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## MUSIC MODERNIZATION ACT

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Mr. GRASSLEY, from the Committee on the Judiciary,  
submitted the following

### R E P O R T

[To accompany S. 2823]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 2823) a bill to modernize copyright law, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

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#### I. BACKGROUND AND PURPOSE OF THE MUSIC MODERNIZATION ACT

##### A. BACKGROUND

The United States' copyright laws have helped make this nation the center of the music world. Copyright laws protect creators and artists, allowing them to thrive by granting them exclusive rights and protections to their works. However, the law has not kept pace with the music industry to reflect changes in consumer preferences and technological developments. The current statutory scheme applies inconsistent rules that place certain technologies at a disadvantage and result in inequitable compensation variances for

music creators. These inconsistencies have drawn criticism that music copyright and licensing laws are too difficult to comply with and do not adequately reward the artists and professionals responsible for creating American music.

To address these issues, multiple bills were introduced in the Senate and House of Representatives. Songwriters, artists, publishers, producers, distributors, and other stakeholders involved in the creation and distribution of music collaborated with legislators in both the Senate and the House to find a path forward on music reform. Legislative options were discussed with copyright experts and the Copyright Office. Hearings and briefings were held on music licensing reform and multiple bills were introduced.

In the Senate, Mr. Hatch introduced S. 2823, the Music Modernization Act, which is identical to the text of the House-passed bill, H.R. 5447, introduced by Mr. Goodlatte. S. 2823 contains three titles consisting of updated versions of three previously introduced bills:

- S. 2334, the Music Modernization Act, introduced by Mr. Hatch (Title I);
- S. 2393, the Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society Act (CLASSICS Act), introduced by Mr. Coons (Title II); and
- S. 2625, the Allocation for Music Producers Act (AMP Act), introduced by Mr. Grassley (Title III).

#### B. PURPOSE

S. 2823 updates music copyright laws by creating a new compulsory blanket licensing system for mechanical works, updating the rate standards applicable to music licensing, modifying the rate setting process in the Southern District of New York, providing copyright royalties to pre-1972 artists, and ensuring that producers, mixers, and sound engineers are able to receive compensation for their creativity.

##### *1. Title I—Music Licensing Modernization*

The first title of S. 2823 is an amended version of S. 2334, the “Music Modernization Act.”

##### *17 U.S.C. 115(a) Availability and scope of compulsory license clause*

Clause (ii) in subparagraph (A) of paragraph (1) creates a new method by which a digital music provider may obtain a compulsory license for a nondramatic musical work. Under the current Section 115, the musical work copyright owner has the right to authorize the first recording of her musical work, sometimes referred to as the “first use” right. Historically, the first use was cleared by the record label, which obtained the right to make a sound recording from the songwriter or her music publisher and distribute the phonorecords derived from that sound recording. A record label may continue to obtain a compulsory license under clause (i) when it is the first to record and distribute recordings of the musical work.

Clause (ii) applies in the situation in which a digital music provider is the first person to make and distribute digital phonorecord deliveries (DPDs) of a sound recording embodying a musical work

(i.e., in cases for which clause (i) does not apply). In such instances, the digital music provider may obtain a compulsory license if it satisfies three criteria: (1) the first fixation of the musical work in a sound recording is made under the authority of the musical work copyright owner; (2) the sound recording copyright owner who first fixes such sound recording has the authority of the musical work copyright owner to make and distribute digital phonorecord deliveries of such musical work to the public in the United States; and (3) the sound recording copyright owner (or its authorized distributor) authorizes the digital music provider to make and distribute digital phonorecords of the sound recording to the public in the United States.

Under the current language of section 115(a)(1), a compulsory license is available to “any other person” after a sound recording embodying a musical work has been distributed to the public in the United States under the authority of the musical work copyright owner. The new language is intended to eliminate any ambiguity under existing law as to whether a digital music provider may obtain a compulsory license when the digital music provider is the first person to distribute digital phonorecord deliveries of such musical work. The new language makes clear that a digital music provider may obtain a compulsory license in those instances in which the digital music provider is the first person to make and distribute digital phonorecord deliveries of a sound recording embodying a musical work.

*17 U.S.C. 115(b) Procedures to obtain a compulsory license*

The amended section 115 provides two separate means of obtaining a compulsory mechanical license. Subsection (b)(1) maintains the ability to obtain a compulsory license to reproduce and distribute phonorecords other than DPDs on a work-by-work basis. This is the historical method by which record labels have obtained compulsory licenses.

A new subsection (b)(2) provides the blanket mechanical license for digital music providers to make and distribute DPDs. If the digital music provider is making and distributing the DPDs before the date the blanket license is available, which is defined in subsection (e)(15) as January 1 following the expiration of the 2 year period beginning on the date the legislation is enacted, then the digital music provider must file a notice of intent on the musical work copyright owner, if the identity and location of the musical work copyright owner is known. Unlike the current section 115, however, under the legislation, in the event the musical work copyright owner is unknown, the digital music provider does not file a notice of intent on the Copyright Office. Instead, the digital music provider continues to search for the musical work copyright owner until the license availability date and, if the musical work copyright owner has not been located by such time, the digital music provider is required to turn over to the mechanical licensing collective any accrued royalties and reports of usage for such unmatched works pursuant to subsection (d)(10). If the digital music provider is making and distributing DPDs after the date the blanket license is available, then the digital music provider may obtain the blanket license by submitting a notice of license to the mechanical licensing collective as described in subsection (d)(2).

Subsection (b)(3) maintains the “pass-through” license for record labels to obtain and pass through mechanical license rights for individual permanent downloads. Under the Music Modernization Act, a record label will no longer be eligible to obtain and pass through a Section 115 license to a digital music provider to engage in activities related to interactive streams or limited downloads.

Subsection (b)(4)(A) maintains the current practice whereby record labels that fail to serve or file a notice of intent are foreclosed from the possibility of obtaining a compulsory license for that work. Subsection (b)(4)(B) provides penalties for a digital music provider for failing to file a notice of intent or notice of license. Again, this subsection distinguishes between activities that occur prior to the date of availability of the blanket license and activities that occur after. Before the date of availability of the blanket license, if the digital music provider fails to serve a notice of intent on the musical work copyright owner (as described in subsection (b)(2)), then the digital music provider is foreclosed from obtaining a compulsory license for use of that particular work under such subsection. After the date the blanket license is available, if the digital music provider fails to submit the notice of license on the mechanical licensing collective, then the digital music provider is foreclosed from obtaining a blanket license for 3 years.

*17 U.S.C. 115(c) Royalty payable under compulsory license*

The amendments to subsection (c) change the current rate-setting standard from that currently found at 801(b) to the “willing buyer/willing seller” standard now applicable to setting rates for the public performance of sound recordings by noninteractive webcasters under the section 114(d)(2) and section 112 statutory licenses. Consistent with the current 115 compulsory license, subsection (c)(2)(A) makes clear that voluntary licenses entered into between musical work copyright owners and digital music providers are given effect in lieu of the rates established for the blanket license.

*17 U.S.C. 115(d) Blanket license for digital uses, mechanical licensing collective, and digital licensee coordinator*

The majority of Title I creates a new section 115(d) that establishes a blanket compulsory licensing system for qualified digital music providers. The Committee has regularly heard from various parties in the music industry that the existing music licensing system does not functionally work to meet the needs of the digital music economy where commercial services strive to have available to their customers as much music as possible. Song-by-song licensing negotiations increase the transaction costs to the extent that only a limited amount of music would be worth engaging in such licensing discussions, depriving artists of revenue for less popular works and encouraging piracy of such works by customers looking for such music.

*The new mechanical licensing collective*

The Board of Directors of the new collective is required to be composed of individuals matching specific criteria. The detailed requirements concerning the overall framework of the Board of Directors of the collective and its three committees, the criteria used to

select individuals to serve on them, and the advance publication of their names and affiliations all highlight the importance of selecting the appropriate individuals. Service on the Board or its committees is not a reward for past actions, but is instead a serious responsibility that must not be underestimated. With the advance notification requirement, the Register is expected to allow the public to submit comments on whether the individuals and their affiliations meet the criteria specified in the legislation; make some effort of its own as it deems appropriate to verify that the individuals and their affiliations actually meet the criteria specified in the legislation; and allow the public to submit comments on whether they support such individuals being appointed for these positions. It has been agreed to by all parties that songwriters should be responsible for identifying and choosing representatives that faithfully reflect the entire songwriting community on the Board.

To ensure that the collective's officers are independent, individuals serving as officers of the collective may not, at the same time, also be an employee or agent of any member of the collective's Board of Directors or any entity represented by a member of the collective's Board of Directors.

Given their importance, the three committees established by the collective must operate in a transparent manner to the greatest extent possible in order to avoid unnecessary litigation as well as to gain the trust of the entire music community. Although it would be desirable that the committees reach unanimous decisions, that will not always be possible in which case a majority vote will control the outcome of a decision. It is expected that the Board of Directors will establish rules on how to resolve tie vote decisions. For the responsibilities described in subparagraphs (J) and (K) of paragraph (3), the collective is only liable to a party for its actions if the collective is grossly negligent in carrying out the policies and procedures adopted by the Board of Directors pursuant to section 115(d)(11)(D). Since the Register has broad regulatory authority under paragraph (12) of subsection (d), it is expected that such policies and procedures will be thoroughly reviewed by the Register to ensure the fair treatment of interested parties in such proceedings given the high bar in seeking redress.

Not later than 1 year after designation by the Register, the collective must establish and make public bylaws relating to the governance of the collective.

The Register is allowed to re-designate an entity to serve as the collective every 5 years after the initial designation. Although there is no guarantee of a continued designation by the collective, continuity in the collective would be beneficial to copyright owners so long as the entity previously chosen to be the collective has regularly demonstrated its efficient and fair administration of the collective in a manner that respects varying interests and concerns. In contrast, evidence of fraud, waste, or abuse, including the failure to follow the relevant regulations adopted by the Copyright Office, over the prior five years should raise serious concerns within the Copyright Office as to whether that same entity has the administrative capabilities necessary to perform the required functions of the collective. In such cases, where the record of fraud, waste, or abuse is clear, the Register should give serious consideration to the

selection of a new entity even if not all criteria are met pursuant to section 115(d)(3)(B)(iii).

*Reasonable cost shifting of the mechanical licensing collective*

Digital music services and musical works copyright owners reached an agreement to transfer the reasonable costs of the new mechanical licensing collective to the licensees. The Committee supports a true free market for copyrighted works and, in the limited number of situations in which a compulsory license exists, believes that the licensees benefit most from the reduction in transaction costs. The Committee rejects statements that copyright owners benefit from paying for the costs of collectives to administer compulsory licenses in lieu of a free market. Therefore, the legislation directs that licensees should bear the reasonable costs of establishing and operating the new mechanical licensing collective. This transfer of costs is not unlimited, however, since it is strongly cabined by the term “reasonable.”

The legislation directs the Copyright Royalty Judges to undertake a proceeding to determine the amount of an administrative assessment fee to be paid by blanket and significant nonblanket licensees for the reasonable costs of starting up and continuing to operate the new mechanical licensing collective. There are several other licensing collectives, such as SoundExchange, American Society of Composers, Authors and Publishers (ASCAP), and Broadcast Music Inc. (BMI), that the Copyright Royalty Judges should look to for comparison points, although their expenditures are simply comparison points. The Copyright Royalty Judges shall make their own determination(s) based upon the evidence provided to them about the appropriate administrative assessment for such reasonable costs that are identified with specificity.

It is expected that not all reasonable expenditures in the first years of the collective may be identifiable in advance, especially as they relate to startup costs, but that future reasonable costs are more likely to be able to be determined in advance with some certainty. When anticipated startup and operational costs are different than anticipated, the Copyright Royalty Judges are expected to use their best judgement as to what has or has not been a reasonable expenditure of the collective and use their authority to adjust the fee subject to prior under or over collection of fees for reasonable costs, as well as lesser or greater reasonable costs than anticipated.

The legislation is focused on the transfer of the collective’s reasonable startup and operating costs to blanket and nonblanket licensees. It is expected that the collective will only accrue reasonable costs and not expend unreasonable costs either on a one-off or continuing basis. It is not the responsibility of any other party other than the collective to ensure that it only expends reasonable amounts of funds for its activities. Although other parties such as the digital licensee coordinator may choose to notify the collective of any concerns of unreasonable spending, they do not have the legal burden to do so and do not waive their right to object to the Copyright Royalty Judges or a federal court of any unreasonable spending by not notifying them of it when suspected or discovered. Although the licensees are free to voluntarily pay some or all unreasonable costs of the collective if they so choose, the legislation

does not require that and makes clear that all such unreasonable costs as determined by the Copyright Royalty Judges are not the responsibility of the licensees. Any such unreasonable costs, to the extent that they are accrued, should be borne by either the collective itself and/or the copyright owners that benefit from the collective. Nor should any unreasonable costs be offset by unmatched royalties or taken from artist revenue. The legislation requires that the collective pay out accrued royalties under a set schedule. With the exception of future adjustments to the administrative assessment, if so determined by the Copyright Royalty Judges, once the licensees meet the terms of the legislation in paying the applicable royalties with the administrative assessment and providing the accompanying usage data for the covered activities, their obligation ends for any additional payments for such usage. This includes any need to pay replacement royalties should the collective engage in waste, fraud, or abuse of such royalties. In the event that an employee of the collective engages in fraud by diverting royalty payments, it is not the responsibility of the licensee(s) to replace these stolen royalties.

Because of the importance to the music community that the collective begin operating as soon as possible, even before any administrative assessment fees are collected, the legislation includes provisions to allow voluntary contributions by digital music providers to the collective to offset some or all of its startup and operational costs, as well as the adoption of voluntary agreements to determine the administrative assessment. Such contributions are to be voluntarily made and accounted for and, unless explicitly agreed to, shall not cover expenses deemed unreasonable by the Copyright Royalty Judges.

#### *Oversight and accountability*

The collective is expected to operate in a transparent and accountable manner. The legislation specifically requires that the collective shall ensure that its policies and practices are transparent and accountable. The collective must identify a point of contact for inquiries and complaints with timely redress. It must also establish an anti-comingling policy for funds.

#### *Audit*

To ensure that the collective does not engage in waste, fraud and abuse, the collective is required to submit to periodic audits to examine its operations and procedures. Beginning in the fourth full calendar year that begins after the initial designation of the collective by the Register, and in every fifth calendar year thereafter, the collective shall retain a qualified auditor to examine the collective's books, records and operations and prepare a report for the Board of Directors to be delivered no later than December 31 of the year in which the auditor is retained. The auditor's report shall address the implementation and efficacy of procedures of the collective's (1) receipt, handling and distribution of royalty funds, including any amounts held as unclaimed royalties; (2) efforts to guard against fraud, abuse, waste, and unreasonable use of funds; and (3) efforts to protect the confidentiality of financial, proprietary, and other sensitive information. The collective shall submit the report to the Register and make it available via the internet to the public.

*Musical works database*

The legislation mandates the creation of a new musical works database. For far too long, it has been difficult to identify the copyright owner of most copyrighted works, especially in the music industry where works are routinely commercialized before all of the rights have been cleared and documented. This has led to significant challenges in ensuring fair and timely payment to all creators even when the licensee can identify the proper individuals to pay. With millions of songs now available to subscribers worldwide, technology also has a role to play through digital fingerprinting of a sound recording. However, there is no reliable, public database to link sound recordings with their underlying musical works. Unmatched works routinely occur as a result of different spellings of artist names and song titles. Even differing punctuation in the name of a work has been enough to create unmatched works. There have been several attempts to create a unified music database, most notably the 2008 Global Repertoire Database project that brought together numerous music industry participants in an attempt to solve the music industry's data problem. Despite hopes that this effort would succeed where others had failed, this project too ended without success due to cost and data ownership issues. Music metadata has more often been seen as a competitive advantage for the party that controls the database, rather than as a resource for building an industry on. In an era in which Americans can buy millions of products via an app on their phone based upon the UPC code on the product, the failure of the music industry to develop and maintain a master database has led to significant litigation and underpaid royalties for decades. This situation must end so that all artists are paid for their creations and that so-called "black box" revenue is not a drain on the success of the entire industry.

The database that is required by this legislation will contain information such as the title of a work, its copyright owner(s) and shares thereof, contact information for the copyright owner(s), International Standard Recordings Codes (ISRC) and International Standard Work Codes (ISWC), relevant information for the sound recordings a work is embodied in, and any other information that the Register of Copyrights may prescribe by regulation. Using standardized metadata such as ISRC and ISWC codes, is a major step forward in reducing the number of unmatched works. For example, the Register may at some point wish to consider after an appropriate rulemaking whether standardized identifiers for individuals would be appropriate, or even audio fingerprints. The Register shall use its judgement to determine what is an appropriate expansion of the required fields, but shall not adopt new fields that have not become reasonably accessible and used within the industry unless there is widespread support for the inclusion of such fields.

Given the importance of this database, the legislation makes clear that it shall be made available to the Copyright Office and the public without charge, with the exception of recovery of the marginal cost of providing access in bulk to the public. Individual lookups of works shall be free although the collective may implement reasonable steps to block efforts to bypass the marginal cost recovery for bulk access if it appears that one or more entities are

attempting to download the database in bulk through repeated queries. However, there shall be no requirement that a database user must register or otherwise turn over personal information in order to obtain the free access required by the legislation. The collective is required under the legislation to routinely undertake its own efforts to identify the musical works embodied in particular sound recordings, as well as to identify and locate the copyright owners of such works so that they can update the database as appropriate. With only the exception of the efficient and accurate collection and distribution of royalties, such actions are the highest responsibility of the collective.

*Records of the collective*

Beyond the new database, the legislation requires that the collective's material records be kept for not less than 7 years after the date of creation or receipt, whichever occurs later. The records applicable to a particular copyright owner are to be accessible to that copyright owner or their representative. Beyond the seven-year limit, there are no such limitations that apply to the access of any record by the Copyright Office.

*Annual report*

Not later than June 30 of each year after the first license availability date, the mechanical licensing collective shall publicly release an annual report that sets forth information regarding the collective's operational and licensing practices; how royalties are collected and distributed; budgeting and expenditures; the collective's total costs for the preceding calendar year; the projected annual collective budget; aggregated royalty receipts and payments; expenses that are more than 10% of the annual collective budget; and the efforts of the collective to locate and identify copyright owners of unmatched musical works and shares of works. It is expected that the collective will create reports similar to that of other collectives, while recognizing that certain reported activities of other collectives, involving lobbying and marketing that this collective is prohibited from doing, will not be applicable.

*Digital licensee coordinator*

The legislation anticipates, but does not require, the designation of a digital licensee coordinator to coordinate the activities of the licensees. Similar to the collective, the choice of the coordinator is subject to a review by the Register of Copyrights every five years, has specified duties, and is prohibited from engaging in lobbying. The coordinator shall make reasonable, good-faith efforts to assist the collective in locating and identifying copyright owners of unmatched musical works (and shares of such works) by encouraging digital music providers to publicize the existence of the collective and the ability of copyright owners to claim unclaimed accrued royalties, including by (1) posting contact information for the collective at reasonably prominent locations on digital music provider websites and applications, and (2) conducting in-person outreach with songwriters. Both the collective and the coordinator have the right to commence an action in federal court for specified damages, injunctive relief, attorneys' fees, costs, and other relief deemed appropriate by a federal court against a significant nonblanket li-

censee that fails to provide monthly usage reports or pay the required administrative fee. Any financial recovery shall be used to offset the costs of the collective's total costs.

*Voluntary licenses*

Although the primary focus of the legislation is the creation of a new compulsory blanket license, voluntary licenses remain in effect and are excluded from the blanket license and individual licenses. However, such voluntary licenses that rise to the threshold of a significant nonblanket license must meet the conditions imposed upon such licensees. Musical work copyright owners may designate the mechanical licensing collective to administer voluntary licenses so long as the rates and terms of the voluntary license were negotiated individually between a musical work copyright owner and digital music provider. Musical work copyright owners may not require as a condition for entering into a direct license that the mechanical licensing collective administer a voluntary license.

*Transition to a blanket license*

The legislation creates a transition period in order to move from the current work-by-work license to the new blanket license. After the date of enactment, a digital music provider will no longer be able to serve notices of intent on the Copyright Office for uses of musical works for which the musical work copyright owner cannot be identified or located. Notices of intent filed before the enactment date will no longer be effective. However, prior to the blanket license availability date a digital music provider is immune from copyright infringement liability for any use of any musical work for which the digital music provider was unable to identify or locate the musical work copyright owner so long as the digital music provider engages in good-faith, commercially reasonable efforts to identify and locate musical work copyright owners. The digital music provider is required to use one or more bulk electronic matching processes, and must continue using these processes, on a monthly basis for so long as the musical work copyright owner is unidentified.

If the musical work copyright owner is identified or located during this search process, then the digital music provider is required to report and pay that copyright owner any royalties owed. If the musical work copyright owner remains unidentified between the date of enactment and the date the blanket license is available, then the digital music provider is required to provide a cumulative usage report and accrued royalties to the mechanical licensing collective. There are no late fees associated with these accrued royalties.

When the blanket license becomes available, the blanket license will be substituted automatically for the compulsory licenses obtained pursuant to notices of intent, without any interruption in license authority. Because the new blanket license replaces the previous work-by-work compulsory license, the compulsory licenses obtained under notices of intent served on musical work copyright owners prior to the availability of the blanket license will no longer be valid. However, any voluntary license agreement between a digital music provider and a musical work copyright owner continues

to be effective and takes precedence over the blanket license until such license expires according to its own terms.

*Obtaining a blanket license*

After the blanket license availability date, digital music services interested in obtaining a blanket license shall provide advance notice to the mechanical licensing collective. The collective has 30 calendar days to reject such notice in writing, listing with specificity why such notice was rejected, either because it does not meet the requirements of the legislation or applicable regulations established by the Copyright Office or if the digital music service provider has had a blanket license terminated by the collective within the past three years. There is an additional 30-day cure period for a potential licensee. Should a provider believe that their notice was improperly rejected, they have the right to seek review in federal district court on a de novo basis. Once obtained, the license covers the making and distribution of server, intermediate, archival, and incidental reproductions of musical works that are reasonable and necessary.

*Default and termination of a blanket license*

Although it would be far preferable for every digital music provider that obtains a compulsory license to meet all of the terms of such license, there may be occasions when that will not be the case. The legislation anticipates the imposition of a late fee to be determined in advance by the Copyright Royalty Judges to address late payments. However, the legislation also recognizes that such late fees may not be enough to bring a provider back into compliance and therefore identifies the conditions upon which digital music providers shall be deemed in default of such compulsory licenses, and thus allow the collective to terminate such license automatically.

A provider that believes their blanket license was improperly terminated has the right to seek review in federal court on a de novo basis. However, the court should recognize that the conditions for determining default and permitting termination are quite specific. So long as those conditions are met, a court may not impose additional termination requirements or waive clear deadlines in an attempt to continue the blanket license. If a party wants to obtain and then maintain a blanket license, it must meet the stated terms specified in the statute. Efforts by the collective to participate in such proceedings, including its own reasonable attorneys' fees, are a reasonable expense of the collective. Since the digital music providers that benefit from the new licensing system are responsible for paying such reasonable costs, other digital music providers may wish to consider joining the case in opposition to a defaulting licensee under Rule 24 of the Federal Rules of Civil Procedure. However, a court could determine that the collective has attempted to impose new conditions beyond those permitted by the legislation. Should a court make such determination, the court has the authority to revoke such attempted termination and grant any other relief it determines to be appropriate. The Committee strongly encourages the court to make the Copyright Office aware of such determination since any financial cost to the collective that results from such relief or related litigation efforts shall not be considered a reasonable cost of the collective.

*Performance saving clause*

Section (d)(13) contains two savings clauses intended to protect the licensing of the public performing right in musical works from interference by the mechanical compulsory license. The clauses clarify that subsection 115(d) applies solely to section 115 mechanical reproduction and distribution rights. Subsection (d)(13)(A) clarifies that the section 115 blanket license shall not extend to any other activity or right other than exclusive rights of reproduction and distribution of musical works with respect to covered activities. Subsection (d)(13)(B) clarifies that subsection (d) does not extend to, limit or affect any musical work public performance works. This administration function can include a voluntary mechanical license that bundles the public performance of musical works when such licenses are entered into by the copyright owner directly with a digital transmission services. However, the mechanical license collective may not itself own, control, grant or be granted the public performance right in musical works. It is further intended that a performing rights society or other entity licensing the public performing right to musical works or administering voluntary licenses shall not be required to use information from the mechanical licensing collective's musical works database for the calculation or distribution of license fees or other payments for public performances of musical works licensed and/or administered by such performing rights society or entity.

*Audit rights*

The legislation contains two different audit rights, one for copyright owners due royalties from the collective and one for the collective due royalties from licensees. Both audit rights are subject to certain specified time limits and other requirements including the ability to choose alternative procedures if both parties agree. The key difference is that only the audit right for the collective contains a shifting of the cost of the audit to the digital music provider being audited if there was an underpayment of 10 percent or more. The reason for this difference is that the collective is assumed to be operating in its members' best interests while digital music services have no such underlying responsibility.

*Significant nonblanket licensees*

The legislation creates a category of licensees, identified as significant nonblanket licensees, who operate outside the blanket licensing context, but who are required to provide notice to the collective of their existence and to help pay for the operation of the new collective. Such licensees are subject to a cause of action in federal court brought by either the mechanical licensing collective or the digital licensee coordinator if they fail to make monthly usage reports or pay the administrative assessment fee. This fee is made applicable to such licensees because they are presumed to benefit from the new database and as a way to avoid parties attempting to avoid funding of the mechanical licensing collective by engaging in direct deals outside the blanket license. Two specific exceptions to the definition of a significant nonblanket licensee are incorporated in the definition of such licensee, one concerning certain free-to-the-user streams of less than 90 seconds and the other in regards to public broadcasting entities.

*Royalty distribution of matched works*

Usage reports from digital music services must include the number of digital phonorecord deliveries, specifying the number of limited downloads and interactive streams. Any reports should be consistent with then-current industry practices regarding how such limited downloads and interactive streams are tracked and reported. The digital music provider must also identify all musical work copyright owners with whom the digital music provider has an effective voluntary license and is not relying on the blanket license. Using this information, the collective is then required to collect and distribute royalties on a specific schedule set forth in the legislation. All copyright owners shall have their royalties distributed fairly and no copyright owner may receive special treatment as a result of their position on the Board, its committees, or for any other reason without a reasonable basis. For example, it may be required for the Board and its committees to focus on specific copyright owners for legitimate, specific reasons such as representing them in a bankruptcy proceeding that not all copyright owners are part of. Absent such legitimate reasons, any such special treatment should be viewed by the Register and federal courts as waste, fraud, and abuse.

It is expected that over time one or more music services will file bankruptcy and the collective may represent its copyright owners in related court proceedings in order to recover as much of the royalties due as possible. The Board shall then distribute any lesser amounts of royalties collected through such bankruptcy proceedings to copyright owners using the best usage data available. Since a bankruptcy proceeding may conclude long after the relevant employees at the music service have long since departed, there may be discrepancies in the usage data that cannot be resolved. With a recorded vote, the Board shall determine how best to proceed with distribution(s) related to bankrupt music services. Although not required by the legislation, the collective may wish to consult with the Register for his or her opinion if a particular approach is reasonable in which case the Register shall provide a timely response.

*Royalty distribution of unmatched works*

It is expected that there will be some percentage of unmatched works that generate royalties that will decline over time as the collective's database becomes more robust and the music industry continues to recognize the importance of obtaining and sharing proper metadata in advance of the initial distribution of a work. Since the legislation permits the distribution of unclaimed royalties that were accrued on unmatched works for which the creators will not be paid, a significantly higher bar to such distributions is required compared to the more routine royalty distributions of matched works.

For unmatched works, the collective must wait for the prescribed holding period of three years before making such distribution. This is intended to give the collective time to actively search for the copyright owner. SoundExchange, a collective for royalties under Section 114 of the Copyright Act, has an admirable history of undertaking significant efforts to locate copyright owners who may not know they are due royalties. Despite their robust efforts, how-

ever, even SoundExchange distributes unmatched royalties after its detailed search efforts conclude. This legislation requires the new collective to undertake its own efforts to locate the copyright owner and update its database accordingly if so identified. If such efforts fail, then the unclaimed royalties oversight committee shall establish such policies identified in the legislation that the Committee believes are necessary to undertake a fair distribution of such unclaimed royalties. These policies include gathering of required information to make such distributions, 90 calendar days' advance public notice, and a requirement that at least 50 percent of such unclaimed royalties be credited or paid to the songwriter(s) represented by that copyright owner. It is the intent of Congress to ensure that songwriters receive their fair share of monies distributed to copyright owners under subsection (d)(3)(J), while at the same time respecting contractual relationships. To that end, payments and credits to songwriters shall be allocated in proportion to the reported usage of individual musical works by digital music providers during the relevant reporting periods. The 50% payment or credit to a songwriter referenced in subsection (d)(3)(J)(iv)(II) is intended to be treated as a floor, not a ceiling, and is not meant to override any applicable contractual arrangement providing for a higher payment or credit of such monies to a songwriter.

This process ensures that copyright owners and artists benefit. While there may be some copyright owners and/or artists who would prefer that such money be escrowed indefinitely until claimed, the simple way to avoid any distribution to other copyright owners and artists is to step forward and identify oneself and one's works to the collective, an exceedingly low bar to claiming one's royalties.

#### *Public notice of unclaimed accrued royalties*

The collective shall maintain a publicly accessible online facility with contact information for the collective that lists unmatched musical works (and shares of works), through which a copyright owner may assert an ownership claim with respect to such a work (and a share of such a work). The collective shall engage in diligent, good-faith efforts to publicize the collective and ability to claim unclaimed accrued royalties for unmatched musical works (and shares of such works), the procedures with respect to receiving accrued royalty payments, and information on accrued royalty transfers and pending distribution of unclaimed accrued royalties and accrued interest.

#### *Termination of prior litigation*

The legislation contains a key component that was necessary to bring the various parties together in an effort to reach common ground by limiting liability for digital music providers after January 1, 2018, so long as they undertake certain payment and matching obligations. Such agreement is welcomed since continued litigation generates unnecessary administrative costs, diverting royalties from artists. Congress routinely preempts such unnecessary litigation in other contexts and views the application here of such date as warranted. The imposition of detailed statutory requirements for obtaining such a limitation of liability ensure that more artist roy-

alties will be paid than otherwise would be the case through continual litigation.

*Copyright Office regulations*

Pursuant to paragraph (12) of subsection (d), the Register is expected to promulgate the necessary regulations required by the legislation in a manner that balances the need to protect the public's interest with the need to let the new collective operate without over-regulation. The Copyright Office has the knowledge and expertise regarding music licensing through its past rulemakings and recent assistance to the Committee during the drafting of this legislation. Although the legislation provides specific criteria for the collective to operate, it is to be expected that situations will arise that were not contemplated by the legislation. The Office is expected to use its best judgement in determining the appropriate steps in those situations. The Register of Copyrights can also turn to another legislative branch agency, the Government Accountability Office, for assistance in determining if artists are being properly compensated for their works.

*Copyright Office activities*

The legislation requires the Register to engage in public outreach and educational activities. The legislation also requires the Register, after soliciting and reviewing comments and relevant information from music industry stakeholders, to submit a report to the Judiciary Committees of the Senate and House recommending best practices that the collective may implement in order to identify and locate musical work copyright owners with unclaimed accrued royalties held by the collective, to encourage musical work copyright owners to claim their royalties, and to reduce the incidence of unclaimed royalties. The collective shall carefully consider and give substantial weight to the Register's recommendations when establishing procedures relative to these issues.

*Uniform rate standards*

Section 103(a) of the legislation creates a uniform willing buyer, willing seller rate standard in section 114(f). This fair standard for sound recordings ensures that copyright owners are appropriately compensated for their works using a standard that most approximates the rates that would have been negotiated in a free market. It has long been a goal of the Committee to move towards such a standard and move beyond earlier unfair standards, such as the now unnecessary discount for so-called "pre-existing services." There is no current justification for such 40-year old discounts that harm copyright owners as well as competitors of such pre-existing services. It is also in the interest of facilitating greater competition in these areas that such discounts are eliminated. Whatever justification for the discounts has long since vanished.

Section 103(a) of the legislation repeals section 114(i), to address the longstanding concern that songwriters have not been adequately compensated for their contributions and section 114(i) prevents songwriters from introducing potentially relevant evidence in rate court proceedings. Section 103(a) creates a specific exception for taking into account license fees payable for the public performance of sound recordings under section 106(6) related to certain

transmissions by broadcasters although these new definitions are not to be given effect in interpreting other provisions in Title 17. In addition, the repeal shall not be taken into account in proceedings to determine royalties for sound recordings and has no impact upon the past precedents of such proceedings. Furthermore, as used in this section of the legislation, the term “digital audio transmission” is intended to incorporate the definition of that term found in section 114(j)(5). Therefore, as used in this section, the term “digital audio transmission” does not include the transmission of any audiovisual work.

*Consent decree rate proceedings*

Section 104 of the legislation modifies the selection of rate court judges and related proceedings for performing rights societies subject to a consent decree, currently ASCAP and BMI. In lieu of the current system, the district court shall use a random process, commonly known as the wheel, to determine which judge shall hear rate setting cases involving a performing rights society’s license fees. However, the original judge(s) who oversee(s) the interpretation of the consent decree(s) shall not be permitted to oversee any rate proceedings. Under the present situation, this would mean that the two judges who oversee the ASCAP and the BMI consent decrees would not hear any rate proceedings involving either performing rights society. This change is not a reflection upon any past actions by the Southern District of New York—rather, it is believed that rate decisions should be assigned on a random basis to judges not involved in the underlying consent decree cases.

*Consent decree review*

In April 2018, the Antitrust Division of the Department of Justice announced its intention to review over 1300 “legacy” consent decrees, including those governing ASCAP and BMI. Collectively, ASCAP and BMI license over 90 percent of musical works to licensees that publicly perform music, including restaurants, retail stores, bars, radio and television broadcasters, and digital music services.

Since the 1940s, ASCAP and BMI have been subject to consent decrees with the U.S. Department of Justice to address antitrust concerns arising from an entity collectively licensing works from competitors and offering them at a single price. As a result, the ASCAP and BMI consent decrees have fundamentally shaped the marketplace for licensing public performance rights in musical works for nearly 80 years and entire industries have developed around them. In 2016, the Department of Justice concluded a multi-year review of these decrees, determined that they still serve the public interest, and declined to modify the decrees.

There is serious concern that terminating the ASCAP and BMI decrees without a clear alternative framework in place would result in serious disruption in the marketplace, harming creators, copyright owners, licensees, and consumers. In fact, sections of the legislation assume the continued existence of the decrees and alter the rate-setting system established by the decrees, including what evidence may be submitted in a rate dispute and how judges will be assigned to such disputes.

The legislation will improve how music is licensed and how songwriters, recording artists, record producers, engineers and copyright owners are paid. Enacting the legislation only to see the Department of Justice move forward with seeking termination of the decrees without a workable alternative framework could displace the legislation's improvements to the marketplace with new questions and uncertainties for songwriters, copyright owners, licensees and consumers.

Given these ongoing concerns, section 105 of the legislation creates a formal role for Congress during any review by the Department of Justice of a consent decree with a performing rights society, such as ASCAP or BMI. During any review of such a decree, the Department of Justice shall provide upon request timely briefings to any Member of the Senate and House Judiciary Committees regarding the status of such review. The Department of Justice shall also share with such Members detailed and timely information and pertinent documents related to the review, subject to confidentiality and rules of agency deliberative process.

Additionally, section 105 of the legislation requires the Department of Justice to notify Members of the Senate and House Judiciary Committees before filing a motion to terminate, including a motion to terminate after a specified period of time, also referred to as "sunsetting", any consent decree with a performing rights society and provide information regarding the impact of the proposed termination on the market for licensing the public performance for musical works should the motion be granted.

The Department of Justice is required to submit such notification in writing to the Chairmen and Ranking Members of the Senate and House Judiciary Committees not later than 90 days prior to filing such motion. This notification shall include a written report setting forth an explanation of the process used by the Department of Justice to review the decree, a summary of the public comments received by the Department of Justice during its review, and any other information requested by Congress.

This section applies only to the Department of Justice's review of and potential motion to terminate consent decrees governing performing rights societies. Nothing in this section broadly impacts the Department of Justice's independent authority to seek whatever modifications to a consent decree, including termination, it determines are within the public interest. Moreover, nothing in this section changes the process a district court would use to review a motion to modify or terminate a consent decree between the United States and a performing rights society.

## 2. *Title II—Compensating Legacy Artists for Their Songs, Service, and Important Contributions to Society*

The second title of S. 2823 is an amended version of S. 2393, the "Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society", or the "CLASSICS Act." The legislation amends Title 17 to create royalties for so-called "pre-72 works" using the same rates and distribution system for royalties already applicable to post-72 works. These sound recordings that were fixed prior to February 15, 1972 generate no royalties for older artists who have highlighted the negative impact upon their ability to survive economically as they increasingly enter their retirement years,

including from testimony received at the Committee hearing on May 15, 2018, from Mr. Smokey Robinson, a pre-72 recording artist. Among the few options artists with pre-72 works have for generating income from such works are grueling touring schedules that older artists are increasingly less able to undertake. In contrast, artists with post-72 works face lesser burdens since they are able to earn royalties for such works outside of touring.

Despite this discrepancy in royalties payable for works, music services have been able to successfully operate while paying royalties for post-72 works. Thus, these same services should be able to continue to successfully operate with a statutory requirement to pay royalties for pre-72 works to enable older artists and their families to benefit financially from their creativity.

There have been several class action suits regarding pre-72 royalties in states including California, Florida, and New York with varying outcomes. A benefit of the CLASSICS Act is that, in addition to providing for financial income for older artists, it will end the need for state litigation by extending the existing federal royalty payment system for eligible, authorized digital transmissions, as defined in new section 1401(b), for works fixed between January 1, 1923, and February 15, 1972, while pre-empting state laws for common law copyright or equivalent rights under the laws of any State that would conflict with these provisions. The legislation also leaves those existing settlements untouched.

Section 1401(d)(1)(C)(ii)(II) provides there should be no liability under state laws protecting pre-1972 (and post-1922) recordings for voluntary agreements between rights owners and digital music services reached before the enactment of the CLASSICS Act if the voluntary agreement 1) either licenses the service to make, or releases the service from liability for, digital audio transmissions or reproductions that would otherwise have been eligible for statutory licensing, and 2) the service complies with the terms of the agreement. This would be the effect of such a license or settlement under state contract law, but the provision was included to remove any doubt about potential liability.

Title II includes several limitations on remedies in the new section 1401(e), including fair use; certain uses by libraries, archives, and educational institutions; section 507; section 512; section 230 safe harbors; and a new filing requirement for obtaining statutory damages and attorneys' fees. This new filing requirement is designed to operate in place of a formal registration requirement that normally applies to claims involving statutory damages.

Section 1401(e)(1)(B) clarifies the application of section 108 of the Copyright Act to a claim against unauthorized performances of pre-1972 (and post-1922) sound recordings by a library or archive under new section 1401(a). Specifically, section 108(h) allows libraries and archives to make certain uses of published works during the last 20 years of the copyright term of those works, if certain conditions are met. The CLASSICS Act does not provide a term of copyright for pre-1972 recordings; rather, it provides a special federal *sui generis* form of protection for digital performances that aligns with the term of other state law pre-1972 recording rights. In the absence of a federal copyright term that would dictate when the limitation would apply, section 180(h) should apply commencing with the date of enactment of the CLASSICS Act. Section

108(h) does not apply to other uses of pre-1972 recordings, including public performance of a pre-1923 recording by means of a digital audio transmission by a library or archive, because such uses remain solely subject to state law.

In the absence of full federalization of these pre-72 works, the new section 1401(e)(5) requires that the copyright owners file a schedule of works subject to potential claims of statutory damages or attorneys' fees with the Copyright Office under regulations that it will promulgate not later than 180 days after the date of enactment of this section. Before this system is operating, the Copyright Office shall also promulgate regulations within 30 days of enactment for the filing of contact information for transmitting entities. This contact information database will operate up to 180 days after enactment after which the database of works by copyright owners will control whether statutory damages and attorneys' fees are available. Copyright owners must provide a 90-day notice to transmitting entities about a claim for royalties up to 180 days after enactment after which time transmitting entities must search the new database established by the Copyright Office for such works.

To ensure that works currently in the public domain remain in the public domain, works fixed prior to January 1, 1923, are specifically excluded from the payment of any royalties under this provision.

### *3. Title III—Allocation for Music Producers*

The third title of S. 2823 is a modified version of S. 2625, the "Allocation for Music Producers," or the "AMP Act." Currently, the provisions included in this title would only impact the one collective designated by the Copyright Royalty Judges to distribute royalties under section 114(f), SoundExchange. SoundExchange has gained widespread industry support with its efforts to efficiently distribute webcasting royalties to copyright owners and artists that proactively identify themselves as due such royalties or, in the absence of such identification, can be identified through the efforts of SoundExchange. It is hoped that the culture of transparency that SoundExchange has brought to the music industry will be duplicated elsewhere, including in the new mechanical licensing collective established by the first title of this legislation.

In order to pay certain creators, such as producers, mixers, and sound engineers, who were not by statute receiving royalties under section 114, SoundExchange has had a policy since 2004 of honoring "letters of direction" to pay these creators a portion of the featured performer's royalties. According to information supplied by SoundExchange, approximately 2,000 active letters of direction are on file with them generating royalties for these creators, although more such letters of direction that do not have any royalty payments due are on file with them. SoundExchange has received only a limited number of letter of direction submissions that do not meet its conditions for execution and has worked with the interested parties to ensure proper execution of them once corrected by the creators.

It is expected that SoundExchange will continue to implement such policies in a transparent and efficient manner, and to the extent that any other distribution collective designated in the future by the Copyright Royalty Judges for the distribution of receipts

from the licensing of transmissions in accordance with section 114(f), also do so. Nothing in section 114(g)(5) requires that SoundExchange modify any of its current policies in place for letters of direction for recordings fixed on or after November 1, 1995. Section 114(g)(5) simply makes the provision of the letter of direction system a statutory requirement while giving SoundExchange, and any future designated distribution collective, the discretion necessary to operate such a system. The effective date of section 114(g)(5)(B) is set as January 1, 2020, by Section 303 of the legislation to correspond both to the need for SoundExchange to update its internal systems and the alignment with the beginning of a calendar tax year.

Although Section 302(a) creates a brief statutory framework for a SoundExchange system already in operation, section 302(b) creates a more detailed statutory framework for a letter of direction system for works fixed before November 1, 1995, which was the date of enactment of P.L. 104–39, the Digital Performance Right in Sound Recordings Act of 1995. Prior to this date, producers, mixers, and sound engineers would not have contemplated or predicted the payment of digital royalties in their contracts with an artist. The legislation identifies the manner in which a letter of direction for two percent of total royalties can be submitted for such works; what additional efforts the collective and qualifying person must make over a four-month period to notify the featured performers in advance of any royalty distribution to one or more producers, mixers, or sound engineers; and the process for objecting to such letters of direction. After a valid letter of direction for a specific work goes into effect, the payout of total royalties through SoundExchange or another collective designated in the future for such distributions would be allocated as follows:

- 50 percent of the receipts shall be paid to the copyright owner of the exclusive right under section 106(6) to publicly perform a sound recording by means of a digital audio transmission.
- 2.5 percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians) who have performed on sound recordings.
- 2.5 percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists) who have performed on sound recordings.
- 43 percent of the receipts shall be paid, on a per sound recording basis, to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings).
- 2 percent of the receipts shall be paid, on a per sound recording basis, to those eligible for payment(s) identified in section 114(g)(6)(B).

Similar to section 114(g)(5)(B), section 303 of the legislation delays the effective date of the new section 114(g)(6)(E) to January 1, 2020, to accommodate the need for SoundExchange to update its internal systems and align with the beginning of a calendar tax year.

Section 302(c) makes several technical and conforming amendments to section 114(g) that should have no operative impact upon any entity operating currently or in the future.

## II. HISTORY OF THE BILL AND COMMITTEE CONSIDERATION

### A. INTRODUCTION OF THE BILL

On March 15, 2018, the Senate Judiciary Committee hosted a bipartisan staff briefing led by Judiciary Committee staff to discuss pending music legislation. Briefers included Mr. David Israelite, President and CEO, National Music Publishers Association; Mr. Bart Herbison, Executive Director, Nashville Songwriters Association International; Mr. Chris Harrison, CEO, Digital Media Association; Ms. Clara Kim, General Counsel, American Society of Composers, Authors and Publishers; Mr. Stu Rosen, General Counsel, Broadcast Music, Inc.; Mr. Michael Lewan, Director of Government Relations, Recording Academy; Mr. Mitch Glazier, President, Recording Industry Association of America; Mr. Michael Beckerman, CEO, Internet Association; Ms. Paula Calhoun, Executive Vice President and General Counsel, Music Choice; Ms. Cynthia Greer, Vice President and Associate General Counsel, SiriusXM; Ms. Meredith Rose, Policy Counsel, Public Knowledge; and Mr. Curtis LeGeyt, Executive Vice President—Government Relations, National Association of Broadcasters.

On May 10, 2018, Mr. Hatch introduced S. 2823, the Music Modernization Act. Senators Grassley, Whitehouse, Alexander, Coons, Kennedy, Harris, Corker, Durbin, Isakson, Leahy, Crapo, Jones, Tillis, Perdue, Capito, Nelson and Blunt were original cosponsors. The bill was referred to the Committee on the Judiciary.

On May 15, 2018, the Committee on the Judiciary held a hearing entitled “Protecting and Promoting Music Creation for the 21st Century.” Testimony regarding S. 2823 was received from Mr. Smokey Robinson, Recording Artist, Songwriter, and Producer; Mr. David Israelite, President and CEO, National Music Publishers Association; Ms. Meredith Rose, Policy Counsel, Public Knowledge; Mr. Justin Roberts, GRAMMY-Nominated Singer/Songwriter, Trustee, Recording Academy; Mr. Chris Harrison, CEO, Digital Media Association, Mr. Dave Del Beccaro, CEO, Music Choice; Mr. Mitch Glazier, President, Recording Industry Association of America; and, Mr. Josh Kear, Songwriter.

### B. COMMITTEE CONSIDERATION

The Committee on the Judiciary considered S. 2823 on June 28, 2018. Mr. Grassley offered a substitute amendment which was adopted by unanimous consent. The Committee voted to report S. 2823 as amended, favorably to the Senate, by a voice vote.

### III. SECTION-BY-SECTION SUMMARY OF THE BILL

The following discussion describes the bill as reported by the Committee.

#### TITLE I. MUSICAL LICENSING MODERNIZATION

##### *Section 101. Short Title*

Section 101 sets forth the short title of Title I as the “Musical Works Modernization Act.”

##### *Sec. 102. Blanket license for digital uses and mechanical licensing collective.*

Section 102 comprises the vast majority of the overall legislation.

The first part of Section 102 updates existing 17 U.S.C. § 115 (a)-(c), partly to accommodate the new provisions added by 115(d).

Subsection 115(a) is amended to clarify what requirements for obtaining a compulsory license exist for digital music providers, and it specifies when a person may seek a license for the duplication of a sound recording.

Subsection 115(b) is amended by removing the ability of persons seeking to make digital phonorecord deliveries to file a notice of intent with the Copyright Office and instead requiring such notice to be filed with the copyright owner. In the event that a party does not file such notice for non-digital phonorecord deliveries, that party is permanently ineligible for the compulsory licenses, although they may obtain voluntary licenses from the copyright owner(s). In the case of digital phonorecord deliveries, the failure to obtain a license forecloses the ability of a party to obtain such license for three years.

Subsection 115(c) is amended to account for the new blanket licensing system created by the new legislation in 115(d).

The latter part of section 102 strikes the existing subsection 115(d) of Title 17 that currently contains only one definition and replaces it with a significantly expanded subsection to create a new compulsory blanket licensing system as follows:

Paragraph 1 of the new subsection 115(d) defines the scope of the new compulsory license and how it interacts with other existing licenses, such as a voluntary license. By obtaining and complying with the terms of such license, a digital music provider is not subject to an infringement action under paragraphs (1) and (3) of section 106.

Paragraph 2 sets forth the availability of the blanket license, including related Copyright Office regulations, its effective date, and dispute resolution in federal district court.

Paragraph 3 creates the framework of the new mechanical licensing collective created by the legislation beginning with subparagraph A that identifies the requirement for a new “mechanical licensing collective” that shall meet specified minimum criteria including being: (1) a nonprofit single entity, (2) endorsed by and enjoying support from the majority of musical works copyright owners as measured over the preceding three years, (3) able to demonstrate that it has or will have prior to the license availability date the necessary capabilities to perform the required functions, and (4) designated by the Register of Copyrights, with the approval of the Librarian of Congress pursuant to section 702.

Subparagraph B sets forth the initial process for designation of the collective by the Register as well as periodic opportunities every five years for re-designation. The Register is authorized to choose a closest alternate designation in case every condition set forth in subparagraph (A) is not met. However, before an initial designation is made, all members of the Board of Directors and the various committees, along with contact information for the collective, are required to be identified with their affiliations so that interested parties can submit comments to the Register on whether the parties meet the requirements set forth in subparagraph (D) of the bill. This requirement is not waivable by the Register and is not subject to the alternate designation language.

Subparagraph C identifies the authorities and functions of the collective along with three specific provisions: the ability of the collective to administer voluntary licenses, a restriction on negotiating or granting licenses for public performance rights, and a restriction on lobbying.

Subparagraph D sets forth the governance of the collective. The collective's Board of Directors will consist of 14 voting members and 3 nonvoting members, and will establish bylaws that will be available to the public. The Board of Directors will meet no less than twice a year. The Board of Directors will establish an operations advisory committee, an unclaimed royalties oversight committee, and a dispute resolution committee. The collective is also required to produce a public annual report, in addition to an independent officers requirement providing that individuals serving as officers of the collective may not, at the same time, also be an employee or agent of any member of the Board of Directors or any entity represented by a member of the Board of Directors. Since the Board of Directors and committee member requirements along with the annual report are statutory in nature, these requirements are not waivable by the Register or subject to modification by the Board of Directors. The subparagraph also requires the collective to ensure that its policies and practices are transparent and accountable, identify a point of contact for inquiries and complaints, and establish an anti-comingling policy. Finally the subparagraph requires that an audit be conducted, beginning in the fourth full calendar year after the initial designation of the collective by the Register and in every fifth year thereafter, to examine the implementation and efficacy of the collective's procedures on royalty funds, how well the collective guards against fraud, abuse, waste, and the unreasonable use of funds, and how it protects the confidentiality of financial, proprietary and other sensitive information. The audit will be made available to the Register and the public.

Subparagraph E explains in detail the fields in the new musical works database that the collective is required to create based upon information provided to them by digital music services and under what conditions the information is made available to others, including the public. The required information in the database depends upon whether a work is considered matched or unmatched. To the extent that information is missing, musical works copyright owners with works in the database are required to undertake commercially reasonable efforts to deliver the names of the sound recording in

which their works are embodied. The database ought also to be accessible.

Subparagraph F requires the collective to maintain publicly accessible lists of blanket and significant nonblanket licensees.

Subparagraph G sets forth how royalties are collected and then distributed along with efforts to collect royalties from bankrupt licensees.

Subparagraph H clarifies that any unmatched royalties shall be held by the collective for at least three years after they were first accrued and must be kept in an interest bearing account.

Subparagraph I sets forth the claiming process for works that are originally deemed unmatched. The collective is required to undertake a process to publicize the existence of a searchable database. Once a work is claimed, the royalties and accrued interest for such work shall be paid out and the musical works database shall be updated for future matching.

Subparagraph J determines how unclaimed royalties are distributed on a market share basis after the holding period specified in subparagraph H. The unclaimed royalties oversight committee shall establish policies and procedures for such distributions subject to the approval of the Board of Directors of the collective. The collective shall maintain a publicly accessible online facility with contact information listing unmatched musical works (and shares of works), through which a copyright owner may assert an ownership claim with respect to such a work (and share of such work), and engage in good faith efforts to publicize the existence of the collective and ability to claim unclaimed royalties, the procedures by which copyright owners may receive royalties, and information on transfers of accrued royalties and pending unclaimed royalties. The collective shall also participate in music industry conferences and events to publicize these matters. Unclaimed royalties are to be distributed based upon market share data that is confidentially provided to the collective by copyright owners. Ninety calendar days notice is required for such distributions and songwriters must be credited at least 50 percent of the royalty paid to their publisher.

Subparagraph K sets forth the functions of the dispute resolution committee concerning ownership disputes among musical works copyright owners. Pursuant to subparagraph (D) the collective is only liable for gross negligence in these functions. It will hold disputed funds in accordance with subparagraph (H)(ii). However, a copyright owner has the ultimate right to seek redress in a federal district court pursuant to paragraph (10)(E).

Subparagraph L sets forth the verification and audit process for copyright owners to audit the collective, although parties may agree on alternate procedures.

Subparagraph M concerns the ability of copyright owners and their agents to access the records of the collective subject to confidentiality agreements prescribed by the Register.

Paragraph 4 specifies the terms and conditions for a blanket license.

Subparagraph A identifies the data that must be reported to the collective by a digital music provider along with its royalty payments not later than 45 calendar days after the end of a monthly reporting period. The Register shall specify information technology

requirements of such reports along with the maintenance of the records of use.

Subparagraph B requires digital music providers to engage in good-faith, commercially reasonable efforts to obtain information from sound recording copyright owners for use by the collective, including in its database.

Subparagraph C requires digital music providers and significant nonblanket licensees to pay the administrative assessment established under paragraph (7)(D).

Subparagraph D sets forth the verification and audit process for the collective to audit the digital music providers, although the parties may agree on alternate procedures.

Subparagraph E identifies the conditions by which a digital music provider may be considered in default and the consequences of such default. A digital music provider may seek review of such default on a de novo basis in a federal district court of competent jurisdiction.

Paragraph 5 identifies the role of the digital licensee coordinator, its initial designation and potential redesignation, as well as its authorities and functions. Like the collective, the coordinator is prohibited from lobbying. However, unlike as would be the case with the collective, it is possible for the new blanket licensing system to proceed in the event a digital licensee coordinator cannot be chosen. The coordinator is authorized to perform a number of functions, including assisting the mechanical licensing collective in publicizing the existence of the collective and the ability of copyright owners to claim royalties for unmatched musical works.

Paragraph 6 sets forth the requirements for significant nonblanket licensees as defined in subsection (e)(31), including reporting requirements and payment of the administrative assessment. Should a significant nonblanket licensee fail to pay the assessment or submit the required reports, either is actionable in a federal district court for damages up to three times the amount of the unpaid assessment, injunctive relief, costs, and attorneys' fees.

Paragraph 7 details the funding of the new collective by the digital music providers and significant nonblanket licensees through a combination of voluntary contributions and an administrative assessment determined by the Copyright Royalty Judges in a separate proceeding. The fee shall be determined on either a percentage of royalties basis or other usage-based formula with a minimum amount due that covers the reasonable costs of the collective. Timelines for the adoption of the initial and future administrative assessments are established in this paragraph along with granting the Copyright Royalty Judges continuing authority to amend their decisions.

Paragraph 8 provides guidance to the Copyright Royalty Judges as to how interim rates should be established as well as the new late fee for nonpayment of royalties to the collective under the blanket license. Neither the mechanical licensing collective nor the digital licensee coordinator may participate in such rate setting activities except to provide information to other parties in the proceeding.

Paragraph 9 identifies the process to transfer the existing licensing system to the blanket system. Existing compulsory licenses will automatically become blanket licenses on the license availability

date and existing voluntary licenses will continue unchanged until they expire or parties agree to amend or discontinue them. Immediately after enactment of the legislation, the Copyright Office shall discontinue accepting notices of intention with regards to works that would be covered by the new blanket license. However, prior to the license availability date, liability is waived if a valid notice was filed prior to the enactment date.

Paragraph 10 provides for a limitation on liability for prior unlicensed uses that have occurred after January 1, 2018, so long as digital music providers engage in at least monthly good-faith efforts to locate copyright owners and pay their royalties prior to the license availability date. Not later than 45 days after the blanket license is available, any non-matched royalties must be turned over to the collective, along with as much information about usage and ownership information as possible. Late fees and infringement causes of action are also limited subject to these conditions. Two savings clauses are included to clarify that nothing in this paragraph limits or alters any existing right of action and that any aggrieved party may seek an action in federal district court if there is an issue that is not adequately resolved by the Board.

Paragraph 11 details the legal protections for various licensing activities, including antitrust exemptions and common agent exemptions. The collective is not liable for good-faith activities under a gross negligence standard, but none of its activities are immune from suit in federal district court. Due to the distribution of unclaimed royalties to other copyright owners, state laws on abandoned property are preempted.

Paragraph 12 gives the Register authority to conduct proceedings and adopt any necessary regulations as necessary or appropriate with the exception of the administrative assessment that is to be determined by the Copyright Royalty Judges. Among the regulations required to be established are those necessary to govern business confidentiality. All such regulations are subject to judicial review.

Paragraph 13 contains two savings clauses for limiting the scope of the blanket license and making clear that rights of public performance are not affected.

A new subsection 115(e) is created that contains 36 new definitions.

Section 102(b) amends the existing 801(b) standard such that the administrative assessment will henceforth be determined under the provisions created by this legislation, rather than the procedures of existing law.

Section 102(c) sets the effective date of certain new provisions.

Section 102(d) directs the Copyright Royalty Judges to update their regulations within nine months to be consistent with the legislation.

Section 102(e) requires the Register to engage in public outreach and educational activities.

Section 102(f) requires the Register to submit to the Senate and House Judiciary Committees a report recommending best practices for the collective to implement regarding identification and location of musical work copyright owners, claims of royalties, and reduction of unclaimed royalties.

*Sec. 103. Amendments to section 114*

Section 103 creates a uniform willing buyer, willing seller rate standard by amending 17 U.S.C. 114(f), repealing 17 U.S.C. 114(i), and modifying 801(b), while ensuring that certain transmissions by a broadcaster shall not take into account license fees for public performances of sound recordings under 17 U.S.C. 106(6). The discounted “pre-existing services” rate standard established in 1976 is removed in order to equalize the rate setting process for all licensees. Further, it is clarified that the repeal of 114(i) shall not be taken into account for the setting of rates for sound recordings under section 112(e) or 114(f). A series of additional technical and conforming amendments rearranges several other provisions in response to these changes.

*Sec. 104. Random assignment of rate court proceedings*

Section 104 creates an updated system to randomly assign ASCAP and BMI rate court cases to judges of the Southern District of New York other than the two judges who oversee the consent decrees. These two judges will no longer hear rate court proceedings.

*Sec. 105. Performing rights society consent decrees*

Section 105 requires the Department of Justice to provide timely briefings upon request of any Member of the Senate and House Judiciary Committees regarding the status of any review of a consent decree with a performing rights society, such as ASCAP or BMI. The Department of Justice shall also share with such Members detailed and timely information and pertinent documents related to the review, subject to rules of confidentiality and agency deliberative process. Before filing a motion to terminate a consent decree between the United States and a performing rights society, the Department of Justice is required to notify such Members and provide them with information regarding the impact of the proposed termination on the market for licensing the public performance of musical works should the motion be granted. The notification will be provided in writing to the Chairmen and Ranking Members of the Senate and House Judiciary Committees not later than 90 days prior to the filing of the motion, and will include an explanation of the process used to review the decree, a summary of the public comments, and any other information requested by Congress. This section only applies to consent decrees between the United States and a performing rights society.

*Sec. 106. Effective date*

Section 106 provides that Title I and the amendments made by this Title shall take effect on the date of enactment of this Act.

TITLE II. COMPENSATING LEGACY ARTISTS FOR THEIR SONGS, SERVICE,  
AND IMPORTANT CONTRIBUTIONS TO SOCIETY ACT

*Section 201. Short title*

Section 201 designates the short title of this Title of the bill as the “Compensating Legacy Artists for Their Songs, Service, and Important Contributions to Society Act” or the “CLASSICS Act.”

*Sec. 202. Unauthorized digital performance of pre-1972 sound recordings*

Section 202 amends Title 17 by adding a new Chapter 14 concerning pre-1972 works titled “Chapter 14—Unauthorized Digital Performance of Pre-1972 Sound Recordings” as follows:

Chapter 14 creates a remedy under section 502 through 505 for the use of works fixed between January 1, 1923, and February 14, 1972, when no federal right existed. However, should a transmitting entity make such transmissions as they do for those works fixed on or after February 15, 1972, including statutory royalties equivalent to those works, these transmissions are considered authorized. Direct licensing of such works from the copyright owners is recognized so long as the collective that receives and distributes such payments is paid 50% of the proceeds with 50% of the performance royalties credited as payments due under the license. State common law copyrights or other equivalent rights are preempted as are claims under them. Fair use and library use privileges in sections 108, 110(1), and 110(2) are available as a defense along with section 512. A rule of construction for section 108(h) provides that with respect to the application of section 108(h) to a claim for unauthorized performance of a sound recording first fixed on or after January 1, 1923, and before February 15, 1972, under subsection (a) of this section, the phrase “during the last 20 years of any term of copyright of a published work” in such section 108(h) shall be construed to mean at any time after the effective date of this section. In order to obtain statutory damages, a copyright owner must file a schedule of pre-1972 works for which the copyright owner is seeking royalties. No suits may arise until 90 days have passed since the works are first indexed into the public records of the Copyright Office. Transmitting entities must also submit their contact information to the Copyright Office so that copyright owners can identify which services are transmitting their works and send them a notice to stop using such works in the event they choose not to receive webcasting royalties. Such notice will prevent an award of statutory damages or attorney’s fees from being imposed for activities within the first 90 days a notice is sent to the transmitter. In case the notice is undeliverable, the 90-day period begins on the date of the attempted delivery. Section 230 safe harbors also apply in the use of such works.

*Sec. 203. Effective date*

Section 203 sets the effective date of Title II as the date of enactment of the overall bill.

TITLE III. ALLOCATION FOR MUSIC PRODUCERS (AMP) ACT

*Section 301. Short title*

Section 301 designates the short title of this section of the bill as the “Allocation for Music Producers Act” or the “AMP Act.”

*Sec. 302. Payment of statutory performance royalties*

Section 302(a) codifies an existing practice of SoundExchange to accept letters of direction in order to pay producers, sound engineers, and mixers a portion of the webcasting royalties that it collects. Section 302(b) expands this program to cover new royalties

for pre-1995 works that will be received by SoundExchange due to enactment of Title II. The new program requires, in the absence of a letter of direction, at least four months' notice to a copyright owner with no objections from the copyright owner before a set percentage of royalties (2% of all webcasting royalties from a particular work) is then paid to producers, sound engineers, and mixers.

*Sec. 303. Effective date*

Section 303 sets the effective date of all three Titles of the bill as the date of enactment with the exception of certain changes to 114(g) made in Title III.

IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee sets forth, with respect to the bill, S. 2823, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, September 17, 2018.*

Hon. CHUCK GRASSLEY,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed revised cost estimate for S. 2823, the Music Modernization Act. This cost estimate supersedes the estimate for S. 2823 that CBO transmitted on August 13, 2018. The earlier cost estimate did not have the correct short title for S. 2823. This cost estimate corrects that error.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Stephen Raben.

Sincerely,

KEITH HALL,  
*Director.*

Enclosure.

*S. 2823—Music Modernization Act*

Summary: Under current law, a digital music provider (such as Spotify, Apple Music, or Pandora) must pay the copyright owner a royalty fee to use a protected work of music. If it does not otherwise have a voluntary license agreement with the copyright owner to use the work, the music provider must file a notice of intent—on a song-by-song or record-by-record basis—with the copyright owner or the U.S. Copyright Office when it seeks to use any copyrighted digital musical work.

S. 2823 would eliminate notice-of-intent licensing for digital musical works and direct the Copyright Office to designate a nonprofit entity—a mechanical licensing collective, or MLC—to administer a new blanket-licensing system. Under such a license, a digital music provider could use certain copyrighted musical works without filing a notice of intent to do so. S. 2823 also would require the MLC to

collect royalties from digital music providers using the blanket license and distribute them to copyright owners.

CBO estimates that enacting S. 2823 would increase deficits by \$47 million over the 2021–2028 period. That amount comprises an increase in direct spending of \$222 million and an increase in revenues of \$175 million. In addition, CBO estimates that, over the 2019–2023 period, it would cost \$1 million to implement the bill, subject to the availability of appropriated funds.

Because enacting S. 2823 would affect direct spending and revenues, pay-as-you-go procedures apply.

CBO estimates that enacting S. 2823 would not increase net direct spending by more than \$2.5 billion or on-budget deficits by more than \$5 billion in any of the four consecutive 10-year periods beginning in 2029.

S. 2823 would impose intergovernmental mandates, as defined in the Unfunded Mandates Reform Act (UMRA), in the form of pre-emptions of state laws, but CBO estimates that the costs of those mandates would fall well below the threshold established in UMRA for intergovernmental mandates (\$80 million in 2018, adjusted annually for inflation).

The bill would impose private-sector mandates on companies that provide digital music services by:

- Requiring those companies to pay higher fees when they apply for licenses issued by the MLC to cover the administrative costs of the organization;
- Requiring those companies to provide usage reports to the MLC each month detailing the artists and works that have been streamed; and
- Changing the processes used to resolve disputes over claims of copyright infringement in certain cases.

Because of the uncertainty in determining the effect on settlements due to copyright holders under the new dispute resolution process, CBO cannot determine whether the aggregate cost of the mandates on private entities would exceed the annual threshold established in UMRA for private-sector mandates (\$160 million in 2018, adjusted annually for inflation).

Estimated cost to the Federal Government: The estimated budgetary effect of S. 2823 is shown in the following table. The costs of the legislation fall within budget function 370 (commerce and housing credit).

	By fiscal year, in millions of dollars—													2019–2023	2019–2028
	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028				
INCREASES IN DIRECT SPENDING															
Estimated Budget Authority .....	0	0	0	20	28	28	29	29	30	31	31	76	227		
Estimated Outlays .....	0	0	0	17	27	28	29	29	30	31	31	72	222		
INCREASES IN REVENUES															
Estimated Revenues .....	0	0	0	16	22	22	22	23	23	23	24	59	175		
NET INCREASE IN THE DEFICIT FROM INCREASES IN DIRECT SPENDING AND REVENUES															
Impact on Deficit .....	0	0	0	1	5	6	6	7	7	7	8	13	47		

Components may not sum to totals because of rounding.  
 CBO estimates that discretionary spending to implement S. 2823 would total \$1 million over the 2019–2023 period, subject to the availability of appropriated funds.

Basis of estimate: For this estimate, CBO assumes that S. 2823 will be enacted near the end of fiscal year 2018 and that the necessary amounts will be available each year. Estimated outlays are based on historical patterns for similar activities.

Under S. 2823, the Copyright Office would designate an entity to act as the MLC and the judges of the Copyright Royalty Board would establish an administrative assessment to be paid by users of the blanket license and by certain other large users of copyrighted digital musical works. That assessment would be designed to cover the costs of establishing, maintaining, and operating the MLC. Payment of the assessment would be compulsory and could be enforced through a court order. In CBO's view, in keeping with guidance in the 1967 *Report of the President's Commission on Budget Concepts*, the cash flows from the assessment and subsequent spending should be recorded in the federal budget.<sup>1</sup> Under the bill, the initial administrative assessment would be effective on January 1 two years after the date of enactment of the legislation and CBO expects that collections would begin in fiscal year 2021.

S. 2823 would make several changes to royalty rates and to protections for certain copyright holders of sound recordings and musical works. Because royalty amounts collected by the U.S. Copyright Office or its designated agents and later distributed to copyright owners are not recorded in the federal budget, CBO estimates that implementing those provisions would have no budgetary effect.

#### *Direct Spending*

S. 2823 would authorize the MLC to spend amounts collected under the administrative assessment levied by the Copyright Royalty Judges, without further appropriation, to cover the MLC's costs. Such expenditures would be considered direct spending. For this estimate, CBO expects that the Copyright Royalty Judges would estimate the operating costs of the MLC accurately and set an assessment rate to equal those costs each year. Using information from industry experts and the administrative costs to operate entities that engage in similar activities, CBO estimates that expenditures by the MLC would average \$30 million annually and would total \$227 million over the 2021–2028 period.

#### *Revenues*

S. 2823 would authorize the Copyright Royalty Judges to levy an assessment on digital music providers with blanket licenses and on certain other digital music providers that instead obtain voluntary licenses to use specific copyrighted musical works. The assessment would be based on the entities' use of musical works and set at a rate intended to fund the operations of the MLC. For this estimate, CBO expects that the assessment would be set to recover all of the allowable costs of the MLC and would be collected in full in each year; therefore, CBO estimates that collections would average about \$30 million annually. Those amounts would be recorded in the budget as revenues. CBO estimates that enacting S. 2823 would increase gross revenues by \$227 million over the 2021–2028 period.

<sup>1</sup>For more information, see Congressional Budget Office, *How CBO Determines Whether to Classify an Activity as Governmental When Estimating Its Budgetary Effects* (June 2017), [www.cbo.gov/publication/52803](http://www.cbo.gov/publication/52803).

Because excise taxes and other indirect business taxes (like the bill's proposed assessment) reduce the base of income and payroll taxes, the amounts collected would lead to reductions in revenues from income and payroll taxes.<sup>2</sup> As a result, the gross assessments under the bill would be partially offset by a loss of receipts of 22 percent to 24 percent of that gross amount each year. Thus, CBO estimates that enacting S. 2823 would increase net revenues by \$175 million over the 2021–2028 period.

#### *Spending Subject to Appropriation*

S. 2823 would require the Copyright Office and Copyright Royalty Judges to make rules that create the MLC, establish a digital licensee coordinator, establish a blanket-licensing system, and set new rates for royalty payments. Under the bill, the Copyright Office also would be required to engage in outreach efforts regarding changes to the copyright royalty system and to complete a report with recommendations to the MLC to identify copyright owners with unclaimed royalties and to reduce the incidence of unclaimed royalties. Using information from the Copyright Office, CBO estimates that those activities would cost the agency \$1 million over the 2019–2023 period.

S. 2823 also would require the Department of Justice (DOJ) to provide briefings upon request to members of the House and Senate Committees on the Judiciary regarding the status of its review of consent decrees between the U.S. government and a performing-rights society. DOJ also would be required to notify and provide certain information to members of Congress before filing a motion to terminate such a consent decree. CBO estimates that any administrative costs associated with such briefings and notifications would be insignificant and would be subject to the availability of appropriated funds.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in outlays and revenues that are subject to those pay-as-you-go procedures are shown in the following table.

CBO ESTIMATE OF PAY-AS-YOU-GO EFFECTS FOR S. 2823, THE MUSIC MODERNIZATION ACT, AS ORDERED REPORTED BY THE SENATE COMMITTEE ON THE JUDICIARY ON JUNE 28, 2018

	By fiscal year, in millions of dollars—												
	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2018–2023	2018–2028
	NET INCREASE IN THE DEFICIT												
Statutory Pay-As-You-Go Effect .....	0	0	0	1	5	6	6	6	7	7	8	13	47
Memorandum:													
Changes in Outlays .....	0	0	0	17	27	28	29	29	30	31	31	72	222
Changes in Revenues .....	0	0	0	16	22	22	22	23	23	23	24	59	175

Increase in long-term direct spending and deficits: CBO estimates that enacting S. 2823 would not increase net direct spending by more than \$2.5 billion or on-budget deficits by more than \$5 billion in any of the four consecutive 10-year periods beginning in 2029.

<sup>2</sup>See Congressional Budget Office, *The Role of the 25 Percent Revenue Offset in Estimating the Budgetary Effects of Legislation* (January 2009), [www.cbo.gov/publication/20110](http://www.cbo.gov/publication/20110).

Mandates: S. 2823 would impose intergovernmental and private-sector mandates as defined in UMRA. CBO estimates that, in the aggregate, the cost of mandates imposed on public entities would not exceed the annual threshold established in that act (\$80 million in 2018, adjusted annually for inflation). CBO cannot determine whether the aggregate cost of mandates on private entities would exceed the annual threshold established in UMRA for private-sector mandates (\$160 million in 2018, adjusted annually for inflation).

*Mandates That Apply to State Governments Only*

S. 2823 would impose intergovernmental mandates as defined in UMRA by preempting state laws. In establishing a new system for collecting and distributing royalties through the MLC, S. 2823 would preempt state laws that allow states to collect royalties that remain unclaimed for a certain period. Using information from music industry sources about current unclaimed royalties and the efforts states make to claim them, CBO estimates that the amount of revenue that states might forgo as a result of the preemption would be small.

S. 2823 also would establish federal copyright protections for musical works recorded before 1972 and would preempt state property laws that govern infringement claims regarding those works. Although the preemption would limit the application of state laws, it would impose no duty on states that would result in additional spending or a loss of revenues.

In addition, S. 2823 would give producers, mixers, and sound engineers a statutory right to seek payment of their royalties through a nonprofit collective designated by the Copyright Royalty Judges. The nonprofit collective would adopt and implement a policy to provide for royalty distributions that would supersede and preempt any state law, including common law, concerning abandoned property. CBO estimates that the preemption would not affect the budgets or revenues of state governments.

*Mandates That Apply to Private Entities*

S. 2823 would impose private-sector mandates on companies that provide digital music services. Under current law, digital music providers negotiate directly with copyright owners for the right to use musical works or, when the copyright owner cannot be identified, pay fees to the Copyright Office for the right to use the music. S. 2823 would direct those companies to pay fees instead to the MLC to administer a new blanket-licensing system. Using information from the Copyright Office and music industry sources, CBO estimates that the fees companies would pay to the MLC would range from \$22 million to \$28 million annually, beginning in 2021. (Those amounts include a small savings that would result from companies' no longer paying fees to the Copyright Office for the covered services.)

As a condition of receiving a blanket license, companies that provide digital music services would be required to submit reports to the MLC detailing the artists and works streamed each month. Because such companies already maintain and provide similar information under current law, CBO estimates that the costs of compliance would not be significant.

Finally, the bill would establish new processes for settling legal disputes over the infringement of copyrights for musical works by ending outstanding—or prohibiting future—lawsuits by copyright owners in certain cases. In the case of lawsuits alleging copyright infringement filed after January 1, 2018, the bill would terminate those lawsuits. In lieu of settlement under the terminated lawsuits, copyright owners would be entitled to royalties under the rates set by the MLC for music streamed during the three years preceding the suit (the period of the federal statute of limitations on claims of copyright infringement); in exchange, digital music companies would receive liability protection as long as they made good-faith efforts to aid the MLC in matching works with their copyright owners and to make timely payments of royalties.

Similarly, in the case of lawsuits involving musical works recorded before 1972 and brought under state law, the bill would nullify those claims and substitute a federal process under which copyright holders would be entitled to three years' worth of back royalties; in exchange, music companies would receive protection from further claims.

In substituting those new processes for rights of legal action under current federal or state law, S. 2823 would impose mandates on copyright holders by terminating their existing rights to make infringement claims. The costs of the mandates would be the forgone value of awards and settlements for those claims to the extent that the legislation resulted in lower compensation than under current law. CBO is uncertain how the value of royalties claimed by copyright owners in lawsuits would be affected under the bill or how much those amounts might differ relative to current law.

Previous CBO estimate: On April 25, 2018, CBO transmitted a cost estimate for H.R. 5447, the Music Modernization Act, as ordered reported by the House Committee on the Judiciary on April 11, 2018. The estimated increases in direct spending and revenues are the same for both pieces of legislation. S. 2823 includes provisions that would direct the Copyright Office to engage in additional outreach efforts and to complete a report. S. 2823 also includes provisions requiring DOJ to provide briefings and additional information to members of Congress. CBO's cost estimates for the two pieces of legislation reflect those differences.

This estimate supersedes the cost estimate for S. 2823 that CBO transmitted on August 13, 2018. The earlier cost estimate did not have the correct short title for S. 2823. This cost estimate corrects that error.

Estimate prepared by: Federal costs: Stephen Rabent and Jacob Fabian; Mandates: Rachel Austin.

Estimate reviewed by: Kim P. Cawley, Chief, Natural and Physical Resources Cost Estimates Unit; Susan Willie, Chief, Mandates Unit; H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

## V. REGULATORY IMPACT EVALUATION

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 2823.

VI. CONCLUSION

The Music Modernization Act, S. 2823, will update music copyright laws and improve the ability of artists and professionals to receive compensation for their music creativity.

VII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 2823, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

**UNITED STATES CODE**  
**TITLE 17—COPYRIGHTS**

<b>Chap.</b>	<b>Sec.</b>
1. Subject Matter and Scope of Copyright .....	101
* * * * *	
14. <i>Unauthorized digital performance of pre-1972 sound recordings</i> .....	1401

**CHAPTER 1—SUBJECT MATTER AND SCOPE OF  
 COPYRIGHT**

\* \* \* \* \*

**§ 114. Scope of exclusive rights in sound recordings**

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

(b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(f)): Provided, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

(c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4).

(d) LIMITATIONS ON EXCLUSIVE RIGHT.—Notwithstanding the provisions of section 106(6)—

(1) EXEMPT TRANSMISSIONS AND RETRANSMISSIONS.—The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of—

(A) a nonsubscription broadcast transmission;

(B) a retransmission of a nonsubscription broadcast transmission: Provided, That, in the case of a retransmission of a radio station's broadcast transmission—

(i) the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter, however—

(I) the 150 mile limitation under this clause shall not apply when a nonsubscription broadcast transmission by a radio station licensed by the Federal Communications Commission is retransmitted on a nonsubscription basis by a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the Federal Communications Commission; and

(II) in the case of a subscription retransmission of a nonsubscription broadcast retransmission covered by subclause (I), the 150 mile radius shall be measured from the transmitter site of such broadcast retransmitter;

(ii) the retransmission is of radio station broadcast transmissions that are—

(I) obtained by the retransmitter over the air;

(II) not electronically processed by the retransmitter to deliver separate and discrete signals; and

(III) retransmitted only within the local communities served by the retransmitter;

(iii) the radio station's broadcast transmission was being retransmitted to cable systems (as defined in section 111(f)) by a satellite carrier on January 1, 1995, and that retransmission was being retransmitted by cable systems as a separate and discrete signal, and the satellite carrier obtains the radio station's broadcast transmission in an analog format: Provided, That the broadcast transmission being retransmitted may embody the programming of no more than one radio station; or

(iv) the radio station's broadcast transmission is made by a noncommercial educational broadcast station funded on or after January 1, 1995, under section 396(k) of the Communications Act of 1934 (47 U.S.C. 396(k)), consists solely of noncommercial educational and cultural radio programs, and the retransmission,

whether or not simultaneous, is a nonsubscription terrestrial broadcast retransmission; or

(C) a transmission that comes within any of the following categories—

(i) a prior or simultaneous transmission incidental to an exempt transmission, such as a feed received by and then retransmitted by an exempt transmitter: Provided, That such incidental transmissions do not include any subscription transmission directly for reception by members of the public;

(ii) a transmission within a business establishment, confined to its premises or the immediately surrounding vicinity;

(iii) a retransmission by any retransmitter, including a multichannel video programming distributor as defined in section 602(12) of the Communications Act of 1934 (47 U.S.C. 522(12)), of a transmission by a transmitter licensed to publicly perform the sound recording as a part of that transmission, if the retransmission is simultaneous with the licensed transmission and authorized by the transmitter; or

(iv) a transmission to a business establishment for use in the ordinary course of its business: Provided, That the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the sound recording performance complement. Nothing in this clause shall limit the scope of the exemption in clause (ii).

(2) STATUTORY LICENSING OF CERTAIN TRANSMISSIONS.—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—

(A)(i) the transmission is not part of an interactive service;

(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

(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 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;

(B) in the case of a subscription transmission not exempt under paragraph (1) that is made by a preexisting subscription service in the same transmission medium used by

such service on July 31, 1998, or in the case of a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service—

(i) the transmission does not exceed the sound recording performance complement; and

(ii) the transmitting entity does not cause to be published by means of an advance program schedule or prior announcement the titles of the specific sound recordings or phonorecords embodying such sound recordings to be transmitted; and

(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—

(i) the transmission does not exceed the sound recording performance complement, except that this requirement shall not apply in the case of a retransmission of a broadcast transmission if the retransmission is made by a transmitting entity that does not have the right or ability to control the programming of the broadcast station making the broadcast transmission, unless—

(I) the broadcast station makes broadcast transmissions—

(aa) in digital format that regularly exceed the sound recording performance complement; or

(bb) in analog format, a substantial portion of which, on a weekly basis, exceed the sound recording performance complement; and

(II) the sound recording copyright owner or its representative has notified the transmitting entity in writing that broadcast transmissions of the copyright owner's sound recordings exceed the sound recording performance complement as provided in this clause;

(ii) the transmitting entity does not cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement, the titles of the specific sound recordings to be transmitted, the phonorecords embodying such sound recordings, or, other than for illustrative purposes, the names of the featured recording artists, except that this clause does not disqualify a transmitting entity that makes a prior announcement that a particular artist will be featured within an unspecified future time period, and in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, the requirement of this clause shall not apply to a prior oral announcement by the broadcast station, or to an advance program schedule published, induced, or facili-

tated by the broadcast station, if the transmitting entity does not have actual knowledge and has not received written notice from the copyright owner or its representative that the broadcast station publishes or induces or facilitates the publication of such advance program schedule, or if such advance program schedule is a schedule of classical music programming published by the broadcast station in the same manner as published by that broadcast station on or before September 30, 1998;

(iii) the transmission—

(I) is not part of an archived program of less than 5 hours duration;

(II) is not part of an archived program of 5 hours or greater in duration that is made available for a period exceeding 2 weeks;

(III) is not part of a continuous program which is of less than 3 hours duration; or

(IV) is not part of an identifiable program in which performances of sound recordings are rendered in a predetermined order, other than an archived or continuous program, that is transmitted at—

(aa) more than 3 times in any 2-week period that have been publicly announced in advance, in the case of a program of less than 1 hour in duration, or

(bb) more than 4 times in any 2-week period that have been publicly announced in advance, in the case of a program of 1 hour or more in duration,

except that the requirement of this subclause shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

(iv) the transmitting entity does not knowingly perform the sound recording, as part of a service that offers transmissions of visual images contemporaneously with transmissions of sound recordings, in a manner that is likely to cause confusion, to cause mistake, or to deceive, as to the affiliation, connection, or association of the copyright owner or featured recording artist with the transmitting entity or a particular product or service advertised by the transmitting entity, or as to the origin, sponsorship, or approval by the copyright owner or featured recording artist of the activities of the transmitting entity other than the performance of the sound recording itself;

(v) the transmitting entity cooperates to prevent, to the extent feasible without imposing substantial costs or burdens, a transmission recipient or any other person or entity from automatically scanning the transmitting entity's transmissions alone or together with transmissions by other transmitting entities in order to select a particular sound recording to be transmitted to the transmission recipient, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed by the Federal Communications Commission, on or before July 31, 1998;

(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;

(vii) phonorecords of the sound recording have been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording, and the transmitting entity makes the transmission from a phonorecord lawfully made under the authority of the copyright owner, except that the requirement of this clause shall not apply to a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

(viii) the transmitting entity accommodates and does not interfere with the transmission of technical measures that are widely used by sound recording copyright owners to identify or protect copyrighted works, and that are technically feasible of being transmitted by the transmitting entity without imposing substantial costs on the transmitting entity or resulting in perceptible aural or visual degradation of the digital signal, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed under the authority of the Federal Communications Commission, on or before July 31, 1998, to the extent that such service has designed, developed, or made commitments to procure equipment or technology that is not compatible with such technical measures before such technical measures are widely adopted by sound recording copyright owners; and

(ix) the transmitting entity identifies in textual data the sound recording during, but not before, the time it is performed, including the title of the sound recording, the title of the phonorecord embodying such sound recording, if any, and the featured recording artist, in a manner to permit it to be displayed to the transmission recipient by the device or technology intended for receiving the service provided by the transmitting entity, except that the obligation in this clause shall not take effect until 1 year after the date of the enactment of the Digital Millennium Copyright Act and shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, or in the case in which devices or technology intended for receiving the service provided by the transmitting entity that have the capability to display such textual data are not common in the marketplace.

(3) LICENSES FOR TRANSMISSIONS BY INTERACTIVE SERVICES.—

(A) No interactive service shall be granted an exclusive license under section 106(6) for the performance of a sound recording publicly by means of digital audio transmission for a period in excess of 12 months, except that with respect to an exclusive license granted to an interactive service by a licensor that holds the copyright to 1,000 or fewer sound recordings, the period of such license shall not exceed 24 months: Provided, however, That the grantee of such exclusive license shall be ineligible to receive another exclusive license for the performance of that sound recording for a period of 13 months from the expiration of the prior exclusive license.

(B) The limitation set forth in subparagraph (A) of this paragraph shall not apply if—

(i) the licensor has granted and there remain in effect licenses under section 106(6) for the public performance of sound recordings by means of digital audio transmission by at least 5 different interactive services: Provided, however, That each such license must be for a minimum of 10 percent of the copyrighted sound recordings owned by the licensor that have been licensed to interactive services, but in no event less than 50 sound recordings; or

(ii) the exclusive license is granted to perform publicly up to 45 seconds of a sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

(C) Notwithstanding the grant of an exclusive or non-exclusive license of the right of public performance under section 106(6), an interactive service may not publicly perform a sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording: Provided, That such license to publicly perform the copyrighted musical

work may be granted either by a performing rights society representing the copyright owner or by the copyright owner.

(D) The performance of a sound recording by means of a retransmission of a digital audio transmission is not an infringement of section 106(6) if—

(i) the retransmission is of a transmission by an interactive service licensed to publicly perform the sound recording to a particular member of the public as part of that transmission; and

(ii) the retransmission is simultaneous with the licensed transmission, authorized by the transmitter, and limited to that particular member of the public intended by the interactive service to be the recipient of the transmission.

(E) For the purposes of this paragraph—

(i) a “licensor” shall include the licensing entity and any other entity under any material degree of common ownership, management, or control that owns copyrights in sound recordings; and

(ii) a “performing rights society” is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owner, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

(4) RIGHTS NOT OTHERWISE LIMITED.—

(A) Except as expressly provided in this section, this section does not limit or impair the exclusive right to perform a sound recording publicly by means of a digital audio transmission under section 106(6).

(B) Nothing in this section annuls or limits in any way—

(i) the exclusive right to publicly perform a musical work, including by means of a digital audio transmission, under section 106(4);

(ii) the exclusive rights in a sound recording or the musical work embodied therein under sections 106(1), 106(2) and 106(3); or

(iii) any other rights under any other clause 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.

(C) Any limitations in this section on the exclusive right under section 106(6) apply only to the exclusive right under section 106(6) and not to any other exclusive rights under section 106. Nothing in this section shall be construed to annul, limit, impair or otherwise affect in any way the ability of the owner of a copyright in a sound recording to exercise the rights under sections 106(1), 106(2) and 106(3), or to obtain the remedies available under this title pursuant to such rights, as such rights and remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

## (e) AUTHORITY FOR NEGOTIATIONS.—

(1) Notwithstanding any provision of the antitrust laws, in negotiating statutory licenses in accordance with subsection (f), any copyright owners of sound recordings and any entities performing sound recordings affected by this section may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings 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 payments.

(2) For licenses granted under section 106(6), other than statutory licenses, such as for performances by interactive services or performances that exceed the sound recording performance complement—

(A) copyright owners of sound recordings affected by this section may designate common agents to act on their behalf to grant licenses and receive and remit royalty payments: Provided, That each copyright owner shall establish the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other copyright owners of sound recordings; and

(B) entities performing sound recordings affected by this section may designate common agents to act on their behalf to obtain licenses and collect and pay royalty fees: Provided, That each entity performing sound recordings shall determine the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other entities performing sound recordings.

## (f) LICENSES FOR CERTAIN NONEXEMPT TRANSMISSIONS.—

[(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 in the case of a different 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. 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 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.

[(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).

[(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.

[(2)(A) Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for public performances of sound recordings by means of eligible nonsubscription transmission services and 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 in the case of a different 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. 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.

[(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 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 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 their decision on economic, competitive and programming information presented by the parties, including—

【(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

【(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.

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 described in subparagraph (A).

【(C) 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 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 eligible nonsubscription services and 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.】

*(1)(A) Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for transmissions subject to statutory licensing under 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 pursuant to subparagraph (A) or (B) of section 804(b)(3), as the case may be, or such other period as the parties may agree. The parties to each proceeding shall bear their own costs.*

*(B) The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (2), 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), or such other period as the parties may agree. Such rates 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 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 by consumers. 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—*

*(i) shall base their decision on economic, competitive, and programming information presented by the parties, including—*

*(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 the copyright owner's sound recordings; and*

*(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*

*(ii) may consider the rates and terms for comparable types of audio transmission services and comparable circumstances under voluntary license agreements.*

*(C) The procedures under subparagraphs (A) and (B) shall also be initiated pursuant to a petition filed by any sound recording copyright owner 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 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 eligible non-subscription services and new subscription services, or pre-existing subscription services and preexisting satellite digital audio radio 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.*

**[(3)]** (2) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more entities performing sound recordings shall be given effect in lieu of any decision by the Librarian of Congress or determination by the Copyright Royalty Judges.

**[(4)]** (3)(A) The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings. The notice and recordkeeping rules in effect on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2004 shall remain in effect unless and until new regulations are promulgated by the Copyright Royalty Judges. If new regulations are promulgated under this subparagraph, the Copyright Royalty Judges shall take into account the sub-

stance and effect of the rules in effect on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2004 and shall, to the extent practicable, avoid significant disruption of the functions of any designated agent authorized to collect and distribute royalty fees.

(B) Any person who wishes to perform a sound recording publicly by means of a transmission eligible for statutory licensing under this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording—

(i) by complying with such notice requirements as the Copyright Royalty Judges shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

(ii) if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection.

(C) Any royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set.

**[(5)]** (4)(A) Notwithstanding section 112(e) and the other provisions of this subsection, the receiving agent may enter into agreements for the reproduction and performance of sound recordings under section 112(e) and this section by any 1 or more commercial webcasters or noncommercial webcasters for a period of not more than 11 years beginning on January 1, 2005, that, once published in the Federal Register pursuant to subparagraph (B), shall be binding on all copyright owners of sound recordings and other persons entitled to payment under this section, in lieu of any determination by the Copyright Royalty Judges. Any such agreement for commercial webcasters may include provisions for payment of royalties on the basis of a percentage of revenue or expenses, or both, and include a minimum fee. Any such agreement may include other terms and conditions, including requirements by which copyright owners may receive notice of the use of their sound recordings and under which records of such use shall be kept and made available by commercial webcasters or noncommercial webcasters. The receiving agent shall be under no obligation to negotiate any such agreement. The receiving agent shall have no obligation to any copyright owner of sound recordings or any other person entitled to payment under this section in negotiating any such agreement, and no liability to any copyright owner of sound recordings or any other person entitled to payment under this section for having entered into such agreement.

(B) The Copyright Office shall cause to be published in the Federal Register any agreement entered into pursuant to subparagraph (A). Such publication shall include a statement containing the substance of subparagraph (C). Such agreements shall not be included in the Code of Federal Regulations. Thereafter, the terms of such agreement shall be available, as an option, to any commercial webcaster or noncommercial webcaster meeting the eligibility conditions of such agreement.

(C) Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), includ-

ing any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges ~~under paragraph (4)~~ *under paragraph (3)* or section 112(e)(4). It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b). This subparagraph shall not apply to the extent that the receiving agent and a webcaster that is party to an agreement entered into pursuant to subparagraph (A) expressly authorize the submission of the agreement in a proceeding under this subsection.

(D) Nothing in the Webcaster Settlement Act of 2008, the Webcaster Settlement Act of 2009, or any agreement entered into pursuant to subparagraph (A) shall be taken into account by the United States Court of Appeals for the District of Columbia Circuit in its review of the determination by the Copyright Royalty Judges of May 1, 2007, of rates and terms for the digital performance of sound recordings and ephemeral recordings, pursuant to sections 112 and 114.

(E) As used in this paragraph—

(i) the term “noncommercial webcaster” means a webcaster that—

(I) is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501);

(II) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or

(III) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes;

(ii) 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; and

(iii) the term “webcaster” means a person or entity that has obtained a compulsory license under section 112 or 114 and the implementing regulations therefor.

(F) The authority to make settlements pursuant to subparagraph (A) shall expire at 11:59 p.m. Eastern time on the 30th

day after the date of the enactment of the Webcaster Settlement Act of 2009.

(g) PROCEEDS FROM LICENSING OF TRANSMISSIONS.—

(1) Except in the case of a transmission licensed under a statutory license in accordance with subsection (f) of this section—

(A) a featured recording artist who performs on a sound recording that has been licensed for a transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the artist's contract; and

(B) a nonfeatured recording artist who performs on a sound recording that has been licensed for a transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the nonfeatured recording artist's applicable contract or other applicable agreement.

(2) **[An agent designated]** *Except as provided for in paragraph (6), a nonprofit collective designated by the Copyright Royalty Judges* to distribute receipts from the licensing of transmissions in accordance with subsection (f) shall distribute such receipts as follows:

(A) 50 percent of the receipts shall be paid to the copyright owner of the exclusive right under section 106(6) of this title to publicly perform a sound recording by means of a digital audio transmission.

(B) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians) who have performed on sound recordings.

(C) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists) who have performed on sound recordings.

(D) 45 percent of the receipts shall be paid, on a per sound recording basis, to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings).

(3) A **[nonprofit agent designated]** *nonprofit collective designated by the Copyright Royalty Judges* to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts to any person or entity entitled thereto other than copyright owners and performers who have elected to receive royalties from **[another designated agent]** *another designated nonprofit collective* and have notified such nonprofit **[agent]** *collective* in writing of such election, the rea-

sonable costs of such [agent] *collective* incurred after November 1, 1995, in—

(A) the administration of the collection, distribution, and calculation of the royalties;

(B) the settlement of disputes relating to the collection and calculation of the royalties; and

(C) the licensing and enforcement of rights with respect to the making of ephemeral recordings and performances subject to licensing under section 112 and this section, including those incurred in participating in negotiations or arbitration proceedings under section 112 and this section, except that all costs incurred relating to the section 112 ephemeral recordings right may only be deducted from the royalties received pursuant to section 112.

(4) Notwithstanding paragraph (3), any [designated agent] *nonprofit collective* designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts, the reasonable costs identified in paragraph (3) of such [agent] *collective* incurred after November 1, 1995, with respect to such copyright owners and performers who have entered with such [agent] *collective* a contractual relationship that specifies that such costs may be deducted from such royalty receipts.

(5) *LETTER OF DIRECTION.*—

(A) *IN GENERAL.*—*A nonprofit collective designated by the Copyright Royalty Judges to distribute receipts from the licensing of transmissions in accordance with subsection (f) shall adopt and reasonably implement a policy that provides, in circumstances determined by the collective to be appropriate, for acceptance of instructions from an artist payee identified under subparagraph (A) or (D) of paragraph (2) to distribute, to a producer, mixer, or sound engineer who was part of the creative process that created a sound recording, a portion of the payments to which the artist payee would otherwise be entitled from the licensing of transmissions of the sound recording. In this section, such instructions shall be referred to as a “letter of direction”.*

(B) *ACCEPTANCE OF LETTER.*—*To the extent that a collective described in subparagraph (A) accepts a letter of direction under that subparagraph, the person entitled to payment pursuant to the letter of direction shall, during the period in which the letter of direction is in effect and carried out by the collective, be treated for all purposes as the owner of the right to receive such payment, and the artist payee providing the letter of direction to the collective shall be treated as having no interest in such payment.*

(C) *AUTHORITY OF COLLECTIVE.*—*This paragraph shall not be construed in such a manner so that the collective is not authorized to accept or act upon payment instructions in circumstances other than those to which this paragraph applies.*

(6) *SOUND RECORDINGS FIXED BEFORE NOVEMBER 1, 1995.*—

(A) *PAYMENT ABSENT LETTER OF DIRECTION.*—A nonprofit collective designated by the Copyright Royalty Judges to distribute receipts from the licensing of transmissions in accordance with subsection (f) (in this paragraph referred to as the “collective”) shall adopt and reasonably implement a policy that provides, in circumstances determined by the collective to be appropriate, for the deduction of 2 percent of all the receipts that are collected from the licensing of transmissions of a sound recording fixed before November 1, 1995, but which is withdrawn from the amount otherwise payable under paragraph (2)(D) to the recording artist or artists featured on the sound recording (or the persons conveying rights in the artists’ performance in the sound recording), and the distribution of such amount to one or more persons described in subparagraph (B) of this paragraph, after deduction of costs described in paragraph (3) or (4), as applicable, if each of the following requirements is met:

(i) *CERTIFICATION OF ATTEMPT TO OBTAIN A LETTER OF DIRECTION.*—The person described in subparagraph (B) who is to receive the distribution has certified to the collective, under penalty of perjury, that—

(I) for a period not less than 120 days, that person made reasonable efforts to contact the artist payee for such sound recording to request and obtain a letter of direction instructing the collective to pay to that person a portion of the royalties payable to the featured recording artist or artists; and

(II) during the period beginning on the date that person began the reasonable efforts described in subclause (I) and ending on the date of that person’s certification to the collective, the artist payee did not affirm or deny in writing the request for a letter of direction.

(ii) *COLLECTIVE ATTEMPT TO CONTACT ARTIST.*—After receipt of the certification described in clause (i) and for a period not less than 120 days before the first distribution by the collective to the person described in subparagraph (B), the collective attempts, in a reasonable manner as determined by the collective, to notify the artist payee of the certification made by the person described in subparagraph (B).

(iii) *NO OBJECTION RECEIVED.*—The artist payee does not, as of the date that was 10 business days before the date on which the first distribution is made, submit to the collective in writing an objection to the distribution.

(B) *ELIGIBILITY FOR PAYMENT.*—A person shall be eligible for payment under subparagraph (A) if the person—

(i) is a producer, mixer, or sound engineer of the sound recording;

(ii) has entered into a written contract with a record company involved in the creation or lawful exploitation of the sound recording, or with the recording artist or artists featured on the sound recording (or the persons conveying rights in the artists’ performance in the

sound recording), under which the person seeking payment is entitled to participate in royalty payments that are based on the exploitation of the sound recording and are payable from royalties otherwise payable to the recording artist or artists featured on the sound recording (or the persons conveying rights in the artists' performance in the sound recording);

(iii) made a creative contribution to the creation of the sound recording; and (iv) submits to the collective—

(I) a written certification stating, under penalty of perjury, that the person meets the requirements in clauses (i) through (iii); and

(II) a true copy of the contract described in clause (ii).

(C) **MULTIPLE CERTIFICATIONS.**—Subject to subparagraph (D), in a case in which more than one person described in subparagraph (B) has met the requirements for a distribution under subparagraph (A) with respect to a sound recording as of the date that is 10 business days before the date on which the distribution is made, the collective shall divide the 2 percent distribution equally among all such persons.

(D) **OBJECTION TO PAYMENT.**—Not later than 10 business days after the date on which the collective receives from the artist payee a written objection to a distribution made pursuant to subparagraph (A), the collective shall cease making any further payment relating to such distribution. In any case in which the collective has made one or more distributions pursuant to subparagraph (A) to a person described in subparagraph (B) before the date that is 10 business days after the date on which the collective receives from the artist payee an objection to such distribution, the objection shall not affect that person's entitlement to any distribution made before the collective ceases such distribution under this subparagraph.

(E) **OWNERSHIP OF THE RIGHT TO RECEIVE PAYMENTS.**—To the extent that the collective determines that a distribution will be made under subparagraph (A) to a person described in subparagraph (B), such person shall, during the period covered by such distribution, be treated for all purposes as the owner of the right to receive such payments, and the artist payee to whom such payments would otherwise be payable shall be treated as having no interest in such payments.

(F) **ARTIST PAYEE DEFINED.**—In this paragraph, the term "artist payee" means a person, other than a person described in subparagraph (B), who owns the right to receive all or part of the receipts payable under paragraph (2)(D) with respect to a sound recording. In a case in which there are multiple artist payees with respect to a sound recording, an objection by one such payee shall apply only to that payee's share of the receipts payable under paragraph (2)(D), and shall not preclude payment under subpara-

*graph (A) from the share of an artist payee that does not so object.*

(7) **PREEMPTION OF STATE PROPERTY LAWS.**—*The holding and distribution of receipts under section 112 and this section by a nonprofit collective designated by the Copyright Royalty Judges in accordance with this subsection and regulations adopted by the Copyright Royalty Judges shall supersede and preempt any State law (including common law) concerning escheatment or abandoned property, or any analogous provision, that might otherwise apply.*

(h) **LICENSING TO AFFILIATES.**—

(1) If the copyright owner of a sound recording licenses an affiliated entity the right to publicly perform a sound recording by means of a digital audio transmission under section 106(6), the copyright owner shall make the licensed sound recording available under section 106(6) on no less favorable terms and conditions to all bona fide entities that offer similar services, except that, if there are material differences in the scope of the requested license with respect to the type of service, the particular sound recordings licensed, the frequency of use, the number of subscribers served, or the duration, then the copyright owner may establish different terms and conditions for such other services.

(2) The limitation set forth in paragraph (1) of this subsection shall not apply in the case where the copyright owner of a sound recording licenses—

(A) an interactive service; or

(B) an entity to perform publicly up to 45 seconds of the sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

[(i) **NO EFFECT ON ROYALTIES FOR UNDERLYING WORKS.**—License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).]

(j) **DEFINITIONS.**—As used in this section, the following terms have the following meanings:

(1) An “affiliated entity” is an entity engaging in digital audio transmissions covered by section 106(6), other than an interactive service, in which the licensor has any direct or indirect partnership or any ownership interest amounting to 5 percent or more of the outstanding voting or non-voting stock.

(2) An “archived program” is a predetermined program that is available repeatedly on the demand of the transmission recipient and that is performed in the same order from the beginning, except that an archived program shall not include a recorded event or broadcast transmission that makes no more than an incidental use of sound recordings, as long as such recorded event or broadcast transmission does not contain an entire sound recording or feature a particular sound recording.

(3) A “broadcast” transmission is a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.

(4) A “continuous program” is a predetermined program that is continuously performed in the same order and that is accessed at a point in the program that is beyond the control of the transmission recipient.

(5) A “digital audio transmission” is a digital transmission as defined in section 101, that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.

(6) An “eligible nonsubscription transmission” is a noninteractive nonsubscription digital audio transmission not exempt under subsection (d)(1) that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

(7) An “interactive service” is 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. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.

(8) A “new subscription service” is a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service.

(9) A “nonsubscription” transmission is any transmission that is not a subscription transmission.

(10) A “preexisting satellite digital audio radio service” is a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(11) A “preexisting subscription service” is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(12) A “retransmission” is a further transmission of an initial transmission, and includes any further retransmission of the same transmission. Except as provided in this section, a transmission qualifies as a “retransmission” only if it is simultaneous with the initial transmission. Nothing in this definition shall be construed to exempt a transmission that fails to satisfy a separate element required to qualify for an exemption under section 114(d)(1).

(13) The “sound recording performance complement” is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than—

(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or

(B) 4 different selections of sound recordings—

(i) by the same featured recording artist; or

(ii) from any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States,

if no more than three such selections are transmitted consecutively:

Provided, That the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

(14) A “subscription” transmission is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission.

(15) A “transmission” is either an initial transmission or a retransmission.

**§ 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 *IN GENERAL.*—

[(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 license for use of such work in a sound recording.】

(1) *ELIGIBILITY FOR COMPULSORY LICENSE.*—

(A) *CONDITIONS FOR COMPULSORY LICENSE.*—A person may by complying with the provisions of this section obtain a compulsory license to make and distribute phonorecords of a nondramatic musical work, including by means of digital phonorecord delivery. A person may obtain a compulsory license only if the primary purpose in making phonorecords of the musical work is to distribute them to the public for private use, including by means of digital phonorecord delivery, and—

(i) phonorecords of such musical work have previously been distributed to the public in the United States under the authority of the copyright owner of the work, including by means of digital phonorecord delivery; or

(ii) in the case of a digital music provider seeking to make and distribute digital phonorecord deliveries of a sound recording embodying a musical work under a compulsory license for which clause (i) does not apply—

(I) the first fixation of such sound recording was made under the authority of the musical work copyright owner, and the sound recording copyright owner has the authority of the musical work copyright owner to make and distribute digital phonorecord deliveries embodying such work to the public in the United States; and

(II) the sound recording copyright owner, or the authorized distributor of the sound recording copyright owner, has authorized the digital music provider to make and distribute digital phonorecord deliveries of the sound recording to the public in the United States.

(B) *DUPLICATION OF SOUND RECORDING.*—A person may not obtain a compulsory license for the use of the work in the making of phonorecords duplicating a sound recording fixed by another, including by means of digital phonorecord delivery, unless—

(i) *such sound recording was fixed lawfully; and*  
 (ii) *the making of the phonorecords was authorized by the owner of the 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 license for use of such work in a sound recording.*

(2) **[A compulsory license]** *MUSICAL ARRANGEMENT.*—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 embodied 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 subparagraph (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 subparagraph (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 subparagraph (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 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 musical 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.】

(b) PROCEDURES TO OBTAIN A COMPULSORY LICENSE.—

(1) PHONORECORDS OTHER THAN DIGITAL PHONORECORD DELIVERIES.—A person who seeks to obtain a compulsory license under subsection (a) to make and distribute phonorecords of a musical work other than by means of digital phonorecord delivery shall, before or not later than 30 calendar days after making, and before distributing, any phonorecord 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 with 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) DIGITAL PHONORECORD DELIVERIES.—A person who seeks to obtain a compulsory license under subsection (a) to make and distribute phonorecords of a musical work by means of digital phonorecord delivery—

(A) prior to the license availability date, shall, before or not later than 30 calendar days after first making any such digital phonorecord delivery, serve a notice of intention to do so on the copyright owner (but may not file the notice with the Copyright Office, even if the public records of the Office do not identify the owner or the owner's address), and such notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation; or

(B) on or after the license availability date, shall, before making any such digital phonorecord delivery, follow the procedure described in subsection (d)(2), except as provided in paragraph (3).

(3) RECORD COMPANY INDIVIDUAL DOWNLOAD LICENSES.—Notwithstanding paragraph (2)(B), a record company may, on or after the license availability date, obtain an individual download license in accordance with the notice requirements described in paragraph (2)(A) (except for the requirement that notice occur prior to the license availability date). A record company that obtains an individual download license as permitted under this paragraph shall provide statements of account and pay royalties as provided in subsection (c)(2)(I).

(4) FAILURE TO OBTAIN LICENSE.—

(A) PHONORECORDS OTHER THAN DIGITAL PHONORECORD DELIVERIES.—In the case of phonorecords made and distributed other than by means of digital phonorecord delivery, the failure to serve or file the notice of intention required by paragraph (1) forecloses the possibility of a compulsory license under paragraph (1). In the absence of a voluntary license, the failure to obtain a compulsory license renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and subject to the remedies provided by sections 502 through 506.

(B) DIGITAL PHONORECORD DELIVERIES.—

(i) *IN GENERAL.*—*In the case of phonorecords made and distributed by means of digital phonorecord delivery:*

(I) *The failure to serve the notice of intention required by paragraph (2)(A) or paragraph (3), as applicable, forecloses the possibility of a compulsory license under such paragraph.*

(II) *The failure to comply with paragraph (2)(B) forecloses the possibility of a blanket license for a period of 3 years after the last calendar day on which the notice of license was required to be submitted to the mechanical licensing collective under such paragraph.*

(ii) *EFFECT OF FAILURE.*—*In either case described in subclause (I) or (II) of clause (i), in the absence of a voluntary license, the failure to obtain a compulsory license renders the making and distribution of phonorecords by means of digital phonorecord delivery actionable as acts of infringement under section 501 and subject to the remedies provided by sections 502 through 506.*

(c) *GENERAL CONDITIONS APPLICABLE TO COMPULSORY LICENSE.*—

(1) *ROYALTY PAYABLE UNDER COMPULSORY LICENSE.*—

(A) *IDENTIFICATION REQUIREMENT.*—*To be entitled to receive royalties under a compulsory license obtained under subsection (b)(1) 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.*

(B) *ROYALTY FOR PHONORECORDS OTHER THAN DIGITAL PHONORECORD DELIVERIES.*—*Except as provided by subparagraph (A), for every phonorecord made and distributed under a compulsory license under subsection (a) other than by means of digital phonorecord delivery, with respect to each work embodied in the phonorecord, the royalty shall be the royalty prescribed under subparagraphs (D) through (F) and paragraph (2)(A) and chapter 8. For purposes of this subparagraph, a phonorecord is considered “distributed” if the person exercising the compulsory license has voluntarily and permanently parted with its possession.*

(C) *ROYALTY FOR DIGITAL PHONORECORD DELIVERIES.*—*For every digital phonorecord delivery of a musical work made under a compulsory license under this section, the royalty payable shall be the royalty prescribed under subparagraphs (D) through (F) paragraph (2)(A) and chapter 8.*

(D) *AUTHORITY TO NEGOTIATE.*—*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) 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, subparagraphs (E) and (F), paragraph (2)(A) and chapter 8 shall next be determined.*

*(E) DETERMINATION OF REASONABLE RATES AND TERMS.—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. Any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a) may submit to the Copyright Royalty Judges licenses covering such activities. The parties to each proceeding shall bear their own costs.*

*(F) SCHEDULE OF REASONABLE RATES.—The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (2)(A), be binding on all copyright owners of nondramatic musical works and persons entitled to obtain a compulsory license under subsection (a) during the period specified in subparagraph (E), such other period as may be determined pursuant to subparagraphs (D) and (E), or such other period as the parties may agree. 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 for digital phonorecord deliveries, the Copyright Royalty Judges shall base their decision on economic, competitive, and programming information presented by the parties, including—*

*(i) whether use of the compulsory licensee's service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the musical work copyright owner's other streams of revenue from its musical works; and*

*(ii) the relative roles of the copyright owner and the compulsory licensee in the copyrighted work and the service made available to the public with respect to the relative creative contribution, technological contribution, capital investment, cost, and risk.*

*(2) ADDITIONAL TERMS AND CONDITIONS.—*

*(A) VOLUNTARY LICENSES AND CONTRACTUAL ROYALTY RATES.—*

*(i) IN GENERAL.—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) shall be given effect in lieu of any determination by the Copyright Royalty Judges. Subject to clause (ii), the royalty rates determined pursuant to subparagraphs (E) and (F) of paragraph (1) 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) *APPLICABILITY.*—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 subparagraphs (E) and (F) of paragraph (1) 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 subparagraphs (E) and (F) of paragraph (1) 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.

(B) *SOUND RECORDING INFORMATION.*—Except as provided in section 1002(e), 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.

(C) *INFRINGEMENT REMEDIES.*—

(i) *IN GENERAL.*—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 sound recording copyright owner; and

(II) the entity making the digital phonorecord delivery has obtained a compulsory license under subsection (a) or has otherwise been authorized by the musical work copyright owner, or by a record company pursuant to an individual download license, to make and distribute phonorecords of each musical work embodied in the sound recording by means of digital phonorecord delivery.

(ii) OTHER REMEDIES.—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 subparagraph (J) and section 106(4) and the owner of the copyright in the sound recording under section 106(6).

(D) LIABILITY OF SOUND RECORDING OWNERS.—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.

(E) RECORDING DEVICES AND MEDIA.—Nothing in section 1008 shall be construed to prevent the exercise of the rights and remedies allowed by this paragraph, subparagraph (J), 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.

(F) PRESERVATION OF RIGHTS.—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 paragraphs (4) and (6) of section 106;

(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 paragraphs (1) and (3) of section 106, 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 before, on, or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

(G) EXEMPT TRANSMISSIONS AND RETRANSMISSIONS.—The provisions of this section concerning digital phonorecord deliveries shall not apply 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 paragraphs (1) through (5) of section 106 with respect to such transmissions and retransmissions.*

*(H) DISTRIBUTION BY RENTAL, LEASE, OR LENDING.—A compulsory license obtained under subsection (b)(1) to make and distribute phonorecords includes the right of the maker of such a phonorecord to distribute or authorize distribution of such phonorecord, other than by means of a digital phonorecord delivery, by rental, lease, or lending (or by acts or practices in the nature of rental, lease, or lending). 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 subsection (a)(1)(A)(ii)(II) 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 subparagraph.*

*(I) PAYMENT OF ROYALTIES AND STATEMENTS OF ACCOUNT.—Except as provided in paragraphs (4)(A)(i) and (10)(B) of subsection (d), 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 subsection (a). 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.*

*(J) NOTICE OF DEFAULT AND TERMINATION OF COMPULSORY LICENSE.—In the case of a license obtained under paragraph (1), (2)(A), or (3) of subsection (b), 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 not later than 30 days after the date on which the notice is sent, 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. In the case of a license obtained under subsection (b)(2)(B), license authority under the compulsory license may be terminated as provided in subsection (d)(4)(E).*

*(d) BLANKET LICENSE FOR DIGITAL USES, MECHANICAL LICENSING COLLECTIVE, AND DIGITAL LICENSEE COORDINATOR.—*

*(1) BLANKET LICENSE FOR DIGITAL USES.—*

(A) *IN GENERAL.*—A digital music provider that qualifies for a compulsory license under subsection (a) may, by complying with the terms and conditions of this subsection, obtain a blanket license from copyright owners through the mechanical licensing collective to make and distribute digital phonorecord deliveries of musical works through one or more covered activities.

(B) *INCLUDED ACTIVITIES.*—A blanket license—

(i) covers all musical works (or shares of such works) available for compulsory licensing under this section for purposes of engaging in covered activities, except as provided in subparagraph (C);

(ii) includes the making and distribution of server, intermediate, archival, and incidental reproductions of musical works that are reasonable and necessary for the digital music provider to engage in covered activities licensed under this subsection, solely for the purpose of engaging in such covered activities; and

(iii) does not cover or include any rights or uses other than those described in clauses (i) and (ii).

(C) *OTHER LICENSES.*—A voluntary license for covered activities entered into by or under the authority of 1 or more copyright owners and 1 or more digital music providers, or authority to make and distribute permanent downloads of a musical work obtained by a digital music provider from a sound recording copyright owner pursuant to an individual download license, shall be given effect in lieu of a blanket license under this subsection with respect to the musical works (or shares thereof) covered by such voluntary license or individual download authority and the following conditions apply:

(i) Where a voluntary license or individual download license applies, the license authority provided under the blanket license shall exclude any musical works (or shares thereof) subject to the voluntary license or individual download license.

(ii) An entity engaged in covered activities under a voluntary license or authority obtained pursuant to an individual download license that is a significant non-blanket licensee shall comply with paragraph (6)(A).

(iii) The rates and terms of any voluntary license shall be subject to the second sentence of clause (i) and clause (ii) of subsection (c)(2)(A) and paragraph (9)(C), as applicable.

(D) *PROTECTION AGAINST INFRINGEMENT ACTIONS.*—A digital music provider that obtains and complies with the terms of a valid blanket license under this subsection shall not be subject to an action for infringement of the exclusive rights provided by paragraphs (1) and (3) of section 106 under this title arising from use of a musical work (or share thereof) to engage in covered activities authorized by such license, subject to paragraph (4)(E).

(E) *OTHER REQUIREMENTS AND CONDITIONS APPLY.*—Except as expressly provided in this subsection, each requirement, limitation, condition, privilege, right, and remedy

*otherwise applicable to compulsory licenses under this section shall apply to compulsory blanket licenses under this subsection.*

**(2) AVAILABILITY OF BLANKET LICENSE.—**

**(A) PROCEDURE FOR OBTAINING LICENSE.—***A digital music provider may obtain a blanket license by submitting a notice of license to the mechanical licensing collective that specifies the particular covered activities in which the digital music provider seeks to engage, as follows:*

*(i) The notice of license shall comply in form and substance with requirements that the Register of Copyrights shall establish by regulation.*

*(ii) Unless rejected in writing by the mechanical licensing collective not later than 30 calendar days after the date on which the mechanical licensing collective receives the notice, the blanket license shall be effective as of the date on which the notice of license was sent by the digital music provider as shown by a physical or electronic record.*

*(iii) A notice of license may only be rejected by the mechanical licensing collective if—*

*(I) the digital music provider or notice of license does not meet the requirements of this section or applicable regulations, in which case the requirements at issue shall be specified with reasonable particularity in the notice of rejection; or*

*(II) the digital music provider has had a blanket license terminated by the mechanical licensing collective during the 3-year period preceding the date on which the mechanical licensing collective receives the notice pursuant to paragraph (4)(E).*

*(iv) If a notice of license is rejected under clause (iii)(I), the digital music provider shall have 30 calendar days after receipt of the notice of rejection to cure any deficiency and submit an amended notice of license to the mechanical licensing collective. If the deficiency has been cured, the mechanical licensing collective shall so confirm in writing, and the license shall be effective as of the date that the original notice of license was provided by the digital music provider.*

*(v) A digital music provider that believes a notice of license was improperly rejected by the mechanical licensing collective may seek review of such rejection in an appropriate district court of the United States. The district court shall determine the matter de novo based on the record before the mechanical licensing collective and any additional evidence presented by the parties.*

**(B) BLANKET LICENSE EFFECTIVE DATE.—***Blanket licenses shall be made available by the mechanical licensing collective on and after the license availability date. No such license shall be effective prior to the license availability date.*

**(3) MECHANICAL LICENSING COLLECTIVE.—**

**(A) IN GENERAL.—***The mechanical licensing collective shall be a single entity that—*

(i) is a nonprofit entity, not owned by any other entity, that is created by copyright owners to carry out responsibilities under this subsection;

(ii) is endorsed by and enjoys substantial support from musical work copyright owners that together represent the greatest percentage of the licensor market for uses of such works in covered activities, as measured over the preceding 3 full calendar years;

(iii) is able to demonstrate to the Register of Copyrights that the entity has, or will have prior to the license availability date, the administrative and technological capabilities to perform the required functions of the mechanical licensing collective under this subsection and that is governed by a board of directors in accordance with subparagraph (D)(i); and

(iv) has been designated by the Register of Copyrights, with the approval of the Librarian of Congress pursuant to section 702, in accordance with subparagraph (B).

**(B) DESIGNATION OF MECHANICAL LICENSING COLLECTIVE.—**

(i) **INITIAL DESIGNATION.**—Not later than 270 days after the enactment date, the Register of Copyrights shall initially designate the mechanical licensing collective as follows:

(I) Not later than 90 calendar days after the enactment date, the Register shall publish notice in the Federal Register soliciting information to assist in identifying the appropriate entity to serve as the mechanical licensing collective, including the name and affiliation of each member of the board of directors described under subparagraph (D)(i) and each committee established pursuant to clauses (iii), (iv), and (v) of subparagraph (D).

(II) After reviewing the information requested under subclause (I) and making a designation, the Register shall publish notice in the Federal Register setting forth—

(aa) the identity of and contact information for the mechanical licensing collective; and

(bb) the reasons for the designation.

(ii) **PERIODIC REVIEW OF DESIGNATION.**—Following the initial designation of the mechanical licensing collective, the Register shall, every 5 years, beginning with the fifth full calendar year to commence after the initial designation, publish notice in the Federal Register in the month of January soliciting information concerning whether the existing designation should be continued, or a different entity meeting the criteria described in clauses (i) through (iii) of subparagraph (A) shall be designated. Following publication of such notice, the Register shall—

(I) after reviewing the information submitted and conducting additional proceedings as appropriate, publish notice in the Federal Register of a

*continuing designation or new designation of the mechanical licensing collective, as the case may be, and the reasons for such a designation with any new designation to be effective as of the first day of a month that is not less than 6 months and not longer than 9 months after the date on which the Register publishes the notice, as specified by the Register; and*

*(II) if a new entity is designated as the mechanical licensing collective, adopt regulations to govern the transfer of licenses, funds, records, data, and administrative responsibilities from the existing mechanical licensing collective to the new entity.*

*(iii) CLOSEST ALTERNATIVE DESIGNATION.—If the Register is unable to identify an entity that fulfills each of the qualifications set forth in clauses (i) through (iii) of subparagraph (A), the Register shall designate the entity that most nearly fulfills such qualifications for purposes of carrying out the responsibilities of the mechanical licensing collective.*

**(C) AUTHORITIES AND FUNCTIONS.—**

*(i) IN GENERAL.—The mechanical licensing collective is authorized to perform the following functions, subject to more particular requirements as described in this subsection:*

*(I) Offer and administer blanket licenses, including receipt of notices of license and reports of usage from digital music providers.*

*(II) Collect and distribute royalties from digital music providers for covered activities.*

*(III) Engage in efforts to identify musical works (and shares of such works) embodied in particular sound recordings, and to identify and locate the copyright owners of such musical works (and shares of such works).*

*(IV) Maintain the musical works database and other information relevant to the administration of licensing activities under this section.*

*(V) Administer a process by which copyright owners can claim ownership of musical works (and shares of such works), and a process by which royalties for works for which the owner is not identified or located are equitably distributed to known copyright owners.*

*(VI) Administer collections of the administrative assessment from digital music providers and significant nonblanket licensees, including receipt of notices of nonblanket activity.*

*(VII) Invest in relevant resources, and arrange for services of outside vendors and others, to support the activities of the mechanical licensing collective.*

*(VIII) Engage in legal and other efforts to enforce rights and obligations under this subsection,*

including by filing bankruptcy proofs of claims for amounts owed under licenses, and acting in coordination with the digital licensee coordinator.

(IX) Initiate and participate in proceedings before the Copyright Royalty Judges to establish the administrative assessment under this subsection.

(X) Initiate and participate in proceedings before the Copyright Office with respect to activities under this subsection.

(XI) Gather and provide documentation for use in proceedings before the Copyright Royalty Judges to set rates and terms under this section.

(XII) Maintain records of the activities of the mechanical licensing collective and engage in and respond to audits described in this subsection.

(XIII) Engage in such other activities as may be necessary or appropriate to fulfill the responsibilities of the mechanical licensing collective under this subsection.

(ii) **ADDITIONAL ADMINISTRATIVE ACTIVITIES.**—Subject to clause (iii) and paragraph (11)(C), the mechanical licensing collective may also administer, or assist in administering, voluntary licenses issued by or individual download licenses obtained from copyright owners for uses of musical works, for which the mechanical licensing collective shall charge reasonable fees for such services.

(iii) **RESTRICTION CONCERNING PUBLIC PERFORMANCE RIGHTS.**—The mechanical licensing collective—

(I) may, pursuant to clause (ii), provide administration services with respect to voluntary licenses that include the right of public performance in musical works; and

(II) may not—

(aa) negotiate or grant licenses for the right of public performance in musical works; or

(bb) be the exclusive or nonexclusive assignee or grantee of the right of public performance in musical works.

(iv) **RESTRICTION ON LOBBYING.**—The mechanical licensing collective may not engage in government lobbying activities, but may engage in the activities described in subclauses (IX), (X), and (XI) of clause (i).

(D) **GOVERNANCE.**—

(i) **BOARD OF DIRECTORS.**—The mechanical licensing collective shall have a board of directors consisting of 14 voting members and 3 nonvoting members, as follows:

(I) Ten voting members shall be representatives of music publishers—

(aa) to which songwriters have assigned exclusive rights of reproduction and distribution of musical works with respect to covered activities; and

(bb) none of which may be owned by, or under common control with, any other board member.

(II) Four voting members shall be professional songwriters who have retained and exercise exclusive rights of reproduction and distribution with respect to covered activities with respect to musical works they have authored.

(III) One nonvoting member shall be a representative of the nonprofit trade association of music publishers that represents the greatest percentage of the licensor market for uses of musical works in covered activities, as measured for the 3-year period preceding the date on which the member is appointed.

(IV) One nonvoting member shall be a representative of the digital licensee coordinator, provided that a digital licensee coordinator has been designated pursuant to paragraph (5)(B). Otherwise, the nonvoting member shall be the nonprofit trade association of digital licensees that represents the greatest percentage of the licensee market for uses of musical works in covered activities, as measured over the preceding 3 full calendar years.

(V) One nonvoting member shall be a representative of a nationally recognized nonprofit trade association whose primary mission is advocacy on behalf of songwriters in the United States.

(ii) BYLAWS.—

(I) ESTABLISHMENT.—Not later than 1 year after the date on which the mechanical licensing collective is initially designated by the Register of Copyrights under subparagraph (B)(i), the collective shall establish bylaws to determine issues relating to the governance of the collective, including, but not limited to—

(aa) the length of the term for each member of the board of directors;

(bb) the staggering of the terms of the members of the board of directors;

(cc) a process for filling a seat on the board of directors that is vacated before the end of the term with respect to that seat;

(dd) a process for electing a member to the board of directors; and

(ee) a management structure for daily operations of the collective.

(II) PUBLIC AVAILABILITY.—The mechanical licensing collective shall make the bylaws established under subclause (I) available to the public.

(iii) BOARD MEETINGS.—The board of directors shall meet not less frequently than biannually and discuss matters pertinent to the operations of the mechanical licensing collective, including the mechanical licensing collective budget.

(iv) *OPERATIONS ADVISORY COMMITTEE.*—The board of directors of the mechanical licensing collective shall establish an operations advisory committee consisting of not fewer than 6 members to make recommendations to the board of directors concerning the operations of the mechanical licensing collective, including the efficient investment in and deployment of information technology and data resources. Such committee shall have an equal number of members of the committee who are—

(I) musical work copyright owners who are appointed by the board of directors of the mechanical licensing collective; and

(II) representatives of digital music providers who are appointed by the digital licensee coordinator.

(v) *UNCLAIMED ROYALTIES OVERSIGHT COMMITTEE.*—The board of directors of the mechanical licensing collective shall establish and appoint an unclaimed royalties oversight committee consisting of 10 members, 5 of which shall be musical work copyright owners and 5 of which shall be professional songwriters whose works are used in covered activities.

(vi) *DISPUTE RESOLUTION COMMITTEE.*—The board of directors of the mechanical licensing collective shall establish and appoint a dispute resolution committee that shall

(I) consist of not fewer than 6 members; and

(II) include an equal number of representatives of musical work copyright owners and professional songwriters.

(vii) *MECHANICAL LICENSING COLLECTIVE ANNUAL REPORT.*—

(I) *IN GENERAL.*—Not later than June 30 of each year commencing after the license availability date, the mechanical licensing collective shall post, and make available online for a period of not less than 3 years, an annual report that sets forth information regarding—

(aa) the operational and licensing practices of the collective;

(bb) how royalties are collected and distributed, and ;

(cc) budgeting and expenditures;

(dd) the collective total costs for the preceding calendar year;

(ee) the projected annual mechanical licensing collective budget;

(ff) aggregated royalty receipts and payments;

(gg) expenses that are more than 10 percent of the annual mechanical licensing collective budget; and

(hh) the efforts of the collective to locate and identify copyright owners of unmatched musical works (and shares of works).

(II) SUBMISSION.—On the date on which the mechanical licensing collective posts each report required under subclause (I), the collective shall provide a copy of the report to the Register of Copyrights.

(viii) INDEPENDENT OFFICERS.—An individual serving as an officer of the mechanical licensing collective may not, at the same time, also be an employee or agent of any member of the board of directors of the collective or any entity represented by a member of the board of directors, as described in clause (i).

(ix) OVERSIGHT AND ACCOUNTABILITY.—

(I) IN GENERAL.—The mechanical licensing collective shall—

(aa) ensure that the policies and practices of the collective are transparent and accountable;

(bb) identify a point of contact for publisher inquiries and complaints with timely redress; and

(cc) establish an anti-comingling policy for funds not collected under this section and royalties collected under this section.

(II) AUDITS.—

(aa) IN GENERAL.—Beginning in the fourth full calendar year that begins after the initial designation of the mechanical licensing collective by the Register of Copyrights under subparagraph (B)(i), and in every fifth calendar year thereafter, the collective shall retain a qualified auditor that shall—

(AA) examine the books, records, and operations of the collective;

(BB) prepare a report for the board of directors of the collective with respect to the matters described in item (bb); and

(CC) not later than December 31 of the year in which the qualified auditor is retained, deliver the report described in subitem (BB) to the board of directors of the collective.

(bb) MATTERS ADDRESSED.—Each report prepared under item (aa) shall address the implementation and efficacy of procedures of the mechanical licensing collective—

(AA) for the receipt, handling, and distribution of royalty funds, including any amounts held as unclaimed royalties;

(BB) to guard against fraud, abuse, waste, and the unreasonable use of funds; and

(CC) to protect the confidentiality of financial, proprietary, and other sensitive information.

(cc) PUBLIC AVAILABILITY.—With respect to each report prepared under item (aa), the mechanical licensing collective shall—

(AA) submit the report to the Register of Copyrights; and

(BB) make the report available to the public.

(E) MUSICAL WORKS DATABASE.—

(i) ESTABLISHMENT AND MAINTENANCE OF DATABASE.—The mechanical licensing collective shall establish and maintain a database containing information relating to musical works (and shares of such works) and, to the extent known, the identity and location of the copyright owners of such works (and shares thereof) and the sound recordings in which the musical works are embodied. In furtherance of maintaining such database, the mechanical licensing collective shall engage in efforts to identify the musical works embodied in particular sound recordings, as well as to identify and locate the copyright owners of such works (and shares thereof), and update such data as appropriate.

(ii) MATCHED WORKS.—With respect to musical works (and shares thereof) that have been matched to copyright owners, the musical works database shall include—

(I) the title of the musical work;

(II) the copyright owner of the work (or share thereof), and the ownership percentage of that owner;

(III) contact information for such copyright owner;

(IV) to the extent reasonably available to the mechanical licensing collective—

(aa) the international standard musical work code for the work; and

(bb) identifying information for sound recordings in which the musical work is embodied, including the name of the sound recording, featured artist, sound recording copyright owner, producer, international standard recording code, and other information commonly used to assist in associating sound recordings with musical works; and

(V) such other information as the Register of Copyrights may prescribe by regulation.

(iii) UNMATCHED WORKS.—With respect to unmatched musical works (and shares of works) in the database, the musical works database shall include—

(I) to the extent reasonably available to the mechanical licensing collective—

(aa) the title of the musical work;

(bb) the ownership percentage for which an owner has not been identified;

(cc) if a copyright owner has been identified but not located, the identity of such owner and the ownership percentage of that owner;

(dd) identifying information for sound recordings in which the work is embodied, including sound recording name, featured artist, sound recording copyright owner, producer, international standard recording code, and other information commonly used to assist in associating sound recordings with musical works; and

(ee) any additional information reported to the mechanical licensing collective that may assist in identifying the work; and

(II) such other information relating to the identity and ownership of musical works (and shares of such works) as the Register of Copyrights may prescribe by regulation.

(iv) SOUND RECORDING INFORMATION.—Each musical work copyright owner with any musical work listed in the musical works database shall engage in commercially reasonable efforts to deliver to the mechanical licensing collective, including for use in the musical works database, to the extent such information is not then available in the database, information regarding the names of the sound recordings in which that copyright owner's musical works (or shares thereof) are embodied, to the extent practicable.

(v) ACCESSIBILITY OF DATABASE.—The musical works database shall be made available to members of the public in a searchable, online format, free of charge. The mechanical licensing collective shall make such database available in a bulk, machine-readable format, through a widely available software application, to the following entities:

(I) Digital music providers operating under the authority of valid notices of license, free of charge.

(II) Significant nonblanket licensees in compliance with their obligations under paragraph (6), free of charge.

(III) Authorized vendors of the entities described in subclauses (I) and (II), free of charge.

(IV) The Register of Copyrights, free of charge (but the Register shall not treat such database or any information therein as a Government record).

(V) Any member of the public, for a fee not to exceed the marginal cost to the mechanical licensing collective of providing the database to such person.

(vi) ADDITIONAL REQUIREMENTS.—The Register of Copyrights shall establish requirements by regulations to ensure the usability, interoperability, and usage restrictions of the musical works database.

(F) NOTICES OF LICENSE AND NONBLANKET ACTIVITY.—

(i) *NOTICES OF LICENSES.*—The mechanical licensing collective shall receive, review, and confirm or reject notices of license from digital music providers, as provided in paragraph (2)(A). The collective shall maintain a current, publicly accessible list of blanket licenses that includes contact information for the licensees and the effective dates of such licenses.

(ii) *NOTICES OF NONBLANKET ACTIVITY.*—The mechanical licensing collective shall receive notices of nonblanket activity from significant nonblanket licensees, as provided in paragraph (6)(A). The collective shall maintain a current, publicly accessible list of notices of nonblanket activity that includes contact information for significant nonblanket licensees and the dates of receipt of such notices.

(G) *COLLECTION AND DISTRIBUTION OF ROYALTIES.*—

(i) *IN GENERAL.*—Upon receiving reports of usage and payments of royalties from digital music providers for covered activities, the mechanical licensing collective shall—

(I) engage in efforts to—

(aa) identify the musical works embodied in sound recordings reflected in such reports, and the copyright owners of such musical works (and shares thereof);

(bb) confirm uses of musical works subject to voluntary licenses and individual download licenses, and the corresponding pro rata amounts to be deducted from royalties that would otherwise be due under the blanket license; and

(cc) confirm proper payment of royalties due;

(II) distribute royalties to copyright owners in accordance with the usage and other information contained in such reports, as well as the ownership and other information contained in the records of the collective; and

(III) deposit into an interest-bearing account, as provided in subparagraph (H)(ii), royalties that cannot be distributed due to—

(aa) an inability to identify or locate a copyright owner of a musical work (or share thereof); or

(bb) a pending dispute before the dispute resolution committee of the mechanical licensing collective.

(ii) *OTHER COLLECTION EFFORTS.*—Any royalties recovered by the mechanical licensing collective as a result of efforts to enforce rights or obligations under a blanket license, including through a bankruptcy proceeding or other legal action, shall be distributed to copyright owners based on available usage information and in accordance with the procedures described in subclauses (I) and (II) of clause (i), on a pro rata basis in proportion to the overall percentage recovery of the

*total royalties owed, with any pro rata share of royalties that cannot be distributed deposited in an interestbearing account as provided in subparagraph (H)(ii).*

**(H) HOLDING OF ACCRUED ROYALTIES.—**

*(i) HOLDING PERIOD.—The mechanical licensing collective shall hold accrued royalties associated with particular musical works (and shares of works) that remain unmatched for a period not less than 3 years after the date on which the funds were received by the mechanical licensing collective, or not less than 3 years after the date on which the funds were accrued by a digital music provider that subsequently transferred such funds to the mechanical licensing collective pursuant to paragraph (10)(B), whichever period expires sooner.*

*(ii) INTEREST-BEARING ACCOUNT.—Accrued royalties for unmatched works (and shares thereof) shall be maintained by the mechanical licensing collective in an interest-bearing account that earns monthly interest—*

*(I) at the Federal, short-term rate; and*

*(II) that accrues for the benefit of copyright owners entitled to payment of such accrued royalties.*

**(I) MUSICAL WORKS CLAIMING PROCESS.—***When a copyright owner of an unmatched work (or share of a work) has been identified and located in accordance with the procedures of the mechanical licensing collective, the collective shall—*

*(i) update the musical works database and the other records of the collective accordingly; and*

*(ii) provided that accrued royalties for the musical work (or share thereof) have not yet been included in a distribution pursuant to subparagraph (J)(i), pay such accrued royalties and a proportionate amount of accrued interest associated with that work (or share thereof) to the copyright owner, accompanied by a cumulative statement of account reflecting usage of such work and accrued royalties based on information provided by digital music providers to the mechanical licensing collective.*

**(J) DISTRIBUTION OF UNCLAIMED ACCRUED ROYALTIES.—**

*(i) DISTRIBUTION PROCEDURES.—After the expiration of the prescribed holding period for accrued royalties provided in subparagraph (H)(i), the mechanical licensing collective shall distribute such accrued royalties, along with a proportionate share of accrued interest, to copyright owners identified in the records of the collective, subject to the following requirements, and in accordance with the policies and procedures established under clause (i):*

*(I) The first such distribution shall occur on or after January 1 of the second full calendar year to commence after the license availability date, with not less than 1 such distribution to take place during each calendar year thereafter.*

*(II) Copyright owners' payment shares for unclaimed accrued royalties for particular reporting periods shall be determined in a transparent and equitable manner based on data indicating the relative market shares of such copyright owners as reflected in reports of usage provided by digital music providers for covered activities for the periods in question, including, in addition to usage data provided to the mechanical licensing collective, usage data provided to copyright owners under voluntary licenses and individual download licenses for covered activities, to the extent such information is available to the mechanical licensing collective. In furtherance of the determination of equitable market shares under this subparagraph—*

*(aa) the mechanical licensing collective may require copyright owners seeking distributions of unclaimed accrued royalties to provide, or direct the provision of, information concerning the usage of musical works under voluntary licenses and individual download licenses for covered activities, and*

*(bb) the mechanical licensing collective shall take appropriate steps to safeguard the confidentiality and security of usage, financial and other sensitive data used to compute market shares in accordance with the confidentiality provisions prescribed by the Register of Copyrights under paragraph (12)(C).*

*(ii) ESTABLISHMENT OF DISTRIBUTION POLICIES.—The unclaimed royalties oversight committee established under subparagraph (D)(v) shall establish policies and procedures for the distribution of unclaimed accrued royalties and accrued interest in accordance with this subparagraph, including the provision of usage data to copyright owners to allocate payments and credits to songwriters pursuant to clause (v) subject to the approval of the board of directors of the mechanical licensing collective.*

*(iii) PUBLIC NOTICE OF UNCLAIMED ACCRUED ROYALTIES.—The mechanical licensing collective shall—*

*(I) maintain a publicly accessible online facility with contact information for the collective that lists unmatched musical works (and shares of works), through which a copyright owner may assert an ownership claim with respect to such a work (and a share of such a work);*

*(II) engage in diligent, good-faith efforts to publicize, throughout the music industry—*

*(aa) the existence of the collective and the ability to claim unclaimed accrued royalties for unmatched musical works (and shares of such works) held by the collective;*

(bb) the procedures by which copyright owners may identify themselves and provide contact, ownership, and other relevant information to the collective in order to receive payments of accrued royalties;

(cc) any transfer of accrued royalties for musical works under paragraph (10)(B), not later than 180 days after the date on which the transfer is received; and

(dd) any pending distribution of unclaimed accrued royalties and accrued interest, not less than 90 days before the date on which the distribution is made; and

(III) as appropriate, participate in music industry conferences and events for the purpose of publicizing the matters described in subclause (II).

(iv) SONGWRITER PAYMENTS.—Copyright owners that receive a distribution of unclaimed accrued royalties and accrued interest shall pay or credit a portion to songwriters (or the authorized agents of songwriters) on whose behalf the copyright owners license or administer musical works for covered activities, in accordance with applicable contractual terms, but notwithstanding any agreement to the contrary—

(I) such payments and credits to songwriters shall be allocated in proportion to reported usage of individual musical works by digital music providers during the reporting periods covered by the distribution from the mechanical licensing collective; and

(II) in no case shall the payment or credit to an individual songwriter be less than 50 percent of the payment received by the copyright owner attributable to usage of musical works (or shares of works) of that songwriter.

(K) DISPUTE RESOLUTION.—The dispute resolution committee established under subparagraph (D)(vi) shall establish policies and procedures—

(i) for copyright owners to address in a timely and equitable manner disputes relating to ownership interests in musical works licensed under this section and allocation and distribution of royalties by the mechanical licensing collective, subject to the approval of the board of directors of the mechanical licensing collective.—

(ii) that shall include a mechanism to hold disputed funds in accordance with the requirements described in subparagraph (H)(ii) pending resolution of the dispute; and

(iii) except as provided in paragraph (11)(D), that shall not affect any legal or equitable rights or remedies available to any copyright owner or songwriter concerning ownership of, and entitlement to royalties for, a musical work.

(L) VERIFICATION OF PAYMENTS BY MECHANICAL LICENSING COLLECTIVE.—

(i) VERIFICATION PROCESS.—A copyright owner entitled to receive payments of royalties for covered activities from the mechanical licensing collective may, individually or with other copyright owners, conduct an audit of the mechanical licensing collective to verify the accuracy of royalty payments by the mechanical licensing collective to such copyright owner, as follows:

(I) A copyright owner may audit the mechanical licensing collective only once in a year for any or all of the 3 calendar years preceding the year in which the audit is commenced, and may not audit records for any calendar year more than once.

(II) The audit shall be conducted by a qualified auditor, who shall perform the audit during the ordinary course of business by examining the books, records, and data of the mechanical licensing collective, according to generally accepted auditing standards and subject to applicable confidentiality requirements prescribed by the Register of Copyrights under paragraph (12)(C).

(III) The mechanical licensing collective shall make such books, records, and data available to the qualified auditor and respond to reasonable requests for relevant information, and shall use commercially reasonable efforts to facilitate access to relevant information maintained by third parties.

(IV) To commence the audit, any copyright owner shall file with the Copyright Office a notice of intent to conduct an audit of the mechanical licensing collective, identifying the period of time to be audited, and shall simultaneously deliver a copy of such notice to the mechanical licensing collective. The Register of Copyrights shall cause the notice of audit to be published in the Federal Register not later than 45 calendar days after the date on which the notice is received.

(V) The qualified auditor shall determine the accuracy of royalty payments, including whether an underpayment or overpayment of royalties was made by the mechanical licensing collective to each auditing copyright owner, except that before providing a final audit report to any such copyright owner, the qualified auditor shall provide a tentative draft of the report to the mechanical licensing collective and allow the mechanical licensing collective a reasonable opportunity to respond to the findings, including by clarifying issues and correcting factual errors.

(VI) The auditing copyright owner or owners shall bear the cost of the audit. In case of an underpayment to any copyright owner, the mechanical licensing collective shall pay the amounts of any such underpayment to such auditing copyright

owner, as appropriate. In case of an overpayment by the mechanical licensing collective, the mechanical licensing collective may debit the account of the auditing copyright owner or owners for such overpaid amounts, or such owner or owners shall refund overpaid amounts to the mechanical licensing collective, as appropriate.

(ii) *ALTERNATIVE VERIFICATION PROCEDURES.*—Nothing in this subparagraph shall preclude a copyright owner and the mechanical licensing collective from agreeing to audit procedures different from those described in this subparagraph, except that, a notice of the audit shall be provided to and published by the Copyright Office as described in clause (i)(IV).

(M) *RECORDS OF MECHANICAL LICENSING COLLECTIVE.*—

(i) *RECORDS MAINTENANCE.*—The mechanical licensing collective shall ensure that all material records of the operations of the mechanical licensing collective, including those relating to notices of license, the administration of the claims process of the mechanical licensing collective, reports of usage, royalty payments, receipt and maintenance of accrued royalties, royalty distribution processes, and legal matters, are preserved and maintained in a secure and reliable manner, with appropriate commercially reasonable safeguards against unauthorized access, copying, and disclosure, and subject to the confidentiality requirements prescribed by the Register of Copyrights under paragraph (12)(C) for a period of not less than 7 years after the date of creation or receipt, whichever occurs later.

(ii) *RECORDS ACCESS.*—The mechanical licensing collective shall provide prompt access to electronic and other records pertaining to the administration of a copyright owner's musical works upon reasonable written request of the owner or the authorized representative of the owner.

(4) *TERMS AND CONDITIONS OF BLANKET LICENSE.*—A blanket license is subject to, and conditioned upon, the following requirements:

(A) *ROYALTY REPORTING AND PAYMENTS.*—

(i) *MONTHLY REPORTS AND PAYMENT.*—A digital music provider shall report and pay royalties to the mechanical licensing collective under the blanket license on a monthly basis in accordance with clause (ii) and subsection (c)(2)(I), except that the monthly reporting shall be due on the date that is 45 calendar days, rather than 20 calendar days, after the end of the monthly reporting period.

(ii) *DATA TO BE REPORTED.*—In reporting usage of musical works to the mechanical licensing collective, a digital music provider shall provide usage data for musical works used under the blanket license and usage data for musical works used in covered activities under voluntary licenses and individual download li-

censes. In the report of usage, the digital music provider shall—

(I) with respect to each sound recording embodying a musical work—

(aa) provide identifying information for the sound recording, including sound recording name, featured artist, and, to the extent reasonably acquired by the digital music provider in connection with its use of sound recordings of musical works to engage in covered activities, including pursuant to subparagraph (B), sound recording copyright owner, producer, international standard recording code, and other information commonly used in the industry to identify sound recordings and match them to the musical works the sound recordings embody;

(bb) to the extent reasonably acquired by the digital music provider in the metadata provided by sound recording copyright owners or other licensors of sound recordings in connection with the use of sound recordings of musical works to engage in covered activities, including pursuant to subparagraph (B), provide information concerning authorship and ownership of the applicable rights in the musical work embodied in the sound recording (including each songwriter, publisher name, and respective ownership share) and the international standard musical workcode;

(cc) provide the number of digital phonorecord deliveries of the sound recording, including limited downloads and interactive streams;

(II) identify and provide contact information for all musical work copyright owners for works embodied in sound recordings as to which a voluntary license, rather than the blanket license, is in effect with respect to the uses being reported; and

(III) provide such other information as the Register of Copyrights shall require by regulation.

(iii) **FORMAT AND MAINTENANCE OF REPORTS.**—Reports of usage provided by digital music providers to the mechanical licensing collective shall be in a machine-readable format that is compatible with the information technology systems of the mechanical licensing collective and meets the requirements of regulations adopted by the Register of Copyrights. The Register shall also adopt regulations setting forth requirements under which records of use shall be maintained and made available to the mechanical licensing collective by digital music providers engaged in covered activities under a blanket license.

(iv) *ADOPTION OF REGULATIONS.—The Register of Copyrights shall adopt regulations—*

*(I) setting forth requirements under which records of use shall be maintained and made available to the mechanical licensing collective by digital music providers engaged in covered activities under a blanket license; and*

*(II) regarding adjustments to reports of usage by digital music providers, including mechanisms to account for overpayment and underpayment of royalties in prior periods.*

*(B) COLLECTION OF SOUND RECORDING INFORMATION.—A digital music provider shall engage in good-faith, commercially reasonable efforts to obtain from sound recording copyright owners and other licensors of sound recordings made available through the service of such digital music provider information concerning—*

*(i) sound recording copyright owners, international standard recording codes, and other information commonly used in the industry to identify sound recordings and match them to the musical works the sound recordings embody; and*

*(ii) the authorship and ownership of musical works, including songwriters, publisher names, ownership shares, and international standard musical work codes.*

*(C) PAYMENT OF ADMINISTRATIVE ASSESSMENT.—A digital music provider and any significant nonblanket licensee shall pay the administrative assessment established under paragraph (7)(D) in accordance with this subsection and applicable regulations.*

*(D) VERIFICATION OF PAYMENTS BY DIGITAL MUSIC PROVIDERS.—*

*(i) VERIFICATION PROCESS.—The mechanical licensing collective may conduct an audit of a digital music provider operating under the blanket license to verify the accuracy of royalty payments by the digital music provider to the mechanical licensing collective as follows:*

*(I) The mechanical licensing collective may commence an audit of a digital music provider not more frequently than once in any 3-calendar-year period to cover a verification period of not more than the 3 full calendar years preceding the date of commencement of the audit, and such audit may not audit records for any such 3-year verification period more than once.*

*(II) The audit shall be conducted by a qualified auditor, who shall perform the audit during the ordinary course of business by examining the books, records, and data of the digital music provider, according to generally accepted auditing standards and subject to applicable confidentiality requirements prescribed by the Register of Copyrights under paragraph (12)(C).*

(III) *The digital music provider shall make such books, records, and data available to the qualified auditor and respond to reasonable requests for relevant information, and shall use commercially reasonable efforts to provide access to relevant information maintained with respect to a digital music provider by third parties.*

(IV) *To commence the audit, the mechanical licensing collective shall file with the Copyright Office a notice of intent to conduct an audit of the digital music provider, identifying the period of time to be audited, and shall simultaneously deliver a copy of such notice to the digital music provider. The Register of Copyrights shall cause the notice of audit to be published in the Federal Register not later than 45 calendar days after the date on which notice is received.*

(V) *The qualified auditor shall determine the accuracy of royalty payments, including whether an underpayment or overpayment of royalties was made by the digital music provider to the mechanical licensing collective, except that before providing a final audit report to the mechanical licensing collective, the qualified auditor shall provide a tentative draft of the report to the digital music provider and allow the digital music provider a reasonable opportunity to respond to the findings, including by clarifying issues and correcting factual errors.*

(VI) *The mechanical licensing collective shall pay the cost of the audit, unless the qualified auditor determines that there was an underpayment by the digital music provider of not less than 10 percent, in which case the digital music provider shall bear the reasonable costs of the audit, in addition to paying the amount of any underpayment to the mechanical licensing collective. In case of an overpayment by the digital music provider, the mechanical licensing collective shall provide a credit to the account of the digital music provider.*

(VII) *A digital music provider may not assert section 507 or any other Federal or State statute of limitations, doctrine of laches or estoppel, or similar provision as a defense to a legal action arising from an audit under this subparagraph if such legal action is commenced not more than 6 years after the commencement of the audit that is the basis for such action.*

(ii) *ALTERNATIVE VERIFICATION PROCEDURES.—Nothing in this subparagraph shall preclude the mechanical licensing collective and a digital music provider from agreeing to audit procedures different from those described in this subparagraph, except that a notice of the audit shall be provided to and published by the Copyright Office as described in clause (i)(IV).*

**(E) DEFAULT UNDER BLANKET LICENSE.—**

(i) **CONDITIONS OF DEFAULT.**—A digital music provider shall be in default under a blanket license if the digital music provider—

(I) fails to provide 1 or more monthly reports of usage to the mechanical licensing collective when due;

(II) fails to make a monthly royalty or late fee payment to the mechanical licensing collective when due, in all or material part;

(III) provides 1 or more monthly reports of usage to the mechanical licensing collective that, on the whole, is or are materially deficient as a result of inaccurate, missing, or unreadable data, where the correct data was available to the digital music provider and required to be reported under this section and applicable regulations;

(IV) fails to pay the administrative assessment as required under this subsection and applicable regulations; or

(V) after being provided written notice by the mechanical licensing collective, refuses to comply with any other material term or condition of the blanket license under this section for a period of not less than 60 calendar days.

(ii) **NOTICE OF DEFAULT AND TERMINATION.**—In case of a default by a digital music provider, the mechanical licensing collective may proceed to terminate the blanket license of the digital music provider as follows:

(I) The mechanical licensing collective shall provide written notice to the digital music provider describing with reasonable particularity the default and advising that unless such default is cured not later than 60 calendar days after the date of the notice, the blanket license will automatically terminate at the end of that period.

(II) If the digital music provider fails to remedy the default before the end of the 60-day period described in subclause (I), the license shall terminate without any further action on the part of the mechanical licensing collective. Such termination renders the making of all digital phonorecord deliveries of all musical works (and shares thereof) covered by the blanket license for which the royalty or administrative assessment has not been paid actionable as acts of infringement under section 501 and subject to the remedies provided by sections 502 through 506.

(iii) **NOTICE TO COPYRIGHT OWNERS.**—The mechanical licensing collective shall provide written notice of any termination under this subparagraph to copyright owners of affected works.

(iv) **REVIEW BY FEDERAL DISTRICT COURT.**—A digital music provider that believes a blanket license was improperly terminated by the mechanical licensing collec-

*tive may seek review of such termination in an appropriate district court of the United States. The district court shall determine the matter de novo based on the record before the mechanical licensing collective and any additional supporting evidence presented by the parties.*

**(5) DIGITAL LICENSEE COORDINATOR.—**

**(A) IN GENERAL.—***The digital licensee coordinator shall be a single entity that—*

*(i) is a nonprofit, not owned by any other entity, that is created to carry out responsibilities under this subsection;*

*(ii) is endorsed by and enjoys substantial support from digital music providers and significant non-blanket licensees that together represent the greatest percentage of the licensee market for uses of musical works in covered activities, as measured over the preceding 3 calendar years;*

*(iii) is able to demonstrate that it has, or will have prior to the license availability date, the administrative capabilities to perform the required functions of the digital licensee coordinator under this subsection; and*

*(iv) has been designated by the Register of Copyrights, with the approval of the Librarian of Congress pursuant to section 702, in accordance with subparagraph (B).*

**(B) DESIGNATION OF DIGITAL LICENSEE COORDINATOR.—**

*(i) INITIAL DESIGNATION.—*The Register of Copyrights shall initially designate the digital licensee coordinator not later than 270 days after the enactment date, in accordance with the same procedure described for designation of the mechanical licensing collective in paragraph (3)(B)(i).

*(ii) PERIODIC REVIEW OF DESIGNATION.—*Following the initial designation of the digital licensee coordinator, the Register of Copyrights shall, every 5 years, beginning with the fifth full calendar year to commence after the initial designation, determine whether the existing designation should be continued, or a different entity meeting the criteria described in clauses (i) through (iii) of subparagraph (A) should be designated, in accordance with the same procedure described for the mechanical licensing collective in paragraph (3)(B)(ii).

*(iii) INABILITY TO DESIGNATE.—*If the Register of Copyrights is unable to identify an entity that fulfills each of the qualifications described in clauses (i) through (iii) of subparagraph (A) to serve as the digital licensee coordinator, the Register may decline to designate a digital licensee coordinator. The determination of the Register not to designate a digital licensee coordinator shall not negate or otherwise affect any provision of this subsection except to the limited extent that a provision references the digital licensee coordinator. In such case, the reference to the digital licensee coordi-

nator shall be without effect unless and until a new digital licensee coordinator is designated.

(C) **AUTHORITIES AND FUNCTIONS.**—

(i) **IN GENERAL.**—*The digital licensee coordinator is authorized to perform the following functions, subject to more particular requirements as described in this subsection:*

(I) *Establish a governance structure, criteria for membership, and any dues to be paid by its members.*

(II) *Engage in efforts to enforce notice and payment obligations with respect to the administrative assessment, including by receiving information from and coordinating with the mechanical licensing collective.*

(III) *Initiate and participate in proceedings before the Copyright Royalty Judges to establish the administrative assessment under this subsection.*

(IV) *Initiate and participate in proceedings before the Copyright Office with respect to activities under this subsection.*

(V) *Gather and provide documentation for use in proceedings before the Copyright Royalty Judges to set rates and terms under this section.*

(VI) *Maintain records of its activities.*

(VII) *Assist in publicizing the existence of the mechanical licensing collective and the ability of copyright owners to claim royalties for unmatched musical works (and shares of works) through the collective*

(VIII) *Engage in such other activities as may be necessary or appropriate to fulfill its responsibilities under this subsection.*

(ii) **RESTRICTION ON LOBBYING.**—*The digital licensee coordinator may not engage in government lobbying activities, but may engage in the activities described in subclauses (III), (IV), and (V) of clause (i).*

(iii) **ASSISTANCE WITH PUBLICITY FOR UNCLAIMED ROYALTIES.**—*The digital licensee coordinator shall make reasonable, good-faith efforts to assist the mechanical licensing collective in the efforts of the collective to locate and identify copyright owners of unmatched musical works (and shares of such works) by encouraging digital music providers to publicize the existence of the collective and the ability of copyright owners to claim unclaimed accrued royalties, including by—*

(I) *posting contact information for the collective at reasonably prominent locations on digital music provider websites and applications; and*

(II) *conducting in-person outreach activities with songwriters.*

(6) **REQUIREMENTS FOR SIGNIFICANT NONBLANKET LICENSEES.**—

(A) **IN GENERAL.**—

(i) *NOTICE OF ACTIVITY.*—Not later than 45 calendar days after the license availability date, or 45 calendar days after the end of the first full calendar month in which an entity initially qualifies as a significant nonblanket licensee, whichever occurs later, a significant nonblanket licensee shall submit a notice of nonblanket activity to the mechanical licensing collective. The notice of nonblanket activity shall comply in form and substance with requirements that the Register of Copyrights shall establish by regulation, and a copy shall be made available to the digital licensee coordinator.

(ii) *REPORTING AND PAYMENT OBLIGATIONS.*—The notice of nonblanket activity submitted to the mechanical licensing collective shall be accompanied by a report of usage that contains the information described in paragraph (4)(A)(ii), as well as any payment of the administrative assessment required under this subsection and applicable regulations. Thereafter, subject to clause (iii), a significant nonblanket licensee shall continue to provide monthly reports of usage, accompanied by any required payment of the administrative assessment, to the mechanical licensing collective. Such reports and payments shall be submitted not later than 45 calendar days after the end of the calendar month being reported.

(iii) *DISCONTINUATION OF OBLIGATIONS.*—An entity that has submitted a notice of nonblanket activity to the mechanical licensing collective that has ceased to qualify as a significant nonblanket licensee may so notify the collective in writing. In such case, as of the calendar month in which such notice is provided, such entity shall no longer be required to provide reports of usage or pay the administrative assessment, but if such entity later qualifies as a significant nonblanket licensee, such entity shall again be required to comply with clauses (i) and (ii).

**(B) REPORTING BY MECHANICAL LICENSING COLLECTIVE TO DIGITAL LICENSEE COORDINATOR.**—

(i) *MONTHLY REPORTS OF NONCOMPLIANT LICENSEES.*—The mechanical licensing collective shall provide monthly reports to the digital licensee coordinator setting forth any significant nonblanket licensees of which the collective is aware that have failed to comply with subparagraph (A).

(ii) *TREATMENT OF CONFIDENTIAL INFORMATION.*—The mechanical licensing collective and digital licensee coordinator shall take appropriate steps to safeguard the confidentiality and security of financial and other sensitive data shared under this subparagraph, in accordance with the confidentiality requirements prescribed by the Register of Copyrights under paragraph (12)(C).

**(C) LEGAL ENFORCEMENT EFFORTS.**—

(i) *FEDERAL COURT ACTION.*—Should the mechanical licensing collective or digital licensee coordinator be

come aware that a significant nonblanket licensee has failed to comply with subparagraph (A), either may commence an action in an appropriate district court of the United States for damages and injunctive relief. If the significant nonblanket licensee is found liable, the court shall, absent a finding of excusable neglect, award damages in an amount equal to three times the total amount of the unpaid administrative assessment and, notwithstanding anything to the contrary in section 505, reasonable attorney's fees and costs, as well as such other relief as the court determines appropriate. In all other cases, the court shall award relief as appropriate. Any recovery of damages shall be payable to the mechanical licensing collective as an offset to the collective total costs.

(ii) *STATUTE OF LIMITATIONS FOR ENFORCEMENT ACTION.*—Any action described in this subparagraph shall be commenced within the time period described in section 507(b).

(iii) *OTHER RIGHTS AND REMEDIES PRESERVED.*—The ability of the mechanical licensing collective or digital licensee coordinator to bring an action under this subparagraph shall in no way alter, limit or negate any other right or remedy that may be available to any party at law or in equity.

(7) *FUNDING OF MECHANICAL LICENSING COLLECTIVE.*—

(A) *IN GENERAL.*—The collective total costs shall be funded by—

(i) an administrative assessment, as such assessment is established by the Copyright Royalty Judges pursuant to subparagraph (D) from time to time, to be paid by—

(I) digital music providers that are engaged, in all or in part, in covered activities pursuant to a blanket license; and

(II) significant nonblanket licensees; and

(ii) voluntary contributions from digital music providers and significant nonblanket licensees as may be agreed with copyright owners.

(B) *VOLUNTARY CONTRIBUTIONS.*—

(i) *AGREEMENTS CONCERNING CONTRIBUTIONS.*—Except as provided in clause (ii), voluntary contributions by digital music providers and significant nonblanket licensees shall be determined by private negotiation and agreement, and the following conditions apply:

(I) The date and amount of each voluntary contribution to the mechanical licensing collective shall be documented in a writing signed by an authorized agent of the mechanical licensing collective and the contributing party.

(II) Such agreement shall be made available as required in proceedings before the Copyright Royalty Judges to establish or adjust the administrative assessment in accordance with applicable stat-

*utory and regulatory provisions and rulings of the Copyright Royalty Judges.*

(ii) *TREATMENT OF CONTRIBUTIONS.—Each voluntary contribution described in clause (i) shall be treated for purposes of an administrative assessment proceeding as an offset to the collective total costs that would otherwise be recovered through the administrative assessment. Any allocation or reallocation of voluntary contributions between or among individual digital music providers or significant nonblanket licensees shall be a matter of private negotiation and agreement among such parties and outside the scope of the administrative assessment proceeding.*

(C) *INTERIM APPLICATION OF ACCRUED ROYALTIES.—In the event that the administrative assessment, together with any funding from voluntary contributions as provided in subparagraphs (A) and (B), is inadequate to cover current collective total costs, the collective, with approval of its board of directors, may apply unclaimed accrued royalties on an interim basis to defray such costs, subject to future reimbursement of such royalties from future collections of the assessment.*

(D) *DETERMINATION OF ADMINISTRATIVE ASSESSMENT.—*

(i) *ADMINISTRATIVE ASSESSMENT TO COVER COLLECTIVE TOTAL COSTS.—The administrative assessment shall be used solely and exclusively to fund the collective total costs.*

(ii) *SEPARATE PROCEEDING BEFORE COPYRIGHT ROYALTY JUDGES.—The amount and terms of the administrative assessment shall be determined and established in a separate and independent proceeding before the Copyright Royalty Judges, according to the procedures described in clauses (iii) and (iv). The administrative assessment determined in such proceeding shall—*

*(I) be wholly independent of royalty rates and terms applicable to digital music providers, which shall not be taken into consideration in any manner in establishing the administrative assessment;*

*(II) be established by the Copyright Royalty Judges in an amount that is calculated to defray the reasonable collective total costs;*

*(III) be assessed based on usage of musical works by digital music providers and significant nonblanket licensees in covered activities under both compulsory and nonblanket licenses;*

*(IV) may be in the form of a percentage of royalties payable under this section for usage of musical works in covered activities (regardless of whether a different rate applies under a voluntary license), or any other usage-based metric reasonably calculated to equitably allocate the collective total costs across digital music providers and significant nonblanket licensees engaged in covered activities, and shall include as a component a min-*

*imum fee for all digital music providers and significant nonblanket licensees; and*

*(V) take into consideration anticipated future collective total costs and collections of the administrative assessment, including, as applicable—*

*(aa) any portion of past actual collective total costs of the mechanical licensing collective not funded by previous collections of the administrative assessment or voluntary contributions because such collections or contributions together were insufficient to fund such costs;*

*(bb) any past collections of the administrative assessment and voluntary contributions that exceeded past actual collective total costs, resulting in a surplus; and*

*(cc) the amount of any voluntary contributions by digital music providers or significant nonblanket licensees in relevant periods, described in subparagraphs (A) and (B) of paragraph (7).*

*(iii) INITIAL ADMINISTRATIVE ASSESSMENT.—The procedure for establishing the initial administrative assessment shall be as follows:*

*(I) Not later than 270 days after the enactment of the date, the Copyright Royalty Judges shall commence a proceeding to establish the initial administrative assessment by publishing a notice in the Federal Register seeking petitions to participate.*

*(II) The mechanical licensing collective and digital licensee coordinator shall participate in the proceeding described in subclause (I), along with any interested copyright owners, digital music providers or significant nonblanket licensees that have notified the Copyright Royalty Judges of their desire to participate.*

*(III) The Copyright Royalty Judges shall establish a schedule for submission by the parties of information that may be relevant to establishing the administrative assessment, including actual and anticipated collective total costs of the mechanical licensing collective, actual and anticipated collections from digital music providers and significant nonblanket licensees, and documentation of voluntary contributions, as well as a schedule for further proceedings, which shall include a hearing, as the Copyright Royalty Judges determine appropriate.*

*(IV) The initial administrative assessment shall be determined, and such determination shall be published in the Federal Register by the Copyright Royalty Judges, not later than 1 year after commencement of the proceeding described in this clause. The determination shall be supported by a*

written record. The initial administrative assessment shall be effective as of the license availability date, and shall continue in effect unless and until an adjusted administrative assessment is established pursuant to an adjustment proceeding under clause (iv).

(iv) *ADJUSTMENT OF ADMINISTRATIVE ASSESSMENT.*—The administrative assessment may be adjusted by the Copyright Royalty Judges periodically, in accordance with the following procedures:

(I) Not earlier than one year after the most recent publication of a determination of the administrative assessment by the Copyright Royalty Judges, the mechanical licensing collective, the digital licensee coordinator, or one or more interested copyright owners, digital music providers, or significant nonblanket licensees, may file a petition with the Copyright Royalty Judges in the month of May to commence a proceeding to adjust the administrative assessment.

(II) Notice of the commencement of such proceeding shall be published in the Federal Register in the month of June following the filing of any petition, with a schedule of requested information and additional proceedings, as described in clause (iii)(III). The mechanical licensing collective and digital licensee coordinator shall participate in such proceeding, along with any interested copyright owners, digital music providers, or significant nonblanket licensees that have notified the Copyright Royalty Judges of their desire to participate.

(III) The determination of the adjusted administrative assessment, which shall be supported by a written record, shall be published in the Federal Register during June of the calendar year following the commencement of the proceeding. The adjusted administrative assessment shall take effect January 1 of the year following such publication.

(v) *ADOPTION OF VOLUNTARY AGREEMENTS.*—In lieu of reaching their own determination based on evaluation of relevant data, the Copyright Royalty Judges shall approve and adopt a negotiated agreement to establish the amount and terms of the administrative assessment that has been agreed to by the mechanical licensing collective and the digital licensee coordinator (or if none has been designated, interested digital music providers and significant nonblanket licensees representing more than half of the market for uses of musical works in covered activities), except that the Copyright Royalty Judges shall have the discretion to reject any such agreement for good cause shown. An administrative assessment adopted under this clause shall apply to all digital music providers and signifi-

*cant nonblanket licensees engaged in covered activities during the period the administrative assessment is in effect.*

(vi) *CONTINUING AUTHORITY TO AMEND.—The Copyright Royalty Judges shall retain continuing authority to amend a determination of an administrative assessment to correct technical or clerical errors, or modify the terms of implementation, for good cause, with any such amendment to be published in the Federal Register.*

(vii) *APPEAL OF ADMINISTRATIVE ASSESSMENT.—The determination of an administrative assessment by the Copyright Royalty Judges shall be appealable, not later than 30 calendar days after publication in the Federal Register, to the Court of Appeals for the District of Columbia Circuit by any party that fully participated in the proceeding. The administrative assessment as established by the Copyright Royalty Judges shall remain in effect pending the final outcome of any such appeal, and the mechanical licensing collective, digital licensee coordinator, digital music providers, and significant nonblanket licensees shall implement appropriate financial or other measures not later than 90 days after any modification of the assessment to reflect and account for such outcome.*

(viii) *REGULATIONS.—The Copyright Royalty Judges may adopt regulations to govern the conduct of proceedings under this paragraph.*

**(8) ESTABLISHMENT OF RATES AND TERMS UNDER BLANKET LICENSE.—**

(A) *RESTRICTIONS ON RATESETTING PARTICIPATION.—Neither the mechanical licensing collective nor the digital licensee coordinator shall be a party to a proceeding described in subsection (c)(1)(E), except that the mechanical licensing collective or the digital licensee coordinator may gather and provide financial and other information for the use of a party to such a proceeding and comply with requests for information as required under applicable statutory and regulatory provisions and rulings of the Copyright Royalty Judges.*

(B) *APPLICATION OF LATE FEES.—In any proceeding described in subparagraph (A) in which the Copyright Royalty Judges establish a late fee for late payment of royalties for uses of musical works under this section, such fee shall apply to covered activities under blanket licenses, as follows:*

(i) *Late fees for past due royalty payments shall accrue from the due date for payment until payment is received by the mechanical licensing collective.*

(ii) *The availability of late fees shall in no way prevent a copyright owner or the mechanical licensing collective from asserting any other rights or remedies to which such copyright owner or the mechanical licensing collective may be entitled under this title.*

(C) *INTERIM RATE AGREEMENTS IN GENERAL.*—For any covered activity for which no rate or terms have been established by the Copyright Royalty Judges, the mechanical licensing collective and any digital music provider may agree to an interim rate and terms for such activity under the blanket license, and any such rate and terms—

(i) shall be treated as nonprecedential and not cited or relied upon in any ratesetting proceeding before the Copyright Royalty Judges or any other tribunal; and

(ii) shall automatically expire upon the establishment of a rate and terms for such covered activity by the Copyright Royalty Judges, under subsection (c)(1)(E).

(D) *ADJUSTMENTS FOR INTERIM RATES.*—The rate and terms established by the Copyright Royalty Judges for a covered activity to which an interim rate and terms have been agreed under subparagraph (C) shall supersede the interim rate and terms and apply retroactively to the inception of the activity under the blanket license. In such case, not later than 90 days after the effective date of the rate and terms established by the Copyright Royalty Judges—

(i) if the rate established by the Copyright Royalty Judges exceeds the interim rate, the digital music provider shall pay to the mechanical licensing collective the amount of any underpayment of royalties due; or

(ii) if the interim rate exceeds the rate established by the Copyright Royalty Judges, the mechanical licensing collective shall credit the account of the digital music provider for the amount of any overpayment of royalties due.

(9) *TRANSITION TO BLANKET LICENSES.*—

(A) *SUBSTITUTION OF BLANKET LICENSE.*—On the license availability date, a blanket license shall, without any interruption in license authority enjoyed by such digital music provider, be automatically substituted for and supersede any existing compulsory license previously obtained under this section by the digital music provider from a copyright owner to engage in 1 or more covered activities with respect to a musical work, except that such substitution shall not apply to any authority obtained from a record company pursuant to a compulsory license to make and distribute permanent downloads unless and until such record company terminates such authority in writing to take effect at the end of a monthly reporting period, with a copy to the mechanical licensing collective.

(B) *EXPIRATION OF EXISTING LICENSES.*—Except to the extent provided in subparagraph (A), on and after the license availability date, licenses other than individual download licenses obtained under this section for covered activities prior to the license availability date shall no longer continue in effect.

(C) *TREATMENT OF VOLUNTARY LICENSES.*—A voluntary license for a covered activity in effect on the license availability date will remain in effect unless and until the voluntary license expires according to the terms of the voluntary license, or the parties agree to amend or terminate

*the voluntary license. In a case where a voluntary license for a covered activity entered into before the license availability date incorporates the terms of this section by reference, the terms so incorporated (but not the rates) shall be those in effect immediately prior to the license availability date, and those terms shall continue to apply unless and until such voluntary license is terminated or amended, or the parties enter into a new voluntary license.*

*(D) FURTHER ACCEPTANCE OF NOTICES FOR COVERED ACTIVITIES BY COPYRIGHT OFFICE.—On and after the enactment date—*

*(i) the Copyright Office shall no longer accept notices of intention with respect to covered activities; and*

*(ii) notices of intention filed before the enactment date will no longer be effective or provide license authority with respect to covered activities, except that before the license availability date there shall be no liability under section 501 for the reproduction or distribution of a musical work (or share thereof) in covered activities if a valid notice of intention was filed for such work (or share) before the enactment date.*

*(10) PRIOR UNLICENSED USES.—*

*(A) LIMITATION ON LIABILITY IN GENERAL.—A copyright owner that commences an action under section 501 on or after January 1, 2018, against a digital music provider for the infringement of the exclusive rights provided by paragraph (1) or (3) of section 106 arising from the unauthorized reproduction or distribution of a musical work by such digital music provider in the course of engaging in covered activities prior to the license availability date, shall, as the copyright owner's sole and exclusive remedy against the digital music provider, be eligible to recover the royalty prescribed under subsection (c)(1)(C) and chapter 8 of this title, from the digital music provider, provided that such digital music provider can demonstrate compliance with the requirements of subparagraph (B), as applicable. In all other cases the limitation on liability under this subparagraph shall not apply.*

*(B) REQUIREMENTS FOR LIMITATION ON LIABILITY.—The following requirements shall apply on the enactment date and through the end of the period that expires 90 days after the license availability date to digital music providers seeking to avail themselves of the limitation on liability described in subparagraph (A):*

*(i) Not later than 30 calendar days after first making a particular sound recording of a musical work available through its service via one or more covered activities, or 30 calendar days after the enactment date, whichever occurs later, a digital music provider shall engage in good-faith, commercially reasonable efforts to identify and locate each copyright owner of such musical work (or share thereof). Such required matching efforts shall include the following:*

*(I) Good-faith, commercially reasonable efforts to obtain from the owner of the corresponding sound*

recording made available through the digital music provider's service the following information:

(aa) Sound recording name, featured artist, sound recording copyright owner, international standard recording code, and other information commonly used in the industry to identify sound recordings and match them to the musical works they embody.

(bb) Any available musical work ownership information, including each songwriter and publisher name, percentage ownership share, and international standard musical work code.

(II) Employment of 1 or more bulk electronic matching processes that are available to the digital music provider through a third-party vendor on commercially reasonable terms, except that a digital music provider may rely on its own bulk electronic matching process if that process has capabilities comparable to or better than those available from a third-party vendor on commercially reasonable terms.

(ii) The required matching efforts shall be repeated by the digital music provider not less than once per month for so long as the copyright owner remains unidentified or has not been located.

(iii) If the required matching efforts are successful in identifying and locating a copyright owner of a musical work (or share thereof) by the end of the calendar month in which the digital music provider first makes use of the work, the digital music provider shall provide statements of account and pay royalties to such copyright owner in accordance with this section and applicable regulations.

(iv) If the copyright owner is not identified or located by the end of the calendar month in which the digital music provider first makes use of the work, the digital music provider shall accrue and hold royalties calculated under the applicable statutory rate in accordance with usage of the work, from initial use of the work until the accrued royalties can be paid to the copyright owner or are required to be transferred to the mechanical licensing collective, as follows:

(I) Accrued royalties shall be maintained by the digital music provider in accordance with generally accepted accounting principles.

(II) If a copyright owner of an unmatched musical work (or share thereof) is identified and located by or to the digital music provider before the license availability date, the digital music provider shall—

(aa) not later than 45 calendar days after the end of the calendar month during which the copyright owner was identified and located, pay the copyright owner all accrued roy-

*alties, such payment to be accompanied by a cumulative statement of account that includes all of the information that would have been provided to the copyright owner had the digital music provider been providing monthly statements of account to the copyright owner from initial use of the work in accordance with this section and applicable regulations, including the requisite certification under subsection (c)(2)(I);*

*(bb) beginning with the accounting period following the calendar month in which the copyright owner was identified and located, and for all other accounting periods prior to the license availability date, provide monthly statements of account and pay royalties to the copyright owner as required under this section and applicable regulations; and*

*(cc) beginning with the monthly royalty reporting period commencing on the license availability date, report usage and pay royalties for such musical work (or share thereof) for such reporting period and reporting periods thereafter to the mechanical licensing collective, as required under this subsection and applicable regulations.*

*(III) If a copyright owner of an unmatched musical work (or share thereof) is not identified and located by the license availability date, the digital music provider shall—*

*(aa) not later than 45 calendar days after the license availability date, transfer all accrued royalties to the mechanical licensing collective, such payment to be accompanied by a cumulative statement of account that includes all of the information that would have been provided to the copyright owner had the digital music provider been serving monthly statements of account on the copyright owner from initial use of the work in accordance with this section and applicable regulations, including the requisite certification under subsection (c)(2)(I), and accompanied by an additional certification by a duly authorized officer of the digital music provider that the digital music provider has fulfilled the requirements of clauses (i) and (ii) of subparagraph (B) but has not been successful in locating or identifying the copyright owner; and*

*(bb) beginning with the monthly royalty reporting period commencing on the license availability date, report usage and pay royalties for such musical work (or share thereof) for such period and reporting periods thereafter to the mechanical licensing collective, as*

required under this subsection and applicable regulations.

(v) A digital music provider that complies with the requirements of this subparagraph with respect to unmatched musical works (or shares of works) shall not be liable for or accrue late fees for late payments of royalties for such works until such time as the digital music provider is required to begin paying monthly royalties to the copyright owner or the mechanical licensing collective, as applicable.

(C) ADJUSTED STATUTE OF LIMITATIONS.—Notwithstanding anything to the contrary in section 507(b), with respect to any claim of infringement of the exclusive rights provided by paragraphs (1) and (3) of section 106 against a digital music provider arising from the unauthorized reproduction or distribution of a musical work by such digital music provider in the course of engaging in covered activities that accrued not more than 3 years prior to the license availability date, such action may be commenced not later than the later of—

(i) 3 years after the date on which the claim accrued;

or

(ii) 2 years after the license availability date.

(D) OTHER RIGHTS AND REMEDIES PRESERVED.—Except as expressly provided in this paragraph, nothing in this paragraph shall be construed to alter, limit, or negate any right or remedy of a copyright owner with respect to unauthorized use of a musical work.

(E) REMEDY IN FEDERAL DISTRICT COURT.—A person may bring a claim in a Federal district court of competent jurisdiction for an issue that is not adequately resolved by the board of directors or a committee of the mechanical licensing collective, as applicable.

(11) LEGAL PROTECTIONS FOR LICENSING ACTIVITIES.—

(A) EXEMPTION FOR COMPULSORY LICENSE ACTIVITIES.—The antitrust exemption described in subsection (c)(1)(D) shall apply to negotiations and agreements between and among copyright owners and persons entitled to obtain a compulsory license for covered activities, and common agents acting on behalf of such copyright owners or persons, including with respect to the administrative assessment established under this subsection.

(B) LIMITATION ON COMMON AGENT EXEMPTION.—Notwithstanding the antitrust exemption provided in subsection (c)(1)(D) and subparagraph (A) of this paragraph (except for the administrative assessment referenced in such subparagraph (A) and except as provided in paragraph (8)(C)), neither the mechanical licensing collective nor the digital licensee coordinator shall serve as a common agent with respect to the establishment of royalty rates or terms under this section.

(C) ANTITRUST EXEMPTION FOR ADMINISTRATIVE ACTIVITIES.—Notwithstanding any provision of the antitrust laws, copyright owners and persons entitled to obtain a compulsory license under this section may designate the mechan-

ical licensing collective to administer voluntary licenses for the reproduction or distribution of musical works in covered activities on behalf of such copyright owners and persons, subject to the following conditions:

(i) Each copyright owner shall establish the royalty rates and material terms of any such voluntary license individually and not in agreement, combination, or concert with any other copyright owner.

(ii) Each person entitled to obtain a compulsory license under this section shall establish the royalty rates and material terms of any such voluntary license individually and not in agreement, combination, or concert with any other digital music provider.

(iii) The mechanical licensing collective shall maintain the confidentiality of the voluntary licenses in accordance with the confidentiality provisions prescribed by the Register of Copyrights under paragraph (12)(C).

(D) **LIABILITY FOR GOOD-FAITH ACTIVITIES.**—The mechanical licensing collective shall not be liable to any person or entity based on a claim arising from its good-faith administration of policies and procedures adopted and implemented to carry out the responsibilities described in subparagraphs (J) and (K) of paragraph (3), except to the extent of correcting an underpayment or overpayment of royalties as provided in paragraph (3)(L)(i)(VI), but the collective may participate in a legal proceeding as a stakeholder party if the collective is holding funds that are the subject of a dispute between copyright owners. For purposes of this subparagraph, the term “good-faith administration” means administration in a manner that is not grossly negligent.

(E) **PREEMPTION OF STATE PROPERTY LAWS.**—The holding and distribution of funds by the mechanical licensing collective in accordance with this subsection shall supersede and preempt any State law (including common law) concerning escheatment or abandoned property, or any analogous provision, that might otherwise apply.

(12) **REGULATIONS.**—

(A) **ADOPTION BY REGISTER OF COPYRIGHTS AND COPYRIGHT ROYALTY JUDGES.**—The Register of Copyrights may conduct such proceedings and adopt such regulations as may be necessary or appropriate to effectuate the provisions of this subsection, except for regulations concerning proceedings before the Copyright Royalty Judges to establish the administrative assessment, which shall be adopted by the Copyright Royalty Judges.

(B) **JUDICIAL REVIEW OF REGULATIONS.**—Except as provided in paragraph (7)(D)(vii), regulations adopted under this subsection shall be subject to judicial review pursuant to chapter 7 of title 5.

(C) **PROTECTION OF CONFIDENTIAL INFORMATION.**—The Register of Copyrights shall adopt regulations to provide for the appropriate procedures to ensure that confidential, private, proprietary, or privileged information contained in the records of the mechanical licensing collective and digital licensee coordinator is not improperly disclosed or

*used, including through any disclosure or use by the board of directors or personnel of either entity, and specifically including the unclaimed royalties oversight committee and the dispute resolution committee of the mechanical licensing collective.*

(13) SAVINGS CLAUSES.—

(A) LIMITATION ON ACTIVITIES AND RIGHTS COVERED.—

*This subsection applies solely to uses of musical works subject to licensing under this section. The blanket license shall not be construed to extend or apply to activities other than covered activities or to rights other than the exclusive rights of reproduction and distribution licensed under this section, or serve or act as the basis to extend or expand the compulsory license under this section to activities and rights not covered by this section on the day before the enactment date.*

(B) RIGHTS OF PUBLIC PERFORMANCE NOT AFFECTED.—

*The rights, protections, and immunities granted under this subsection, the data concerning musical works collected and made available under this subsection, and the definitions under subsection (e) shall not extend to, limit, or otherwise affect any right of public performance in a musical work; and*

(5) *by adding at the end the following*

(e) DEFINITIONS.—*As used in this section:*

(1) ACCRUED INTEREST.—*The term “accrued interest” means interest accrued on accrued royalties, as described in subsection (d)(3)(H)(ii).*

(2) ACCRUED ROYALTIES.—*The term “accrued royalties” means royalties accrued for the reproduction or distribution of a musical work (or share thereof) in a covered activity, calculated in accordance with the applicable royalty rate under this section.*

(3) ADMINISTRATIVE ASSESSMENT.—*The term “administrative assessment” means the fee established pursuant to subsection (d)(7)(D).*

(4) AUDIT.—*The term “audit” means a royalty compliance examination to verify the accuracy of royalty payments, or the conduct of such an examination, as applicable.*

(5) BLANKET LICENSE.—*The term “blanket license” means a compulsory license described in subsection (d)(1)(A) to engage in covered activities.*

(6) COLLECTIVE TOTAL COSTS.—*The term “collective total costs”—*

*(A) means the total costs of establishing, maintaining, and operating the mechanical licensing collective to fulfill its statutory functions, including—*

- (i) startup costs;*
- (ii) financing, legal, audit, and insurance costs;*
- (iii) investments in information technology, infrastructure, and other long-term resources;*
- (iv) outside vendor costs;*
- (v) costs of licensing, royalty administration, and enforcement of rights;*
- (vi) costs of bad debt; and*

(vii) costs of automated and manual efforts to identify and locate copyright owners of musical works (and shares of such musical works) and match sound recordings to the musical works the sound recordings embody; and

(B) does not include any added costs incurred by the mechanical licensing collective to provide services under voluntary licenses.

(7) *COVERED ACTIVITY*.—The term “covered activity” means the activity of making a digital phonorecord delivery of a musical work, including in the form of a permanent download, limited download, or interactive stream, where such activity qualifies for a compulsory license under this section.

(8) *DIGITAL MUSIC PROVIDER*.—The term “digital music provider” means a person (or persons operating under the authority of that person) that, with respect to a service engaged in covered activities—

(A) has a direct contractual, subscription, or other economic relationship with end users of the service, or, if no such relationship with end users exists, exercises direct control over the provision of the service to end users;

(B) is able to fully report on any revenues and consideration generated by the service; and

(C) is able to fully report on usage of sound recordings of musical works by the service (or procure such reporting).

(9) *DIGITAL LICENSEE COORDINATOR*.—The term “digital licensee coordinator” means the entity most recently designated pursuant to subsection (d)(5).

(10) *DIGITAL PHONORECORD DELIVERY*.—The term “digital phonorecord delivery” means each individual delivery of a phonorecord by digital transmission of a sound recording that 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 musical work embodied therein, and includes a permanent download, a limited download, or an interactive stream. A digital phonorecord delivery does not result from a real-time, noninteractive 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. A digital phonorecord delivery does not include the digital transmission of sounds accompanying a motion picture or other audiovisual work as defined in section 101.

(11) *ENACTMENT DATE*.—The term “enactment date” means the date of the enactment of the Musical Works Modernization Act.

(12) *INDIVIDUAL DOWNLOAD LICENSE*.—The term “individual download license” means a compulsory license obtained by a record company to make and distribute, or authorize the making and distribution of, permanent downloads embodying a specific individual musical work.

(13) *INTERACTIVE STREAM*.—The term “interactive stream” means a digital transmission of a sound recording of a musical

work in the form of a stream, where the performance of the sound recording by means of such transmission is not exempt under section 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under section 114(d)(2). An interactive stream is a digital phonorecord delivery.

(14) *INTERESTED*.—The term “interested”, as applied to a party seeking to participate in a proceeding under subsection (d)(7)(D), is a party as to which the Copyright Royalty Judges have not determined that the party lacks a significant interest in such proceeding.

(15) *LICENSE AVAILABILITY DATE*.—The term “license availability date” means January 1 following the expiration of the two-year period beginning on the enactment date.

(16) *LIMITED DOWNLOAD*.—The term “limited download” means a digital transmission of a sound recording of a musical work in the form of a download, where such sound recording is accessible for listening only for a limited amount of time or specified number of times.

(17) *MATCHED*.—The term “matched”, as applied to a musical work (or share thereof), means that the copyright owner of such work (or share thereof) has been identified and located.

(18) *MECHANICAL LICENSING COLLECTIVE*.—The term “mechanical licensing collective” means the entity most recently designated as such by the Register of Copyrights under subsection (d)(3).

(19) *MECHANICAL LICENSING COLLECTIVE BUDGET*.—The term “mechanical licensing collective budget” means a statement of the financial position of the mechanical licensing collective for a fiscal year or quarter thereof based on estimates of expenditures during the period and proposals for financing those expenditures, including a calculation of the collective total costs.

(20) *MUSICAL WORKS DATABASE*.—The term “musical works database” means the database described in subsection (d)(3)(E).

(21) *NONPROFIT*.—The term “nonprofit” means a nonprofit created or organized in a State.

(22) *NOTICE OF LICENSE*.—The term “notice of license” means a notice from a digital music provider provided under subsection (d)(2)(A) for purposes of obtaining a blanket license.

(23) *NOTICE OF NONBLANKET ACTIVITY*.—The term “notice of nonblanket activity” means a notice from a significant nonblanket licensee provided under subsection (d)(6)(A) for purposes of notifying the mechanical licensing collective that the license has been engaging in covered activities.

(24) *PERMANENT DOWNLOAD*.—The term “permanent download” means a digital transmission of a sound recording of a musical work in the form of a download, where such sound recording is accessible for listening without restriction as to the amount of time or number of times it may be accessed.

(25) *QUALIFIED AUDITOR*.—The term “qualified auditor” means an independent, certified public accountant with experience performing music royalty audits.

(26) *RECORD COMPANY*.—The term “record company” means an entity that invests in, produces, and markets sound recordings of musical works, and distributes such sound recordings

for remuneration through multiple sales channels, including a corporate affiliate of such an entity engaged in distribution of sound recordings.

(27) *REPORT OF USAGE*.—The term “report of usage” means a report reflecting an entity’s usage of musical works in covered activities described in subsection (d)(4)(A).

(28) *REQUIRED MATCHING EFFORTS*.—The term “required matching efforts” means efforts to identify and locate copyright owners of musical works as described in subsection (d)(10)(B)(i).

(29) *SERVICE*.—The term “service”, as used in relation to covered activities, means any site, facility, or offering by or through which sound recordings of musical works are digitally transmitted to members of the public.

(30) *SHARE*.—The term “share”, as applied to a musical work, means a fractional ownership interest in such work.

(31) *SIGNIFICANT NONBLANKET LICENSEE*.—The term “significant nonblanket licensee”—

(A) means an entity, including a group of entities under common ownership or control that, acting under the authority of one or more voluntary licenses or individual download licenses, offers a service engaged in covered activities, and such entity or group of entities—

(i) is not currently operating under a blanket license and is not obligated to provide reports of usage reflecting covered activities under subsection (d)(4)(A);

(ii) has a direct contractual, subscription, or other economic relationship with end users of the service or, if no such relationship with end users exists, exercises direct control over the provision of the service to end users; and

(iii) either—

(I) on any day in a calendar month, makes more than 5,000 different sound recordings of musical works available through such service; or

(II) derives revenue or other consideration in connection with such covered activities greater than \$50,000 in a calendar month, or total revenue or other consideration greater than \$500,000 during the preceding 12 calendar months; and

(B) does not include—

(i) an entity whose covered activity consists solely of free-to-the-user streams of segments of sound recordings of musical works that do not exceed 90 seconds in length, are offered only to facilitate a licensed use of musical works that is not a covered activity, and have no revenue directly attributable to such streams constituting the covered activity; or

(ii) a “public broadcasting entity” as defined in section 118(f).

(32) *SONGWRITER*.—The term “songwriter” means the author of all or part of a musical work, including a composer or lyricist.

(33) *STATE*.—The term “State” means each State of the United States, the District of Columbia, and each territory or possession of the United States.

(34) *UNCLAIMED ACCRUED ROYALTIES.*—The term “unclaimed accrued royalties” means accrued royalties eligible for distribution under subsection (d)(3)(J).

(35) *UNMATCHED.*—The term “unmatched”, as applied to a musical work (or share thereof), means that the copyright owner of such work (or share thereof) has not been identified or located.

(36) *VOLUNTARY LICENSE.*—The term “voluntary license” means a license for use of a musical work (or share thereof) other than a compulsory license obtained under this section.

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## CHAPTER 8—PROCEEDINGS BY COPYRIGHT ROYALTY JUDGES

Sec.

801. Copyright Royalty Judges; appointment and functions.

802. Copyright Royalty Judgeships; staff.

803. Proceedings of Copyright Royalty Judges.

804. Institution of proceedings.

805. General rule for voluntarily negotiated agreements.

### § 801. Copyright Royalty Judges; appointment and functions

(a) *APPOINTMENT.*—The Librarian of Congress shall appoint 3 full-time Copyright Royalty Judges, and shall appoint 1 of the 3 as the Chief Copyright Royalty Judge. The Librarian shall make appointments to such positions after consultation with the Register of Copyrights.

(b) *FUNCTIONS.*—Subject to the provisions of this chapter, the functions of the Copyright Royalty Judges shall be as follows:

(1) To make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119, and 1004. [The rates applicable under sections 114(f)(1)(B), 115, and 116 shall be calculated to achieve the following objectives:]

[(A) To maximize the availability of creative works to the public.

[(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

[(C) To reflect the relative roles of the copyright owner 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 for creative expression and media for their communication.

[(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices].

(2) To make determinations concerning the adjustment of the copyright royalty rates under section 111 solely in accordance with the following provisions:

(A) The rates established by section 111(d)(1)(B) may be adjusted to reflect—

(i) national monetary inflation or deflation; or

(ii) changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar level of the royalty fee per subscriber which existed as of the date of October 19, 1976, except that—

(I) if the average rates charged cable system subscribers for the basic service of providing secondary transmissions are changed so that the average rates exceed national monetary inflation, no change in the rates established by section 111(d)(1)(B) shall be permitted; and

(II) no increase in the royalty fee shall be permitted based on any reduction in the average number of distant signal equivalents per subscriber. The Copyright Royalty Judges may consider all factors relating to the maintenance of such level of payments, including, as an extenuating factor, whether the industry has been restrained by subscriber rate regulating authorities from increasing the rates for the basic service of providing secondary transmissions.

(B) In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by section 111(d)(1)(B) may be adjusted to ensure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations. In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, the Copyright Royalty Judges shall consider, among other factors, the economic impact on copyright owners and users; except that no adjustment in royalty rates shall be made under this subparagraph with respect to any distant signal equivalent or fraction thereof represented by—

(i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal; or

(ii) a television broadcast signal first carried after April 15, 1976, pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15, 1976.

(C) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(1)(B) may be adjusted to assure that such rates are

reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

(D) The gross receipts limitations established by section 111(d)(1)(C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section, and the royalty rate specified therein shall not be subject to adjustment.

(3)(A) To authorize the distribution, under sections 111, 119, and 1007, of those royalty fees collected under sections 111, 119, and 1005, as the case may be, to the extent that the Copyright Royalty Judges have found that the distribution of such fees is not subject to controversy.

(B) In cases where the Copyright Royalty Judges determine that controversy exists, the Copyright Royalty Judges shall determine the distribution of such fees, including partial distributions, in accordance with section 111, 119, or 1007, as the case may be.

(C) Notwithstanding section 804(b)(8), the Copyright Royalty Judges, at any time after the filing of claims under section 111, 119, or 1007, may, upon motion of one or more of the claimants and after publication in the Federal Register of a request for responses to the motion from interested claimants, make a partial distribution of such fees, if, based upon all responses received during the 30-day period beginning on the date of such publication, the Copyright Royalty Judges conclude that no claimant entitled to receive such fees has stated a reasonable objection to the partial distribution, and all such claimants—

(i) agree to the partial distribution;

(ii) sign an agreement obligating them to return any excess amounts to the extent necessary to comply with the final determination on the distribution of the fees made under subparagraph (B);

(iii) file the agreement with the Copyright Royalty Judges; and

(iv) agree that such funds are available for distribution.

(D) The Copyright Royalty Judges and any other officer or employee acting in good faith in distributing funds under subparagraph (C) shall not be held liable for the payment of any excess fees under subparagraph (C). The Copyright Royalty Judges shall, at the time the final determination is made, calculate any such excess amounts.

(4) To accept or reject royalty claims filed under sections 111, 119, and 1007, on the basis of timeliness or the failure to establish the basis for a claim.

(5) To accept or reject rate adjustment petitions as provided in section 804 and petitions to participate as provided in section 803(b) (1) and (2).

(6) To determine the status of a digital audio recording device or a digital audio interface device under sections 1002 and 1003, as provided in section 1010.

(7)(A) To adopt as a basis for statutory terms and rates or as a basis for the distribution of statutory royalty payments, an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding, except that—

(i) the Copyright Royalty Judges shall provide to those that would be bound by the terms, rates, or other determination set by any agreement in a proceeding to determine royalty rates an opportunity to comment on the agreement and shall provide to participants in the proceeding under section 803(b)(2) that would be bound by the terms, rates, or other determination set by the agreement an opportunity to comment on the agreement and object to its adoption as a basis for statutory terms and rates; and

(ii) the Copyright Royalty Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement, if any participant described in clause (i) objects to the agreement and the Copyright Royalty Judges conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates.

(B) License agreements voluntarily negotiated pursuant to section 112(e)(5), ~~114(f)(3)~~ 114(f)(2), 115(c)(3)(E)(i), 116(c), or 118(b)(2) that do not result in statutory terms and rates shall not be subject to clauses (i) and (ii) of subparagraph (A).

(C) Interested parties may negotiate and agree to, and the Copyright Royalty Judges may adopt, an agreement that specifies as terms notice and recordkeeping requirements that apply in lieu of those that would otherwise apply under regulations.

*(8) To determine the administrative assessment to be paid by digital music providers under section 115(d). The provisions of section 115(d) shall apply to the conduct of proceedings by the Copyright Royalty Judges under section 115(d) and not the procedures described in this section, or section 803, 804, or 805.*

~~[(8)]~~ (9) To perform other duties, as assigned by the Register of Copyrights within the Library of Congress, except as provided in section 802(g), at times when Copyright Royalty Judges are not engaged in performing the other duties set forth in this section.

(c) RULINGS.—The Copyright Royalty Judges may make any necessary procedural or evidentiary rulings in any proceeding under this chapter and may, before commencing a proceeding under this chapter, make any such rulings that would apply to the proceedings conducted by the Copyright Royalty Judges.

(d) ADMINISTRATIVE SUPPORT.—The Librarian of Congress shall provide the Copyright Royalty Judges with the necessary administrative services related to proceedings under this chapter.

(e) LOCATION IN LIBRARY OF CONGRESS.—The offices of the Copyright Royalty Judges and staff shall be in the Library of Congress.

(f) EFFECTIVE DATE OF ACTIONS.—On and after the date of the enactment of the Copyright Royalty and Distribution Reform Act of 2004, in any case in which time limits are prescribed under this title for performance of an action with or by the Copyright Royalty Judges, and in which the last day of the prescribed period falls on

a Saturday, Sunday, holiday, or other nonbusiness day within the District of Columbia or the Federal Government, the action may be taken on the next succeeding business day, and is effective as of the date when the period expired.

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**§ 803. Proceedings of Copyright Royalty Judges**

(a) PROCEEDINGS.—

(1) IN GENERAL.—The Copyright Royalty Judges shall act in accordance with this title, and to the extent not inconsistent with this title, in accordance with subchapter II of chapter 5 of title 5, in carrying out the purposes set forth in section 801. The Copyright Royalty Judges shall act in accordance with regulations issued by the Copyright Royalty Judges and the Librarian of Congress, and on the basis of a written record, prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress, the Register of Copyrights, copyright arbitration royalty panels (to the extent those determinations are not inconsistent with a decision of the Librarian of Congress or the Register of Copyrights), and the Copyright Royalty Judges (to the extent those determinations are not inconsistent with a decision of the Register of Copyrights that was timely delivered to the Copyright Royalty Judges pursuant to section 802(f)(1) (A) or (B), or with a decision of the Register of Copyrights pursuant to section 802(f)(1)(D)), under this chapter, and decisions of the court of appeals under this chapter before, on, or after the effective date of the Copyright Royalty and Distribution Reform Act of 2004.

\* \* \* \* \*

(E) CONTINUITY OF RATES AND TERMS.—

(i) If the decision of the Copyright Royalty Judges on any motion for a rehearing is not rendered before the expiration of the statutory rates and terms that were previously in effect, in the case of a proceeding to determine successors to rates and terms that expire on a specified date, then—

(I) the initial determination of the Copyright Royalty Judges that is the subject of the rehearing motion shall be effective as of the day following the date on which the rates and terms that were previously in effect expire; and

(II) in the case of a proceeding under section 114(f)(1)(C) [or 114(f)(2)(C)], royalty rates and terms shall, for purposes of section [114(f)(4)(B)] 114(f)(3)(B), be deemed to have been set at those rates and terms contained in the initial determination of the Copyright Royalty Judges that is the subject of the rehearing motion, as of the date of that determination.

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**§ 804. Institution of proceedings**

(a) FILING OF PETITION.—With respect to proceedings referred to in paragraphs (1) and (2) of section 801(b) concerning the determination or adjustment of royalty rates as provided in sections 111, 112, 114, 115, 116, 118, 119, and 1004, during the calendar years specified in the schedule set forth in subsection (b), any owner or user of a copyrighted work whose royalty rates are specified by this title, or are established under this chapter before or after the enactment of the Copyright Royalty and Distribution Reform Act of 2004, may file a petition with the Copyright Royalty Judges declaring that the petitioner requests a determination or adjustment of the rate. The Copyright Royalty Judges shall make a determination as to whether the petitioner has such a significant interest in the royalty rate in which a determination or adjustment is requested. If the Copyright Royalty Judges determine that the petitioner has such a significant interest, the Copyright Royalty Judges shall cause notice of this determination, with the reasons for such determination, to be published in the Federal Register, together with the notice of commencement of proceedings under this chapter. With respect to proceedings under paragraph (1) of section 801(b) concerning the determination or adjustment of royalty rates as provided in sections 112 and 114, during the calendar years specified in the schedule set forth in subsection (b), the Copyright Royalty Judges shall cause notice of commencement of proceedings under this chapter to be published in the Federal Register as provided in section 803(b)(1)(A).

(b) TIMING OF PROCEEDINGS.—

(1) SECTION 111 PROCEEDINGS.—(A) A petition described in subsection (a) to initiate proceedings under section 801(b)(2) concerning the adjustment of royalty rates under section 111 to which subparagraph (A) or (D) of section 801(b)(2) applies may be filed during the year 2015 and in each subsequent fifth calendar year.

(B) In order to initiate proceedings under section 801(b)(2) concerning the adjustment of royalty rates under section 111 to which subparagraph (B) or (C) of section 801(b)(2) applies, within 12 months after an event described in either of those subsections, any owner or user of a copyrighted work whose royalty rates are specified by section 111, or by a rate established under this chapter before or after the enactment of the Copyright Royalty and Distribution Reform Act of 2004, may file a petition with the Copyright Royalty Judges declaring that the petitioner requests an adjustment of the rate. The Copyright Royalty Judges shall then proceed as set forth in subsection (a) of this section. Any change in royalty rates made under this chapter pursuant to this subparagraph may be reconsidered in the year 2015, and each fifth calendar year thereafter, in accordance with the provisions in section 801(b)(2)(B) or (C), as the case may be. A petition for adjustment of rates established by section 111(d)(1)(B) as a result of a change in the rules and regulations of the Federal Communications Commission shall set forth the change on which the petition is based.

(C) Any adjustment of royalty rates under section 111 shall take effect as of the first accounting period commencing after

the publication of the determination of the Copyright Royalty Judges in the Federal Register, or on such other date as is specified in that determination.

(2) CERTAIN SECTION 112 PROCEEDINGS.—Proceedings under this chapter shall be commenced in the year 2007 to determine reasonable terms and rates of royalty payments for the activities described in section 112(e)(1) relating to the limitation on exclusive rights specified by section 114(d)(1)(C)(iv), to become effective on January 1, 2009. Such proceedings shall be repeated in each subsequent fifth calendar year.

(3) SECTION 114 AND CORRESPONDING 112 PROCEEDINGS.—

(A) FOR ELIGIBLE NONSUBSCRIPTION SERVICES AND NEW SUBSCRIPTION SERVICES.—Proceedings under this chapter shall be commenced as soon as practicable after the date of enactment of the Copyright Royalty and Distribution Reform Act of 2004 to determine reasonable terms and rates of royalty payments under sections 114 and 112 for the activities of eligible nonsubscription transmission services and new subscription services, to be effective for the period beginning on January 1, 2006, and ending on December 31, 2010. Such proceedings shall next be commenced in January 2009 to determine reasonable terms and rates of royalty payments, to become effective on January 1, 2011. Thereafter, such proceedings shall be repeated in each subsequent fifth calendar year.

(B) FOR PREEXISTING SUBSCRIPTION AND SATELLITE DIGITAL AUDIO RADIO SERVICES.—Proceedings under this chapter shall be commenced in January 2006 to determine reasonable terms and rates of royalty payments under sections 114 and 112 for the activities of preexisting subscription services, to be effective during the period beginning on January 1, 2008, and ending on December 31, 2012, and preexisting satellite digital audio radio services, to be effective during the period beginning on January 1, 2007, and ending on December 31, 2012. Such proceedings shall next be commenced in 2011 to determine reasonable terms and rates of royalty payments, to become effective on January 1, 2013. Thereafter, such proceedings shall be repeated in each subsequent fifth calendar year.

(C)(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.

(ii) Not later than 30 days after a petition to determine rates and terms for a new type of service is filed by any copyright owner of sound recordings, or such new type of service, indicating that such new type of service is or is about to become operational, the Copyright Royalty Judges shall issue a notice for a proceeding to determine rates and terms for such service.

(iii) The proceeding shall follow the schedule set forth in subsections (b), (c), and (d) of section 803, except that—

(I) the determination shall be issued by not later than 24 months after the publication of the notice under clause (ii); and

(II) the decision shall take effect as provided in subsections (c)(2) and (d)(2) of section 803 and section ~~114(f)(4)(B)(ii)~~ *114(f)(3)(B)(ii)* and (C).

(iv) 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.

(4) SECTION 115 PROCEEDINGS.—A petition described in subsection (a) to initiate proceedings under section 801(b)(1) concerning the adjustment or determination of royalty rates as provided in section 115 may be filed in the year 2006 and in each subsequent fifth calendar year, or at such other times as the parties have agreed under section 115(c)(3) (B) and (C).

(5) SECTION 116 PROCEEDINGS.—(A) A petition described in subsection (a) to initiate proceedings under section 801(b) concerning the determination of royalty rates and terms as provided in section 116 may be filed at any time within 1 year after negotiated licenses authorized by section 116 are terminated or expire and are not replaced by subsequent agreements.

(B) If a negotiated license authorized by section 116 is terminated or expires and is not replaced by another such license agreement which provides permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the 1-year period ending March 1, 1989, the Copyright Royalty Judges shall, upon petition filed under paragraph (1) within 1 year after such termination or expiration, commence a proceeding to promptly establish an interim royalty rate or rates for the public performance by means of a coin-operated phonorecord player of nondramatic musical works embodied in phonorecords which had been subject to the terminated or expired negotiated license agreement. Such rate or rates shall be the same as the last such rate or rates and shall remain in force until the conclusion of proceedings by the Copyright Royalty Judges, in accordance with section 803, to adjust the royalty rates applicable to such works, or until superseded by a new negotiated license agreement, as provided in section 116(b).

(6) SECTION 118 PROCEEDINGS.—A petition described in subsection (a) to initiate proceedings under section 801(b)(1) concerning the determination of reasonable terms and rates of royalty payments as provided in section 118 may be filed in the year 2006 and in each subsequent fifth calendar year.

(7) SECTION 1004 PROCEEDINGS.—A petition described in subsection (a) to initiate proceedings under section 801(b)(1) concerning the adjustment of reasonable royalty rates under section 1004 may be filed as provided in section 1004(a)(3).

(8) PROCEEDINGS CONCERNING DISTRIBUTION OF ROYALTY FEES.—With respect to proceedings under section 801(b)(3) concerning the distribution of royalty fees in certain circumstances under section 111, 119, or 1007, the Copyright Royalty Judges shall, upon a determination that a controversy exists concerning such distribution, cause to be published in the Federal

Register notice of commencement of proceedings under this chapter.

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**CHAPTER 14—UNAUTHORIZED DIGITAL PERFORMANCE OF PRE-1972 SOUND RECORDINGS**

Sec.

1401. Unauthorized Digital Performance of Pre-1972 Sound Recordings.

**§ 1401. Unauthorized Digital Performance of Pre-1972 Sound Recordings**

(a) *UNAUTHORIZED ACTS.*—Anyone who, before February 15, 2067, and without the consent of the rights owner, performs publicly, by means of a digital audio transmission, a sound recording fixed on or after January 1, 1923, and before February 15, 1972, shall be subject to the remedies provided in sections 502 through 505 to the same extent as an infringer of copyright.

(b) *CERTAIN AUTHORIZED TRANSMISSIONS.*—A digital audio transmission of a sound recording fixed on or after January 1, 1923, and before February 15, 1972, shall, for purposes of subsection (a), be considered to be authorized and made with the consent of the rights owner if—

(1) the transmission is made by a transmitting entity that is publicly performing sound recordings fixed on or after February 15, 1972, by means of digital audio transmissions subject to section 114;

(2) the transmission would satisfy the requirements for statutory licensing under section 114(d)(2), or would be exempt under section 114(d)(1), if the sound recording were fixed on or after February 15, 1972;

(3) in the case of a transmission that would not be exempt under section 114(d)(1) as described in paragraph (2), the transmitting entity pays statutory royalties and provides notice of its use of the relevant sound recording in the same manner as is required by regulations adopted by the Copyright Royalty Judges for sound recordings fixed on or after February 15, 1972; and

(4) in the case of a transmission that would not be exempt under section 114(d)(1) as described in paragraph (2), the transmitting entity otherwise satisfies the requirements for statutory licensing under section 114(f)(3)(B).

(c) *TRANSMISSIONS BY DIRECT LICENSING OF STATUTORY SERVICES.*—

(1) *IN GENERAL.*—A transmission of a sound recording fixed on or after January 1, 1923, and before February 15, 1972, shall, for purposes of subsection (a), be considered to be authorized and made with the consent of the rights owner if such transmission is included in a license agreement voluntarily negotiated at any time between the rights owner and the entity performing the sound recording.

(2) *PAYMENT OF ROYALTIES TO NONPROFIT COLLECTIVE.*—To the extent that a license agreement described in paragraph (1) and entered into on or after the date of the enactment of this section extends to digital audio transmissions of a sound re-

ording fixed on or after January 1, 1923, and before February 15, 1972, that meet the conditions of subsection (b), the licensee shall pay, to the collective designated to distribute receipts from the licensing of transmissions in accordance with section 114(f), 50 percent of the performance royalties for the transmissions due under the license, with such royalties fully credited as payments due under the license.

(3) *DISTRIBUTION OF ROYALTIES BY COLLECTIVE.*—The collective described in paragraph (2) shall, in accordance with subparagraphs (B) through (D) of section 114(g)(2), and paragraphs (5) and (6) of section 114(g), distribute the royalties received under paragraph (2) under the license described in paragraph (2). Such payments shall be the only payments to which featured and nonfeatured artists are entitled by virtue of the transmissions described in paragraph (2) under the license.

(4) *RULE OF CONSTRUCTION.*—This subsection does not prohibit any other license from directing the licensee to pay other royalties due to featured and nonfeatured artists for such transmissions to the collective designated to distribute receipts from the licensing of transmissions in accordance with section 114(f).

(d) *RELATIONSHIP TO STATE LAW.*—

(1) *IN GENERAL.*—Nothing in this section shall be construed to annul or limit any rights or remedies under the common law or statutes of any State for sound recordings fixed before February 15, 1972, except, notwithstanding section 301(c), for the following:

(A) This section preempts any claim of common law copyright or equivalent right under the laws of any State arising from any digital audio transmission that is made, on and after the date of the enactment of this section, of a sound recording fixed on or after January 1, 1923, and before February 15, 1972.

(B) This section preempts any claim of common law copyright or equivalent right under the laws of any State arising from any reproduction that is made, on and after the date of the enactment of this section, of a sound recording fixed on or after January 1, 1923, and before February 15, 1972, and that would satisfy the requirements for statutory licensing under paragraphs (1) and (6) of section 112(e), if the sound recording were fixed on or after February 15, 1972.

(C) This section preempts any claim of common law copyright or equivalent right under the laws of any State arising from any digital audio transmission or reproduction that is made, before the date of the enactment of this section, of a sound recording fixed on or after January 1, 1923, and before February 15, 1972, if—

(i) the digital audio transmission would have satisfied the requirements for statutory licensing under section 114(d)(2) or been exempt under section 114(d)(1), or the reproduction would have satisfied the requirements of section 112(e)(1), as the case may be, if the sound recording were fixed on or after February 15, 1972; and

(ii) either—

(I) *except in the case of a transmission that would have been exempt under section 114(d)(1), the transmitting entity, not later than 270 days after the date of the enactment of this section, pays statutory royalties and provides notice of the use of the relevant sound recordings in the same manner as is required by regulations adopted by the Copyright Royalty Judges for sound recordings that are protected under this title for all the digital audio transmissions and reproductions satisfying the requirements for statutory licensing under sections 112(e)(1) and 114(d)(2) during the 3 year period ending on the date of the enactment of this section;*

*or*

(II) *an agreement voluntarily negotiated between the rights owner and the entity performing the sound recording authorizes or waives liability for any such transmission or reproduction and the transmitting entity has complied with all provisions of such agreement for any such transmission or reproduction.*

(2) **RULE OF CONSTRUCTION FOR COMMON LAW COPYRIGHT.**—*For purposes of subparagraphs (A) through (C) of paragraph (1), a claim of common law copyright or equivalent right under the laws of any State includes a claim that characterizes conduct subject to such subparagraphs as an unlawful distribution, act of record piracy, or similar violation.*

(3) **RULE OF CONSTRUCTION FOR PUBLIC PERFORMANCE RIGHTS.**—*Nothing in this section shall be construed to recognize or negate the existence of public performance rights in sound recordings under the laws of any State.*

(e) **LIMITATIONS ON REMEDIES.**—

(1) **FAIR USE; USES BY LIBRARIES, ARCHIVES, AND EDUCATIONAL INSTITUTIONS.**—

“(A) **IN GENERAL.**—*The limitations on the exclusive rights of a copyright owner described in sections 107, 108, and 110 shall apply to a claim under subsection (a) of this section for the unauthorized performance of a sound recording fixed on or after January 1, 1923, and before February 15, 1972.*

(B) **RULE OF CONSTRUCTION FOR SECTION 108(H).**—*With respect to the application of section 108(h) to a claim for unauthorized performance of a sound recording first fixed on or after January 1, 1923, and before February 15, 1972, under subsection (a) of this section, the phrase ‘during the last 20 years of any term of copyright of a published work’ in such section 108(h) shall be construed to mean at any time after the effective date of this section.*

(2) **ACTIONS.**—*The limitations on actions described in section 507 shall apply to a claim under subsection (a) of this section for the unauthorized performance of a sound recording fixed on or after January 1, 1923, and before February 15, 1972.*

(3) **MATERIAL ONLINE.**—*Section 512 shall apply to a claim under subsection (a) for the unauthorized performance of a*

sound recording fixed on or after January 1, 1923, and before February 15, 1972.

(4) *PRINCIPLES OF EQUITY.*—Principles of equity apply to remedies for a violation of this section to the same extent as such principles apply to remedies for infringement of copyright.

(5) *FILING REQUIREMENT FOR STATUTORY DAMAGES AND ATTORNEYS' FEES.*—

(A) *FILING OF INFORMATION ON SOUND RECORDINGS.*—

(i) *FILING REQUIREMENT.*—Except in the case of a transmitting entity that has filed contact information for that transmitting entity under subparagraph (B), in any action under this section, an award of statutory damages or of attorneys' fees under section 504 or 505 may be made with respect to an unauthorized transmission of a sound recording under subsection (a) of this section only if—

(I) the rights owner has filed with the Copyright Office a schedule that specifies the title, artist, and rights owner of the sound recording and contains such other information, as practicable, as the Register of Copyrights prescribes by regulation; and

(II) the transmission is made after the end of the 90-day period beginning on the date on which the information filed under subclause (I) is indexed into the public records of the Copyright Office.

(ii) *REGULATIONS.*—Not later than 180 days after the date of enactment of this section, the Register of Copyrights shall issue regulations establishing the form, content, and procedures for the filing of schedules under clause (i). Such regulations shall provide that persons may request that they receive timely notification of such filings, and shall set forth the manner in which such requests may be made.

(B) *FILING OF CONTACT INFORMATION FOR TRANSMITTING ENTITIES.*—

(i) *REQUIREMENT.*—Not later than 30 days after the date of enactment of this section, the Register of Copyrights shall issue regulations establishing the form, content, and procedures for the filing, by any entity that, as of the date of the enactment of this section, performs sound recordings fixed before February 15, 1972, by means of digital audio transmissions, of contact information for such entity.

(ii) *TIME LIMIT ON FILINGS.*—The Register of Copyrights may not accept filings under clause (i) after the date that is 180 days after the date of enactment of this section.

(iii) *LIMITATION ON STATUTORY DAMAGES AND ATTORNEYS' FEES.*—

(I) *LIMITATION.*—An award of statutory damages or of attorneys' fees under section 504 or 505 may not be made, against an entity that has filed contact information for that entity under clause (i) of this subparagraph, with respect to an unauthorized transmission by that entity of a sound record-

ing under subsection (a) of this section if the transmission is made not later than 90 days after the date on which the entity receives a notice that—

(aa) is sent by or on behalf of the rights owner of the sound recording;

(bb) states that the entity is not legally authorized to transmit that sound recording under subsection (a); and

(cc) identifies the sound recording in a schedule conforming to the requirements prescribed by the regulations issued under subparagraph (A)(ii).

(II) UNDELIVERABLE NOTICES.—In any case in which a notice under subclause (I) is sent to an entity by mail or courier service and the notice is returned to the sender because the entity either is no longer located at the address provided in the contact information filed under clause (i) or has refused to accept delivery, or the notice is sent by electronic mail and is undeliverable, the 90-day period under subclause (I) shall begin on the date of the attempted delivery.

(C) SECTION 412.—Section 412 shall not limit an award of statutory damages under section 504(c) or attorneys’ fees under section 505 with respect to an unauthorized transmission of a sound recording under subsection (a) of this section.

(6) APPLICABILITY OF OTHER PROVISIONS.—

(A) IN GENERAL.—Subject to subparagraph (B), no provision of this title shall apply to or limit the remedies available under this section except as otherwise provided in this section.

(B) APPLICABILITY OF DEFINITIONS.—Any term used in this section that is defined in section 101 shall have the meaning given that term in section 101.

(f) APPLICATION OF SECTION 230 SAFE HARBOR.—For purposes of section 230 of the Communications Act of 1934 (47 U.S.C. 230), subsection (a) of this section shall be considered to be a “law pertaining to intellectual property” under subsection (e)(2) of such section 230.

(g) RIGHTS OWNER DEFINED.—In this section, the term “rights owner” means the person who has the exclusive right to reproduce a sound recording under the laws of any State.

**TITLE 28, UNITED STATES CODE**

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**PART I—ORGANIZATION OF COURTS**

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**CHAPTER 5—DISTRICT COURTS**

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**§ 137. Division of business among district judges**

**【The business】** (a) *IN GENERAL.*—*The business* of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

(b) *RANDOM ASSIGNMENT OF RATE COURT PROCEEDINGS.*—

(1) *IN GENERAL.*—

(A) *DETERMINATION OF LICENSE FEE.*—*Except as provided in subparagraph (B), in the case of any performing rights society subject to a consent decree, any application for the determination of a license fee for the public performance of music in accordance with the applicable consent decree shall be made in the district court with jurisdiction over that consent decree and randomly assigned to a judge of that district court according to the rules of that court for the division of business among district judges, provided that any such application shall not be assigned to—*

(i) *a judge to whom continuing jurisdiction over any performing rights society for any performing rights society consent decree is assigned or has previously been assigned; or*

(ii) *a judge to whom another proceeding concerning an application for the determination of a reasonable license fee is assigned at the time of the filing of the application.*

(B) *EXCEPTION.*—*Subparagraph (A) does not apply to an application to determine reasonable license fees made by individual proprietors under section 513 of title 17.*

(2) *RULE OF CONSTRUCTION.*—*Nothing in paragraph (1) shall modify the rights of any party to a consent decree or to a proceeding to determine reasonable license fees, to make an application for the construction of any provision of the applicable consent decree. Such application shall be referred to the judge to whom continuing jurisdiction over the applicable consent decree is currently assigned. If any such application is made in connection with a rate proceeding, such rate proceeding shall be stayed until the final determination of the construction application. Disputes in connection with a rate proceeding about whether a licensee is similarly situated to another licensee shall not be subject to referral to the judge with continuing jurisdiction over the applicable consent decree.*

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