

105TH CONGRESS
1ST SESSION

H. R. 789

To amend title 17, United States Code, with respect to certain exemptions from copyright, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 13, 1997

Mr. SENSENBRENNER (for himself, Mr. BURR of North Carolina, Mr. CUNNINGHAM, Mr. GILLMOR, Mr. NORWOOD, Mr. McHUGH, Mr. ANDREWS, Mr. ENSIGN, Mr. MASCARA, Mr. HERGER, Mr. LEWIS of California, Mr. BURTON of Indiana, Mr. PETRI, Mr. SMITH of New Jersey, Mr. PARKER, Mr. McDERMOTT, Mr. THORNBERRY, Mr. CHRISTENSEN, Mr. INGLIS of South Carolina, Mr. DAVIS of Virginia, Mr. LATOURETTE, Mr. EHLERS, Mr. EHRLICH, Mr. HOEKSTRA, Ms. JACKSON-LEE of Texas, Mr. PETERSON of Minnesota, Mr. LoBIONDO, Mrs. SMITH of Washington, Mr. HOLDEN, Mr. SCHIFF, Mr. STUMP, Mr. WYNN, Mr. CALVERT, Mr. BARTON of Texas, Mr. LEWIS of Kentucky, Mr. BAESLER, Mr. SAXTON, Mr. WOLF, Mr. DOYLE, Mr. SPRATT, Mr. SKEEN, Mrs. CUBIN, Mr. KNOLLENBERG, Mr. PORTER, Mr. BACHUS, Mr. HASTERT, Mr. COLLINS, Mr. PICKETT, Mr. DUNCAN, Mr. UPTON, Mr. WELLER, Mr. POSHARD, Mr. CRANE, Mr. METCALF, Mr. PRYCE of Ohio, Mr. SALMON, Mrs. EMERSON, Mr. YOUNG of Alaska, Mr. McHALE, Mr. HORN, Mr. KLUG, Mr. LATHAM, Mr. TALENT, Mr. FRANKS of New Jersey, Mr. BARCIA, Mr. CHAMBLISS, Mr. BARTLETT of Maryland, Mr. McINNIS, Mr. OBERSTAR, Mr. TIAHRT, Mr. PACKARD, Mr. BONILLA, Mr. SKELTON, Mr. KOLBE, Mr. MANZULLO, Mr. STEARNS, Mr. GEKAS, Mr. LIPINSKI, Mr. COMBEST, Mr. QUINN, Mr. WALSH, Mr. SAM JOHNSON of Texas, Mr. GILCHREST, Mr. DICKEY, Mr. STENHOLM, Mr. SESSIONS, and Mr. HOBSON) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 17, United States Code, with respect to certain exemptions from copyright, and for other purposes.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Fairness in Musical
5 Licensing Act of 1997”.

6 **SEC. 2. EXEMPTION OF CERTAIN MUSIC USES FROM COPY-**
7 **RIGHT PROTECTION.**

8 (a) BUSINESS EXEMPTION.—Section 110(5) of title
9 17, United States Code, is amended to read as follows:

10 “(5) communication by electronic device of a
11 transmission embodying a performance or display of
12 a nondramatic musical work by the reception of a
13 broadcast, cable, satellite, or other transmission, un-
14 less—

15 “(A) an admission fee is charged specifi-
16 cally to see or hear the transmission at a par-
17 ticular time or on a particular date or dates, or

18 “(B) the transmission is not properly li-
19 censed;”.

20 (b) AGRICULTURAL EVENTS.—Section 110(6) of title
21 17, United States Code, is amended to read as follows:

22 “(6) performance of a nondramatic musical
23 work by a governmental body or a nonprofit agricul-
24 tural or horticultural organization, in the course of
25 an agricultural or horticultural fair, convention,

1 meeting, event, or exhibition conducted by such body
2 or organization; the exception provided by this para-
3 graph shall extend to any liability for copyright in-
4 fringement that would otherwise be imposed on such
5 body or organization, including under the doctrines
6 of vicarious liability, contributory infringement, or
7 related infringement, for a performance by a conces-
8 sionaire, business establishment, or other person at
9 such fair, convention, meeting, event, or exhibition,
10 but shall not excuse any such person from liability
11 for the performance;”.

12 (c) EXEMPTION RELATING TO PROMOTION.—Section
13 110(7) of title 17, United States Code, is amended—

14 (1) by striking “a vending” and inserting “an”;

15 (2) by striking “sole”;

16 (3) by inserting “or of the audio, video, or other
17 devices utilized in the performance,” after
18 “phonorecords of the work,”; and

19 (4) by striking “and is within the immediate
20 area where the sale is occurring”.

21 (d) PERFORMANCES AT CHILDREN’S CAMPS.—Sec-
22 tion 110 of title 17, United States Code, is amended—

23 (1) by striking the periods at the end of para-
24 graphs (8) and (9) and inserting semicolons;

1 (2) in paragraph (10) by striking the period at
2 the end and inserting “; and”; and

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

4 “(11) performance of a nondramatic musical
5 work at an organized children’s camp, if children in
6 attendance sing all or a portion of the work, children
7 in attendance engage in games or dance to the ac-
8 companiment of all or a portion of the work, or the
9 performance is of an instructional nature.”.

10 **SEC. 3. BINDING ARBITRATION OF RATE DISPUTES INVOLV-**
11 **ING PERFORMING RIGHTS SOCIETIES.**

12 (a) IN GENERAL.—Section 504 of title 17, United
13 States Code, is amended by adding at the end the follow-
14 ing new subsection:

15 “(d) PERFORMING RIGHTS SOCIETIES; BINDING AR-
16 BITRATION.—

17 “(1) ARBITRATION OF DISPUTES PRIOR TO
18 COURT ACTION.—

19 “(A) ARBITRATION.—(i) If a general music
20 user and a performing rights society are unable
21 to agree on the appropriate fee to be paid for
22 the user’s past or future performance of musi-
23 cal works in the repertoire of the performing
24 rights society, the general music user shall, in
25 lieu of any other dispute-resolution mechanism

1 established by any judgment or decree govern-
2 ing the operation of the performing rights soci-
3 ety, be entitled to binding arbitration of such
4 disagreement pursuant to the rules of the
5 American Arbitration Association. The music
6 user may initiate such arbitration.

7 “(ii) The arbitrator in such binding arbi-
8 tration shall determine a fair and reasonable fee
9 for the general music user’s past and future
10 performance of musical works in such society’s
11 repertoire and shall determine whether the
12 user’s past performances of such musical works,
13 if any, infringed the copyrights of works in the
14 society’s repertoire. If the arbitrator determines
15 that the general music user’s past performances
16 of such musical works infringed the copyrights
17 of works in the society’s repertoire, the arbitra-
18 tor shall impose a penalty for such infringe-
19 ment. Such penalty shall not exceed the arbitra-
20 tor’s determination of the fair and reasonable
21 license fee for the performances at issue.

22 “(B) DEFINITIONS.—(i) For purposes of
23 this paragraph, a ‘general music user’ is any
24 person who performs musical works publicly but
25 is not engaged in the transmission of musical

1 works to the general public or to subscribers
2 through broadcast, cable, satellite, or other
3 transmission.

4 “(ii) For purposes of this paragraph,
5 transmissions within a single commercial estab-
6 lishment or within establishments under com-
7 mon ownership or control are not transmissions
8 to the general public.

9 “(iii) For purposes of clause (ii), an ‘estab-
10 lishment’ is a retail business, restaurant, bar,
11 inn, tavern, or any other place of business in
12 which the public may assemble.

13 “(C) ENFORCEMENT OF ARBITRATOR’S
14 DETERMINATIONS.—An arbitrator’s determina-
15 tion under this paragraph is binding on the
16 parties and may be enforced pursuant to sec-
17 tions 9 through 13 of title 9.

18 “(2) COURT-ANNEXED ARBITRATION.—In any
19 civil action for infringement of the right granted in
20 section 106(4) involving a musical work that is in
21 the repertoire of a performing rights society, if the
22 defendant admits the prior public performance of

1 one or more works in the repertoire of the perform-
2 ing rights society but contests the amount of the li-
3 cense fee demanded by such society for such per-
4 formance, the dispute shall, if requested by the de-
5 fendant, be submitted to arbitration under section
6 652(e) of title 28. In such arbitration proceeding,
7 the arbitrator shall determine the amount owed by
8 the defendant to the performing rights society for all
9 past public performances of musical works in the so-
10 ciety's repertoire. Such amount shall not exceed two
11 times the amount of the blanket license fee that
12 would be applied by the society to the defendant for
13 the year or years in which the performances oc-
14 curred. In addition, the arbitrator shall, if requested
15 by the defendant, determine a fair and reasonable li-
16 cense fee for the defendant's future public perform-
17 ances of the musical works in such society's rep-
18 ertoire.

19 “(3) TERM OF LICENSE FEE DETERMINA-
20 TION.—In any arbitration proceeding initiated under
21 this subsection, the arbitrator's determination of a
22 fair and reasonable license fee for the performance
23 of the music in the repertoire of the performing
24 rights society concerned shall apply for a period of

1 not less than 3 years nor more than 5 years after
2 the date of the arbitrator's determination.”.

3 (b) ACTIONS THAT SHALL BE REFERRED TO ARBI-
4 TRATION.—Section 652 of title 28, United States Code,
5 is amended by adding at the end the following:

6 “(e) ACTIONS THAT SHALL BE REFERRED TO ARBI-
7 TRATION.—In any civil action for infringement of the
8 right granted in section 106(4) of title 17 involving a mu-
9 sical work that is in the repertoire of a performing rights
10 society, if the defendant admits the public performance of
11 any musical work in the repertoire of the performing
12 rights society but contests the amount of the license fee
13 demanded for such performance by the society, the district
14 court shall, if requested by the defendant, refer the dispute
15 to arbitration, which shall be conducted in accordance with
16 section 504(d)(2) of title 17. Each district court shall es-
17 tablish procedures by local rule authorizing the use of ar-
18 bitration under this subsection. The definitions set forth
19 in title 17 apply to the terms used in this subsection.”.

20 **SEC. 4. RADIO PER PROGRAMMING PERIOD LICENSE.**

21 Section 504 of title 17, United States Code, as
22 amended by section 3 of this Act, is further amended by
23 adding at the end thereof the following new subsection:

24 “(e) RADIO PER PROGRAMMING PERIOD LI-
25 CENSES.—

1 “(1) IN GENERAL.—Each performing rights so-
2 ciety shall offer, to any radio broadcaster that so re-
3 quests, a per programming period license to perform
4 nondramatic musical works in the repertoire of the
5 performing rights society. Such license shall be of-
6 fered on reasonable terms and conditions that pro-
7 vide an economically and administratively viable al-
8 ternative to the society’s blanket license for all such
9 broadcasters.

10 “(2) PRICE OF PER PROGRAMMING PERIOD LI-
11 CENSES.—(A) The total price of a per programming
12 period license described in paragraph (1)—

13 “(i) shall include separate components for
14 incidental and feature performances, with the
15 incidental performance component to be inde-
16 pendent of the quantity of such performances
17 by the broadcaster and not to exceed the rel-
18 ative value that the performing rights society
19 assigns to such performances in its distribution
20 of royalties; and

21 “(ii) shall not exceed the fee that would be
22 payable by the broadcaster under the lowest
23 price blanket license offered to radio broad-
24 casters, and shall vary between the incidental
25 performance component, for a broadcaster that

1 makes only incidental performances of music in
2 the society's repertoire, and such blanket license
3 fee, in direct proportion to the percentage of
4 the broadcaster's revenue attributable to pro-
5 gramming periods containing feature perform-
6 ances of musical works in the society's rep-
7 ertoire compared to the industry average per-
8 centage of revenue attributable to programming
9 periods containing feature performances of such
10 musical works.

11 “(B) Nondramatic musical works that have
12 been licensed directly or at the source, or whose per-
13 formance constitutes fair use or is otherwise exempt
14 from liability under this title, shall not be considered
15 in calculating any per programming period license
16 fee under this subsection.

17 “(3) IMPLEMENTATION.—Any radio broad-
18 caster entitled to a per programming period license
19 under this subsection may bring an action to require
20 compliance with this subsection in an appropriate
21 United States district court, including any district
22 court established by court order or statute as a
23 court that resolves disputes, with respect to license

1 rates, that may arise between performing rights soci-
2 eties and persons who perform musical works in the
3 society's repertoire.

4 “(4) DEFINITIONS.—As used in this sub-
5 section—

6 “(A) the term ‘blanket license’ means a li-
7 cense provided by a performing rights society
8 that authorizes the unlimited performance of
9 musical works in the society's repertoire, for a
10 fee that does not vary with the quantity or type
11 of performances of musical works in the soci-
12 ety's repertoire;

13 “(B) the term ‘incidental’ refers to com-
14 mercial jingles not exceeding 60 seconds in du-
15 ration, bridges, themes or signatures, arrange-
16 ments of works in the public domain, and back-
17 ground music, including music used in conjunc-
18 tion with sporting events; and

19 “(C) the term ‘programming period’ means
20 any 15-minute period of radio broadcasting
21 commencing on the hour, or at 15, 30, or 45
22 minutes past the hour.”.

1 **SEC. 5. ACCESS TO REPERTOIRE AND LICENSING INFORMA-**
2 **TION.**

3 Section 504 of title 17, United States Code, as
4 amended by sections 3 and 4 of this Act, is further amend-
5 ed by adding at the end the following:

6 “(f) ACCESS TO MUSICAL REPERTOIRE.—

7 “(1) ONLINE COMPUTER ACCESS.—Each per-
8 forming rights society shall make available, free of
9 charge, to all interested persons, online computer ac-
10 cess to copyright and licensing information for each
11 work in its repertoire. Such access shall, for each
12 such musical work, identify the work by title of the
13 work, the name of the author and the copyright
14 owner, and the names of any artists known to have
15 performed the work. Such online computer access
16 shall permit the efficient review of multiple musical
17 works consistent with reasonably available tech-
18 nology.

19 “(2) DIRECTORY OF TITLES.—Each performing
20 rights society shall make available at cost, not less
21 frequently than semiannually, a printed directory of
22 each title in its repertoire, as of the date which is
23 not more than 30 days before the date on which the
24 directory is published, containing the information set
25 forth in paragraph (1).

1 “(3) DOCUMENTATION OF RIGHT TO LI-
2 CENSE.—A performing rights society shall, upon the
3 request of any person who performs or may perform
4 musical works in the society’s repertoire, provide to
5 that person copies of the documentation establishing
6 the society’s right to license the public performance
7 of such musical works.

8 “(4) RESTRICTIONS ON INFRINGEMENT AC-
9 TIONS.—

10 “(A) RESTRICTIONS.—A performing rights
11 society may not institute or be a party to, or
12 pay the costs of another party in, any action al-
13 leging the infringement of the copyright in, or
14 charge a fee under any per programming period
15 license for, any work in that society’s repertoire
16 that is not identified and documented as re-
17 quired by paragraphs (1), (2), and (3).

18 “(B) EXCEPTION.—Subparagraph (A)
19 shall not apply on the basis of a failure to com-
20 ply with paragraph (2) with respect to a musi-
21 cal work first entering the society’s repertoire
22 within the 6-month period beginning 30 days
23 before the date on which the society’s last direc-
24 tory was published under paragraph (2), if the
25 society establishes that such musical work was

1 included in the online database required by
2 paragraph (1) not less than 10 days before the
3 performance giving rise to the alleged infringe-
4 ment or charge.

5 “(g) ACCESS TO LICENSING INFORMATION.—

6 “(1) TERMS OF LICENSES.—Each performing
7 rights society shall provide, within 5 business days
8 after it receives a written request from a licensee of
9 any musical work in the society’s repertoire, or from
10 any person that is negotiating to become such a
11 licensee—

12 “(A) the schedule of the society’s license
13 rates and terms of the license fees to be paid
14 under the license agreement, including any slid-
15 ing scale or schedule for any increase or de-
16 crease in rates for the duration of the license
17 agreement;

18 “(B) the formulas by which the rates are
19 derived; and

20 “(C) license terms under agreements exe-
21 cuted by the performing rights society and li-
22 censees described in subparagraph (A).

23 “(2) COPIES OF LICENSES.—Any performing
24 rights society that receives a written request from an
25 entity that has been requested to enter into a license

1 agreement with the performing rights society on be-
2 half of persons who perform or may perform musical
3 works within that society's repertoire, shall provide
4 to that entity, within 5 business days after receiving
5 that request, a schedule of fees for such perform-
6 ances by similar persons.'".

7 **SEC. 6. ANNUAL REPORTS.**

8 Not later than March 1 of each year, the Attorney
9 General of the United States shall submit a written report
10 to the Congress on the activities of the Department of
11 Justice during the preceding calendar year relating to the
12 continuing supervision and enforcement by the Depart-
13 ment of the consent decree of the American Society of
14 Composers, Authors, and Publishers of March 14, 1950,
15 and the consent decree of Broadcast Music, Inc. of Decem-
16 ber 29, 1966. Such report shall include a description of
17 all issues raised or complaints filed with the Department
18 of Justice relating to the operations of those performing
19 rights societies, and a summary of the Department's ac-
20 tions or investigations undertaken by the Department in
21 response to such issues and complaints.

22 **SEC. 7. VICARIOUS LIABILITY PROHIBITED.**

23 A landlord, an organizer or sponsor of a convention,
24 exposition, or meeting, a facility owner, or any other per-
25 son making space available to another party by contract,

1 shall not be liable under any theory of vicarious or con-
2 tributory infringement with respect to an infringing public
3 performance of a copyrighted work by a tenant, lessee,
4 subtenant, sublessee, licensee, exhibitor, or other user of
5 such space on the ground that—

6 (1) a contract for such space provides the land-
7 lord, organizer or sponsor, facility owner, or other
8 person a right or ability to control such space and
9 compensation for the use of such space; or

10 (2) the landlord, organizer or sponsor, facility
11 owner, or other person has or had at the time of the
12 infringing performance actual control over some as-
13 pects of the use of such space,

14 if the contract for the use of such space prohibits infring-
15 ing public performances and the landlord, organizer or
16 sponsor, facility owner, or other person does not exercise
17 control over the selection of works performed.

18 **SEC. 8. CONFORMING AMENDMENTS.**

19 Section 101 of title 17, United States Code, is
20 amended by inserting after the undesignated paragraph
21 relating to the definition of “perform” the following:

22 “A ‘performing rights society’ is an association,
23 corporation, or other entity that licenses the public
24 performance of nondramatic musical works on behalf
25 of copyright owners of such works, such as the

1 American Society of Composers, Authors, and Pub-
2 lishers, Broadcast Music, Inc., and SESAC, Inc. The
3 ‘repertoire’ of a performing rights society consists of
4 those works for which the society provides licenses
5 on behalf of the owners of copyright in the works.”.

6 **SEC. 9. CONSTRUCTION OF ACT.**

7 Except as provided in section 504(d)(1) of title 17,
8 United States Code, as added by section 3(a) of this Act,
9 nothing in this Act shall be construed to relieve any per-
10 forming rights society (as defined in section 101 of title
11 17, United States Code) of any obligation under any con-
12 sent decree, State statute, or other court order governing
13 its operation, as such decree or order is in effect on the
14 date of the enactment of this Act, as it may be amended
15 after such date, or as it may be issued or agreed to after
16 such date.

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