

as to the copyright owners of sound recordings and performers, the strong encouragement of Congress to reach an accommodation with the small webcasters on an expedited basis.

“(4) The representatives have indicated that they do not believe the agreement provides for or in any way approximates fair or reasonable royalty rates and terms, or rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.

“(5) Congress has made no determination as to whether the agreement provides for or in any way approximates fair or reasonable fees and terms, or rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.

“(6) Congress likewise has made no determination as to whether the July 8 order is reasonable or arbitrary, and nothing in this Act [amending this section and enacting provisions set out as notes under this section and section 101 of this title] shall be taken into account by the United States Court of Appeals for the District of Columbia Circuit in its review of such order.

“(7) It is, nevertheless, in the public interest for the parties to be able to enter into such an agreement without fear of liability for deviating from the fees and terms of the July 8 order, if it is clear that the agreement will not be admissible as evidence or otherwise taken into account in any government proceeding involving the setting or adjustment of the royalties payable to copyright owners of sound recordings for the public performance or reproduction in ephemeral phonorecords or copies of such works, the determination of terms or conditions related thereto, or the establishment of notice or record-keeping requirements.”

Pub. L. 107-321, §5(a), Dec. 4, 2002, 116 Stat. 2783, provided that: “Congress finds that—

“(1) in the case of royalty payments from the licensing of digital transmissions of sound recordings under subsection (f) of section 114 of title 17, United States Code, the parties have voluntarily negotiated arrangements under which payments shall be made directly to featured recording artists and the administrators of the accounts provided in subsection (g)(2) of that section;

“(2) such voluntarily negotiated payment arrangements have been codified in regulations issued by the Librarian of Congress, currently found in section 261.4 of title 37, Code of Federal Regulations, as published in the Federal Register on July 8, 2002;

“(3) other regulations issued by the Librarian of Congress were inconsistent with the voluntarily negotiated arrangements by such parties concerning the deductibility of certain costs incurred for licensing and arbitration, and Congress is therefore restoring those terms as originally negotiated among the parties; and

“(4) in light of the special circumstances described in this subsection, the uncertainty created by the regulations issued by the Librarian of Congress, and the fact that all of the interested parties have reached agreement, the voluntarily negotiated arrangements agreed to among the parties are being codified.”

SUSPENSION OF CERTAIN PAYMENTS

Pub. L. 107-321, §3, Dec. 4, 2002, 116 Stat. 2781, provided that:

“(a) NONCOMMERCIAL WEBCASTERS.—

“(1) IN GENERAL.—The payments to be made by non-commercial webcasters for the digital performance of sound recordings under section 114 of title 17, United States Code, and the making of ephemeral phonorecords under section 112 of title 17, United States Code, during the period beginning on October 28, 1998, and ending on May 31, 2003, which have not already been paid, shall not be due until June 20, 2003.

“(2) DEFINITION.—In this subsection, the term ‘non-commercial webcaster’ has the meaning given that

term in section 114(f)(5)(E)(i) of title 17, United States Code, as added by section 4 of this Act.

“(b) SMALL COMMERCIAL WEBCASTERS.—

“(1) IN GENERAL.—The receiving agent may, in a writing signed by an authorized representative thereof, delay the obligation of any 1 or more small commercial webcasters to make payments pursuant to sections 112 and 114 of title 17, United States Code, for a period determined by such entity to allow negotiations as permitted in section 4 of this Act [amending this section], except that any such period shall end no later than December 15, 2002. The duration and terms of any such delay shall be as set forth in such writing.

“(2) DEFINITIONS.—In this subsection—

“(A) the term ‘webcaster’ has the meaning given that term in section 114(f)(5)(E)(iii) of title 17, United States Code, as added by section 4 of this Act; and

“(B) the term ‘receiving agent’ shall have the meaning given that term in section 261.2 of title 37, Code of Federal Regulations, as published in the Federal Register on July 8, 2002.”

REPORT TO CONGRESS

Pub. L. 107-321, §6, Dec. 4, 2002, 116 Stat. 2785, provided that: “By not later than June 1, 2004, the Comptroller General of the United States, in consultation with the Register of Copyrights, shall conduct and submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a study concerning the economic arrangements among small commercial webcasters covered by agreements entered into pursuant to section 114(f)(5)(A) of title 17, United States Code, as added by section 4 of this Act, and third parties, and the effect of those arrangements on royalty fees payable on a percentage of revenue or expense basis.”

§ 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) AVAILABILITY AND SCOPE OF COMPULSORY LICENSE.—

(1) When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery. A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording or, if the sound recording was fixed before February 15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the copyright in the musical work or pursuant to a valid compulsory li-

cence for use of such work in a sound recording.

(2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

(b) NOTICE OF INTENTION TO OBTAIN COMPULSORY LICENSE.—

(1) Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention to do so on the copyright owner. If the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served, it shall be sufficient to file the notice of intention in the Copyright Office. The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(2) Failure to serve or file the notice required by clause (1) forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.

(c) ROYALTY PAYABLE UNDER COMPULSORY LICENSE.—

(1) To be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office. The owner is entitled to royalties for phonorecords made and distributed after being so identified, but is not entitled to recover for any phonorecords previously made and distributed.

(2) Except as provided by clause (1), the royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license. For this purpose, and other than as provided in paragraph (3), a phonorecord is considered “distributed” if the person exercising the compulsory license has voluntarily and permanently parted with its possession. With respect to each work embodied in the phonorecord, the royalty shall be either two and three-fourths cents, or one-half of one cent per minute of playing time or fraction thereof, whichever amount is larger.

(3)(A) A compulsory license under this section includes the right of the compulsory licensee to distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of a digital transmission which constitutes a digital phonorecord delivery, regardless of whether the digital transmission is also a public performance of the sound recording under section 106(6) of this title or of any nondramatic musical work em-

bodied therein under section 106(4) of this title. For every digital phonorecord delivery by or under the authority of the compulsory licensee—

(i) on or before December 31, 1997, the royalty payable by the compulsory licensee shall be the royalty prescribed under paragraph (2) and chapter 8 of this title; and

(ii) on or after January 1, 1998, the royalty payable by the compulsory licensee shall be the royalty prescribed under subparagraphs (B) through (E) and chapter 8 of this title.

(B) Notwithstanding any provision of the antitrust laws, any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a)(1) may negotiate and agree upon the terms and rates of royalty payments under this section and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay or receive such royalty payments. Such authority to negotiate the terms and rates of royalty payments includes, but is not limited to, the authority to negotiate the year during which the royalty rates prescribed under this subparagraph and subparagraphs (C) through (E) and chapter 8 of this title shall next be determined.

(C) Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for the activities specified by this section during the period beginning with the effective date of such rates and terms, but not earlier than January 1 of the second year following the year in which the petition requesting the proceeding is filed, and ending on the effective date of successor rates and terms, or such other period as the parties may agree. Such terms and rates shall distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general. Any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a)(1) may submit to the Copyright Royalty Judges licenses covering such activities. The parties to each proceeding shall bear their own costs.

(D) The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to subparagraph (E), be binding on all copyright owners of nondramatic musical works and persons entitled to obtain a compulsory license under subsection (a)(1) during the period specified in subparagraph (C), such other period as may be determined pursuant to subparagraphs (B) and (C), or such other period as the parties may agree. Such terms and rates shall distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general. In addition to the objectives set forth in section 801(b)(1), in establishing such rates and

terms, the Copyright Royalty Judges may consider rates and terms under voluntary license agreements described in subparagraphs (B) and (C). The royalty rates payable for a compulsory license for a digital phonorecord delivery under this section shall be established de novo and no precedential effect shall be given to the amount of the royalty payable by a compulsory licensee for digital phonorecord deliveries on or before December 31, 1997. The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such use shall be kept and made available by persons making digital phonorecord deliveries.

(E)(i) License agreements voluntarily negotiated at any time between one or more copyright owners of nondramatic musical works and one or more persons entitled to obtain a compulsory license under subsection (a)(1) shall be given effect in lieu of any determination by the Librarian of Congress and Copyright Royalty Judges. Subject to clause (ii), the royalty rates determined pursuant to subparagraph¹ (C) and (D) shall be given effect as to digital phonorecord deliveries in lieu of any contrary royalty rates specified in a contract pursuant to which a recording artist who is the author of a nondramatic musical work grants a license under that person's exclusive rights in the musical work under paragraphs (1) and (3) of section 106 or commits another person to grant a license in that musical work under paragraphs (1) and (3) of section 106, to a person desiring to fix in a tangible medium of expression a sound recording embodying the musical work.

(ii) The second sentence of clause (i) shall not apply to—

(I) a contract entered into on or before June 22, 1995, and not modified thereafter for the purpose of reducing the royalty rates determined pursuant to subparagraph¹ (C) and (D) or of increasing the number of musical works within the scope of the contract covered by the reduced rates, except if a contract entered into on or before June 22, 1995, is modified thereafter for the purpose of increasing the number of musical works within the scope of the contract, any contrary royalty rates specified in the contract shall be given effect in lieu of royalty rates determined pursuant to subparagraph¹ (C) and (D) for the number of musical works within the scope of the contract as of June 22, 1995; and

(II) a contract entered into after the date that the sound recording is fixed in a tangible medium of expression substantially in a form intended for commercial release, if at the time the contract is entered into, the recording artist retains the right to grant licenses as to the musical work under paragraphs (1) and (3) of section 106.

(F) Except as provided in section 1002(e) of this title, a digital phonorecord delivery licensed under this paragraph shall be accompanied by the information encoded in the

sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer.

(G)(i) A digital phonorecord delivery of a sound recording is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, unless—

(I) the digital phonorecord delivery has been authorized by the copyright owner of the sound recording; and

(II) the owner of the copyright in the sound recording or the entity making the digital phonorecord delivery has obtained a compulsory license under this section or has otherwise been authorized by the copyright owner of the musical work to distribute or authorize the distribution, by means of a digital phonorecord delivery, of each musical work embodied in the sound recording.

(ii) Any cause of action under this subparagraph shall be in addition to those available to the owner of the copyright in the nondramatic musical work under subsection (c)(6) and section 106(4) and the owner of the copyright in the sound recording under section 106(6).

(H) The liability of the copyright owner of a sound recording for infringement of the copyright in a nondramatic musical work embodied in the sound recording shall be determined in accordance with applicable law, except that the owner of a copyright in a sound recording shall not be liable for a digital phonorecord delivery by a third party if the owner of the copyright in the sound recording does not license the distribution of a phonorecord of the nondramatic musical work.

(I) Nothing in section 1008 shall be construed to prevent the exercise of the rights and remedies allowed by this paragraph, paragraph (6), and chapter 5 in the event of a digital phonorecord delivery, except that no action alleging infringement of copyright may be brought under this title against a manufacturer, importer or distributor of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or against a consumer, based on the actions described in such section.

(J) Nothing in this section annuls or limits (i) the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of a digital transmission, under sections 106(4) and 106(6), (ii) except for compulsory licensing under the conditions specified by this section, the exclusive rights to reproduce and distribute the sound recording and the musical work embodied therein under sections 106(1) and 106(3), including by means of a digital phonorecord delivery, or (iii) any other rights under any other provision of section 106, or remedies available under this title, as such rights or remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

(K) The provisions of this section concerning digital phonorecord deliveries shall not apply

¹ So in original. Probably should be "subparagraphs".

to any exempt transmissions or retransmissions under section 114(d)(1). The exemptions created in section 114(d)(1) do not expand or reduce the rights of copyright owners under section 106(1) through (5) with respect to such transmissions and retransmissions.

(4) A compulsory license under this section includes the right of the maker of a phonorecord of a nondramatic musical work under subsection (a)(1) to distribute or authorize distribution of such phonorecord by rental, lease, or lending (or by acts or practices in the nature of rental, lease, or lending). In addition to any royalty payable under clause (2) and chapter 8 of this title, a royalty shall be payable by the compulsory licensee for every act of distribution of a phonorecord by or in the nature of rental, lease, or lending, by or under the authority of the compulsory licensee. With respect to each nondramatic musical work embodied in the phonorecord, the royalty shall be a proportion of the revenue received by the compulsory licensee from every such act of distribution of the phonorecord under this clause equal to the proportion of the revenue received by the compulsory licensee from distribution of the phonorecord under clause (2) that is payable by a compulsory licensee under that clause and under chapter 8. The Register of Copyrights shall issue regulations to carry out the purpose of this clause.

(5) Royalty payments shall be made on or before the twentieth day of each month and shall include all royalties for the month next preceding. Each monthly payment shall be made under oath and shall comply with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall also prescribe regulations under which detailed cumulative annual statements of account, certified by a certified public accountant, shall be filed for every compulsory license under this section. The regulations covering both the monthly and the annual statements of account shall prescribe the form, content, and manner of certification with respect to the number of records made and the number of records distributed.

(6) If the copyright owner does not receive the monthly payment and the monthly and annual statements of account when due, the owner may give written notice to the licensee that, unless the default is remedied within thirty days from the date of the notice, the compulsory license will be automatically terminated. Such termination renders either the making or the distribution, or both, of all phonorecords for which the royalty has not been paid, actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506.

(d) DEFINITION.—As used in this section, the following term has the following meaning: A “digital phonorecord delivery” is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic mu-

sical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.

(Pub. L. 94-553, title I, §101, Oct. 19, 1976, 90 Stat. 2561; Pub. L. 98-450, §3, Oct. 4, 1984, 98 Stat. 1727; Pub. L. 104-39, §4, Nov. 1, 1995, 109 Stat. 344; Pub. L. 105-80, §§4, 10, 12(a)(7), Nov. 13, 1997, 111 Stat. 1531, 1534; Pub. L. 108-419, §5(d), Nov. 30, 2004, 118 Stat. 2364; Pub. L. 109-303, §4(c), Oct. 6, 2006, 120 Stat. 1482; Pub. L. 110-403, title II, §209(a)(3), Oct. 13, 2008, 122 Stat. 4264; Pub. L. 111-295, §6(g), Dec. 9, 2010, 124 Stat. 3181.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

The provisions of section 1(e) and 101(e) of the present law [sections 1(e) and 101(e) of former title 17], establishing a system of compulsory licensing for the making and distribution of phonorecords of copyrighted music, are retained with a number of modifications and clarifications in section 115 of the bill. Under these provisions, which represented a compromise of the most controversial issue of the 1909 act, a musical composition that has been reproduced in phonorecords with the permission of the copyright owner may generally be reproduced in phonorecords by another person, if that person notifies the copyright owner and pays a specified royalty.

The fundamental question of whether to retain the compulsory license or to do away with it altogether was a major issue during earlier stages of the program for general revision of the copyright law. At the hearings it was apparent that the argument on this point had shifted, and the real issue was not whether to retain the compulsory license but how much the royalty rate under it should be. The arguments for and against retention of the compulsory license are outlined at pages 66-67 of this Committee's 1967 report (H. Rept. No. 83, 90th Cong., 1st Sess.). The Committee's conclusion on this point remains the same as in 1967: “that a compulsory licensing system is still warranted as a condition for the rights of reproducing and distributing phonorecords of copyrighted music,” but “that the present system is unfair and unnecessarily burdensome on copyright owners, and that the present statutory rate is too low.”

Availability and Scope of Compulsory License. Subsection (a) of section 115 deals with three doubtful questions under the present law: (1) the nature of the original recording that will make the work available to others for recording under a compulsory license; (2) the nature of the sound recording that can be made under a compulsory license; and (3) the extent to which someone acting under a compulsory license can depart from the work as written or recorded without violating the copyright owner's right to make an “arrangement” or other derivative work. The first two of these questions are answered in clause (1) of section 115(a), and the third is the subject of clause (2).

The present law, though not altogether clear, apparently bases compulsory licensing on the making or licensing of the first recording, even if no authorized records are distributed to the public. The first sentence of section 115(a)(1) would change the basis for compulsory licensing to authorized public distribution of phonorecords (including disks and audio tapes but not the sound tracks or other sound records accompanying a motion picture or other audiovisual work). Under the clause, a compulsory license would be available to anyone as soon as “phonorecords of a nondramatic musical

work have been distributed to the public in the United States under the authority of the copyright owner.”

The second sentence of clause (1), which has been the subject of some debate, provides that “a person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use.” This provision was criticized as being discriminatory against background music systems, since it would prevent a background music producer from making recordings without the express consent of the copyright owner; it was argued that this could put the producer at a great competitive disadvantage with performing rights societies, allow discrimination, and destroy or prevent entry of businesses. The committee concluded, however, that the purpose of the compulsory license does not extend to manufacturers of phonorecords that are intended primarily for commercial use, including not only broadcasters and jukebox operators but also background music services.

The final sentence of clause (1) provides that a person may not obtain a compulsory license for use of the work in the duplication of a sound recording made by another, unless the sound recording being duplicated was itself fixed lawfully and the making of phonorecords duplicated from it was authorized by the owner of copyright in the sound recording (or, if the recording was fixed before February 15, 1972, by the voluntary or compulsory licensee of the music used in the recording). The basic intent of this sentence is to make clear that a person is not entitled to a compulsory license of copyrighted musical works for the purpose of making an unauthorized duplication of a musical sound recording originally developed and produced by another. It is the view of the Committee that such was the original intent of the Congress in enacting the 1909 Copyright Act, and it has been so construed by the 3d, 5th, 9th and 10th Circuits in the following cases: *Duchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir.), cert. denied, 409 U.S. 847 (1972) [93 S.Ct. 52, 34 L.Ed.2d 88]; *Edward B. Marks Music Corp. v. Colorado Magnetics, Inc.*, 497 F.2d 285, aff’d on rehearing en banc, 497 F.2d 292 (10th Cir. 1974), cert. denied, 419 U.S. 1120 (1975) [95 S.Ct. 801, 42 L.Ed.2d 819]; *Jondora Music Publishing Co. v. Melody Recordings, Inc.*, 506 F.2d 392 (3d Cir. 1974, as amended 1975), cert. denied, 421 U.S. 1012 (1975) [95 S.Ct. 2417, 44 L.Ed.2d 680]; and *Fame Publishing Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667 (5th Cir.), cert. denied, 423 U.S. 841 (1975) [96 S.Ct. 73, 46 L.Ed.2d 61].

Under this provision, it would be possible to obtain a compulsory license for the use of copyrighted music under section 115 if the owner of the sound recording being duplicated authorizes its duplication. This does not, however, in any way require the owner of the original sound recording to grant a license to duplicate the original sound recording. It is not intended that copyright protection for sound recordings be circumscribed by requiring the owners of sound recordings to grant a compulsory license to unauthorized duplicators or others.

The second clause of subsection (a) is intended to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be perverted, distorted, or travestied. Clause (2) permits arrangements of a work “to the extent necessary to conform it to the style or manner of interpretation of the performance involved,” so long as it does not “change the basic melody or fundamental character of the work.” The provision also prohibits the compulsory licensee from claiming an independent copyright in his arrangement as a “derivative work” without the express consent of the copyright owner.

Procedure for Obtaining Compulsory License. Section 115(b)(1) requires anyone who wishes to take advantage of the compulsory licensing provisions to serve a “notice of intention to obtain a compulsory license,” which is much like the “notice of intention to use” required by the present law. Under section 115, the notice must be served before any phonorecords are distrib-

uted, but service can take place “before or within 30 days after making” any phonorecords. The notice is to be served on the copyright owner, but if the owner is not identified in the Copyright Office records, “it shall be sufficient to file the notice of intention in the Copyright Office.”

The Committee deleted clause (2) of section 115(b) of S. 22 as adopted by the Senate. The provision was a vestige of jukebox provisions in earlier bills, and its requirements no longer served any useful purpose.

Clause (2) [formerly clause (3)] of section 115(b) [cl. (2) of subsec. (b) of this section] provides that “failure to serve or file the notice required by clause (1) * * * forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506.” The remedies provided in section 501 are those applicable to infringements generally.

Royalty Payable Under Compulsory License. Identification of Copyright Owner.—Under the present law a copyright owner is obliged to file a “notice of use” in the Copyright Office, stating that the initial recording of the copyrighted work has been made or licensed, in order to recover against an unauthorized record manufacturer. This requirement has resulted in a technical loss of rights in some cases, and serves little or no purpose where the registration and assignment records of the Copyright Office already show the facts of ownership. Section 115(c)(1) therefore drops any formal “notice of use” requirements and merely provides that, “to be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office.” On the other hand, since proper identification is an important precondition of recovery, the bill further provides that “the owner is entitled to royalties for phonorecords manufactured and distributed after being so identified, but is not entitled to recover for any phonorecords previously made and distributed.”

Basis of Royalty.—Under the present statute the specified royalty is payable “on each such part manufactured,” regardless of how many “parts” (i.e., records) are sold. This basis for calculating the royalty has been revised in section 115(c)(2) to provide that “the royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license.” This basis is more compatible with the general practice in negotiated licenses today. It is unjustified to require a compulsory licensee to pay license fees on records which merely go into inventory, which may later be destroyed, and from which the record producer gains no economic benefit.

It is intended that the Register of Copyrights will prescribe regulations insuring that copyright owners will receive full and prompt payment for all phonorecords made and distributed. Section 115(c)(2) states that “a phonorecord is considered ‘distributed’ if the person exercising the compulsory license has voluntarily and permanently parted with its possession.” For this purpose, the concept of “distribution” comprises any act by which the person exercising the compulsory license voluntarily relinquishes possession of a phonorecord (considered as a fungible unit), regardless of whether the distribution is to the public, passes title, constitutes a gift, or is sold, rented, leased, or loaned, unless it is actually returned and the transaction cancelled. Neither involuntary relinquishment, as through theft or fire, nor the destruction of unwanted records, would constitute “distribution.”

The term “made” is intended to be broader than “manufactured,” and to include within its scope every possible manufacturing or other process capable of reproducing a sound recording in phonorecords. The use of the phrase “made and distributed” establishes the basis upon which the royalty rate for compulsory licensing under section 115 is to be calculated, but it is in no way intended to weaken the liability of record pressers and other manufacturers and makers of phono-

records for copyright infringement where the compulsory licensing requirements have not been met. As under the present law, even if a presser, manufacturer, or other maker had no role in the distribution process, that person would be regarded as jointly and severally liable in a case where the court finds that infringement has taken place because of failure to comply with the provisions of section 115.

Under existing practices in the record industry, phonorecords are distributed to wholesalers and retailers with the privilege of returning unsold copies for credit or exchange. As a result, the number of recordings that have been “permanently” distributed will not usually be known until some time—six or seven months on the average—after the initial distribution. In recognition of this problem, it has become a well-established industry practice, under negotiated licenses, for record companies to maintain reasonable reserves of the mechanical royalties due the copyright owners, against which royalties on the returns can be offset. The Committee recognizes that this practice may be consistent with the statutory requirements for monthly compulsory license accounting reports, but recognizes the possibility that, without proper safeguards, the maintenance of such reserves could be manipulated to avoid making payments of the full amounts owing to copyright owners. Under these circumstances, the regulations prescribed by the Register of Copyrights should contain detailed provisions ensuring that the ultimate disposition of every phonorecord made under a compulsory license is accounted for, and that payment is made for every phonorecord “voluntarily and permanently” distributed. In particular, the Register should prescribe a point in time when, for accounting purposes under section 115, a phonorecord will be considered “permanently distributed,” and should prescribe the situations in which a compulsory licensee is barred from maintaining reserves (e.g., situations in which the compulsory licensee has frequently failed to make payments in the past.)

Rate of Royalty.—A large preponderance of the extensive testimony presented to the Committee on section 115 was devoted to the question of the amount of the statutory royalty rate. An extensive review and analysis of the testimony and arguments received on this question appear in the 1974 Senate report (S. Rep. No. 94-473) at page 71-94.

While upon initial review it might be assumed that the rate established in 1909 would not be reasonable at the present time, the committee believes that an increase in the mechanical royalty rate must be justified on the basis of existing economic conditions and not on the mere passage of 67 years. Following a thorough analysis of the problem, the Committee considers that an increase of the present two-cent royalty to a rate of 2¾ cents (or .6 of one cent per minute or fraction of playing time) is justified. This rate will be subject to review by the Copyright Royalty Commission, as provided by section 801, in 1980 and at 10-year intervals thereafter.

Accounting and Payment of Royalties; Effect of Default. Clause (3) of Section 115(c) provides that royalty payments are to be made on a monthly basis, in accordance with requirements that the Register of Copyrights shall prescribe by regulation. In order to increase the protection of copyright proprietors against economic harm from companies which might refuse or fail to pay their just obligations, compulsory licensees will also be required to make a detailed cumulative annual statement of account, certified by a Certified Public Accountant.

A source of criticism with respect to the compulsory licensing provisions of the present statute has been the rather ineffective sanctions against default by compulsory licensees. Clause (4) of section 115(c) corrects this defect by permitting the copyright owner to serve written notice on a defaulting licensee, and by providing for termination of the compulsory license if the default is not remedied within 30 days after notice is given. Termination under this clause “renders either the making

or the distribution, or both, of all phonorecords for which the royalty had not been paid, actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506.”

REFERENCES IN TEXT

The date of enactment of the Digital Performance Right in Sound Recordings Act of 1995, referred to in subsec. (c)(3)(J), is the date of enactment of Pub. L. 104-39, which was approved Nov. 1, 1995.

AMENDMENTS

2010—Subsec. (c)(3)(G)(i). Pub. L. 111-295 made technical correction to directory language of Pub. L. 110-403, § 209(a)(3)(A). See 2008 Amendment note below.

2008—Subsec. (c)(3)(G)(i). Pub. L. 110-403, § 209(a)(3)(A), as amended by Pub. L. 111-295 struck out “and section 509” after “506” in introductory provisions.

Subsec. (c)(6). Pub. L. 110-403, § 209(a)(3)(B), struck out “and 509” before period at end.

2006—Subsec. (c)(3)(B). Pub. L. 109-303, § 4(c)(1), substituted “this subparagraph and subparagraphs (C) through (E)” for “subparagraphs (B) through (F)”.

Subsec. (c)(3)(D). Pub. L. 109-303, § 4(c)(2), inserted “in subparagraphs (B) and (C)” after “described” in third sentence.

Subsec. (c)(3)(E)(i), (ii)(I). Pub. L. 109-303, § 4(c)(3), substituted “(C) and (D)” for “(C) or (D)” wherever appearing.

2004—Subsec. (c)(3)(A)(ii). Pub. L. 108-419, § 5(d)(1), substituted “(E)” for “(F)”.

Subsec. (c)(3)(B). Pub. L. 108-419, § 5(d)(2)(C), which directed substitution of “this subparagraph and subparagraphs (C) through (E)” for “subparagraphs (C) through (F)”, could not be executed because “subparagraphs (C) through (F)” does not appear in text.

Pub. L. 108-419, § 5(d)(2)(A), (B), substituted “under this section” for “under this paragraph” and inserted “on a nonexclusive basis” after “common agents”.

Subsec. (c)(3)(C). Pub. L. 108-419, § 5(d)(3), substituted first sentence for former first sentence which read: “During the period of June 30, 1996, through December 31, 1996, 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 subparagraph (A) during the period beginning January 1, 1998, and ending on the effective date of any new terms and rates established pursuant to subparagraph (C), (D) or (F), or such other date (regarding digital phonorecord deliveries) as the parties may agree.”, substituted “Copyright Royalty Judges” for “Librarian of Congress” in third sentence, and struck out “negotiation” before “proceeding” in last sentence.

Subsec. (c)(3)(D). Pub. L. 108-419, § 5(d)(4), substituted first sentence for former first sentence which read: “In the absence of license agreements negotiated under subparagraphs (B) and (C), 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 a schedule of rates and terms which, subject to subparagraph (E), shall be binding on all copyright owners of nondramatic musical works and persons entitled to obtain a compulsory license under subsection (a)(1) during the period beginning January 1, 1998, and ending on the effective date of any new terms and rates established pursuant to subparagraph (C), (D) or (F), or such other date (regarding digital phonorecord deliveries) as may be determined pursuant to subparagraphs (B) and (C).”, substituted “Copyright Royalty Judges may consider” for “copyright arbitration royalty panel may consider” and “described” for “negotiated as provided in subparagraphs (B) and (C)” in third sentence, and “Copyright Royalty Judges shall also establish” for “Librarian of Congress shall also establish” in last sentence.

Subsec. (c)(3)(E)(i). Pub. L. 108-419, § 5(d)(5)(A), substituted “Librarian of Congress and Copyright Royalty

Judges” for “Librarian of Congress” in first sentence and “(C) or (D) shall be given effect as to digital phonorecord deliveries” for “(C), (D) or (F) shall be given effect” in second sentence.

Subsec. (c)(3)(E)(i)(I). Pub. L. 108-419, §5(d)(5)(B), substituted “(C) or (D)” for “(C), (D) or (F)” in two places.

Subsec. (c)(3)(F) to (L). Pub. L. 108-419, §5(d)(6), redesignated subpars. (G) to (L) as (F) to (K), respectively, and struck out former subpar. (F), which read as follows: “The procedures specified in subparagraphs (C) and (D) shall be repeated and concluded, in accordance with regulations that the Librarian of Congress shall prescribe, in each fifth calendar year after 1997, except to the extent that different years for the repeating and concluding of such proceedings may be determined in accordance with subparagraphs (B) and (C).”

1997—Subsec. (c)(3)(D). Pub. L. 105-80, §4, struck out “and publish in the Federal Register” before “a schedule of rates and terms”.

Subsec. (c)(3)(E)(i). Pub. L. 105-80, §12(a)(7)(A), substituted “paragraphs (1) and (3) of section 106” for “sections 106(1) and (3)” in two places.

Subsec. (c)(3)(E)(ii)(II). Pub. L. 105-80, §12(a)(7)(A), substituted “paragraphs (1) and (3) of section 106” for “sections 106(1) and 106(3)”.

Subsec. (d). Pub. L. 105-80, §10, amended directory language of Pub. L. 104-39, §4. See 1995 Amendment note below.

1995—Subsec. (a)(1). Pub. L. 104-39, §4(1), substituted “any other person, including those who make phonorecords or digital phonorecord deliveries,” for “any other person” in first sentence and inserted before period at end of second sentence “, including by means of a digital phonorecord delivery”.

Subsec. (c)(2). Pub. L. 104-39, §4(2), inserted “and other than as provided in paragraph (3),” after “For this purpose,” in second sentence.

Subsec. (c)(3) to (6). Pub. L. 104-39, §4(3), added par. (3) and redesignated former pars. (3) to (5) as (4) to (6), respectively.

Subsec. (d). Pub. L. 104-39, §4(4), as renumbered by Pub. L. 105-80, §10, added subsec. (d).

1984—Subsec. (c)(3) to (5). Pub. L. 98-450 added par. (3) and redesignated existing pars. (3) and (4) as (4) and (5), respectively.

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109-303 effective as if included in the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. 108-419, see section 6 of Pub. L. 109-303, set out as a note under section 111 of this title.

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.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104-39 effective 3 months after Nov. 1, 1995, see section 6 of Pub. L. 104-39, set out as a note under section 101 of this title.

PERSONS OPERATING UNDER PREDECESSOR COMPULSORY LICENSING PROVISIONS

Pub. L. 94-553, title I, §106, Oct. 19, 1976, 90 Stat. 2599, provided that: “In any case where, before January 1, 1978, a person has lawfully made parts of instruments serving to reproduce mechanically a copyrighted work under the compulsory license provisions of section 1(e) of title 17 as it existed on December 31, 1977, such person may continue to make and distribute such parts embodying the same mechanical reproduction without obtaining a new compulsory license under the terms of section 115 of title 17 as amended by the first section of this Act [this section]. However, such parts made on or after January 1, 1978, constitute phonorecords and are otherwise subject to the provisions of said section 115 [this section].”

§ 116. Negotiated licenses for public performances by means of coin-operated phonorecord players

(a) APPLICABILITY OF SECTION.—This section applies to any nondramatic musical work embodied in a phonorecord.

(b) NEGOTIATED LICENSES.—

(1) AUTHORITY FOR NEGOTIATIONS.—Any owners of copyright in works to which this section applies and any operators of coin-operated phonorecord players may negotiate and agree upon the terms and rates of royalty payments for the performance of such works and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

(2) CHAPTER 8 PROCEEDING.—Parties not subject to such a negotiation may have the terms and rates and the division of fees described in paragraph (1) determined in a proceeding in accordance with the provisions of chapter 8.

(c) LICENSE AGREEMENTS SUPERIOR TO DETERMINATIONS BY COPYRIGHT ROYALTY JUDGES.—License agreements between one or more copyright owners and one or more operators of coin-operated phonorecord players, which are negotiated in accordance with subsection (b), shall be given effect in lieu of any otherwise applicable determination by the Copyright Royalty Judges.

(d) DEFINITIONS.—As used in this section, the following terms mean the following:

(1) A “coin-operated phonorecord player” is a machine or device that—

(A) is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by the insertion of coins, currency, tokens, or other monetary units or their equivalent;

(B) is located in an establishment making no direct or indirect charge for admission;

(C) is accompanied by a list which is comprised of the titles of all the musical works available for performance on it, and is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

(D) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

(2) An “operator” is any person who, alone or jointly with others—

(A) owns a coin-operated phonorecord player;

(B) has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or

(C) has the power to exercise primary control over the selection of the musical works made available for public performance on a coin-operated phonorecord player.

(Added Pub. L. 100-568, §4(a)(4), Oct. 31, 1988, 102 Stat. 2855, §116A; renumbered §116 and amended Pub. L. 103-198, §3(b)(1), Dec. 17, 1993, 107 Stat. 2309; Pub. L. 105-80, §5, Nov. 13, 1997, 111 Stat.