

AMENDMENT NO. \_\_\_\_\_ Calendar No. \_\_\_\_\_

Purpose: To propose a substitute.

**IN THE SENATE OF THE UNITED STATES—107th Cong., 2d Sess.**

**H.R. 5469**

To amend title 17, United States Code, with respect to the statutory license for webcasting, and for other purposes.

Referred to the Committee on \_\_\_\_\_  
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended to be proposed by Mr. HELMS (for himself and Mr. LEAHY)

Viz:

1 Strike all after the enacting clause and insert the fol-  
2 lowing:

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Small Webcaster Set-  
5 tlement Act of 2002”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

8 (1) Some small webcasters who did not partici-  
9 pate in the copyright arbitration royalty panel pro-

1 ceeding leading to the July 8, 2002 order of the Li-  
2 brarian of Congress establishing rates and terms for  
3 certain digital performances and ephemeral repro-  
4 ductions of sound recordings, as provided in part  
5 261 of the Code of Federal Regulations (published  
6 in the Federal Register on July 8, 2002) (referred  
7 to in this section as “small webcasters”), have ex-  
8 pressed reservations about the fee structure set forth  
9 in such order, and have expressed their desire for a  
10 fee based on a percentage of revenue.

11 (2) Congress has strongly encouraged rep-  
12 resentatives of copyright owners of sound recordings  
13 and representatives of the small webcasters to en-  
14 gage in negotiations to arrive at an agreement that  
15 would include a fee based on a percentage of rev-  
16 enue.

17 (3) The representatives have arrived at an  
18 agreement that they can accept in the extraordinary  
19 and unique circumstances here presented, specifi-  
20 cally as to the small webcasters, their belief in their  
21 inability to pay the fees due pursuant to the July 8  
22 order, and as to the copyright owners of sound re-  
23 cordings and performers, the strong encouragement  
24 of Congress to reach an accommodation with the  
25 small webcasters on an expedited basis.

1           (4) The representatives have indicated that they  
2 do not believe the agreement provides for or in any  
3 way approximates fair or reasonable royalty rates  
4 and terms, or rates and terms that would have been  
5 negotiated in the marketplace between a willing  
6 buyer and a willing seller.

7           (5) Congress has made no determination as to  
8 whether the agreement provides for or in any way  
9 approximates fair or reasonable fees and terms, or  
10 rates and terms that would have been negotiated in  
11 the marketplace between a willing buyer and a will-  
12 ing seller.

13           (6) Congress likewise has made no determina-  
14 tion as to whether the July 8 order is reasonable or  
15 arbitrary, and nothing in this Act shall be taken into  
16 account by the United States Court of Appeals for  
17 the District of Columbia Circuit in its review of such  
18 order.

19           (7) It is, nevertheless, in the public interest for  
20 the parties to be able to enter into such an agree-  
21 ment without fear of liability for deviating from the  
22 fees and terms of the July 8 order, if it is clear that  
23 the agreement will not be admissible as evidence or  
24 otherwise taken into account in any government pro-  
25 ceeding involving the setting or adjustment of the

1 royalties payable to copyright owners of sound re-  
2 cordings for the public performance or reproduction  
3 in ephemeral phonorecords or copies of such works,  
4 the determination of terms or conditions related  
5 thereto, or the establishment of notice or record-  
6 keeping requirements.

7 **SEC. 3. SUSPENSION OF CERTAIN PAYMENTS.**

8 (a) **NONCOMMERCIAL WEBCASTERS.—**

9 (1) **IN GENERAL.—**The payments to be made by  
10 noncommercial webcasters for the digital perform-  
11 ance of sound recordings under section 114 of title  
12 17, United States Code, and the making of ephem-  
13 eral phonorecords under section 112 of title 17,  
14 United States Code, during the period beginning on  
15 October 28, 1998, and ending on May 31, 2003,  
16 which have not already been paid, shall not be due  
17 until June 20, 2003.

18 (2) **DEFINITION.—**In this subsection, the term  
19 “noncommercial webcaster” has the meaning given  
20 that term in section 114(f)(5)(E)(i) of title 17,  
21 United States Code, as added by section 4 of this  
22 Act.

23 (b) **SMALL COMMERCIAL WEBCASTERS.—**

24 (1) **IN GENERAL.—**The receiving agent may, in  
25 a writing signed by an authorized representative

1       thereof, delay the obligation of any 1 or more small  
2       commercial webcasters to make payments pursuant  
3       to sections 112 and 114 of title 17, United States  
4       Code, for a period determined by such entity to  
5       allow negotiations as permitted in section 4 of this  
6       Act, except that any such period shall end no later  
7       than December 15, 2002. The duration and terms of  
8       any such delay shall be as set forth in such writing.

9               (2) DEFINITIONS.—In this subsection—

10               (A) the term “webcaster” has the meaning  
11               given that term in section 114(f)(5)(E)(iii) of  
12               title 17, United States Code, as added by sec-  
13               tion 4 of this Act; and

14               (B) the term “receiving agent” shall have  
15               the meaning given that term in section 261.2 of  
16               title 37, Code of Federal Regulations, as pub-  
17               lished in the Federal Register on July 8, 2002.

18       **SEC. 4. AUTHORIZATION FOR SETTLEMENTS.**

19       Section 114(f) of title 17, United States Code, is  
20       amended by adding after paragraph (4) the following:

21               “(5)(A) Notwithstanding section 112(e) and the  
22               other provisions of this subsection, the receiving  
23               agent may enter into agreements for the reproduc-  
24               tion and performance of sound recordings under sec-  
25               tion 112(e) and this section by any 1 or more small

1 commercial webcasters or noncommercial webcasters  
2 during the period beginning on October 28, 1998,  
3 and ending on December 31, 2004, that, once pub-  
4 lished in the Federal Register pursuant to subpara-  
5 graph (B), shall be binding on all copyright owners  
6 of sound recordings and other persons entitled to  
7 payment under this section, in lieu of any deter-  
8 mination by a copyright arbitration royalty panel or  
9 decision by the Librarian of Congress. Any such  
10 agreement for small commercial webcasters shall in-  
11 clude provisions for payment of royalties on the  
12 basis of a percentage of revenue or expenses, or  
13 both, and include a minimum fee. Any such agree-  
14 ment may include other terms and conditions, in-  
15 cluding requirements by which copyright owners may  
16 receive notice of the use of their sound recordings  
17 and under which records of such use shall be kept  
18 and made available by small commercial webcasters  
19 or noncommercial webcasters. The receiving agent  
20 shall be under no obligation to negotiate any such  
21 agreement. The receiving agent shall have no obliga-  
22 tion to any copyright owner of sound recordings or  
23 any other person entitled to payment under this sec-  
24 tion in negotiating any such agreement, and no li-  
25 ability to any copyright owner of sound recordings or

1 any other person entitled to payment under this sec-  
2 tion for having entered into such agreement.

3 “(B) The Copyright Office shall cause to be  
4 published in the Federal Register any agreement en-  
5 tered into pursuant to subparagraph (A). Such pub-  
6 lication shall include a statement containing the sub-  
7 stance of subparagraph (C). Such agreements shall  
8 not be included in the Code of Federal Regulations.  
9 Thereafter, the terms of such agreement shall be  
10 available, as an option, to any small commercial  
11 webcaster or noncommercial webcaster meeting the  
12 eligibility conditions of such agreement.

13 “(C) Neither subparagraph (A) nor any provi-  
14 sions of any agreement entered into pursuant to  
15 subparagraph (A), including any rate structure, fees,  
16 terms, conditions, or notice and recordkeeping re-  
17 quirements set forth therein, shall be admissible as  
18 evidence or otherwise taken into account in any ad-  
19 ministrative, judicial, or other government pro-  
20 ceeding involving the setting or adjustment of the  
21 royalties payable for the public performance or re-  
22 production in ephemeral phonorecords or copies of  
23 sound recordings, the determination of terms or con-  
24 ditions related thereto, or the establishment of notice  
25 or recordkeeping requirements by the Librarian of

1 Congress under paragraph (4) or section 112(e)(4).  
2 It is the intent of Congress that any royalty rates,  
3 rate structure, definitions, terms, conditions, or no-  
4 tice and recordkeeping requirements, included in  
5 such agreements shall be considered as a com-  
6 promise motivated by the unique business, economic  
7 and political circumstances of small webcasters,  
8 copyright owners, and performers rather than as  
9 matters that would have been negotiated in the mar-  
10 ketplace between a willing buyer and a willing seller,  
11 or otherwise meet the objectives set forth in section  
12 801(b).

13 “(D) Nothing in the Small Webcaster Settle-  
14 ment Act of 2002 or any agreement entered into  
15 pursuant to subparagraph (A) shall be taken into  
16 account by the United States Court of Appeals for  
17 the District of Columbia Circuit in its review of the  
18 determination by the Librarian of Congress of July  
19 8, 2002, of rates and terms for the digital perform-  
20 ance of sound recordings and ephemeral recordings,  
21 pursuant to sections 112 and 114.

22 “(E) As used in this paragraph—

23 “(i) the term ‘noncommercial webcaster’  
24 means a webcaster that—

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

4           “(II) has applied in good faith to the  
5           Internal Revenue Service for exemption  
6           from taxation under section 501 of the In-  
7           ternal Revenue Code and has a commer-  
8           cially reasonable expectation that such ex-  
9           emption shall be granted; or

10          “(III) is operated by a State or pos-  
11          session or any governmental entity or sub-  
12          ordinate thereof, or by the United States  
13          or District of Columbia, for exclusively  
14          public purposes;

15          “(ii) the term ‘receiving agent’ shall have  
16          the meaning given that term in section 261.2 of  
17          title 37, Code of Federal Regulations, as pub-  
18          lished in the Federal Register on July 8, 2002;  
19          and

20          “(iii) the term ‘webcaster’ means a person  
21          or entity that has obtained a compulsory license  
22          under section 112 or 114 and the implementing  
23          regulations therefor to make eligible non-  
24          subscription transmissions and ephemeral re-  
25          cordings.

1           “(F) The authority to make settlements pursu-  
2           ant to subparagraph (A) shall expire December 15,  
3           2002, except with respect to noncommercial  
4           webcasters for whom the authority shall expire May  
5           31, 2003.”.

6 **SEC. 5. DEDUCTIBILITY OF COSTS AND EXPENSES OF**  
7                                   **AGENTS AND DIRECT PAYMENT TO ARTISTS**  
8                                   **OF ROYALTIES FOR DIGITAL PERFORMANCES**  
9                                   **OF SOUND RECORDINGS.**

10           (a) FINDINGS.—Congress finds that—

11                   (1) in the case of royalty payments from the li-  
12                   censing of digital transmissions of sound recordings  
13                   under subsection (f) of section 114 of title 17,  
14                   United States Code, the parties have voluntarily ne-  
15                   gotiated arrangements under which payments shall  
16                   be made directly to featured recording artists and  
17                   the administrators of the accounts provided in sub-  
18                   section (g)(2) of that section;

19                   (2) such voluntarily negotiated payment ar-  
20                   rangements have been codified in regulations issued  
21                   by the Librarian of Congress, currently found in sec-  
22                   tion 261.4 of title 37, Code of Federal Regulations,  
23                   as published in the Federal Register on July 8,  
24                   2002;

1           (3) other regulations issued by the Librarian of  
2 Congress were inconsistent with the voluntarily ne-  
3 gotiated arrangements by such parties concerning  
4 the deductibility of certain costs incurred for licens-  
5 ing and arbitration, and Congress is therefore re-  
6 storing those terms as originally negotiated among  
7 the parties; and

8           (4) in light of the special circumstances de-  
9 scribed in this subsection, the uncertainty created by  
10 the regulations issued by the Librarian of Congress,  
11 and the fact that all of the interested parties have  
12 reached agreement, the voluntarily negotiated ar-  
13 rangements agreed to among the parties are being  
14 codified.

15       (b) DEDUCTIBILITY.—Section 114(g) of title 17,  
16 United States Code, is amended by adding after para-  
17 graph (2) the following:

18           “(3) A nonprofit agent designated to distribute  
19 receipts from the licensing of transmissions in ac-  
20 cordance with subsection (f) may deduct from any of  
21 its receipts, prior to the distribution of such receipts  
22 to any person or entity entitled thereto other than  
23 copyright owners and performers who have elected to  
24 receive royalties from another designated agent and  
25 have notified such nonprofit agent in writing of such

1 election, the reasonable costs of such agent incurred  
2 after November 1, 1995, in—

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

5 “(B) the settlement of disputes relating to  
6 the collection and calculation of the royalties;  
7 and

8 “(C) the licensing and enforcement of  
9 rights with respect to the making of ephemeral  
10 recordings and performances subject to licens-  
11 ing under section 112 and this section, includ-  
12 ing those incurred in participating in negotia-  
13 tions or arbitration proceedings under section  
14 112 and this section, except that all costs in-  
15 curred relating to the section 112 ephemeral re-  
16 cordings right may only be deducted from the  
17 royalties received pursuant to section 112.

18 “(4) Notwithstanding paragraph (3), any des-  
19 igned agent designated to distribute receipts from  
20 the licensing of transmissions in accordance with  
21 subsection (f) may deduct from any of its receipts,  
22 prior to the distribution of such receipts, the reason-  
23 able costs identified in paragraph (3) of such agent  
24 incurred after November 1, 1995, with respect to  
25 such copyright owners and performers who have en-

1       tered with such agent a contractual relationship that  
2       specifies that such costs may be deducted from such  
3       royalty receipts.”.

4       (c) DIRECT PAYMENT TO ARTISTS.—Section  
5 114(g)(2) of title 17, United States Code, is amended to  
6 read as follows:

7           “(2) An agent designated to distribute receipts  
8       from the licensing of transmissions in accordance  
9       with subsection (f) shall distribute such receipts as  
10       follows:

11           “(A) 50 percent of the receipts shall be  
12       paid to the copyright owner of the exclusive  
13       right under section 106(6) of this title to pub-  
14       licly perform a sound recording by means of a  
15       digital audio transmission.

16           “(B) 2½ percent of the receipts shall be  
17       deposited in an escrow account managed by an  
18       independent administrator jointly appointed by  
19       copyright owners of sound recordings and the  
20       American Federation of Musicians (or any suc-  
21       cessor entity) to be distributed to nonfeatured  
22       musicians (whether or not members of the  
23       American Federation of Musicians) who have  
24       performed on sound recordings.

1           “(C) 2½ percent of the receipts shall be  
2 deposited in an escrow account managed by an  
3 independent administrator jointly appointed by  
4 copyright owners of sound recordings and the  
5 American Federation of Television and Radio  
6 Artists (or any successor entity) to be distrib-  
7 uted to nonfeatured vocalists (whether or not  
8 members of the American Federation of Tele-  
9 vision and Radio Artists) who have performed  
10 on sound recordings.

11           “(D) 45 percent of the receipts shall be  
12 paid, on a per sound recording basis, to the re-  
13 cording artist or artists featured on such sound  
14 recording (or the persons conveying rights in  
15 the artists’ performance in the sound record-  
16 ings).”.

17 **SEC. 6. REPORT TO CONGRESS.**

18           By not later than June 1, 2004, the Comptroller Gen-  
19 eral of the United States, in consultation with the Register  
20 of Copyrights, shall conduct and submit to the Committee  
21 on the Judiciary of the House of Representatives and the  
22 Committee on the Judiciary of the Senate a study con-  
23 cerning the economic arrangements among small commer-  
24 cial webcasters covered by agreements entered into pursu-  
25 ant to section 114(f)(5)(A) of title 17, United States Code,

1 as added by section 4 of this Act, and third parties, and  
2 the effect of those arrangements on royalty fees payable  
3 on a percentage of revenue or expense basis.