LEGAL AFFAIRS

A New Music Law for the Age of Digital Technology

by Lionel S. Sobel

It was a long time in coming, but there is truth in the old adage "Better late than never." On November 1, 1995, President Bill Clinton signed into law a piece of legislation that also brings to mind two additional adages: "You had to be there to appreciate it" and "Half a loaf is better than none."

The legislation in question is the "Digital Performance Right in Sound Recordings Act of 1995." [Public Law 104-39, S.227, H.R. 1506 (104th Cong., 1st Sess., Nov. 1, 1995)]. Its title is something of a misnomer. The new law should have been called the "Music

Digital Transmission Act of 1995," because it deals with more than sound recording performances. It also deals with the distribution of recordings by digital transmission.

Technology has now blurred the once-obvious distinction between performance and distribution. But the distinction is still significant for at least two purposes: setting license fee rates; and determining who ought to collect license fees. The new law deals with the two related-but-distinct subjects of performance and distribution by: (1) creating a new digital public performance right for sound recordings, and (2) broadening the Copyright Act's existing compulsory "mechanical" license to include a right to distribute recordings by digital transmission.

Be forewarned, however: this one sentence description of what the new law does is a deceptive oversimplification. Indeed, on the day the Senate passed its

version of the bill that became the new Act, the bill's co-sponsor, Senator Orrin Hatch, told his colleagues that "the legislation is complex," and even that was an understatement. The Internal Revenue Code is "complex"; the Digital Performance Right in Sound Recordings Act of 1995 is something else. "Incomprehensible" perhaps, though "You had to be there to appreciate it" may be fairer, because the convoluted language of the new Act appears to have been required by a number of very specific problems which the Act attempts to address with precision.

The difficulty for those of us who were not "there" when the language of the Act was negotiated and drafted is that the Act does not contain any recitals (the "Whereas" clauses often found in complex contracts), so readers are not told what problems it is attempting to solve. In this sense, the Act is reminiscent of the television series "Jeopardy," because the Act gives the

answers but its readers must guess the questions. Unlike "Jeopardy," whose answers are short and clear, many of the answers given by the Act are themselves difficult to understand without knowing in advance what the questions are. Moreover, the organization of the new Act makes it appear that each subsection was written on a separate 5-by-7 inch card, and that the cards were spilled on the floor and accidentally reassembled out of order just before the bill was retyped in the form in which it was enacted.

Despite this criticism of the language of the "Digital Performance . . . Act," it is extremely important - even historic - legislation, and it will become even more important in the future as digital technology becomes more prevalent. Here is one attempt to distill the new Act and make some sense of what it means. (The full text of the Act is appended to this article.)

New public performance right

The first thing the new Act does - and the thing that gives the Act its name - is to create a new exclusive right which it adds to those already enjoyed by copyright owners. This new right is the right to publicly perform sound recordings by means of "digital audio transmission," and it has been added to the Copyright Act in a new subsection numbered 106(6).

Sound recordings have never had a general right of public performance under section 106(4) of the Copyright Act. Indeed, until 1972, sound recordings were not protected by federal copyright law at all - not even against piracy. The first federal protection sound recordings received was limited to protection against piracy, and thus did not include a public performance right. But the record industry and recording artists, with the support of the Copyright Office, have been seeking a public

performance right like the one enjoyed by music publishers and songwriters since the 1970s. Creation of such a right was opposed by broadcasters (and others who publicly perform recordings), because they were unwilling to pay royalties to record companies. On this issue, broadcasters were joined by music publishers in an unusual alliance. Music publishers - who agree with broadcasters about virtually nothing else in the realm of copyright law - feared that their public performance royalties would be diminished, if broadcasters had to pay public performance royalties to record companies as well. All Congressmen have radio station owners in their districts; very few have record companies or recording artists among their constituents. Thus, Congress could not be persuaded to enact a public performance right for record companies and recording artists, over the opposition of broadcasters and music publishers.

This is why a public performance right for sound recording copyright owners is so late in coming, though "better late than never." Moreover, to get broadcasters and music publishers to agree to a public performance right for record companies and recording artists, it was necessary for the record industry to agree to accept a very narrow and specific right.

Thus this new right for public performances by means of "digital audio transmission" is the only type of public performance right enjoyed by owners of the copyrights to sound recordings.

Limited nature of new public performance right

The new right is a very limited one, precisely because it is confined to public performances by means of "digital audio transmission." "Digital audio transmissions" are statutorily defined to be digital (or other

nonanalog) transmissions (which are communications that are received beyond the place from which they are sent) of sound recordings. [Section 114(j)] Thus, the new law gives sound recording copyright owners a public performance right:

- for digital public performances only (not for AM or FM broadcasts or other analog performances);
- for audio public performances of sound recordings only (not for the audio portion of audiovisual works such as music videos); and
- for transmissions only (not for public performances by means of CD players or digital audiotape players).

Even this limited right is subject to: exemptions for certain types of performances; statutory licenses for other types of performances; and limitations on voluntary

licenses for those few types of public performances that are not exempt or subject to statutory licenses.

Exemptions from new public performance right

Several types of public performances of sound recordings are entirely exempt from the new right. [Section 114(d)(1)]:

- "Nonsubscription transmissions" - that is, transmissions to the public for which there is no charge - including radio broadcasts, retransmissions of network feeds and nonbroadcast transmissions;
- Retrans-missions of radio broadcasts (even if a subscription fee is charged to the recipients of the retransmission), provided certain conditions are satisfied; and
- Certain other transmissions, including those within or to a business establishment.

Since these types of performances are exempt, they do not have to be licensed at all, despite the new right.

Statutory public performance licenses

Other types of public performances of sound recordings are not "exempt" from the new right, but they are subject to "statutory licenses." [Section 114(d)(2)] ("Statutory licenses" are those which the Copyright Act calls "compulsory licenses" in other contexts). Statutory licenses require consideration of four issues:

- The type of performances that qualify for statutory licenses (and thus do not require voluntarily negotiated licenses);
- The mechanism by which statutory license fees and other terms will be determined;
- The method by which statutory license fees will be paid and collected; and

- The allocation of collected statutory license fees between record companies and performers.

Performances that qualify for statutory licenses

Public performances by "subscription transmission" require a license - they are not exempt - but they qualify for statutory licenses if certain conditions are satisfied. "Subscription transmissions" are transmissions that are controlled and limited to particular recipients who must pay to receive the transmission. (Cable and satellite TV are examples of "subscription transmissions" - though at the present time in most areas of the country, virtually all of the works transmitted by cable and satellite TV companies are audiovisual works rather than sound recordings.) These are the conditions that must be satisfied in order for a subscription transmission to qualify for a statutory license [Section 114(d)(2)]:

- The transmission must not be "interactive," which means that it must not be one that permits a member of the public to receive, on request, any particular sound recording chosen by or for the recipient;
- The transmission must not contain, during any rolling three-hour period: more than two consecutive selections, or more than three selections in total, from any one sound recording; or more than three consecutive selections, or more than four selections in total, by the same recording artist or from any boxed set of sound recordings. (These numerical limits are given a new term of art; they are called the "sound recording performance complement." [Section 114(j)(7)])
- The company transmitting the performance must not publish in advance the titles of sound recordings to be transmitted;

- The company transmitting the performance may not automatically cause the receiver to switch from one channel to another; and
- If the sound recording contains encoded information concerning its title, recording artist, the song and the songwriter, such encoded information must be transmitted as well.

If a subscription transmission does not satisfy all these conditions, it amounts to a performance that must be licensed through voluntary negotiations with the owner of the sound recording copyright.

Establishing statutory license terms

Whenever Congress creates a "statutory" (or "compulsory") copyright license, it also must set the terms of that license or establish a mechanism by which

the terms of that license are to be set. In this case, Congress did not set the terms of the license itself, but did establish an elaborate mechanism by which those terms will be set.

First, there will be a period of "voluntary negotiations" on statutory license fees and terms. [Section 114(f)] For the purpose of these voluntary negotiations, the owners of sound recording copyrights and companies that publicly perform recordings have been granted an exemption from antitrust laws so they may designate "common agents" to negotiate and agree to statutory license terms. [Section 114(e)(1)]

If voluntary negotiations do not produce agreements, a Copyright Royalty Arbitration Panel will be convened to determine license rates and terms that will be binding on all sound recording copyright owners and on all companies that perform recordings. [Section 114(f)]

Voluntary negotiations may be conducted even after the Copyright Royalty Arbitration Panel makes such a determination; and if such negotiations result in agreements, those voluntarily negotiated agreements will be given effect as between the parties who reached agreement, in lieu of the Arbitration Panel determination. [Section 114(f)]

Payment and receipt of statutory license fees

Owners of sound recording copyrights and companies that publicly perform recordings have been granted an additional exemption from antitrust laws so they may designate nonexclusive "common agents" to pay or receive statutory license fees. [Section 114(e)(1)]

Allocation of receipts from statutory licensing

The new statute requires sound recording copyright owners to allocate half of the statutory license fees they receive among featured recording artists, nonfeatured vocalists, and nonfeatured musicians in the following fashion [Section 114(g)(2)]:

- 45% must be allocated, "on a per sound recording basis," to the recording artists featured on each sound recording;
- 2 1/2% of the fees must be deposited in an escrow account managed by an administrator appointed by the American Federation of Musicians and sound recording copyright owners to be distributed to nonfeatured musicians who have performed on sound recordings (even if they are not members of the AFofM); and
- 2 1/2% of the fees must be deposited in an escrow account managed by an administrator appointed by

AFTRA and sound recording copyright owners to be distributed to nonfeatured vocalists who have performed on sound recordings (whether or not they are members of AFTRA).

Sound recording copyright owners - that is, record companies - may retain for themselves the remaining half of the statutory license fees they receive.

Voluntary public performance licenses

Public performances of sound recordings by means of "digital audio transmission" that are not exempt or eligible for statutory licensing now require voluntary licenses.

Performances that require voluntary licenses

The new exclusive right permits sound recording copyright owners to grant (or withhold) voluntary licenses for two types of transmissions: for "subscription transmissions" that do not satisfy all of the conditions for statutory licenses (described above); and for "interactive transmissions." An "interactive transmission" is one that enables members of the public to receive, on request, the transmission of a particular sound recording chosen by (or for) the recipient. [Section 114(d)(3)]

Limitations on voluntary license terms

Though sound recording copyright owners are given the right to grant (or withhold) voluntary licenses to these two narrowly-defined types of public performances, copyright owners are subject to certain limitations in granting even these licenses.

Limitations on licenses for subscription transmissions (that do not qualify for statutory licenses)

One type of limitation on voluntary licenses might be described as a statutory "most favored nations clause." It works like this: if the owner of a sound recording copyright grants a license to an "affiliated entity" authorizing the "affiliated entity" to engage in a subscription transmission of that sound recording (that is, a subscription transmission of the type that does not qualify for a statutory license), the copyright owner also must make the licensed sound recording available for subscription transmission "on no less favorable terms and conditions to all bona fide entities that offer similar services." (An "affiliated entity" is one in which the sound recording copyright owner has a 5% or more partnership or ownership interest.) [Section 114(h)]

This most-favored-nations type provision does not apply, however, to interactive licenses or to promotional licenses of no more than 45 seconds. [Section 114(h)]

Limitations on licenses for interactive transmissions

The new law imposes certain limits on exclusive "interactive" licenses. Except in two circumstances, exclusive interactive licenses may not be granted for more than 12 months by companies that own more than 1,000 sound recording copyrights, or for more than 24 months by companies that own 1,000 or fewer sound recording copyrights. Moreover, exclusive licenses may not be tacked together to extend these periods beyond their limits, because at least 13 months must separate exclusive licenses granted to the same company. [Section 114(d)(3)(A)]

These limits do not apply under two circumstances. They do not apply to sound recording copyright owners who have granted interactive licenses to five or more interactive services, if each such license is for at least 10% of the sound recordings owned by the licensor (or 50 sound recordings, whichever is greater). And they do not apply to exclusive licenses to perform up to 45 seconds of a sound recording, solely to promote its distribution or performance. Thus, in these two types of cases, exclusive licenses may be granted for longer than 12 or 24 months. [Section 114(d)(3)(B)]

Of course, even when such licenses have been granted by the owners of sound recording copyrights, interactive services may not publicly perform sound recordings without licenses to do so from the performing rights societies that represent the owners of the copyright to the recorded songs or from those copyright owners directly. [Section 114(d)(3)(C)]

Payment and receipt of voluntary license fees

The new Act also deals with the payment and receipt of voluntary license fees that become due as a result of interactive performances and subscription transmissions that do not qualify for statutory licensing.

The law permits sound recording copyright owners to designate "common agents" to grant licenses and receive and remit public performance royalties, though each copyright owner must establish its own royalty rates and license terms unilaterally, not in combination with other copyright owners. [Section 114(e)(2)(A)]

Likewise, companies that perform recordings are permitted to designate "common agents" to obtain licenses and collect and pay public performance royalties, though they too must determine the royalty rates and license terms they will agree to unilaterally, not in

combination with other companies that perform recordings. [Section 114(e)(2)(B)]

Allocation of receipts from voluntary licensing

When sound recording copyright owners receive license fees as a result of voluntarily issued licenses, the new statute does not require that any particular portion of those receipts be paid to the featured artists, nonfeatured musicians or nonfeatured vocalists who performed on those recordings. Instead, as to voluntarily issued licenses, the new statute provides that performers are entitled to receive payment from sound recording copyright owners as provided in their individual contracts (or collective bargaining agreements). [Section 114(g)(1)]

New compulsory mechanical license

Although the name of the new Act emphasizes its provisions that create a digital public performance right for sound recording copyright owners, the Act contains additional provisions that add significantly to the compulsory mechanical license section of the Copyright Act, section 115. The compulsory mechanical license section of the Copyright Act is one that gives record companies the right to make new recordings - referred to in the industry as "cover recordings" - of previously-recorded songs, on terms and conditions established by law rather than by negotiation with the owners of the copyrights to those songs.

The act of making and distributing recordings of a song requires a license from the owner of the copyright to that song, because the recording itself is a reproduction of the song (as well as a derivative work based

on it) and distributing the recording amounts to distributing the song as well.

Congress created the compulsory mechanical license almost a century ago - when most "recordings" were player piano rolls - because it was concerned that one company - a then-leading manufacturer of player pianos - was attempting to monopolize the business by acquiring exclusive recording rights - then and now called "mechanical" rights - to that era's most popular songs. The compulsory mechanical license was designed to prevent any one company from acquiring exclusive mechanical rights to any song; and it has accomplished that mission. As a result of the compulsory license, some especially popular songs have been recorded dozens of times by dozens of different recording artists whose records have been released by different record companies.

At the present time, "recordings" are distributed as CDs and audiocassettes - that is, as physical objects

that can packaged and handled and sold in retail stores. But the technology already exists for "records" to be distributed by digital transmissions sent over telephone lines, by cable, or even by satellite - transmissions that are nothing more than intangible electronic impulses. Many people in the music business expect recordings to be distributed by digital transmission in the not-very-distant future. Indeed, just a week after the new Act became law, MCI Communications Corp. announced an 800 number - (800) MUSIC-NOW - that customers can call to sample and buy recordings by phone, using their credit cards to pay. According to MCI's announcement, its service will be available over the Internet before then end of November.

Congress anticipated this development by amending the Copyright Act to permit record companies to obtain compulsory mechanical licenses for songs that will be recorded and then distributed by digital transmission,

and to provide a method for determining what the compulsory mechanical license fee should be when recordings are distributed in this fashion.

Right to distribute by digital transmission

The new Act creates a new section - which has been codified at section 115(c)(3) of the Copyright Act - which provides that a compulsory mechanical license includes the right to distribute (or authorize the distribution) of recordings of nondramatic musical works by means of digital transmission. [Section 115(c)(3)(A)]

Establishing compulsory mechanical license terms

Until the end of 1997, the compulsory mechanical license fee that must be paid when recordings are distributed by digital transmission is the same fee that is

now payable on account of the distribution of CDs and audiocassettes [section 115(c)(3)(A)(i)] - namely, 6.6 cents per song (or 1.25 cents per minute of playing time) per recording distributed. (ELR 16:4:33)

Beginning in 1998, the compulsory mechanical license fee that will be payable on account of the distribution of recordings by digital transmissions will be set in accordance with an elaborate procedure that is virtually identical to the procedure that Congress established for setting the "statutory" license terms for digital public performances (the procedures that are described above). [Section 115(c)(3)(A)&(B)-(F)]

Of course, mechanical license fees are substantially greater than public performance license fees (calculated on a per song, per recording basis). Also, performance licenses are issued and performance fees collected by ASCAP, BMI and SESAC, while mechanical licenses are issued and mechanical fees collected by

the Harry Fox Agency or by music publishers directly. For both of these reasons, it was important for Congress to distinguish digital transmissions that are merely public performances from digital transmissions that are distributions of recordings.

The new Act distinguishes between digital performances and digital distributions by creating a new type of digital transmission called a "digital phonorecord delivery" that is a distribution of a recording. The trick, of course, was in defining "digital phonorecord delivery" in a way that distinguishes it from a digital transmission that is merely a performance of the recording. And the new Act does so - or attempts to - by defining "digital phonorecord delivery" as a digital transmission of a sound recording "which results in a specifically identifiable reproduction" of the recording, but "not . . . a real-time, noninteractive subscription transmission . . . where

no reproduction . . . is made . . . in order to make the sound recording audible." [Section 115(d)].

In other words, a "noninteractive subscription transmission" is not a "digital phonorecord delivery" and thus will not require the payment of mechanical license fees - though such transmissions may be public performances that will require the payment of statutory public performance license fees (or even negotiated public performance license fees, if the subscription transmission is ineligible for a statutory license, for any of the reasons described above).

Compulsory mechanical rates vs. "controlled composition clause" rates

As a general rule, the terms of voluntarily negotiated mechanical licenses are to be given effect over the terms of compulsory mechanical licenses for "digital

phonorecord delivery," just as negotiated mechanical license terms always have been given effect over compulsory licenses for physical recordings. There is however one important exception to this general rule in the context of the new license for "digital phonorecord deliveries," and that exception concerns negotiated "controlled composition clause" royalty rates.

A "controlled composition clause" is a clause that is often found in recording agreements between singer-songwriters and their record companies. In general terms, controlled composition clauses require singer-songwriters (or their music publishers) to grant mechanical licenses to their record companies at a rate that is less than the compulsory mechanical license rate.

Music publishers persuaded Congress that controlled composition clauses should not always be given effect when recordings are distributed by "digital phonorecord delivery." Therefore, the new Act provides that

when records are distributed by "digital phonorecord delivery," the compulsory mechanical license rate must be paid by record companies - rather than the rate set forth in any negotiated controlled composition clause - except under two circumstances. First, contracts containing controlled composition clauses that were entered into on or before June 22, 1995 will continue to be given effect. And second, contracts containing controlled composition clauses that are entered into by singer-songwriters who retain the right to grant licenses to their songs - that is, who act as their own music publishers - will be given effect, if they are entered into after the songs in question have been recorded. [Section 115(c)(3)(E)]

Compulsory license conditions

If the distributor of a sound recording takes advantage of this compulsory license, the delivery of that

sound recording must contain any information encoded in the recording concerning its title, the recording artist, the song and the songwriter. [Section 115(c)(3)(G)]

Effects of new provisions on pre-existing rights

Whenever new rights and obligations are added to the law, there is a reason to be concerned that the new rights and obligations may be interpreted by judges and other government officials to have an unintended effect on already existing rights and obligations. Record companies, music publishers and others had just this concern about the new rights added to the law by the "Digital Performance . . . Act," and therefore they persuaded Congress to insert into the new Act a number of provisions that neutralize any such effect.

Effect of new public performance right

On rights of record companies

The record industry was concerned that the limitations on the new public performance right might be misconstrued as limitations on the rights of sound recording copyright owners to reproduce their records (that is, to prevent piracy), to create derivative works (for example, to incorporate their recordings into the sound tracks of movies or television programs), and to distribute their recordings. Thus Congress expressly provided, at some length and with considerable emphasis, that the limits on the public performance right do not "annul, limit, impair or otherwise affect in any way" the ability of sound recording copyright owners to enforce any of these other exclusive rights. [Section 114(d)(4)]

On rights of music publishers

The music publishing industry was concerned that license fees payable under the new sound recording public performance right might have a negative impact on license fees payable to the owners of copyrights to songs on account of the public performance of songs (by any means). Thus Congress expressly provided that license fees payable under the new sound recording public performance right "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." Indeed, to avoid any ambiguity on this issue, Congress added an unusual statement of its intent, saying, "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)." [Section 114(i)]

Effect of new compulsory mechanical license

On rights of record companies

Although record companies are permitted to take advantage of the compulsory license permitting "digital phonorecord delivery," they are not required to so. If a record company does not obtain such a license, but a third party distributes one of its recordings by "digital phonorecord delivery" anyway - by putting the recording "on line" without authorization, for example - the record company itself will not be liable to the owners of the copyrights in the songs on that recording. [Section 115(c)(3)(I)]

Also, the Act expressly provides that the new compulsory mechanical license provision does not affect

the record company's exclusive public performance right, or any other rights it had before the Act was passed. [Section 115(c)(3)(K)]

On rights of music publishers

The Act confirms that the new compulsory mechanical license provision does not diminish any existing rights of the owners of copyrights to songs. It does so by expressly providing that a "digital phonorecord delivery" is an infringement that triggers civil remedies and criminal penalties, unless the sound recording copyright owner has authorized the "digital phonorecord delivery," and the company making the "digital phonorecord delivery" has obtained a compulsory or negotiated mechanical license for each song in the recording. [Section 115(c)(3)(H)]

On the rights of consumers and digital audio recorder makers

The Audio Home Recording Act of 1992 exempts consumers from potential liability for rerecording CDs and tapes - activity that in the commercial context would be considered "piracy." The Audio Home Recording Act also exempts companies that make, import or sell digital audio recorders and blank tape from potential liability for contributory infringement if consumers use their products to make such rerecordings. The new "Digital Performance . . . Act" preserves these exemptions. As a practical matter, this simply means that if unauthorized and thus infringing "digital phonorecord deliveries" occur, copyright owners will be able to sue those responsible for the delivery, but not those consumers who received the delivery or those companies who

make the equipment with which such deliveries are recorded. [Section 115(c)(3)(J)]

International impact of new public performance right

More than 60 nations of the world, including nine members of the European Union, already grant public performance rights to record companies and recording artists. In those countries, however, performance rights are not limited to digital transmissions, or to subscription or interactive services. Instead, in those countries, sound recording performance rights include the right to be compensated even for conventional AM and FM radio broadcasts. Reportedly, some $150 million in royalties are collected each year, worldwide, on account of public performances of recordings, which royalties are payable to record companies and recording artists (in

addition to separate royalties that are payable to music publishers and songwriters).

American record companies and recording artists are thought to account for 35% of all recordings sold worldwide, and are estimated by some to be "entitled" to half of all public performance royalties collected (in other countries) on account of the performance of recordings. But American record companies and artists have received none of these royalties, because until now, the United States has never paid such royalties to foreign record companies or artists (or to American ones).

The Bob Dylan case in Germany illustrates exactly why American recording artists have not received public performance royalties from Germany, even though German law requires that such royalties be paid to German and some other artists. [Bob Dylan, 18 IIC 418 (Germany S.Ct. 1985)] The defendant in that case

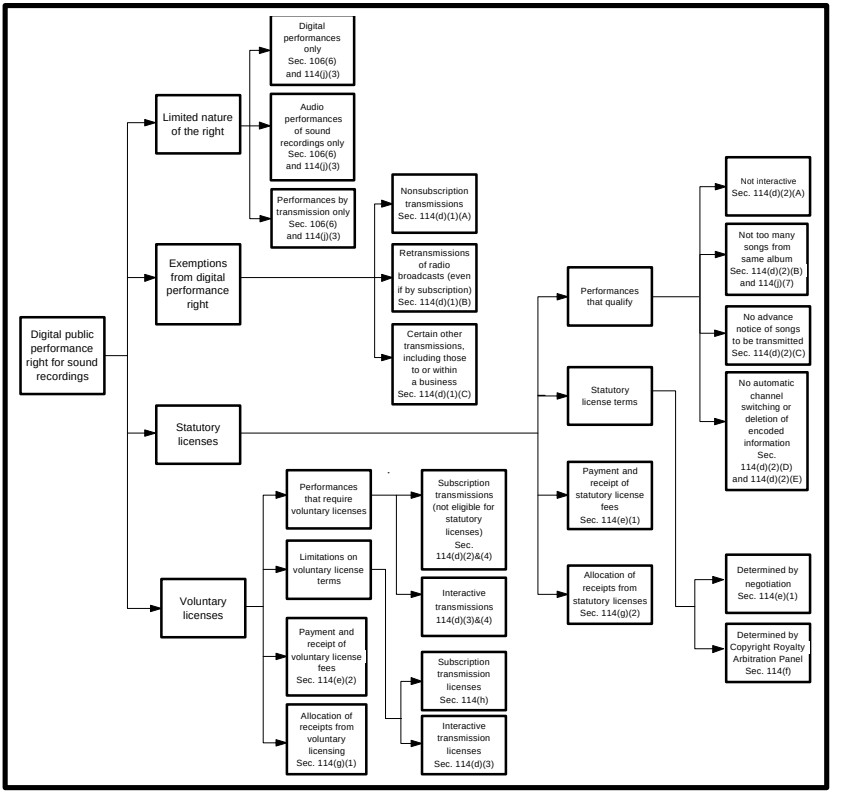
manufactured and distributed Bob Dylan records in Germany, without authorization. Dylan did not sue as the owner of the copyrights to the songs; he sued solely as the performer, seeking the benefit of a provision of German copyright law which gives performers a right to authorize recordings of their performances and public performances of those recordings. The German Supreme Court held that Dylan could not claim the benefit of that provision of German law, because it applies only to German nationals (which he was not), to performances in Germany (which his were not), and to those entitled to such benefit by treaty. The U.S. and Germany were then parties to two copyright treaties: a bilateral treaty (entered into in 1892), and the Universal Copyright Convention. But neither treaty required Germany (or the U.S.) to protect performers (and the U.S. did not). Although Germany does protect performers by copyright, it does so in a separate part of the German copyright

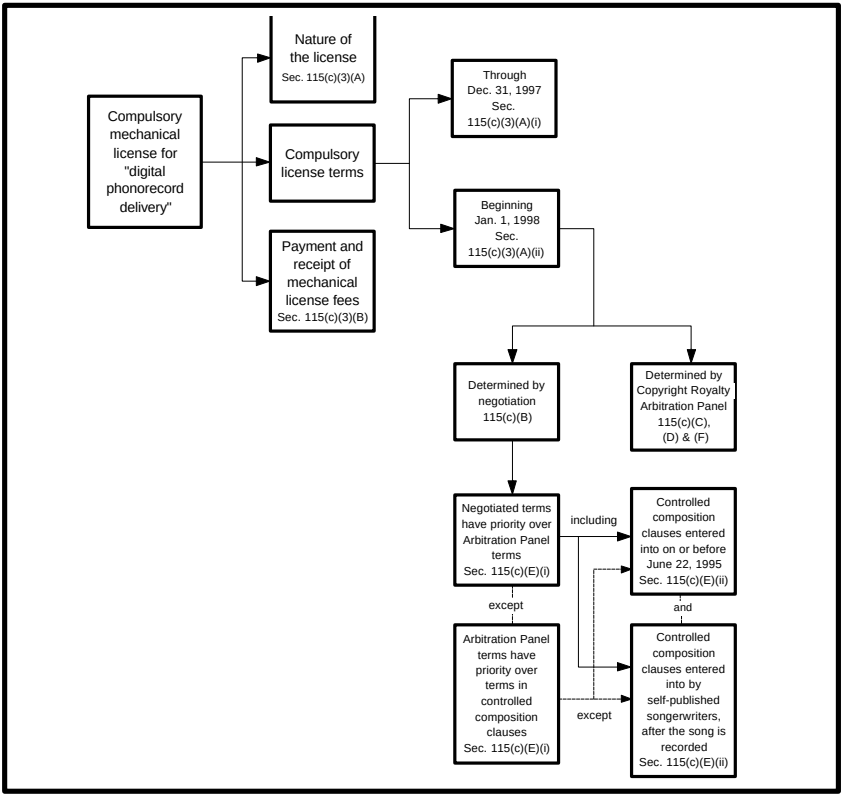
statute that applies only to nationals of those countries which by treaty or reciprocity protect German performers. The Rome Convention, to which Germany is a signatory, requires signatories to provide protection to performers who are nationals of other signatories; but the U.S. is not a signatory to that treaty, because the U.S. has never before provided such protection to performers. Thus, there was no basis for protecting the rights claimed by Dylan.

When the Senate and House of Representatives voted on the new "Digital Performance . . . Act," it was suggested by speakers in both houses that one reason to support the Act was that it would finally enable American record companies and recording artists to claim their fair share of public performance royalties collected in other countries. But will it? The answer is as likely to be "no" as "yes" - perhaps more likely to be "no." This is so, unfortunately, because the new Act is unlikely to be

perceived by foreigners as being reciprocal. That is, the new act provides public performance royalties to record companies and recording artists in so narrow a range of cases that judges and officials in other countries are likely to deem U.S. law to be inadequate to qualify as a "reciprocal" law that requires them to pay royalties to American companies and artists.

This is not to say that the new Act is worse than none. It was the best the record industry and recording artists could get. And a half a loaf - or even a single slice - is better than nothing. But it is likely that Congress will have to revisit the issue again, if collecting foreign public performance royalties is an important objective.


Digital public performance right for sound recordings
Limited nature of the right
Exemptions from digital performance right
Statutory licenses
Voluntary licenses
Digital performances only Sec. 106(6) and 114(j)(3)
Audio performances of sound recordings only Sec. 106(6) and 114(j)(3)
Performances by transmission only Sec. 106(6) and 114(j)(3)
Nonsubscription transmissions Sec. 114(d)(1)(A)
Retransmissions of radio broadcasts (even if by subscription) Sec. 114(d)(1)(B)
Certain other transmissions, including those to or within a business Sec. 114(d)(1)(C)
Performances that qualify
Statutory license terms
Payment and receipt of statutory license fees Sec. 114(e)(1)
Allocation of receipts from statutory licenses Sec. 114(g)(2)
Not interactive Sec. 114(d)(2)(A)
Not too many songs from same album Sec. 114(d)(2)(B) and 114(j)(7)
No advance notice of songs to be transmitted Sec. 114(d)(2)(C)
No automatic channel switching or deletion of encoded information Sec. 114(d)(2)(D) and 114(d)(2)(E)
Determined by negotiation Sec. 114(e)(1)
Determined by Copyright Royalty Arbitration Panel Sec. 114(f)
Performances that require voluntary licenses
Limitations on voluntary license terms
Payment and receipt of voluntary license fees Sec. 114(e)(2)
Allocation of receipts from voluntary licensing Sec. 114(g)(1)
Subscription transmissions (not eligible for statutory licenses) Sec. 114(d)(2)&(4)
Interactive transmissions 114(d)(3)&(4)
Subscription transmission licenses Sec. 114(h)
Interactive transmission licenses Sec. 114(d)(3)


Compulsory mechanical license for "digital phonorecord delivery"
Nature of the license
Sec. 115(c)(3)(A)
Compulsory license terms
Payment and receipt of mechanical license fees
Sec. 115(c)(3)(B)
Through Dec. 31, 1997
Sec. 115(c)(3)(A)(i)
Beginning Jan. 1, 1998
Sec. 115(c)(3)(A)(ii)
Determined by negotiation
115(c)(B)
Determined by Copyright Royalty Arbitration Panel
115(c)(C), (D) & (F)
Negotiated terms have priority over Arbitration Panel terms
Sec. 115(c)(E)(i)
including
Controlled composition clauses entered into on or before June 22, 1995
Sec. 115(c)(E)(ii)
and
except
Arbitration Panel terms have priority over terms in controlled composition clauses
Sec. 115(c)(E)(i)
except
Controlled composition clauses entered into by self-published songerwriters, after the song is recorded
Sec. 115(c)(E)(ii)

Lon Sobel is the Editor of the Entertainment Law Reporter and a professor at Loyola Law School in Los Angeles where he teaches Copyright and Entertainment Law.

Public Law 104-39, S. 227, H.R. 1506 (104th Cong., 1st Sess.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ``Digital Performance Right in Sound Recordings Act of 1995".

SEC. 2. EXCLUSIVE RIGHTS IN COPYRIGHTED WORKS.

Section 106 of title 17, United States Code, is amended-

(1) in paragraph (4) by striking ``and'' after the semicolon;

(2) in paragraph (5) by striking the period and inserting ``; and''; and

(3) by adding at the end the following: ``(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.''.

SEC. 3. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS.

Section 114 of title 17, United States Code, is amended-

(1) in subsection (a) by striking ``and (3)'' and inserting ``(3) and (6)'';

(2) in subsection (b) in the first sentence by striking ``phonorecords, or of copies of motion pictures and other audiovisual works,'' and inserting ``phonorecords or copies'';

(3) by striking subsection (d) and inserting:

(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) (i) a nonsubscription transmission other than a retransmission;

(ii) an initial nonsubscription retransmission made for direct reception by members of the public of a prior or simultaneous incidental transmission that is not made for direct reception by members of the public; or

(iii) 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 trans-mission,

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) SUBSCRIPTION TRANSMISSIONS.-In the case of a subscription transmission not exempt under subsection (d)(1), the performance of a sound recording publicly by means of a digital audio transmission shall be subject to statutory licensing, in accordance with subsection (f) of this section, if-

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

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

(C) 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;

(D) except in the case of 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

(E) except as provided in section 1002(e) of this title, the transmission of the sound recording is accompanied 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.

(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 re-main 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 nonexclusive 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.

and (4) by adding after subsection (d) the following:

(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 NONEXEMPT SUBSCRIPTION TRANSMISSIONS.-

(1) No later than 30 days after the enactment of the Digital Performance Right in Sound Recordings Act of 1995, 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 subsection (d)(2) of

this section during the period beginning on the effective date of such Act and ending on December 31, 2000. Such terms and rates shall distinguish among the different types of digital audio transmission services then in operation. Any copyright owners of sound recordings or any entities performing sound recordings affected by this section may submit to the Librarian of Congress licenses covering such activities with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

(2) In the absence of license agreements negotiated under paragraph (1), during the 60-day period commencing 6 months after publication of the notice specified in paragraph (1), 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 rates and terms

which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings. In addition to the objectives set forth in section 801(b)(1), in establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated as provided in paragraph (1). The Librarian of Congress 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.

(3) License agreements voluntarily negotiated at any time between one or more copyright owners of sound recordings and one or more entities performing sound recordings shall be given effect in lieu of any

determination by a copyright arbitration royalty panel or decision by the Librarian of Congress.

(4) (A) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in paragraph (1) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe-

(i) no later than 30 days after a petition is filed by any copyright owners of sound recordings or any entities performing sound recordings affected by this section indicating that a new type of digital audio transmission service on which sound recordings are performed is or is about to become operational; and

(ii) in the first week of January, 2000 and at 5-year intervals thereafter.

(B) (i) The procedures specified in paragraph (2) shall be repeated, in accordance with

regulations that the Librarian of Congress shall prescribe, upon the filing of a petition in accordance with section 803(a)(1) during a 60-day period commencing-

(I) six months after publication of a notice of the initiation of voluntary negotiation proceedings under paragraph (1) pursuant to a petition under paragraph (4)(A)(i); or

(II) on July 1, 2000 and at 5-year intervals thereafter.

(ii) The procedures specified in paragraph (2) shall be concluded in accordance with section 802.

(5) (A) Any person who wishes to perform a sound recording publicly by means of a nonexempt subscription transmission 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 Librarian of Congress 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 twentieth day of the month next succeeding the month in which the royalty fees are set.

(g) PROCEEDS FROM LICENSING OF SUBSCRIPTION TRANSMISSIONS.-

(1) Except in the case of a subscription transmission licensed 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 subscription 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 subscription 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) 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 shall allocate to recording artists in the following manner its receipts from the statutory licensing of

subscription transmission performances of the sound recording in accordance with subsection (f) of this section:

(A) 2 1/2 percent of the receipts shall be de-posited 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.

(B) 2 1/2 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.

(C) 45 percent of the receipts shall be allocated, 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).

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

(3) 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.

(4) An "interactive service" is one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large does not make a service interactive. If an entity offers both interactive and non-interactive services (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service.

(5) A "nonsubscription" transmission is any transmission that is not a subscription transmission.

(6) 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).

(7) 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.

(8) 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.

(9) A "transmission" includes both an initial transmission and a retransmission.

SEC. 4. MECHANICAL ROYALTIES IN DIGITAL PHONORECORD DELIVERIES.

Section 115 of title 17, United States Code, is amended-

(1) in subsection (a)(1)-

(A) in the first sentence by striking out ``any other person" and inserting in lieu thereof ``any other person, including those who make phonorecords or digital phonorecord deliveries,"; and

(B) in the second sentence by inserting before the period ``, including by means of a digital phonorecord delivery";

(2) in subsection (c)(2) in the second sentence by inserting ``and other than as provided in paragraph (3)," after ``For this purpose, ";

(3) by redesignating paragraphs (3), (4), and (5) of subsection (c) as paragraphs (4), (5), and (6), respectively, and by inserting after paragraph (2) the following new paragraph:

(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 (F) 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 paragraph 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. 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 subparagraphs (B) through (F) and chapter 8 of this title shall next be determined.

(C) During the period of June 30, 1996, through December 31, 1996, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by subparagraph (A) during the period beginning January 1, 1998, and ending on the effective date of any new terms and rates established pursuant to subparagraph (C), (D) or (F), or such other date (regarding digital phonorecord deliveries) as the parties may agree. 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 Librarian of Congress licenses covering such activities. The parties to each negotiation proceeding shall bear their own costs.

(D) In the absence of license agreements negotiated under subparagraphs (B) and (C), upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to subparagraph (E), shall be binding on all copyright owners of nondramatic musical works and persons entitled to obtain a compulsory license under subsection (a)(1) during the period

beginning January 1, 1998, and ending on the effective date of any new terms and rates established pursuant to subparagraph (C), (D) or (F), or such other date (regarding digital phonorecord deliveries) as may be determined pursuant to subparagraphs (B) and (C). 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 arbitration royalty panel may consider rates and terms under voluntary license agreements negotiated as provided 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 Librarian of Congress 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. Subject to clause (ii), the royalty rates determined pursuant to subparagraph (C), (D) or (F) shall be given effect 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 sections 106(1) and (3) or commits another person to grant a license in that musical work under sections 106(1) and (3), 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), (D) or (F) 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), (D) or (F) 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 sections 106(1) and 106(3).

(F) The procedures specified in subparagraphs (C) and (D) shall be repeated and concluded, in accordance with regulations that the Librarian of Congress shall prescribe, in each fifth calendar year after 1997, except to the extent that different years for the repeating and concluding of such proceedings may be determined in accordance with sub-paragraphs (B) and (C).

(G) 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.

(H) (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 and section 509, 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).

(I) 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.

(J) 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.

(K) 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.

(L) 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.

and (5) by adding after subsection (c) the following:

(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, 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.

SEC. 5. CONFORMING AMENDMENTS.

(a) DEFINITIONS.-

Section 101 of title 17, United States Code, is amended by inserting after the definition of ``device", ``machine", or ``process" the following: ``A `digital transmission' is a transmission in whole or in part in a digital or other nonanalog format.".

(b) LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY TRANSMISSIONS.-

Section 111(c)(1) of title 17, United States Code, is amended in the first sentence by inserting ``and section 114(d)" after ``of this subsection".

(c) LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY TRANSMISSIONS OF SUPERSTATIONS AND NETWORK STATIONS FOR PRIVATE HOME VIEWING.-

(1) Section 119(a)(1) of title 17, United States Code, is amended in the first sentence by inserting ``and section 114(d)'' after ``of this subsection''.

(2) Section 119(a)(2)(A) of title 17, United States Code, is amended in the first sentence by inserting ``and section 114(d)'' after ``of this subsection''.

(d) COPYRIGHT ARBITRATION ROYALTY PANELS.-

(1) Section 801(b)(1) of title 17, United States Code, is amended in the first and second sentences by striking ``115'' each place it appears and inserting ``114, 115,''.

(2) Section 802(c) of title 17, United States Code, is amended in the third sentence by striking ``section 111, 116, or 119," and inserting ``section 111, 114, 116, or 119, any person entitled to a compulsory license under section 114(d), any person entitled to a compulsory license under section 115,".

(3) Section 802(g) of title 17, United States Code, is amended in the third sentence by inserting ``114," after ``111,".

(4) Section 802(h)(2) of title 17, United States Code, is amended by inserting ``114," after ``111,".

(5) Section 803(a)(1) of title 17, United States Code, is amended in the first sentence by striking ``115" and inserting ``114, 115" and by striking ``and (4)" and inserting ``(4) and (5)".

(6) Section 803(a)(3) of title 17, United States Code, is amended by inserting before the period ``or as prescribed in section 115(c)(3)(D)".

(7) Section 803(a) of title 17, United States Code, is amended by inserting after paragraph (4) the following new paragraph: ``(5) With respect to proceedings under section 801(b)(1) concerning the determination of reasonable terms and rates of royalty payments as provided in section 114, the Librarian of Congress shall proceed when and as provided by that section.".

SEC. 6. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect 3 months after the date of enactment of this Act, except that the provisions of sections 114(e) and 114(f) of title 17, United States Code (as added by section 3 of this Act) shall take effect immediately upon the date of enactment of this Act.

Approved November 1, 1995

[ELR 17:6:3]

RECENT CASES

Agent recovers damages from NFL player who breached representation agreement by hiring another agent to negotiate his Atlanta Falcons contract; but appellate court approves jury verdict of only $20,000, which was much less than agreed-upon percentage of salary actually earned by player

Professional sports leagues conduct player drafts, but professional sports agents still compete for clients. As a general rule, players benefit from their freedom to choose among competing agents. But occasionally that freedom results in undesired legal complications. It did, for example, in a recent case involving the Atlanta

Falcons' Bruce Pickens and a Nebraska-based player agency named Team America. Those complications resulted in a $20,000 judgment being entered against Pickens in favor of Team America. Pickens appealed the judgment, but he may have been less disappointed by it than Team America, because Team America also appealed. It had been looking for a judgment of $263,680. The appellate court rejected both appeals, however, and has affirmed the trial court's $20,000 judgment.

Pickens played football for the University of Nebraska, and in his senior year was a member of the Cornhuskers team that went to the Orange Bowl in January 1991. When the team returned home from that game, Pickens was met at the airport by a representative of a Lincoln, Nebraska auto dealership whose owner, Howard Misle, also owned Team America and had been a player agent for some 12 to 15 NFL players. Pickens was taken to the auto dealership and was allowed to

select and take a car, in return for which he signed a "house note" but paid no money. At the same time, he signed a "Standard Representation Agreement Between NFLPA Contract Advisor and Player," which is the standard form for agreements between players and agents certified by the NFL Players Association, which Misle then was. The form wasn't dated, nor was it sent to the NFLPA immediately, as NFLPA rules require. According to Misle, it was left undated by inadvertence and wasn't sent to the NFLPA because the Players Association was not then a certified union but only a voluntary organization. According to Pickens, however, the form wasn't dated or sent to the NFLPA, because it wasn't suppose to become a binding agreement unless and until he later decided to hire Team America as his agent.

Shortly thereafter, Pickens hired Tom Condon to be his agent. Condon had previously played for the

Kansas City Chiefs, had been president of the NFLPA, is a lawyer, and had represented more than 200 NFL players including several first-round draft choices. When Pickens was drafted by the Falcons in the third round of the 1991 draft, Condon negotiated his contract. And quite a contract it turned out to be: Pickens received signing bonuses of $2,492,000 plus compensation for each season he made the team, in amounts escalating from $450,000 for 1991 to $1,200,000 for 1995.

Team America's contract with Pickens entitled it to 4% of the money Pickens received under his NFL contract, so Team America sued for breach of that contract, seeking damages of 4% what Pickens would earn from the Falcons. The jury ruled in favor of Team America on the question of whether Pickens had breached, but awarded it damages of only $20,000. Both parties appealed, complaining that the result had been affected

by jury instructions that were improperly given or refused by the trial judge.

In an attempt to defeat Team America's contention that he had entered into a binding contract, Pickens had requested instructions directing the jury to rule in his favor: if it found that he had been offered anything of value to be represented by Team America; if it found that his agreement was to be governed by the NFLPA Code of Conduct and that the form had not been sent to the NFLPA; or if the NFLPA Code of Conduct had been incorporated into his agreement and Team America had failed to comply with it in any other way. These instructions were relevant because the Code of Conduct does require the form to be sent to the NFLPA, and because the Code prohibits agents from giving players anything of value to persuade them to sign an NFLPA representation agreement. But the trial court refused to give any of these instructions, and the Missouri Court of Appeals, in

an opinion by Judge Robert G. Ulrich, has affirmed the trial court's refusal. The appellate court has ruled that Pickens had "fail[ed] to demonstrate" that his contract with Team America would have been "illegal under either Missouri or Nebraska law" even if he had been given something of value to sign it. And the court ruled that Pickens had "fail[ed] to show how or why" the NFLPA's Code of Conduct, or Team America's failure to abide by it, "would have defeated Team America's claim of anticipatory breach of contract."

Pickens also argued that the jury should not have been instructed (if it found a valid contract) to award the amount "which would have been due [Team America] under the agreement," but instead should have been instructed to award "the reasonable value of the services furnished" by Team America (which presumably would have been zero, because it rendered no services). But the appellate court disagreed. It ruled that the instruction

given was the proper one, because "When the principal [in this case, Pickens] wrongly terminates an agency agreement, the agent may . . . sue for breach of contract for the commissions that would have been earned under the agreement."

As a result of the relatively meager amount awarded by the jury, Team America appealed on two grounds. First, the trial took place in 1993, and the jury was instructed to base its award only on the signing bonus Pickens had received and on the amount he earned under his 1991, 1992 and 1993 contracts. Team America contended the award should have been based on the amounts Pickens was likely to earn in 1994 and 1995 as well. But since Pickens contract required him to make the team each year, in order to be entitled to that year's salary, and since there was no guaranty he would make the team in 1994 and 1995, the jury instruction had been proper. The appellate court explained, "Although

damages need not be absolutely certain, the existence and amount of damages must be reasonably certain and not speculative. . . . Because no evidence established with reasonable certainty that Mr. Pickens would qualify and become a member of the Atlanta Falcons Football Team in 1994 and 1995, his fulfillment of the contracts for those years was uncertain and speculative."

The amount that Pickens received in signing bonuses and as salary for 1991, 1992 and 1993 amounted to $4,392,000 - 4% of which would have been $175,680, not the mere $20,000 awarded by the jury. So Team America appealed on this ground too. Again, however, the appellate court rejected his arguments. It noted that Team America would have been entitled to 4% of what it negotiated on Picken's behalf - not 4% of what Condon did. And focusing on how much more experience Condon had than Team America, the appellate court approved the jury's verdict. It explained, "Contrary

to Team America's assertions, it was not entitled to commissions based solely on the contracts negotiated by others. Although required to show what it would have negotiated, Team America points to no evidence showing its own past achievements in negotiating NFL player contracts. The jury was instructed to award Team America such sum as it believed to be the sum which would have been due Team America under the representation agreement. In determining damages, the jury could consider all evidence, including the contracts negotiated by others, and the backgrounds and experience of the negotiator. Here, the $20,000 damage award appears to be within the range of the evidence, and is not unwarranted."

Editor's note: The court's discussion of Picken's argument that his contract with Team America was invalid, because the NFLPA Code of Conduct had not been complied with, is brief and conclusionary and does not

do full justice to the potential importance of the argument. The court's ultimate conclusion - that non-adherence to NFLPA rules does not invalidate an NFLPA contract advisor agreement - may be correct as a matter of Nebraska and Missouri contract law; but this is an issue that deserves a more thorough analysis and explanation. The court's damages rulings, on the other hand, are quite enlightening and seem perfectly consistent with common law principles of contract damages in all states. The result, of course is that inexperienced (and even some experienced) player agents have less incentive to bring cases of this sort, because they must prove what they would have obtained on the player's behalf, not simply what the other agent obtained.

Total Economic Athletic Management of America, Inc. v. Pickens, 898 S.W.2d 98, 1995 Mo.App.LEXIS 765 (Mo.App. 1995) [ELR 17:6:20]

Publication of folk song verse by "Sing Out!" magazine in 1957 without proper copyright notice put verse in the public domain, Court of Appeals rules in case involving Pete Seeger and Enya

Old law and discarded formalities die lingering deaths. Copyright notices haven't been required at all since 1989, and incorrect notices have been curable since 1978. But before 1978, copyright notices were required by U.S. law, and in those days, even small mistakes in notices were excused only under narrow circumstances. Although 17 years have passed since the harsh requirements of pre-1978 law were in effect, the old law still applies to all works that were first published during the pre-1978 era, even in cases involving alleged infringements that have occurred quite recently.

Those in the music business are reminded of all this, because of something that folk singer Pete Seeger did 38 years ago which had legal repercussions only three years ago. What Seeger did back in 1957 was to arrange for the publication of a three-verse folk song entitled "How Can I Keep from Singing" in Sing Out! magazine. The song had been taught to him by Doris Plenn, a family friend who had learned its first two verses from her grandmother and who had written its third verse herself. Plenn taught Seeger the song with the hope he would keep it alive, and she authorized him to publish it without placing any restrictions on the way in which he did that.

When Sing Out! published the song, the only copyright notice in the magazine was one in Sing Out!'s own name. There was no notice in Plenn's name anywhere in the issue.

Thirty-five years later, in 1992, the song was recorded by Enya in the album "Shepard Moons." By then, Plenn had assigned her copyright in the third verse of the song to Sanga Music, Inc., and when "Shepard Moons" was released by Reprise Records, Sanga sued Reprise and EMI (the publisher of Enya's version) for copyright infringement. One issue in the case quickly became whether the copyright to the song's third verse was put in the public domain, because the copyright notice that accompanied its publication 35 years before was incorrect. District Judge Charles S. Haight, Jr., held that it was, and thus granted summary judgment for EMI and Reprise. And the Second Circuit Court of Appeals has affirmed, in an opinion by Judge Pierre N. Leval.

The Copyright Act of 1909 - which was the law in effect prior to 1978 - required copyright notices to be "accompanied by the name of the copyright proprietor," and since Sing Out! magazine was merely a licensee, it

was not the proprietor and the notice was defective. The appellate court ruled that since Plenn had authorized Seeger to publish the song, his arranging for its publication by Sing Out! was legally equivalent to her own publication of it. And since the notice was defective, the third verse went into the public domain.

The court's decision follows the well-established principle that pre-1978 publication without a notice, or with a defective notice, put the work in the public domain. Until 1970, this was the rule in the Second Circuit as well as others, even though the rule was acknowledged to be harsh. In 1970, however, the Second Circuit decided Goodis v. United Artists Television, Inc., 425 F.2d 397 (2d Cir. 1970). In that case, the court ruled that when a work is published in a magazine, a single notice in the magazine's own name was sufficient to protect the copyrights to individual articles as well, even if the copyrights to those articles had been retained by

their authors. It was this principle Sanga Music had relied on in this case.

But Judge Leval distinguished Goodis on two grounds. First, he ruled that under Goodis, a single copyright notice in the magazine's name is sufficient only where the author had shown no intent to contribute his or her work to the public domain. In this case, Judge Leval ruled that Plenn had shown an intent to put her verse in the public domain, because when she gave it to Seeger, she expressed no desire for credit or royalties and had placed no restrictions on the manner in which he could publish it. Second, Judge Leval ruled that Goodis applies only where the public has not been misled into a reasonable belief the work was in the public domain. Here, the public was misled, Judge Leval concluded, because Sing Out! had introduced the song with text indicating it was a church hymn that dated back to at least 1894 and probably before. Judge Leval added

that while the harshness of the pre-Goodis rule should be avoided, in the "unusual circumstances" of this case, "the rule is not harsh or unfair."

Editor's note: If Goodis had been distinguished in this fashion by the Ninth Circuit, it would not have been surprising, because the Ninth Circuit so frequently disagrees with the Second in copyright matters. It is however remarkable that the Second Circuit distinguished Goodis in this way. One wonders, for example, whether Goodis would have been distinguished if Plenn had written all three verses of "How Can I Keep from Singing," rather than just the third. Moreover, there is nothing in the decision to suggest that Plenn had approved of the text in Sing Out! that suggested the song was an old church hymn. Nor was there any way that Enya or Reprise could have known whether Plenn had intended to put her verse in the public domain when she gave it to Seeger more than 35 years before. Thus, this decision

invites future litigation over what had become a well-settled, if narrow, exception to the pre-1978 rule requiring notice in the proprietor's own name. To the extent the Second Circuit was concerned by Enya's and Reprise's reasonable belief that the entire song - including Plenn's third verse - was in the public domain, the same result could have been achieved by means of the implied license doctrine - an issue that was not reached because the case was disposed of on defective-notice grounds.

Sanga Music, Inc. v. EMI Blackwood Music, Inc., 55 F.3d 756, 1995 U.S.App.LEXIS 13499 (2d Cir. 1995) [ELR 17:6:21]

Restaurant not eligible for "homestyle receiving apparatus" exemption from public performance provisions of Copyright Act, because restaurant used sophisticated receiver connected to nine ceiling speakers, Court of Appeals rules in case brought by ASCAP member music publishers

There's a restaurant in Racine, Wisconsin that used to be known as the Port Town Family Restaurant. Until recently, both the town and the restaurant were about as far from the music business as they could be. But now, they may deserve at least a small corner in any Hall of Fame display devoted to milestones in the history of music law. This is so, because the restaurant - and its radio - became the focus of an important case construing the meaning of a provision of the Copyright Act that deals with when small businesses are entitled to an exemption from the usual rule that public

performances of music - even by radio - require a license.

The provision in question is section 110(5) of the Copyright Act which exempts public performances "by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes." The Port Town Family Restaurant was equipped with Realistic brand AM/FM receiver, Model STA-700, sold at Radio Shack stores for about $200, connected to nine ceiling speakers. One evening, while ASCAP investigators were in the restaurant, the receiver was tuned to Milwaukee station WMYX-FM while it broadcast recordings by James Taylor, Lionel Richie, Billy Joel, the Pointer Sisters, the Eagles and the Temptations. All of these recordings were of songs whose copyrights are owned by ASCAP member music publishers. The restaurant did not have an ASCAP license, and ASCAP's attempts to persuade the restaurant that it

needed one came to naught. As a result, the music publishers sued.

The restaurant didn't respond to the lawsuit. But a District Court in Wisconsin added insult to ASCAP's injury by ruling that the Port Town Family Restaurant was entitled to the section 110(5) "homestyle receiving apparatus" exemption. (ELR 15:7:8) Now, however, the Court of Appeals has reversed that ruling. In a decision by Judge Kenneth F. Ripple, it has held that the restaurant's "receiving apparatus" was too sophisticated to qualify for the exemption, and therefore it remanded the case to the District Court for entry of judgment in favor of the music publishers and for "the determination of appropriate relief."

The District Court had concluded that the restaurant's receiver was eligible for the exemption despite its nine ceiling speakers, for two reasons. First, the District Court believed that section 110(5) focused on the

receiver itself, not on the number of speakers attached to it. And second, the District Court concluded that many homes now have multiple-speaker systems. However, the Court of Appeals found itself "in respectful disagreement" with the District Court's conclusion. It held that the words "receiving apparatus" mean more than the receiver itself, because "apparatus" means "the totality of means by which a designated function is performed." The appellate court described the restaurant's apparatus - including its nine speakers - in some detail, and it concluded that the "system at issue here, when assessed in its totality, cannot be characterized fairly as . . . a system" of the kind "commonly found in homes."

Editor's note: The Court of Appeals' decision correctly interprets section 110(5) and properly reverses a clearly erroneous District Court opinion. Those in the music business should not take the District Court decision lightly however, even though it was wrong and has

now been reversed, because that decision reflected the widespread but incorrect notion that if a radio station is licensed by ASCAP, all who listen to that station - including public businesses - are or ought to be considered to be licensed as well. Legislation is now pending in Congress that would broaden the section 110(5) exemption to cover businesses such as the Port Town Family Restaurant; and legislation has been enacted in Texas, and is pending in other states, that would regulate the manner in which ASCAP, BMI and SESAC do business in those states. See the "New Legislation and Regulations" section of this issue of the Entertainment Law Reporter for a report on that legislation. (ELR 17:6:28)

Cass County Music Co. v. Muedini, 55 F.3d 263, 1995 U.S.App.LEXIS 10897 (7th Cir. 1995) [ELR 17:6:23]

Appellate court affirms dismissal of libel and false light claims arising from "And the Sea Will Tell," the Vincent Bugliosi book and CBS miniseries about a murder trial

Palmyra Island is an uninhabited dot of land in the middle of the Pacific Ocean. It's the sort of place to which adventurous souls dream of sailing, and a couple named Muff and Mac Graham once did. So did Stephanie Stearns and Buck Walker. The Grahams never returned; Stearns and Walker did, on a boat that turned out to belong to the Grahams. So when Muff Graham's bones washed up on shore, Stearns and Walker were prosecuted for her murder. If this sounds like the stuff from which a best-selling book and television miniseries could be made, you're right; and they have. The book was And the Sea Will Tell by Vincent Bugliosi and

Bruce Henderson. CBS broadcast the miniseries based on the book.

Bugliosi of course was once a prosecutor. He became famous as a result of his successful prosecution of Charles Manson and the best-selling book he wrote about that case, Helter Skelter. Bugliosi's introduction to the Palmyra murder trials also was as a lawyer. He represented Stephanie Stearns, and won an acquittal for her. Buck Walker was represented by Earle Partington in a separate trial, and Walker was convicted. And the Sea Will Tell is Bugliosi's account of the two trials.

Partington took offense at the way in which he was portrayed in the book and miniseries and therefore sued Bugliosi, Henderson, their publisher, CBS, the company that produced the miniseries, and others for defamation and false light invasion of his privacy. A federal district court granted summary judgment with

respect to most of his claims. (ELR 15:11:22) And a federal appellate court has affirmed.

In a decision by Judge Stephen Reinhardt, the Ninth Circuit Court of Appeals has concluded, after lengthy analysis, that although the descriptions in the book and miniseries of Partington's performance during Walker's trial might have implied that he represented his client poorly, these objected-to statements were protected by the First Amendment, because the contexts in which the statements were made did not imply the assertion of an objective fact and were not capable of being proved true or false.

In reaching this conclusion, the appellate court noted that the general tenor of the book and miniseries clearly indicated that Bugliosi's observations about Partington's trial strategies were statements of personal viewpoint, not assertions of an objective fact. The court stated that given the ambiguous nature of the subject

matter at issue, the First Amendment required the court "to give the author substantial latitude in describing and interpreting the events involved." Moreover, the court also found that the specific context in which the challenged statements were made negated the impression that they implied the assertion of objective facts.

Partington had claimed that all of the challenged statements implied that he should have adopted different trial strategies and that he had provided inadequate representation to his client. But Judge Reinhardt concluded that "negative statements concerning a lawyer's performance during trial, even if made explicitly, are generally not actionable since they are not ordinarily `susceptible of being proved true or false.'" Although there is no "wholesale protection" extended to commentary upon trials, the court emphasized the importance of informing the public about court proceedings.

The court also rejected Partington's false light claim, and therefore affirmed the district court decision granting summary judgment to Bugliosi, CBS and the other defendants.

Editor's note: This is not the first time Vincent Bugliosi has been sued for libel and invasion of privacy as a result of things he has written in books - nor is this the first time he has won such cases. In fact, he was sued twice, by two different people, in connection with Helter Skelter. In Forsher v. Bugliosi, 26 Cal.3d 792, 163 Cal.Rptr. 628 (1980) (ELR 2:1:5), the California Supreme Court ruled that the objected-to statements were not defamatory as a matter of law, so that case was properly dismissed by the trial court. But in Kanarek v. Bugliosi, 108 Cal.App.3d 327, 166 Cal.Rptr. 526 (1980) (ELR 2:7:4), the California Court of Appeal ruled that the "Uniform Single Publication Act" did not bar a defamation lawsuit arising from the paperback republication

of that book, and thus that case had been improperly dismissed by the trial court.

Partington v. Bugliosi, 56 F.3d 1147, 1995 U.S.App. LEXIS 13769 (9th Cir. 1995) [ELR 17:6:23]

Wisconsin retraction statute does not apply to allegedly defamatory statements posted on SportsNet on-line computer service, because on-line services are not "periodicals"; thus plaintiffs may proceed with defamation lawsuit even though they failed to request correction or retraction

Cyberspace is metaphysical. There are no courts there, and it doesn't have its own law. So when allegedly defamatory statements are made in cyberspace, earth-bound judges must apply the laws of their own

jurisdictions. But earthly laws are sometimes difficult to apply to cyber-torts, because most such laws were written long before the advent of computer networks, and thus the wording of those laws may not neatly fit the circumstances.

This is precisely the dilemma that confronted the Wisconsin Court of Appeals in a recent defamation lawsuit brought by Jeff Meneau and his company It's in the Cards, Inc., against Rosario Fuschetto who does business as Triple Play Collectibles. As the names of their businesses suggest, Meneau and Fuschetto are sports memorabilia dealers. SportsNet is an on-line computer network used by sports memorabilia dealers to communicate with one another. SportsNet's "mailbox" feature permits dealers to send private email to specifically identified recipients, and its "bulletin board" feature permits them to send public messages to all SportsNet members.

Meneau and Ruschetto are both SportsNet members and used the service to communicate with one another by private email. Unfortunately, a disagreement developed between them; and Fuschetto posted a message on the SportsNet bulletin board explaining their argument to all other members who cared to read about it. According to Meneau, the message was defamatory, and he sued Fuschetto for defamation in state court in Wisconsin.

Wisconsin has a statute that provides that before a defamation action may be filed against any "newspaper, magazine or periodical," the defamed person must send those responsible for the publication a written notice identifying the false and defamatory statements and indicating what the true facts are. The person so notified then has an opportunity to publish a correction or retraction, and if this is done, it constitutes a defense against

any damages except actual damages and may be considered in mitigation of actual damages.

Meneau did not give Fuschetto the notice required by this Wisconsin law. The trial court concluded that the notice was necessary, and dismissed the case. But the Wisconsin Court of Appeals has reversed. All agreed that the SportsNet bulletin board is not a newspaper or magazine, and thus the question became whether it was a "periodical." The appellate court has held that it is not. Relying on Webster's Dictionary, it noted that periodicals appear at regular or stated intervals, while messages on the SportsNet bulletin board do not. "SportsNet users place their messages on the bulletin board at any time and there are no set time limits as to when the messages are read. The messages are not done on a monthly, weekly or daily basis, but are sporadic as to whenever a SportsNet user desires to write a communication. Thus, we conclude that these messages on the bulletin board

are not periodicals under the ordinary meaning of the term."

Since the bulletin board is not a periodical, the retraction statute does not apply, and the appellate court remanded the case to the trial court so that Meneau may proceed with his lawsuit.

Editor's note: SportsNet itself does not appear to be a defendant in this action, and thus this case - unlike some others - will not deal with the liability of computer on-line services themselves. (See, e.g., Playboy Enterprises, Inc. v. Frena, 839 F.Supp. 1552 (M.D.Fla. 1993) (ELR 16:4:10), which dealt with the copyright liability of a computer bulletin board service for images posted and downloaded by its subscribers.) On the other hand, unless this case is settled, it is likely to generate some additional decisions of significance. For example, Meneau is a Wisconsin resident; that apparently is why he filed suit there. Fuschetto, however, is a New York

resident. Thus, one question this case is likely to pose is whether Wisconsin courts may assert personal jurisdiction over New York residents if their only contact with Wisconsin involves posting messages to a computer bulletin board that is accessed by Wisconsin residents. This and other issues are similar to those already confronted by courts in connection with cases arising out of the publication of nationally-distributed magazines and newspapers. But in the context of computer on-line services, and especially the international Internet, the connections between computer network users and the states where they are sued are likely to be even more tenuous than in print media cases; and that will make jurisdiction and choice of law questions even more difficult to decide.

It's in the Cards, Inc. v. Fuschetto, 193 Wisc.2d 429, 535 N.W.2d 11, 1995 Wisc.App.LEXIS 489 (Wisc. App. 1995) [ELR 17:6:24]

Termination of college basketball coach for using the word "nigger" in locker room speech is sustained by appellate court; but university's discriminatory harassment policy is declared unconstitutional

Long before police detective Mark Fuhrman's use of the "N-word" became the subject of nationwide controversy, the head basketball coach at Central Michigan University used the word "nigger" in a locker room speech to his players. According to the coach, Keith Dambrot, he used the word in a "positive and reinforcing" manner, just as African American players use the word among themselves, "to connote a person who is

fearless, [and] mentally strong and tough." Indeed, when the university's Athletic Director later investigated the incident, he found that none of the African American players he interviewed had been offended by their coach's use of the term. Nevertheless, the university's affirmative action officer determined that the coach had violated the university's discriminatory harassment policy; and as a consequence, the coach was suspended without pay for five days - a penalty he accepted in lieu of a more formal investigation. As things turned out, however, that was not the end of the matter, because when the coach was suspended, the incident became newsworthy on and far beyond the university campus. As a result, the university advised the coach he would not be rehired for the following season, because he "was no longer capable of effectively leading the men's basketball program."

His termination provoked an almost immediate lawsuit by the coach and by several of his African American players who joined him as co-plaintiffs. They claimed that the coach's termination violated his First Amendment free speech and academic freedom rights, and that the university's discriminatory harassment policy was unconstitutional too. A federal district court ruled in favor of the university with respect to its termination of the coach, but in favor of the players with respect to the university's harassment policy. (ELR 16:3:16) Cross-appeals were taken by both sides, but a Court of Appeals has affirmed the district court's rulings on both issues.

In an opinion by Circuit Judge Damon J. Keith, the Sixth Circuit Court of Appeals has ruled that even though the university terminated the coach because of something he said - that is, because he used the word "nigger" - the termination was permissible and did not

violate the coach's First Amendment rights. Government employees (including coaches at state universities) have a right to speak about certain issues without being fired for doing so, but this right exists only with respect to speech about matters of "public concern." According to Judge Keith, the coach's use of the word "nigger" was not related to a matter of public concern, because the coach's speech did not relate to "any matter of political, social or other concern to the community." Instead, the coach's locker room speech "was intended to be motivational" and his use of the word "was incidental to the message conveyed."

Likewise, Judge Keith ruled that the coach's termination did not violate his First Amendment academic freedom rights, because "Dambrot's speech served to advance no academic message and is solely a method by which he attempted to motivate - or humiliate - his

players . . . [and] the University has a right to disapprove of the use of the word `nigger' as a motivational tool. . . ."

On the other hand, Judge Keith agreed with the players and the district court that the university's discriminatory harassment policy was unconstitutional. It was, he ruled, because it was overbroad and because it was vague. Since the players prevailed on this issue, the district court had awarded them attorneys' fees; and Judge Keith affirmed that award too, over the university's objections.

Dambrot v. Central Michigan University, 55 F.3d 1177, 1995 U.S.App.LEXIS 13615 (6th Cir. 1995) [ELR 17:6:25]

Briefly Noted:

Seizure of videotape from TV station.

A policeman and a prosecutor violated the federal Privacy Protection Act by seizing a videotape, pursuant to a search warrant, from television station WDAF-TV, a federal District Court has ruled. The videotape was made by a tourist, and by chance it showed the abduction of a woman from the Liberty Memorial in Kansas City, Missouri. After her abduction, the woman was murdered. The tourist allowed WDAF-TV to make a copy of the tape, and the station broadcast excerpts from it on an evening newscast. When contacted by the police, the TV station said they could view the station's copy of the tape and could have a copy of it by subpoena. Instead of seeking a subpoena, however, the police obtained a search warrant, which was served by a

police officer and a prosecutor who seized the station's copy of the videotape. The station filed suit, alleging that the seizure of the tape violated its rights under the Privacy Protection Act and under section 1983 of Title 42 of the United States Code. The Privacy Protection Act was passed by Congress in 1980 in response to the Supreme Court's decision in Zurcher v. Stanford Daily, 436 U.S. 547 (1978), in which the Court held that the Fourth Amendment was not violated by a district attorney who had seized photographs of a demonstration from the Stanford University newspaper. Thus, the Privacy Protection Act makes it illegal for government officers or employees to seize material from news organizations. In this case, District Judge Fernando J. Gaitan, Jr., held that the Act had been violated by the seizure of the videotape from WDAF-TV; he ordered the police and prosecutor to return the tape to the station; and he awarded the station $1,000 in damages. On

the other hand, Judge Gaitan dismissed the station's section 1983 claim, saying that he could find no support for the station's argument that it had a First Amendment "reporter's privilege" to a hearing before material was seized from it in connection with a criminal investigation.

Citicasters, Inc. v. McCaskill, 883 F.Supp. 1282, 1995 U.S.Dist.LEXIS 9926 (W.D.Mo. 1995) [ELR 17:6:26]

Defamation, privacy, emotional distress.

A defamation, privacy and emotional distress case against Boston television station WCVB-TV was properly dismissed without trial, a federal Court of Appeals has held, even though the "suggestion of murder runs through the [complained-of] program like a gold thread,"

and the suggested murderer was the plaintiff. The case arose out of a newsmagazine segment that reported on the mysterious disappearance and suspected murder of an airline flight attendant, and bitter divorce proceedings then pending between the attendant and her husband, an airline pilot. According to the husband, the broadcast suggested he had murdered his wife, but the District Court dismissed his case, in response to the station's motion for summary judgment. That ruling has now been affirmed by the Court of Appeals, in a decision by Judge Michael Boudin. The judge noted that the station "does not appear to dispute that the broadcast charges [the husband] with murder or at least that a jury would be entitled to find this to be the import of the program." Nonetheless, to prevail in a defamation case, a plaintiff - even a private figure plaintiff - must show "fault" which in Massachusetts means "negligence or worse." Judge Boudin observed that the husband had pointed to

nothing to suggest the station had been negligent in its presentation of the available evidence, nor had he pointed to any "exculpatory evidence" the station "wrongly withheld" or "would have discovered by diligent research." The husband's false light invasion of privacy claim failed for two reasons. First, "Massachusetts has never adopted the false light theory of privacy invasion." And second, as to that claim too, the husband would have had to show the station was negligent, and he hadn't. Finally, although Massachusetts does recognize the tort of intentional infliction of emotional distress, that tort requires "extreme and outrageous conduct," and since the station's conduct was not even negligent, it "could hardly be `extreme and outrageous.'" Moreover, Judge Boudin observed that "many of the legitimate news stories that appear in the media involve foreseeable distress for the subject of the story, probably severe distress in some cases." But the husband had

provided "no basis to think that generally accurate coverage in such a case is even remotely close to conduct `beyond all possible bounds of decency' and `utterly intolerable in a civilized community,'" as is required by Massachusetts law.

Brown v. Hearst Corp., 54 F.3d 21, 1995 U.S.App. LEXIS 10433 (1st Cir. 1995) [ELR 17:6:26]

Producer's liability insurance.

An insurance policy issued to a film distributor did not cover the distributor's liability for the distribution of homevideo cassettes or videodiscs, and thus summary judgment was properly granted to Seaboard Surety, the company that had issued the policy. On the other hand, summary judgment was properly denied to the insurance

brokers who had placed the policy on behalf of the distributor, because issues of fact were presented regarding the broker's duty to obtain "appropriate coverages to protect their clients' interests." The insurance policy in question provided coverage only for certain acts "committed or alleged to have been committed in the conduct of the Insured's business of Producer or Distributor or Owner of the film for commercial use on television and arising out of the telecasting of the film series." According to a New York appellate court, this language was "clear and unambiguous" and did not cover homevideo-related liability, because the court had previously held in Tele-Pac, Inc. v. Grainger, 570 N.Y.S.2d 521 (N.Y.App.Div. 1991) (ELR 13:4:10), that the terms "television and/or broadcasting" do not include homevideo cassettes or videodiscs.

Video-Cinema Films, Inc. v. Seaboard Surety Co., 625 N.Y.S.2d 195, 1995 N.Y.App.Div. LEXIS 4372 (N.Y.App.Div. 1995) [ELR 17:6:27]

Previously Reported:

The United States Supreme Court has denied a petition for certiorari in the case of La Cienega Music Co. v. ZZ Top (ELR 16:10:13, 17:5:18). This is the case in which the Ninth Circuit ruled that the release of a recording of an otherwise unpublished song "publishes" that song, and thus starts the initial 28-year term of copyright with respect to pre-1978 releases. In so ruling, the Ninth Circuit expressly disagreed with a contrary ruling (in a factually identical case) by the Second Circuit Court of Appeals. And thus the Supreme Court's denial of certiorari leaves in tact this conflict among the

circuits, on an issue that probably affects the current copyright status of countless songs that were first "published" - according to the Ninth Circuit - by their release as recordings, but whose copyrights were not renewed 28 years thereafter.

The following case, which was previously reported in an earlier issue of the Entertainment Law Reporter, has now been published in print: People v. The Concert Connection, 211 A.D.2d 310, 629 N.Y.S.2d 254 (N.Y. App.Div. 1995) (ELR 17:3:17).
[ELR 17:6:27]

NEW LEGISLATION AND REGULATIONS

Congress enacts sound recording public performance bill

Congress has enacted the Digital Performance Right in Sound Recordings Act of 1995, and President Clinton signed it into law on November 1, 1995.

The Act gives sound recording copyright owners a public performance right for the first time in the history of U.S. copyright law. It also amends the compulsory mechanical license provisions of existing law, to include a right to distribute recordings by digital transmission.

The Act is quite complex, and is the subject of the Legal Affairs article in this issue of the Entertainment Law Reporter. See, "A New Music Law for the Age of Digital Technology," at page 3 (ELR 17:6:3).

Digital Performance Right in Sound Recordings Act of 1995, Public Law 104-39, S. 227, H.R. 1506 (104th Cong., 1st Sess., Nov. 1, 1995) [ELR 17:6:28]

Texas adopts legislation to regulate music performance licensing practices of ASCAP, BMI and SESAC

Many bars, restaurants, retail stores and other small businesses play music for the enjoyment of their customers and employees. Although the owners of such businesses pay all of their other suppliers, apparently without complaint, they have long resented the fact that songwriters and music publishers are usually entitled to be paid as well. This resentment boils over into never-ending battles with ASCAP, BMI and SESAC which are the three performing rights societies that issue non-dramatic public performance licenses on behalf of those songwriters and music publishers who are their members and affiliates.

Twenty years ago, the owners of small businesses won a significant victory when the United States Supreme Court ruled in Twentieth Century Music Corp. v.

Aiken, 422 U.S. 151 (1975), that they do not have to pay public performance royalties for merely playing ordinary radios, even if their radios are tuned to stations that broadcast copyrighted music. This victory was then quickly cemented into statutory law by Congress, in section 110(5) of the Copyright Act, which codified the Supreme Court's decision in Aiken. The proper scope of the section 110(5) exemption has been a fertile topic for litigation ever since. The most recent such case is Cass County Music Co. v. Muedini, which is reported in the "Recent Cases" section of this issue of the Entertainment Law Reporter. (ELR 17:6:23).

One thing is clear, however: both the Aiken case and section 110(5) of the Copyright Act exempt only public performances of music by means of ordinary homestyle radios and television sets. Public performance licenses are necessary whenever music is performed in business establishments by live bands, piano players, or

vocalists, or by CD, audiotape or record players, or even by radios and television sets that are more elaborate than ordinary homestyle receivers. Legislation is now pending in Congress that would broaden the section 110(5) exemption to cover certain types of businesses that perform music by radio or television, regardless of the nature or quality of the radio or television set. (H.R. 789).

Many business owners, however, are not content to work within the context of federal copyright law. Since ASCAP, BMI and SESAC are the objects of the resentment of these business owners, they have encouraged and support bills that have been introduced in the legislatures of 10 states which would regulate the manner in which these performing rights societies conduct their music licensing activities. These bills are still pending in nine states: Colorado, Hawaii, Maryland, Missouri, New Hampshire, New Jersey, Oklahoma, Virginia

and Wyoming. Texas has enacted its bill, and it became effective September 1, 1995.

The Texas legislation requires performing rights societies to provide certain information, and to use contracts in a certain form, when issuing music public performance licenses to a "retail establishment, restaurant, inn, bar, tavern or other similar place of business" located in Texas. The legislation does not apply to broadcasters, cable operators or programmers or other transmission services, nor does it apply to the licensing of motion pictures or audiovisual works.

Three types of information must be provided in writing when a license is offered or 72 hours or more before a license "contract" is executed: a schedule of the rates and terms of royalties; the most current available list of the members or affiliates represented by the society, if requested by the business owner; and information on how the business owner may obtain a list of the

musical works in the society's repertory, if requested by the owner and at the business owner's expense.

Public performance licenses must be: in writing; signed by the parties; and must include the names and addresses of the parties, the duration of the "contract," and the schedule of rates and terms of royalties.

Performing rights societies are prohibited from collecting, or attempting to collect, royalties from a business "licensed by that performing rights society . . . except as provided in a contract executed pursuant to the provisions of the Act." And anyone who "suffers a violation" of the act may sue for actual damages, an injunction or other remedy, and reasonable attorney's fees.

Editor's note: This state legislation ought to be preempted under the Supremacy Clause of the Constitution, because it purports to limit the manner in which copyright owners may exercise rights given them by federal law in the Copyright Act. However, there are two

reasons a constitutional preemption challenge to the validity of the law may not be successful. First, this legislation is reminiscent of similar state legislation that prohibits "blind-bidding" in the motion picture business, and constitutional preemption challenges to those state statutes were not successful. See, e.g., Allied Artists Pictures Corp. v. Rhodes, 679 F.2d 656 (6th Cir. 1982) (ELR 4:4:3); Associated Film Distribution Corp. v. Thornburgh, 800 F.2d 369 (3d Cir. 1986). Since blind-bidding legislation interferes to an even greater extent with federal rights than the Texas performing rights society legislation does, there is a significant chance that the blind-bidding decisions would be followed if the Texas legislation were challenged. Second, the Texas legislation does not prohibit ASCAP, BMI or SESAC members and affiliates from filing copyright infringement lawsuits against businesses that publicly perform music without public performance licenses. The Texas

legislation only purports to prohibit performing rights societies - not copyright owners themselves - from seeking to collect royalties except as provided in contracts executed pursuant to the act. Moreover, even societies are only prohibited from seeking to collect royalties from a business "licensed by that performing right society" except as provided in such contracts. Thus, if a business is not licensed by a performing rights society, that society may attempt to collect royalties from it despite the absence of a contract containing the terms required by the act. Indeed, the Texas legislation appears to require contracts that contain provisions that have long been part of ASCAP, BMI and SESAC licenses anyway. The only thing this legislation appears to require from the societies that they may not have been offering before is a list of their members or affiliates and a list of the songs in their repertories.

Texas Copyright Royalty Collection Practices Act, 1995 Tex. ALS 161, 1995 Tex. SB 526 (1995) [ELR 17:6:28]