISSIONS OF SUPERSTATIONS AND NETWORK  
25       STATIONS FOR PRIVATE HOME VIEWING.—Section

1 119(a)(1) of title 17, United States Code, is amended by  
2 striking “Subject to” and inserting “Except in the case  
3 of a performance of a sound recording in the course of  
4 a digital transmission, and subject to”.

5 (d) COPYRIGHT ARBITRATION ROYALTY PANELS.—

6 (1) Section 801(b)(1) of title 17, United States  
7 Code, is amended in the first and second sentences  
8 by inserting “114” before “115”.

9 (2) Section 802(c) of title 17, United States  
10 Code, is amended in the third sentence by deleting  
11 “section 111, 116, or 119,” and inserting “section  
12 111, 114, 116, or 119, any person entitled to a com-  
13 pulsory license under section 114(d), any person en-  
14 titled to a compulsory license under section 115,”.

15 (3) Section 802(g) of title 17, United States  
16 Code, is amended in the third sentence by inserting  
17 after “111” “, 114”.

18 (4) Section 802(h)(2) of title 17, United States  
19 Code, is amended by inserting after “111” “, 114”.

20 **SEC. 6. EFFECTIVE DATE.**

21 This Act shall become effective three months after  
22 the date of enactment, except that the provisions of sec-  
23 tions 114(e) and 114(f) shall take effect immediately upon  
24 enactment.

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