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# CRS Report for Congress

## Platform Equality and Remedies for Rights Holders in Music Act of 2007 (S. 256): Section-by-Section Analysis

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# Platform Equality and Remedies for Rights Holders in Music Act of 2007 (S. 256): Section-by-Section Analysis

## Summary

As new technologies have changed the ways in which copyrighted musical works and sound recordings may be reproduced, distributed, and publicly performed, copyright owners, broadcasters, and music vendors have become increasingly concerned that the various compulsory licenses applicable to sound recordings result in different treatment for entities offering similar services. S. 256, the Platform Equality and Remedies for Rights Holders in Music Act of 2007 (the Perform Act), represents one legislative approach to resolving these concerns, at least as they apply to digital public performances of sound recordings.

The Perform Act would amend 17 U.S.C. § 112 to require that webcasters pay copyright owners a compulsory license fee based on the fair market value of their works when making "ephemeral recordings." It would similarly change the terms under which transmission services obtain compulsory licenses for digital public performances of copyrighted sound recordings under 17 U.S.C. § 114(f) by (1) providing for compulsory licenses for all types of transmission services under the same statutory provision, (2) setting license fees for all types of transmission services based on the same three criteria, and (3) using the fair market value of the works licensed as the standard for determining all compulsory license fees.

The Perform Act also strengthens the requirements of 17 U.S.C. § 114(d) to ensure that transmission services cannot rely on a compulsory license for digital public performance in order to *distribute* sound recordings to listeners. It further adds a concept of "reasonable recording" to 17 U.S.C. § 114(j), under which transmission services, in order to qualify for the compulsory public performance license, must employ technological measures to limit copying or recording by listeners.

Finally, the Perform Act requires that the Register of Copyrights convene a meeting between owners of copyrighted sound recordings and transmitting services no later than 60 days after its enactment to discuss the creation of a new category for "limited interactive services" and set appropriate compulsory license fees for these services.

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# Platform Equality and Remedies for Rights Holders in Music Act of 2007 (S. 256): Section-by-Section Analysis

## Introduction

S. 256, the Platform Equality and Remedies for Rights Holders in Music Act of 2007 (the Perform Act), introduced on January 11, 2007, by Senator Dianne Feinstein, seeks to promote parity in the music licensing fees paid by entities involved in the digital performance and distribution of copyrighted music. It would amend certain provisions of U.S. copyright law (17 U.S.C. §§ 112 and 114) to (1) subject all digital public performances of copyrighted sound recordings to compulsory licensing under the same statutory provision and standards, regardless of whether they are transmitted by preexisting or new, subscription, or non-subscription services; (2) require services that transmit digital public performances of copyrighted sound recordings under compulsory licenses to use technological measures to prevent the making of copies embodying the transmission of the sound recordings; and (3) use the fair market value of the copyrighted sound recordings in setting compulsory license fees for digital public performances of them. This report provides a section-by-section analysis of the Perform Act and the changes it would make to U.S. copyright law.

## Background

Among the creative works that U.S. copyright law protects are sound recordings (material or digital embodiments of performances of musical works) and musical works (musical compositions consisting of musical notation and any accompanying words).[1] Owners of copyrighted sound recordings have exclusive rights to reproduce, adapt, or distribute their works, or to perform them publicly by digital means.[2]

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[1] 17 U.S.C. §§ 102(a)(1) & (7). Cole Porter's song "I've Got You Under My Skin" is a musical work. A tape, compact disk, or MP3 of Frank Sinatra singing "I've Got You Under My Skin" is a sound recording.

[2] 17 U.S.C. §§ 106(1)-(3) & (6). The owners of copyrighted musical works, in contrast, have exclusive rights to publicly perform their works by any means, digital or non-digital. 17 U.S.C. § 106(4). As defined by the Copyright Act, public performance includes (1) performance at any place open to the public or where a "substantial number of persons outside of a normal circle of a family and its social acquaintances" gather, or (2) transmission or other communication to a public place or to the public by any device or process allowing members of the public to receive the performance as a group or

(continued...)

Normally, anyone who wants to exercise any of the copyright owner's exclusive rights must obtain the copyright owner's permission to do so, typically by negotiating a private licensing agreement.[3] However, copyright law also provides several types of "compulsory licenses" for sound recordings. These licenses allow third parties who pay statutorily prescribed fees to use copyrighted sound recordings under certain conditions, *without* having to negotiate private licensing agreements.[4] Among other things, compulsory licenses currently are available for "ephemeral recordings" (reproductions of sound recordings made by webcasters or radio stations to facilitate the "streaming" of their content on the Internet),[5] as well as public performances of sound recordings by digital transmission services, such as webcasters and satellite digital audio radio services.[6]

As new technologies have changed the ways in which copyrighted musical works and sound recordings may be reproduced, distributed, and publicly performed, copyright owners, broadcasters, and music vendors have become increasingly concerned that the various compulsory licenses applicable to sound recordings result in different and inequitable treatment for entities offering similar services. Webcasters object to paying compulsory license fees for "ephemeral" reproductions and public performances when terrestrial (AM/FM) radio stations do not.[7] They also are concerned about paying more in compulsory license fees than existing satellite radio services, whose license fees are separately established based upon factors that recognize their infrastructure investments and seek to minimize disruption to their business models.[8] Copyright owners worry that satellite digital services are

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[2] (...continued)
individually. 17 U.S.C. § 101.

[3] *See* CRS Report RL33631, *Copyright Licensing in Music Distribution, Reproduction, and Public Performance*, by Jared Huber and Brian T. Yeh.

[4] *Id.*

[5] 17 U.S.C. § 112(a)(1). Webcasters are radio stations that transmit their broadcasts through the Internet instead of, or in addition to, through radio waves transmitted by air. "Streaming" refers to the transmission of audio or video content via the Web in such a way that the content is viewable while it is being transmitted.

[6] 17 U.S.C. § 114.

[7] *Parity, Platforms, and Protection: The Future of the Music Industry in the Digital Radio Revolution: Hearing Before the Senate Comm. on the Judiciary* [hereinafter *Parity, Platforms*], 109th Cong., 2nd Sess. (2006) (statement of N. Mark Lam, Chairman and CEO of Live365, Inc.) (noting that a terrestrial radio station with the same sized audience as Live365 pays 3.5% of its revenue for use of copyrighted musical works and nothing for use of copyrighted sound recordings, while Live365 pays 6.5% of its revenue for use of copyrighted musical works and 33.4% of its revenue for use of copyrighted sound recordings). *See* Bonneville Int'l Corp. v. Peters, 347 F.3d 485 (3d Cir. 2003) (rejecting webcasters' claim that they should be exempt from paying for use of copyrighted sound recordings, like terrestrial radio stations are).

[8] *Parity, Platforms* (noting that satellite digital audio radio services pay royalties on sound recordings at a rate of 5-7% of revenue, 4-6% less than the rate paid by subscription Internet radio services and the 22-28% less than paid by a webcaster of Live365's size). *Cf.* 17
(continued...)

impermissibly "stretching" the compulsory public performance license in order to *distribute* sound recordings because they have developed portable devices that allow users not only to record musical programming but also to save and re-sequence selected songs from such recordings.[9] Satellite radio services, on the other hand, note that they face more expenses in transmitting public performances than webcasters do because they must purchase spectrum and launch satellites prior to transmitting music.[10] They argue that listeners recording from satellite radio are no different than listeners recording from terrestrial radio and thus are covered by the Audio Home Recording Act (AHRA) (P.L. 102-563).[11] The Perform Act represents one legislative approach to resolving these concerns, at least as they apply to digital public performances of sound recordings.

## Section 1: Short Title

Section 1 of the bill contains its short title, the Platform Equality and Remedies for Rights Holders in Music Act of 2007, or the Perform Act of 2007. Bills with the same name and largely identical content were introduced in both houses of the 109th Congress but not enacted.[12]

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[8] (...continued)
U.S.C. §§ 801(b)(1)(C)-(D) (applying only to 17 U.S.C. § 114(f)(1)(B), or preexisting satellite digital audio radio services, and stating that the compulsory fee is to be set based upon consideration of (1) "the relative roles of the copyright owners and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets" and (2) "minimiz[ing] any disruptive impact on the structure of the industries involved and on generally prevailing industry practices").

[9] *Parity, Platforms* (statement of Edgar Bronfman, chairman and CEO of Warner Music Group) ("Satellite services are now offering new devices, which can essentially transform a satellite service like XM and Sirius into a distribution service like iTunes."). Owners of copyrights in sound recordings have also sued, claiming that satellite digital audio radio services violate their distribution rights with these recording and playback devices. *See* Atlantic Recording Corp. v. XM Satellite Radio, Inc., 2007 WL 136186 (S.D.N.Y. Jan. 19, 2007). For more information, see CRS Report RL33538, *Satellite Digital Audio Radio Services and Copyright Law Issues*, by Brian T. Yeh.

[10] *Parity, Platforms* (statement of Gary Parsons, chairman of the board of XM Satellite Radio, Inc.) (noting an investment of nearly $4 billion in start-up costs).

[11] *Id. But see Protecting Digital Broadcast Content: Hearing Before the House Comm. on the Judiciary*, 109th Cong., 1st Sess. (2005) (statement of Mitch Bainwol, chairman and CEO of the Recording Industry Association of America, Inc.) ("Satellite radio should ... not be able to rely on [AHRA] to create an unlicensed download service."). AHRA requires that importers and manufacturers of certain digital audio recording devices pay a percentage of each device's sale price to owners of copyrighted musical works.

[12] H.R. 5361, 109th Cong., 2d Sess. (2006) (sponsored by Representative Howard L. Berman) and S. 2644, 109th Cong., 2d Sess. (2006) (sponsored by Senator Dianne Feinstein).

# Section 2: Rate-Setting Standards

## Section 112 Licenses

The Digital Millennium Copyright Act (DMCA) of 1998 (P.L. 105-304) created a new compulsory license for webcasters who temporarily reproduce copyrighted sound recordings while publicly performing them (e.g., creating cache or buffer copies prior to or during streaming).[13] Under the current version of 17 U.S.C. § 112(e)(4), if the webcasters and copyright owners fail to negotiate a fee for these "ephemeral recordings," the U.S. Copyright Office's Copyright Royalty Judges are to determine a fee corresponding to that which willing buyers and sellers would negotiate in the marketplace. The Perform Act amends 17 U.S.C. § 112(e)(4) by replacing the willing buyer/seller standard with a standard based on "the fair market value of the rights licensed." The rationale for this change is unclear; even the sponsor of S. 256, Senator Feinstein, notes that there is "some concern about what fair market value means, especially under a government licensing scheme where there is not an actual competitive market."[14] However, one possibility is that the use of the fair market value in setting compulsory license fees may parallel its use in assessing actual damages for copyright infringement under 17 U.S.C. § 504(a)(1).[15]

## Section 114 Licenses

In amending the Copyright Act to grant owners of copyrighted sound recordings exclusive rights in digital public performances of their works, the Digital Performance Right in Sound Recordings Act (DPRSRA) of 1995 (P.L. 104-39) also created a compulsory license for digital public performances of copyrighted sound recordings. The DMCA later modified the DPRSRA compulsory license system by distinguishing between licenses for (1) preexisting subscription services and satellite radio services, such as cable services, XM Satellite Radio, and SIRIUS Satellite Radio, and (2) transmissions by new subscription or satellite services and all other

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[13] 17 U.S.C. § 112(e). Although § 112 licenses are available for both (1) services transmitting under any type of license or transfer of copyright and (2) broadcasters licensed by the Federal Communications Commission that make nonsubscription digital transmissions of sound recordings, discussions of § 112 typically use the term "webcaster" as a shorthand for both groups. That convention is followed in this report in reference to § 112 licenses.

[14] 152 CONG. REC. S3510-01 (Apr. 25, 2006).

[15] Yet, in assessing fair market value when setting actual damages, courts have treated fair market value as *synonymous* with the rate that "a willing buyer would have ... [paid] a willing seller" for use of the work. Christopher Phelps & Assocs., LLC v. Galloway, — -F.3d — -, 2007 WL 438806, at *6 (4th Cir. Feb. 12, 2007); *see also* United States v. Broad. Music, Inc., 316 F.3d 189, 194 (2d Cir. 2003) (fair market value is "the price that a willing buyer and a willing seller would agree to in an arm's length transaction"). Later litigation involving the performing rights organization BMI established that fair market value can be set higher than the retail price in order to cover the costs of processes and services necessary to bring the product to market. United States v. Broad. Music, Inc., 426 F.3d 91, 97 (2d Cir. 2005).

eligible nonsubscription transmissions, such as webcasters.[16] Currently, under DPRSRA as amended by the DMCA, only the preexisting subscription or satellite services[17] have their rates set under standards that consider the services' role in creating new markets and seek to minimize disruption of their industry.[18] New subscription or satellite services, as well as eligible nonsubscription services, do not have their rates determined under such standards. Their rate setting standards do not consider their role in creating new markets, or seek to minimize disruption to their industries[19] — and their rates thus tend to be higher.[20]

The Perform Act eliminates the DMCA's distinction between preexisting subscription or satellite services and all other services by deleting 17 U.S.C. § 114(f)(1). Instead, it renumbers the current § 114(f)(2) as the new § 114(f)(1) and revises it to cover all "transmissions."[21] The Perform Act further revises the new § 114(f)(1)(B) to use the same three factors in setting compulsory license fees for all transmission services. Two of these factors — (1) the transmission's impact on sound recordings' sales or the copyright owners' revenue stream and (2) the creative, technological and financial contributions of the copyright owner and transmission provider — are included in the current § 114(f)(2)(B). However, the Perform Act adds a third factor that more directly addresses copyright owners' concerns that public performance licences are being used to avoid negotiating distribution rights. This factor is "the degree to which reasonable recording affects the potential market for sound recordings, and the additional fees that are required to be paid by services for compensation." The Perform Act also changes § 114(f) in the same way that it changes § 112(e), by providing that compulsory license fees are to correspond to the fair market value of the works, not the price that would be negotiated by willing buyers and sellers in the marketplace. Further, the Perform Act revises the new § 114(f)(1)(C) to allow owners of copyrighted sound recordings to seek re-calculation of the compulsory license fee whenever services digitally transmitting public performances of copyrighted sound recordings introduce new technologies or devices.

To the degree that the Perform Act applies the same statutory provision and rate-setting factors to all services that publicly perform copyrighted sound recordings by digital means, it does promote parity. However, the Perform Act does not require absolute rate parity between all services publicly performing sound recordings by digital means under § 114 compulsory licenses. Rather, the Perform Act leaves language in the new § 114(f) that requires different transmitting entities to pay different compulsory license fees:

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[16] *Compare* 17 U.S.C. §§ 114(f)(1) and (f)(2).

[17] Governed by 17 U.S.C. § 114(f)(1).

[18] *See* 17 U.S.C. §§ 801(b)(1)(C)-(D) (applying only to subsection (f)(1) of 17 U.S.C. § 114).

[19] 17 U.S.C. § 804(b)(3)(C).

[20] *See supra* note 8.

[21] Specifically, the Perform Act deletes from the new 17 U.S.C. § 114(f)(1) language describing "eligible nonsubscription transmission services" and "transmissions by new transmission services specified by subsection (d)(2)."

> [R]ates and terms shall distinguish among the different types of services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords[22] by consumers.[23]

## Content Protection

The Perform Act attempts to ensure that transmission services cannot rely upon compulsory licenses for public performances to *distribute* copyrighted sound recordings. Currently, under 17 U.S.C. § 114(d)(2), transmission services are eligible for compulsory licenses only if (1) their transmissions are not part of an interactive service;[24] (2) they do not automatically and intentionally cause any device receiving the transmission to switch from one program channel to another unless they are transmitting to a business entity; and (3) they accompany their transmissions, whenever technically feasible, with any information encoded into the sound recording by the copyright owner to identify its title, performer, or underlying musical work. The Perform Act would add a fourth requirement to this listing, allowing a transmission service to rely on the compulsory license only where it

> takes no affirmative steps to authorize, enable, cause or induce[25] the making of a copy or phonorecord by or for the transmission recipient and uses technology that is reasonably available, technologically

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[22] Under U.S. copyright law, a phonorecord is "any material object[] in which sounds ... are fixed by any method ... and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101.

[23] Congressional proponents of the Perform Act typically say that it will subject "Internet, cable and satellite ... to the same rate standards," not the same rates. *Parity, Platforms* (statement of Senator Arlen Specter, Chairman of the Senate Judiciary Committee).

[24] The meaning of "interactive service" has been a matter of some dispute, as the sponsors of the Perform Act note. *See* 152 CONG. REC. S3510-01 (Apr. 25, 2006) (statement of Senator Feinstein). Under the DPRSRA, an "interactive service" was defined as "one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of that recipient." The DMCA amended that definition to "one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient." Many people have objected that in changing this definition, the DMCA replaced a "fairly straightforward and objective test [with] one requiring a complex subjective analysis." *Music Licensing Issues: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (2005) (statement of Rob Glaser, Chairman and CEO of RealNetworks, Inc.).

[25] It is unclear whether the Perform Act's usage of "induce" here is intended to correspond to the meaning of "induce" in the Supreme Court's decision in MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005), which held that manufacturers of devices can face secondary liability for copyright infringement when they "induce" their customers to use their products illegally. The verb "induce" is used in the current § 114(d)(2)(C)(vi), which predates the *Grokster* decision.

> feasible, and economically reasonable to prevent the making of copies or phonorecords embodying the transmission in whole or in part, except for reasonable recording.

Language similar to the fourth requirement is currently in § 114(d)(2)(C)(vi), although the Perform Act would remove this subsection. Presently, § 114(2)(C)(vi) applies only to new subscription services or preexisting subscription services using different transmission mechanisms than those they used on July 31, 1998; it does not reach the activities of preexisting subscription or satellite services such as XM or SIRIUS so long as they do not change their transmission mechanisms.[26] Moreover, the Perform Act's proposed language for the new § 114(d)(2)(A)(iv) is broader in terms of what a transmitting service must do to qualify for a compulsory license than is current law. Under the current § 114(d)(2)(C)(vi), a service cannot rely on the compulsory license if it (1) causes or induces recipients to make recordings and (2) to the degree its transmission technologies enable it to limit the making of recordings, fails to impose such limits. Under the new § 114(d)(2)(A)(iv), a service cannot rely on the compulsory license if it (1) authorizes or enables, as well as causes or induces, recipients to make copies or recordings and (2) fails to use technologies that are reasonably available, technologically feasible, and economically reasonable to prevent copying or recording by listeners. Thus, under the Perform Act, a transmitting service must satisfy additional conditions to qualify for a § 114 compulsory license, including potentially using digital rights management (DRM) technologies to limit the recipient's ability to reproduce, distribute, or perform the transmitted music.[27]

## Definition

The Perform Act adds a new definition describing "reasonable recording" to 17 U.S.C. § 114(j). Under the Perform Act, a recording cannot be reasonable where an entity, which is transmitting digital public performances under a § 114 compulsory license for private, noncommercial use, fails to employ technological measures incorporated into recording devices to prevent

- automated recording or playback of user-selected sound recordings, albums, or artists;

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[26] New devices promoted by XM and SIRIUS allow consumers to record segments of transmissions and then save only selected songs, or re-sequence the songs from their broadcast order. These would not fall within the category of "transmission medium" because they are devices for receiving, not sending, content. *See* 17 U.S.C. § 101 (defining "transmit"). Some critics contend that the entire Perform Act is targeted at XM and SIRIUS. *See* Joseph Palenchar, *Senate Bill Targets Sat-Radio Recording*, 21 TWICE 1 (2006).

[27] Some observers have noted that this requirement of the Perform Act may force webcasters to stream music to the public using a DRM-enabled digital music file format, such as Microsoft's Windows Media Audio (WMA) or Real's RealAudio (RA) format. MP3-encoded audio is *not* DRM-compliant, and thus webcasters may need to switch their Internet radio streams to a non-MP3 format. Such a change may require additional license fees to be paid to the owners of those proprietary music file formats. *See* Fred von Lohmann, *The Season of Bad Laws, Part 3: Banning MP3 Streaming,* Apr. 26, 2006, *available on March 12, 2007, at* [http://www.eff.org/deeplinks/archives/004587.php].

- separation of a transmission into its component segments (e.g., songs) so as to permit their playback in a different sequence; and

- redistribution, retransmission or exporting of a phonorecord containing any part of a sound recording licensed under § 114 unless the destination device is a secure, in-home network complying with these requirements.

The Perform Act does not, however, prohibit automated recording or playback of user-selected programs, time periods or channels, or noninfringing, non-automated manual recording and playback by consumers.

The Perform Act relies upon this definition of "reasonable recording" as one of the factors to be considered in setting compulsory license fees under the new § 114(f)(1)(B) and in establishing when a preexisting satellite digital audio radio service may rely on the statutory license under § 114(d).

### Technical and Conforming Amendments

The Perform Act removes references to § 114(f)(2)(C), which the Perform Act renumbers as § 114(f)(1)(C), from 17 U.S.C. § 803(b)(3)(B).

## Section 3: Register of Copyrights Meeting and Report

Finally, the Perform Act requires that the Register of Copyrights convene a meeting between owners of copyrighted sound recordings and transmitting services no later than 60 days after its enactment to discuss the creation of a new category for "limited interactive services" and set appropriate compulsory license fees for these services.

# Appendix A: A Side-by-Side Comparison of the Current Statutory Language and the Changes That Would Be Made to It by the Perform Act

| Current Statute | Statute as Amended by the Perform Act |
|---|---|
| **§ 112(e)(4)**<br>The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (5), be binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under this subsection during the 5-year period specified in paragraph (3), or such other period as the parties may agree. Such rates shall include a minimum fee for each type of service offered by transmitting organizations. The Copyright Royalty Judges shall establish rates that most clearly represent the **fees that would have been negotiated in the marketplace between a willing buyer and a willing seller**. | **§ 112(e)(4)**<br>The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (5), be binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under this subsection during the 5-year period specified in paragraph (3), or such other period as the parties may agree. Such rates shall include a minimum fee for each type of service offered by transmitting organizations. The Copyright Royalty Judges shall establish rates that most clearly represent the **fair market value of the rights licensed under this subsection**. |
| **§ 114(d)(2)(A)**<br>[The performance of a sound recording publicly by means of a subscription digital audio transmission not exempt under paragraph (1), an eligible nonsubscription transmission, or a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service shall be subject to statutory licensing, in accordance with subsection (f) if — ]<br><br>(i) the transmission is not part of an interactive service;<br>(ii) except in the case of a transmission to a business establishment, the transmitting entity does not automatically and intentionally cause any device receiving the transmission to switch from one program channel to another; **and**<br>(iii) except as provided in section 1002(e) the transmission of the sound recording is accompanied, if technically feasible, by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the | **§ 114(d)(2)(A)**<br>[The performance of a sound recording publicly by means of a subscription digital audio transmission not exempt under paragraph (1), an eligible nonsubscription transmission, or a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service shall be subject to statutory licensing, in accordance with subsection (f) if — ]<br><br>(i) the transmission is not part of an interactive service;<br>(ii) except in the case of a transmission to a business establishment, the transmitting entity does not automatically and intentionally cause any device receiving the transmission to switch from one program channel to another; ~~**and**~~<br>(iii) except as provided in section 1002(e) the transmission of the sound recording is accompanied, if technically feasible, by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the |

| Current Statute | Statute as Amended by the Perform Act |
|---|---|
| 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**;** | 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; **and**<br><br>**(iv) the transmitting entity takes no affirmative steps to authorize, enable, cause or induce the making of a copy or phonorecord by or for the transmission recipient and uses technology that is reasonably available, technologically feasible, and economically reasonable to prevent the making of copies or phonorecords embodying the transmission in whole or in part, except for reasonable recording as defined in this subsection;** |
| **§ 114(d)(2)(C)**<br>[The performance of a sound recording publicly by means of a subscription digital audio transmission not exempt under paragraph (1), an eligible nonsubscription transmission, or a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service shall be subject to statutory licensing, in accordance with subsection (f) if — ]<br><br>(C) in the case of an eligible nonsubscription transmission or a subscription transmission not exempt under paragraph (1) that is made by a new subscription service or by a preexisting subscription service other than in the same transmission medium used by such service on July 31, 1998 —<br><br>(vi) the transmitting entity takes no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient, and if the technology used by the transmitting entity enables the transmitting entity to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format, the transmitting entity sets such technology to limit such making of phonorecords to the extent permitted by such technology; | **§ 114(d)(2)(C)**<br>[The performance of a sound recording publicly by means of a subscription digital audio transmission not exempt under paragraph (1), an eligible nonsubscription transmission, or a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service shall be subject to statutory licensing, in accordance with subsection (f) if — ]<br><br>(C) in the case of an eligible nonsubscription transmission or a subscription transmission not exempt under paragraph (1) that is made by a new subscription service or by a preexisting subscription service other than in the same transmission medium used by such service on July 31, 1998 —<br><br>~~**(vi) the transmitting entity takes no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient, and if the technology used by the transmitting entity enables the transmitting entity to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format, the transmitting entity sets such technology to limit such making of phonorecords to the extent permitted by**~~ |

| Current Statute | Statute as Amended by the Perform Act |
|---|---|
| | **~~such technology;~~** |
| | **New text added at end of § 114(d)(2)(C)**<br>For purposes of subparagraph (A)(iv), the mere offering of a transmission and accompanying metadata does not in itself authorize, enable, cause, or induce the making of a phonorecord. Nothing shall preclude or prevent a performing rights society or a mechanical rights organization, or any entity owned in whole or in part by, or acting on behalf of, such organizations or entities, from monitoring public performances or other uses of copyrighted works contained in such transmissions. Any such organization or entity shall be granted a license on either a gratuitous basis or for a de minimus fee to cover only the reasonable costs to the licensor of providing the license, and on reasonable, nondiscriminatory terms, to access and retransmit as necessary any content contained in such transmissions protected by content protection or similar technologies, if such licenses are for purposes of carrying out the activities of such organizations or entities in monitoring the public performance or other uses of copyrighted works, and such organizations or entities employ reasonable methods to protect any such content accessed from further distribution. |
| **§ 114(f)(1)**<br>(1) (A) Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services specified by subsection (d)(2) during the 5-year period beginning on January 1 of the second year following the year in which the proceedings are to be commenced, except where a different transitional period is provided under section 6(b)(3) of the Copyright Royalty and Distribution Reform Act of 2004 or such other period. Such terms and rates shall distinguish among the different types of digital audio transmission services then in operation. Any copyright owners of sound recordings, preexisting subscription services, or preexisting satellite digital | **Deleted and replaced with what was formerly § 114(f)(2)** |

| Current Statute | Statute as Amended by the Perform Act |
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| audio radio services may submit to the Copyright Royalty Judges licenses covering such subscription transmissions with respect to such sound recordings. The parties to each proceeding shall bear their own costs.<br>(B) The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (3), be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the 5-year period specified in subparagraph (A), a transitional period provided under section 6(b)(3) of the Copyright Royalty and Distribution Reform Act of 2004, or such other period as the parties may agree. In establishing rates and terms for preexisting subscription services and preexisting satellite digital audio radio services, in addition to the objectives set forth in section 801 (b)(1) the Copyright Royalty Judges may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A).<br>(C) The procedures under subparagraphs (A) and (B) also shall be initiated pursuant to a petition filed by any copyright owners of sound recordings, any preexisting subscription services, or any preexisting satellite digital audio radio services indicating that a new type of subscription digital audio transmission service on which sound recordings are performed is or is about to become operational, for the purpose of determining reasonable terms and rates of royalty payments with respect to such new type of transmission service for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for subscription digital audio transmission services most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree. | |

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| **§ 114(f)(2)(A)**<br>Proceedings **under chapter 8 shall determine reasonable rates and terms of royalty payments for subscription transmissions by eligible nonsubscription transmission services and transmissions by new subscription services specified by subsection (d)(2) during the 5-year period beginning on January 1 of the second year following the year in which the proceedings are to be commenced, except where a different transitional period is provided under section 6(b)(3) of the Copyright Royalty and Distribution Reform Act of 2004, or such other period as the parties may agree. Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services and new subscription services then in operation and shall include a minimum fee for each such type of service. Any copyright owners of sound recordings or any entities performing sound recordings affected by this paragraph may submit to the Copyright Royalty Judges licenses covering such eligible nonsubscription transmissions and new subscription services with respect to such sound recordings. The parties to each proceeding shall bear their own costs.** | **Renumbered as § 114(f)(1)(A)**<br>Proceedings **under chapter 8 shall determine reasonable rates and terms of royalty payments for transmissions during 5-year periods beginning on January 1 of the second year following the year in which the proceedings are to be commenced, except where a different transitional period is provided under section 6(b)(3) of the Copyright Royalty and Distribution Reform Act of 2004, or such other period as the parties may agree.** |
| **§ 114(f)(2)(B)**<br>The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (3), be binding on all copyright owners of sound recordings and entities performing sound recordings **affected by this paragraph** during the 5-year period specified in subparagraph (A), a transitional period provided under section 6(b)(3) of the Copyright Royalty and Distribution Act of 2004, or such other period as the parties may agree. Such rates and terms shall distinguish among the different types of **eligible nonsubscription transmission** services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound | **Renumbered as § 114(f)(1)(B)**<br>The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (3), be binding on all copyright owners of sound recordings and entities performing sound recordings **under this section** during the 5-year period specified in subparagraph (A), a transitional period provided under section 6(b)(3) of the Copyright Royalty and Distribution Act of 2004, or such other period as the parties may agree. Such rates and terms shall distinguish among the different types of ~~**eligible nonsubscription transmission**~~ services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings |

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| recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers. In establishing rates and terms for transmissions by **eligible nonsubscription services and new subscription** services, the Copyright Royalty Judges shall establish **rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller**. In determining such rates and terms, the Copyright Royalty Judges shall **base its** decision on economic, competitive and programming information presented by the parties, including —<br>(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; **and**<br>(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.<br>In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements **negotiated under subparagraph (A)**. | and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers. In establishing rates and terms for transmissions by ~~**eligible nonsubscription services and new subscription**~~ services, the Copyright Royalty Judges shall establish **the fair market value of the rights licensed under this section**. In determining such rates and terms, the Copyright Royalty Judges shall **base their** decision on economic, competitive and programming information presented by the parties, including —<br>(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; ~~**and**~~<br>(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk**; and**<br><br>**(iii) the degree to which reasonable recording affects the potential market for sound recordings, and the additional fees that are required to be paid by services for compensation.**<br><br>In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements ~~**negotiated under subparagraph (A).**~~ |
| **§ 114(f)(2)(C)**<br>The procedures under subparagraphs (A) and (B) shall also be initiated pursuant to a petition filed by any copyright owners of sound recordings or any eligible nonsubscription service or new subscription service indicating that a new type of **eligible nonsubscription service or new subscription service on which sound recordings are performed is or is about to become operational**, for the | **Renumbered as § 114(f)(1)(C)**<br>The procedures under subparagraphs (A) and (B) shall also be initiated pursuant to a petition filed by any copyright owners of sound recordings or any **transmitting entity indicating that a new type of service on which sound recordings are performed is or is about to become operational**, for the purpose of determining reasonable terms and rates of royalty payments with respect to such new |

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| purpose of determining reasonable terms and rates of royalty payments with respect to such new type of service for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for preexisting subscription digital audio transmission services **or preexisting satellite digital radio audio services**, as the case may be, most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree. | type of service for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for preexisting subscription digital audio transmission services, **eligible nonsubscription services, or new subscription services**, as the case may be, most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree. |
| **§ 114(j)** | **New text added at end of § 114(j)(10)**<br>(A) A 'reasonable recording' means the making of a phonorecord embodying all or part of a performance licensed under this section for private, noncommercial use where technological measures used by the transmitting entity, and which are incorporated into a recording device —<br><br>(i) permit automated recording or playback based on specific programs, time periods, or channels as selected by or for the user;<br><br>(ii) do not permit automated recording or playback based on specific sound recordings, albums, or artists;<br><br>(iii) do not permit the separation of component segments of the copyrighted material contained in the transmission program which results in the playback of a manipulated sequence; and<br><br>(iv) do not permit the redistribution, retransmission or other exporting of a phonorecord embodying all or part of a performance licensed under this section from the device by digital outputs or removable media, unless the destination device is part of a secure in-home network that also complies with each of the requirements in this paragraph.<br><br>(B) Nothing in this paragraph shall prevent a consumer from engaging in non-automated manual recording and playback in a manner that is not an infringement of copyright. |

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| **§ 804(b)(3)(C)(i)**<br>(i) Notwithstanding any other provision of this chapter, this subparagraph shall govern proceedings commenced pursuant to section 114 (f)(1)(C) and 114 (f)(2)(C) concerning new types of services. | **§ 804(b)(3)(C)(i)**<br>(i) Notwithstanding any other provision of this chapter, this subparagraph shall govern proceedings commenced pursuant to section 114 (f)(1)(C) ~~**and 114 (f)(2)(C)**~~ concerning new types of services. |
| **§ 804(b)(3)(C)(iv)**<br>The rates and terms shall remain in effect for the period set forth in section 114(f)(1)(C) or 114(f)(2)(C), as the case may be. | **§ 804(b)(3)(C)(iv)**<br>The rates and terms shall remain in effect for the period set forth in section 114(f)(1)(C) ~~**or 114(f)(2)(C), as the case may be**~~. |

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