§ 112. Limitations on exclusive rights: Ephemeral recordings

(a)(1) Notwithstanding the provisions of section 106, and except in the case of a motion picture or other audiovisual work, it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work, under a license including a statutory license under section 114(f), or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114(a), or for a transmitting organization that is a broadcast radio or television station licensed as such by the Federal Communications Commission and that makes a broadcast transmission of a performance of a sound recording in a digital format on a nonsubscription basis, to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display, if—

(A) the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and

(B) the copy or phonorecord is used solely for the transmitting organization’s own transmissions within its local service area, or for purposes of archival preservation or security; and

(C) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public.

(2) In a case in which a transmitting organization entitled to make a copy or phonorecord under paragraph (1) in connection with the transmission to the public of a performance or display of a work is prevented from making such copy or phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the work, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such copy or phonorecord as permitted under that paragraph, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization’s reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such copies or phonorecords as permitted under paragraph (1) of this subsection.

(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 119(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display, if—

(1) no further copies or phonorecords are reproduced from the copies or phonorecords made under this clause; and

(2) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are destroyed within seven years from the date the transmission program was first transmitted to the public.

(c) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization to make for distribution no more than one copy or phonorecord, for each transmitting organization specified in clause (2) of this subsection, of a particular transmission program embodying a performance of a nondramatic musical work of a religious nature, or of a sound recording of such a musical work, if—

(1) there is no direct or indirect charge for making or distributing any such copies or phonorecords; and

(2) none of such copies or phonorecords is used for any performance other than a single transmission to the public by a transmitting organization entitled to transmit to the public a performance of the work under a license or transfer of the copyright; and
(3) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are all destroyed within one year from the date the transmission program was first transmitted to the public.

(d) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance of a work under section 110(8) to make no more than ten copies or phonorecords embodying the performance, or to permit the use of any such copy or phonorecord by any governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), if—

(1) any such copy or phonorecord is retained and used solely by the organization that made it, or by a governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), and no further copies or phonorecords are reproduced from it; and

(2) any such copy or phonorecord is used solely for transmissions authorized under section 110(8), or for purposes of archival preservation or security; and

(3) the governmental body or nonprofit organization permitting any use of any such copy or phonorecord by any governmental body or nonprofit organization under this subsection does not make any charge for such use.

(e) STATUTORY LICENSE.—(1) A transmitting organization entitled to transmit to the public a performance of a sound recording under the limitations on exclusive rights specified by section 114(d)(1)(C)(iv) or under a statutory license in accordance with section 114(f) is entitled to a statutory license, under the conditions specified by this subsection, to make no more than 1 phonorecord of the sound recording (unless the terms and conditions of the statutory license allow for more), if the following conditions are satisfied:

(A) The phonorecord is retained and used solely by the transmitting organization that made it, and no further phonorecords are reproduced from it.

(B) The phonorecord is used solely for the transmitting organization’s own transmissions originating in the United States under a statutory license in accordance with section 114(f) or the limitation on exclusive rights specified by section 114(d)(1)(C)(iv).

(C) Unless preserved exclusively for purposes of archival preservation, the phonorecord is destroyed within 6 months from the date the sound recording was first transmitted to the public using the phonorecord.

(D) 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 phonorecord under this subsection from a phonorecord lawfully made and acquired under the authority of the copyright owner.

(2) Notwithstanding any provision of the antitrust laws, any copyright owners of sound recordings and any transmitting organizations entitled to a statutory license under this subsection may negotiate and agree upon royalty rates and license terms and conditions for making phonorecords of such sound recordings under this section and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

(3) Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for the activities specified by paragraph (1) during the 5-year period beginning on January 1 of the second year following the year in which the proceedings are to be commenced, or such other period as the parties may agree. Such rates shall include a minimum fee for each type of service offered by transmitting organizations. Any copyright owners of sound recordings or any transmitting organizations entitled to a statutory license under this subsection may submit to the Copyright Royalty Judges licenses covering such activities with respect to such sound recordings. The parties to each proceeding shall bear their own costs.

(4) The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (5), be binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under this subsection during the 5-year period specified in paragraph (3), or such other period as the parties may agree. Such rates shall include a minimum fee for each type of service offered by transmitting organizations. The Copyright Royalty Judges shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. 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—

(A) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interfere with or enhance the copyright owner’s traditional streams of revenue; and

(B) the relative roles of the copyright owner and the transmitting organization 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 under voluntary license agreements described in paragraphs (2) and (3). 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 transmitting organizations entitled to obtain a statutory license under this subsection.

(5) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more transmitting organizations entitled to obtain a statutory license under this subsection shall be given effect in lieu of any decision by the Librarian of Con-
gress or determination by the Copyright Royalty Judges.

(6)(A) Any person who wishes to make a phonorecord of a sound recording under a statutory license in accordance with this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording under section 106(1)—

(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.

(B) Any royalty payments in arrears shall be made on or before the 20th day of the month next succeeding the month in which the royalty fees are set.

(7) If a transmitting organization entitled to make a phonorecord under this subsection is prevented from making such phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the sound recording, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such phonorecord as permitted under this subsection, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization’s reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such phonorecords as permitted under this subsection.

(8) Nothing in this subsection annuls, limits, impairs, or otherwise affects in any way the existence or value of any of the exclusive rights of the copyright owners in a sound recording, except as otherwise provided in this subsection, or in a musical work, including the exclusive right to reproduce and distribute a sound recording or musical work, including by means of a digital phonorecord delivery, under sections 106(1), 106(3), and 115, and the right to perform publicly a sound recording or musical work, including by means of a digital audio transmission, under sections 106(4) and 106(6).

(f)(1) Notwithstanding the provisions of section 106, and without limiting the application of subsection (b), it is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled under section 110(2) to transmit a performance or display to make copies or phonorecords of a work that is in digital form and, solely to the extent permitted in paragraph (2), of a work that is in analog form, embodying the performance or display to be used for making transmissions authorized under section 110(2), if—

(A) such copies or phonorecords are used solely for transmissions authorized under section 110(2).

(2) This subsection does not authorize the conversion of print or other analog versions of works into digital formats, except that such conversion is permitted hereunder, only with respect to the amount of such works authorized to be performed or displayed under section 110(2), if—

(A) no digital version of the work is available to the institution; or

(B) the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use for section 110(2).

(g) The transmission program embodied in a copy or phonorecord made under this section is not subject to protection as a derivative work under this title except with the express consent of the owners of copyright in the preexisting works employed in the program.


HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94–1476

Section 112 of the bill concerns itself with a special problem that is not dealt with in the present statutes but is the subject of provisions in a number of foreign statutes and in the revisions of the Berne Convention since 1948. This is the problem of what are commonly called "ephemeral recordings": copies or phonorecords of a work made for purposes of later transmission by a broadcasting organization legally entitled to transmit the work. In other words, where a broadcaster has the privilege of performing or displaying a work either because he is licensed or because the performance or display is exempted under the statute, the question is whether he should be given the additional privilege of recording the performance or display to facilitate its transmission. The need for a limited exemption in these cases because of the practical exigencies of broadcasting has been generally recognized, but the scope of the exemption has been a controversial issue.

Recordings for Licensed Transmissions. Under subsection (a) of section 112, an organization that has acquired the right to transmit any work (other than a motion picture or other audiovisual work), or that is free to transmit a sound recording under section 114, may make a single copy or phonorecord of a particular program embodying the work, if the copy or phonorecord is used solely for the organization’s own transmissions within its own area; after 6 months it must be destroyed or preserved solely for archival purposes.

Organizations Covered.—The ephemeral recording privilege is given by subsection (a) to “a transmitting organization entitled to transmit to the public a performance or display of a work.” Assuming that the transmission meets the other conditions of the provision, it makes no difference what type of public transmission the organization is making: commercial radio and television broadcasts, public radio and television broadcasts not exempted by section 110(2), pay-TV, closed circuit, background music, and so forth. However, to come within the scope of subsection (a), the organization must have the right, “under a license or transfer of the copyright or under the limitations on exclusive rights in sound re-
cordings specified by section 114(a)." Thus, except in the case of copyrighted sound recordings (which have no exclusive performing rights under the bill), the organizations under clause (2) of the subsection, the ephemeral broadcaster or individual transmitter; but, under the limitations on exclusive rights in sound recordings specified by section 114(a)." Aside from phonorecords of copyrighted sound recordings, the ephemeral recordings made by an instructional broadcaster may make "no more than thirty copies or phonorecords for transmitting purposes for not more than seven years after the initial transmission. Organizational Broadcaster.—The privilege of making ephemeral recordings under section 112(b) extends to a "governmental body or other nonprofit organization entitled to transmit a performance or display of a work for special recording privileges, although it does not go as far as these groups requested. In general, it permits a nonprofit organization that is free to transmit a performance or display of a work for religious purposes to duplicate their own ephemeral recordings for transmitting purposes for not more than one copy for each transmitting organization resulting from the scheduling of courses and the need to prerecord well in advance of transmission. The period of use has been extended to seven years from the date the transmission program was first transmitted to the public. Recordings for Instructional Transmissions.—Section 112(b) represents a response to the arguments of instructional broadcasters and other educational groups for special recording privileges, although it does not go as far as these groups requested. In general, it permits a nonprofit organization that is free to transmit a performance or display of a work for religious purposes to duplicate their own ephemeral recordings for transmitting purposes for not more than one copy for each transmitting organization resulting from the scheduling of courses and the need to prerecord well in advance of transmission. The period of use has been extended to seven years from the date the transmission program was first transmitted to the public. Religious Broadcasts.—Section 112(c) provides that it is not an infringement of copyright for certain nonprofit organizations to make no more than one copy for each transmitting organization resulting from the scheduling of courses and the need to prerecord well in advance of transmission. The period of use has been extended to seven years from the date the transmission program was first transmitted to the public.
§ 113. Scope of exclusive rights in pictorial, graphic, and sculptural works

(a) Subject to the provisions of subsections (b) and (c) of this section, the exclusive right to re-

concluding provisions, “their decision” for “its decision”, “described” for “negotiated as provided”, and “Copyright Royalty Judges shall also establish” for “Librarian of Congress shall also establish”.

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

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


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

Form par. (7) redesignated (6).

2002—Subsecs. (1), (g). Pub. L. 107–273 added subsec. (f) and redesignated former subsec. (f) as (g).


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

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

Former par. (4) redesignated (3).


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

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

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

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

Statutory Notes and Related Subsidiaries

Effective Date of 2004 Amendment


Construction of 1998 Amendment

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

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

(a) Subject to the provisions of subsections (b) and (c) of this section, the exclusive right to re-

organization possessing a license to transmit a copyrighted work, and, other than for one copy that may be preserved for archival purposes, the remaining copies must be destroyed within one year from the date the program was first transmitted to the public.

Despite objections by music copyright owners, the Committee found this exemption to be justified by the special circumstances under which many religious programs are broadcast. These programs are produced on tape or disk for distribution by mail of one copy only to each broadcast station carrying the program. None of the programs are prepared for profit, and the program producer either pays the station to carry the program or furnishes it free of charge. The stations have performing licenses, so the copyright owners receive compensation. Following the performance, the tape is returned or the disk destroyed. It seems likely that, as has been alleged, to require a second payment for the mechanical reproduction under these circumstances would simply have the effect of driving some of the copyrighted music off the air.

Ephemeral Recordings for Transmissions to Handicapped Audiences. As a counterpart to its amendment of section 110(b) to authorize a new paradigm of copyright law, subsection (d) of section 112, to provide an ephemeral recording exemption in the case of transmissions to the blind and deaf. New subsection would permit the making of one recording of another copyrightable work, and will thus be potentially copyrightable under section 110(b), and its retention for an unlimited period. It would not permit the making of further reproductions or their exchange with other organizations.

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

Editorial Notes

AMENDMENTS

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

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